

# **The Human Rights of Aliens under International and Comparative Law**

*CARMEN TIBURCIO*

**MARTINUS NIJHOFF PUBLISHERS**

**THE HUMAN RIGHTS OF ALIENS  
UNDER INTERNATIONAL AND COMPARATIVE LAW**

# International Studies in Human Rights

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# The Human Rights of Aliens under International and Comparative Law

by

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Printed in the Netherlands.

To my parents, Paulo and Myrian, with gratitude;  
To Carlos, my husband and best friend, with love;  
To Antonio Augusto, my son, the best gift life has given me, with hope that he neither perpetrates nor suffers any kind of discrimination

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## Foreword

To be an alien is not necessarily a bad thing. Millions of inhabitants of the globe deliberately seek out this status each year, traveling to foreign lands in pursuit of tourism, excitement, exotic adventure, or the commerce that increasingly binds the planet together. Alienage is not an immutable characteristic. It is a status readily lost by returning to one's country of nationality. And in many of the top immigrant receiving states, naturalization is available on relatively easy terms after lawful residence for three to five years – a process that by definition cancels out alienage.

Nonetheless, for a great many alienage is not easily mutable. Much travel falls well below the glamorous level of jet-set tourism or executive-level business dealing. Poverty or the threat of violence in the home country may have impelled the initial migration. Lingering war or persecution there may make it difficult for the migrant to contemplate return – and sometimes renders it violative of international law for the host state to expel a migrant. Moreover, in some countries host to millions of resident foreigners, even of the second or third generation, naturalization remains difficult to acquire.

When alienage becomes disadvantageous, questions of aliens' rights come to the fore. Aliens may be the object of discrimination (or worse), based solely on their alienage – or perhaps because of ethnic or tribal affiliation that overlaps state borders. In what ways does international law protect them? Even jet-setters can find themselves accused of crime, and they then have a great stake in knowing what sorts of procedural protections they have to contest the charge or plead for leniency. What access should aliens have to the broader labor market, and to social insurance or workers' compensation schemes? Should they be considered to obtain a right to vote, at least at the local level, after many years of lawful residence?

According to the Population Reference Bureau, in the mid-1990s, 145 million people lived outside the country of their nationality, and that number grows by 2 to 4 million each year. What rights these persons possess, living as aliens in a foreign land, is therefore a question of growing salience. Classic international law assigned most of these issues to the realm of diplomatic protection—ultimately an unsatisfactory placement, because it reduced questions of individual rights to issues of state discretion and political compromise. As we move increasingly into a global regime that comfortably considers individuals to be rights-bearing subjects at the international level, we need greater clarity on the range of human rights possessed by aliens sojourning or settling, legally or illegally, in distant lands.

This timely book makes its enormously important contribution on precisely these issues. Professor Carmen Beatriz de Lemos Tiburcio Rodrigues, a leader among younger scholars investigating human rights questions, here offers her critical analysis of basic human rights of aliens. Many works having that investigatory objective rest content with reviewing the texts of international instruments, as though the texts can somehow bring about a reality on the ground – and even if the treaties themselves gain only limited adherence. But Professor Tiburcio knows that the subject deserves a more detailed and practical treatment, with close attention to actual state practice and domestic laws. She has therefore set herself a daunting research task, but this book offers the fruits of a patient and successful multi-year inquiry that embraces both international instruments and real domestic outcomes. Even those who may not agree with all her conclusions will find here the detailed evidence on which she bases her analysis. And her helpful typology of categories of rights provides a useful framework for ongoing research and debate in a field of increasing importance. I am delighted to have the chance to welcome other readers to the rich offerings set forth in these pages.

David A. Martin  
Charlottesville, Virginia

## Preface

Humanity has entered the 21<sup>st</sup> century, but is still under the scourge of discrimination of all kinds, including discrimination against aliens. Even advanced countries such as England, Germany, France, the United States, as well as Austria, among others, are filled with mistrust, suspicion and discrimination against human beings for the mere reason that they are of different nationalities or of other ethnic groups.

Discrimination still exists and laymen continue to behave in a discriminatory manner, despite the fact that it is prohibited both under international and most domestic legislation. Surprisingly, it is not only laymen that act in a discriminatory manner, but also many judges, national authorities and legislators still believe that aliens should be treated with suspicion.

I lived as a resident alien in the United States for a few years and was able to detect and experience what it means to be a member of a minority, a foreigner in an alien country. On the other hand, I had the privilege of spending the best hours of my days in the School of Law of the University of Virginia where I could inhale the air of academic freedom, fairness and equality and witness the spirit of respect for intellectual merit, independent of one's nationality or other type of origin. This was a great consolation, a source of elevating inspiration, a lesson of a lifetime.

I also had the good fortune to meet there a professor who instilled me and his other students a sense of the importance of the subject he taught- Immigration Law. Under the guidance of Professor David Martin I worked for my S.J.D. degree after having received the LL.M from the same School. Prof. David Martin is Henry L.& Grace Doherty Professor of Law at the University of Virginia; from 1978 to 1980 he served in the Human Rights Bureau of the U.S. Department of State and from 1995 to 1997 he was the General Counsel of the Immigration and Naturalization Service (INS).

Professor Martin treated me with utmost attention and kindness and also revealed keen interest in the contribution I could bring to this topic of his expertise, especially due to my alien status. I am indebted and very grateful to him for his patient and intelligent orientation.

I should also add that I made many friends at the University, who always treated me with respect and kindness. Prof. John Norton Moore, who originally accepted me into the Graduate Program and Prof. Michael Dooley, who granted me the degree in the end, as well as all the University librarians (of an exceptionally rich and well organized library) are among those to whom I owe my sincere gratitude. In

all these years at U Va. these fine people made me feel part of this wonderful School, not an alien.

The State University of Rio de Janeiro— my *alma mater*— as well as FAPERJ (Fundação Amparo à Pesquisa no Estado do Rio de Janeiro) provided me, in different periods of time, with research assistants of exceptional dedication, and I am indebted to them all for their help. I therefore thank Eduardo Altoé, Juliana Ianakiewa de Carvalho Naliato, Fabricio Antônio Soares, Rogério Tucherman, Fernando Luís Gonçalves de Moraes, Fabio de Souza Silva, Rodrigo Ramos Lourega de Menezes, Maíra Caldas Taboada Dias, Bruno Almeida, Viviane Alves, Clovis Silva de Souza, Isabela Cezar and Gillian Santiago. I also had the help of Andrew Timothy Oliver, a JD student at University of Virginia School of Law, who helped me with the convention index. Without the help of these dedicated and serious young law school students I would not have been able to complete this work.

I am equally thankful to all my faculty colleagues of the State University of Rio de Janeiro who helped me in so many ways, especially to Prof. Jacob Dolinger for his constant and invaluable support.

Finally, when preparing for publication I could also count on a very helpful tool: the Internet. Most foreign constitutions quoted were obtained in very useful sites, such as the one maintained by the University of Richmond (<http://www.urich.edu/~jpjones/confinder/const.htm>); the one maintained by the Bayerische Julius-Maximilians-Universität Wuerzburg (<http://www.uni-wuerzburg.de/law>) as well as by findlaw (<http://www.findlaw.com>).

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## Introduction to the subject

The objective of this research is to examine the rules dealing with the treatment of aliens in the international law arena and to analyze the extent to which these rules have been adopted in the domestic legislation of different countries.

Hence, the objectives of this work are twofold: 1) define the status of aliens under international law, that is, which rights, under international instruments are granted to everyone; 2) determine if this set of rules established by international law has been adopted by the domestic legislation of various States.

The methodology used is the adoption of a classification of basic human rights into categories.<sup>1</sup> The objective of the adopted typology of rights is basically the following: 1) organize most human rights into categories, in order to 2) verify whether some generalizations can be made as to which rights can be denied to aliens and which cannot.

Hence, seven categories of rights have been adopted: 1- fundamental rights; 2- private rights; 3- social and cultural rights; 4- economic rights; 5- political rights; 6- public rights; 7- procedural rights.

Fundamental rights include the right to life, the right to personal freedom, the right not to be discriminated against and the right not to be incriminated under *ex post facto laws*. These rights are classified as fundamental in accordance with the criterion of non-derogability. Thus, as most international conventions consider that the above rights do not admit derogation, even under special circumstances such as public danger or public need, (e.g., states of emergency), they are included in this category.

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<sup>1</sup> The idea of creating categories within human rights is not new. Several legal commentators have established categories, in accordance with different criteria. Theodor Meron, *On a Hierarchy of International Human Rights* 80 AM. J. INT'L L. I (1986) attempts to establish a distinction between fundamental human rights and other human rights. J.A. Oliveira Baracho, *Direitos e garantias Fundamentais, Direitos Invioláveis, Teoria Geral dos Direitos Individuais, Direitos e Liberdades Constitucionais Garantidos; Ensaio de Enumeração*, 33 RFDFMG 275-318 (1991) divides into: the right to freedom; the right to equality; political rights; right to property; right to security; social rights. I. FRANÇOIS RIGAUX, DROIT INTERNATIONAL PRIVÉ: THÉORIE GÉNÉRALE 165-167 (1977) focuses on the rights of aliens and divides them as such: 1- right to enter and reside; 2- public rights (libertés publiques); 3- private rights; 4- economic, social and cultural rights; 5- political rights and access to public jobs.

Private rights comprise the right to own property, right to family life and right to be treated as a person before the law, following the classification of 'civil rights' as adopted in civil law systems.

Social and cultural rights include the right to education, the right to social assistance and the right to work for a living. This category as a rule requires a positive attitude from the State in order to guarantee their enforcement. Their implementation requires the State to take an active role, such as when financing schools, hospitals or social programs or, at a minimum, maintain a system for the enforcement of contracts and basic labor standards as well as adopt economic policies which lead to employment. These rights require State involvement and their enjoyment leads to an improvement of living conditions and a better distribution of wealth among the individuals. Moreover, these rights are basic to human life.

Economic rights are understood as comprising the right to own property (movable or immovable) in search of profit. Thus, this right is dealt with in a different category from the right to work, because some form of occupation is basic to humans as social animals and work is basic to provide feeding for oneself and one's family, while investments are not.

Political rights comprise the right to vote and be elected, the right to access to public jobs, the right to exercise some policy-making functions and the right to serve in the armed forces, i.e., all rights that require the status of citizen in order to be enjoyed. The rights included in this category are those which are closely connected to public decision-making in a democracy. Thus, rights, which are inherent to human nature, such as expressing one's opinions and thoughts, are excluded from this category. Additionally, this category entails a direct influence on the public decision-making of a country, such as what happens when one votes or is elected. Expressing one's ideas may have an indirect influence on public decisions – but no more than that – and therefore is not included in this category, but in the following one.

Public rights are the rights that do not require the status of citizen in order to be enjoyed, as political rights do; they do not require a positive attitude from the State, as social rights do; and they are of substantive nature.<sup>2</sup> Freedom of expression, religious freedom, freedom of movement, the right to assemble, the right to associate and the right to strike are classified within this category.

Procedural rights are the rights that guarantee the enforcement of all other rights. Basically all rights related to the concept of due process of law are comprised in this category, such as the right to access to courts, right to fair trial, right to legal counsel, right to confrontation, right to a hearing and right to an interpreter.

Thus, the work starts with these seven categories of rights with a didactical approach, in order to facilitate comprehension, as each category contains rights which are somehow of similar nature and value. As the work proceeds it comes out that while five categories really contain homogeneous rights, which have the same degree of compliance and therefore have a normative function, two categories contain heterogeneous groups of rights, which are treated differently in domestic law and in treaties, and consequently do not subsist beyond the organizational purpose.

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<sup>2</sup> These rights are called by the French legal commentators "libertés publiques", public freedoms, because declared in the public legislation of the country, which is generally the Constitution.

Bearing in mind this classification, an analysis of international law is made, mainly international conventions on the subject, and also customary international law, as well as international tribunals' decisions and the writings of experts in the field, in order to extract rules of widespread acceptance. Then, I proceed with a comparative analysis, aiming at verifying to what extent these rights are granted to aliens domestically and upon which conditions.

The domestic legislation of many countries is analyzed not only for descriptive purposes, but also to determine to what extent some guarantees set forth in international law instruments have become general principles of law, because adopted by the legislation of the great majority of countries analyzed.

As a rule, the treatment of aliens has always been concerned with the positive and negative obligations of the State with regard to nationals of another State. Presently, the contradiction between the theories of "national treatment" and the "minimum international standard", the necessity and the attempts to determine a set of "rights" to be granted to the alien, all these questions bring into light fundamental issues.

Besides these traditional aspects of the topic, others have been recently raised by international organizations, such as the United Nations, the Organization of American States, and the Council of Europe, as they promote the formulation of international documents on human rights. The obligations imposed on the international community as a direct result of this movement, the principle of non-discrimination adopted in all human rights conventions, and the recognition of the rights and guarantees of the individual regardless of nationality, have brought a new perspective to the study of the subject of alien treatment.

In a world of diverse cultures and heterogeneous peoples, in which every living human being is an alien in relation to all the States of which he or she is not a national, a study on the treatment of aliens is undoubtedly necessary, in order that there might be some basis of security and predictability upon which to build the complex structure of the inevitable interaction among individuals.

Empirically, the deprivations imposed upon aliens at the national level are several: some of these deprivations are contrary to international law patterns and some are not. The most widely accepted is the denial of full participation in the making of community decisions. Aliens are deprived from participating in the determination of the social and economic order because they do not have the political means for the protection of their interests. Aliens are thus commonly denied access to voting and holding public functions. They are also, as a rule, exempted from the rights/obligations incident to citizenship, such as military service and they are denied diplomatic protection. Aliens are normally subject to rigorous registration requirements and to severe restrictions with regard to freedom of movement, both within the country of residence and internationally. In addition, aliens may also be subject to expulsion even after living in a country for several years and having established a family life. Under some circumstances, they may experience arbitrary arrests and detention, be denied access to appropriate tribunals, and be deprived of a fair hearing.

Last, but not the least, restrictions may be imposed on aliens with regard to the acquisition of land or other forms of property. Aliens may be prohibited from engaging in a wide range of economic activities, and their wealth may be expropriated without compensation. They may also be forbidden to engage in certain forms of paid employment. Furthermore, they may be excluded from the enjoyment of some welfare benefits, as well as from the practice of some professions.

Moreover, due to language problems, aliens may experience limited opportunities for education and financial aid. Even today, in the 21<sup>st</sup> century they may be discriminated against in their daily lives simply because they are aliens, for this prejudice still exists.

In spite of these deprivations found in the municipal law arena, the international community has traditionally paid little attention to the problem of the treatment of aliens, and there are doubts regarding which rights may be denied to them in accordance with international law.

Thus, the protection of the basic rights of aliens has been dealt with either by the institution of diplomatic protection (State Responsibility) or, more recently, by the human rights instruments.

It should be observed that the law of State Responsibility for injuries to aliens can only be invoked on the international level by a State whose national is alleged to be a victim of a violation of that law. Hence, if the alien is stateless, or if formally a national of the espousing State, but whose nationality is not entitled to recognition in the international arena, or even if the alien has dual nationality – of the espousing State and of the defendant State – as a rule the claim will be dismissed. Thus, there are several cases in which the alien will remain unprotected.

Sometimes the existing international human rights instruments are also inadequate to protect the rights of non-nationals. The human rights conventions, with few exceptions, have a very broad scope and are non-specific. Furthermore, most of these conventions have exception clauses, admitting that, under special circumstances, many of these rights can be limited or restricted.

In ancient times, the alien was commonly not considered subject of rights and obligations. As the Roman Empire expanded, aliens were gradually given protection under the *ius gentium*, a law made applicable to foreigners as well as to citizens, as distinguished from the *ius civile* which was applied exclusively to Roman citizens. Further improvement in the treatment of aliens came with the spread of Christianity and the idea of the unity of mankind. In the feudal period, the idea of boundaries again became very clearly defined and the situation of aliens deteriorated.

With the formation of the modern national States, a more humanitarian attitude toward aliens began to develop. The founding fathers of modern international law (Grotius and Vattel, among others) advocated the idea that all persons, including aliens, were entitled to certain natural rights.

Just after the French Revolution, when the Declaration of the Rights of the Man and Citizen was approved in 1789, commentators made a distinction between the rights of man and the rights of the citizen. The rights of man are those which belong to the individual independently of his or her status and are natural and inherent to human nature. Rights of the citizen are those created by the State.<sup>3</sup> This difference subsists until today and that is exactly what allows for the exclusion of aliens from the enjoyment of political rights. The basis for this exclusion is the idea that, if the State created this right it may restrict it to whomever it deems appropriate. Conversely, if the right was not created by the State, but rather considered as

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<sup>3</sup> IMRE SZABO, *Fundamentos Históricos e Desenvolvimento dos Direitos do Homem, As DIMENSÕES INTERNACIONAIS DOS DIREITOS DO HOMEM* 27,32 (Ed. Karel Vasak, 1983).

inherent to the human nature, then the State cannot restrict its enjoyment. Hence, the right to vote, to be elected and to work for the government, as they are not inherent to human nature, may be limited by the State, whereas the right to have family life and to work for a living, among others, cannot.

As a result of the spread of industrialization and interaction throughout the world, a sort of customary international law developed for the special protection of aliens, built upon administrative and judicial decisions and strengthened by a broad number of relatively uniform treaties of Friendship, Commerce, and Navigation.

At first the national States undertook the task of protecting the interests of their members abroad, giving birth to the doctrine of State Responsibility. Two different standards of the responsibility of States have competed for general acceptance. One of these standards is described by the doctrine as the "national treatment", which provides that aliens should receive equal and only equal treatment with nationals. The second standard is described as that of a "minimum international standard", which supports the idea that, no matter how a State may treat its nationals, there are certain minimum standards of human treatment that cannot be violated in relation to aliens.

More recently, since World War II, because the UN Charter and the Universal Declaration of Human Rights extend their protection to all persons, whether nationals or aliens, the subject has been linked to the doctrine of human rights, in which the "minimum international standard" approach has been adopted.

It should also be emphasized that, according to some human rights instruments, the individual himself has the possibility of presenting his case (in contrast to the doctrine of State Responsibility in which only the State has legitimacy to present a claim).

Since an alien is widely defined as a non-national, the question of nationality is of foremost importance for the development of this research.

Under traditional international law, States are considered free to legislate on nationality. Hence, States have granted or withdrawn nationality on many different grounds – place of birth, blood relation, and subjective classification of individuals and activities – even though these characterizations may bear little relation to the actual facts of community membership. In some ways, however, this freedom has been restricted by some international conventions and decisions of international tribunals (the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws; the UN Convention Relating to the Status of Stateless Persons, the UN Convention on the Nationality of Married Women, the recent European Convention on Nationality and the ICJ decision on the *Nottebohm* case, for instance).

The scope of this work is of a general nature and so is the methodology adopted as regards the international law research material. As a rule, the research was based mostly on instruments of more general acceptance, such as the Universal Declaration, the UN Covenants, the American Convention and the European Convention. Notwithstanding, other instruments, which have received a lesser degree of acceptance, are also analyzed either to stress aspects already crystallized by other instruments of widespread acceptance or to show State resistance with regard to controversial issues. Moreover, the status of this subject matter within the European Union will not be discussed in depth, as it is regulated by special provisions, which allow for preferential treatment to nationals of other members of the European Union, concerning the rights to enter, to reside, to work, to social assistance, whereas with regard to aliens who are not nationals of any EU country, these

rights are not granted to them as a matter of law.<sup>4</sup> The same methodology was adopted as regards the Mercosur and the NAFTA.

Along the same lines, treaties of narrower scope were also ignored, such as bilateral agreements of the sort of Friendship, Commerce and Navigation Treaties, which establish specific reciprocal rights to nationals of each country, once they are within the country of residence, despite the fact that these reciprocal FCN treaties contributed in the past to the development of customary international law concerning aliens.

In addition, as already stated, the domestic legislation of the States was also taken into account for the purpose of verifying to what extent some guarantees have become general principles of law, because these guarantees have been adopted in the legislation of the great majority of the countries examined.

Moreover, refugees and persons in exile were not given special attention, as the basic scope of this work concerns aliens in general, and not the specific additional protections sometimes extended to potential victims of persecution.

It should also be observed that the scope of this work is to find patterns established by international law as regards aliens and to compare these patterns with domestic legislation, to verify to what extent States comply with international law rules. The comparative conclusions reached were based mostly on the constitutional legislation of these States.

It is known that constitutional rules do not always mirror the reality of a certain people. As an example, if we examine superficially the present French Constitution, we are led to believe that the French people do not care for human rights, as they are not referred to in the constitutional text. In fact, exactly the opposite is true, as the French feel that the idea of liberties is so enshrined in their lives that they do not need to reiterate them in their constitutional text in order to guarantee their compliance.

Chile and Paraguay are examples of the contrary, for their constitutional texts grant a long list of human rights, such as freedom of expression and freedom of assembly. The Chilean Constitution dates from 1980, but the country, until 1989, was under a dictatorship, and Paraguay, which approved its Constitution in 1967, was ruled for 30 years by dictator Alfred Stroessner. Needless to mention that during these periods all the rights, formally recognized, were not respected at all.<sup>5</sup>

Along the same lines is the Brazilian case where, during periods of dictatorship, either under Getulio Vargas, when the 1937 Constitution was in force, or under the military regime, when the texts of 1967 and 1969 were conceived, a long list of human rights was established, but were not respected by the authorities.<sup>6</sup>

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<sup>4</sup> See Marie-Claire Foblets, *Europe and Its Aliens After Maastricht. The Painful Move to Substantive Harmonization of Member-States' Policies Towards Third-Country Nationals* 42 AM. J. COMP. L. 783, 805 (1994), where the author mentions the difficulties in finding a common policy towards aliens, non-nationals of other European Union Member States, and concludes saying that "the climate in the Union Member States in 1992 is still not very hospitable to third country nationals".

<sup>5</sup> See LUIS ROBERTO BARROSO, *O DIREITO CONSTITUCIONAL E A EFETIVIDADE DE SUAS NORMAS: LIMITES E POSSIBILIDADES DA CONSTITUIÇÃO BRASILEIRA* 57 (2nd ed. 1993).

<sup>6</sup> The first Constitution was approved in 1824 at a time when the country was still under a monarchic regime. After the Republic, proclaimed in 1889, there was the Constitution of 1891, elaborated under the influence of the American text, the Constitution of 1934, the Constitution of 1937, the Constitution of 1946, the Constitutions of 1967 and 1969, both elaborated under a period of military dictatorship, and the text now in force, approved in 1988.

Moreover, immigration matters such as entry and expulsion are traditionally within the discretionary power of the States. Thus very few objective criteria exist on this subject. State legislation, as a rule, either permits, in practice, wide discretion of authorities due to the broad terms employed, such as national security, public policy, morals or other terms of flexible content, or expressly allows for discretion of local authorities. Legislation often refers to "may", "in the opinion of" or "at the discretion of" to allow for different solutions in this field. This grants enormous discretion not only to the highest local authorities, such as Ministers or Secretaries of State, but also to minor authorities, such as immigration and visa officers, which makes the verification of compliance with international patterns extremely difficult.

Additionally, aliens have always been seen with distrust. This can be observed from the very meaning of the word, which, in English, means also someone "different in nature or character" and may also mean someone from outer space; in French, where "étranger" also means someone strange or peculiar; and in Portuguese where "alienígena" also means someone of strange character. In literature, aliens are often quoted as bad examples to be avoided. Many examples can be mentioned: André de Lamartine in "La Chute d'un Ange", criticizing the common view of distrust towards aliens<sup>7</sup> and Albert Camus, with his book "L'Étranger" uses the ambiguity of the term to tell the story of a man whose behavior is not understood as normal. This same prejudice can also be found in popular literature. Agatha Christie, in several of her novels, always refers to foreigners as individuals worthy of suspicion. And these examples tend to continue, for Felix Cohen identified that most American newspapers regularly referred to arrested criminals as "negro" and "alien", a technique that builds popular impressions as to the criminality of negroes and aliens.<sup>8</sup>

Foreigners are also viewed differently depending on the country in which they choose to reside. If it is a developed country, they may be viewed as immigrant workers who come in search of a job, and therefore threaten to take the place of a native worker. If it is a developing country, they may be viewed as exploitative capitalists who are in search of opportunities for profit.

Viewpoints may differ but distrust is the rule. Thus, there is one aspect which both developing and developed countries share: a tendency to avoid treating aliens with liberality.

Along these lines, discrimination against aliens was strongly manifested through immigration legislation. Several openly discriminatory rules based on racial and religious grounds were in force in the 19<sup>th</sup> century and, even today, we witness the influence of some of these policies.

Immigration was free at first, subject to no regulations at all. Later, mostly at the beginning of the 19<sup>th</sup> century, rules concerning immigration started to appear, but as the first aim of immigration was generally to provide cheap labor for industrialization and development, the rules were aimed at the verification of the health of the immigrants, because unhealthy immigrants would not meet this main goal of immigration, besides representing a public burden. Later, at the end of the 19<sup>th</sup> century, immigration rules started to play another role: to stop and reverse unwanted immigration for racial reasons.

<sup>7</sup> "...Et pensent que de Dieu l'amour a des frontières."

<sup>8</sup> Quoted by *Legal Realism and the Race Question: Some Realism about Realism on Race Relations* (notes), 108 HARV. L. REV. 1607, 1614 (1995).

At that time, there was an enormous flow of emigration to the white Commonwealth countries of Australia, New Zealand, and Canada, mainly chasing the possibility of discovering gold. Because of the great number of Chinese immigrants in 1855, Australia passed the first of its anti-Chinese laws, openly discriminatory against a certain group of people.<sup>9</sup> This led to several protests, mainly from the Chinese government, because legislation clearly established higher entry fees to Chinese immigrants.

The same discriminatory policies were applied in the US, and upheld by the US Supreme Court.<sup>10</sup> Specifically in California, the Chinese were the victims of openly discriminatory legislation, as they were denied the right to testify in court, were prohibited from attending public schools with white children and from marrying Americans.<sup>11</sup>

Jews also suffered discriminatory practices.<sup>12</sup>

In Brazil the same discriminatory trend was demonstrated in legislation that forbade entry of indigenous populations of Asia and Africa, as well as Chinese and Japanese.<sup>13</sup>

At the end of the 19<sup>th</sup> century, despite the fact that the goals of immigration policy were still the same, that is, controlling the influx of undesirable immigrants, the methods had to be changed.<sup>14</sup> Immigration legislation could no longer be so openly discriminatory, for this invited potential diplomatic claims and incurred growing criticisms.

In 1901, Australia enacted legislation to strengthen the 'White Australia policy', as it was known. It prohibited immigration by anyone who was unable to pass a dictation test of 50 words in any European language at the time of his arrival. This requirement could later be demanded up to one year after arrival in 1910, and three years in 1920.<sup>15</sup>

<sup>9</sup> IAN MACDONALD, IMMIGRATION LAW IN PRACTICE IN THE UNITED KINGDOM 12 (2<sup>nd</sup> ed. 1987).

<sup>10</sup> In the *Japanese Immigrant Case, Yamataya v. Fisher*, 189 U.S. 86 (1903), the US Supreme Court stated: "the constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country.... are principles firmly established by the decisions of this court."

<sup>11</sup> THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 3 (1983). The widespread feeling against the Chinese was so strong that in 1876 the California State Senate Committee said that "the Chinese are inferior to any race God ever made...[and] have no souls to save, and if they have, they are not worth saving." *Id.* at 45. See also Rebecca Bailey-Harris, *Madame Butterfly and the Conflict of Laws*, 39 AJCL 172-173 (1991).

<sup>12</sup> The 1851 Norwegian Constitution which prohibited the entry of Jews in the country and the UK Aliens Act of 1905 aimed at restricting Jewish immigration from eastern Europe are only some of many examples of this trend.

<sup>13</sup> Decree number 528 of June 28, 1890 and Law number 97 of October 5, 1892.

<sup>14</sup> In the words of the Secretary of State for British Colonies in 1897 "to arrange a form of words which will avoid hurting the feelings of Her Majesty's subjects while at the same time it would amply protect the colonies against the invasion of the class to which they would justly object". Proceedings of a conference between the Secretary of State for the Colonies and the Premiers of self-governing colonies, quoted by MACDONALD, *supra* note 9, at 12.

<sup>15</sup> *Id.* at 13.

Canada adopted the same method in 1910, directed at the Indians and Japanese, but on equally euphemistic terms: it only admitted immigrants who came 'on a continuous journey' straight from their home country. As there was no direct steam service between India and Japan and Canada, the objective was clear. It also imposed heavier entry taxes on Chinese than on other immigrants, thus barring entry to Chinese who did not possess means,<sup>16</sup> and prevented immigration of black Americans.<sup>17</sup>

New Zealand, at the same time, in 1907, maintained the same discriminatory legislation determining that any Chinese immigrant had to be able to read a written passage of not less than 100 words in English in order to be admitted.<sup>18</sup>

In the US, the national origin quotas were created in 1921 and extended in 1924. This was also an instrument to maintain the discriminatory practices designed to preserve the racial and ethnic status of the US population. This criterion remained basically intact until the 1965 Amendments to the Immigration legislation. As a result of the 1924 Act, Japanese immigration was completely abolished from the US.<sup>19</sup>

This prejudice was so strongly felt by some sectors of the American culture, that during World War II, even American citizens of Japanese ancestry were sent to internment camps, and the US Supreme Court upheld these measures.<sup>20</sup>

Brazil also adopted, in its 1934 Constitution, a quota system, which was in force until 1946, after World War II.<sup>21</sup>

These purposes and methods have unfortunately been maintained throughout the years, and even recently, the 1971 British Act, followed by the 1981 Nationality Act, created a category of "patrials" or British citizens, reproducing these same criteria.

It is interesting to observe that, despite the fact that these discriminatory practices continue to exist, in some cases and to some extent, even today, the victims of these practices have changed considerably. In the US, for instance, Japanese, Chinese, Irish and Jewish immigrants are no longer seen with distrust.

Along these lines of discriminatory treatment, in many circumstances aliens are treated differently not because of objective criteria, but for subjective reasons: because they are aliens, consequently they are different and as such they are not trustworthy. Rudyard Kipling told his countrymen he felt comfortable with them

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<sup>16</sup> CHRISTOPHER J. WYDRZYNSKI, CANADIAN IMMIGRATION LAW AND PROCEDURE 48 (1983).

<sup>17</sup> *Id.* at 49.

<sup>18</sup> *Id.* at 14.

<sup>19</sup> ALENKOFF & MARTIN, *supra* note 11, at 50. This criterion affected tragically those who succeeded in fleeing Europe during World War II and were denied entry in the US because their quotas were already filled.

<sup>20</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>21</sup> Article 121 para. 6 of the 1934 Constitution and article 151 of the 1937 Constitution.

because he knew the lies they would tell.<sup>22</sup> When we cannot predict what another person will do, we are not likely to trust that person. Consequently, we are bound to trust countrymen more and therefor they receive preference in employment, promotion, the delegation of responsibility, property rights, and our daughter's hands in marriage.<sup>23</sup>

Besides these motives for avoiding the stranger, immigration rules also have an economic purpose, such as protecting the local labor market from foreign competition and cheap labor.

Another purpose for limiting immigration has been to keep down the social cost of supporting aliens who do not contribute to the community. This happened in Britain with the Aliens Act of 1793; when poor Jews were expelled, and with the 1905 Act, which admitted entry of aliens to work, but determined that once they became a public burden they had to leave.<sup>24</sup> The British Immigration Act 1971 shows this purpose, for it forbids entry to those who may become a burden on the State, and the ability to survive without recourse to public funds has become an essential qualification for visitors, students, business persons, the self-employed and family members.<sup>25</sup>

Excluding an alien or a group of aliens for economic reasons is more acceptable under modern international law (and modern global opinion) than excluding them for racial reasons. Immigration laws generally reflect economic priorities. Encouraging entry is based on economic grounds and encouragement of tourism, while discouraging immigration is also based on economic considerations, with a view to protecting the local labor market.

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<sup>22</sup> Poem named "The Stranger".

*The Stranger within my gate,  
He may be true or kind,  
But he does not talk my talk,  
I cannot feel his mind.  
I see the face and the eyes and the mouth,  
But not the soul behind.*

*The men of my own stock  
They may do ill or well,  
But they tell the lies I am wonted to,  
They are used to the lies I tell;  
And we do not need interpreters  
When we go to buy and sell,*

*The stranger within my gates,  
He may be evil or good,  
But I cannot tell what powers control,  
What reasons sway his mood;  
Nor when the God of his far-off land  
May repossess his blood.*

<sup>23</sup> As observed by KARL DEUTSCH, NATIONALISM AND ITS ALTERNATIVES 15 (1969).

<sup>24</sup> *Id.*, at 19.

<sup>25</sup> For instance, see Part I, section 8, ii and Part 2, section 41, vi, of the Statement of Changes to the Immigration Rules dated 1994.

Besides these grounds which lead the State to restrain or expel aliens already present, the reasons which make the individual emigrate also have to be considered.

First, concerning objective criteria for emigration, individuals may look for better standards of living, that is, leave their country of origin for economic reasons, which is the traditional reason for emigration. Individuals may also leave their countries because of natural disasters such as earthquakes, excessive aridity of the soil and the like. Additionally, aliens may flee their country for fear of persecution for specific reasons, such as religion, race, political opinions, belonging to a specific group, wars, civil conflicts and also to join family members and to allow the possibility of intellectual development as well as demographic reasons.

There are also subjective reasons for emigration. Humans are naturally mobile. All through history, in every part of the world, there has been migration. It is part of the human nature to look for better work opportunities or even look for adventures.

Although movement is inherent to human nature, there is no international law rule which guarantees the right of movement to individuals who are not nationals of the State. Therefore, the existence of frontiers has to be taken into account.<sup>26</sup>

Since ancient times, people have changed their place of residence for a myriad of reasons. The Old Testament tells of the exodus of the Jewish people from Egypt, their move to Babylon and their return to Palestine. More recently, in 1685, Huguenots fled France to England and Prussia after the revocation of the Edict of Nantes; in the late 19<sup>th</sup> century, Jews fled Russia, and Armenian Christians, the Ottoman Turkey. In the 20<sup>th</sup> century, persecution of Jews made them flee to whichever country which was willing to receive them. Ugandan citizens of Asian origin were persecuted and expelled in 1972. After 1974, thousands of Cypriots of Greek origin were made to leave their place of residence because of the invasion of Cyprus by Turkish armies. After 1975, thousands of Vietnamese citizens of Chinese ethnic origin felt compelled to seek protection in the countries of Southeast Asia. In 1978, large numbers of Burundi citizens of the Hutu tribe were slaughtered and others fled to neighboring countries. The continuing persecution of Kurds by Iraq is another example of this situation and, recently, we have witnessed in Kosovo the persecution of ethnic Albanian citizens and their escape to adjacent countries.

With all these facts of human history, ancient and recent, in mind, the main judicial issue of this research is to determine the extent to which aliens are protected under international law, and, the instruments from which this protection derives.

It should be observed though that in the international arena there are no law instruments that deal specifically with aliens, for all the attempts of the International Law Commission regarding this subject failed. Exceptionally, there are some specific instruments which deal with immigrant workers, such as Conventions sponsored by the International Labor Organization and the recent Convention sponsored by the UN and those referring to refugees and asylees.

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<sup>26</sup> I do not go as far as Jose Ingles, who in the UN Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country in the Upsala Colloquium, at 476, argues that this freedom of movement of persons is based on natural law. Thus, he argues, if we do not try to interfere in the movement of birds and animals, neither should we interfere with the movement of persons.

It should also be mentioned that as the main objective of the research was to define the legal status of aliens under international law, I tried to avoid taking the ‘politically correct’ side, that of the weakest part, namely the alien. My goal has been to look for rules and patterns under international law. Along these lines, I have criticized legislation against aliens, as well as court decisions pro-alien, which were not supported by a theoretical basis. My objective has been to look for coherence in international law and a system that is altogether consistent with other international obligations and human rights instruments. Therefore, on some occasions I have criticized liberal decisions, as well as legal commentators’ opinions, as freely as I have criticized discriminatory legislation against aliens.

### Scheme of the Work

The purpose of this work, as mentioned, is to define which are the rights granted by international law to aliens and which rights may be denied to them. Firstly, it should be mentioned that this work is necessarily somewhat selective, considering and analyzing some human rights granted to aliens and not all of them. The choice of the rights analyzed was determined largely by the following criteria: their practical importance; scope of application (not to a specific group of persons); existence of several international and national decisions and legislation so that the discussion be less speculative and more *de lege lata*.

Secondly, there is both the place and the opportunity for an intellectual contribution on this topic because very little literature has been produced on the subject, and what has been written adopts a different methodology.

The human rights adopted by international instruments are listed and analyzed and the compliance with these rights in comparative legislation is examined, by verifying chosen legislation of various foreign countries concerning the subject. Consequently, it is a study both on international and on comparative law.

However, since not all rights mentioned in the conventions hold the same degree of protection, the rights comprised in the instruments are classified according to their level of compliance and to their nature.

In the first chapter the importance of the concept of nationality is emphasized in order to define who is an alien, since an alien is an individual who does not possess a specific nationality. In this chapter the concept of nationality is defined and principles imposed by international law are listed and analyzed.

In Chapter II, the treatment granted to aliens is analyzed throughout history from ancient Rome and Greece until the French Revolution.

Chapter III deals with the development of the legal treatment granted to aliens, from the concept of state responsibility, where only the State of nationality of the individual has legitimacy to represent him or her at the international level, to the concept of human rights, where the individual is protected not because he or she is a national of a certain State but because he or she is a human being.

Chapter IV focuses on the fundamental rights, that is the right to life, the right to personal freedom, the right not to be discriminated against and the right not to be incriminated under *ex post facto laws*. In this chapter, the concept of non-derogable rights is discussed and the rights which are included in this category are defined.

Chapter V deals with private rights, namely, the right to be considered as a person, the right to have family life and the right to private property. The evolution of these rights historically is discussed, and international law rules and legislation of various foreign countries are analyzed.

Chapter VI focuses on the social rights, specifically, the right to education, the right to social assistance and the right to work, when the State has to have a positive attitude as regards the individual in order to guarantee compliance of these rights.

Chapter VII deals with economic rights, namely the right to take part in profitable activities as well as participating in specific economic activities.

Chapter VIII discusses the political rights, that is, the right to vote and be elected, the right to access to public jobs, the right to exercise some policy-making functions, under an historical, international and comparative perspective.

Chapter IX is dedicated to the analysis of public rights, the right to freedom of movement, the right to freedom of expression and the right to freedom of religion. Additionally, the right to associate, the right to assemble and the right to strike are discussed.

Chapter X deals with procedural rights, the right to due process, the right to access to courts, the right to a lawyer and the right to judicial review, in the scope of immigration cases as well as in other situations.

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## Definition of Alien: the Importance of Nationality

### 1. THE DEFINITION OF ALIEN

An alien is an individual who, according to the laws of a given State, is not considered its national. This means that the definition of alien is a definition by exclusion. Anyone who is not a national of a certain country is considered and treated as an alien by that country. Even those who possess two or more nationalities, outside the countries of those nationalities, will be considered and treated as an alien. A stateless person<sup>1</sup> then, is an alien everywhere.

Two conclusions can be drawn from this: firstly, the importance of the concept of nationality regarding the definition of aliens and secondly, the obvious but often overlooked fact that anyone is an alien outside the country of one's nationality. As such, if being an alien is something that we all can be, and are sometimes, there must be nothing inherently wrong or inferior in this status.<sup>2</sup>

### 2. NATIONALITY & NATURALITY & CITIZENSHIP

Nationality must be distinguished from *naturality* and from *citizenship*.

Naturality is a territorial concept. When someone is born in a certain city this individual is a *natural* of this city and of the country in which the city is located. It does not imply that the individual is a *national* of that country and much less that the individual has the *citizenship* of that country. However, in the case of the countries which grant nationality to all those born in their territory, the effect of the concepts of naturality and nationality coincide, as an individual will be at the same time natural and national of the same country.

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<sup>1</sup> Each country will define, according to its laws, who are its nationals. As there is no uniformity in the laws of nationality of the various countries, it may happen that an individual is not considered a national of any country. This individual is then stateless.

<sup>2</sup> Myres McDougal, Harold D. Lasswell and Lung-chu Chen observed that: "the reference of the generic label 'aliens' is not to some static isolated group, but potentially to the whole of humanity. Every individual is a potential alien in relation to all the states of which he is not a national; to the extent that he moves and engages in activities across state boundaries, this potentiality becomes an actuality." *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AJIL 432, 433 (1978).

Citizenship, in its turn, is a much more specific concept. It comprises all the nationals of a certain country who actually have full political and civil rights.<sup>3</sup> In order to be able to participate completely in the public life of the State, and to have full enjoyment of political rights, an individual besides being a *national*, has to be a *citizen*.<sup>4</sup>

Nationality can at first be defined as a broad concept, comprising citizens and those individuals who, while not citizens, owe allegiance<sup>5</sup> to the State and are entitled to its protection at various levels.<sup>6</sup> Put perhaps in a more objective way, nationals have a special and more permanent tie with the State of their nationality and, while they have some obligations toward the State of their nationality, they also have the right of abode. Nationality is thus a bilateral relationship.<sup>7</sup> The distinction between nationality and citizenship is somewhat difficult to explain as both terms emphasize different aspects of the same idea: State membership.<sup>8</sup> Nationality stresses the international; citizenship, the municipal aspect.<sup>9</sup> Furthermore, it is often said that while every citizen is a national, not necessarily every national is a citizen of the

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<sup>3</sup> Some commentators define citizen as those with the potential to acquire political rights, as observed by CHARLES GORDON & HARRY N. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, para. 11.3, that some citizens may not enjoy full political rights, e.g. children, women and persons convicted of certain crimes, and in the specific case of the U.S.A., residents of the District of Columbia.

<sup>4</sup> We will see later in this work that the great majority of countries only grant political rights to their nationals. See *infra* note 12 and accompanying text.

<sup>5</sup> As observed by GORDON AND ROSENFIELD, *supra* note 3, the term allegiance derived from feudal and aristocratic societies, and it meant subjection and obedience. Nowadays it generally connotes loyalty and participation rather than subjection.

<sup>6</sup> WILLIAM W. BISHOP, JR., INTERNATIONAL LAW: CASES AND MATERIALS 488 (3<sup>rd</sup> ed. 11<sup>th</sup> printing, 1971).

<sup>7</sup> I OPPENHEIM, INTERNATIONAL LAW 645-46 (1<sup>st</sup> ed. 1905), puts this bilateral relationship in the following terms: "The right is that of protection over its citizens abroad which every State holds... The duty is that of receiving on its territory such of its citizens as are not allowed to remain on the territory of other States." As regards the right of the State to protect its national abroad, in the *Paneyezys-Saldutiskis Railways Case* the PCIJ observed that: "in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection." P.C.I.J.(1939), Ser. A/B, No.70, p.16. See *infra* note 20 and Chapter III as regards the nature of this right.

<sup>8</sup> Many legal commentators do not differentiate between these terms. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 372 (Robert Tucker rev. 2<sup>nd</sup> ed. 1967), says "*Citizenship or nationality is the status of an individual who legally belongs to a certain State or formulated in a figurative way - is a member of that community*". THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 833 n3 (1985), state clearly the distinction between these two terms, but use it interchangeably through the text.

The US Constitution does not address in express terms the subject of nationality, but the Supreme Court in *US v. Wong Kim Ark*, 169 U.S. 649 (1898) has read the Fourteenth Amendment to the US Constitution which determines that: "*All persons born or naturalized in the US and subject to the jurisdiction thereof, are citizens of the US and of the State wherein they reside*" to mean that all persons born in the US, even of Chinese parents, are US nationals.

<sup>9</sup> PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 5 (1956).

State concerned.<sup>10</sup> As a rule, for an individual to have political rights in a certain country this individual has primarily to be a national of that State.<sup>11</sup> The natural outcome of this is that aliens are commonly deprived of political rights.<sup>12</sup>

### 3. THE MEANING OF NATIONALITY

Nationality can be understood as a political-legal term, or as a sociological term, although on most occasions it is difficult to distinguish between them because one concept does not exclude the other.

On a political legal basis, nationality has been defined as the status of a natural person who is attached to a State by the tie of allegiance.<sup>13</sup> From this definition we

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<sup>10</sup> *Id.* at 6. At the turn of the 20<sup>th</sup> century when the US acquired territories outside its continental limits, the Supreme Court in *Downes v. Bidwell*, 182 US 244 (1901) adopted a distinction between "incorporated" and "unincorporated" territories. In consequence of this decision, persons born in an incorporated territory were citizens like those born in any of the other US states; persons born in an unincorporated territory were not US citizens but owed allegiance to the US and were its nationals. Gradually, the status of those territories was changed. The Philippines was granted its independence in 1946, Puerto Ricans were granted full citizenship in 1917, amended in 1934, and 1940, as were Virgin Islanders, in 1940 and persons of Guam, in 1952. However, inhabitants of the outlying possessions of American Samoa and Swain's Island are still considered non-citizen nationals. See McGovney, *Our Non-citizen Nationals, Who are they?* 22 CALIF. L. REVIEW 593 (1934); GORDON & ROSENFIELD, *supra* note 3 at para. 11.3 and RESTATEMENT OF THE LAW THIRD, THE FOREIGN RELATIONS LAW OF THE US, 2 vols., The American Law Institute, para. 212. Additionally, even after the introduction of the 14<sup>th</sup> Amendment, American born tribal Indians were still not considered citizens, regardless of where in the US they were born. They were also considered non-citizen nationals, McGovney, *id* at 613. This understanding was adopted in the Supreme Court decision *Elk v. Wilkins*, 112 US 94 (1884). Later, US Congress passed legislation overcoming the effects of this ruling. From at least 1940 all Indians born in the US are US citizens at birth. See ALEBNIKOFF & MARTIN, *supra* note 8 at 850. Besides that, according to Dutch Law, persons born in the Dutch possessions had the status of 'Dutch subjects' as distinct from "Netherlanders". Law of February 10, 1910, as amended on June 10, 1927, STAATSBALD, 1927, No. 175, Article 1, quoted by WEIS, *supra* note 9. See RICHARD PLENDER, INTERNATIONAL MIGRATION LAW (1987) regarding the British nationality, at 22, at 30 for the American and at 34 for the French nationality. See also José Francisco Rezek, *Le Droit International de la Nationalité*, 198 RECUEIL DES COURS 337, 344 (1986) who gives the example of the Romanian Jews, who were excluded of the Romanian citizenship until 1918.

<sup>11</sup> See Universal Declaration, article 21 (1); American Convention, article 23 and American Declaration, article XXXVIII.

<sup>12</sup> In Brazil though, Portuguese people are granted some political rights in consequence of a treaty between these two countries, which gives reciprocal rights to Brazilians in Portugal. *Convenção sobre a Igualdade de Direitos e Deveres entre Brasileiros e Portugueses*, ratified in Brazil by Decree Number 70391 of April 12th, 1972, Brazil-Portugal, JACOB DOLINGER & CARMEN TIBURCIO, VADE- MÉCUM DE DIREITO INTERNACIONAL PRIVADO 868 (1994). From 1976 aliens have been able to take part in local elections in Sweden if they have been resident for at least three years. Similar legislation has been introduced in Denmark and Norway. See COUNCIL OF EUROPE, Human Rights Information Sheet No 12 (Oct. 1982- March 1983) at 88, & 7 of Resolution 790 of the EUR. PARL. ASS. The same has happened in the Netherlands. See OECD, THE FUTURE OF MIGRATION 24 (1987). See also *infra* Chapter on Political Rights, Title 2.

<sup>13</sup> Harvard Research in International Law, Draft on Nationality, Harvard, 1929, Article 1(a). In the comments to this article it is further explained that nationality is the relationship between a person and a State, at 22, and that the tie of allegiance is a term used to denote the sum of the obligations of a natural person to the State, at 23; 23 AJIL 27-29 (Special Supp. 1929).

can conclude that nationality is a twofold relationship, between single individuals, on the one side, and formal States on the other. Moreover there has to be a formally recognized *vinculum* (link) between them.<sup>14</sup>

Nationality, more broadly defined, on a sociological basis, is the feeling of being part of a group.<sup>15</sup> As a rule, this group has several attributes in common, including some of common descent, common language, territory, political entity, customs and traditions and religion. Very seldom is it possible to find all these attributes in the same group.<sup>16</sup> It is a sense or sentiment of being a nation ethnically, culturally or linguistically, which can exist before political loyalty is nationalized,<sup>17</sup> that is, before the creation of the State. However, besides being a group held together, animated by common attributes, the idea of nationality generally requires that this group seek its expression in what is regarded the highest form of organized activity, that is, as a sovereign State.<sup>18</sup> Hence, nationality is a state of mind corresponding, or striving to correspond, to a political fact.<sup>19</sup>

By comparing these two definitions, we can observe that the latter – the sociological definition – stresses the role of the individual in the relationship. It even admits the existence of the feeling of nationality before the formal creation of the State. The former definition – the one adopted in the Harvard Research, mentioned earlier – requires, for the existence of nationality, that the relationship between the individual and a State be formally recognized. Thus, for the political-legal definition, it is not sufficient for the individual to consider him-or herself a national of the State. The State in question must, in addition, expressly recognize him or her as such.

Paul Lagarde merges these two definitions by allowing the concept of nationality to comprise two dimensions. The vertical dimension: the link between the individual and the State to which the individual belongs, by which the individual has duties (loyalty, military obligations, etc.) as well as rights (diplomatic protection)<sup>20</sup>. The horizontal dimension makes the individual a member of a community, of the population which forms the State.<sup>21</sup>

Hence, there is another important conclusion regarding the political-legal definition of nationality: only the State involved can recognize an individual as its national.<sup>22</sup>

<sup>14</sup> PLENDER, *supra* note 10. Also See I ZEBALLOS, LA NATIONALITÉ 155 (1914).

<sup>15</sup> HANS KOHN, THE IDEA OF NATIONALISM 12 (1967).

<sup>16</sup> *Id.* at 13-14.

<sup>17</sup> F.H. HINSLEY, NATIONALISM & THE INTERNATIONAL SYSTEM 22 (1973).

<sup>18</sup> *Id.* at 19.

<sup>19</sup> *Id.*

<sup>20</sup> Diplomatic protection is by far more of an eventual benefit than a right. In reality diplomatic protection abroad is a right of the State involved and not of the citizen, as the State may or may not exercise diplomatic protection abroad, at its own discretion. As Borchard puts it: "The State does not give effect to the right of its citizen but to its own right, the right that its citizen may be treated by other States in the manner prescribed by international law." DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 18 (1916). See further comments in *infra* Chapter III on the Development of the Treatment of Aliens from Diplomatic Protections to Human Rights.

<sup>21</sup> PAUL LAGARDE, LA NATIONALITÉ FRANÇAISE 1 (1975).

<sup>22</sup> This rule was expressed in articles 1 and 2 of the Hague Convention on Nationality, which provides that each State determines under its own law who are its nationals, and that any questions as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

That is, the laws of each State will establish who will be considered as State nationals, to the exclusion of everyone else, no matter how closely linked to the State.<sup>23</sup>

However, both definitions – political-legal and sociological – may coexist and it is even beneficial for both parties when they do. Where the people feel a strong loyalty toward the State of which they are nationals, it is one relationship reinforcing the other. A more united and loyal people will make the State stronger, by unconditionally abiding by its rules and supporting it, and the State will make the people even more united.

This interesting and important concept is very often forgotten. When we think about a State we think about its authorities, the group of administrators in charge, bureaucrats, the armed forces and so on. We often forget that for a State to be effective and efficient, there must be an active participation by the people, abiding by the laws, believing in and working towards the same goals. Without this participation the authorities of the State alone would be entirely unable to function properly.<sup>24</sup>

#### 4. IMPORTANCE OF A NATIONALITY - COROLLARY OF A NATIONALITY

Apart from being a very important factor for the State, the concept of nationality is also of extreme importance to the individual, as the State plays a very important role regarding its nationals, at international level, protecting them vis-à-vis other States.<sup>25</sup>

Emphasizing the importance of this circumstance, the Inter-American Commission on Human Rights argued that the right to a nationality is “*one of the most important rights of man, after the right to life itself, because all the prerogatives, guarantees and benefits man derives from this membership in a political and social community, the State, stem from or are supported by the right.*”<sup>26</sup>

In the Middle Ages it was believed that no salvation was possible outside the Church. Today it could be more appropriately said that without the protection of a State human beings are likely to endure much more suffering and hardship than

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<sup>23</sup> The PCIJ has stated: “... the national status of a person belonging to a state can only be based on the law of that state.” *The Exchange of Greek and Turkish Populations*, ser. B, No. 10, at 19 (1928).

<sup>24</sup> This idea has been developed by KARL DEUTSCH, NATIONALISM AND ITS ALTERNATIVES 17-19 (1969). He says: “*Compliance is the invisible 9/10ths that keeps afloat the iceberg of the state, and it is a vital development in the process of integration. To say that law-breakers will be punished implies that most people will not break the law because if they all did there would be no one to punish them. No law can be maintained that is not overwhelmingly backed by the voluntary consensus of the community. The consent of the governed is not an ornament of the government of the State; it is its foundation.*” (emphasis added).

<sup>25</sup> It must be emphasized that international protection is not a right of the individual. The State may either refuse for various reasons to protect its national at international level or the State may decide to take legal protective measures even against the will of the individual. However, it should be observed that the mere existence of a State which has legitimacy to protect the individual at international level is a matter of extreme importance for the individual. See *infra* Chapter III.

<sup>26</sup> *Report on Chile*, 1985, at 146, para. 6, as quoted by JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 99 (1996).

would otherwise be the case – a good example of this is the plight of stateless persons and refugees, which have been the object of some international institutions' interest.<sup>27</sup>

Normally we take for granted the idea that we are nationals of a given State (if we are not stateless) and consider it a matter of minimal importance. Paradoxically, while nationality is one of the things that when we have it we do not consider it noteworthy, if we do not have it, then we are able to see how fundamental it is.

In conclusion, the issue of nationality is of foremost importance in the life of an individual. It will determine his or her right to enter a country,<sup>28</sup> and if so, under what circumstances.<sup>29</sup> While in the country, it will determine the right of an individual to remain<sup>30</sup> and to work and the limitations to which this alien will be subject.<sup>31</sup> As regards the departure of the individual from a country, his or her nationality will also play a fundamental role, as only aliens are subject to deportation, expulsion<sup>32</sup> and, as a rule, to extradition.<sup>33</sup> Finally, the status of an individual may determine whether a State has a legitimate interest in exercising its protection as regards the treatment given by other States, as only the State of the nationality of the individual is so entitled at international level, under the traditional theory of diplomatic protection.<sup>34</sup>

The right of the State to grant protection to its nationals abroad in relation to other States has been internationally recognized. This is called diplomatic protection and its exercise involves resort to all forms of diplomatic intervention for the settlement of disputes, both amicable and non-amicable, from diplomatic negotiations and good offices to the use of force.<sup>35</sup>

<sup>27</sup> As observed by ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* (1986).

<sup>28</sup> An alien has no right of entry to a country, whereas a national of a certain country has a recognized right to enter this country as many times as he or she wishes. Article 22.5 of the American Convention; article 3.2 of the Fourth Protocol to the European Convention; and article 13(2) of the Universal Declaration.

<sup>29</sup> In the event of an immigration policy of quotas, the country of nationality of the individual will be of utmost importance. The same can also be said with regard to treaty agreements between countries, by which individuals of the nationality of one of the countries involved will be able to enter the other country, for instance, without a visa.

<sup>30</sup> Article VIII of the American Declaration establishes that nationals have a right to choose their place of residence inside the country of their nationality.

<sup>31</sup> Many countries deny to aliens the exercise of several professions, *see infra* Chapter on Social and Cultural Rights.

<sup>32</sup> American Convention, article 22.5 and article 3(1) of the Fourth Protocol of the European Convention.

<sup>33</sup> See BISHOP, *supra* note 6, at 577. However, some States extradite their nationals, such as Italy, according to article 26 of the 1948 Constitution, the United States and the United Kingdom, when based on a treaty.

<sup>34</sup> There are, in the field of migration law, some important exceptions to this general rule, most notably in the case of obligations imposed by the ILO Conventions, where an attempt has been made to "denationalize" the obligations. See PLENDER, *supra* note 10, at 7n39, and also under human rights law. *See also infra* Chapter III.

<sup>35</sup> See WEIS, *supra* note 9, at 35.

The justification of a State using force abroad to defend its nationals in danger is a very controversial issue.<sup>36</sup> In such instances, the justification normally invoked by the invading State is that the territorial State has failed to take all the precautions necessary for protecting the life and property of foreigners and therefore it is absolutely necessary for the invading State to take some measures to protect the life and property of its nationals.

Phillimore demonstrates that this idea is not new: in the two wars between Sardinia and Austria, in 1848 and in 1859, the main motivation for the Sardinians going to war was their feeling of solidarity with fellow Italian suffering. Also the British fought against the Boers of Transvaal in 1899-1902 because they considered that some British subjects who lived in the region had been deprived of many fundamental rights.<sup>37</sup>

Even after the enactment of the UN Charter, which in art 2(4) prohibits the use of force, this justification has been used, whether effectively or not, on several occasions: the threatened intervention by the United Kingdom in Iran in 1946 and 1951;<sup>38</sup> the Cairo Riots in 1952, when the UK threatened to intervene in Egypt;<sup>39</sup> the Anglo-French intervention in Egypt in 1956;<sup>40</sup> the Belgian intervention in the Congo, in 1960;<sup>41</sup> the evacuation of British citizens resident in Zanzibar in 1964;<sup>42</sup> the US intervention<sup>43</sup> in the Dominican Republic in 1965;<sup>44</sup> the Mayaguez Incident, when Cambodia seized a US ship, which was in Cambodia's territorial waters and on an espionage mission, and the US sent armed forces, in 1975;<sup>45</sup> the evacuation of US citizens from the Lebanon, in 1976;<sup>46</sup> the Israeli Raid on Entebbe, in 1976, when Israel entered Uganda on a military operation and freed its hostages;<sup>47</sup> the threat by France to intervene in Western Sahara, in 1977;<sup>48</sup> the US attempt to free American hostages held in Iran by Military force, in 1980;<sup>49</sup> and the UK intervention in the Falkland Islands, in 1982<sup>50</sup>. Other examples that may also be mentioned are the US intervention in Grenada in 1983; the proclamation of the Turkish Republic of Northern Cyprus in 1983, and the US attack on Libya in 1986. It has to be mentioned that the justification of intervention abroad to rescue nationals has

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<sup>36</sup> This issue has been examined in detail by NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUND OF HUMANITY (1985).

<sup>37</sup> *Droits et Devoirs des Etats*, RECUEIL DES COURS 45 (1923).

<sup>38</sup> See RONZITTI, *supra* note 36, at 26.

<sup>39</sup> *Id.* at 27-28.

<sup>40</sup> *Id.* at 28-30.

<sup>41</sup> *Id.* at 30-32.

<sup>42</sup> *Id.* at 32.

<sup>43</sup> The US had used this argument several times before, as mentioned by Offutt. Between 1813 and 1928 US troops were sent abroad at least 70 times in order to protect US nationals or US interests. A. OFFUTT, THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE US 12 (1928).

<sup>44</sup> See RONZITTI, *supra* note 36, at 32-35.

<sup>45</sup> *Id.* at 35-36.

<sup>46</sup> *Id.* at 36-37.

<sup>47</sup> *Id.* at 37-40.

<sup>48</sup> *Id.* at 40.

<sup>49</sup> *Id.* at 41-49.

<sup>50</sup> See PLENDER, *supra* note 10.

been used as a veneer to cover other ulterior motives on occasion, such as to restore an overthrown government or to prevent a sympathetic government from being overthrown. It is also interesting to observe that in the great majority of cases the intervening State is a Western Power and the intervened State is a Third World country.<sup>51</sup>

Many States have expressed the view that armed intervention for the protection of their nationals is lawful according to international law.<sup>52</sup> They base this opinion on article 51 of the UN Charter, which allows for the use of force for self-defense, and define the right to protect one's nationals abroad as self-defense, for the national is part of the State. They also base it on a customary rule, that, according to them, was unaffected by the Charter.

Accordingly, article 2(4) of the Charter has been interpreted to the effect that it authorizes resort to force whenever it is not directed against the territorial integrity or the political independence of another State, and is caused by one of the purposes of the Charter. Along these lines, some commentators have argued in favor of using force to vindicate international legal rights, to protect nationals abroad, to enforce ICJ decisions, or even to carry out armed reprisals against wrongdoings of other States.<sup>53</sup>

## 5. ACQUISITION OF NATIONALITY

Nationality can be acquired at birth or thereafter. Nationality acquired at birth is called original nationality, and it is normally acquired on the basis of *ius soli*, that is, the individual acquires the nationality of the country in which he or she was born, or *ius sanguinis*, when the individual acquires the nationality of his or her parents, no matter the place of birth.<sup>54</sup> When nationality is acquired later, it is normally acquired through the procedure of naturalization, by which the individual, after fulfilling certain requirements, acquires the nationality of a given State.

In both cases the individual will bear the nationality of a certain State. However, most countries establish a fundamental distinction between these categories of nationals. The national who acquires nationality at birth is a complete national,

<sup>51</sup> The misuse of diplomatic protection has led many Latin American countries and legal commentators to question it and refuse its applicability. See *infra* Chapter III.

<sup>52</sup> Louis Henkin exemplifies this argument by pointing to President Kennedy's sending airplanes to save civilians in the Congo under his authority to protect American citizens abroad. FOREIGN AFFAIRS AND THE CONSTITUTION 54 (1972). Also the power to use force to protect citizens abroad was recognized by a US Supreme Court decision *In re Neagle*, 135 U.S. 1 (1890). The right to protection abroad has been said to be one of the privileges and immunities of citizens of the US *Slaughter-House Cases*, 16 Wall 36,79 (US 1872). *Id.* at 308. Additionally, in 1948 the US adopted national legislation laying down a right to use force abroad to protect the "lives and property" of American citizens abroad "against arbitrary violence". Article 614 of US Navy Regulations, quoted by CASSESE, *supra* note 27, at 238. It is worth observing that the enactment of this legislation followed the adoption of the UN Charter prohibiting the use of force, as seen above. This means that the US considers that in some cases, such as the protection of nationals abroad, the use of force is lawful.

<sup>53</sup> See CASSESE, *supra* note 27.

<sup>54</sup> Nowadays, however, countries tend to adopt either a mixture of both systems or a attenuated version of one of the concepts. The reason for this is the need and desirability of avoiding statelessness.

possessing all rights inherent to the status of a national; while the national who acquires nationality at a later stage, is a national of inferior status, not enjoying the same rights and benefits held by the former.

The distinction between these two types of nationals is one of the most discriminatory practices in the field of nationality. However, it is still found, at different levels, in all countries of the world. The reason for this distinction lies deep in the discrimination towards aliens, for the naturalized person is a former alien; therefore the idea is that if the individual was an alien before naturalization he or she should not be a hundred per cent trustworthy.<sup>55</sup>

The recently approved European Convention on Nationality attempts to put an end to most of these discriminatory practices, setting forth at article 5.2: "*Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.*"

## 6. DUAL NATIONALITY AND STATELESSNESS

As a result of the discretion which States have regarding the formulation of their nationality laws, two or more States may at the same time confer their nationality on the same individual. Good examples of this phenomenon are: a child born in a State which adopts the *ius soli* rule, of parents who are nationals of another State, which applies the *ius sanguinis* rule. The child will then have two nationalities at birth: one, of the State where he or she was born, and another, of the State of the nationality of

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<sup>55</sup> The US Supreme Court in *Schneider v. Rusk*, 377 US 163 (1964) invalidated a residency requirement that applied to naturalized citizens but not to native born citizens under the argument that it was "impermissible the assumption that naturalized citizens as a class are less reliable and bear less allegiance than the native born". However, despite this manifestation of the Supreme Court, the US Constitution prohibits some functions to be performed by naturalized nationals, such as the Presidency and Vice-Presidency of the country (article II and Amendment XII) and it also establishes that naturalized citizens have to wait some years after naturalization to become Senators (9 years- article I, section 3, paragraph 3) & Representatives (7 years- article I, section 2, paragraph 2), which proves the existence of some degree of distinction. In Brazil, the Republican Constitution of 1891 only denied access to the offices of President and Vice President to naturalized Brazilians, exactly as in the US Constitution. The scope of differentiation against naturalized persons increased steadily until the Constitution of 1969, which created 22 different functions which could not be performed by naturalized citizens. See Jacob Dolinger, *Os Brasileiros Naturalizados no Poder Público, A NOVA CONSTITUIÇÃO E O DIREITO INTERNACIONAL* 89 (J. Dolinger ed. 1987). The 1988 Constitution diminished these cases, restricting it to the following: (1) a naturalized Brazilian cannot be elected President, Vice President, or President of the Chamber of Deputies or Senate; (2) a naturalized Brazilian cannot become a career diplomat, an officer in the Armed Brazilians Forces or of the Brazilian Supreme Court (Article 12, para. 3); (3) naturalized cannot become a member of the Council of the Republic (Article 89, VII); (4) a naturalized Brazilian cannot become the owner, manager, or director of a publishing or broadcast firm until ten years after naturalization (Article 222); and (5) naturalized Brazilians can be extradited for crimes relating to drug trafficking or those committed prior to acquisition of Brazilian nationality (Article 5, LI); (In reality, in this last case, the naturalization will be ineffective, for when applying for naturalization, one has to declare that one has never committed any extraditable crime. If the declaration is determined to be false, the naturalization will be deemed null and void.)

his or her parents. Dual nationality may also arise when an individual, a national of a certain country, acquires another nationality by naturalization and does not lose the previous nationality. Besides these more common cases, dual nationality may also arise when there is a partial or total cession of a certain territory to the sovereignty of another State and the residents of this territory acquire the nationality of their new sovereign without losing their "old" nationality.<sup>56</sup>

However, dual nationality is more a problem of international law than municipal law because, as a rule, questions arising out of this duality will have to be resolved by international law. Domestically each State involved will recognize only its own nationality.<sup>57</sup> Under international law, in case of dual nationality the most effective nationality will be applied.<sup>58</sup>

Few international documents deal with dual nationality and when they do they have a very limited scope. Such is the case of the 1930 Hague Protocol Relating to Military Obligations in Certain Cases of Double Nationality, which, as its title indicates, only deals with the effects of dual nationality with regard to military service. The same can be said of the Council of Europe Convention on Reduction of Cases of Multiple Nationality and Military Obligations in case of Multiple Nationality, 1963 and its Protocols.

Besides, at the doctrinal level in 1896 the International Law Institute recommended the States to abide by the principle that dual nationality should be avoided.<sup>59</sup> Additionally, in 1928 the Institute determined that the States, when granting or withdrawing their nationalities, should avoid applying rules which would lead individuals to become dual nationals.<sup>60</sup>

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<sup>56</sup> See NISSIM BAR-YACOV, DUAL NATIONALITY 3-4 (1961). For a more detailed analysis on the subject see also ANTONIO BOGGIANO, LA DOBLE NACIONALIDAD EN DERECHO INTERNACIONAL PRIVADO (1973).

<sup>57</sup> Article 3 of the Hague Convention on Nationality: "*Subject to the provisions of the present Convention a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses*"; Article 9 of the Bustamante Code rules that "*Each contracting party shall apply its own law for determination of the nationality of origin of any individual or juristic person and of its acquisition, loss and recuperation thereafter; either within or without its territory, whenever one of the nationalities in controversy is that of the said State...*"

<sup>58</sup> Article 10 of the Bustamante Code determines: "*In questions relating to nationality of origin in which the State in which they are raised is not interested, the law of that one of the nationalities in issue in which the person concerned has his domicile shall be applied*" and article 5 of the Hague Convention on Nationality establishes: "*Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected*".

<sup>59</sup> ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL XV (1896) at 233 quoted by Hans von Mangoldt, *Migration Ouvrière et double Nationalité- La Situation Allemande*, 84 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 671-693; 680 (1995).

<sup>60</sup> ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL XXXIV (1928) at 678 and 760, quoted by Hans von Mangoldt, *id.*

In 1954 the UN International Law Commission set forth the following rule as regards nationality: "Every person has the right to a nationality – but to only one".<sup>61</sup>

However, more recently this trend seems to be changing. As an example of this, the Council of Europe in 1988 recommended that children of mixed marriages should keep the nationality of both parents.<sup>62</sup>

Finally, the 1997 European Convention on Nationality determines that, under certain circumstances, dual nationality cannot be avoided.<sup>63</sup>

Also arising from this discretion of the State concerning nationality laws, there is the phenomenon of statelessness. A stateless person is an individual who is not considered as a national by any State under the operation of its law.<sup>64</sup>

Statelessness may arise from one of four reasons: (1) voluntary renunciation of nationality, when such renunciation is admissible; (2) conflict of nationality laws, that is, a child born in a country which adopts the *ius sanguinis* rule, of parents from a country which adopts the *ius soli* rule; (3) territorial changes and inadequacy of treaties on territorial settlement and (4) loss of nationality, that is, when the State in accordance with its own law, strips the individual of his or her nationality.<sup>65</sup>

## 7. COMPETENCE TO DEAL WITH MATTERS RELATED TO NATIONALITY

It may seem somewhat paradoxical to concentrate on the importance of international principles regarding nationality, given that the determination of an individual's nationality is always for municipal law to establish. Indeed, it is not uncommon to find the view expressed that matters relating to nationality are substantially within the domestic jurisdiction of the State concerned.<sup>66</sup> Oppenheim stated: "Nationality of an individual is his quality of being a subject of a certain state, and therefore its citizen. It is not for international law but for municipal law to determine who is, and who is not, to be considered a subject."<sup>67</sup>

As regards this right of the State to determine who are its nationals, the UN Human Rights Committee analyzed a communication in the case *Charles E. Stewart v. Canada*. The Committee had to verify the applicability of the rule comprised in article 12 § 4 of the I.C.C.P.R. "no one shall be arbitrarily deprived of the right to enter his own country". In this case, the applicant, born in Scotland had lived in Canada from the age of seven and was opposing expulsion under the argument that Canada should be understood as "his own country", although he did not have Canadian nationality. The Committee disagreed with this argument and adopted a stricter interpretation to this provision, as comprehending only nationals of a certain

<sup>61</sup> Institut de Droit International, *Tableau Général des Résolutions (1873-1956)*, 1957, at 41 and ILCY(1954) at 42, quoted by Hans von Mangoldt, *id.*

<sup>62</sup> Hans von Mangoldt, *see supra* note 59.

<sup>63</sup> Articles 14 to 17.

<sup>64</sup> Article 1.1 of the Convention Relating to the Status of Stateless Persons of 1954.

<sup>65</sup> A. PETER MUTHARIKA, THE REGULATION OF STATELESSNESS UNDER INTERNATIONAL AND NATIONAL LAW, TEXT AND DOCUMENTS (1977).

<sup>66</sup> I OPPENHEIM, INTERNATIONAL LAW 642 (8th ed. 1955).

<sup>67</sup> *Id.*

State in accordance with the domestic laws of these States and exceptionally, those individuals who, in accordance with international law, should be considered as nationals of a given State, even if this State denationalized him or her. The decision was not unanimous as many members adopted the viewpoint that Canada should be understood as Mr. Stewart's own country.<sup>68</sup>

The rights and duties conferred by nationality depend on the municipal law of the State concerned. However, the term nationality is in itself also a concept of international law. The co-existence of States and the existence of international relations constitute, at least in modern times, a prerequisite of the concept of nationality. Nationals are protected by their States of origin when abroad, and internally, States respect aliens, nationals of other countries, also because of comity regarding other States. The main reason why States are anxious to determine who are their nationals is their desire to distinguish between nationals and foreigners.<sup>69</sup>

Consequently, nationality is not only a matter of domestic jurisdiction, but of international concern as well.<sup>70</sup> The existence of rules and principles of international law relating to nationality exist alongside, and are not precluded by, internal rules. For this reason, the right of States to determine matters regarding nationality can be limited by international conventions, international custom and the principles of law generally recognized with regard to nationality.<sup>71</sup>

Undoubtedly, the right of the State to determine who are its nationals is a corollary of their sovereignty. However, as widely accepted by legal commentators and international conventions, this right may be limited by international law in some cases. Which are these cases and which are these rules of international law?

There is not much discussion about the existence of this customary international law limiting the freedom of States to determine who are their nationals. However, the most difficult aspect of the problem seems to be the exact content of these rules.<sup>72</sup>

The Hague Convention on Conflict of Nationality Laws does not greatly assist this debate. It establishes in article 1, that States are free to determine who are their nationals, provided that they respect international conventions, international custom and the principles of law generally recognized with regard to nationality. However, the convention does not mention the content of this international custom or the principles of law regarding nationality.

Conversely, the recent European Convention on Nationality, approved in 1997, lists some principles to be followed on nationality, as follows:

<sup>68</sup> *Jurisprudence*, 9 RUDH 181- 193 (1997).

<sup>69</sup> See Prof. Scelle in his *Précis de Droit des Gens*, at 66, quoted by WEIS, *supra* note 9, at 13: "Déterminer la nationalité des individus c'est, non seulement déterminer quels sont les nationaux, mais aussi quels sont les non-nationaux ou les étrangers. C'est donc indirectement fixer le statut international des non-nationaux et, par conséquent, la compétence à l'égard des sujets de droit de la communauté internationale des autorités gouvernementales étrangères."

<sup>70</sup> WEIS, *supra* note 9, at 13.

<sup>71</sup> The Hague Convention on Nationality, article 1, see also article 3.2 on the European Convention on Nationality.

<sup>72</sup> Johannes M. M. Chan, *The Right to a Nationality as a Human Right*, 12 HUMAN RIGHTS LAW JOURNAL 1-14 (1991) lists several international law rules regarding nationality, mainly as regards avoidance of statelessness.

#### *Article 4 - Principles*

*The rules on nationality of each State Party shall be based on the following principles:*

- a) *everyone has the right to a nationality;*
- b) *statelessness shall be avoided;*
- c) *no one shall be arbitrarily deprived of his or her nationality;*
- d) *neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.*

#### *Article 5 - Non-discrimination*

- 1) *The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, color or national or ethnic origin.*
- 2) *Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.<sup>73</sup>*

These rules of customary international law regarding nationality are divided into: (a) positive rules,<sup>74</sup> imposing an international obligation on certain cases; (b) negative rules,<sup>75</sup> which prevent the acceptance of certain domestic norms and (c) conflict rules,<sup>76</sup> which solve conflict between two or more domestic rules.<sup>77</sup>

Zeballos, a well-known scholar on the subject, as early as in 1914 already established some rules regarding nationality that should always be respected. He named these principles "axioms" of the principle of nationality.<sup>78</sup> According to him there are ten principles:

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<sup>73</sup> See comments to this convention in Roland Schärer, *The European Convention on Nationality*, 40 GERMAN YEARBOOK OF INTERNATIONAL LAW 438-459 (1997). The text of the Convention is reproduced in 37 I.L.M. 44(1998).

<sup>74</sup> Weis has concluded in his work that there is no basis in customary international law for a right to a nationality. See WEIS, *supra* note 9, at 248. However, contrarily to his viewpoint, the Hague Protocols Relating to Statelessness and the Convention on the Reduction of Statelessness, article 1, established that a State should grant its nationality to an individual born in its territory who would otherwise be stateless and the recent European Convention on Nationality, article 6, which sets forth that a State should grant its nationality to a child born when one of his or her parents has the nationality of this State or when the child would otherwise be stateless. See next item, in this chapter, number 5 regarding international principles on the right to a nationality.

<sup>75</sup> These are the most commonly found international rules regarding nationality. They mean that the municipal laws granting nationality to an individual will have no effect at international level if they violate international law. A good example of this is the rule of voluntariness of naturalization. That is, naturalization against the will of individuals will not be recognized at international level.

<sup>76</sup> In the cases of plural nationality, for instance, when International Law grants priority to the effective nationality. See *supra* note 58.

<sup>77</sup> WEIS, *supra* note 9, at 92-93.

<sup>78</sup> See *supra* note 14, at 233- 235.

1. nationality is a voluntary bond, *bona fide*;
2. every individual has to have a nationality;
3. no one should have two nationalities;<sup>79</sup>
4. everybody has the right to change freely one's nationality;<sup>80</sup>
5. the State does not have the right to prevent an individual from changing his or her nationality;
6. the State cannot oblige an individual to change his or her nationality against his or her will;<sup>81</sup>
7. everyone has the right to recover the nationality one has abandoned;
8. the State cannot impose its nationality on a person domiciled in its territory against the will of that individual;
9. the natural nationality or the one which has been voluntarily acquired will determine the applicability of private and public law;
10. every State is obliged to determine the status of the stateless in public and private law.<sup>82</sup>

Lauterpacht proposed a right to the nationality of the State of birth, no deprivation of nationality unless accompanied by a concurrent acquisition of a new nationality, and the recognition of the right to emigration and expatriation.<sup>83</sup>

Jacob Dolinger emphasizes the fact that, within the concept of nationality, there are important sub-items. The freedom to acquire a nationality later in life is a corollary of two rights: the right to change one's nationality and the right not to change one's nationality. The right to change one's nationality embodies two other rights: the

<sup>79</sup> He quotes Cicero, *Oratio pro Balbo*: *Duarum civitatum civis esse, nostro iure civile, nemo potest.*

<sup>80</sup> He quotes Plato, Socrates, Cicero: *Ne quis invitatus in civitate maneat.*

<sup>81</sup> Quoting Cicero: *Ne quis invitatus civitate mutetur.*

<sup>82</sup> Some of these rules later became part of human rights instruments, such as numbers 1, 2, 3, 5, 6 and 8, as we will see later. See next item of this chapter respectively rule number 14 which reproduces partially rules number 1, 6 and 8 of Zeballos, rule 5 and 6 reproduce Zeballos' number 2 rule, rule number 3 comprises Zeballos' number 5 rule and rule number 12 which follows the principle comprised in rule number 3 of Zeballos. Zeballos' rule number 4 is not accepted as nationality depends on a State to grant it, thus the will of the individual alone will not lead to acquisition of a certain nationality. Zeballos' rule number 7 has not been internationally accepted either; however there is a rule that imposes on the State of the last nationality of the individual, who has become stateless, to receive him or her in its territory. See the Harvard Draft on Nationality, article 20 and article 1 of the Hague Special Protocol on Statelessness. This Special Protocol entered into force on October 11, 1973, but in 1974 the People's Republic of China informed the UN that it did not consider this Protocol as binding on China, consequently it is not in force. Despite the fact that this is not reacquisition of a previous nationality, the effect of having the right to enter a certain country is largely the same as being a national. It should be observed though that this obligation imposed on the State of last nationality to receive its former nationals cannot be understood as binding under international law because these instruments are not in force. As regards Zeballos' rules number 9 and 10, these rules deal with conflicts of laws, that is the applicable law on matters related to the individual, such as his or her legal capacity to sign a contract, to marry or to make a will. In some countries it is for the law of the nationality of the individual to regulate his or her status. See, for instance, French Civil Code, article 3; Spanish Civil Code, article 9, para. 1; German Code (BGB), article 7 ; Private International Law Legislation in Austria § 9 (1978).

<sup>83</sup> INTERNATIONAL LAW AND HUMAN RIGHTS 346-50 (1968).

right to lose one's nationality and the right to acquire a nationality. Comprised in the right not to change one's nationality are two other rights: the right not to acquire a nationality and the right not to lose one's nationality.<sup>84</sup>

The right to lose one's nationality is nowadays recognized in the great majority of countries, and also in several instruments of international law,<sup>85</sup> and the idea of "once a subject, always a subject" has completely lost its appeal.<sup>86</sup>

The right not to acquire a nationality has also been widely recognized, as the voluntariness of the acquisition, when the nationality is acquired after birth, is considered to be an important element.<sup>87</sup>

The right not to lose one's nationality has been recognized to a lesser extent. Some international documents mention the right of an individual not to be arbitrarily deprived of his/her nationality,<sup>88</sup> and the 1961 Convention on the Reduction of Statelessness, in article 9, determines "*A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds*". As such, one cannot properly speak of a right not to lose one's nationality, but one can speak of a right not to lose it for arbitrary and discriminatory reasons.

The right to acquire a nationality, in its turn, cannot, in general terms, be considered a right. As a rule, States are free to grant nationality to whomever they consider appropriate and even in the case of an individual fulfilling all the legal requirements regarding acquisition of nationality later in life, the State is not obliged to grant nationality to the individual.<sup>89</sup>

Paul Weis in his work on nationality also established some principles, which, according to him, are part of the international law regarding nationality.

First of all, the inherent notion that a national of a given State has the right to settle and to reside in the territory of his or her State of nationality, or to put it another way, the duty of the State to grant and permit such residence to its nationals.<sup>90</sup>

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<sup>84</sup> JACOB DOLINGER, *DIREITO INTERNACIONAL PRIVADO* 143 (5th ed. 1997).

<sup>85</sup> Article XIX, American Declaration; article 20, 3 of the American Convention; article 15, 2 of the Universal Declaration, article 7 and 8 of the European Convention on Nationality.

<sup>86</sup> See OPPENHEIM, *supra* note 66, at 393. In the first half of the 19th century, the United Kingdom still adopted the principle *nemo potest exire patriam* but the Naturalization Act of 1870 made it possible for a British subject to lose his or her nationality by becoming naturalized in a foreign country. The Nationality Act of 1948 went further, doing away with the uniqueness of nationality. This Act permitted naturalization and provided that naturalization abroad did not necessarily result in loss of British nationality. This principle had first been challenged during the American Revolution. On the outbreak of the Revolution, each inhabitant of the American states was given the opportunity to choose to remain British or to take the citizenship of the US. Presently, in general, national legal systems commonly provide for deprivation of nationality in certain circumstances and current State practice does not support any general rule prohibiting such measures. GUY S. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 7 (1978), quoting Oppenheim and Brownlie.

<sup>87</sup> See the Convention on the Nationality of Women of 1933. See also the Convention on the Elimination of All Forms of Discrimination Against Women of 1979, dealing also with the nationality of married women and the American Declaration, Article XIX.

<sup>88</sup> Article 20-3 of the American Convention; Article 15(2) of the Universal Declaration, Article 7 of the European Convention on Nationality.

<sup>89</sup> The American Declaration, in its article XIX expressly mentions the right to change one's nationality "*for the nationality of any other country that is willing to grant it to him.*"

<sup>90</sup> WEIS, *supra* note 9, at 49.

As a consequence of this, the State is also obliged to readmit its nationals from abroad.<sup>91</sup> However, Weis further explains that as regards former nationals, that is those who have lost the nationality of the State in question, there is no rule of international law at present which obliges States to admit them from abroad.<sup>92</sup> He also stresses the idea that nationality has to be voluntarily acquired,<sup>93</sup> and that a State has the right, in certain circumstances, to denationalize an individual. He points out that denationalization is normally caused by entry into foreign civil or military service or acceptance of foreign distinctions, including foreign naturalization; departure or sojourn abroad; conviction for certain crimes; political attitudes or activities and racial and national security grounds.<sup>94</sup>

As regards universal succession of States, Weis concludes that there is no rule of international law under which the nationals of a predecessor State acquire the nationality of the successor State. Notwithstanding this, as a rule, States have conferred their nationality on the former nationals of the predecessor State.<sup>95</sup>

As regards partial succession, questions on nationality will normally be regulated by treaties.<sup>96</sup> However, Weis stresses the obligation under international law for the predecessor State to withdraw its nationality from the inhabitants of the transferred territory.<sup>97</sup>

Concerning questions on plural nationality, when there is a doubt regarding a binational as to what his or her real nationality is, he advises the applicability of the most active or effective nationality between both.<sup>98</sup>

As a matter of fact, this principle of the most effective or active nationality has already been recognized several times in international law. In the *Canevaro Case*, (*Italy v. Peru*), decided in 1912 by the Permanent Court of Arbitration,<sup>99</sup> the issue of the nationality of one of the individuals involved in the case was of foremost importance.

Rafael Canevaro was born on Peruvian territory and therefore according to Peru he was its national. He also was the son of a Italian father and therefore according to Italy he was also its national. So far, a simple matter of dual nationality. The Italian government sued the Peruvian government on his behalf and the Court decided that the Peruvian government had the right to consider Canevaro its national, mainly because on several occasions he had acted as a Peruvian national, such as running as a candidate for the Senate, where only Peruvian citizens are admitted. Although the Court did not put it this way, it was crystal clear that the Court considered Canevaro much more a Peruvian than a Italian, given his obvious links with Peru.

<sup>91</sup> *Id.* at 53.

<sup>92</sup> *Id.* at 58. Conversely, see article 1 of the Special Protocol to Hague Convention on Nationality and article 20 of the Harvard Draft on Nationality. See *supra* note 82 for comments on these documents.

<sup>93</sup> WEIS, *supra* note 9, at 104.

<sup>94</sup> *Id.* at 123/24 and 133.

<sup>95</sup> *Id.* at 149.

<sup>96</sup> *Id.* at 150.

<sup>97</sup> *Id.* at 153. See also GOODWIN-GILL, *supra* note 86.

<sup>98</sup> WEIS, *supra* note 9, at 173.

<sup>99</sup> SCOTT, Hague Court Reports 284 (1916) as quoted by BISHOP, *supra* note 6, at 507.

Along the same lines we have the *Mergé Case*,<sup>100</sup> in which Mrs. Mergé who was an American national by birth because she was born in the USA, was also an Italian national because of her marriage to an Italian. The US presented a claim against Italy on behalf of Mrs. Mergé, based on the Italian Peace Treaty of 1947. The Commission refused the claim of the US on the grounds that Mrs. Mergé could not be considered as having predominantly an American nationality. She had lived in Italy for years, she always used an Italian passport and during the war she was not treated and did not behave as a national of the US while in Italy.

More recently, as a result of the so-called Algiers Accord, between the Islamic Republic of Iran and the United States of America, having the Government of the Democratic and Popular Republic of Algeria as an intermediary, which facilitated the release of the 52 US nationals who had been detained in Iran for 444 days, the Iran-US Claims Tribunal was established. This Tribunal aimed to decide (1) claims of US nationals against Iran; (2) claims of Iranian nationals against the United States; (3) certain claims of the United States and Iran against each other. The Agreement established in article VII, I, that: "*For the purposes of this agreement: a national of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States...*".<sup>101</sup>

However, several claims were presented by individuals who possessed both Iranian and US nationality. The Tribunal had then to decide whether such claims were to be accepted or if they violated the terms of the Treaty between the parties and international law. Six of the arbitrators<sup>102</sup> agreed that these claims were to be accepted, and the principle of the most effective nationality was respected. The decision was based on the fact that the Treaty did not imply that dual nationals were to be excluded from benefiting from the Agreement and the fact that the term used was "citizen" of Iran or the United States and not "national" of Iran or the United States. The idea of citizenship, as mentioned previously, is unmistakably a concept of municipal law, whereas nationality is a concept of international law. Thus, the term should be understood as the status of the individual as regards the internal law of each State.<sup>103</sup>

However, the most famous case in which the principle of the most effective nationality was applied is the *Nottebohm Case*.<sup>104</sup>

This case was decided by the International Court of Justice, on April 6, 1955, following a complaint filed by Liechtenstein against Guatemala, on behalf of Friedrich Nottebohm, who was born in Hamburg in 1881 and was a German national by birth. In 1905 Nottebohm emigrated to Guatemala where he lived and carried on business for several years. In 1939, at the outset of World War II, Nottebohm acquired the nationality of Liechtenstein, while still domiciled in Guatemala. In 1943 he was

<sup>100</sup> *United States of America ex rel. Florence S. Mergé v. Italian Republic*, Italian-United States Conciliation Commission, 1955, also quoted by BISHOP, *id.*, at 508.

<sup>101</sup> 20 ILM 223 (1981).

<sup>102</sup> The Tribunal consisted of nine arbitrators, according to article III, I of the Agreement. Three were appointed by the US, three by Iran and three chosen by the six arbitrators. The three arbitrators appointed by Iran disagreed with the decision of the Tribunal.

<sup>103</sup> 23 ILM 489 (1984).

<sup>104</sup> *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4 - 65 (April 6).

arrested in Guatemala and sent to the United States where he was kept in prison for two years without trial as a dangerous enemy alien.

After the war, Nottebohm went to Liechtenstein, as all his assets had been expropriated in Guatemala, and Liechtenstein brought this action against Guatemala before the International Court of Justice, in 1951, asking the Court to declare that the Government of Guatemala by arresting, detaining, expelling and refusing to readmit Nottebohm and in seizing and retaining his property without compensation, acted in breach of their obligations under international law and consequently in a manner which required the payment of compensation.

The Court held that Liechtenstein had no title to act on behalf of Nottebohm, as Nottebohm's purported acquisition of Liechtenstein nationality in 1939 was invalid under international law. The Court held that the purported naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction but could not be considered at international level. The Court analyzed the bond of nationality as such:

*According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.*<sup>105</sup>

Thus, the Court affirmed its preference for the test of real and effective nationality and denied international recognition to the nationality which was not based on stronger factual ties between the person concerned and one of the States whose nationality was involved.<sup>106</sup>

All these international law rules regarding nationality have a rather limited scope. The practical effect of these rules is that municipal laws in violation of international law need not be recognized by other States, may not have any extraterritorial effect, and will not be applied by international tribunals. Paradoxically however, the individual vis-à-vis his or her own State will still bear the nationality of this State or will be considered stateless no matter how inconsistent this rule may be with international law.

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<sup>105</sup> *Id.* at 23.

<sup>106</sup> See in *infra* chapter III, which deals with Diplomatic Protection & Human Rights, criticisms of this decision of the Court because the Court applied the rule of the effective nationality, valid when there has to be a choice between two or more nationalities, in a situation where there was no dual nationality. As a matter of fact, by applying this rule, the Court rendered Nottebohm stateless on international level.

## 8. GENERAL PRINCIPLES LIMITING THE POWER OF STATES IN MATTERS OF NATIONALITY

In summary, some conclusions can be drawn regarding the basic principles involving the determination of the nationality of an individual in international law:

1. Each State is empowered to determine who are its nationals and who are not;<sup>107</sup>
2. International Law imposes some limitations on the power of the States to determine who are their nationals and who are not;<sup>108</sup>
3. Nationality is not a permanent link, so it is possible for a national to become an alien;<sup>109</sup>
4. As a corollary to the former principles, States may denationalize individuals, as long as the provisions for deprivation of nationality are clearly established and enumerated in the legislation.<sup>110</sup>
5. Right to a Nationality- The vast majority of international human rights documents mention the right to a nationality. However, the practical application of this rule is open to debate. The most appropriate interpretation of this rule is to consider it as a suggestion for the States when establishing their rules regarding nationality, in order to try to avoid statelessness.<sup>111</sup> Notwith-

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<sup>107</sup> The Hague Convention on Nationality, articles 1 and 2; The Bustamante Code ratified by all American States except the US, Mexico, Colombia, Argentina, Uruguay and Paraguay, articles 9, 12, 14 and 15; The American Declaration, article XIX; Harvard Draft on Nationality, 1929, article 2; Decision of the ICJ (1928), The Exchange of Greek and Turkish Populations and article 3.1 of the European Convention on Nationality.

<sup>108</sup> This means that although the State is empowered to determine its nationals, the State has to establish such criteria considering a factual basis and not arbitrarily. See Hague Convention on Nationality, article 1; The Harvard Draft on Nationality, 1929, article 2; see the *Nottebohm Case*, *supra* note 104 and accompanying text, the European Convention on Nationality, article 3.2.

<sup>109</sup> See the American Convention, article 20.3; The American Declaration, article XIX, articles 7 and 8 of the European Convention on Nationality.

<sup>110</sup> Universal Declaration, Article 15(2); Convention on the Reduction of Statelessness, article 9; American Convention, article 20.3, European Convention on Nationality, article 4, c and 7.

<sup>111</sup> See Universal Declaration, article 15(1); the American Convention, article 20.1; the American Declaration, article XIX, the I.C.C.P.R., article 24(3), the Convention on the Rights of the Child, article 7, and article 4,a and b, article 6.1, b, article 7.3 and article 8.1 of the European Convention on Nationality. It should also be remarked that this right to a nationality has been invoked in several domestic jurisdictions such as *Ministry of Home Affairs V. Kemali* (Italy); *Iranian Naturalization Case* (FRG); at international level in the *Nottebohm* case in Judge Guggenheim's dissenting opinion and also by the Inter-American Court of Human Rights in *Re Amendments to the Naturalization Provision of the Constitution of Costa Rica* 5 HRLJ 161 (1984) all quoted by Chan, *supra* note 72 at 3 n20. Additionally, the US Supreme Court decision in *Afroyim v. Rusk* 387 US 253 (1967), which ruled that the Fourteenth Amendment does not allow Congress to withdraw nationality if the citizen does not voluntarily assent to the withdrawal, should be understood in the context that there is a right to a nationality.

standing, some rules avoiding statelessness actually lead to the acquisition of a nationality.<sup>112</sup>

6. Avoidance of Statelessness- As seen above, as the link of nationality becomes more and more important in the life of the individual, the great majority of international conventions try to minimize the possibility of statelessness.<sup>113</sup>
7. Only a national has the right to enter, live, move freely and not to be expelled from the territory of the country (although this right can be abridged under exceptional circumstances). As a consequence of this principle aliens do not enjoy these rights as a matter of international law.<sup>114</sup>
8. Also, as a consequence of this rule, former nationals, if they have nowhere else to go, should be admitted by the State of last nationality, or should be allowed to reacquire the lost nationality.<sup>115</sup>
9. As a rule, nationals have the right to leave their country.<sup>116</sup>
10. Marriage has no automatic influence on nationality. Until recently, some States established that a woman national lost her nationality whenever she married an alien and, conversely, whenever an alien woman married a national she would automatically acquire the nationality of her husband. Presently,

<sup>112</sup> The Convention on the Reduction of Statelessness, article 1; Protocol to the Hague Convention on Nationality, article 1; the American Convention, article 20.2; the European Convention on Nationality, article 6.

<sup>113</sup> See Universal Declaration, article 15(2). This convention tries at least to assimilate stateless persons to aliens in general; Convention on the Reduction of Statelessness, article 1, with the adoption of the *ius solis* principle for those who would otherwise be stateless, also article 8.1; The American Convention, article 20.1; Hague Convention on Nationality, articles 14, 15, 16, and 17; Harvard Draft on Nationality, article 7 and 9 and, articles 4.b, 6.1.b, 7.3, and 8.1 of the European Convention.

<sup>114</sup> Universal Declaration, article 13(2); American Convention, article 22.5, American Declaration, article VIII; Fourth Protocol to the European Convention, article 3(1); The Havana Convention on the Status of Aliens, specifically article 6. Some conventions establish that the right to freedom of movement within national boundaries is granted to those lawfully in the territory of the State, such as the Fourth Protocol to the European Convention, article 2(1); American Convention, article 22.1; The I.C.C.P.R., article 12.1. The Universal Declaration, in article 13(1) also states the right to freedom of movement and residence within the borders of each State.

<sup>115</sup> Harvard Draft on Nationality, article 20 and the Special Protocol to the Hague Convention on Nationality, article 1. That is to say that if a Brazilian living in the Netherlands loses her Brazilian nationality and then is expelled from her country of residence, under international law, Brazil has a more clear obligation to admit her than any other country in the world. If this were not the case, the Netherlands would not be able to expel her as no other country in the world would be obliged to admit her. This is a guarantee both to the country of residence and to the individual. As observed earlier, Paul Weis disagrees that this is an international law rule. As for the right to reacquire the lost nationality if the former national habitually resides in the territory of the country, see article 9 of the European Convention on Nationality.

<sup>116</sup> Universal Declaration, article 13(2); the C.P.R. Covenant, article 12.2, article 2 of the Fourth Protocol to the European Convention.

however, it tends to be the case that marriage may facilitate the process of acquisition of nationality (naturalization).<sup>117</sup>

11. Only nationals are granted political rights.<sup>118</sup>
12. In cases of dual nationality, each State involved may consider the individual as its national.<sup>119</sup> If not, the principle of "effective nationality" becomes applicable.<sup>120</sup>
13. As regards acquisition of nationality, children of diplomats tend to be an exception to the principle of *ius soli* and as a rule should not acquire the nationality of the country in which they are born.<sup>121</sup>
14. Acquisition of nationality later in life has to be voluntary.<sup>122</sup>
15. Rules regarding nationality have to be established by law.<sup>123</sup>
16. Rules on nationality shall not be discriminatory. Rules on acquisition and loss of nationality cannot discriminate on grounds of race, sex, religion, color or national or ethnic origin.<sup>124</sup>

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<sup>117</sup> Abolished by the 1933 Montevideo Conventions on the Nationality of Women, the Convention on the Nationality of Married Women, the Convention on the Elimination of All Forms of Discrimination Against Women, article 9.1; and the European Convention on Nationality, article 4.d, specifically; and in general all the non-discrimination provisions, prohibiting discrimination based on sex; Universal Declaration, article 2; C.P.R. Covenant, article 2.1; American Convention, article 1(1); American Declaration, article II; European Convention on Nationality, article 5. As for the facilitation see article 6.4.a of the European Convention.

<sup>118</sup> Universal Declaration, article 21(1), article 21(2); the C.P.R. Covenant, article 25; American Convention, article 23; American Declaration, articles XX, XXXII, XXXIV, XXXVIII; the Havana Convention on the Status of Aliens, article 7; the Bustamante Code, article 2.

<sup>119</sup> Hague Convention on Nationality, article 3; Bustamante Code, article 9.

<sup>120</sup> Bustamante Code, article 10, where the effective nationality is the place of the domicile of the individual; Hague Convention on Nationality, article 5, where it is exemplified by the principal and habitual residence or "*the country with which in the circumstances he appears to be in fact most closely connected*". The Harvard Draft on Nationality, articles 11 and 12.

<sup>121</sup> See Harvard Draft on Nationality, article 5; the Hague Convention on Nationality, article 12; Optional Protocol to the Vienna Convention on Diplomatic Relations, article 2.

<sup>122</sup> Harvard Draft on Nationality, article 15; the Hague Convention on Nationality, articles 10 and 11.

<sup>123</sup> Harvard Draft on Nationality, article 2; Hague Convention on Nationality, article 1 and 2; European Convention on Nationality, article 3.1.

<sup>124</sup> See article 5 of the European Convention on Nationality and the 1966 Convention on the Elimination of All Forms of Racial Discrimination, article 1.3

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## Historical Development of the Treatment of Aliens

### 1. ANTIQUITY

Among the ancients, that is the Greeks, Romans, as well as among the Hindus, it is known that law was at first a part of religion. The ancient city codes were a collection of rites, liturgical directions, and prayers, joined with legislative provisions.<sup>1</sup> That is to say that, at that time, the basis of every society was worship.

Thus, a citizen was one who took part in the religion of the city. From this participation he received all his civil and political rights. The public meals, for instance, which took place both in Greece and in Rome, were the principal ceremonies of national worship.<sup>2</sup> They were shared in common by all the citizens of the city in honor of the protecting divinities. The ancients believed that the safety of the city depended upon these meetings. Attendance at these ceremonies was also very important for the individual to be able to enjoy his political rights,<sup>3</sup> and in some situations missing these ceremonies would lead to loss of rights of citizenship.<sup>4</sup>

In line with the above, if we had to give a definition of a citizen at that time, it would be the person who had the religion of the city.<sup>5</sup> A stranger, on the other hand, was a person who did not have access to this specific religion. The local gods supposedly did not want to receive prayers from strangers, and access to the temples was not only denied to them, but their presence during sacrifices was actually considered a sacrilege.<sup>6</sup>

As religion at that time was a domestic matter, anyone who came from another culture, another city, was excluded from this privilege. As put by De Coulanges "*Religion did not say to a man, showing him another man, That is thy brother. It said to him, That is a stranger; he cannot participate in the religious acts of thy heart; he*

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<sup>1</sup> NUMA DENIS FUSTEL DE COULANGES, THE ANCIENT CITY 178 (1980). See also *The Laws of Manu, THE SACRED BOOKS OF THE EAST*, vol XXV, (ed. by F. Max Muller, 3rd ed. 1970). The opening verses of this code narrate how the great sages approached Manu, the descendant of self-existent Brahman, and asked him to explain the sacred law. Manu then gives them an account of the creation as well of his own origin from Brahman.

<sup>2</sup> DE COULANGES, *supra* note 1, at 147.

<sup>3</sup> De Coulanges mentions that a censor had to take the names of those present, such was the importance of these attendances, *id* at 186.

<sup>4</sup> *Id.* at 185.

<sup>5</sup> *Id.* at 186, quotes Demosthenes, in Noeram, 113, 114. In Greek, a citizen was the one who makes the sacrifice together.

<sup>6</sup> *Id.*

*cannot approach the tomb of thy family; he has other gods than thine, and cannot unite with thee in a common prayer; thy gods reject his adoration, and regard him as their enemy; he is thy foe also.*<sup>7</sup>

It can be observed that religion established a deep and ineffaceable distinction between strangers and citizens. It even forbade that the privilege of citizenship be granted to a stranger.<sup>8</sup>

Participation in worship carried with it the possession of rights; the stranger, who had no part in the religion, consequently had no rights before the law. That is not to say that the ancients mistreated foreigners as such. It is reported that their presence was in fact welcome among the citizens. Only within conquered territories were the residents enslaved and, in such cases, based on a principle of equality, i.e., irrespective of their color, sex, social origin or religion.<sup>9</sup> Notwithstanding, the laws of the city did not apply to them. They could not marry, and if they did, their children were considered illegitimate;<sup>10</sup> they could not own land, they could not make contracts; they could not inherit,<sup>11</sup> because in every transmission of property, there was also a transmission of worship, and it was just as impossible for the foreigner to perform the citizen's worship, as it was for the citizen to perform the foreigner's worship.

## 2. ANCIENT JUDEA

Among the Jews some important traits were found which today characterize the present idea of nationalism.<sup>12</sup> These traits were: the idea of being a chosen people, the consciousness of national history, and the national Messianism.<sup>13</sup>

The idea of the Jewish people being chosen by God was developed at the beginning of Jewish history and has been present throughout the ages. *"For thou art an holy people unto the Lord thy God, and the Lord has chosen thee to be a peculiar people unto himself, out of all the nations that are upon the earth."*<sup>14</sup> This viewpoint put the Jews in a position isolated from strangers.<sup>15</sup> It also brought with it an idea of racial purity that prevented the Jews from mixing with other peoples. Marriage with strange women was expressly forbidden,<sup>16</sup> and during a certain period the Jews

<sup>7</sup> *Id.* at 87.

<sup>8</sup> *Id.* at 187, quoting Demosthenes, according to whom, "*the purity of the sacrifices must be preserved.*"

<sup>9</sup> The same however cannot be said about the slave-trade which started after the discovery of America and that was based on extremely racist principles: only African blacks were enslaved, as observed by ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 52 (1986).

<sup>10</sup> DE COULANGES, *supra* note 1, at 188, quoting, Gaius, I.67, Ulpian, V. 4-9, Paulus, II.9, Aristophanes, Birds, 1652.

<sup>11</sup> *Id.*

<sup>12</sup> HANS KOHN, THE IDEA OF NATIONALISM: A STUDY IN ITS ORIGINS AND BACKGROUND 27 (1967).

<sup>13</sup> *Id.* at 36.

<sup>14</sup> Deuteronomy 14:2.

<sup>15</sup> Exodus 12:43; Exodus 23:32-33; Leviticus 22:25; Nehemiah 9:2; Nehemiah 13:3-30; Psalms 81:10; Psalms 144:11; Ezekiel 44:9.

<sup>16</sup> Genesis 34:14; Exodus 34:16; Deuteronomy 7:3-4; Josue 23:12-13; Ezra 9, Ezra 10; Nehemiah 13:26-27.

were told to repudiate not only the wives they had taken from foreign tribes, but also the children born of these women.<sup>17</sup>

It is also possible to find some texts in which the practice of usury with foreigners is considered legal,<sup>18</sup> and the fact that a stranger could not be a valid witness in Court,<sup>19</sup> side by side with others in which the native is advised to welcome the stranger with hospitality.<sup>20</sup> It is also important to mention that Gentiles were not refused entry to the cities created by Moses.<sup>21</sup>

However, it is noteworthy that among the Jews it was not race alone that determined membership in the group of chosen people. As the Old Testament shows, circumcision was also a key to this group. As Kohn puts it: "*The Jews became a Nation not by blood but by an act of volition and of spiritual decision.*"<sup>22</sup>

### 3. GREECE

The Greeks began writing law about the middle of the 7<sup>th</sup> century BC. By this time, their earliest literary works, the poems of Homer and Hesiod, had already achieved their final form, so, from these sources, it is possible to know the treatment of aliens in primitive Greece.

It is interesting to observe that among the early Greek legislators several were foreigners, perhaps summoned when disagreement among the ruling class was so widespread that reaching a solution would have been impossible. Thus, Demonax the Martinean was lawgiver for Cyrene; Andromadas of Rhegium became the lawgiver for Thracian Chalcis and Philolaus, a member of the ruling family of Corinth, left that city and wrote laws for Thebes.<sup>23</sup>

However, the fact that Homer, in his *Odyssey*, described the Cyclops as belonging to a less advanced civilization, suggests to us that the description of these strange people was in reality Homer's idea of aliens. As a rule, this feeling that primitive communities had for people with different customs from their own is expressed in the way these strangers were described, as monsters, giants and such.<sup>24</sup>

Aristotle also cites this passage of the Cyclops after mentioning an example of the contrast between the Greeks and barbarians,<sup>25</sup> and Plato uses it as well, in the same context.<sup>26</sup>

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<sup>17</sup> Ezra 10:3;44; Nehemiah 10:31.

<sup>18</sup> Deuteronomy 23:19-20.

<sup>19</sup> ANDRÉ WEISS, TRAITE THÉORIQUE ET PRATIQUE DE DROIT INTERNATIONAL PRIVÉ 12 (1908), quoting De Pastoret.

<sup>20</sup> Leviticus 19:33-34, Exodus 23:9.

<sup>21</sup> Numbers 35:15.

<sup>22</sup> See *supra* note 12, at 37.

<sup>23</sup> See MICHEL GAGARIN, EARLY GREEK LAW 60 (1986) quoting Aristotle in *Politics*.

<sup>24</sup> HENRY SUMNER MAINE, ANCIENT LAW 120 (1963).

<sup>25</sup> POLITICS, 1252b22, quoted by RICHARD GARNER, LAW & SOCIETY IN CLASSICAL ATHENS 20 (1987).

<sup>26</sup> Leg 680b, also quoted by GARNER, *id.*

Aristotle, in his *Politics*,<sup>27</sup> uses as a starting point the idea that the State is composed by a body of citizens, and that “citizenship is not determined by residence, or by rights at private law, but by constitutional rights under the system of public law: a citizen is one who permanently shares in the administration of justice and the holding of office”.<sup>28</sup> Further, when examining those eligible for citizenship, he excludes aliens. He justifies this by quoting Homer, in the *Iliad*, who says “like an alien man, without honor”.<sup>29</sup> Additionally, he concludes that the mixture of races may lead to revolutions.<sup>30</sup>

Plato, in his *Laws*<sup>31</sup> mentions several times the treatment that should be accorded to strangers. First, talking about hospitality, he preaches that a stranger should be given fruits to eat, with the exception of some that should be reserved for citizens.<sup>32</sup> Further, when advocating how the food supply and the distribution of the country’s produce should be made, he suggests that the produce must be divided into twelve parts, and each of these twelve parts is to be divided further into three parts, one being granted to strangers.<sup>33</sup>

He discusses also the requirements with which any person wanting to become a resident alien must comply: He has to settle in a specific part of the city; he has to have a trade; he can stay no longer than twenty years, with some rare exceptions.<sup>34</sup> Furthermore, as regards the theft of some public thing, the stranger is treated with more benevolence than the citizen, who was brought up according to the rules of the city. The latter was punished by death, no matter the extent of the theft, while the former was to be judged on the grounds that he was likely to be curable, therefore not receiving the death penalty.<sup>35</sup>

Notwithstanding, he advises also that as a rule no man younger than forty should be allowed to travel abroad, in order to avoid the danger that cities, which are well governed, be harmed by the interaction with strangers.<sup>36</sup>

It was also very commonplace in Greek literature to find a comparison between Greeks, who were not ruled by tyrants and therefore were free, and foreigners, usually Persians and Trojans, who were ruled by tyrants and were therefore slaves. In this sense:

*Mother, it is fitting for Greeks to rule  
barbarians, but not the barbarians Greeks,  
for barbarians are slaves, but Greeks  
free men.*<sup>37</sup>

<sup>27</sup> ARISTOTLE, THE POLITICS OF ARISTOTLE, Book III, The Theory of Citizenship and Constitution, (Ernest Baker trans., 4th ed. 1961)

<sup>28</sup> *Id.* at 92.

<sup>29</sup> *Id.* at 109.

<sup>30</sup> *Id.* Book VIII, chapter II.

<sup>31</sup> THE LAWS OF PLATO, (Thomas L. Pangle trans., 1980).

<sup>32</sup> *Id.* Book VIII, 845b, at 237.

<sup>33</sup> *Id.* 848a, at 240.

<sup>34</sup> *Id.* 850b and 850c, at 243.

<sup>35</sup> *Id.* 941c, 941d, 941a, at 342/3.

<sup>36</sup> *Id.* 950a to 915c, at 352/3.

<sup>37</sup> Euripedes, *I.A. 1401-2*, quoted by GARNER, *supra* note 25.

In Athens, the situation of foreigners and natives differed substantially, although access to the city was allowed to the former. Four classes of foreigners existed: (1) *the isoteles*, who had been granted, either in accordance with a treaty or by popular decree, some or all civil rights; (2) *the meteques* (moetics), who had been granted the right to live in the city but with several limitations, such as not being able to own immovable property, marry, either transmit property after death or receive it, among others. Each "meteque" was put under the protection of a "prostatae" (patron), who had both the mission of representation and supervision; (3) *the non-resident aliens*, who lived in the city, but without authorization and on a temporary basis. They were put under the supervision of proxenes (patrons), and had still fewer privileges than the meteques; and (4) *the barbarians*, who lived entirely apart from the Greek civilization, were denied all rights and had no protection whatsoever. It must be observed however, that as a consequence of increasing commercial interaction, the situation of the barbarians improved, and finally it was even possible for them to obtain naturalization, ridding them of many of the restrictions they faced.<sup>38</sup>

#### 4. ROME

In the Twelve Tables of Rome, which is a codification dating back to around 450 BC, the alien and the enemy were classed together.<sup>39</sup> However, because in early Latin the word *hostis* meant *peregrinus*,<sup>40</sup> it may be difficult for us nowadays to know if the Romans meant to put the enemy and the aliens on the same level or if they were employing the term with the old Latin meaning.

This consolidation did not contain any provision regarding marriage between Romans and non-Romans. It did declare, however, that the title of ownership was to remain permanently without the scope of a peregrine.<sup>41</sup>

It should be observed that, in Rome, the inferior condition of foreigners was due mainly to religious reasons, not to a feeling of hatred or suspicion against aliens. Rome, historically speaking, accepted foreigners in its midst. Nasmith describes how the patricians, the founders and the sole population of the city in the year 753 BC, gradually accepted and assimilated the presence of foreigners, plebeians, in the city.<sup>42</sup>

He stresses this point further saying that: "*the ius gentium was merely a system forced on his attention by a political necessity. He (the primitive Roman) loved it as little as he loved the foreigners from whose institutions it was derived and for whose benefit it was intended*".<sup>43</sup>

<sup>38</sup> WEISS, *supra* note 19, at 15/20.

<sup>39</sup> As observed by EDWIN BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 33 (1916).

<sup>40</sup> ALAN WATSON, ROMAN OF THE XII TABLES 154 (1975).

<sup>41</sup> *Id.*

<sup>42</sup> DAVID NASMITH, OUTLINE OF ROMAN HISTORY: FROM ROMULUS TO JUSTINIAN 4-5 (1890).

<sup>43</sup> In 247 BC, as a result of police measures and also as an incentive to commerce, foreigners were given access to courts. As such, the law was able to be applied in disputes in which the parties were either foreigners, or a native and a foreigner. As they refused to decide these new cases by pure Roman Civil Law, they set themselves to form a system based on reason and equity, the *ius gentium*, also to be applied by a special class of *Praetor*: the *Praetor Peregrinus*. *Id.* at 47.

In 212 AD, by an enactment of the Emperor Caracalla, all Roman subjects were made Roman citizens.<sup>44</sup> From this period on, *peregrini* were those in fact strangers to Rome and the term ceased to comprise inhabitants of the Empire.

Much changed though with the acceptance of the ideas preached by Christianity. It was no longer the religion of a family, or the official worship of a city. From its inception, Christianity was aimed at comprising the whole human race, therefore making the traditional separation between the citizen and the alien disappear.

In the Old Testament there are several passages which mention the stranger. In Exodus, it is written: “*you shall not wrong a stranger or oppress him, for you were strangers in the land of Egypt*”.<sup>45</sup> This clause is one among several others aiming to protect those who are underprivileged according to the law, the society and in work.

In Numbers, the same idea of non-discrimination is emphasized. It is said: “*And if a stranger is sojourning with you, or any one is among you throughout your generations, and he wishes to offer an offering by fire, a pleasing odor to the Lord, he shall do as you do*”.<sup>46</sup> This order is comprised in the legislation about the cereal and drink offerings accompanying every kind of animal sacrifice.

Further, in Leviticus, the idea of loving one's neighbors is stressed under the following rule: “*When a stranger sojourns with you in your land, you shall not do him wrong. The stranger who sojourns with you shall be to you as the native among you, and you shall love him as yourself, for you were strangers in the land of Egypt*”.<sup>47</sup>

In the New Testament the idea that no man may be considered impure is also emphasized.<sup>48</sup>

## 5. MIDDLE AGES

The invasion of the Roman Empire by Germanic tribes did not change the overall picture substantially. These tribes had no consciousness of a German nationality or race, and “*from the Goths on to Charles Magne, the Germanic tribes could enter civilization only by entering into the heritage of Roman universalism*”.<sup>49</sup> They did not fight French or German battles but a Christian battle. And the alien then, in spite of still existing practical inequality, had some rights.

Moreover, these barbarian tribes did not create an unified system of laws; they either followed Roman Law or the laws of the individual tribes. A system of personal law was therefore created: each individual was regulated by the law of the corresponding tribe. And this fact also contributed to an improvement in the treatment of aliens at that time.

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<sup>44</sup> The objective of the law was not so humanitarian, as a historian pointed out. Caracalla first increased the amount of taxes payable by citizens, and then increased the number of citizens. Quoted by NASMITH, *supra* note 42, at 100.

<sup>45</sup> *Exodus* 23:9.

<sup>46</sup> *Numbers* 22:21.

<sup>47</sup> *Leviticus* 19:33-34.

<sup>48</sup> *Acts* 10:28; *Luke* 17:18 and *Matthew* 25:31-46.

<sup>49</sup> KOHN, *supra* note 12, at 86.

This system of personalizing the laws existed roughly until the end of the 10<sup>th</sup> century. With the development of feudalism, the system ceased to exist. The laws became once again eminently territorial. Each feudal lord had a set of laws or customs applicable inside his domain to everybody. However, these laws were only applicable inside these territorial boundaries. When an individual left the domain of one feudal lord and entered another one, he automatically became a foreigner in the latter. The alien became then *aubain*, that is, the one who leaves the place where he was born to settle elsewhere. It should be pointed out though, that the situation of the *aubain* varied considerably all through Europe, as well as throughout the times.<sup>50</sup>

Thus, during the feudal period in Europe, as a rule, the alien was denied land ownership, because ownership involved allegiance to the local feudal lord. The *ius albinagii*, or *droit d'aubaine*, was formulated, according to which all property of a deceased foreigner was confiscated for the use of the State.<sup>51</sup> The alien was also denied the right to transmit property after death, as the lord was the owner of everything the individual owned.

During the Middle Ages religion played a very important role. As the Christian doctrine preaches equality among all men and is against a permanent situation of hostility, interaction among the peoples becomes easier. All learning and writing was in the hands of the clerics who used one common language: Latin. People looked upon everything, not from the point of view of their nationality or race, but from the point of view of religion. Therefore mankind was divided not into Germans and French and Slavs and Italians, but into Christians and Infidels, and within Christianity into faithful sons of the Church and heretics.<sup>52</sup>

However, this feeling was not universal. Despite the efforts put forth by Europe, the Koran triumphed in the Orient. The crusades failed completely and the gap between Orient and Occident was clearly drawn.

Islam, like Christianity, bases its unity not in nationalistic ideas, but religious ones. As a matter of fact, until the end of the 19<sup>th</sup> century, religion, with its unifying regulation of thought, social life, and attitudes, entirely dominated the private and public life of all Islamic countries. Non-Muslims, who lived outside the Islamic lands, were allowed to enter and live in Islam for a limited period.<sup>53</sup> These individuals, although protected by the State, and able to work and even hold certain positions, suffered important restrictions. They could not present evidence in Court, could not inherit, could not marry a Muslim woman, paid higher taxes, and were subject to several other limitations regarding their dress and conduct in public.<sup>54</sup>

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<sup>50</sup> WEISS, *supra* note 19, at 52-64.

<sup>51</sup> HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 116 (1936).

<sup>52</sup> KOHN, *supra* note 12, at 79. Additionally, it should be remarked that the Catholic Church on several occasions reaffirmed the idea of equality and non-discrimination among men, preached by the Bible, in the Old and New Testament. Such is the case of the Canon Code, Canon 208, which preaches the fundamental equality among all men. This idea was reproduced by Vatican II in several opportunities such as in "Gaudium et Spes" 29 and 60; in "Dignitatis Humanae" 6 and "Nostra Aetate" 5, among others.

<sup>53</sup> The main objective of this permission was to allow the alien to listen to Allah's words. Observed by ANN LAMPTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM 202 (1981).

<sup>54</sup> *Id.* at 206-207.

## 6. MODERN AGE

The Westphalia Peace Treaty of 1648 ended the Thirty Year War and created a new system of international law. According to this Treaty, the European States recognized their common political interests and formed an international community; it was established that a political equilibrium was fundamental to the maintenance of peace; and France was recognized as the main international Power.<sup>55</sup>

The second half of the 17<sup>th</sup> and the 18<sup>th</sup> century witnessed the end of the feudal system and the rise of royal power. This change considerably improved the situation of aliens, despite the fact that several limitations were retained.<sup>56</sup> Before the French Revolution, the situation of the *aubain* in France was far from uniform, due to the existence of treaties with several foreign countries. Aliens, nationals of certain countries, were subject to the *droit de détraction*, instead of being submitted to the *droit d'aubaine*. According to the *droit de détraction*, the property transmitted by a foreigner was subject to a tax, which could range from 5% to 50% of the value of the property. Others were relieved from the *droit d'aubaine* on condition of reciprocity and others were permitted to transmit property, but only to French heirs.<sup>57</sup>

Among the classic law theoreticians of this period, considered to be the founders of modern international law, one may quote Francisco de Victoria,<sup>58</sup> Francisco Suarez<sup>59</sup> and the celebrated Hugo Grotius.<sup>60</sup> According to James Brown Scott, these three authors formed a threefold relationship: Victoria was the expounder and founder of the modern Law of Nations; Suarez the philosopher of law in general and, in particular, of the Law of Nations; and Grotius was the compiler, or better, the purveyor of the ideas, a popularizer in the best sense of the word.<sup>61</sup>

Victoria, dealing with a concrete case, that is, the effects of the discovery of America upon the law of international relations regarding Spaniards and foreigners alike, invoked the Roman *ius gentium*, among other sources, to grant Spaniards the right to travel to the New World.<sup>62</sup> He also introduced the idea of equality among foreigners, forbidding discrimination among them.<sup>63</sup>

<sup>55</sup> HENRY BONFILS, MANUEL DE DROIT INTERNATIONAL PUBLIC 38-39 (5<sup>th</sup> edition, 1908).

<sup>56</sup> See WEISS, *supra* note 19, at 58-70.

<sup>57</sup> *Id.* at 70.

<sup>58</sup> Born in 1483, theologian and founder of the Spanish School of International Law.

<sup>59</sup> Born in 1548, jurist, theologian and philosopher. His approach to law was as a theologian and he dealt with it as a moral science.

<sup>60</sup> Born in 1583.

<sup>61</sup> THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW 127 (1934).

<sup>62</sup> *De Indis et de Iure Belli Relectiones*, THE CLASSICS OF INTERNATIONAL LAW, Section III, On the Indians, para. 386, at 151, (Ed. Ernest Nys, Carnegie Endowment, 1917), says: "The Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them. Proof of this may in the first place be derived from the law of nations (*ius gentium*), which is either natural law or is derived from natural law."

<sup>63</sup> *Id.* para. 390, at 153. It says: "If there are among the Indians any things which are treated as common both to citizens and to strangers, the Indians may not prevent the Spaniards from a communication and participation in them. If, for example, other foreigners are allowed to dig for gold in the land of the community or in rivers, or to fish for pearls in the sea or in a river, the natives cannot prevent the Spaniards from doing this, but they have the same right to do it as others have, so long as the citizens and indigenous population are not hurt thereby."

Suarez stresses the idea of equality, according to which aliens should be subjected to the same laws as residents, admitting only some exceptions.<sup>64</sup>

Hugo Grotius, in his turn, advocates the right of temporary sojourn for all.<sup>65</sup> Concerning permanent residence, he also preaches that it ought not to be denied, given the fulfillment of certain conditions.<sup>66</sup> He even emphasizes that "*it is characteristic of barbarians to drive away strangers*".<sup>67</sup> As regards the idea of equality the author stresses that they should be granted the same rights granted to other foreigners.<sup>68</sup> Thus, Grotius repeats the principle first invoked by Victoria, as already examined above.

Foreigners should, however, not be granted this same humanitarian treatment in periods of war. According to the law of nations, first, they should be granted the right to leave the country and, after the expiration of this time, they should be regarded as enemies.<sup>69</sup>

Samuel Pufendorf<sup>70</sup> similarly understands that admitting strangers is one of the duties of humanity.<sup>71</sup> He also discusses how meaningless discrimination is by saying: "*It is characteristic of dogs to fawn upon the meanest of the household slaves, and to snarl at strangers, although they be the most eminent of people*".<sup>72</sup> And he stresses the idea that, once admitted, the State has some obligations towards the alien.<sup>73</sup>

Christian Wolff<sup>74</sup> highlights the right of the sovereign to deny entry to his domain: "*No foreigner is permitted to enter a territory contrary to the prohibition of its*

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<sup>64</sup> Selections from Three Works, THE CLASSICS OF INTERNATIONAL LAW, ch. 33, "Are the Municipal Laws of a Given Domain Strictly Binding upon Aliens while they are Living within that Domain?", Book III, at 402 (ed. James Brown Scott, Carnegie Endowment, 1944).

<sup>65</sup> De Iure Belli ac Pacis, THE LEGAL CLASSICS LIBRARY, at 200, Book II, Chapter II, (Birmingham, Alabama, 1984), "To those who pass through a country, by water or by land, it ought to be permissible to sojourn for a time, for the sake of health, or for any other good reason; for this also finds place among the advantages which involve no detriment."

<sup>66</sup> Id. at 201: "Furthermore a permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strife."

<sup>67</sup> Id. at 202.

<sup>68</sup> Id. at 204: "A common right by supposition relates to the acts which any people permits without distinction to foreigners; for if under such circumstances a single people is excluded, a wrong is done to it. Thus if foreigners are anywhere permitted to hunt, fish, snare birds, or gather pearls, to inherit by will, to sell property, or even to contract marriages in case there is no scarcity of women, such rights cannot be denied to one people alone, except on account of previous wrong-doing."

<sup>69</sup> Id. book III, chapter IV, at 646.

<sup>70</sup> Born in 1632, Saxony. The principal source of his fame was his work concerning national and international law.

<sup>71</sup> De Jure Naturae et Gentium- Libri Octo, THE CLASSICS OF INTERNATIONAL LAW, On the Laws of Nature and Nations, Book 3, ch. 3, at 363, (Carnegie Endowment, 1934), "Among the duties of humanity there is included the further one of admitting strangers, as well as of kindly providing travelers with shelter and hospitality".

<sup>72</sup> Id. at 364.

<sup>73</sup> Id. at 364: "But to expel without probable cause guests and strangers, once admitted, surely savors of inhumanity and disdain."

<sup>74</sup> Born in 1679, and of whom Vattel was a disciple.

*ruler*".<sup>75</sup> However, he expressly mentions the right of naturalization,<sup>76</sup> as well as the presumed equality between strangers and citizens,<sup>77</sup> and the right of the exile to dwell anywhere in the world, granted by nature.<sup>78</sup>

A disciple of Wolff, Emmer de Vattel<sup>79</sup> plays a very important role in the development of modern immigration laws, as his ideas proved to be the inspiration behind some important exclusion cases in the 19<sup>th</sup> century.<sup>80</sup> Primarily, he recognizes the right of the lord of the territory to deny entry to aliens, or establish conditions thereupon.<sup>81</sup> However, by allowing the foreigner to enter, the sovereign has some duties regarding the individual.<sup>82</sup> It is also important to observe that the alien has duties regarding the state that receives him as well, such as the duty to obey its laws, to defend it from a multitude of dangers and to pay taxes.<sup>83</sup> Aliens should be allowed to marry<sup>84</sup> and to go to court, naturally to be judged by the judge of the place and according to the local laws.<sup>85</sup> However, the right to own property cannot be claimed by the alien, for he has to submit himself to the will of the sovereign.<sup>86</sup> Vattel mentions the possibility of aliens being granted naturalization,<sup>87</sup> the various ways of acquiring citizenship,<sup>88</sup> and the right of an individual to leave a country, when

<sup>75</sup> *Ius Gentium - Methodo Scientifica- Pertractatum*, THE CLASSICS OF INTERNATIONAL LAW, The Law of Nations, The Duties of Nations to Themselves, para. 296. See also, para. 298-300 (ed. James Brown Scott, Carnegie Endowment, 1934).

<sup>76</sup> *Id.* para. 134: "Naturalization is the conferring of the right of a native upon a stranger or foreigner".

<sup>77</sup> *Id.* para. 304 : "Since foreigners, as long as they dwell in alien territory or stay there as temporary citizens, they are bound only to do and not to do the things which must be done or not done by citizens at the time under the same circumstances, except in so far as particular laws introduce something else concerning foreigners."

<sup>78</sup> *Id.* para. 147, at 76; " By nature the right belongs to an exile to dwell anywhere in the world. For exiles do not cease to be men, because they are driven into exile, consequently compelled to depart from the place where they have a domicile, a thing which is evident of itself."

<sup>79</sup> Born in Switzerland in 1714.

<sup>80</sup> GUY GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 95 (1978).

<sup>81</sup> THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 30, para. 100 (Simeon Butler, 1820): " Since the lord of the territory may forbid it being entered when he thinks proper he has, doubtless, a power to make the conditions on which he will admit it. This, as we have already said, is a consequence of the right of domain."

<sup>82</sup> *Id.* at 235, para. 104: " The sovereign sought not to grant an entrance into his state, to make strangers fall into a snare: as soon as he receives them, he engages to protect them as his own subjects, and to make them enjoy, as much as depends on him, an entire security."

<sup>83</sup> *Id.* at 235, para. 105-106.

<sup>84</sup> *Id.* at 239, para. 115: "Nothing naturally hinders foreigners contracting marriage in the state."

<sup>85</sup> *Id.* at 234, para. 103: "...The disputes that may arise between the strangers, or between a stranger and a citizen, ought to be terminated by the judge of the place, and also according to the laws of the place."

<sup>86</sup> *Id.* at 239, para. 114, "Every state has the liberty of granting or refusing foreigners the power of possessing lands or other immovable goods within its territory."

<sup>87</sup> *Id.* at 160, para. 214: "A nation, or the sovereign who represents it, may grant to a stranger, the quality of a citizen, by admitting him into the body of the political society. This is called naturalization."

<sup>88</sup> *Id.* at 161-162, para. 215-219.

backed by important reasons<sup>89</sup>. Further, he makes a subtle distinction between those who leave their countries for lawful reasons, and are therefore called emigrants<sup>90</sup> and those who are obliged to leave the country, or as he put it, with a mark of infamy, according to a decree of expulsion or banishment, called exiles.<sup>91</sup>

The 18<sup>th</sup> century brought several changes in this area. The French Revolution, supported by the philosophical ideas of the Enlightenment, had to put an end to the various limitations and restrictions that aliens still held regarding private law. Hence, one of the first decisions of the Constituent Assembly was to revoke the *droit d'aubaine*, and to permit the alien to transmit his property after death.<sup>92</sup> Later, the right to inherit was also granted, even from French relatives.<sup>93</sup>

The Constitution of 1791 repeats these privileges, regarding the *droit d'aubaine*, the *droit de détraction*, and the right to inherit. And it also allows the alien to exercise some civil rights, such as the right to contract and to acquire property in general. Further, it granted the alien protection as to his person, religion and property.<sup>94</sup> However, the assimilation was far from complete and the alien still remained subject to various procedural restraints, such as the *cautio judicatum solvi*.<sup>95</sup>

Notwithstanding these liberal provisions, the Napoleonic Code in article 11 adopted the system of reciprocity regarding the exercise of civil rights. Only much later, in 1948, did French courts drastically alter the interpretation of this provision, establishing that nationals and foreigners have the same civil rights, unless the legislator adopts a distinction.<sup>96</sup>

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<sup>89</sup> *Id.* at 163, para. 220: "Every man has a right to quit his country, in order to settle in any other, when by that step he does not expose the welfare of his country. But a good citizen will never resolve to do it without necessity, or without very strong reasons."

<sup>90</sup> *Id.* at 165, para. 224: "Those who quit the country for a lawful reason, with a design to settle elsewhere, are called emigrants, and take their families and fortunes with them."

<sup>91</sup> *Id.* at 166, para. 228.

<sup>92</sup> Decree of October 6th, 1790, reads: "L'Assemblé nationale, considérant que le droit d'aubaine est contraire aux principes de fraternité qui doivent lier tous les hommes, quels que soient leur pays et leur gouvernement; que ce droit, établi dans le temps barbares, doit être proscribt chez un peuple qui a fondé sa constitution sur les droits de l'homme et du citoyen; et que la France libre doit ouvrir son sein à tous les peuples de la terre, en les invitant à jouir, sous un gouvernement libre, des droits sacrés et inviolables de l'humanité, a décreté: Le droit d'aubaine et celui de détraction sont abolis pour toujours." Quoted by WEISS, *supra* note 19, at 80.

<sup>93</sup> Decree of April 8th, 1791: "les étrangers, quoique établis hors du royaume, sont capables de recueillir en France les successions de leurs parents même Français; ils pourront de même recevoir et disposer par tous les moyens qui seront autorisés par la loi." *Id.* at 81.

<sup>94</sup> "La Constitution n'admet point le droit d'aubaine. Les étrangers, établis ou non en France, succèdent à leurs parents étrangers ou français. Ils peuvent contracter, acquérir et recevoir des biens situés en France et en disposer de même que tout citoyen français, par tous les moyens autorisés par les lois. ....leur personnes, leurs biens, leur industrie, leur culte sont également protégés par la loi." *Id.* at 81-2.

<sup>95</sup> *Id.* at 84. *Cautio Judicatum solvi* is the security for judicial costs, charges or expenses to be given by the plaintiff in a judicial proceeding.

<sup>96</sup> BRUNO NASCIMBENE, IL TRATTAMENTO DELLO STRANIERO NEL DIRITTO INTERNAZIONALE ED EUROPEO 29-30 (1979). See also, in this work, *infra* Chapter V, on Private Rights.

It is interesting to mention though, that despite this progressive assimilation, foreigners were still regarded as being more likely to cause harm or even as dangerous, because of the rise, at the same time, of nationalistic ideals.

Rousseau, the philosopher of fraternity, stresses the danger that a State can put itself in because of too much contact with foreigners: "*For the people to be all that they can be, they must not yet have rooted prejudices, must be pliable, isolated from foreigners and, in sum, have the simplicity of nature joined to the needs of society.*"<sup>97</sup> According to the philosopher, the best way to keep peace is to keep the people apart from others. One should observe that Plato, before Christ, already preached the idea of separation.<sup>98</sup> That is to say that, centuries afterwards, the alien was still regarded with suspicion and as likely to bring harm and bad influence.

Perhaps the reason why Rousseau was so skeptical about interaction with other peoples was because of the important role he played in the development of the ideal of nationalism. It can be said that Rousseau provided the newly formed nation with the emotional and moral supports it so badly needed, such as the idea of the "amour de la patrie".<sup>99</sup> Besides that, Rousseau, like Montesquieu, believed that differences in the external environment play a fundamental role in shaping the people. Thus, different climate and geographic conditions produce different types of people, so the idea of one people copying another does not make much sense. Following from this reasoning, he also advocated the idea that foreigners should not take part in the teaching process,<sup>100</sup> nor have the role of kings, for they would try to introduce new customs.<sup>101</sup>

Furthermore, according to Rousseau, it is important for ordinary people to avoid foreigners, and even to dislike them: "*Every patriot hates foreigners: they are only men, and nothing to him.*"<sup>102</sup> Emile might be allowed to travel: he is not a citizen, but even so, he must be warned against the dangers of foreign influence to his inner integrity.<sup>103</sup>

With the French Revolution, the modern concept of citizenship was born, that is, someone who participates in the administration of the State and has all the political rights, as opposed to the ordinary individual, who has the basic human rights. The individuals in general were no longer satisfied with the idea of leaving all the public affairs in the hands of a few chosen authorities, so the idea of participation in the administration of the State became an important goal.

If, on the one hand, some inhumane distinctions were erased, then on the other hand, the French Revolution gave rise to a new basis for distinction between citizens and strangers, regarding the exercise of political rights.

<sup>97</sup> JEAN JACQUES ROUSSEAU, *CONTRAT SOCIAL*, Vaughan II, 60.

<sup>98</sup> See *supra* note 36 and accompanying text.

<sup>99</sup> KOHN, *supra* note 12, at 251.

<sup>100</sup> *Id.*, at 256.

<sup>101</sup> *Id.*, at 257.

<sup>102</sup> JEAN JACQUES ROUSSEAU, *EMILE* 7 (1851).

<sup>103</sup> *Id.*, at 418.

## Development of the Treatment of Aliens from Diplomatic Protection to Human Rights

### 1. ORIGINS

Since time immemorial aliens have been protected by certain rules of humanitarianism and fair treatment. In the previous chapter we saw that the idea of aliens being accorded a humanitarian treatment has been common to religions and to many peoples, since antiquity. It has then always been part of the history of mankind for the treatment of aliens to follow certain basic patterns, dictated by morals, religion or comity.

However, commentators disagree as to when international law started to focus on the treatment of aliens.

Vattel is deemed to have been the father of the concept of State Responsibility,<sup>1</sup> because of his assertion:

*whoever wrongs the State, violates its rights, disturbs its peace, or injures it in any manner whatever becomes its declared enemy and is in a position to be justly punished. Whoever ill-treats a citizen indirectly injures the State, which must protect the citizen. The sovereign of the injured citizen must avenge the dead and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.<sup>2</sup>*

Other legal commentators suggest that the meaning of this text was quite different than what it is understood to mean today: Vattel was not considering the treatment (or mistreatment) of aliens by governmental authorities, but rather had in mind relations between private individuals. Additionally, Vattel was more concerned with wrongs done by, and not to, aliens.<sup>3</sup>

Heffter, who is also considered by some<sup>4</sup> as the first to give a scientific treatment to the subject, focused on the topic of state responsibility in general, rather than specifically on the subject of injuries committed to aliens.<sup>5</sup>

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<sup>1</sup> Richard Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 1 (R. Lillich ed. 1983).

<sup>2</sup> *The Law of Nations*, CLASSICS OF INTERNATIONAL LAW, Bk.II, Ch.VI, at 136 (ed. C. Fenwick trans. 1916).

<sup>3</sup> Clive Parry, *Some Considerations upon the Protection of Individuals in International Law*, 90 RECUEIL DES COURS 657 (1956). Also FRANK G. DAWSON & IVAN L. HEAD, INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS 2 n5 (1971).

<sup>4</sup> Parry, *supra* note 3, at 657.

<sup>5</sup> A.G. HEFFTER, LE DROIT INTERNATIONAL DE L'EUROPE (4<sup>th</sup> ed. 1883).

The subject matter of State Responsibility for Injuries to Aliens was firmly established as a separate branch of international law in 1916, with Borchard's great treatise *The Diplomatic Protection of Citizens Abroad*.<sup>6</sup> Indeed, with the publication of this work, the technical name for the discipline it treats was firmly established.

Borchard emphasized that, in practical terms, only after the French Revolution, which focused on the rights of the individual, did a definite practice arise of granting diplomatic protection to citizens abroad.<sup>7</sup> Consequently, according to his viewpoint, it makes no sense to look for its origins before this period.

Some others trace the origins of State Responsibility for Injuries to Aliens back to the Middle Ages,<sup>8</sup> where the view was taken that justice could be achieved by one's own hands. At that time, the individual harmed abroad who did not obtain redress from the host State had the right, when back to his own land, to be paid in nature by the nationals of the host State.<sup>9</sup> That is to say, the nationals of the host State living in the land of the harmed individual could be deprived of their properties to compensate for the harm.

In reality, the creation of nation States and the idea of nationality as a juridical link between the individual and the State is quite a recent phenomenon, for only after the 15<sup>th</sup> century did States start to organize in territorial units. Thus, the concept of diplomatic protection, as we know it today, technically only became possible after the creation of nation States and the consequent formation of nationalities.<sup>10</sup>

It therefore makes no sense to look for the origins of State Responsibility for Injuries to Aliens earlier than that. Only after that period did a definite practice arise and, as a consequence to that practice, did international law commentators start to develop its theoretical basis.

<sup>6</sup> Party, *supra* note 3, at 658. CHITTHARANJAN F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 2 (Oxford, 1967), lists several authors who focused on the subject at the end of the 19<sup>th</sup> century, therefore, before Borchard, such as Bluntschli, Fiore, Pradiere-Fodéré, Rivier, Heilborn, Tcharnoff, Triepel, Moore, Anzilotti, Arias, Goebel and Calvo.

<sup>7</sup> See EDWIN BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 6 (1916).

<sup>8</sup> Paul De Visscher, *Cours Général de Droit International Public*, 136 RECUEIL DE COURS 9, 155 (1973).

<sup>9</sup> See Franciscus de Victoria, *De Indis Et de Ivre Belli Relectiones*, CLASSICS OF INTERNATIONAL LAW 181, The Second Relection, number 41, Third proposition (1917): "If the enemy refuses to restore things wrongfully seized by them and the injured party can not otherwise properly recoup himself, he may do so wherever satisfaction is obtainable, whether from guilty or from innocent. For instance, if French brigands made a raid into Spanish territory and the French King would not, though able, compel them to restore their booty, the Spanish might, on the authorization of their sovereign despoil French merchants or farmers, however innocent these might be. This is because, although the French State or Sovereign might initially be blameless, yet it is a breach of duty, as St. Augustine says, for them to neglect to vindicate the right against the wrongdoing of their subjects, and the injured sovereign can take satisfaction from every member and portion of their State. There is, accordingly, no inherent injustice in the letters of marque and reprisals which princes often issue in such cases, because it is on account of the neglect and breach of duty of the other prince and the prince of the injured party grants him this right to recoup himself even from innocent folk. These letters are, however, hazardous and open the way to plunder."

<sup>10</sup> As modern constitutional law determines, a State is composed of a territory, of a government and of a people, here understood as a group of nationals. See JOSÉ JOAQUIM GOMES CANOTILHO, DIREITO CONSTITUCIONAL E TEORIA DA CONSTITUIÇÃO 84 (1997) for an analysis of these elements and José Francisco Rezek, *Le Droit International de La Nationalité*, 198 RECUEIL DES COURS 337,341-342 (1986).

## 2. DEFINITION

Diplomatic protection is "an elementary principle of international law under which an individual who was wronged in a strange land and who had there been unable to obtain that justice which had been refused him"<sup>11</sup> can obtain justice.

The "Dictionnaire de la Terminologie du Droit International" defines State Responsibility as the obligation which is imposed on a State by International Law following a violation of international obligations by acts or omissions of that State as regards another State for injuries suffered by the State itself or its nationals.<sup>12</sup>

Borchard defines diplomatic protection as "a limitation upon the territorial jurisdiction of the country in which the alien is settled."<sup>13</sup>

George Yates simply considers state responsibility as the international law of torts applicable to States.<sup>14</sup>

De Visscher defines it as an institution with customary origin, according to which every sovereign State is entitled to claim reparation for international law violations committed by an alien State towards the nationals of the first.<sup>15</sup>

It should be observed that the definition of State Responsibility is broader than the definition of diplomatic protection or State Responsibility for Injuries to Aliens. State Responsibility comprises not only diplomatic protection but responsibility of the State for any act considered contrary to international law, such as damage caused by nuclear tests or any other environmental accident, or breach of an obligation created by a treaty. Diplomatic protection, in its turn, may be resorted to in the event of damage to property – material and concrete damage –, or to the person of the alien – injuries affecting the physical or mental well being of the individual –, caused by the State or its agent. Thus, diplomatic protection for injuries to aliens is part of state responsibility.

## 3. CONDITIONS OF EXERCISE

For the exercise of diplomatic protection several factors have to be considered: 1) it has to be exercised by the State of the nationality of the harmed individual; 2) the harmed individual has to exhaust all local remedies before the claim can be espoused by the State at international level and 3) there has to be a wrong, defined as such by international law, imputable to the defendant State, which caused direct injury to the individual.<sup>16</sup>

<sup>11</sup> ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF THE STATES FOR DENIAL OF JUSTICE (1938), quoted by Lillich, *supra* note 1.

<sup>12</sup> At page 541, (1960) as quoted by CELSO D. DE ALBUQUERQUE MELLO, RESPONSABILIDADE INTERNACIONAL DO ESTADO (1995).

<sup>13</sup> BORCHARD, *supra* note 7, at V.

<sup>14</sup> *State Responsibility for Non-wealth Injuries to Aliens in the Postwar Era*, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 213 (R. Lillich ed. 1983).

<sup>15</sup> De Visscher, *supra* note 8, at 154.

<sup>16</sup> AMERASINGHE, *supra* note 6, at 37, lists the following conditions of exercise: a) there must be an act or omission of an individual or an organ consisting of a group of individuals; b) this act or omission must be in breach of an obligation laid down by a norm of international law; c) the act or omission must be imputable to the defendant State; d) the act or omission must cause injury to the alien. It should be observed that his only focus is on the third item considered in this work.

First of all, diplomatic protection comprises a relation between States, not between the harmed individual and the State which caused it. Thus, a bond of nationality is required between the individual, or the corporate entity, and the State, in order to allow representation in the international arena against the State which caused the harm.<sup>17</sup>

As regards this item, the Permanent Court of International Justice has stated that: “*In the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.*”<sup>18</sup>

Similarly, as stated by Commissioner Nielsen in the United States-Mexican Special Claims Commission in the *Naomi Russell* case: “*Nationality is the justification in international law for the intervention of one government to protect persons and property in another country.*”<sup>19</sup>

The ICJ has also determined that nationality has to be effective to allow the State to represent its national in the international sphere.<sup>20</sup> In other words, international law requires not only the existence of a bond between the individual and the State of nationality to allow representation at international level, but also requires that this bond represent a real and effective link between the individual and the State. An important distinction has therefore been drawn between nationality at national level, i.e. according to domestic laws of the State, and nationality at international level, which provides for representation by the State.

As such, this decision of the ICJ has adopted the distinction embodied in the Hague Convention on Nationality, article 1,<sup>21</sup> between nationality in the domestic sphere, which is granted by the State, without any interference whatsoever, and nationality at international level, which implies recognition – under certain conditions – by the international community of the internal laws of each State.

Additionally, as nationality is the bond that allows representation, diplomatic protection, as a rule, cannot be extended towards a person if that person is also a national of the injuring State, thus limiting the scope of diplomatic protection. In that case,

<sup>17</sup> As an exception, States may protect aliens in the international arena without the bond of nationality, as in the case of (1) alien seamen, during their period of service, (2) the functional protection of agents of international organizations and (3) the protection of consular or diplomatic personnel of another State, as a consequence of bilateral treaties. See PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 39 (2nd ed., 1979). I CELSO DUVIVIER DE ALBUQUERQUE MELLO, CURSO DE DIREITO INTERNACIONAL PÚBLICO 454 (10th. ed. 1994) quotes also, as another exception to the general rule, the protection granted by Israel by virtue of a Treaty signed in 1952, to Jewish people, who suffered harm by Germany during World War II, who, at the time of the harm, were Polish, Germans, and so on. It should however be remembered that many of these people had Israeli nationality at the time of the claim. Thus, it could also involve the issue of when the link of nationality should exist: at the time of the damage, or at the time of the claim? See *infra* footnote number 95.

<sup>18</sup> *Paneyezy-Saldutiskis Railway Case*, 1939 P.C.I.J. (ser.A/B), No. 76, at 16.

<sup>19</sup> Opinions of Commissioners (Sp.C.I.C.) (1931), p. 44, 51; U.N. Reports, vol. IV, p.805, 811.

<sup>20</sup> *Nottebohm Case* (Liechtenstein v. Guatemala), 1955 I.C.J. 53. See *infra* in this chapter some comments on the case and see also Chapter 1 where the rule of effective nationality is discussed.

<sup>21</sup> “*It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.*”

as both the complaining State and the injuring State would have the faculty to represent the individual internationally, that right cannot be granted to one of them against the other.<sup>22</sup>

Along the same lines, individuals who are stateless are left completely unprotected internationally, because they do not have any State entitled to present a claim on their behalf.<sup>23</sup>

Currently, the State may protect its national at international level, no matter if nationality was acquired originally, i.e. at the time of birth, or later, through naturalization. The present tendency is to assimilate the national who acquired nationality later in life with the national who acquired nationality at birth. Thus, in international matters, the State will extend equal protection to both.<sup>24</sup> The concept of treating the original national more favorably, for he or she is the *real* national, whereas the naturalized national was a former alien, shows prejudice and bias so it is being gradually abandoned, despite the fact that it is still found in various degrees in several countries.<sup>25</sup>

In conclusion then, we may say that, notwithstanding the exceptions established in treaties, the existence of the bond of nationality is essential for the exercise of diplomatic protection. It should be observed however, that nationality at the internal level does not always lead to protection at international level. Or, put another way, for the exercise of diplomatic protection, the individual, as a rule, has to be a national of the State, but nationality in the domestic sphere does not always assure the individual of diplomatic protection, for, as we will see further on, it is exercised at the discretion of the State. Finally, as seen, under some circumstances, the bond of nationality granted at internal level will not necessarily produce any effects internationally.<sup>26</sup>

Secondly, for the exercise of diplomatic protection, international law also requires that all domestic remedies be first exhausted in the State where the injury took place.<sup>27</sup> Until local remedies are exhausted, the injury can still be considered a domestic problem which can be solved by the competent internal (local) authorities. Therefore, what is still being decided locally is an internal matter and not yet an international issue and may even never become one. Local authorities may decide to punish the agent which caused the harm, for instance, and/or compensate the aggrieved party and thus, if the injured State decides to exercise diplomatic protection before a final domestic decision is reached, it would amount to undue and unnecessary interference in the internal affairs of the other country.

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<sup>22</sup> The Hague Convention on Nationality, article 4: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."

<sup>23</sup> See *supra* Chapter I , on Definition of Alien: The Importance of Nationality.

<sup>24</sup> It is interesting to observe though, that a century ago, in Britain, naturalization was strictly domestic in effect. A person naturalized as a British subject was considered to enjoy his status only within the dominions of the Crown. Naturalized nationals were denied thus any diplomatic protection whatsoever. See Parry, *supra* note 3, at 700.

<sup>25</sup> We can still find differentiated treatment domestically in some situations. See *supra*, Chapter I, note 55.

<sup>26</sup> See Hague Convention on Nationality, article 1, according to which internal legislation regarding nationality will only produce international effects if established in accordance with international conventions and principles.

<sup>27</sup> This expression of exhaustion of local remedies comprises not only resort to the Judiciary and administrative authorities but also to other types of redress.

Additionally, I would draw a parallel between this second condition for the exercise of diplomatic protection and what we call *litis pendens* and *res judicata* in domestic civil procedure. If the case has not yet been decided or may still lead to redress and punishment by determination of local authorities, then there is no defined situation in international yet, no decision to be challenged. Only after a decision is reached, only after there is *res judicata* on the merits or if the Judiciary finds the claim to be inadmissible, do we know it is a final, definitive decision and that the individual will have no other opportunity to be compensated locally. Only then may we consider the possibility of an international claim.

Another argument which stresses the importance of this condition is that if diplomatic protection could be exercised before the exhaustion of local remedies, it could provoke interference by the local Executive in the Judiciary. Diplomatic protection means that the Executive of the complaining country will present its demands to the Executive of the injuring country. If local remedies have not been exhausted and if diplomatic protection is exercised, it may result that the Executive of the injuring country could interfere with the Judiciary, breaking the principle of separation of powers.

Nevertheless, the requirement of exhaustion of local remedies has been much questioned, mainly during the Cold War, due to the seizing of private properties which took place in Communist and Socialist States. As these seizures were permitted under domestic legislation, the Judiciary of these countries could do nothing but confirm them, as they were entirely legal from their viewpoint.<sup>28</sup>

It is important to observe that this rule requiring exhaustion of local remedies is considered mandatory only in the context of diplomatic protection, not as regards state responsibility in general. This is because diplomatic protection, as seen, deals with complaints involving two States, the injured State, representing its national, and the injuring State, of which the individual is not a national. In these cases, as mentioned, the individual who is harmed has to submit to the local Judiciary all injuries suffered before his national State presents the complaint. It may happen that the harm is adequately compensated as a result of local decisions and therefore all interference of one State on the other will be unnecessary and severe political strains will be avoided.

On the other hand, cases dealing with State Responsibility in general, involving two States when neither one of them is representing its national, do not necessarily require that local remedies be exhausted,<sup>29</sup> mostly because of the theory of immunity of jurisdiction.<sup>30</sup>

<sup>28</sup> "The customary international rule grew up in a day when countries had a common interest in respecting and preserving the integrity of every other country. In some respects changed political and economic conditions have modified the assumptions underlying the traditional view... There is little reason to change the traditional rule requiring local remedies to be exhausted before espousal in relationship to Western-oriented countries..." Gordon A. Christenson, *International Claims Procedure Before the Department of State*, 13 SYRACUSE L. REV. 527, 538 (1962), as quoted by DAWSON & HEAD, *supra* note 3, at 51 n 65.

<sup>29</sup> A. A. CANÇADO TRINDADE, O ESGOTAMENTO DE RECURSOS INTERNOS NO DIREITO INTERNACIONAL 45 (1984).

<sup>30</sup> Thus, in cases involving, for instance, complaints because of nuclear tests which caused harm in a neighboring State, the harmed State may have difficulties in suing the injuring State in local courts because of the principle *Par in Parem non Habet Jurisdictionem* which led to the rule that foreign States are immune from the jurisdiction of local courts.

Besides all of these aspects, if a State does not have the basic judicial structure, this fact alone may be considered a breach of international law, which may give rise to diplomatic protection.<sup>31</sup> In that case, the rule of exhaustion of local remedies will be interpreted accordingly, and will have a much more limited scope, for obvious reasons. Additionally, when the State does not possess specific means of redress for the case, or when local remedies are non-existent, inadequate or ineffectual, this rule determining exhaustion of local remedies does not apply either.<sup>32</sup>

As an exception to this rule, when the complaint involves immediate danger, it can also be admitted resort to international tribunals without exhaustion of local remedies.<sup>33</sup>

Thus, an alien who receives diplomatic protection of the State of his or her nationality, after exhausting all local remedies to ensure reparation for a wrong suffered, may eventually receive a higher standard of protection than a national of that State, who may have suffered the same gross violations of rights, but can do nothing further and has to abide by the decision of the local courts.<sup>34</sup> For this reason, diplomatic protection has received considerable criticism.

Thirdly, diplomatic protection can only be exercised by a State, representing one of its nationals, towards another State because of an injury caused by the State itself, or its agents, by action or omission, which, as a rule, occurred abroad.<sup>35</sup> Thus, primarily the injury must have been caused by the State – the Executive, Legislative or Judiciary – or its agents and not by private individuals. The State can only be considered responsible for acts of private individuals under the exceptional circumstance of its failing in its obligation to prevent the injury and punish it, as the primary obligation of the State is to guarantee public order.<sup>36</sup>

<sup>31</sup> Garcia Amador, *State Responsibility - Some New Problems*, 94 RECUEIL DES COURS 453 (1958)

<sup>32</sup> Charles de Visscher, *Le Deni de Justice en Droit International*, 52 RECUEIL DES COURS 423 (1935).

<sup>33</sup> *Id.* at 425.

<sup>34</sup> H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 121 (1968), as quoted by Elles, INTERNATIONAL PROVISIONS PROTECTING THE HUMAN RIGHTS OF NON-CITIZENS, U.N. Doc.E/CN.4/Sub.2/392/Ver.1 (1980) at 9. However, it should be observed that the reparation eventually granted by the injuring State may never reach the harmed individual, as we observe *infra* in the text, as the reparation is due to the complaining State and not to the individual. In this case, for instance, the individual will not receive a higher compensation than the national in the same situation. See *infra* note 115 in this Chapter.

<sup>35</sup> In both the definition of Freeman and Borchard, quoted *supra*, the injury has to be committed abroad, that is, not in the State of nationality. This observation makes sense for if the injury occurred in the State of nationality, committed by that State, no other State would be able to espouse the claim of this individual. However, if the injury occurred in the State of nationality and was committed by another State or its agents there would be no reason to exclude diplomatic protection. See Discussion number 14 of the Committee preparing the Hague Convention of 1930: "les actes accomplies par les fonctionnaires d'un État en pays étranger tels que les agents diplomatiques ou les consuls – agissant dans les limites appartenant de leurs fonctions, sont imputables à cet Etat et peuvent, à cet titre, engager la responsabilité de celui-ci." Quoted by Hildebrando Accioly, *Principes Généraux de la Responsabilité Internationale D'Après la Doctrine et La Jurisprudence*, 96 RECUEIL DES COURS 392 (1959).

<sup>36</sup> MELLO, *supra* note 12, at 141-43. Also AMERASINGHE, *supra* note 6, at 50 quotes the decision *Home Missionary Society Case* which decided that: "It is a well established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing the insurrection." According to this reasoning there is an implied idea that there could have been responsibility under different circumstances.

This third condition for the admissibility of a claim based on diplomatic protection, as seen, is the existence of an injury, a wrong, as defined by international law.<sup>37</sup> Legal commentators considered this condition very difficult to be fulfilled, for there was no clear definition in traditional international law of *wrong* and *illicit* and, therefore, that which would give rise to diplomatic protection.<sup>38</sup>

As regards this aspect, two doctrinal viewpoints coexist: 1) the national treatment doctrine, according to which, if an alien receives the same treatment as granted to nationals, no illicit act is committed by the State under international law patterns, and 2) the international minimum standards doctrine, according to which there are some standards of treatment of individuals as determined by international law. Thus, if the State treats the aliens in a manner contrary to these criteria, this attitude violates international law.

Despite the difficulties of establishing its content, the rule – which requires the existence of a wrong – itself has been unanimously adopted by codification drafts, court decisions, and text writers.<sup>39</sup>

Comprised in this concept of wrong are not only the situations covered by public law but also those covered by private law. Along these lines, the Permanent Court of International Justice in the *Mavrommatis* case has stated that:

*The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes,*

<sup>37</sup> Along these lines the General Claims Commission, established to decide claims between the US and Mexico, declared in the *International Fisheries Co. Case* (US. vs. Mexico), 1931 4 U.N.R.I.A.A. 701, that “*States according to a thoroughly established rule of international law are responsible only for those injuries which are inflicted through an act which violates some principles of international law.*”, as quoted by AMERASINGHE, *supra* note 6, at 39. 1 JAN BROWNIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* 85 (1983), attempts to settle the question listing the following fundamental causes of action as regards State Responsibility according to international law: a) State Responsibility arising from breach of a treaty obligation; b) State Responsibility otherwise arising [from breach of a duty set by general international law]; c) Claim of sovereignty or title; d) Action for a declaration of the validity of a State measure in general international law; e) Violation of the sovereignty of a State by specified acts; f) Infringement of the freedom of the high seas or outer space; g) The unreasonable exercise of a power causing loss or damage[abuse of rights]; h) Usurpation of jurisdiction; i) Breach of the international standard concerning the treatment of aliens[denial of justice]; j) Breach of human rights standards: in particular, forms of unlawful discrimination; k) Unlawful confiscation or expropriation of property; l) Unlawful seizure of vessels.

<sup>38</sup> At first, international law admitted reparation for wrongs which occurred because of an act committed with fault. This was first advocated by Grotius and remained so until the end of the nineteenth century, as a rule. After that time, Triepel and Anzilotti defended another theory to establish the basis of state responsibility, rejecting the traditional ‘fault’ theory. According to this new theory, it is not fault, but an act contrary to international law that makes the State responsible. This theory became known as objective responsibility. See Amador, *supra* note 31, at 382-88. At present the latter theory prevails, that is the State or its agents are deemed responsible for acts contrary to international law, without resorting to the fault theory. However, in my understanding, as regards acts committed by private parties the fault theory prevails. In these cases the State is only considered responsible under international law, if it acted with fault, that is, acted with recklessness, negligence or malpractice.

<sup>39</sup> AMERASINGHE, *supra* note 6, at 39-41, lists several legal commentators, convention drafts and decisions which expressly adopt this rule.

*is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eye of the latter the State is the sole claimant.*<sup>40</sup>

Despite the concurrence of all these conditions of exercise the State may not be deemed responsible under certain circumstances, such as *force majeure*, for instance.<sup>41</sup> In these cases, because the act committed by the State is exceptionally admitted, the act will not be considered illicit.<sup>42</sup> On this subject, the International Law Commission (ILC) classifies as exceptions the following situations: consent, countermeasures in respect of an internationally wrongful act, force majeure and fortuitous event, distress, state of necessity, self defense.<sup>43</sup>

Finally, the exercise of diplomatic protection involves resorting to all forms of diplomatic intervention for the settlement of disputes, both amicable and non-amicable. These range from diplomatic negotiations, good offices, resort to international tribunals and, finally, to the use of force.<sup>44</sup>

#### 4. DEFINITION OF A WRONG UNDER INTERNATIONAL LAW- NATIONAL TREATMENT- THE CALVO DOCTRINE- MINIMUM STANDARDS

Many Latin American jurists fought against the development of the doctrine of diplomatic protection because they viewed it with distrust. They understood it as a consequence of control of the countries with more economic power over those countries with less power and therefore refused to take it seriously as a whole. Padilla Nervo<sup>45</sup> and Castañeda of Mexico,<sup>46</sup> were examples of jurists who espoused that view.

<sup>40</sup> *Mavrommatis Palestine Concessions Case*, 1924 P.C.I.J. (ser. A), No 2, at 12.

<sup>41</sup> Amador, *supra* note 31, at 377.

<sup>42</sup> Roberto Ago, *Yearbook of the International Law Commission*, tome II, pt. 2, at 127, U.N.(1980).

<sup>43</sup> 2 Roberto Ago's Draft, *Yearbook of the International Law Commission*, pt. 2, ch. 5 of the Draft, art. 29-35 (1980).

<sup>44</sup> WEIS, *supra* note 17, at 33.

<sup>45</sup> At the 413<sup>th</sup> Meeting of the International Law Commission, which took place in 1957, he said: "The vast majority of new States had taken no part in the creation of the many institutions of international law which were consolidated and systematized in the nineteenth century. In the case of the law of the sea, for instance, though the future needs and interests of newly-established small countries were not taken into account, at least the body of principles thus created was not directly inimical to them. With State Responsibility, however, international rules were established, not merely without reference to small States but against them, and were based almost entirely on the unequal relations between the great Powers and small States. Probably ninety-five per cent of the international disputes involving State responsibility over the last century had been between a great industrial Power and a small, newly - established State. Such inequality of strength was reflected in an inequality of rights, the vital principle of international law, 'par in parem non habet imperium' being completely disregarded." As quoted by LOUIS HENKIN ET AL, *INTERNATIONAL LAW: CASES AND MATERIALS* 691-92 (1980).

<sup>46</sup> Castañeda published an article in 1961 in which he said: "The doctrine of State Responsibility was merely the legal garb that served to cloak and protect the imperialistic interests of the international oligarchy during the 19<sup>th</sup> and the 1<sup>st</sup> part of the 20<sup>th</sup>." As quoted by Lillich, *supra* note 1, at 2.

While it is correct that on several occasions some States abused the rules relating to diplomatic protection, that fact should not mean the doctrine is wholly invalidated.

In reality, diplomatic protection should be much more an exception, a last resort, than the rule. It should be understood almost as an obligation of the State to intervene whenever local laws and remedies do not exist or are ineffective or are against basic principles even, in order to protect its national.<sup>47</sup> The idea is exactly that: to protect, so it is called diplomatic protection. It should not be resorted to every time an individual is harmed in a foreign country. If what happened is not against international law and if it is being settled equally and fairly, then the other State should not interfere, or it will be an invalid interference in the domestic affairs and sovereignty of the other State.

Along these lines the Permanent Court of International Justice has defined diplomatic protection as the right of the State to protect its nationals who have suffered a harm which has not been compensated under domestic law.<sup>48</sup>

It should be emphasized that the harm suffered by the individual has to be contrary to international law in order to justify intervention, not only against domestic laws of the State of the individual involved. It is a basic principle of private international law – conflicts of laws – that legislation of States differ and therefore many situations receive different legislative treatment in each country involved. As an example, we can cite the case of a Frenchman domiciled in Brazil, who, in accordance with Brazilian legislation, will only be considered legally capable after 21 years of age, whereas in accordance with French legislation, this same individual will reach legal capacity at the age of 18. Is France entitled to bring a claim against Brazil for not considering its national, at the age of nineteen, able to marry, acquire property or sign a contract in the country? Obviously not, because in this situation there is only diversity of legislation between France and Brazil. Brazilian legislation, as regards this aspect, cannot be considered as against international law, which could justify diplomatic protection by France.<sup>49</sup>

Hence, if an individual is treated in accordance with the laws of the other State and if these laws do not violate international law, the fact alone that these laws are different from the laws of the State of nationality does not justify any form of diplomatic protection.<sup>50</sup> The idea that States are sovereign and independent is the basis

<sup>47</sup> According to Georges Scelle, the State has an obligation to intervene in order to assure: “*le respect des situations juridiques où sont impliqués ses ressortissants, toutes les fois que le droit positif local ne fournit pas à ceux-ci une action directe ou que cette action reste insuffisante*” as quoted by Accioly, *supra* note 35, at 420.

<sup>48</sup> Decision of October 30, 1924 as quoted by Accioly, *supra* note 35, at 423.

<sup>49</sup> See previous sub-title “conditions of exercise”, in which the requirement of the existence of a wrong according to international law patterns is discussed. The capacity to exercise rights is in Brazil regulated by the law of domicile in accordance with article 7 of the Introductory Law to the Brazilian Civil Code of 1942. Brazilian substantive legislation determines that capacity to exercise rights is acquired at the age of 21, in accordance with article 9 of the Brazilian Civil Code, whereas in France this capacity is attained at the age of 18, according to article 488 of the French Civil Code.

<sup>50</sup> This point has been stressed by G. Cohn, *La Theorie de la Responsabilité Internationale*, 68 RECUEIL DES COURS 210 (1939).

of public international law; thus interference of one State in the other can only be justifiable if the attitudes of one State are entirely against international law.

The fact that diplomatic protection was used in situations when it should not have been resorted to, gave birth to criticisms and theories to completely abolish it.

Latin American countries, trying to encourage immigration and investment at the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup>, promised aliens equality of treatment with nationals, which should benefit them, for they would be granted equal civil and economic rights. That idea became known as the national treatment doctrine, which also was based on the concept that aliens were entitled to no better treatment than nationals.

This doctrine of absolute equality received serious criticism from Borchard, who argued that this equality was purely theoretical and did not work in practice because no State grants absolute equality or is bound to grant it.<sup>51</sup> There are always several restrictions imposed on aliens.

As a matter of fact, this doctrine of national treatment should be understood as granting the alien the same rights as are granted to nationals, with certain exceptions to be established by law. Consequently, as the law may create distinctions between nationals and aliens, it is not absolute equality. It only protects them against arbitrary distinctions, that is, those distinctions which are not established in local legislation.

The national treatment doctrine preaches that aliens are entitled to the same treatment granted to nationals and nothing else. The adoption of this doctrine without the existence of international patterns to be followed may lead to absurd situations, namely, if nationals can be expropriated without indemnity, the same could happen to aliens; if nationals could be jailed without a proper trial, the same could happen to aliens.

This theory can go as far as admitting that the State could kill the individual, torture him, proscribe him for any reason the State believes right, whether the individual is a national or an alien, as long as he is inside the State and within its jurisdiction. In reality, admitting that the States are free to treat their residents in any way they please, without regard to other States or to a common set of rules, is to deny the existence of international law. This understanding, based on Hegel's ideas that municipal law prevails and that there are no such things as international patterns to be followed, is contrary to the core of international law and should not be accepted.<sup>52</sup>

This national treatment doctrine was strongly supported by Calvo, an Argentinean jurist, who, in a work published in 1896, became known for questioning the concept of diplomatic protection. The basic premise of his doctrine is that national States are independent and sovereign and therefore, as a rule, enjoy the right to be free from external interference, whether that interference be diplomatic or by force. He argued further that aliens and nationals should be granted equal rights.

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<sup>51</sup> Edwin Borchard, *The Minimum Standard of the Treatment of Aliens*, AMERICAN SOCIETY OF INTERNATIONAL LAW - PROCEEDINGS 51, 56 (1939).

<sup>52</sup> By adopting in unrestricted terms the national treatment doctrine we may even admit absurd situations, such as remembering World War II, when Germany decided to discriminate against specific races and religion, and treated nationals and aliens alike. Under the national treatment criterion, the international community would have no reason to complain.

Calvo became known as an opponent to the whole concept of diplomatic protection. However, an accurate examination of his works shows that he only opposes diplomatic protection in cases where intervention is unfounded.

It is true that Calvo condemned intervention of one State into another, in the following terms:

*Aside from political motives, these interventions have nearly always had as apparent pretexts, injuries to private interests, claims and demands for pecuniary indemnities on behalf of subjects... According to strict international law, the recovery of debts and the pursuit of private claims does not justify de plano the armed intervention of governments, and, since European states invariably follow this rule in their reciprocal relations, there is no reason why they should not also impose it upon themselves in their relations with nations of the new world.*<sup>53</sup>

However, this text should be understood as condemning intervention in certain cases, where it really should not take place. He was criticizing intervention only in cases of expropriation of private property, not intervention in all cases, as is often believed.

Another one of Calvo's texts, which Borchard cites as the basis of Calvo's doctrine,<sup>54</sup> is equally unclear:

*It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country persecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity.*<sup>55</sup>

It should be observed that this paragraph is part of a chapter in which Calvo deals with state responsibility for acts of private individuals, where, as seen, responsibility is controversial.<sup>56</sup>

Additionally, Calvo in the next paragraph expressly admits that this rule, of non-compensation, applies when there is no fault of the State. Thus, it can be understood that he admits responsibility, diplomatic intervention and compensation in certain specific situations, such as when there is fault of the State.<sup>57</sup>

<sup>53</sup> I M. CHARLES CALVO, LE DROIT INTERNATIONAL THEORIQUE ET PRATIQUE, section 205, at 350-51.

<sup>54</sup> Edwin Borchard, as Rapporteur for the Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners. AM. J. INT'L L. (Special Supplement) (1929).

<sup>55</sup> See CALVO, *supra* note 53, vol. VI, § 256, at 231 (1896).

<sup>56</sup> See *supra* note 36 of this chapter and accompanying text.

<sup>57</sup> *Supra* note 53, vol. VI at 231, where he deals with responsibility for acts of private individuals. In his own words: "En l'absence de toute faute de sa part, il n'est pas possible que ce gouvernement soit forc e d'indemniser les  trangers victimes de violences commises par ses nationaux: un  tat ne saurait  tre engag  par les actes de simples particuliers."

Therefore, Calvo admits international responsibility of the State for acts committed by its agents in its territory towards aliens,<sup>58</sup> but he argues that the responsibility of States as regards aliens cannot be greater than the responsibility it has towards its nationals.<sup>59</sup> He also opposes diplomatic intervention in cases where there is no denial of justice and the State of the alien – stronger and richer – resorts to diplomatic protection as a means to compel the other State – poorer and weaker – to pay an undue large compensation.<sup>60</sup>

Thus, in reality, the ideas, which became known as the Calvo Doctrine and which were often perceived as entirely against diplomatic protection, were never preached as such by Calvo. It is difficult to find a text written by him, either in his six volume treaty or his Manual (where he openly argues this viewpoint known as the basis of "his" doctrine), completely against diplomatic protection. As a matter of fact, his ideas were in favor of the national treatment doctrine, according to which the basis for treatment of aliens should be local legislation, but he admitted that, in certain cases, there could be resort to diplomatic protection when this pattern was not followed.

Some commentators show that he set up two basic principles: 1) States are sovereign and equal, thus they are free from interference; 2) equality of aliens and nationals, so aliens cannot look for rights and privileges not granted to nationals. It is from these points that some commentators went further and read a complete denial of diplomatic protection.<sup>61</sup>

As concerns this aspect, Borchard states that the inference drawn from the whole text, read together with the general principle that foreigners are subject to the local

<sup>58</sup> He mentions the affair of Vexaincourt, which happened in 1887 in the French-German border, involving a German soldier, who killed a French hunter. The French government resorted to the German government asking for redress because of the death of one of its nationals. The German government decided to settle the question and paid the amount established by the French government. See CALVO, *supra* note 53, at 121, vol. III, para. 1265. In his own words: "*L'issue d'un incident, survenu récemment à la frontière franco-allemande, a dûment établi cette responsabilité d'un gouvernement pour les actes commis, par un de ses agents exerçant ses fonctions à l'intérieur, au détriment de ressortissants étrangers. Le règlement définitif de l'affaire a même eu pour base le principe de l'obligation, pour le gouvernement en question, de réparer dans la mesure du possible, les dommages causés par son agent.*"

<sup>59</sup> *Id.* at 138, 140, para. 1276, 1278. In his own words: "*Les liens moraux qui unissent les peuples sont du même ordre et impliquent un caractère absolu de solidarité; un État ne saurait donc légitimement ni revendiquer, chez les autres, une situation privilégiée dont il ne serait pas reciprocement disposé à faire jouir les étrangers, ni réclamer pour ses sujets des avantages supérieurs à ce qui constitue le droit commun des habitants du pays.*"

<sup>60</sup> *Id.* at 147, para. 1290, he quotes M. Sonojo, who published in a newspaper *Foro* of Caracas the following arguments: "*Un étranger commet un crime; on le poursuit; la justice suit son cours et, le crime étant prouvé, il est condamné. Aussitôt il en appelle au représentant de son pays. Celui-ci, dans la plupart des cas (cependant, il faut le dire, on rencontre d'honnêtes exceptions, des agents diplomatiques qui n'appuient aucune prétention mal fondée), trouve la sentence injuste, adresse au gouvernement des reclamations en faveur du condamné. Quand même il est dans l'indigence, il demande des centaines de milliers de piastres pour les jours de prison qu'il a soufferts, pour le déshonneur que lui inflige la sentence. On comprend qu'en pareilles circonstances le gouvernement refuse de payer l'indemnité demandée. Le ministre étranger, au lieu de rebattre ses prétentions, donne ordre à une escadre de venir bloquer les ports de la nation. Le gouvernement de la république menacée proteste contre ces abus de la force, et paie...*"

<sup>61</sup> See DONALD SHEA, THE CALVO CLAUSE 19-20 (1955).

law and must submit their disputes to local courts, has given the Spanish-American countries a basis from which to assert the doctrine that, in private litigation, the alien must first exhaust the local remedies before invoking diplomatic intervention, and that in his claims against the State he must make the local courts his final forum.<sup>62</sup>

Calvo's viewpoint can be considered much more as a predecessor of the Drago doctrine,<sup>63</sup> of non-intervention in the internal affairs of foreign States, than as an opponent to the concept of diplomatic protection as such. Calvo, as well as Drago, fought against the abuses of diplomatic protection, in situations where protection was not really needed and therefore should not take place.

As a matter of fact, this doctrine of non-intervention became later part of OAS Charter, in its article 18:

*No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.*

This doctrine of the national treatment was very enthusiastically welcomed in Latin America, but not elsewhere.<sup>64</sup> These ideas were endorsed by the First

<sup>62</sup> See *supra* note 7, at page 793. See also Alwyn V. Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law*, 40 AM. J. INT'L L. 121,132-133 (1946); "Calvo found fault not with those principles, but with their disregard and abuse by the stronger nations, whom he condemned for imposing upon small States a measure of duties different from that which they observed in their relation among themselves. What he deplored was their practice of seeking special privileges and favors for foreign subjects which the local law did not even provide for citizens. The plea, in other words, was for recognition of the general principle of submission of foreign subjects to the local law - a thoroughly reasonable demand."

<sup>63</sup> Luis M. Drago was the Foreign Minister of Argentina in 1902 and he protested against intervention in the following terms: "Entre los principios fundamentales del Derecho Público Internacional que la humanidad ha consagrado, es uno de los mas preciosos el que determina que todos los Estados, cualesquiera que sea la fuerza de que dispongan, son entidades de derecho perfectamente iguales entre si y reciprocamente acreedoras por ello a las mismas consideraciones y respeto. El reconocimiento de la deuda, la liquidacion de su importe, pueden y deben ser hechos por la nacion, sin menoscabo de sus derechos primordiales como entidad soberana; pero el cobro compulsivo e inmediato, en un momento dado, por medio de la fuerza, no traeria otra cosa que la ruina de las naciones mas debiles y la absorcion de su gobierno, con todas las facultades que le son inherentes, por los fuertes de la tierra." As quoted by Garcia Amador, 2 ANUARIO DE LA COMISION DE DERECHO INTERNACIONAL 213 (1956). It should be pointed out that this doctrine is originally of limited applicability for it deals only with the question of intervention by force for the collection of public debts: "the public debt of an American State can not occasion armed intervention, nor even the actual occupation of the territory of American nations by an European Power," as quoted by SHEA, *supra* note 61.

<sup>64</sup> Freeman, *supra* note 62, says in very incisive terms: "In the guise of liberalism, it reasserts the ancient theory of an unbridled sovereignty, that 'states are responsible only to themselves'. Let us make no mistake about it: there is nothing progressive, humanitarian, or altruistic in the philosophy inspiring this resolution. Its exclusive aim is to free an interested state from restraints imposed by international law upon conduct which would otherwise produce a pecuniary liability to its sister nations. The far-reaching implications of this doctrine are so sinister and so deplorable that it should be resisted by the profession with every means at its command."

International Conference of the American States, meeting in Washington DC in 1889-1890,<sup>65</sup> and were also incorporated in the Convention on the Rights and Duties of States, done at Montevideo, 1933, article 9, among others.<sup>66</sup>

The ideas attributed to Calvo, also highly influenced President Cardenas of Mexico in an address to the *Congreso Internacional Por Paz* on September 10, 1938, soon after the expropriation of American-owned agrarian property in Mexico. In this address, he argued that nationality should have no extraterritorial effect, consequently putting an end to diplomatic protection, according to his viewpoint.<sup>67</sup>

More recently, the so-called Calvo doctrine was also adopted by the UNCTAD Resolution, which states that any dispute concerning a State's nationalization of foreign-owned property falls within the sole jurisdiction of its courts, and by Resolution 3171 (XXVIII), which determines that "any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures".<sup>68</sup>

Along the same lines, the Charter of Economic Rights and Duties of States, adopted in 1974, in article 2, states the same principle:

*art 2(2)- Each State has the right: (c) to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.*

According to this document then, diplomatic protection can only be resorted to if there is an express agreement admitting its exercise.

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<sup>65</sup> This Conference recommended "the adoption of the following principles of American International law: 1) foreigners are entitled to enjoy all the civil rights enjoyed by natives; and they shall be afforded all the benefits of said rights in all that is essential as well as in the form or procedure, and the legal remedies incident thereto, absolutely in the like manner as said natives; 2) a nation has not, nor recognizes in favor of foreigners, any other obligations and responsibilities than those which in favor of the natives are established, in like cases, by the constitution and the laws." As quoted by Amador, *supra* note 31, at 432.

<sup>66</sup> It established that aliens must seek remedies in local courts and not request diplomatic protection, in the following terms: "the jurisdiction of States within the limits of national territory applies to all the inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights either other, or more extensive, than those of the nationals." As quoted by Amador, *supra* note 31, at 432. "This rule does not apply in the cases of manifest denial or unmotivated delay of justice, which should always be interpreted restrictively, that is, in favor of the State where the dispute has arisen. If within a reasonable time it is not settled by diplomatic means, it will be submitted to arbitration." As quoted by DAWSON & HEAD, *supra* note 3, at 21. See also SHEA, *supra* note 61, at 21-27 where he mentions several treaties and domestic constitutions adopting this theory.

<sup>67</sup> Freeman, *supra* note 62, at 86.

<sup>68</sup> As cited by Richard Lillich, *The Valuation of Nationalized Property in International Law*, 3 VA J. INT'L LAW 191 (1976) as quoted by HENKIN ET AL, *see supra* note 45.

The so-called Calvo Doctrine evolved into the Calvo clause, to be inserted into international contracts or domestic Constitutions, making the alien assimilated to the national for particular purposes and making the decisions of the local courts binding and final,<sup>69</sup> or even establishing in some cases that the alien waive the benefit of diplomatic protection.<sup>70</sup>

As we will see further on, the individual cannot waive the benefit of diplomatic protection, because this right belongs to the State and not to the individual. Thus, the individual cannot make a contract limiting in any manner the exercise of a right which belongs to his own State. The individual lacks competence to make this agreement. It can be admitted though, that the State itself, when making a treaty with another State, may accept those clauses, for, in such a case, the State will be waiving its own right for the State is legally competent to make such an agreement. Therefore the Calvo Clause does not produce any effect when signed by individuals, but does produce effects when executed by the State itself.

Opposing this theory of national treatment is the understanding that aliens should be treated according to international minimum standards.<sup>71</sup> This theory argues that international law has determined a minimum set of rights which every civilized country should grant to all in its territory. This doctrine was very difficult to apply at the time it was created, because the exact definition of this minimum set of rights was imprecise, and there was no definite set of rights to be considered as such.

In an effort to define these standards, Borchard exemplified the existence of this minimum set of rights with the decision of the Permanent Court of International Justice, which asserted the existence of a common or generally accepted international law rule respecting the treatment of aliens, applicable to them despite municipal legislation, and with the Treaty of Lausanne of 1923, which provided that nationals of the Allied Powers shall be treated in accordance with "modern" or "ordinary" international law. Additionally, the treaty between US and Germany of 1923 provided that nationals of each country shall be treated by the other with "that degree of protection that is required by international law".<sup>72</sup> The rule of *nulla poena*

<sup>69</sup> TRINDADE, *supra* note 29, at 36 emphasizes an important distinction between the Calvo Clause and the exhaustion of local remedies rule. The first determines an exclusive competence of the local courts whereas the latter determines as a preliminary condition to admissibility of complaints in the international arena the resort to local courts.

<sup>70</sup> The Peruvian Constitution of 1993 in article 63, requires that in every State contract with foreigners, or in the concessions which grant them in the latter's favor, it must be expressly stated that they will submit to the laws and tribunals of the Republic and renounce all diplomatic claims.

<sup>71</sup> According to some commentators the doctrine of international minimum standards was also created to counter abuse of the doctrine of diplomatic protection. The Inter American Conference on Problems of War and Peace, in Mexico, 1945 decided that:

*International protection of the essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens, with respect to the essential rights of man.*

As quoted by Amador, *supra* note 31, at 436.

<sup>72</sup> Borchard, *supra* note 51, at 51.

*sine lege*, is also, according to him, a rule accepted by international law and part of this minimum standard.<sup>73</sup>

The PCIJ in the 1924 case of *Mavrommatis Palestine Concessions Case* stated that the institution of diplomatic protection was an “elementary principle of international law”<sup>74</sup> and, in the 1926 *Case Concerning Certain German Interests in Polish Upper Silesia*, recognized the existence of “a common or generally accepted international law respecting the treatment of aliens... which is applicable to them despite municipal legislation.”<sup>75</sup>

Kelsen also preached the existence of this international standard, in the following terms.

*This, however, does not mean that the law of a state must confer upon aliens the same rights as upon its citizens. Aliens may be excluded from political rights, from certain professions, and even from acquiring property in land. But the legal status granted to aliens must not remain below a certain minimum standard of civilization. The fact that the legal status granted to the citizens by the national law does not correspond to this standard is no excuse.*<sup>76</sup>

Nowadays this difficulty to determine the contexts of these international standards has been substantially reduced, as every human right assured in an international instrument of wide acceptance forms part of this minimum set of rights.<sup>77</sup>

It is noteworthy though, that criticisms and discussions exist mainly with regard to the extent that diplomatic protection is used to protect the taking of property abroad, for in these cases the doctrine would be deemed to be serving the purposes of the strong against the weak, according to some of its critics, or would be an instrument of a specific political and economic theory, according to others. Or, from a more technical standpoint: there is no consensus in the international arena as to the patterns of international law to be followed in this area and that, if violated, would allow diplomatic protection.<sup>78</sup>

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<sup>73</sup> *Id.* at 54.

<sup>74</sup> “It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights- its right to ensure, in the person of its subjects, respect for the rules of international law.” See *supra* note 40.

<sup>75</sup> *Case Concerning Certain German Interests in Polish upper Silesia* 1892, P.C.I.J. (ser A), No. 17.

<sup>76</sup> HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 366-67 (2nd ed. rev. Robert Tucker, 1966).

<sup>77</sup> This understanding was first advocated by Garcia Amador in his ILC Draft on State Responsibility, quoted *infra* in this chapter.

<sup>78</sup> “Both the international minimum standard of treatment and the standard of equality of treatment were meaningful in the past. The real basis for these standards was the existence of an implicit understanding that the property of aliens was to be treated more or less in conformity with the principles derived from the conception of the liberal capitalist state. Today the situation has changed. There is no implicit understanding on the legal position of private property, whether owned by aliens or by citizens.” A. A. Fatouros, *International Law and the Third World*, 50 VA L. REV. 783, 811 (1964). See also my conclusions as regards this aspect in *infra* Chapter V on Private Rights, specifically on the right to property, as well as *infra* Chapter X on Economic Rights.

In brief, it can be said that as regards diplomatic protection, developed countries have generally had a different viewpoint than developing countries. The first argue that international law imposes a legal obligation on members of the international community to treat aliens according to an international minimum standard of rights, which prohibits unreasonable discrimination against aliens and determines a minimum standard by which aliens, as well as nationals, should be treated. The latter argue that, when an individual decides to live in a foreign country, he or she has to take some risks and cannot claim to be treated better than the nationals of that country. As such, aliens should be accorded the same treatment as granted to nationals.<sup>79</sup>

The doctrine of international minimum standards should prevail over the national treatment rule for several reasons. Firstly, this national treatment rule, while it may sound acceptable as regards the context of nationalized property, it does not in the context of treatment of individuals. If, for instance, a Brazilian national who goes to live in Saudi Arabia, is condemned there for theft and receives the punishment of having his right hand cut off, the same punishment granted to nationals, does it mean that Brazil cannot intervene on behalf of its national?<sup>80</sup> The theory of international minimum standards, on the other hand, permits the State to protect its nationals every time another State acts against some basic principles of international law, such as in this hypothetical case, under the principle prohibiting corporal punishment.

Recently, the US intervened diplomatically to protect one of its nationals who was living in Singapore and, because he defaced some public walls, was condemned to suffer corporal punishment, specifically whipping. In this case, Singapore intended to apply the same punishment it would apply to one of its nationals in a similar situation. Nevertheless, the US intervened diplomatically. The basis for their intervention was the existence of a minimum set of rights, established by international law, that in the event of their violation, justifies interference of one State in the other.<sup>81</sup>

Secondly, while general acceptance of the national treatment doctrine would eliminate the abuses of diplomatic protection, it would also eliminate diplomatic protection when the alien is treated in accordance with local legislation. Thus, an individual living in a foreign country would have to be treated in accordance with local laws, and if these laws were discriminatory and abusive, nothing could be done. This individual would be left at the mercy of the State of residence, entirely unprotected as regards international law.

Along these lines it can also be pointed out that, in Afghanistan, couples condemned for adultery are still killed by stoning.<sup>82</sup> This is the custom among nationals,

<sup>79</sup> The Convention on the Rights and Duties of States which entered into force for the US in December 26, 1934 at article 9, mentioned at *supra* note 66, seems to bear this last view, which nowadays is a contradiction to the US, as this country apparently adopts the international minimum standards doctrine.

<sup>80</sup> Celso Albuquerque Mello, Professor of Public International law, in a speech on the topic of diplomatic protection, raised this question, on May 15, 1996, School of Law, State University of Rio de Janeiro.

<sup>81</sup> Charles P. Wallace, *Ohio Youth to be Flogged in Singapore*, L.A. TIMES, Mar. 4, 1994, at A1.

<sup>82</sup> Originally published by the New York Times and reproduced by the Brazilian newspaper O GLOBO of November 10, 1996 (2nd ed.) at 59.

thus according to the national treatment doctrine, if a foreigner in this country is involved in an adulterous relationship and is killed by stoning, the country of his or her nationality cannot present any claim against Afghanistan. On the other hand, in accordance with the minimum standard doctrine, as this type of punishment is prohibited in all human rights instruments, comprising thus a violation of international law, the country of the nationality of the harmed individual would have legitimacy to present a claim at international level. This case demonstrates that the adoption of the national treatment doctrine can lead to absurd and inadmissible solutions.

The idea that there are some minimum standards to be followed in the treatment of aliens, presently established by international law, that it is not entirely for domestic law to establish the patterns of treatment, is also in accordance with that which religion and morals preached in antiquity as regards the treatment of aliens.<sup>83</sup>

##### 5. CODIFICATION:

In 1925, the American Institute of International Law prepared a draft with the title 'Diplomatic Protection' dealing with the topic of responsibility for harm caused to the person or property of aliens on state territory.<sup>84</sup>

In 1927, the Institute of International Law also addressed the topic proposing a Resolution on 'International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners'.<sup>85</sup>

The American Institute of International Law and the International Commission of Jurists also presented projects on the topic, respectively in 1927 and 1928.<sup>86</sup>

The Codification Committee of the League of Nations examined the question of "The Responsibility of States for Damage done in Their Territories to the Person or Property of Foreigners",<sup>87</sup> for the Harvard Research of International Law, with E. Borchard as *Rapporteur*, to serve as a basis for discussion at the Hague Conference of 1930. This Conference could not approve any definitive draft, due to the complexity of the subject.

The International Law Commission, in its session of 1949, listed the topic of state responsibility as one for which codification was needed. In 1955, the Commission finally decided to concentrate efforts in the codification of the topic and appointed Garcia Amador as Special *Rapporteur* on the subject.

As the subject of State Responsibility was so vast and complex, the codification of the entire topic was not viable, according to the ILC at the time. Thus, the

<sup>83</sup> See *supra* Chapter II on the Historical Development of Treatment of Aliens.

<sup>84</sup> 24 AM. J. INT'L. L. 517 (1930)

<sup>85</sup> "The Institute of International Law expresses the hope of seeing sanctioned in the practice of the law of nations the whole of the following rules concerning the international responsibility of States by reason of injuries caused upon their territory, in time of peace, to the persons or property of foreigners.

*Article 1- The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations, whatever be the authority of the State whence it proceeds: constitutional, legislative, governmental, administrative, or judicial.*" *Supra* note 54, at 228.

<sup>86</sup> Borchard reproduces both projects. See, *supra* note 54, at 232.

<sup>87</sup> *Id.*

*Rapporteur* decided to adopt a gradual approach, dealing first with the part which was most required and was most ripe for codification: the responsibility of the State for injuries caused in its territory to the person or property of aliens. From 1956 to 1961, the Special *Rapporteur* presented six reports on State Responsibility for Injuries to Aliens, but the Commission did not approve any of them. Garcia Amador tried to merge the doctrine of national treatment and minimum standards determining that the fundamental human rights adopted by international conventions should be regarded as the minimum standards, to be granted to both nationals and aliens. In his own words:

*art 5-1- The State is under a duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees, as are enjoyed by its own nationals. (national treatment) These rights and guarantees shall not, however, in any case be less than the "fundamental human rights" recognized and defined in contemporary international instruments. (minimum standards)*

*2- In consequence, in case of violation of civil rights, or disregard of individual guarantees, with respect to aliens, international responsibility will be involved only if internationally recognized "fundamental human rights" are affected.<sup>88</sup> (My emphasis).*

His draft encountered harsh opposition and, by the time his term in the ILC expired, despite this article having already suffered considerable changes, his draft was not accepted by the Commission. Many countries opposed his draft because of this reference to human rights law, without listing the rights to be considered fundamental.

Additionally, many commentators believe that his work was too specific, for it does not cover all aspects of the subject of state responsibility. It only deals with injuries caused to the person or property of aliens.<sup>89</sup> However, this criticism has proven unfounded, for most international conventions which have a great number of parties are specific, as, for example, the conventions sponsored by the Hague or the OAS. The main reasons frustrating the approval of the text was the complexity of the subject, its political content and the nature of the opposition to it, not that the subject was too specific.<sup>90</sup> The specificity of the topic, on the contrary, would actually help the representatives reach any sort of conclusion.

<sup>88</sup> 2 YEARBOOK OF INTERNATIONAL LAW 112-13 (1957).

<sup>89</sup> BROWNLIE, *supra* note 37, at 12.

<sup>90</sup> See HENKIN ET AL, *supra* note 45, at 686 where they classify this subject as the most controversial in international law: "There is no area of international law that has generated greater controversy during the last few decades than the law of state responsibility. Traditional law, which 40 years ago was regarded by the great majority of the states of the world as well settled customary international law, has been attacked, principally by the communist states and by many of the less developed countries." And further, at 692, quoting Sir Gerald Fitzmaurice, at the 415th Meeting of the ILC in 1957: "There could hardly be a subject which it would be less propitious to try to codify at the present time. As had been only too evident, the subject was one which immediately touched off strong emotional charges, and the tendency to approach it from a political and ideological standpoint, entirely inappropriate in a commission of jurists, appeared irresistible..." Additionally, WOLFGANG FRIEDMANN ET AL, INTERNATIONAL LAW: CASES AND MATERIALS 748 (1969): "There is no area of international law that has generated greater controversy during the last few decades than the law of state responsibility. Not even the most basic principles on which the traditional law was founded have been immune from attack."

After a period, the International Law Commission, in 1963, again appointed a new Special *Rapporteur*, Roberto Ago, to work on the general rules governing international responsibility of the State. Ago, who presented his Reports on the topic during the period 1969 to 1980, was equally unsuccessful. His reports were highly criticized because of the generic treatment of the topic.<sup>91</sup> His draft deals with State Responsibility for internationally wrongful acts in general.<sup>92</sup> It does not focus specifically on problems of aliens.

The International Law Commission afterwards nominated another *Rapporteur* on the subject, Willem Riphagen, who presented several drafts from 1980 to 1986. Riphagen followed the same trend initiated by the previous *Rapporteur*, Roberto Ago, by focusing on state responsibility in general, without dealing specifically with the problems of aliens, except as regards one article which deals with exhaustion of local remedies. Notwithstanding, this later draft is less generic than its predecessor, for it tries to define what is an internationally wrongful act.

From 1987 onwards, the ILC designated as *Rapporteur* Mr. Gaetano Arangio-Ruiz, who also focused on state responsibility in general. He resigned in 1996 after the adoption by the Commission of an entire set of draft articles dealing with a diversity of legal issues. In 1997, James Crawford was designated the new *Rapporteur* on the topic.<sup>93</sup>

Until now no definite draft on the subject has been produced by that Commission.

The Institute of International Law has also adopted Resolutions on the subject, dealing with the rule of the exhaustion of local remedies, in 1956,<sup>94</sup> and the national character of an international claim presented by a State for injury suffered by an individual, in 1965, which makes it essential that the injured individual has the

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<sup>91</sup> Professor McDougal considers that it was marked by "such a high level of abstraction as to shed but a dim light upon specific controversies". MYRES S. McDUGAL ET AL, HUMAN RIGHTS AND WORLD PUBLIC ORDER 762 (1980). On the other hand, Professor Brownlie praises it. *Supra* note 37, at 21.

<sup>92</sup> See 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, pt. 2, at 30 (1980).

<sup>93</sup> The Riphagen draft states: "Article 22- Exhaustion of local remedies - When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment." UN Doc. A/CN.4/397/add.1 (1986). See David Kaye, *International Law Commission: Draft Articles on State Responsibility*, 37 I.L.M. 440 (1998), for updated information on the work of the ILC. See also James Crawford, *On Re-Reading the Draft Articles on State Responsibility*, *Proceedings of the 92<sup>nd</sup> Annual Meeting*, ASIL, 295-299 (1998).

<sup>94</sup> "When a State claims that an injury to the person or property of one of its nationals has been committed in violation of international law, any diplomatic claim or claim before a judicial body vested in the State making the claim by reason of such injury to one of its nationals is irreceivable if the international legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be effective and sufficient and so long as the normal use of these means of redress has not been exhausted. This rule does not apply: a) if the injurious act affected a person enjoying special international protection; b) if the application of the rule has been set on one side by agreement between the States concerned." 2 YEARBOOK OF THE ILC 142 (1969).

nationality of the claimant State both at the date of its presentation and at the date of the injury.<sup>95</sup>

In 1961, Harvard Law School sponsored a draft on the topic of the international responsibility of States for injuries to aliens, prepared by Professors L. Sohn and R. Baxter, based on the principle that the treatment of aliens should be governed by an international minimum standard.<sup>96</sup>

In 1962, the Inter-American Juridical Committee, a branch of the OAS, prepared a set of principles of international law which govern the responsibility of the State, in the opinion of Latin American countries. In 1965, it prepared a set of principles of international law which, according to the United States of America, govern the responsibility of the State.<sup>97</sup>

After the mass expulsion of persons of Asian origin from Uganda by Idi Amin in 1972, the UN Commission on Human Rights started to study the application of international human rights instruments to non-citizens and appointed Baroness Elles to write a report on the topic. It was first published in 1980, as the Draft Declaration on the Human Rights of Individuals who are not Citizens of the Country in which they live.<sup>98</sup>

The draft prepared by Baroness Elles was in response to Economic, Social and Cultural Council resolutions, which questioned the application of contemporary international human rights instruments to non-nationals on the same basis as nationals due to the controversy on whether human rights instruments should be applied equally to aliens and nationals, as these instruments do not expressly assimilate aliens to nationals. Some commentators believe that the human rights instruments should be applied equally to aliens and nationals, as their provisions, with rare exceptions, mention "everyone",<sup>99</sup> while other commentators think differently, for they argue that the International Bill of Rights does not protect aliens as nationality is not listed as a prohibited ground for differentiation.<sup>100</sup>

In fact, as regards the terms of the above mentioned conventions, it seems clear that, in most cases, the rights are granted to everyone. However, the existence of other conventions granting rights to a specific group of people, such as the case of the recent Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,<sup>101</sup> may give rise to doubts. In other words, if the human

<sup>95</sup> This resolution determines that in order to admit diplomatic protection by a State the individual has to have the nationality of that State both at the time of the injury and at the time of the presentation of the claim. *Id.*

<sup>96</sup> L. Sohn and R. Baxter, *Introductory Note to the Draft on Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L. L. 547 (1961).

<sup>97</sup> See *supra* note 94 at 153.

<sup>98</sup> See *supra* note 34.

<sup>99</sup> Lillich, *supra* note 1, at 25.

<sup>100</sup> *Id.* at 27. See also W. McKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 199 (1983) as quoted by Ahcene Boulesbaa, *A Comparative Study between the International Law and the United States Supreme Court Standards for Equal and Human Rights in the Treatment of Aliens* 4 GEO. IMMIG. L. J. 453 (1990). See *infra*, Chapter IV, on Fundamental Rights, item referring to the right not to be discriminated against where this discussion is better analyzed.

<sup>101</sup> Or any other convention also of specific scope.

rights conventions are to be applied to everybody, why is there a need for these specific conventions? Why would the UN put all this effort into approving a convention protecting people who are already protected under general conventions?<sup>102</sup>

Elles' Report has been compared to the work of Garcia Amador and it has been said that it follows the same approach and seeks the same objective, albeit in a more limited sphere.<sup>103</sup>

But, in reality, Elles' Draft has a much broader scope than the one adopted by Garcia Amador and their objectives are different. Garcia Amador's Report is on State Responsibility, specifically on diplomatic protection. Elles' Draft is on the Human Rights of Non Citizens. Thus, the first Report focuses on the right of the State and the latter on the individual's.

The structure of Elles' Draft is to reproduce specifically many human rights already protected in other human rights instruments, such as the Universal Declaration and the UN Covenants. Additionally, it contains new rights because of the persons it was supposed to protect – aliens, e.g., the right to freely communicate with diplomatic agents; the right to retain one's own language and culture; the right to family reunion, among others.

State responsibility depends entirely on the State espousing the claims of its national, while, as regards the application of human rights instruments, the mere will of the individual may put it into practice, either when the individual himself can bring the claim before the competent international tribunals<sup>104</sup> or when a supranational organization does so, on receipt of complaints from individuals.

In brief, Garcia Amador's Report was prepared for application in the domain of diplomatic protection, while the draft made by Baroness Elles can be used in the sphere of diplomatic protection and in the sphere of human rights of individuals as well.

In 1985, the General Assembly adopted the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live.<sup>105</sup>

Therefore, in accordance with what was exposed above, the subject of diplomatic protection has not yet been codified. Accordingly, its practice is based on customary law only.

Another interesting observation is that many drafts elaborated by international organizations have dealt specifically with the topic of state responsibility for injuries to aliens, that is, diplomatic protection. The subject matter of state responsibility as such has attracted very little attention. This proves that the observation of Garcia Amador, made when he was presenting his first report, that diplomatic protection

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<sup>102</sup> The mentioned convention guarantees the right to life, article 9; right not to be tortured, article 10; freedom of thought and religion, article 12; freedom of expression, article 13; right to privacy, article 14.

<sup>103</sup> As argued by Lillich, *supra* note 1, at 25.

<sup>104</sup> Individuals have had access to international tribunal under very exceptional circumstances. Some examples can be quoted such as the Central Commission of the Rhine, which created tribunals to decide on problems related to navigation on the Rhine (created in 1868); The Second Peace Conference at the Hague in 1907, which adopted a Convention creating an International Tribunal for Women Arrested; also in 1907 a Permanent Central American Court of Justice was created; The League of Nations and the National Minorities Committee, created after 1920, among others. See TRINDADE, *supra* note 29, at 83-110 see *infra* note 134.

<sup>105</sup> G.A.Res.144, U.N. GAOR, 40th See., Supp.No 53, U.N. Doc. A/RES/40/144 (1985).

was the subject most ripe for codification and that the topic of state responsibility is too vast and complex to allow codification, was absolutely correct.

## 6. NATURE OF THE RIGHT OF DIPLOMATIC PROTECTION

As regards the right to diplomatic protection, there has been discussion among legal commentators as to whom this right belongs: to the State or to the individual. One school of thought defends the idea that the State merely represents the individual at international level, because the individual does not have access to international tribunals.<sup>106</sup> The other school thinks that the State, when protecting its national abroad, defends its own right.<sup>107</sup>

The second school prevails as the institute of diplomatic protection has been almost unanimously understood as a right of the State and not of the individual. The International Court of Justice so decided, in the following terms:

*This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.*<sup>108</sup> (emphasis added)

Anzilotti expresses the same viewpoint in a very objective manner:

*International responsibility does not derive, therefore, from the fact that an alien has suffered injury, and does not form a relationship between the State and the injured alien...The alien as such has no rights against the State, save in so far*

<sup>106</sup> This understanding is espoused by H. Lauterpacht, *apud* TRINDADE, *supra* note 29, at 120 and apparently by Garcia Amador, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 3 (1961). J. L. Brierly apparently changed his view as regards this aspect for he argues: "a State has in general an interest in seeing that its nationals are fairly treated in a foreign State, but it is an exaggeration to say that whenever a national is injured in a foreign State, his State as a whole is necessarily injured too." See J.L. BRIERLY, THE LAW OF NATIONS. AN INTRODUCTION TO THE LAW OF PEACE 218 (5th ed., 1955) as quoted by Guha Roy, *In The Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* 55 AM. J. INT'L L. 880 (1961).

<sup>107</sup> Borchard, as its predecessor. TRINDADE, see *supra* note 29, at 120.

<sup>108</sup> See *supra* note 18. For a somewhat contrary viewpoint, see AMADOR, *supra* note 31, at 419. He points to the fact that the claim depends on the individual, because if the individual abandons his nationality, the claim cannot be espoused by that country anymore. This argument puts the matter in an equivocal perspective, as the individual cannot abandon his nationality. Very few countries allow the renunciation of one's nationality. As a rule, the State determines under what conditions the individual will lose his or her nationality. Additionally, nationality is a factor related to the admissibility of the claim, that is the claim has to be espoused by the State of nationality of the individual. But that does not mean that all nationals have the right to have their claim espoused. Further, the States can also espouse, by virtue of treaties, claims of individuals who are not their nationals. See *supra* note 17 of this Chapter.

*as the law confers them upon him; accordingly, a right to reparation can only be vested in him on the basis of the legal provisions in force in the State and is independent of the right which the State to which he belongs may have to demand reparation for a wrong suffered in consequence of treatment contrary to international law... The reparation sought by the State in cases of this kind [denial of justice] is not, therefore, reparation of the wrong suffered by individuals, but reparation of the wrong suffered by the State itself.<sup>109</sup>*

Diplomatic protection is a right of the State to be exercised vis-à-vis the other States, in the international sphere, having no effects at domestic level, as put by Weis:

*This protection, which has been termed diplomatic protection, is different from the internal, legal protection which every national may claim from his State of nationality under its municipal law, i.e. the right of the individual to receive protection of his person, rights and interests from the State. International diplomatic protection is a right of the State, accorded to it by customary international law, to intervene on behalf of its own nationals, if their rights are violated by another State, in order to obtain redress.<sup>110</sup>*

Some States grant the right of diplomatic protection in their domestic legislation. In Germany, the Constitution of the German Empire of 1870 provided: "Article 3, para. 6 - Against foreign States all Germans equally have the right to demand the protection of the Reich" and the Weimar Constitution of 1919 stated in article 112: "Against foreign States all Reich nationals have, both within and without the Reich, a claim to the protection of the Reich."

Notwithstanding these legal provisions, German constitutional law experts denied there was any legal effect to these rules, because, as we have already seen, the right to diplomatic protection at international level is a right of the State and not of the individual.<sup>111</sup>

Furthermore, as diplomatic protection is a right of the State, the State itself determines if and when this right will be exercised, entirely at its own discretion. Borchard affirmed that diplomatic protection "*is a right of the government, the justification and expediency of its employment being a matter for the government's unrestricted discretion. This protection is subject in its grant to such rules of municipal administrative law as the State may adopt, and in its exercise internationally, to certain rules which custom has recognized.*"<sup>112</sup>

Also, according to Borchard, the protecting State which takes up the claim of one of its nationals is neither the agent nor the trustee for the claimant.<sup>113</sup> Therefore, the individual has no control over the claim, either in its presentation or in the distribution

<sup>109</sup> I CORSO DI DIRITTO INTERNAZIONALE 423 (4th ed., 1955), as quoted by Garcia Amador, see *supra* note 106 at 3.

<sup>110</sup> See *supra*, note 17, at 32.

<sup>111</sup> Jellinek, as quoted by Weis, *supra* note 17, at 34.

<sup>112</sup> BORCHARD, *supra* note 7, at VI.

<sup>113</sup> *Id.* at 358.

of any award which may be made as a result of protective intervention.<sup>114</sup> Consequently, the State has the power to settle, release or abandon the claim without the consent of the claimant. Thus, renunciation of the claim by the national is irrelevant for the State.<sup>115</sup>

International law, according to a temporal criterion, has established a distinction, setting up the dividing line at the moment the international claim is espoused. Thus, before the claim is presented at international level, the right belongs to the individual exclusively, so the individual can waive or settle the claim prior to diplomatic intervention, and this would prevent diplomatic protection.<sup>116</sup> But, after the alien's State has espoused the injury, the claim would belong to the State and the harmed individual would have no more say in the matter, as seen above.

This distinction does not survive scrutiny. Either the claim belongs to the State, and then it is irrelevant if the claim has already been settled domestically or not, or the claim belongs to the individual. The distinction drawn by international law, according to my view, is inconsistent.

The idea is that before the claim is brought to international level, the exercise of the right belongs to the individual, for he or she has to exhaust all domestic remedies and may or may not settle the claim internally. Thus, the difference does not lie in the fact that before the claim is brought to international level the right belongs to

<sup>114</sup> See *infra* note 115.

<sup>115</sup> WEIS, *supra* note 17, at 38 argues that according to the nature of the claim, renunciation of the individual may produce effects on the State's claim. In his own words: "*The effect of renunciation of a claim depends on the nature of the right of the national. If this may be renounced according to municipal law, as, for instance, a claim for damages under civil law, no diplomatic action can be taken after the national's renunciation. This, however, is not because the renunciation is binding upon the State, but because, in view of the renunciation, the right whose infringement has been complained of has been destroyed or extinguished and there is thus no longer any violation of a right which would warrant diplomatic action.*" With due respect, this assertion of Professor Weis does not survive scrutiny. Either the right belongs to the State or to the individual. The right cannot at the same time belong to the State while the individual retains the power to renounce to it. Besides that, the nature of the right which gives rise to the claim is irrelevant. As the most usual claim arises from the taking of or damage to private property, this would mean that such claims, because of their private nature, could admit renunciation by the individual. If so, diplomatic protection would change according to the nature of the right. Additionally, if there is harm, it is not for the individual to decide if he wants a reparation. So much so that the State is not obliged to distribute to the individual the indemnity it received. As to this last aspect see De Visscher, *supra* note 8, at 158. Along these lines AMERASINGHE, *supra* note 6, at 60 summarizes: "*It has been asserted that the damage for which reparation must be made is the damage to the alien's national State which is not identical with that which its national had experienced, is that the reparation ordered in a given case would not be equivalent to the loss suffered by the alien, though the latter may be used as a measure of the former. It has been stated that the national State has complete control over the disposition of the proceeds of a claim and is not even obliged to hand them to the individual whose claim it has espoused, on the basis of the public character of the claim.*" He also quotes several decisions containing this rule.

<sup>116</sup> See HENKIN ET AL, *supra* note 45, at 706: "*It is generally agreed that if an alien injured by a state in a manner wrongful under international law waives or settles the claim prior to diplomatic intervention by the state of which he is a national, then the waiver or settlement is effective as a defense on behalf of the respondent state, provided the waiver or settlement is not made under duress.*"

the individual and only afterwards it belongs to the State, but that on a national level the right belongs to the individual and internationally it belongs to the State.

Following this trend of thought, the Restatement of Foreign Affairs (Third) makes a further distinction, affirming that "*a state's claim against another state for injury to its nationals fails if, after the injury, the person waives the claim or otherwise reaches a settlement with the respondent state.*"<sup>117</sup> However, the Restatement also establishes that if the waiver is signed before the injury effectively happens, i.e. the Calvo Clause, then "*the United States regards companies that sign such clauses or submit to such laws as waiving rights that are not theirs to waive, since, in principle, the injury is to the state.*"<sup>118</sup>

Consequently, the US makes a distinction between 1) the time before the injury, when the right cannot be waived because it belongs to the State – the Calvo Clause; 2) the time after the injury, but before the claim is presented at international level, when the right belongs to the individual; and 3) the time after the injury and after the international claim is presented, when the right belongs to the State.<sup>119</sup>

I understand this view cannot be accepted for the same reasons presented above. The right cannot be divided into several moments in time, in each of which it will either belong to the individual or to the State. It simply belongs either to the State or to the individual, and undoubtedly at international level, this right only belongs to the State.

Of course, one of the conditions of exercise of diplomatic protection is the existence of a wrong according to international law. If there is no wrong which caused harm to the individual, diplomatic protection cannot be exercised. Maybe the basis of the US viewpoint is that after settlement there would be no wrong in accordance with international law, so there may be no claim. However, this is not a definite rule, for the settlement may not be considered adequate or fair by the State,<sup>120</sup> and if the right to protect its nationals belongs to the State, it can be exercised at the discretion of the State. Besides, it is not for the individual to decide whether the injury committed is a wrong according to international law. The individual may consider it so and the international community may not and vice-versa. Also, of course, it will not be the individual's viewpoint that will prevail. Thus, even if the individual decides to settle a question for immediate financial reasons, the State may be interested in pursuing the claim internationally in order to avoid that the situation happens again, for instance. Thus, the attitude of the individual will not necessarily prevent the later interference of the State.<sup>121</sup>

Undoubtedly, it is a well settled principle of international law that the right of diplomatic protection belongs to the State of the nationality of individuals. This

<sup>117</sup> Para. 713, comment g.

<sup>118</sup> *Id.*

<sup>119</sup> The Restatement in the Reporter's notes to para. 713 at number 6 is inconsistent with the rule stated in the comments, for these Reporter's notes say that: "*settlement by the injured person, after the alleged wrong but before espousal of the claim by the state of nationality, is generally regarded as effective if the settlement was voluntary. However, the United States has taken the position that it will not be bound if its national accepts less than adequate compensation.*"

<sup>120</sup> *Id.*

<sup>121</sup> See my comments as regards this aspect expressed in *supra* note 115.

makes sense for we are referring to *diplomatic* relations, which can only be exercised among States. The individual is not entirely excluded, though. The individual will be taken into account as regards the conditions of exercise of diplomatic protection. The harmed individual has to be a national of the protecting State and necessarily has to exhaust all local remedies before the issue is taken to international level.

Thus, it can be said that internally, the individual is the holder of the right, for he or she will access domestic tribunals and claim for his or her rights. However, at international level, the individual is not the holder of this right, neither before nor after the injury, for the State may have different interests to preserve. There is complete independence between those situations. Internationally the claim may be settled and the individual may not even receive proper reparation, for the State is under no obligation, according to international law, to distribute what has been received, because the State was exercising its own right. Conversely, internally the claim may be settled, and still the State may have interest to pursue the claim internationally. And also, the basis for reparation at the international level does not necessarily have to do with the amount of the harm suffered by the individual. The value of the harm is taken into account as a basis for reparation, but it does not need to be equivalent.<sup>122</sup>

As a consequence of the premise that diplomatic protection is a right of the State and not of the individual, the State may or may not decide to exercise it at will.

The International Court of Justice focused on this discretionary aspect of diplomatic protection, in the *Barcelona Traction, Light and Power Company Case*, because Canada, the country in which the company was incorporated, had exercised diplomatic protection vis-à-vis Belgium for a number of years until it ceased to do so without apparent reason. The Court also focused on the distinction between the right of the individual, to be exercised domestically, and the right of the State, to be exercised internationally, through diplomatic protection, in the following terms:

*The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the national a right to demand the performance of that obligation and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.*

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the

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<sup>122</sup> This last aspect was decided by the Permanent Court in *Chorz'ow Factory Case* 1928 P.C.I.J. (ser. A) No. 17 at 288 as quoted by AMERASINGHE, *supra* note 6, at 60. See also *supra* note 115.

claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.<sup>123</sup>

## 7. THEORETICAL FOUNDATION OF DIPLOMATIC PROTECTION

The theoretical basis of diplomatic protection is also controversial. The most widely accepted theory develops the idea that, since a national is part of the State and the national is the personal element of the State, therefore, whoever ill-treats an individual harms the State of nationality itself. This theory is based on Vattel's principles.

Another theory which justifies the existence of diplomatic protection is the objective theory, which submits the idea that every State has the duty to abide by the rules of the international community. Therefore, whoever breaks the law, has to be punished.<sup>124</sup>

This second theory does not exactly reproduce what happens with state responsibility for injuries to aliens as, if nationality is essential for the State to bring a claim on behalf of the individual, clearly the focus is not on the illegality of the act alone, despite the fact that it will be taken into account, as seen, as a condition of exercise of diplomatic protection.

Another viewpoint stresses the respect due to human rights in general as the philosophical basis of diplomatic protection. According to this theory, as the individual is denied personal access to most international jurisdictions, the State of nationality has to act on his behalf.

The alternative to this viewpoint is that diplomatic protection is based upon the idea of sovereignty of States. Thus, the dispute will be between States, one of them defending its national.<sup>125</sup>

This theory, which stresses the importance due to human rights as the basis for diplomatic protection, is illogical if the State may decide at will whether or not it will bring the claim. The other theory, namely the one stressing the sovereignty of the States, is closely linked to the theory focusing on the subjective aspect, mentioned before. In reality, as already seen, the State is composed of its territorial area, of its government and of its personal element, its nationals, the people. Thus, whoever ill treats a national hurts the sovereignty of the State, for the national is part of the State.

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<sup>123</sup> As quoted by MYRES McDUGAL & W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 842 (1981).

<sup>124</sup> MELLO, *supra* note 17, at 471.

<sup>125</sup> De Visscher, *supra* note 8, at 154.

## 8. HUMAN RIGHTS

In the last half of the century there has been a deep shift regarding international law's main focus.<sup>126</sup> Presently, international law concentrates its attention on the individual, the human being, whereas previously individuals were protected under certain conditions and as components of certain groups, such as nationals of certain countries, members of minority groups, workers under the ILO Conventions, and inhabitants of certain territories.

This tendency to protect individuals, whatever their status, was drawn as early as in 1929 by the International Law Institute, which adopted unanimously a Resolution stating that, under certain circumstances, the individual should have access to an international court as regards disputes involving individuals and States.<sup>127</sup>

Primarily, as regards human rights, international law concentrated efforts in the making of declarations, with no legal efficacy. These declarations led to the making of international conventions dealing with the generality of human rights or with some specific human rights.

Thus, at universal level, human rights are protected by the Universal Declaration of 1948, and the 1966 UN Covenants. Besides these general instruments, there are also several documents dealing with specific human rights, such as the UN Convention Against Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, among many others.

Additionally there is the UN Human Rights Commission, which for the first twenty years of its existence, despite receiving several complaints on human rights violations, was not empowered to take any practical step concerning them. Later, a system was created by Resolution 1503 (XLVIII) of 1970 of the Economic and Social Council, by which complaints are submitted to the UN Human Rights Commission, which can analyze and investigate them. Those complaints, however, are not individual complaints, but related to entire groups or communities.<sup>128</sup>

In the Americas, the first general document dealing with human rights was the American Declaration, completed in 1948, eight months before the Universal Declaration. In 1969, the American Convention was elaborated, but its entry into force happened only almost 10 years later, in 1978. The American Convention is the keystone of the American system of human rights protection, together with the Inter-American Human Rights Commission and the Inter-American Court of Human Rights.

<sup>126</sup> Commentators show that the concept of human rights— that is, assuring the protection of the individual vis-à-vis the State— has antecedents in early Greek law and was codified in the French Declaration of the Rights of Man and the Citizen of 1789 and the US Bill of Rights. See Thomas Carboneau, *The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement* 25 VA. J. INT'L L. 99, 103 (1984).

<sup>127</sup> 35 ANNUAIRE DE L'INSTITUT, vol. II, at 267 and 271.

<sup>128</sup> The right to individual complaints was approved only in the Optional Protocol to the C.P.R.Covenant.

This Commission was created long before the adoption of the Convention, in 1959, by Resolution number VIII, of Foreign Affairs Ministers, and afterwards was incorporated in the OAS Charter and in the American Convention.<sup>129</sup> Its functions cover the promotion as well as the control and supervision of the protection of human rights. The Commission analyzes the complaints of human rights violations, presented either by individuals, groups of individuals or States,<sup>130</sup> before they are submitted to the Human Rights Court. The complaints to the Court can only be presented by the Commission and by the States.<sup>131</sup>

At the European level, there is the European Convention and its Protocols, and the European Social Charter. There is also the European Human Rights Commission, which also receives complaints presented by individuals<sup>132</sup> and States,<sup>133</sup> to be afterwards submitted to the European Court of Human Rights. Additionally, the recent Protocol number 11 to the European Convention allows individuals to submit their complaints to the Court.<sup>134</sup>

These conventions have been applied by the organizations created for their implementation, as seen above, and by international courts, such as the International Court of Justice. They have also been applied by domestic courts.

The American Commission of Human Rights enacted Resolution number 3 of 1987 concerning a case involving the United States of America. In this case, the Commission decided that the application of the rights comprised in the American Declaration of 1948 and in the American Convention are mandatory because of the OAS Charter, articles 3(j), 16, 51(e), 112 and 150,<sup>135</sup> even vis-a-vis States that are not parties to the American Convention.

As regards the application of human rights instruments by domestic courts, perhaps the best known case is *Filartiga v. Pena Irala*,<sup>136</sup> which involved citizens of the Republic of Paraguay, as plaintiffs and defendant.

The plaintiffs, the Filartigas, were sister and father of Joeliteo, who had been murdered in Paraguay, after having been kidnapped and tortured, because he and his

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<sup>129</sup> The American Convention, article 34.

<sup>130</sup> Only exceptionally can States present complaints to the Commission for human rights violations by other State Parties. See the Convention, article 45.

<sup>131</sup> The European Convention, article 61. The jurisdiction of the Court is advisory and contentious. The Court's contentious jurisdiction, however, only extends to the Commission and those States which expressly accepted such jurisdiction. See the American Convention, article 61.

<sup>132</sup> The European Convention, article 25.

<sup>133</sup> The European Convention, article 24.

<sup>134</sup> Protocol n.11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, Strasbourg, 1994, which entered into force in 1998. Its article 1 change article 34, as follows: "Individual applications- The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

<sup>135</sup> As quoted by A. A. Cancado Trindade, *Reflexões sobre o Valor Jurídico das Declarações Universais e Americana de Direitos Humanos de 1948 por Ocasião do seu Quadragesimo Aniversário*, 99 REVISTA DE INFORMAÇÃO LEGISLATIVA 14 (1988).

<sup>136</sup> *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980).

family were opponents to the government of President Alfred Stroessner. The defendant, Americo Norberto Pena-Irala was the Inspector General of Police in Asuncion who tortured Joelito to death in his own home (that of the police Inspector).

A criminal action was initiated in Paraguay by the plaintiffs, but without success, because it was still pending after four years. Pena-Irala, the defendant, entered the US, under a visitor's visa and overstayed his visa when the suit was filed.

The suit was of a civil nature, for it sought compensatory and punitive damages of US \$ 10,000,000 and was based on human rights instruments and customary international law.

The court had to decide mainly if US courts had jurisdiction to examine the case and the decision of the US Court of Appeals established that federal jurisdiction could be exercised over the claim based on an Act of 1789, which determined original district court jurisdiction over "*all causes where an alien sues for a tort only [committed] in violation of the law of nations*" and torture was considered as such.

In the decision of the case it was said that:

*... the torturer has become – like the pirate and slave trader before him – hostis humani generis – an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.<sup>137</sup>*

Despite the importance of this decision, it should be pointed out that these words would have been more suitable if US courts had had jurisdiction to decide also on a criminal suit, following which Pena Irala would be sent to jail for the crime of torture. In the present case, the issue under discussion was only the payment of a certain amount of money, and Pena-Irala was left free to return to Paraguay.

## 9. DIPLOMATIC PROTECTION & HUMAN RIGHTS

Notwithstanding that much has been studied and written on both the subjects of diplomatic protection and human rights, there have been great controversies as regards the exact limits of each with regard to the other. Doctrine has been mostly unclear and controversial referring to this aspect, for it has been said that the modern doctrine of human rights has taken the place of diplomatic protection,<sup>138</sup> and thus diplomatic protection does not exist anymore. Conversely, it has also been said that diplomatic protection will always exist because of its specific nature.

Borchard highlights that the study of the right of diplomatic protection necessarily involves an examination of three different legal relations: (1) that between the State and its national abroad; (2) that between the alien and the State of residence,

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<sup>137</sup> *Id.* notes 13 and 14.

<sup>138</sup> See Freeman, *supra* note 62, at 121, where he reports that at the Third Conference of the Inter-American Bar Association in 1944 a draft resolution was proposed aiming to abolish diplomatic protection of citizens abroad in favor of an international protection of the rights of man. It also has been said that due to several reasons the American countries have attained a similar reasonable standard of justice that renders diplomatic protection unnecessary in their case.

and (3) that between the two States concerned with respecting their mutual rights and obligations.<sup>139</sup> The study of the human rights of the individual may only comprise the second of these relations: namely, that between the individual and the State of residence. Thus, there is a significant difference in the scope of both theories.

Baroness Elles affirms that, at present, the doctrines of equality of treatment and minimum standards have been resolved by the UN Charter, which provides for non-discrimination and the promotion and observance of human rights and fundamental freedoms for everyone. She believes that "*the two views have been synthesized by the setting of a universal standard, which should ensure to the benefit of both national and alien alike*"<sup>140</sup> Apparently, she believes that diplomatic protection ceased to exist and the concept of human rights took its place. However, the doctrines of minimum standards and national treatment were construed in the sphere of State responsibility, specifically diplomatic protection, in search of a criterion to determine its extent. As regards human rights, these theories have no application at all.

Diplomatic protection, although deeply criticized, still exists, for every government in the world recognizes the principle. The major issue under discussion is the extent to which and in which situations this right can be exercised. As observed, this right has been exercised by apparently philosophically contrasting States, such as Vietnam, against the US, because of the ravages of war, and by the US, against several developing States, because of nationalized property. Even Idi Amin, after the Israeli raid in Entebbe, complained about the killing of several Ugandans and the damage to local property.<sup>141</sup>

On the other hand, as the individual, regardless of nationality, has become a subject of international law, receiving direct protection for his enjoyment of rights and freedoms through legally enforceable international provisions, the protection of the individual cannot be left at the discretion of the State alone, for all the above reasons.

Thus, before World War II, as individuals had no rights under international law, it made sense that the only protection individuals had at international level, was through their State of nationality. Protection at international level could only be exercised with regard to a specific group, such as nationals, nationals of certain countries, minorities, inhabitants of territories under mandate. Consequently, diplomatic protection was the only remedy available. After World War II, when individuals became themselves subjects of international law, instead of mere objects, another remedy to protect them was created: the law of human rights.

In addition, States, before taking up a claim of one of their nationals in the international sphere, take into consideration the political consequences of so doing. Thus, the State will weigh the possible consequences of this action to see if it is still worthwhile. Once again, the State's interest will often outweigh the interest of the individual.

This attitude has been present since the beginning of the exercise of diplomatic protection by States, for they would determine the gravity of the offense and the lengths to which they would go to protect their nationals' interests. Even in the nineteenth century, foreign offices were generally unwilling to embroil themselves and

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<sup>139</sup> BORCHARD, *supra* note 7.

<sup>140</sup> See *supra* note 34 at 4.

<sup>141</sup> YATES, *supra* note 14.

their prestige in claims and so exercised a restraining influence.<sup>142</sup> Great Britain repeatedly found it necessary to explain to indignant British subjects that it would not espouse doubtful or exaggerated claims.<sup>143</sup> Similarly, the United States refused to espouse claims of its nationals based on contractual disputes between the nationals and the host States, because they believed the Government should not be regarded as an international debt collector.<sup>144</sup>

Another interesting point is that diplomatic protection can be exercised only by the State of nationality as regards damages suffered by its national when abroad, as already observed. Therefore, individuals who suffer any sort of damage at the hands of the State of nationality are deprived of these measures of protection. In such cases, individuals would have to be protected by human rights documents. As regards this aspect, it has been pointed out that:

*Although international law does not at present recognize, apart from treaty, any fundamental rights of the individual protected by international society as against the State of which he is a national, it does acknowledge some of the principal fundamental rights of the individual in one particular scope, namely, in respect of aliens... The result, which is somewhat paradoxical, is that the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as the citizen of his own State.*<sup>145</sup>

Therefore, as regards diplomatic protection there is necessarily a distinction between nationals and aliens, for as the relation involves States, and the protecting State has to have the nationality of the individual and the individual has to be regarded as an alien by the damaging State. On the other hand, as regards the application of human rights documents, the question of nationality is not relevant at all, for the individual is treated as an individual, not as a national or an alien.

The European Convention sets forth in its article 1: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*" So, primarily this Convention is addressed to everyone, without any distinction whatsoever, and this same criterion is adopted in all other human rights instruments.<sup>146</sup>

Additionally, the Convention does not make it essential for the individual to have a nationality in order to be able to complain at international level. It only requires that the individual or group of individuals are "*the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention...*"<sup>147</sup>

<sup>142</sup> Richard Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 328 (1967).

<sup>143</sup> *Id.*

<sup>144</sup> DAWSON & HEAD, *supra* note 3, at 12.

<sup>145</sup> H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 121(1950) quoted by DAWSON & HEAD, *supra* note 3, at 9 n26.

<sup>146</sup> See the American Convention, article 1(1) "to all persons"; the Universal Declaration, Preamble and article 2 "everyone"; the African Charter, article 2 "every individual"; the C.P.R. Covenant, article 2 and Preamble "all individuals"; the Convention on the Rights of the Child article 2.1 "each child".

<sup>147</sup> The European Convention, article 25. It is important to observe that for the complaints presented under article 24, where any State Party may refer to the Commission, the State does not have to be the victim of the wrong, but that it has the general interest to see the Convention respected.

Thus, here lies another difference between the concepts of diplomatic protection and human rights. While the first requires the bond of nationality and is exercised with discretion, the latter presupposes a common interest of the States to respect international treaties.<sup>148</sup> In the first case then, the State would be defending its own interests, while in the second it would be defending a general interest.

Another point to be stressed is that some human rights instruments have entrusted to a supranational organism the power to supervise the obligations of the States, while as regards diplomatic protection, as we have already seen, it is left entirely at the discretion of the State whether or not to espouse the complaint of its national.

Both the concepts of diplomatic protection and human rights require the exhaustion of local remedies but the application of this rule differs in each case.<sup>149</sup>

As regards diplomatic protection, for it involves an individual and the State of his or her nationality against another State, this principle should be applied more strictly.<sup>150</sup> Thus, as we have already seen, the individual who has suffered harm has to resort domestically to the administrative or judiciary authorities of the State before contacting his own State. In reality, as the complaint will be between States, in order to avoid tensions at international level, unnecessary confrontation should be avoided. On the other hand, as regards human rights, as in most cases the complaints will be presented by a supranational entity, there will be no direct confrontation between two States, so this rule of exhaustion of local remedies may be applied less strictly.

It should also be pointed out that international courts are, as a rule, somewhat reluctant to accept a claim based on diplomatic protection, as we may conclude from the cases of *Nottebohm* and *Barcelona Traction*, decided by the International Court of Justice.

The case *Barcelona Traction, Light and Power Company Limited* was decided in 1970 by the ICJ and the Court, in its opinion, did not question the principle of diplomatic protection itself, but whether or not Belgium had *ius standi* to represent the shareholders of the company, or, to put it another way, which State could exercise diplomatic protection. In the words of the Court:

*International law had to refer to those rules generally accepted by municipal legal systems. An injury to a shareholder's interests resulting from an injury to the rights of a company was insufficient to found a claim. Where it was a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorized the national State of the company alone to exercise diplomatic protection for the purpose of seeking redress. No rule of general international law expressly conferred such a right on the shareholder's national State.*<sup>151</sup>

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<sup>148</sup> PAUL WEIS, *Diplomatic Protection of Nationals and International Protection of Human Rights* 4 HUM. RTS. J. 675 (1971), as quoted by TRINDADE, *supra* note 29.

<sup>149</sup> See the European Convention, article 26 and 27(3); the American Convention, article 46(1)(a) and (2)(b); the International Convention on the Elimination of All Forms of Racial Discrimination, articles 11(3) and 14(7); the C.P.R. Covenant, article 41(c); the African Charter, article 50.

<sup>150</sup> TRINDADE, *supra* note 29, at 173-77.

<sup>151</sup> INTERNATIONAL COURT OF JUSTICE YEARBOOK, number 24, at 110 (1969-1970).

Therefore, although the practical result of this case was the same as if it had been rejected on the merits, the decision was for lack of Belgian *ijs standi* – Belgium did not have legitimacy to represent the company, and as a consequence, the court was precluded from deciding the case.<sup>152</sup>

This decision reached by the Court was very strongly criticized by F. Mann, on the grounds that the Court let “legal conceptualism prevail over realism.”<sup>153</sup>

It is interesting to observe that Judge Padilla Nervo, a Mexican jurist, who, as mentioned above, had strongly opposed the doctrine of diplomatic protection earlier on, was one of the judges of the Court which rendered this decision, and despite the controversy on the *ratio* of the decision, the principle of diplomatic protection was left untouched.<sup>154</sup>

In the *Nottebohm* case, which involved a claim of Liechtenstein against Guatemala, in respect of the expropriation of property and imprisonment of Mr. Nottebohm, the Court reached a rather controversial decision. Nottebohm, contrary to the widespread argument, did have effective links with Liechtenstein. As the dissenting vote of M. Guggenheim stressed:

*Moreover, in order to determine the validity of a naturalization, an international tribunal must also bear in mind that, from the moment of his naturalization, Liechtenstein has never ceased to regard F. Nottebohm as one of its nationals; this attitude was likewise adopted by Switzerland, the Power representing Liechtenstein interests abroad, as appears from the Certificate of Swiss Clearing Office of 24th July, 1946(...) ...Finally, F. Nottebohm, who in fact lost his German nationality in consequence of his naturalization, has never invoked the protection of any State other than Liechtenstein; he returned to Liechtenstein in 1946 and never changed his residence thereafter.*<sup>155</sup>

By reading the dissenting opinions, one may conclude that Nottebohm had strong links with the representative country, for he had already been living in Liechtenstein for three years when the suit was initiated and he had a brother living in Vaduz.<sup>156</sup> Another interesting point is that Germany, his country of origin, recognized this naturalization as effective and legal, for it resulted in the loss of his original German nationality.<sup>157</sup>

How then is it possible that this naturalization may produce loss of his original nationality, but may not allow the country of naturalization to represent him at international level? It seems rather inconsistent that such naturalization may have one

<sup>152</sup> See this distinction in Herbert Briggs, *Barcelona Traction: The Ius Standi of Belgium*, 65 AM. J. INT'L L. 327-45 (1971).

<sup>153</sup> F. Mann, *The Protection of Shareholder's Interests in the Light of the Barcelona Traction Case*, 65 AM. J. INT'L L. 274 (1971).

<sup>154</sup> See *supra* note 45.

<sup>155</sup> See *supra* note 20.

<sup>156</sup> Capital of Liechtenstein. See the dissenting opinion of Judge Klaestad at 31.

<sup>157</sup> *Id.* at 55. There was a certificate of the Senate of the Free Harbor City of Hamburg of 15<sup>th</sup> June, 1954, certifying the loss of German nationality by Mr. Nottebohm as a consequence of his naturalization in Liechtenstein.

extraterritorial effect, namely the loss of his original nationality, a negative effect, and not have the other, the one which allows the individual to be represented in the international sphere, the positive effect. If the naturalization was not to be recognized internationally, it should have been deemed totally ineffective, and therefore Nottebohm should not have lost his German nationality.

It also stands out from the facts presented by Liechtenstein that Guatemala had been notified of Mr. Nottebohm's change of nationality and did not present any objection whatsoever.<sup>158</sup>

A further point which can be inferred from the dissenting opinion is that the principle of effective nationality has been created in cases of dual nationality in order to choose one of them, the most effective one. But, when the individual has but one nationality, the application of this principle could have the consequence of rendering him stateless at international level. It is noteworthy that statelessness is to be avoided in international law.<sup>159</sup> Accordingly, in this case, because (1) Mr. Nottebohm lost his German nationality, (2) he did not acquire the nationality of Guatemala and (3) his acquisition of the nationality of Liechtenstein was not recognized at international level, Mr. Nottebohm was left completely unprotected internationally.

Judge Read, dissenting, held that "*it was not open to me, nearly sixteen years after the event and in the absence of fraud, to find that the naturalization was invalid under the Liechtenstein law*".<sup>160</sup>

Notwithstanding these facts and arguments, the majority of the Court decided that there existed no bond of attachment between Nottebohm and Liechtenstein, whereas there was a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. The naturalization, which was not based on any prior connection with Liechtenstein, nor did it in any way alter the lifestyle of the person upon whom it was conferred, was granted in exceptional circumstances of speed and accommodation.<sup>161</sup>

This decision became known as having established the principle of real and effective nationality for recognition in the international sphere. That is to say, an acquisition of nationality will only be recognized by the international community if it reflects reality, i.e. if there are real bonds between the State and the individual.

One may speculate if this "real and effective link" required by the Court is necessary only for acquisitions of nationality later in life, that is, naturalization, or

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<sup>158</sup> "Reliance has been placed on the fact that, on December 1st, 1939, the Consul General of Guatemala in Zurich entered a visa in the Liechtenstein passport of Mr. Nottebohm for his return to Guatemala; that on January 29th, 1940, Nottebohm informed the Ministry of External Affairs in Guatemala that he had adopted the nationality of Liechtenstein and therefore requested that the entry relating to him in the Register of Aliens should be altered accordingly, a request which was granted on January 31st; that on February 9th, 1940, a similar amendment was made to his identity document, and lastly, that a certificate to the same effect was issued to him by the Civil Registry of Guatemala on July 1st, 1940." Extracted from the Judgment, at page 17.

<sup>159</sup> See the Universal Declaration, article 15(2); the 1954 Convention Relating to the Status of Stateless Persons; the 1961 Convention on the Reduction of Statelessness; the American Convention, article 20.1; the 1930 Hague Convention on Nationality, arts. 14-17 and its Protocols. See Chapter I on this aspect.

<sup>160</sup> Dissenting opinion of Judge Read, at 37.

<sup>161</sup> Extracted from the judgement, at 26.

whether it should also be applied to original acquisition of nationality, at birth.<sup>162</sup> Does the decision of the Court apply in the case of those countries which confer their nationality on the basis of the *ius sanguinis* criterion, so as to permit nationality to be acquired by descent without limit of time? What is the “real and effective link” between that individual and the State of nationality, in which he has never lived or visited, of whose language and customs he has no knowledge? Or even, for countries which adopt the *ius solis* criterion, will the sole fact that the individual was born in that country, by mere accident, without residence or other links, be enough to admit representation at international level?

In brief, one may conclude that, as a matter of law, this decision erroneously applied article 5 of the Hague Convention on Nationality, which determines that in cases of dual nationality, the most effective one should be applied. In this case, Nottebohm did not have the nationality of Guatemala, only the nationality of Liechtenstein, therefore it was not a case related to dual nationality.<sup>163</sup> And it should be pointed out that Nottebohm did have some links with Liechtenstein, as mentioned before.

A similar conclusion, which adopted a critical approach to the ICJ decision, was reached in the *Flegenheimer* case, decided by the Italian-US Conciliation Commission. This case involved the interpretation of the Italian Peace Treaty and Bancroft Nationality Treaty, and had at its core questions as to the effectiveness of an acquisition of nationality in the US. The Court referred to the *Nottebohm* case:

*There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business center is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized.*<sup>164</sup>

Another aspect worth considering regarding the differences between state responsibility and human rights, is that many States in the international community, as well as some tribunals, are reluctant to accept the concept of State Responsibility for they view it with some distrust, as a sign of domination of the weak by the strong.<sup>165</sup>

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<sup>162</sup> See Parry, *supra* note 3 at 709-11 and the dissenting opinion in the *Nottebohm* case by M. Guggenheim, at 55.

<sup>163</sup> Contrarily, De Visscher, *supra* note 8, at 164 praised the reasoning of the Court in the following terms: “Il est certain qu’en transposant la théorie du lien du plan de la double nationalité à celui de la nationalité unique, la Cour a fait preuve d’une grande audace et, à notre avis, d’une grande lucidité.” See also *supra* Chapter I where this case is also mentioned.

<sup>164</sup> *The Flegenheimer Case*, 53 AM. J. INT'L L. 957 (1959).

<sup>165</sup> PHILIP C. JESSUP, THE PROTECTION OF NATIONALS 1-3 (1932) as quoted by Garcia Amador, *supra* note 31, at 374 says: “The history of the development of international law on the responsibility of States for injuries to aliens is thus an aspect of the history of ‘imperialism’ or ‘dollar diplomacy’”.

In brief, the doctrine of human rights may be applied in situations where diplomatic protection cannot, but they may also coexist. Despite the fact that diplomatic protection deals only with aliens, and human rights with the whole of mankind, and therefore one would necessarily comprise the other, conditions of exercise, goals and nature of each are too different for us to grant that one has taken the place of the other.

In reality, diplomatic protection, understood as a right of the State, to be exercised against another State in defense of a national, still exists as such. In this case, the right belongs to the State, and not to the individual, and can be exercised at its discretion.

Additionally, there is the doctrine of human rights, which was elaborated to protect the whole of mankind, not one specific group. This right can be exercised by the individual against an alien State and against the State of his or her nationality. It can also, exceptionally, be exercised by one State against another State, but in that case the complaining State will not be exercising its own right, but a right of the community of States as a whole.

There is, however, a clear link between both concepts. As regards diplomatic protection, when international law requires the existence of a wrong to allow its exercise, as seen, there is no precise definition of it internationally. It is only accepted that it should be a wrong according to international law. Thus, we have to resort to customary international law and treaty law to look for the definition of 'wrong'. Many situations are comprised in this concept, as seen, and of course, any violation of human rights law is included in this definition. Consequently, state responsibility for injuries to aliens can be exercised in situations where there have been violations of human rights law, for human rights law is part of international law, and any violation of it is a violation of international law.

The Restatement (Third) of Foreign Relations, in section 711, embodies exactly this concept, stating that state responsibility can be exercised if there has been a violation of a human right protected by international law.<sup>166</sup> This approach, although criticized,<sup>167</sup> is correct, in my view, for the reasons set forth above.

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<sup>166</sup> Section 711- State Responsibility for injury to Nationals of Other States.

*A state is responsible under international law for injury to a national of another state caused by an official act or omission that violates*

*a) a human right that, under para. 701, a state is obligated to respect for all persons subject to its authority;*  
*b) a personal right that, under international law, a state is obligated to respect for individuals of foreign nationality; or*  
*c) a right to property or another economic interest that, under international law, a state is obligated to respect for persons, natural or juridical, of foreign nationality, as provided in § 712.*

<sup>167</sup> See Carboneau, *supra* note 126, at 102-03.

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## Fundamental Rights

### I. DEFINITION

International human rights instruments<sup>1</sup> use the terms human rights, freedoms, fundamental human rights, and fundamental freedoms interchangeably. Thus, the term fundamental rights, in practice, is used as a synonym of human rights.<sup>2</sup> In this chapter, however, fundamental rights are a special category of human rights, comprising the most basic human rights, which are granted to everyone, always, under whatever circumstances.

Within this category, I classify the human rights which cannot by any means be derogated, even under special circumstances, such as war, public danger or public need, in brief, states of emergency.<sup>3</sup>

These fundamental rights, for the purposes of this work comprise the right to life, the right to personal freedom (not to be subjected to torture, slavery or illegal arrest), right not to be discriminated against (equality before the law) and right not to be incriminated under *ex post facto* laws.

The fact that there are some human rights, which are hierarchically superior to others is open to continuous doctrinal controversy.<sup>4</sup> The difficulty lies more in the definition of which rights comprise this category, rather than in the existence of the category itself.

Many commentators accept the idea of the existence of some basic rights independently of their being defined in treaties. Rougier, at the beginning of the century, already cited human rights as those rights of which their violation could justify a humanitarian intervention, such as the right to life, the right to freedom (physical and moral) and the right to legality.<sup>5</sup>

The same idea can be observed in the treaties which granted rights to minorities, for some basic rights were granted to all inhabitants, including not only those which

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<sup>1</sup> UN Charter, Universal Declaration, Convention on the Elimination of All Forms of Racial Discrimination and of Discrimination Against Women, the American Convention, the I.C.C.P.R., the I.C.E.S.C.R. and the European Convention among others.

<sup>2</sup> THEODOR MERON, HUMAN RIGHTS LAW MAKING IN THE UNITED STATES 178 (1986).

<sup>3</sup> This is the term used by JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1996).

<sup>4</sup> See Theodor Meron, *On A Hierarchy of International Human Rights*, 80 AM. J. INT'L L. I (1986).

<sup>5</sup> As quoted by Theodoor C. Van Boven, *Os Critérios de Distinção dos Direitos do Homem, As Dimensões Internacionais dos Direitos do Homem* 60 (ed. Karel Vasak, 1983).

were considered minority groups but also those which were not. The rights which were considered as such were the right to life, the right to personal freedom, freedom of religion and freedom of conscience.<sup>6</sup>

Also to be mentioned are the existence of some human rights established by customary international law, regardless of their inclusion in treaties. Along these lines the US Restatement establishes a list of human rights deemed to be established by customary international law, namely: prohibition of genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination or a consistent pattern of gross violations of internationally recognized human rights.<sup>7</sup>

Theodor Meron concludes that the right to life, prohibition of slavery, torture and retroactive penal measures form this category of basic human rights, receiving widespread acceptance. Notwithstanding, in his opinion, the right to due process, because of its importance should also be considered as included in this category.<sup>8</sup>

Goodwin-Gill has mentioned the principle of “*non-refoulement*” and non-discrimination to be included in this list.<sup>9</sup> Bossuyt considers the principle of non-discrimination to be unquestionably within this category.<sup>10</sup>

For the purposes of this work an objective criterion to select the rights comprised in this category was adopted, the criterion of non-derogability, according to human rights instruments.

This does not mean that these rights are necessarily more important than other human rights, due merely to their non-derogability. There are several other human rights, which may be derogable, but are of prime importance, such as the right to due process of law. In fact, this right provides the most solid assurance that other human rights will be complied with, including those considered non-derogable.

These non-derogable rights are deemed to be the cornerstone of the entire system for protecting human rights since the gravest violations of fundamental human rights occur in the context of states of emergency, and these specific rights cannot be derogated at all, not even under very exceptional circumstances, such as war, or other instances of extraordinary peril or crisis, in which the continuing existence of the State and the safety of the people are at stake.

It should be observed that the Universal Declaration does not deal with this category of rights, as in accordance with article 29(2) all rights listed in the Declaration can be suspended and the E.S.C.R. Covenant adopts the same approach. The European Convention, the C.P.R. Covenant and the American Convention adopt this category of non-derogable right.

<sup>6</sup> *Id.* at 60.

<sup>7</sup> American Law Institute, Restatement of the Law Third on the Foreign Relations Law of the United States, para. 702 (1987).

<sup>8</sup> MERON, *supra* note 2, at 186.

<sup>9</sup> GUY GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES, respectively at 141 and 75 (1978). “*Non-refoulement*” means that an alien who suffers persecution in his or her country of origin cannot be denied entry at the border of a third State.

<sup>10</sup> See MARC BOSSUYT, L’INTERDICTION DE LA DISCRIMINATION DANS LE DROIT INTERNATIONAL DES DROITS DE L’HOMME (1976).

Thus, most human rights treaties contain three levels of human rights as regards the types of limitation clauses:

- 1) rights which can be derogated by limitation clauses, such as public order, national security, public health and morals, that is, under normal situations and in peacetime. These limitation clauses only affect specific rights and do not require any special behavior on the part of the State to apply them;
- 2) rights which can be derogated under exceptional circumstances, in public emergencies threatening the life of the State. In fact, this exceptional situation requires a special declaration on the part of the State and may be applied to the entire treaty, with the exception of these rights made expressly non-derogable;
- 3) non-derogable rights, not even under exceptional circumstances.

*a) International Law*

The American Convention on Human Rights ordains:

*Article 27- Suspension of Guarantees*

- 1) *In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.*
- 2) *The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality); Article 4 (Right to life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights (my emphasis).*

Hence the American Convention possesses a broad list of rights which are considered non-derogable and they are mentioned expressly in this provision of the Convention.

The International Covenant on Civil and Political Rights sets forth:

*Article 4*

- 1) *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obli-*

*gations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origins.*

- 2) *No derogation from articles 6 (right to life), 7(right to humane treatment), 8(paragraphs 1 and 2)( freedom from slavery), 11(right to physical freedom), 15(freedom from ex post facto laws), 16(right to recognition as a person before the law) and 18(freedom of thought, conscience and religion) may be made under this provision.*

Thus, in accordance with this Covenant, there are also rights which cannot be derogated but the list differs somewhat from the one mentioned in the American Convention.

The European Convention for the Protection of Human Rights and Fundamental Freedoms determines:

#### *Article 15*

- 1) *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
- 2) *No derogation from Article 2 (right to life), except in respect of deaths resulting from lawful acts of war, or from Articles 3(right to humane treatment), 4 (paragraph 1)(freedom from slavery) and 7(freedom from ex post facto laws) shall be made under this provision.*

Thus, the European Convention possesses a smaller list of non-derogable rights than the American Convention and the International Covenant on Civil and Political Rights.

It is interesting to observe that, although there is total agreement regarding the existence of non-derogable rights, the question of establishing which rights are within this category has not been completely settled. The European Convention lists four such rights; the UN Covenant on Civil and Political Rights enumerates seven rights to be considered as such and the American Convention, eleven.

The right not to be discriminated against and of equality before the law are indirectly included in both the American Convention and in the International Covenant on Civil and Political Rights as a basic condition regarding the suspension of the rights mentioned in both Conventions in states of emergency, which puts this right of non-discrimination in the same category as the rights which are expressly mentioned as non-derogable.<sup>11</sup>

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<sup>11</sup> It was expressly excluded from the I.C.C.P.R. because it was argued that enemy aliens in time of war cannot be treated equally as the citizens of the State, as mentioned by ORAÁ, *supra* note 3, at 89. This argument does not survive scrutiny because non-discrimination means forbidding treating differently those who are in the same situation, and in this case of enemy alien, it would not apply, for there would be a strong reason to treat differently.

Additionally, this right is deemed to be of fundamental importance because it is applicable to the enjoyment of all the rights listed in the treaties.<sup>12</sup>

As a matter of fact, if this right were not considered equally non-derogable, the State even if prohibited to suspend directly the enjoyment of some rights, could do so indirectly by discriminating in the enjoyment of these rights.<sup>13</sup>

The C.P.R. Covenant and the American Convention determine that derogation of rights in emergencies must not involve discrimination on the grounds of race, color, sex, language, religion or social origin. It should be noted that this list is smaller than the general one contained in the non-discrimination provision of other human rights instruments (it omits political or other opinion, national origin, property, and birth or other status).<sup>14</sup>

Consequently, it can be said that the right to equality before the law and the right not to be discriminated against are part of international law as a rule of fundamental importance, firstly, because they are comprised in all human rights instruments,<sup>15</sup> secondly, because they are mentioned as a basic condition for the suspension of rights in states of emergency, as seen, and finally, because they form part of the general principles of law, as mentioned by article 38 of the Statute of the International Court of Justice, for the rule which prohibits discrimination is a "principle common to all systems of law of civilized nations".<sup>16</sup>

In the European Convention, besides the four rights mentioned in article 15, the right to "non bis in idem" included in article 4 (1) of the 7<sup>th</sup> Protocol, can be added. Also, according to articles 2 and 3 of the 6<sup>th</sup> Protocol, the death penalty can only be imposed in time of war and not in other exceptional situations, which gives more strength to the right to life, guaranteed in Article 2(1) of the Convention.

The right to be recognized as a person before the law is common to two conventions, the C.P.R. Covenant and the American Convention.

Some other rights, such as the right to a nationality, the right to family life, right to a name, although considered non-derogable in the American Convention are considered subject to derogation in the others.

As regards the American Convention, which contains a long list of non-derogable rights, it should be mentioned that, despite its length, there is an absence of other equally fundamental rights.

The right to freedom of conscience and religion are non-derogable under the C.P.R. Covenant and the American Convention, but strangely enough they are bound to

<sup>12</sup> European Convention, article 14; I.C.C.P.R., article 26; American Convention, article 24.

<sup>13</sup> ORAÁ, *supra* note 3, at 102-03.

<sup>14</sup> See I.C.C.P.R., article 4 (1); the American Convention, article 27(1) and the European Convention, article 15 (1).

<sup>15</sup> The applicability of the right not to be discriminated against is controversial because it can be applied only as regards specific rights, granted by the Convention, as in the cases of the Covenants: I.C.E.S.C.R., article 2(2); I.C.C.P.R., article 2(1); European Convention, article 14; American Convention, article 1.1 or it may be applied in a broader sense, as formulated in the Universal Declaration, article 7; I.C.C.P.R., article 26 and the American Convention, article 24.

<sup>16</sup> More than 111 States expressly state in their Constitutions the right not to be discriminated against. See BOSSUVT, *supra* note 10, at 78.

suffer specific limitations for reasons of public safety, morals and others. Thus, technically speaking they should not be included in this category of non-derogable rights.

The right to participate in the government is only included in the American Convention and includes the right to vote, be elected and the right to have access to public services. These rights are granted only to nationals and according to the American Convention cannot be suspended even during emergencies.

Thus this list of non-derogable rights contained in the three treaties can be criticized since: 1) some very fundamental rights are excluded from the list; 2) some rights which are not so fundamental are included in the list, weakening the concept of non-derogability.<sup>17</sup>

This may be due to the fact that the “*travaux préparatoires*” of one of the Conventions show that some delegations demonstrated that the rights which were classified as non-derogable were not adequately examined.<sup>18</sup>

In the cases *Lawless*<sup>19</sup> and *Ireland v. UK*<sup>20</sup> decided by the European Court of Human Rights, it was established that the right to be free from arbitrary arrest was a very important guarantee established in the Convention, having the same status as the four non-derogable rights.

This right to be free from arbitrary arrest is very closely connected to the right to freedom from torture and freedom from slavery and inhuman or degrading punishment because it is comprised in the right to personal freedom, and thus non-derogable.

In brief, the four non-derogable rights common to all conventions are the right to life, the right to personal freedom (comprising the right to freedom from torture and other inhuman or degrading treatment or punishment, the right to be free from slavery or servitude and the right to be free from arbitrary arrest), and the principle of non-retroactivity of penal laws. These rights, together with the right not to be discriminated against, are the core of fundamental rights, mentioned in this chapter.

## 2. THE NON-DEROGABLE RIGHTS

### *I. Right to life*

All human rights instruments guarantee the right to life to everyone.

#### a) International Law

The Universal Declaration of Human Rights sets forth:

*Article 3 - Everyone has the right to life, liberty and security of person.*

<sup>17</sup> ORAÁ, *supra* note 3, at 95.

<sup>18</sup> *Id.* at 91.

<sup>19</sup> Decided in 1961, by the European Court of Human Rights regarding a detention without trial which happened in Ireland concerning a member of the IRA during state of emergency. Ser. A: Judgements (Jul. 1, 1961) quoted by ORAÁ, *supra* note 3, at 16.

<sup>20</sup> *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 28 (1978).

Along the same lines, the American Declaration<sup>21</sup> the International Covenant on Civil and Political Rights,<sup>22</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>23</sup> adopt similar rules.

The Convention on the Rights of the Child reproduces this same ruling,<sup>24</sup> as well as the African Charter.<sup>25</sup>

The American Convention guarantees to the right to life to all in the following terms:

*Article 4-1-Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.*

The right to life, due to its prime importance is assured as a rule to anyone, without distinctions. Therefore, this right should be granted equally to nationals and aliens alike.

#### b) Comparative Law

All countries analyzed grant this right to aliens and nationals alike in their domestic legislation, thus following the patterns established by international law.<sup>26</sup> This is the case in Antigua and Barbuda,<sup>27</sup> Belize,<sup>28</sup> Brazil,<sup>29</sup> Canada,<sup>30</sup> Cape Verde,<sup>31</sup> Chile,<sup>32</sup> Costa Rica,<sup>33</sup> Greece,<sup>34</sup> Honduras,<sup>35</sup> Hungary,<sup>36</sup> India,<sup>37</sup> Israel,<sup>38</sup> Liberia,<sup>39</sup>

<sup>21</sup> Article 1.

<sup>22</sup> Article 6.1.

<sup>23</sup> Article 2.1.

<sup>24</sup> Article 6.1 – “States Parties recognize that every child has the inherent right to life”.

<sup>25</sup> Article 4- “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person.”

<sup>26</sup> The Taiwanese Constitution is the only one that grants this right only to “the people”. TAIWANESE CONST. (1946) article 15.

<sup>27</sup> ANTIQUAN CONST. (1981) article 4.

<sup>28</sup> BELIZEAN CONST. (1981) article 3.a.

<sup>29</sup> BRAZILIAN CONST. (1988) article 5.

<sup>30</sup> CANADIAN CONST. (Constitution Act 1982) article 7.

<sup>31</sup> CAPE VERDIAN CONST. (1992) article 26.1.

<sup>32</sup> CHILEAN CONST. (1980) article 19.1.

<sup>33</sup> COSTA RICAN CONST. (1949) article 21.

<sup>34</sup> GREEK CONST. (1975) article 5.2.

<sup>35</sup> HONDURAN CONST. (1982) article 65.

<sup>36</sup> HUNGARIAN CONST. (1949) article 54.

<sup>37</sup> INDIAN CONST. (1950) article 21.

<sup>38</sup> ISRAELI CONST. (Basic law 13, Human Dignity and Liberty, 1994) section 2.

<sup>39</sup> LIBERIAN CONST. (1984) article 20.a.

Nicaragua,<sup>40</sup> Peru,<sup>41</sup> Poland,<sup>42</sup> Portugal,<sup>43</sup> Spain,<sup>44</sup> Sweden,<sup>45</sup> Thailand<sup>46</sup> and Turkey<sup>47</sup> and the US.<sup>48</sup>

The right to life may be applied in the context of immigration cases whenever the alien proves unequivocally that deportation/expulsion to a specific country would amount to a risk to his or her life.<sup>49</sup>

One can look for the origins of this guarantee in the context of extradition cases, for some countries refuse to grant extradition to a country where the death penalty will be imposed or will only grant extradition on the condition that this penalty be substituted for another.<sup>50</sup>

Notwithstanding, other countries do extradite aliens to countries where the death penalty is imposed. The Supreme Court of Canada in the case *Kindler v. Canada(Minister of Justice)* confirmed an extradition order issued by the Minister without the guarantee that the death penalty would not be imposed. The Court concluded that the Minister's action did not constitute cruel and unusual punishment and argued: "*The execution, if it takes place, will be in the US under American law against an American citizen in respect of an offense that took place in the US.*"<sup>51</sup>

## *II. Right to Personal Freedom*

### *a) International Law*

The Universal Declaration of Human Rights guarantees the right not to be subjected to torture, not to be held in slavery and not to be arbitrarily arrested in the following terms:

*Article 3 - Everyone has the right to life, liberty and security of person.*

*Article 4 - No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.*

*Article 5 - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

*Article 9 - No one shall be subjected to arbitrary arrest, detention or exile.*

<sup>40</sup> NICARAGUAN CONST. (1987) article 23.

<sup>41</sup> PERUVIAN CONST. (1993) article 2.1.

<sup>42</sup> POLISH CONST. (1997) article 38.

<sup>43</sup> PORTUGUESE CONST. (1976) article 24.

<sup>44</sup> SPANISH CONST. (1978) article 15.

<sup>45</sup> SWEDISH CONST. (1975) chapter 2, article 4.

<sup>46</sup> THAI CONST. (1997) article 17.

<sup>47</sup> TURKISH CONST. (1981) article 4.

<sup>48</sup> US CONST. XIV Amendment .

<sup>49</sup> This is better developed in the item related to the right to physical freedom, below.

<sup>50</sup> This is the case in Brazil, in accordance with the Aliens' Act, Law Number 6815 of Aug. 19, 1980, article 91,III.

<sup>51</sup> (1991) 2 S.C.R., decided on September 26, 1991, file n. 21321.

The International Covenant on Civil and Political Rights,<sup>52</sup> and the European Convention,<sup>53</sup> guarantee to everyone the right not to be tortured and not to be held in slavery or servitude, while the right not to be imprisoned for not paying a contractual obligation is mentioned only in the International Covenant.

The length of time of the detention has been examined several times by the European Court. In the case *Quinn v. France* the Court determined that the length of the provisional detention has to be reasonable in accordance with article 5 para. 3 of the Convention. Notwithstanding, this rule does not apply to extradition proceedings if it is conducted with diligence.<sup>54</sup> Along the same lines, in the case *Kolompar v. Belgium*, the Court decided that a detention in an extradition case, which lasted 2 years and 8 months, did not violate article 5 paragraph 1 of the Convention as the proceedings took that long as a result of the many appeals filed by the alien himself.<sup>55</sup>

As regards detention in the migration context, the Court in the case *Amuur v. France* determined that the power of the States to control entry of foreigners can be limited by international law.<sup>56</sup> In this case, an individual was held in detention in an international area of the airport in France soon after his arrival. The Court decided that the mere existence of this area does not violate article 5 of the European Convention, which deals with the legality of a detention. Notwithstanding, the Court considered that France violated article 5 because the detention was prolonged, there was no possibility of submitting this detention to judicial review and because no possibility of judicial or social assistance was given to the alien in accordance with the rules in force then.

In the case *Scott v. Spain* the Court examined the issue of the length of detention in a situation involving both an extradition request and a rape charge, for Mr. Scott was kept in prison for more than 4 years. The Court held that the detention followed domestic requirements and, in view of the new evidence obtained in the rape case, was not arbitrary.<sup>57</sup>

Despite the fact that the right of the States to control migration has been widely recognized, the European Court has already applied the right to physical integrity in the context of migration cases. In the case *Soering v.UK*<sup>58</sup> the Court decided that a State Party was in violation of article 3 of the Convention when it decided to extradite an individual to a State where his physical integrity will not be guaranteed. The same argument was used in a case of expulsion<sup>59</sup> and in a denial of entry- “refoulement”<sup>60</sup>

<sup>52</sup> Article 7, 8(1)(2) and 11.

<sup>53</sup> Article 3, 4(1) and 5.

<sup>54</sup> Vincent Coussirat-Coustère, *La Jurisprudence de la Cour Européenne des Droits de L'Homme en 1995*, XLI ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 491 (1995).

<sup>55</sup> Decided on September 24, 1992, Série A, number 235-C, as quoted by Sylvie Sarolea, *La Jurisprudence Recente de la Cour Européene des Droits de L'Homme en Matière D'Eloignement et de Détenion des Étrangers au Départ de l'Arrêt Chahal*, 92 REVUE DU DROIT DES ETRANGERS 19-35; 28n53(1997).

<sup>56</sup> Decision of June 25,1996, RUDH 144 (1996). See also RUDH 9 (1997).

<sup>57</sup> LXVIII BRITISH YEARBOOK OF INTERNATIONAL LAW 429(1997)

<sup>58</sup> July 7, 1989, RUDH 99 (1989).

<sup>59</sup> *Cruz Varas case*, March 20 1991, RUDH 209 (1991).

<sup>60</sup> *Vitvarajah case*, October 30 1991, RUDH 537 (1991).

because the State would be exposing the individual to torture or inhuman and degrading treatment in the State of destiny.

Additionally, the non-derogatory nature of this right was stressed in the case *Chahal v. UK*, when the Court decided that expulsion to India, for reasons of national security, of an individual who defended Sikh separatism would amount to a violation of article 3 as the physical integrity of this Indian national would be put at risk. Therefore, the mandatory nature of article 3 would prevail over reasons of national security and national interest leading to the expulsion of Mr. Chahal.<sup>61</sup>

This aspect is of extreme importance as the European Court has interpreted this right beyond that which is guaranteed in the *non-refoulement* principle, established at article 33 of the 1951 Geneva Convention on the Status of Refugees, which determines that a refugee should not be expelled to a territory where his or her life or liberty would be threatened, unless his or her presence seriously endangers local national security or if he or she is condemned for a serious crime. Thus, as the limitation established at article 3 of the European Convention admits no derogation, if the situation is qualified as threatening the life or physical integrity of the alien, the expulsion/extradition/deportation or denial to entry cannot be admitted even if the presence of the alien is contrary to national security and public interest.<sup>62</sup>

Along the same lines was the decision of the Court in the case *Ahmed v. Austria* where a Somalian national, who lost his refugee status because of his involvement in an attempted robbery, was expelled from Austria. The Court decided that his expulsion would amount to a violation of article 3 and therefore should be deemed unacceptable because he would be in danger in Somalia due to his activities against the government.<sup>63</sup>

In the case *D v. UK*, the Court analyzed the request of an individual born in St Kitts who arrived at Gatwick and was refused leave to enter because he was in possession of a substantial amount of cocaine and his exclusion was ordered. Subsequently, he was arrested and sentenced. After three year's imprisonment, he received parole but he was re-detained pending his deportation. At this point he requested leave to stay on compassionate grounds for he found out he was HIV positive while in prison. Removal to St Kitts would entail the loss of medical treatment, thus shortening his life expectancy.

The Court started by reiterating that States do have the right to control entry and expulsion of aliens. It also noted the gravity of the offense with which the applicant was charged. Notwithstanding, it held that article 3 applied "*irrespective of the reprehensible nature of the conduct of the person in question.*"

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<sup>61</sup> Decision of November 15, 1996. See *Decisions on the European Convention on Human Rights during 1997*, LXVIII THE BRITISH YEARBOOK OF INTERNATIONAL LAW 388-390 (1997) and in RUDH 366 (1997). It should be observed that in this case Mr. Chahal had two children of British nationality, and also argued violation of article 8 of the Convention if he were expelled. The Court refused to analyze this issue because his expulsion was already deemed illegal under article 3 of the Convention.

<sup>62</sup> The Court stated at the case *Chahal*: "*la Convention prohibe en termes absolus la torture ou les peines ou traitements inhumains ou dégradants, quels que soient les agissements de la victime*" as quoted by Sylvie Sarolea, *supra note 55* at 24.

<sup>63</sup> Decided in December 17, 1996. See RUDH 386 (1997).

It is also interesting to remark that the Court also rejected the argument of the Government that the applicant had never entered the United Kingdom. It stated that an individual's physical presence means that he is within the jurisdiction of the State notwithstanding the internal legal position.<sup>64</sup>

In the *HLR v. France* case the Court analyzed the situation of the applicant, a Colombian national who was imprisoned and ordered expelled. He objected expulsion under the argument that he faced serious risk in Colombia from the drug traffickers and not from the authorities. The Court concluded that despite the fact that the risk does not need to be from governmental authorities, it has to be real. There was no evidence in the case that the risk to the applicant was worse than to other Colombians. Additionally, although the authorities in Colombia were having difficulties controlling traffickers, the applicant had not proved that the authorities were incapable of protecting him. Thus, the Court concluded that there was no violation of article 3 by France.<sup>65</sup>

In the case *Paez v. Sweden*, the European Court was faced with a very interesting situation: Mr. Paez, a Peruvian national, member of the "Sendero Luminoso", the communist party of Peru, was residing in Sweden and was threatened with expulsion from this country. Meanwhile a similar situation – involving the brother of Mr. Paez – was examined by the UN Committee based on the 1984 Convention Against Torture and the Committee concluded that Sweden should not expel the brother of Mr. Paez to Peru because his life and integrity would be threatened in this country. As a consequence to this decision, Sweden, at its own will, revoked the measure of expulsion of Mr. Paez. Notwithstanding, he submitted his case to the European Commission, which decided that there was no violation of article 3 of the European Convention. Subsequently, the European Court concluded that the threat disappeared in accordance with the decision issued by Sweden, which authorized his stay, and thus avoided any contradiction with the decision of the UN Committee. This is a very interesting situation for there was a real risk of contradictory decisions, as the UN Committee decided in a similar case that expulsion would amount to violation of the right to physical integrity of the individual, whereas the European Commission decided that there was not such a violation. Despite the advantages due to the existence of numerous instruments available for human rights protection, this can eventually lead to contradictory and confusing decisions, as well as to enormous difficulty to understand the patterns and the criteria adopted in each case.<sup>66</sup>

In a recent decision, the European Court analyzed the situation of a national of Zaire, living in France, who had AIDS and was expelled to his country of origin. The Court concluded that in this case humanitarian considerations should take place.<sup>67</sup>

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<sup>64</sup> See *Decisions on the European Convention on Human Rights during 1997*, LXVIII THE BRITISH YEARBOOK OF INTERNATIONAL LAW 407-408 (1997).

<sup>65</sup> *Id.* at 438-439.

<sup>66</sup> Decision of the European Court of October 30, 1997, JOURNAL DE DROIT INTERNATIONAL 226-7 (1998).

<sup>67</sup> Case *B.B. v. France*, decided by the Court on September 7, 1998, JOURNAL DE DROIT INTERNATIONAL 217-218 (1999).

From the above decisions of the European Court it can be concluded that the protection of aliens in the context of migration cases has found new grounds at international level. At first, as the States were considered free to control migration, it was understood that no limits could be imposed on this freedom of States. Timidly and without very objective patterns, international tribunals started to view the right to family life as a limit to the right of the States to control migration.<sup>68</sup> However, the Courts have concluded that the right to family life does not necessarily lead to an absolute impossibility to expel, for the States can still expel an alien for reasons of national security and national interest, as understood by the Courts. More recently, the European Court applied new criteria to limit this freedom of the States: denial of entry, deportation, expulsion and extradition should not put the alien in a situation where his or her physical integrity or life is threatened.

Presently, the right to physical integrity applies in the context of migration cases and due to the non-derogatory nature of this right, it guarantees to the alien an absolute prohibition to expel/deport/ extradite/deny entry when this right is threatened. Therefore, not even in the event of reasons of national security and national interest of the State, can these measures take place.

#### *b) Comparative Law*

The great majority of countries grant to everyone in their legislation the right not to be tortured, not to be subject to illegal arrest and not to be held in slavery or servitude. This is the case in Antigua and Barbuda,<sup>69</sup> Algeria,<sup>70</sup> Belgium,<sup>71</sup> Belize,<sup>72</sup> Brazil,<sup>73</sup> Cape Verde,<sup>74</sup> Chile,<sup>75</sup> Congo,<sup>76</sup> Costa Rica,<sup>77</sup> Cuba,<sup>78</sup> Egypt,<sup>79</sup> Spain,<sup>80</sup> Germany,<sup>81</sup> Greece,<sup>82</sup> Honduras,<sup>83</sup> Hungary,<sup>84</sup> India,<sup>85</sup> Israel,<sup>86</sup> Italy,<sup>87</sup> Jordan,<sup>88</sup>

<sup>68</sup> See Chapter V on Private Rights, where the right to family life is discussed.

<sup>69</sup> ANTIQUAN CONST. (1981) articles 5, 6, 7 and 8.

<sup>70</sup> ALGERIAN CONST. (1976) article 47.

<sup>71</sup> BELGIAN CONST. (1970) article 12.

<sup>72</sup> BELIZEAN CONST. (1981) articles 3.a, 5, 7 and 8.

<sup>73</sup> BRAZILIAN CONST. (1988) article 5, III, XLIX.

<sup>74</sup> CAPE VERDIAN CONST. (1992) article 26.2.

<sup>75</sup> CHILEAN CONST. (1980) article 19.7.c and d.

<sup>76</sup> CONGOLESE CONST. (1992) articles 12, 13 and 16.

<sup>77</sup> COSTA RICAN CONST. (1949) articles 37 and 40.

<sup>78</sup> CUBAN CONST. (1976) article 58.

<sup>79</sup> EGYPTIAN CONST. (1971) article 41.

<sup>80</sup> SPANISH CONST. (1978) articles 15 and 17.

<sup>81</sup> GERMAN CONST. (1949) article 2.2.

<sup>82</sup> GREEK CONST. (1975) articles 6.1 and 7.2.

<sup>83</sup> HONDURAN CONST. (1982) articles 68 and 84.

<sup>84</sup> HUNGARIAN CONST. (1949) articles 54.2 and 55.

<sup>85</sup> INDIAN CONST. (1950) article 21.

<sup>86</sup> ISRAELI CONST. (Basic Law 13, Human Dignity and Liberty, 1994) section 5.

<sup>87</sup> ITALIAN CONST. (1948) article 13.

<sup>88</sup> JORDANIAN CONST. (1952) articles 7 and 8.

Liberia,<sup>89</sup> Luxemburg,<sup>90</sup> Mexico,<sup>91</sup> Netherlands,<sup>92</sup> Nicaragua,<sup>93</sup> Norway,<sup>94</sup> Paraguay,<sup>95</sup> Peru,<sup>96</sup> Poland,<sup>97</sup> Portugal,<sup>98</sup> Sweden,<sup>99</sup> Switzerland,<sup>100</sup> Thailand<sup>101</sup> and Turkey.<sup>102</sup>

France introduced in its 1997 Amendment to the Aliens Act and maintained in its 1998 Law, the rule that an alien seriously ill should not be deported or expelled, unless very grave reasons of national security demand otherwise.<sup>103</sup> Additionally, whenever the alien is expelled or deported to a certain country, generally his or her country of origin, and if in this country his or her life, physical freedom or integrity are threatened, in accordance the legislation, this expulsion or deportation cannot take place.<sup>104</sup>

Additionally, French Courts have been applying this guarantee established at Article 3 of the European Convention, even before the above-mentioned change in the domestic legislation. In a case involving deportation of an individual suffering of a serious disease the Administrative Court determined that the European Convention prohibits such deportation if the treatment cannot be continued in the country of destination.<sup>105</sup>

In Canada, an alien convicted of a serious crime was ordered deported by the authorities in accordance with the Aliens Act, which determines deportable an alien convicted to more than a 5 year term imprisonment. He appealed to the Supreme Court of Canada alleging that his expulsion would amount to cruel and unusual punishment or treatment, prohibited by Article 12 of the Canadian Charter, because he was a permanent resident of the country. The Court replied that as an alien has no

<sup>89</sup> LIBERIAN CONST. (1984) article 12.

<sup>90</sup> LUXEMBURG CONST. (1868) article 12.

<sup>91</sup> MEXICAN CONST. (1917) articles 18.3 and 22.

<sup>92</sup> DUTCH CONST. (1983) articles 11 and 15.

<sup>93</sup> NICARAGUAN CONST. (1987) articles 33 and 36.

<sup>94</sup> NORWEGIAN CONST. (1814) article 96.

<sup>95</sup> PARAGUAYAN CONST. (1967) article 59.

<sup>96</sup> PERUVIAN CONST. (1993) article 2.1.

<sup>97</sup> POLISH CONST. (1997) articles 40 and 41.4.

<sup>98</sup> PORTUGUESE CONST. (1976) article 25.

<sup>99</sup> SWEDISH CONST. (1975) article 20.1.3 (aliens)

<sup>100</sup> SWISS CONST. (1874) article 65.2.

<sup>101</sup> THAI CONST. (1997) articles 30, 31 and 32.

<sup>102</sup> TURKISH CONST. (1982) article 17.1.

<sup>103</sup> Article 25, 8 of the Law. See Hagues Fulchiron, *La Réforme du Droit des Étrangers. Commentaire de la loi n° 98-349 du 11 Mai 1998 relative à l'Entrée des Étrangers en France et au Droit d'Asile, dite loi 'Chevènement' ou loi 'Reseda'*, 2 JOURNAL DE DROIT INTERNATIONAL 335-411, esp. 390-1 (1999).

<sup>104</sup> Article 27 bis of the Aliens Act of 1945 in accordance with the 1993 Amendments determines: "un étranger ne peut être éloigné à destination d'un pays s'il établit que sa vie ou sa liberté y sont menacées ou qu'il y est exposé à des traitements contraires à l'article 3". RUDOLPH D'HAËM, L'ENTRÉE ET LE SÉJOUR DES ÉTRANGERS EN FRANCE, 62 (Que sais-je?, 1999).

<sup>105</sup> The Administrative Tribunal of Versailles, decision of September 26, 1996, 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 688 (1998).

right to reside in the country of residence, the country can establish the conditions and requirements leading to deportation/expulsion.<sup>106</sup>

Thus, this recent trend will lead to the impossibility of deportation/expulsion whenever the alien will be submitted to cruel and inhumane treatment in the country of destination, putting the life or physical integrity of the alien at risk. Therefore, the threat has to be real and unequivocal.

Moreover, the rule prohibiting arbitrary arrest or detention should be analyzed in the context of detentions ordered by administrative authorities, before or during expulsion proceedings, during deportation proceedings and before and during extradition proceedings.

There may be some doubts as regards the imprisonment of an individual due to an administrative decision before the case is submitted to the courts. Additionally, even if this imprisonment is considered to be in accordance with the basic principles of law, should it have a deadline, or can the individual remain in prison for years as a result of an administrative decision without the case being submitted to the judiciary?

In the US, in the *Mezei case*, decided by the US Supreme Court, Mezei was kept in Ellis Island for two years by order of the Attorney General.<sup>107</sup> This decision was read by legal commentators as an approval of the Supreme Court to indefinite detention of an excludable alien, without any judicial testing of the substantive merits or even the procedural validity of the detention order.<sup>108</sup>

The decision of the US Supreme Court in this case, with all due respect, does not survive scrutiny. It should be observed that this proceeding involves an executive custody without accusation of a crime or judicial trial. Mr. Justice Jackson, dissenting of the majority in this case, although presenting his arguments in order to determine that the Executive should be required to reveal its evidence and not that there should be a time limit on administrative detention, points out that, since John at Runnymede, executive imprisonment was considered oppressive and lawless, for he pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgement of his peers or by the law of the land. Additionally, he argues that the judges of England developed the writ of *habeas corpus* largely to preserve these immunities from executive restraint.

Notwithstanding, in many situations, aliens are kept in prison for various reasons of difficult solution. This is the case of more than 125,000 Marielitos, who came from Cuba, some of whom already had criminal records in their country of origin. Many of these aliens were denied entry into the US, as well as were denied return to Cuba, so they have been kept in prison for a long time. However, in this case, as they

<sup>106</sup> *Canada (Minister of Employment and Immigration) v. Chiarelli*, March 26, 1992, file n.21.920.

<sup>107</sup> *Mezei Case, Shaughnessy v. United States*, 345 U.S. 206 (ex rel. Mezei, vote of Mr. Justice Black, 1953).

<sup>108</sup> THOMAS ALEXANDER ALENIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 293 (1985). Presently, this Supreme Court decision has to be read in accordance with the 1996 Act on Immigration which sets three types of removal procedures: 1) for arriving aliens; 2) for other inadmissible aliens— those who entered the US illegally; 3) for deportable aliens— those who came to the US lawfully, or are lawful permanent residents and receive more procedural guarantees. For more details see THOMAS ALEXANDER ALENIKOFF & DAVID A. MARTIN AND HIROSHI MOTOMURA, IMMIGRATION: PROCESS AND POLICY, 721-881 (4<sup>th</sup> ed., 1998).

have Cuban nationality, under international law Cuba would be obliged to accept them back<sup>109</sup> and the US are not obliged to take them in. Hence, it is Cuba that is violating a basic international law rule.

Brazilian ordinary legislation used to admit administrative imprisonment in deportation proceedings,<sup>110</sup> expulsion<sup>111</sup> and extradition.<sup>112</sup>

The Constitutional text of 1988, in article 5, LXI determines that "*no one shall be arrested unless in flagrante delicto or by written and substantiated order of a proper judicial authority, except in the case of a military offense or a strictly military crime, as defined by law.*"<sup>113</sup> Due to this constitutional rule, the Brazilian Supreme Court decided that the provisions of the ordinary legislation are now revoked and therefore no administrative imprisonment is admitted. Only the Ministers of the Supreme Court may decide, as an example, on imprisonment in extradition proceedings.<sup>114</sup>

Canada admits imprisonment during expulsion proceedings.<sup>115</sup>

Originally, in the Netherlands, aliens who were denied formal entry were taken to the barracks of the Royal Military Police in Badhoevedorp or the police station at Hoofddorp. A decision of the Supreme Court issued on May 1982 decided that this solution was considered a deprivation of liberty, for which the Aliens Act provided no basis. Afterwards, a solution for the problem of reception was sought by accommodating the aliens in question in one of the hotels in the vicinity of the Schiphol Airport. This solution, besides being much more costly, proved to be inadequate, for many persons vanished soon after being registered in the hotel.

Another solution which was tried was to keep aliens in the transit lounge of the airport pending their departure, which could take weeks. This solution also proved inadequate for it was sharply criticized by many social organizations and the Parliament and it led to the construction of the reception center at Schiphol-Oost, which can accommodate up to 40 aliens.<sup>116</sup>

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<sup>109</sup> See, *supra* Chapter I, on Definition of Alien: The Importance of Nationality, title 8, rule 7. As for the Marielitos see *Barrera-Echavarria v. Rison*, 44F.3d 1441 (9<sup>th</sup> Cir.1995) upholding continued detention. See also Gerald Neuman, *Recent trends in US Migration Control*, 38 GERMAN YEARBOOK OF INTERNATIONAL LAW, 284-305; 286(1995).

<sup>110</sup> Aliens'Act, Law Number 6815 of Aug. 19, 1980, article 61 permits the Minister of Justice to determine imprisonment for a period of sixty days, which can be extended for equal period.

<sup>111</sup> *Id.* Article 69 determines the possibility of imprisonment to be determined by the Minister of Justice during a period of 90 days, admitting extension for equal period. This provision also establishes that in the event the expulsion measure is submitted to the Judiciary, this deadline is interrupted while the judgement lasts.

<sup>112</sup> *Id.* As regards imprisonment during extradition proceedings, article 81 determines that the Minister of Justice may order it and establishes no deadline for this imprisonment. Article 82 also admits imprisonment before request for extradition is made and imprisonment may last up to 90 days. After that period no imprisonment is admitted without a formal request.

<sup>113</sup> See Keith Rosenn, PANORAMA OF BRAZILIAN LAW 383-418 (Keith Rosenn and Jacob Dolinger ed. 1992), for a translation of the Brazilian Constitution in English.

<sup>114</sup> Extradition 478, 127 RTJ 18 (1989).

<sup>115</sup> Immigration Adjudication Division rules of 1993, article 18.

<sup>116</sup> *Netherlands State Practice*, NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 217-218(1990).

In Australia, the High Court in *Lim's case* decided that the sections of the Migration Act which confer upon the Executive the authority to detain an alien in custody for the purposes of expulsion or deportation have to be interpreted as having limits imposed by what is reasonable. Thus, the judges indicated that the 273 days time limit was an appropriate means to ensure the power of detention was adequately limited.<sup>117</sup>

France, in accordance with the 1998 Amendment, admits only 12 days of administrative imprisonment. Finland, Ireland and UK establish no time limit to this detention whereas Germany sets a time limit of 6 months extensible to 12 months; Belgium, Austria, Sweden and Luxembourg determine a limit of 2 to 6 months and in Spain, Norway and the Netherlands there is a limit of 15 to 40 days.<sup>118</sup>

With regard to detention in immigration cases, in many situations the detention lasts longer than it should or is ordered arbitrarily. In these cases, it should be understood that there is inhuman or degrading treatment and therefore, the detention should be deemed contrary to international law.

International law sets forth that detention cannot be arbitrary nor prolonged i.e., detention has to be authorized by local legislation and cannot last longer than is reasonable. However, as regards the time limit for detention, international law determines that there should be a deadline but it does not establish precisely its limit. Comparative legislation also does not establish a precise time limit for detention. Therefore, the criteria established by international law may give rise to some difficulties as regards their applicability. However, undoubtedly, these criteria apply equally to aliens and nationals.

### *III. Right not to be Discriminated Against*

#### *a) International Law*

The Universal Declaration of Human Rights ordains:

*Article 1 - All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

*Article 2, 1 - Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

*Article 7 - All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of his Declaration and against any incitement to such discrimination.*

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<sup>117</sup> 15 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 549 (1994).

<sup>118</sup> Dominique Turpin, *La Loi n° 98-349 du 11 Mai 1998 relative à L'Entrée et au Séjour des Étrangers en France et au Droit d'Asile*, 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 521-564, 548n44 (1998).

The International Covenant on Civil and Political Rights sets forth:

*Article 26 - All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall be prohibited from any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The International Convention on the Elimination of All Forms of Racial Discrimination establishes:

*Article 1.3 - Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.*

*Article 5 - In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, ...*

The authoritative interpretation of this provision notes that it “must not...detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the [ICESCR] and the [ICCPR].”<sup>119</sup>

Article 1, paragraph 3 of the UN Charter states that one of the purposes of the UN is “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...”

Additionally, article 55 of the UN Charter provides that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”

It is important to observe that international law does not prohibit all distinctions. It only forbids distinctions which are unreasonable, arbitrary or malicious. Thus, it is necessary to compare the treatment granted to one particular person with that given to another, regarding the same aspect. If the treatment is different, there is distinction. In order to verify the existence of discrimination, first of all there must be distinction of treatment. However, in some cases, this distinction is neither illegal nor arbitrary, consequently it is not discrimination. On the other hand, when the distinction is illegal and against the principles of international law, then it is considered discrimination.

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<sup>119</sup> Human Rights Commission, General Recommendation XI on Non-citizens, 42nd Sess., at 66, HRI/GEN/1/Rev. 1 (1993).

The European Court of Human Rights in the *Belgian Linguistics case*<sup>120</sup> determined that the rights and freedoms protected by the European Convention are to be secured without discrimination, defining that "*equality of treatment is violated if the distinction has no objective and reasonable justification.*"<sup>121</sup> In brief, the Court affirmed that the principle of equality of treatment is violated – or in the words of the *Marckx case* 'a distinction is discriminatory' – if the distinction has no objective and reasonable justification. The existence of such justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference in treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>122</sup>

Hence, the European Court of Human Rights in this case established that differential treatment is not unlawful 1) if the distinction is made in pursuit of a legitimate aim; 2) if the distinction does not lack an "objective justification"; 3) provided that a reasonable proportionality exists between the means employed and the aims sought to be realized.<sup>123</sup>

Additionally, to be classified as discrimination, the distinction does not need to be motivated by grounds such as race, sex, religion, or other status, because these provisions admit other grounds which also can be considered as discrimination.

Discrimination is the negative side of equality of treatment, being however, more objectively formulated, for the conventions exemplify some of the grounds on which discrimination is forbidden, while equality of treatment has been formulated as a general principle.<sup>124</sup>

The formal and express prohibition against discrimination is quite a recent phenomenon. Bossuyt shows that in ancient dictionaries, both English and French, the term is either non-existent or brought with a different meaning from the one we employ nowadays. He also shows that more than forty Constitutions of Latin American and African countries, enacted after World War II, mention a general prohibition against discrimination.<sup>125</sup>

Bossuyt also points out that the first international instrument to mention this prohibition, although it actually mentions a prohibition against distinctions, rather than discrimination, was the UN Charter,<sup>126</sup> followed by the Universal Declaration.<sup>127</sup>

<sup>120</sup> *Belgian Linguistic Case*, 6 Eur. Ct. H.R., (ser. A) (1968). See also Anne F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L. J. 1-34 (1990).

<sup>121</sup> *The Belgian Linguistic Case*, para. 10.

<sup>122</sup> *Id.*

<sup>123</sup> As quoted by GOODWIN-GILL, *supra* note 9, at 78.

<sup>124</sup> BOSSUYT, *supra* note 10, at 38.

<sup>125</sup> *Id.* at 8-10.

<sup>126</sup> U.N. CHARTER, article 1, para. 3; article 13, para. 1, b; article 55, para. c; article 76, para. c.

<sup>127</sup> Universal Declaration, article 2 and article 7. The French text employs the expression "distinction" while the English text uses the term "discrimination". See BOSSUYT, *supra* note 10, at 12-18.

Several other international instruments contain express provisions prohibiting discrimination, such as the Convention relating to the Status of Refugees, article 3; the Convention relating to the status of Stateless Persons of 1954, article 3; article 1, paragraph 1 of the ILO 1951 Convention relating to Discrimination on Profession of 1958; article 1, paragraph 1 of the UNESCO Convention Against Discrimination on Education of 1960.

The European Convention, in its article 14, as well as the European Social Charter in its preamble mention this prohibition. The International Covenant on Economic, Social and Cultural Rights in article 2, 2 and the Covenant on Civil and Political Rights, in article 2,1 also contain a similar prohibition.<sup>128</sup>

It has been the object of doctrinal debate as to whether this right also applies to aliens, that is to say, whether the States are free to establish arbitrary distinctions as regards aliens, or if they are limited by this prohibition.

The Universal Declaration of Human Rights, in its Preamble, proclaims that this instrument is to be understood as a "*common standard of achievement for all peoples and all nations*"; the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes in its article 1 that "*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention.*"

The American Convention on Human Rights determines that :

- 1) *States parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, [without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition].*
- 2) *For the purposes of this Convention, 'person' means every human being.*

Therefore, according to the language of these instruments the rights described in them are to be granted to everyone, to every human being. Additionally, as international law sets forth that everyone has the right to be recognized as a person before the law,<sup>129</sup> aliens must be considered as persons.

Moreover, the non-discrimination provisions contained in these conventions can be understood as limiting the scope of those protected by the conventions, because the rights guaranteed in these conventions are already granted to everyone.

The U.N. Charter establishes a general prohibition against discrimination and does not limit the scope of this prohibition to the rights listed in the Convention,

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<sup>128</sup> The I.C.C.P.R. does not mention the term "discrimination" but distinction in both French and English versions. It should be pointed out that commentators such as Felix Ermacora and McKean, who have written about the topic have observed that the terms cannot be used interchangeably, for discrimination means an illegal or arbitrary distinction, thus it is not necessary to employ the term illegal discrimination for discrimination is always illegal. See BOSSUYT, *supra* note 10, at 25.

<sup>129</sup> See *infra* Chapter V on Private Rights, where the right to be recognized as a person before the law is analyzed.

instead it sets forth a broad principle regarding the application of all human rights.<sup>130</sup> The American Declaration, when establishing the principle of non-discrimination limits it “*to the rights and duties established in this declaration*”.<sup>131</sup> The Universal Declaration determines the principle of non-discrimination as regards “*the rights and freedoms set forth in this Declaration*” and, when guaranteeing equal protection by the law, it conditions it to the rules contained in “*this Declaration*”.<sup>132</sup> The C.P.R Covenant contains a broad rule of equality before the law and a general prohibition against discrimination.<sup>133</sup>

The European Convention refers to the “*enjoyment of the rights and freedoms set forth in this Convention*”,<sup>134</sup> and because of this lacuna in the European Convention, the Council of Europe has tried several times, without success, to introduce a more general rule to the Convention, prohibiting discrimination and granting equality before the law.<sup>135</sup> Thus, only the UN Charter and the C.P.R. Covenant contain general rules prohibiting discrimination without limiting the scope of this rule to the rights listed in the conventions.

In fact, if this rule prohibiting discrimination is limited to the rights listed in the Convention, the understanding of the term ‘everyone’ employed in the great majority of the provisions may create some controversy, because if these rights should be granted to everyone, as mentioned, why is there a need for the non-discrimination provision? In these cases, the non-discrimination provision has the role of emphasizing that the term ‘everyone’ employed in the conventions should be understood as such, without any sort of differentiation, which would very much weaken the strength of the provision. Instead, if this rule of non-discrimination is not limited to the rights listed in the Convention, this provision, besides emphasizing that no one may be excluded from the enjoyment of these rights, also stands out as a general principle of international law, prohibiting discrimination in all cases, all circumstances, applicable both in the international and domestic spheres.

The Human Rights Committee has stated, as regards non- discrimination, in accordance with article 26 of the C.P.R Covenant, that it does not merely duplicate the guarantee already provided for in article 2, but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination

<sup>130</sup> The U.N. Charter, article 1, determines that the Purposes of the United Nations are: (3) “*to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion*”.

<sup>131</sup> American Declaration, article II.

<sup>132</sup> Universal Declaration, article 7.

<sup>133</sup> I.C.C.P.R., article 26.

<sup>134</sup> European Convention, article 14.

<sup>135</sup> As quoted by BOSSUYT, *supra* note 10, at 69-71.

contained in article 26 is not limited to those rights which are provided for in the Covenant.<sup>136</sup>

Additionally, the U.N. Charter lists a prohibition of discrimination on the following grounds: “*race, sex, language or religion*”,<sup>137</sup> the American Declaration: “*race, sex, language, creed or any other factor*”,<sup>138</sup> the Universal Declaration: “*race, color, sex, language, religion, political or other opinion, national or social origin*,<sup>139</sup> *property, birth or other status*”,<sup>140</sup> the International Covenants: “*race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”,<sup>141</sup> the European Convention: “*sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”,<sup>142</sup> the American Convention: “*race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition*”<sup>143</sup>

Because of this limited list containing the grounds on which discrimination is prohibited, legal commentators argue whether this list is merely illustrative or comprehensive, because if it is understood as comprehensive, and as aliens are not included, distinctions based on alienage, no matter how absurd, may be understood as legal and valid under international law. However, if a distinction is made based on one of these grounds, there is an immediate presumption that the distinction is discriminatory. On the other hand, if we understand that this list is merely illustrative, distinction based on other grounds can also be considered discriminatory.

Undoubtedly, this list of grounds should be understood as merely illustrative and not conclusive, due to the terms employed in these provisions. They all admit the existence of other grounds or ‘other status’ or ‘other social condition’, as mentioned in the American Convention. Consequently, distinctions based on alienage, if entirely

<sup>136</sup> Human Rights Comment 18, Non-discrimination, 37th Sess, para. 12, at 28, HRI/GEN/1/Rev. 1 (1989). As regards the definition of discrimination the Committee said that it included “any distinction, exclusion, restriction or preference which is based on any ground which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.” *Id.* para 7, at 27.

<sup>137</sup> U.N. Charter article 1, para 3.

<sup>138</sup> The American Declaration, article 2.

<sup>139</sup> This ground prohibiting discrimination was introduced by the Universal Declaration and afterwards this expression, or an analogous one, is employed in all human rights instruments. See Bossuyt, *supra* note 10, at 53-54, and according to this author it is understood as not comprising a prohibition against discrimination based on alienage, but on nationalities in the sociological meaning, as in Belgium - not to discriminate against Belgians because of their French or Dutch origin.

<sup>140</sup> The Universal Declaration, article 2.

<sup>141</sup> The I.C.E.S.C.R., article 2(2), the I.C.C.P.R., article 2(1).

<sup>142</sup> The European Convention, article 14.

<sup>143</sup> The American Convention, article 1(1).

unfounded, can also be considered discrimination, and therefore should be understood as against international law.<sup>144</sup>

Another argument which can be used in favor of the understanding that aliens are included as beneficiaries of all general human rights instruments is the provision contained in the UN International Covenant on Economic, Social and Cultural Rights, article 2 (3), which expressly admits that developing countries may deny some economic rights to non-nationals. The fact that this provision was formulated together with the provision which establishes the rule of non-discrimination shows that this exception regarding non-nationals had to be expressly formulated or else aliens could not be excluded from benefiting from the Convention. If there was not such exception, aliens could not be denied the enjoyment of economic rights. Therefore, if there was the need of an express exception to admit that aliens are denied some economic rights, in the absence of such an exception, aliens cannot be discriminated against.

In sum, aliens can only be excluded from the enjoyment of certain rights, when the provision is formulated in such a way as to apply only to nationals, as in the case of political rights, or in the case of social rights in the UN Covenant with regard to developing countries, or else the right to enter and fix residence within a certain country.

In conclusion, aliens cannot be discriminated against, both in accordance with the understanding that the grounds prohibiting discrimination are merely illustrative, and under the general rule of the UN Charter prohibiting discrimination, which has raised the rule of non-discrimination to the status of a general principle of law.

Along these lines, the Human Rights Committee, in its interpretation of the C.P.R. Covenant, has observed that the civil and political rights detailed therein generally “*apply to everyone...irrespective of his or her nationality. The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.*”<sup>145</sup>

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<sup>144</sup> This understanding is also espoused by Vierdag, Guradze as quoted by BOSSUYT, *supra* note 10, at 64. Also RICHARD LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 43 (The Melland Schill Monographs in International Law, 1984) and Rüdiger Wolfrum, *International Law on Migration Reconsidered under the Challenge of New Population Movements*, 38 GERMAN YEARBOOK OF INTERNATIONAL LAW 191-207; 200(1995). Contrarily, Goodwin Gill, argues that, as regards the European Convention, the rights and freedoms laid down in it are expressed broadly and apply equally to both aliens and nationals, however, at 83, and 85 he admits that as alienage is not a prohibited ground for discrimination, some distinctions may be acceptable, *see supra* note 9; Karl Josef Partsch, *Os Princípios de Base dos Direitos do Homem: a autodeterminação, a igualdade e a não-discriminação*. AS DIMENSÕES INTERNACIONAIS DOS DIREITOS DO HOMEM 89 (ed. Karel Vasak, 1983) and Hernan Santa Cruz, Study of Discrimination in the Matter of Political Rights at 3 (UN Doc). Notwithstanding, legal commentators are somewhat uncertain as regards the extent of the protection granted to aliens under human rights instruments. As an example, Lillich’s conclusion lays on the premise that they are uncovered by the existing instruments, for he mentions: “*In the meantime, the law governing the treatment of aliens – in its broadest sense – resembles a giant unassembled juridical jigsaw puzzle... Actually, this figure of speech is not entirely apt, since it conveys the impression that there exists a certain number of pieces which, when assembled, will complete a predetermined design,*” at 122.

<sup>145</sup> Human Rights Committee, General Comment 15, 27th Sess., para. 2, at 20, HRI/GEN/1/Rev.1 (1986).

And further:

*Once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant. Aliens have the full right to liberty and security of the person ... They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence... Their children are entitled to those measures of protection required by their status as minors... Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.*<sup>146</sup>

Thus, undoubtedly, the right not to be discriminated against also applies to aliens, in spite of the fact that, in most human rights conventions, alienage is not listed as a prohibitive ground for discrimination. These grounds are merely explicative and not conclusive, for the terms of the provisions expressly admit the existence of 'other status' as prohibited grounds for discrimination.

Aliens can be treated differently though in cases where the right is only granted to nationals.<sup>147</sup> Consequently, as regards rights which are granted to everyone in the Universal Declaration, the UN Covenants or in the European Convention, if the States deny some of these rights to aliens, without any plausible reason, then it will be discrimination, deemed illegal under international law.

#### b) Comparative Law

Presently, more than 111 States express in their Constitutions the right to equality before the law and/or a prohibition against discrimination, and many countries which do not have these principles firmly established in their Constitution grant them a status of extreme importance.<sup>148</sup> Consequently, not only because of international law instruments, but also because of the domestic legislation of the States, the rule which prohibits discrimination is part of general international law.

The US Supreme Court has decided on several occasions the exact meaning of the right of equality before the law.

The XIV Amendment, section 1, of the US Constitution, the "equal protection clause"<sup>149</sup> is the basis for prohibition against discrimination as regards the states.

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<sup>146</sup> *Id.* para 5-7. This was quoted by Stephen Knight, *Proposition 187 and the International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HASTINGS INT'L & COMP. L. REV. 183, 204-05 (1995).

<sup>147</sup> MERON, *supra* note 2, at 114 argues that as the I.C.C.P.R. does not guarantee to everyone the right to enter, to reside in, and not be expelled from a particular country, consequently exclusion or restrictions upon entry of some individuals and not others cannot constitute discrimination in respect of a right granted by the Covenant.

<sup>148</sup> BOSSUYT, *supra* note 10, at 78.

<sup>149</sup> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Commentators tend to hold two different positions: 1) the equal protection clause does not have any substantive content but it establishes some general criteria to be followed. In order to establish whether a legislation violates this principle the rational-basis approach has to be used. Thus the discriminatory legislation has to serve a legitimate governmental purpose, and the classification invoked by the law has to be reasonably related or be a plausible means to that purpose.<sup>150</sup>

2) The equal protection clause has substance and thus it embodies some rules. One author defines these as: a) the state may not treat anyone's interests differently from the similar interests of anyone else; b) it may not dismiss anyone's interests; c) it may not impose harms that cause a group to become systematically isolated from the rest of society so that its members are unable to participate as equals; d) People are not essentially different in ways that would warrant treating some as generally inferior to others.<sup>151</sup>

Other commentators establish a simpler criterion, defining equal protection as the rule that admits that the Government may treat person (or group) A differently from person (or group) B, but only on the condition that the government is acting on the basis of some difference between A and B in the form of a contribution, a capacity to contribute, or a greater or lesser need which is relevant to the governmental policy in question.<sup>152</sup>

As regards alienage, US Supreme Court did not establish that equal protection prohibits discrimination against aliens as such, for it may be legitimate under certain circumstances to treat nationals and aliens differently, such as in the field of political rights. However, it should be said that legislation treating nationals and aliens differently should be carefully analyzed to determine whether it comprises invalid discrimination.

Along these lines, section 722 of the Revised Restatement deals specifically with the topic of aliens, in the following terms:

- 1) *An alien in the United States is entitled to all the guarantees of the Constitution of the United States other than those expressly reserved for citizens.*
- 2) *Under Subsection (1), an alien in the United States may not be denied the equal protection of the laws, but equal protection does not preclude reasonable distinctions between aliens and citizens, or between different categories of aliens.*

In France, it is important to examine not only the Constitution in force, but also what has been called the “*bloc de constitutionalité*”—block of constitutionality—, which comprises a group of sources of law having supra legislative value, including the

<sup>150</sup> As summarized by Judith Lichtenberg, *Within the Pale: Aliens, Illegal Aliens, and Equal Protection* 44 U. PIT. L. REV. 352 (1983).

<sup>151</sup> *Id.* at 367.

<sup>152</sup> Michael J. Perry, *The Principle of Equal Protection*, 32 HASTINGS L. J. 141-48. See also Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. (1979) and Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond, Plyler v. Doe* 44 U. PIT. L. REV. 329.

1789 Declaration of the Rights of Man, the Preamble of the 1946 Constitution and the Constitution of 1958. Additionally, the *Conseil Constitutionnel* also recognized the fundamental principles recognized by the laws of the Republic as part of this block.<sup>153</sup>

As regards the right of equality before the law, the French Constitution states in article 2: "*France is an indivisible, lay, democratic, and social republic. It ensures equality before the law for all citizens, without distinction as to origin, race, or religion. It respects all beliefs*". However the *Conseil* relies more on article 6 of the 1789 Declaration, which determines that: "*the law must be the same for all, whether it punishes or protects*". Also, the Preamble of the 1946 Constitution is devoted to equality.<sup>154</sup>

The *Conseil Constitutionnel* decided, on January 22 1990, in the *Social Measures* case, that as regards foreigners, legislation may establish specific distinctions on the condition that they comply with: 1) the international agreements to which France is a party, and 2) the fundamental rights and freedoms provided for in the Constitution. Only when the *Conseil* believes that the difference in treatment is the result of arbitrary legislation, rather than a result of a legitimate policy, this legislation will be deemed to violate the rule of equality.<sup>155</sup> Another decision of the *Conseil Constitutionnel* of January 9, 1990 states that simply being a foreigner places a person in a different legal situation and thus warrants different treatment under the laws.<sup>156</sup>

Brazilian legislation grants equality before the law both to nationals and resident aliens since the Constitution of 1891.<sup>157</sup> Therefore, only the distinctions adopted in the

<sup>153</sup> Susan Soltesz, *Implications of the Conseil Constitutionnel's Immigration and Asylum Decision of August 1993*, 18 B.C. INT'L & COMP. L. REV. 271 (1995).

<sup>154</sup> *Id.* at 283.

<sup>155</sup> *Id.* at 283-284.

<sup>156</sup> *Id.* at 289.

<sup>157</sup> The 1824 Brazilian Constitution grants the rights to life, freedom, security and property only to nationals. After the 1891 Constitutional text, resident aliens in Brazil enjoy the same fundamental rights as nationals, at Article 72, para. 2 (equality before the law). Afterwards all constitutional texts maintained this privilege, respectively, the Constitution of 1934, at Article 113,1; the Constitution of 1937, Article 122, 1; Constitution of 1946, Article 141, para.1; Constitution of 1967, Article 150, para.1; Constitution of 1969, Article 153, para.1. Currently, Article 5 of the Constitution determines: "*Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners resident in the country the inviolability of the rights to life, liberty, equality, security and property, on the following terms...*". In spite of the constitutional text which only guarantees these fundamental rights to resident aliens, non-residents have not been left unprotected. Legal commentators either understand that the term "resident aliens" employed in the Constitution mean everyone physically present in the country, or they interpret the Constitution as comprising only resident aliens, but consider that non-resident aliens are granted the same rights as a consequence of international human rights conventions ratified by Brazil, in accordance with article 5 para. 2 of the Brazilian Constitution, which reads: "*The rights and guaranteed established in this Constitution do not exclude others arising from the regime and principles adopted by it, or from international treaties to which the Federal Republic of Brazil is a party.*" For further details see Carmen Tiburcio, *Nationality and the Status of Aliens in the 1988 Brazilian Constitution*, PANORAMA OF BRAZILIAN LAW 280-81(1992).

constitutional text are acceptable.<sup>158</sup> Other distinctions, adopted in ordinary legislation, and not comprised in the constitutional text, are consequently unconstitutional.

Despite the fact that the right not to be discriminated against is clearly entrenched in general international law, many countries, such as Algeria, Australia; Austria; Belgium; Cape Verde; China; Congo; Cuba, Egypt, Greece, France, Italy, Jordan, Luxemburg, Portugal, Spain, Taiwan and Thailand grant this right in their legislation only to nationals.<sup>159</sup>

Antigua and Barbuda, Belize, Brazil, Chile, Germany, Hungary, India, Liberia, The Netherlands, Nicaragua, Paraguay, Peru and Poland determine in their legislation that the prohibition to discriminate should be applied to both nationals and aliens alike.<sup>160</sup>

#### *IV. Right not to be subjected to ex post facto laws*

##### **International Law**

The Universal Declaration adopts this rule,<sup>161</sup> as does the American Convention,<sup>162</sup> the International Covenant on C.P.R.<sup>163</sup> and the European Convention.<sup>164</sup>

The right not to be incriminated under *ex post facto* laws has limited application as regards the rights of aliens, as it only applies in criminal proceedings, according to the text of the conventions. Thus, as it has been widely accepted that expulsion

<sup>158</sup> In Brazil, in accordance with article 5 of the 1988 Constitution, resident aliens are assimilated to Brazilian nationals as regards the right to life, liberty, equality and property. The only distinctions which are admitted are those set forth in the Constitution, which are the following: article 5, LXXIII; article 12, para.3; article 14 para 2 and 3 ; article 89, VII; article 176 para.1; article 178 sole para.; article 192, III; article 199 para 3; article 222; article 227 para 5.

<sup>159</sup> ARGELIAN CONST.(1976) article 29; AUSTRALIAN CONST.(1900) article 117; AUSTRIAN CONST. (1929) article 7 (1); BELGIAN CONST.(1970) article 10.2; CAPE VERDIAN CONST. (1992) article 1.2; CHINESE CONST.(1982) article 33.2; CONGOLESE CONST. (1992) article 11.1; CUBAN CONST.(1976) article 41; EGYPTIAN CONST.(1971) article 40; GREEK CONST.(1975) article 4.1; FRENCH CONST. (1958) article 2; ITALIAN CONST.(1948) article 3, but the 1998 Aliens' Act expressly forbids discrimination against aliens in accordance with article 41 of the Law; JORDANIAN CONST. (1952) article 6.i; LUXEMBURG CONST. (1868) article 11.2; PORTUGUESE CONST.(1976) article 13.1 of the Constitution. However, article 15 of the Constitution sets forth: "Aliens and stateless persons staying or residing in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens."; SPANISH CONST. (1979) article 14; TAIWANESE CONST.(1978) article 7; THAI CONST.(1997) article 5.

<sup>160</sup> ANTIGUAN CONST. (1981) articles 3 and 14; BELIZEAN CONST.(1981) article 3; BRAZILIAN CONST.(1988) article 5; CHILEAN CONST.(1980) article 19.2; GERMAN CONST. (1949) article 3.1; HUNGARIAN CONST.(1949) article 57.1; INDIAN CONST.(1950) article 14; LIBERIAN CONST.(1984) article 11; DUTCH CONST.(1983) article 1; NICARAGUAN CONST.(1987) article 27; PARAGUAYAN CONST.(1967) article 54; PERUVIAN CONST.(1993) article 2.2; POLISH CONST.(1997) article 32.1.

<sup>161</sup> Article 11(2)

<sup>162</sup> Article 9.

<sup>163</sup> Article 15.1.

<sup>164</sup> Article 7(1).

and deportation are technically civil proceedings and not criminal, this guarantee does not apply in these cases.<sup>165</sup>

As a consequence, aliens may be expelled under legislation which did not exist at the time of the illicit behavior.

Another possibility of applying this rule, prohibiting application under *ex post facto* laws, outside the field of criminal law, has to do with the principle of respect for acquired rights. For example, if an alien acquires movable property in a foreign country, can that property be questioned under some other legislation? Likewise, if an alien is validly married in a foreign country, can the validity of that marriage be submitted to another legislation, for instance, of the country of residence?

The answers to these questions do not appear to be easy, for they deal with the theory of acquired rights in private international law<sup>166</sup> and legal commentators do not seem to have reached a definite rule as to how to determine if the right was validly acquired or not, that is to say, which legislation is to answer that question, namely foreign or domestic legislation.<sup>167</sup>

In my understanding, a right which has been validly acquired in accordance with the law in force in the foreign country should be respected everywhere, unless of course if it seriously violates local public policy. Local legislation should not be used to define whether a right was validly acquired or not, mainly in cases where the situation had absolutely no connection with the local forum at the time it occurred.

### Comparative Law

The great majority of countries grant this right in their legislation to both nationals and aliens alike. This is the case in Antigua and Barbuda,<sup>168</sup> Algeria,<sup>169</sup> Argentina,<sup>170</sup> Chile,<sup>171</sup> Congo,<sup>172</sup> Costa Rica,<sup>173</sup> Cuba,<sup>174</sup> Spain,<sup>175</sup> Germany,<sup>176</sup>

<sup>165</sup> It should be observed that this assumption leads to several other differences as regards the applicability of human rights treaties and guarantees limited to criminal proceedings, such as the standard of proof required. In criminal proceedings normally the standard of proof required is the one beyond a reasonable doubt, while in civil proceedings the standard is less strict. Along these lines, the US Supreme Court in the case *Bugajewitz v. Adams* 228 US 585 (1913) defined deportation not as a punishment. See infra chapter IX on Procedural Rights.

<sup>166</sup> It should be mentioned that Alfred Verdross, *Les Règles Internationales concernant le Traitement des Étrangers*, 37 RECUEIL DES COURS 354, 354,357-76 (1931), points out that respect with regard to acquired rights is a basic rule of treatment of aliens.

<sup>167</sup> See Pierre Armijon, *La Notion des Droits Acquis en Droit International Privé*, 44 RECUEIL DES COURS 103 (1933); R. D. Carswell, *The Doctrine of Vested Rights in Private International Law*, 8 INT'L AND COMP. L. Q. 271 (1959).

<sup>168</sup> ANTIGUAN CONST. (1981), article 15.4.

<sup>169</sup> ARGELIAN CONST. (1976), article 46.

<sup>170</sup> ARGENTINIAN CONST. (1853), article 18.

<sup>171</sup> CHILEAN CONST. (1980), article 19.3.

<sup>172</sup> CONGOLESE CONST. (1992), article 15.

<sup>173</sup> COSTA RICAN CONST. (1949), article 34.

<sup>174</sup> CUBAN CONST. (1976), articles 59 and 61.

<sup>175</sup> SPANISH CONST. (1978), article 25.1.

<sup>176</sup> GERMAN CONST. (1949), article 103.2.

Greece,<sup>177</sup> Honduras,<sup>178</sup> Hungary,<sup>179</sup> Liberia,<sup>180</sup> Mexico,<sup>181</sup> The Netherlands,<sup>182</sup> Nicaragua,<sup>183</sup> Norway,<sup>184</sup> Paraguay,<sup>185</sup> Peru,<sup>186</sup> Portugal,<sup>187</sup> Sweden<sup>188</sup> and Turkey.<sup>189</sup>

In brief, as regards those non-derogable rights such as the right to life, right to personal freedom, equality before the law (non-discrimination) and the right not to be incriminated under *ex post facto* laws, there should be no differential treatment between nationals and aliens.<sup>190</sup>

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<sup>177</sup> GREEK CONST. (1975), article 7.1.

<sup>178</sup> HONDURAN CONST. (1982), article 95.

<sup>179</sup> HUNGARIAN CONST. (1949), article 57.4.

<sup>180</sup> LIBERIAN CONST. (1984), article 21.a.

<sup>181</sup> MEXICAN CONST. (1917), article 14.

<sup>182</sup> DUTCH CONST. (1983), article 16.

<sup>183</sup> NICARAGUAN CONST. (1987), article 38.

<sup>184</sup> NORWEGIAN CONST. (1814), article 97.

<sup>185</sup> PARAGUAYAN CONST. (1967), article 67.

<sup>186</sup> PERUVIAN CONST. (1993), article 2.24.d.

<sup>187</sup> PORTUGUESE CONST. (1976), article 29.1.

<sup>188</sup> SWEDISH CONST. (1975), Chapter 2, article 20.1.5 (grants this right to aliens).

<sup>189</sup> TURKISH CONST. (1982), article 38.

<sup>190</sup> GOODWIN-GILL expresses this opinion, *see supra* note 9 at 75.

## Private Rights

### I. DEFINITION

The expression private rights should be understood as comprising "civil rights" according to its meaning in the civil law tradition. Thus, we employ the expression private rights to mean the rights related to those areas covered by the civil codes and their auxiliary statutes.<sup>1</sup>

The best classification of civil rights is the one adopted by Justinian's *Institutes*, in the 6th century AD, in the first three books: Of Persons, Of Things, Of Obligations. Under this category we include the law of persons, the family, inheritance, property, torts, unjust enrichment, and contracts and the remedies by which interests falling within these categories are judicially protected.<sup>2</sup>

Civil rights, as understood by the common law tradition, meaning the fundamental rights of a human being, for the purposes of this dissertation, are treated in the previous chapter, "fundamental rights".

### 2. HISTORICAL DEVELOPMENT OF THE PRIVATE RIGHTS

In the chapter dealing with the historical viewpoint of the treatment of aliens, it has been pointed out that in ancient times, aliens had no rights at all, because law was intrinsically linked to worship.<sup>3</sup> As aliens did not profess the same religion as that of the city, they were denied civil and political rights.

Among the Hebrews, aliens were not able to transmit property after death.<sup>4</sup>

In Athens, as seen earlier, there were four categories of aliens: the isoteles, the meteques, the non-resident aliens and the barbarians. Civil rights were granted in Athens only to the isoteles, because of treaties signed between Athens and other States, or popular decrees.

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<sup>1</sup> See MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 57 (ed. 1985)

<sup>2</sup> That is the definition proposed by JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 6 (2nd ed., 1985)

<sup>3</sup> See *supra* chapter II on the Historical Development on the Treatment of Aliens. See also 2 ANDRE WEISS, TRAITE THEORIQUE ET PRATIQUE DE DROIT INTERNATIONAL PRIVÉ 7 (2nd ed. 1908) and NUMA DENIS FUSTEL DE COULANGES, THE ANCIENT CITY 185 (1980).

<sup>4</sup> WEISS, *supra* note 3, at 12, quoting De Pastoret.

Other aliens domiciled in Athens were denied these basic civil rights. If the alien happened to be the creditor of a citizen, he could not sue him in the courts for the payment of the debt, as the law recognized no validity of contracts signed by aliens.<sup>5</sup>

In Rome, for the same reasons, a foreigner could not be a proprietor, nor marry, nor execute a contract. Roman law forbade aliens to inherit from a citizen and also forbade a citizen to inherit from them. This was because an alien could not own part of the religious soil of the city and because every transmission of property also implied a transmission of worship. As an alien could not perform religious duties, he was therefore denied these rights.<sup>6</sup>

During the Middle Ages, as law was eminently territorial, someone who left his or her territory of origin, became a foreigner elsewhere, and was treated as an *aubain*. The *aubain* was denied land ownership and could also not inherit. By the eighteenth century, the *droit d'aubain* became a widespread institution in Europe.<sup>7</sup>

The right to family life was considered a basic human right as early as with Hugo Grotius who argued that every individual should be allowed the right to seek marriages in foreign countries.<sup>8</sup>

However, as regards the right to own property he was less liberal, not admitting that an alien may own part of a local soil, except when this is regarded as desert and unproductive land.<sup>9</sup>

Vattel defends the right of the alien to own property and to dispose after death, in the following terms:

*As the right of bequeathing by will, or of disposing of his fortune, in case of death, is a right resulting from property, it cannot without injustice, be taken from a stranger. The stranger has then, by natural right, the liberty of making a will.*<sup>10</sup>

Further, he criticizes the law which denied aliens the right to inherit and to transmit, under the argument that this law was made “*in the ages when foreigners were almost considered enemies*”.<sup>11</sup> Notwithstanding this viewpoint, Vattel admits that States are free to establish specific prohibitions or limitations regarding the right of aliens to own immovable property.<sup>12</sup>

As regards marriage, he also admits limitations imposed on aliens for reasons of national security. He reminds readers that in Switzerland citizens could not marry a foreign woman unless it was proved that she brought with her a certain sum, established by law.<sup>13</sup>

<sup>5</sup> DE COULANGES, *supra* note 3, at 185.

<sup>6</sup> *Id.* at 188-89.

<sup>7</sup> See EDWIN BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 35 (1916).

<sup>8</sup> Hugo Grotius, *The Law of War and Peace*, THE LEGAL CLASSICS LIBRARY, bk. 2, ch. 2, no. XVII (1984).

<sup>9</sup> *Id.* Rule XXI: “*Again, if within the territory of a people there is any deserted and unproductive soil, this also ought to be granted to foreigners if they ask for it.*”

<sup>10</sup> EMMER DE VATTEL, THE LAW OF NATIONS, bk. 2, ch. 8.

<sup>11</sup> *Id.* at para. 112.

<sup>12</sup> *Id.* at para. 114.

<sup>13</sup> *Id.* at para. 115.

In France, before the Revolution, due to the existence of several treaties with other foreign States, there was no uniformity regarding the treatment of the *aubain*. Nationals of certain States could transfer their property after death, provided their property was subjected to the payment of taxes, which also, in their turn, varied greatly. Nationals of certain other countries could transfer and receive property because of reciprocity, while others could transmit property only to French heirs.

In England the *droit d'aubain* did not become a legal institution, mainly because of commerce. Merchant aliens received a license to trade and to reside in England, subject to the payment of certain taxes. As regards real property though, aliens were also discriminated against, for the possession of a real property involved an oath of allegiance, which was impossible for the alien to perform. This situation remained so until 1870, when aliens were first rendered capable of taking title in fee to real property.<sup>14</sup>

After the French Revolution, one of the first decisions of the Constituent Assembly was the extinction of the *droit d'aubain*, by law of October 6<sup>th</sup>, 1790, but this situation did not last long, as the Napoleonic Civil Code re-established it<sup>15</sup> prohibiting once again an alien to receive or transmit property. The Napoleonic Code also established, in its article 11, that aliens could only be granted the same civil rights granted to the French in their countries of origin.<sup>16</sup>

This was once again prejudicial to the alien, for the Civil Code established the need of a diplomatic treaty between France and the country of origin of the alien for him to have rights in France. In absence of such a treaty the alien should be denied all civil rights. Later, French tribunals softened the understanding of this rule.<sup>17</sup>

On July, 14, 1819 the *droit d'aubain* was abolished, but the same law introduced the *droit de prélèvement*, which established a preference for French heirs in matters of inheritance.<sup>18</sup>

At the end of the XIX century, the Chilean and Italian Civil Codes adopted the rule of equality between nationals and aliens regarding civil rights. Following this trend, the International Law Institute, in its session of 1874, in Geneva, under the influence of Mancini and the Italian Code, decided that aliens should not be denied civil rights, nor should these rights be conditioned to reciprocity or international treaties.<sup>19</sup>

Along these lines, Anzilotti, in his course at the Hague in 1929, summarized the common viewpoint that all States are obliged to recognize nationals of other States as human beings, who have legal personality and can acquire rights, with all the consequences of public and private law.<sup>20</sup>

<sup>14</sup> BORCHARD, *supra* note 7, at 35.

<sup>15</sup> Napoleonic Civil Code articles 726 and 912.

<sup>16</sup> See J HENRI BATIFFOL & PAUL LAGARDE, DROIT INTERNATIONAL PRIVÉ 205 (5th ed. 1970).

<sup>17</sup> See *infra* this chapter, a report on the interpretation of this rule by French courts.

<sup>18</sup> BATIFFOL & LAGARDE, *supra* note 16, vol. II, at 319.

<sup>19</sup> I ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, édition abrégée, at 52.

<sup>20</sup> Dionizio Anzilotti, 26 RECUEIL DES COURS 45 (1929): "tout État est tenu envers les autres États de reconnaître à leur nationaux respectifs la qualité de personnes, de sujets de droits, avec les conséquences de droit public et de droit privé qui en d'écoulent et de leur octroyer la protection juridique voulue par la reconnaissance de cette qualité."

Later, in 1931, Verdross, also at the Hague, when describing the rights of aliens in international law, concluded that already at that time there was a consensus regarding the right of the alien to be treated as a person and to be able to acquire rights in general. According to Verdross there was no such rule, either as regards the right to acquire private property nor regarding the acquisition of ships and airplanes. However, if the alien already owned private property, he should be accorded the right to dispose of the asset. Finally, the right to make a will and to inherit were also considered to be a consensus in international law and therefore should be granted to everyone, without distinction.<sup>21</sup>

### 3. LIMITATIONS TO BE IMPOSED ON HUMAN RIGHTS

Except for the rights classified as non-derogable, all the guarantees established in Human Rights instruments may be suspended temporarily or be denied in specific cases, for reasons of public policy, public health, national security and morals or the rights and freedoms of others.

Along these lines, the Universal Declaration sets forth a general criterion in article 29 (2) in accordance to which the rights provided for in the Declaration can be suspended, in the following terms:

*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*

Hence, the Universal Declaration does not consider any set of rights to be non-derogable and it establishes a general possibility of derogation of all rights listed in broad terms, although it determines in clear and objective terms that limitations to the rights guaranteed in the Declaration have to be established by law.

The E.S.C.R. Covenant adopts the same criterion as the Universal Declaration as it determines a general possibility of derogation, in the following terms:

*Article 4- The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.*

Notwithstanding this general clause, the E.S.C.R. Covenant also adopts the possibility of specific limitations as regards the right to form trade unions and the right to strike.

The European Convention adopts a different methodology as regards the possibility of limitations, as it sets forth three levels of rights: 1) non-derogable rights –

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<sup>21</sup> A. Verdross, *Les Règles Internationales concernant le Traitement des Étrangers* 37 RECUEIL DES COURS 327, 354-57 (1931).

article 15 (2) ; 2) rights which can only be derogated in times of emergency – article 15(1), and; 3) rights which can be derogated on a case-by-case basis for reasons of public safety, public order, public health or morals or the rights and freedoms of others: right to have a public hearing; right to private and family life; right to freedom of thought, conscience and religion; freedom of expression; freedom of peaceful assembly and association.

The C.P.R. Covenant adopts this same methodology with the following categories: 1) non-derogable rights; 2) rights which can only be derogated in times of emergency, officially proclaimed by the State as set forth in article 4 of the Covenant (right to due process of law; recognition as a person before the law; right to private life; right to marry); 3) rights which can be derogated on a case-by-case basis for reasons of national security, public order, public health or morals or the rights and freedoms of others: freedom of movement; prohibition against collective expulsion; freedom of religion; freedom of opinion, freedom of peaceful assembly and freedom of association.

As regards this third category of rights, which include rights which can be derogated by the State on a case-by-case basis, the Human Rights Committee has stated that States should provide justification for the limitations imposed.<sup>22</sup>

The American Convention follows this same trend as it establishes three categories of rights: 1) non-derogable rights – article 27 para.2; 2) rights which can only be derogated in states of emergency – article 27 para. 1 and; 3) rights which can be derogated on a case-by-case basis for reasons of national security, public policy, public health or morals or rights and freedoms of others: freedom of religion; freedom of expression; right to assemble; right to associate; right to private property; freedom of movement and to fix residence.

That is to say, that each of these conventions establishes a list of rights which cannot be derogated, therefore these rights – different in each convention – cannot be abridged or suspended, as already analyzed in the previous chapter.

As regards the category of rights which can only be suspended after an official declaration of the State due to state of emergency, as they demand a more formal proceeding in order to admit derogation, they are of easy verification.

Rights which can be derogated on a case-by-case basis and for reasons of national security, public policy, public health morals or the rights and freedoms of others are more bound to be disrespected as the States may limit or restrict them without the need of a formal declaration. However, in accordance with the decision of the Human Rights Committee, mentioned above, all these limitations have to be justified in order to be viewed by the international community as valid, bound to limit human rights as declared in human rights instruments.

#### 4. THE ESCAPE CLAUSES- THE PUBLIC POLICY PRINCIPLE

Twenty three centuries ago, Aristotle already perceived how difficult it is to legislate. On the one hand, there is the need for legal certainty, uniformity and pre-

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<sup>22</sup> THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 117 (1986).

dictability while on the other, there is the need for flexible and equitable solution.<sup>23</sup> Joseph Beale, wrote with regard to the perpetual struggle between legal certainty and flexibility: “*The whole history of law is the history of alternate efforts to render the law more certain and to render it more flexible*”.<sup>24</sup>

More recently, René David puts it in the following terms, “*there is and will always be in all countries, a contradiction between two requirements of justice: the law must be certain and predictable on one hand, it must be flexible and adaptable to circumstances on the other.*”<sup>25</sup>

Private International law has always dealt with this problem by adopting rigid rules, but with the possibility of avoiding undesirable results through the applicability of escape devices, such as *ordre public* and *remvoi*.<sup>26</sup> The creators of modern Private International Law in the 14<sup>th</sup> century, Bartolo and Baldo, distinguished between favorable statutes and hateful statutes<sup>27</sup> and Savigny and Story, setting forth the basis for modern Private International Law in the 19<sup>th</sup> century, developed the public policy principle.<sup>28</sup> At present, all Private International Law Conventions elaborated by the Hague Conference of Private International Law contain such general clauses, stating that the general rules adopted by the conventions may be derogated by the States if the law deemed applicable by the convention violates local public policy. The Inter-American Conference on Private International Law, which also produces conventions, adopts the same criterion, just to quote a few examples. Thus, Private International Law has always dealt with this perpetual tension by admitting the possibility of derogation of rigid rules by these escape devices, to be applied by the States, on a case-by-case basis.

More recently, the same approach was taken with regard to human rights instruments. There are rights, guaranteed in the human rights conventions, that can be derogated by the State parties, under special circumstances, due to reasons of national security, public order, public health or morals or the rights and freedoms of others. Therefore, these exceptions are limitations to the general rule comprised in the provision – that the right in question should be granted – and should be applied as such, as exceptions to the general rule. These exceptions, although open-ended, do not mean that the State may, at its own discretion, derogue the rules adopted in

<sup>23</sup> ARISTOTLE, THE NICOMACHEAN ETHICS, V, x 4-7 as quoted by S.C.Symeonides, *Exception Clauses in Conflicts Law, United States, EXCEPTION CLAUSES IN CONFLICT OF LAWS AND CONFLICTS OF JURISDICTIONS – OR THE PRINCIPLE OF PROXIMITY* 77 (International Academy of Comparative Law, ed. Kokkini-Iatridou, 1994)

<sup>24</sup> 1 JOSEPH H BEALE, A TREATISE ON THE CONFLICT OF LAWS 50 (1935).

<sup>25</sup> FRENCH AND ENGLISH LAW 24 (1980).

<sup>26</sup> It should be observed that THE RESTATEMENT OF CONFLICT OF LAW 2ND § 188 (1969) has adopted a more modern approach, of flexible rules, such as the rule which leads to the law which “*has the most significant relationship to the occurrence*”, which was also adopted by the Rome Convention on the Applicable Law to Contractual Obligations, 1980. 1980 and the Inter-American Convention on the Applicable Law to International Contracts, 1994.

<sup>27</sup> BARTOLUS DE SAXOFERRATO, BARTOLUS ON THE CONFLICT OF LAWS 32 (J. Beale trans, 1914).

<sup>28</sup> For an historical and current analysis of the public policy principle in private international law, see Jacob Dolinger, *World Public Policy: Real International Public Policy in the Conflict of Laws*, 17 TEX. INT'L L. J. 167 ( 1982).

international conventions. These exceptions have to be motivated and justified and the States may be held responsible for breach of the obligations imposed by the convention if these exceptions are resorted to in an abusive manner.

## 5. THE ANALYSIS OF THE PRIVATE RIGHTS

### *I. Private Rights in General*

#### *a) International Law*

Few international documents mention the general expression "civil rights" or "private rights", granting or establishing limitations to their enjoyment. This fact could be explained by the diversity of legal systems in the world. As the expression "civil rights" is not employed in this sense by the countries which belong to the common law tradition, international conventions, in order to have a greater number of member States, have to employ a terminology more universally accepted. Therefore, in the great majority of conventions, the provisions deal with a specific right, such as the right to own property, to marry and so on, instead of dealing with the general category, civil rights or private rights. For this reason, only conventions of more limited scope, such as those of regional level, mention the above expression.

The first international convention ever realized on Private International Law was the Lima Treaty on Private International Law, in 1878, which established that all foreigners have the same civil rights as nationals.<sup>29</sup>

This convention never came into force as such, for none of the countries that participated in the Congress ratified it. However, Ecuador and Colombia, in 1903, adopted the terms of this convention in a treaty which is in force between them.

The Havana Convention on the Rights of Aliens, done in 1928, also refers to civil rights in general, establishing that as a rule aliens should be granted the same civil rights as nationals, but under certain circumstances the State of residence can limit the enjoyment of some specific rights.<sup>30</sup>

The Bustamante Code, elaborated in Havana in 1928, has the same approach, establishing:

*Article I - Foreigners belonging to any of the contracting States enjoy, in the territory of the others, the same civil rights as are granted to nationals.*

*Each contracting State may, for the reasons of public order, refuse or subordinate to special conditions, the same exercise to the nationals of the former.*

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<sup>29</sup> Article 1 - "Los extranjeros gozan en la Republica de los mismos derechos civiles que los nacionales"

<sup>30</sup> Article 5 - "States should extend to foreigners, domiciled or in transit through their territory, all individual guarantees extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usage for the exercise of said rights and guarantees."

This convention, which mentions civil rights in general, also admits limitations established by the States, because of special circumstances.

Thus, as regards civil rights as a category, we can observe that the only convention which grants these rights to everyone without any sort of limitation has never been ratified as such. The other two grant civil rights to aliens, but with the possibility of establishing limitations to the enjoyment of these rights.

### *b) Comparative Law*

The legislation of countries which are party to the common law tradition, for obvious reasons do not make any reference whatsoever to the enjoyment of civil rights in general. Even many countries which are party to the civil law tradition do not refer to civil rights in their legislation, with regard to their enjoyment by aliens.

Among the countries which make express reference to civil rights, three different categories can be observed. The first category establishes complete assimilation between aliens and nationals concerning the enjoyment of civil rights, without any limitation whatsoever. The legislation of these countries adopts a general rule that aliens and nationals should be treated alike for the purposes of enjoyment of civil rights.

The Chilean Civil Code, adopted in 1855, was the first ever to adopt this complete assimilation,<sup>31</sup> and the Italian Civil Code followed the same trend, of total assimilation, in its Civil Code of 1865, later revoked.<sup>32</sup>

Brazil, Greece and Uruguay also, in their ordinary legislation, establish similar rules of absolute equality,<sup>33</sup> and Argentina also adopts the same principle, in its Constitution.<sup>34</sup>

Spanish legislation, in the 1888 Civil Code, also assimilates aliens to Spaniards, establishing the exception of hierarchically superior legislation, that is, Constitution and international conventions.<sup>35</sup>

Peruvian legislation, although not mentioning expressly the Constitution, adopts the same idea, assimilating aliens to nationals, but putting national interest on a higher level, admitting thus that some aliens' rights may be abridged.<sup>36</sup>

<sup>31</sup> Article 57 - "La ley no reconoce diferencia entre el chileno y el extranjero en cuanto a la adquisición y goce de los derechos civiles que regla este Código."

<sup>32</sup> Article 3 - "Lo straniero è ammesso a godere dei diritti civile attribuiti ai cittadini."

<sup>33</sup> Respectively, the Brazilian Civil Code of 1917, article 3: "A lei não distingue entre nacionais e estrangeiros quanto à aquisição e ao gozo dos direitos civis"; Greek Civil Code of 1940, article 4: "L'étranger jouit des mêmes droits civils que le national"; Uruguayan Civil Code of 1868, 1941 and 1994, article 22: "La ley oriental no reconoce diferencia entre orientales y extranjeros, en cuanto a la adquisición y goce de los derechos civiles que regla este Código."

<sup>34</sup> ARGENTINEAN CONST. (1853), article 20. Argentinean Civil Code (1869), article 53: "Les [a todos] son permitidos todos los actos y todos los derechos que no les fueren expresamente prohibidos, independientemente de su calidad de ciudadanos y de su capacidad política." Therefore, Argentina adopts complete equality in its Constitution, but in its ordinary legislation does not seem so liberal.

<sup>35</sup> Article 27 - "Los extranjeros gozan en España de los derechos que las leyes civiles conceden a los españoles, salvo lo dispuesto en el artículo 2 de la Constitución del Estado o en Tratados internacionales."

<sup>36</sup> Civil Code (1936), article XVI: "El derecho de propiedad y los demás derechos civiles son comunes a peruanos y extranjeros, salvo las prohibiciones y limitaciones que por motivo de necesidad nacional se establezcan para los extranjeros y las personas jurídicas extranjeras."

The second category also puts the alien on the same footing as nationals, but ordinary legislation can create further distinctions. That is to say, this rule is directed to administrators applying the law, for once the statutory law does not discriminate, no difference in treatment is allowed. This rule is not directed towards legislators, for they can establish differences.

Polish legislation is an example of this category.<sup>37</sup>

The third group is composed of countries which, for the concession of any right to aliens, observe the treatment of their nationals in the country of the alien's origin. This is the idea of reciprocity, or according to the ancients "an eye for an eye, a tooth for a tooth".<sup>38</sup>

French legislation is the traditional example of this trend, as per its 1804 Civil Code.<sup>39</sup>

However, although French legislation adopts a very harsh criterion of treatment of aliens, only admitting that aliens enjoy in France the same rights granted to French nationals in the alien's country of origin, treaties, legal comments and court decisions have substantially softened the application of this rule. Thus, according to a decision of the French *Cour de Cassation* in 1948, France would be classified in the second group, where only legislation could create distinctions between aliens and nationals and reciprocity is not taken into account.<sup>40</sup>

<sup>37</sup> Polish legislation on Private International Law (1965), article 8: "*Les étrangers peuvent avoir en Pologne les mêmes droits et obligations que les ressortissants Polonais, à moins qu'une loi n'en dispose autrement.*"

<sup>38</sup> This rule was part of the Code of Hammurabi (1792 to 1750 B.C.).

<sup>39</sup> Article 11 - "*L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les traités que la nation à laquelle cet étranger appartiendra.*"

<sup>40</sup> In French doctrine, there have been three understandings regarding this rule:

A) Demolombe's He proposes a literal explanation. The civil rights mentioned in the Code are all private rights. Therefore, in the absence of any treaty, aliens would be granted no rights in France.

B) Aubry and Rau's - They propose to interpret art. 11 of the Civil Code according to the distinction made by ancient authors between "droits civils" and "droits des gens", preaching that only the former could be denied to aliens, conditioned to reciprocity. In order to distinguish between the two categories, they propose the following criterion: rights belonging to "droits des gens" are those which originate from natural law or which are generally granted by the majority of States. Thus, marriage and property are in this category, while adoption is in the other. Therefore, according to this explanation, aliens would be granted a certain minimum set of rights, independently of reciprocity. This interpretation follows the understanding expressed by the authors of the Code.

C) Demangeat and Valette's - They also understand that only civil rights can be subject to reciprocity and that aliens should be granted all 'droit des gens'. However, they define civil rights as those rights expressly denied to aliens by the law.

The tribunals have finally adopted the understanding that: "*qu'il est de principe que les étrangers jouissent en France des droits qui ne leur sont pas spécialement refusés*", that is, aliens should be granted in France all civil rights not expressly denied to them. Decision of the French *Cour de Cassation Civile*, of June 27, 1948, D. 1948, 535, R. 1949.75. JEAN DERRUPPÉ, DROIT INTERNATIONAL PRIVÉ 36-37 (6th ed. 1980).

Portugal, Austria and Italy adopt a somewhat more demanding criterion in their legislation: besides admitting legislation to create further distinctions, they also condition the enjoyment of civil rights by aliens to reciprocity.<sup>41</sup>

In reality, these three groups could be understood to form only two, for the first and second, in practice, are the same. The first group, adopting complete assimilation in ordinary legislation, because of general rules on law revocability, *posteriori revogat priori*, permits any other law, later enacted to revoke this previous provision. Therefore, this assimilation provision is only valid in the silence of any other law, enacted afterwards. This group could be said to be a different category if this assimilation provision integrated hierarchically higher legislation, such as the Constitution, because in this case ordinary legislation could not create any distinctions.

However, even if similar in practice, there is a difference in the purpose and philosophy of these provisions. The first group can be understood as adopting a rule directed towards the administrator applying the law as well as towards the legislator, while the second is clearly directed towards the administrator alone.

## *H. Right to be recognized as a person*

### *a) International Law*

Since long, aliens have been recognized as persons, as human beings before the law. It is true, as we have seen, that in Antiquity, aliens were not recognized as such, for they were denied the enjoyment and acquisition of all rights. Therefore many international conventions still emphasize this right, maybe for the sake of tradition.

The American Declaration, signed in 1948, establishes the following:

*Article XVII- Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.*

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<sup>41</sup> Civil Code, (1966), article 14: “1- Os estrangeiros são equiparados aos nacionais quanto ao gozo de direitos civis, salvo disposição legal em contrário. 2- Não são, porém, reconhecidos aos estrangeiros os direitos que, sendo atribuídos pelo respectivo Estado aos seus nacionais, o não sejam aos portugueses em igualdade de circunstâncias.” The Austrian General Code of 1811, in force according to Section VIII, Final Acts of the Federal Law of Austria of June 15, 1978, ordains: “Les étrangers ont, en général, les mêmes droits civils et les mêmes obligations que les nationaux, sauf si la qualité de citoyen est exigée expressément pour l’usage de ces droits. Pour pouvoir jouir des mêmes droits que les nationaux, les étrangers doivent aussi prouver en cas de doute, que l’État dont ils sont ressortissants traite les citoyens autrichiens de la même façon que ses propres citoyens pour les droits dont il s’agit.” In Italy the rule establishes equal treatment except when international conventions and the Alien’s Act determine otherwise. Reciprocity is still an adopted criterion, *in verbis*: “art. 2.2- Lo straniero regolarmente soggiornante nel territorio dello Stato gode dei diritti in materia civili attribuiti al cittadino italiano, salvo che le convenzione internazionali in vigore per l’Italia e la presente legge dispongano diversamente. Nei casi in cui la presente legge o le convenzione internazionale prevedano la condizione di reciprocità, essa è accertata secondo i criteri e le modalità previsti dal regolamento di attuazione.” Legge n.40 of March 6, 1998, LXXXI RIVISTA DI DIRITTO INTERNAZIONALE 878-911 (1998).

The Universal Declaration, also elaborated in 1948, in its article 6, sets forth:

*Article 6 - Everyone has the right to recognition everywhere as a person before the law.*

The C.P.R. Covenant, signed in 1966, determines:

*Article 16- Everyone shall have the right to recognition everywhere as a person before the law.*

The American Convention, of 1969, establishes:

*Article 3 - Every person has the right to recognition as a person before the law.*

Consequently, international law determines that everybody should be considered as a person before the law, without any exceptions whatsoever and, as a consequence to this ruling, aliens are also included in this provision.

Finally, it should be noted that both the C.P.R. Covenant (art. 4.2) and the American Convention (art. 27.2) consider this right to be recognized as a person before the law as non-derogable and therefore bound to suffer no limitations at all.

It is important to distinguish between 'juridical personality' – right to be recognized as a person – "legal capacity" and "capacity to exercise rights" in the civil law tradition, for each of these aspects can be submitted to a different rule of law.

As regards the juridical personality, that is the right to be recognized as a person before the law or the ability to be part of a legal relation, this is recognized by international law to aliens, as we have seen. Thus, everyone has the generic ability to acquire rights, without limitations of any sort.

Legal capacity, in turn, can be partially limited in some circumstances and refers, among other things, to these specific restrictions imposed on aliens by the law, concerning specific situations, such as the prohibition to own property in certain areas, or to be shareholders of an enterprise. That is, these limitations do not interfere in the juridical personality of the alien as he or she are not denied the right to be recognized as a person before the law, for other rights are not necessarily denied to them.

Capacity of exercise is the capacity to act in his or her own name in the legal arena, established by the law applicable to the case, according to Private International Law rules.

Undoubtedly, the issue of the status of aliens is preliminary to the issue of conflict of laws, that is, the law applicable to a concrete case. The issue of the legal capacity of aliens—status of aliens—is to be determined by the *lex fori*, that is, in France, French law determines to what extent an alien can have rights and which rights can be denied to him or her.<sup>42</sup> For instance, as regards the prohibition established in Brazilian legislation regarding ownership of broadcast corporations, it does not mean that in Brazil an alien should be denied all rights, for any such prohibition, denying an alien juridical personality, would be entirely against international law. It

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<sup>42</sup> See BATIFFOL & LAGARDE, *supra* note 16, at 180.

only denies an alien the enjoyment of this specific right. On the other hand, the enjoyment of this right in France, over corporations located in France, has to be allowed or denied to aliens by French law (status of aliens – legal capacity)<sup>43</sup> and any restriction applies to specific situations only.

The capacity to exercise rights, in turn, determined by conflicts of laws rules, is to be established by the law of the domicile or nationality of the individual in most cases, or as regards corporations, this capacity is regulated by the law of the place of incorporation, as a rule. It may happen therefore, that someone has legal personality, has the capacity to acquire a specific right but, in accordance with the laws of his domicile, has not the capacity to exercise this right. It may also happen that someone has personality, has capacity to exercise rights according to the law of domicile, but does not have capacity to acquire a specific right, according to the *lex fori*, because she is an alien. In this case, the individual definitively cannot acquire the specific right, while in the first example, he may be able to exercise the right if represented by someone else.

### *b) Comparative Law*

At this stage of civilization, no country expressly denies to aliens legal personality. Rules dealing with the acquisition of personality apply to every human being without distinctions.<sup>44</sup>

Few countries have specific rules on acquisition of legal personality. Argentinean legislation, in its 1869 Civil Code<sup>45</sup> adopts rules regarding acquisition of personality to every human being, without distinctions, and Brazil, in its 1917 Civil Code<sup>46</sup> follows the same trend.

As regards capacity to acquire rights, there are several restrictions imposed on aliens, which will be analyzed separately. In Brazil, for instance, according to the Constitution, aliens are denied proprietorship of media network companies<sup>47</sup> and ownership of real estate in rural areas may be denied to aliens in accordance with

<sup>43</sup> See PIERRE MAYER, DROIT INTERNATIONAL PRIVÉ 671 (1977). This distinction between personality and legal capacity is sometimes difficult to make. Some legal commentators use the concepts interchangeably. Such is the case of BATTIFOL & LAGARDE, *supra* note 16, at 57, in which they state that in France the concept of "person" varies according to the status of the individual, if national or alien. As we have seen, this is not the case. Everyone is a person, no matter if a national or an alien. The restrictions imposed on aliens concern their legal capacity, not their personality and are specific to a certain right, not a generic incapacity, concerning all rights. .

<sup>44</sup> See, for instance, GERMAN CONST. (1949), article 2.1; NICARAGUAN CONST. (1987), article 25; POLISH CONST. (1997), article 30; THAI CONST. (1997), article 4.

<sup>45</sup> Article 51 – "Todos los entes, que presentasen signos característicos de humanidad, sin distinción de cualidades o accidentes, son personas de existencia visible."

<sup>46</sup> Article 4 – "A personalidade civil começa do nascimento com vida; mas a lei põe a salvo desde a concepção os direitos do nascituro."

<sup>47</sup> Art. 222 – "The ownership of journalism firms and radio and television broadcasting firms is restricted to native-born Brazilians or those naturalized more than ten years ago, who shall be responsible for management and intellectual orientation." BRAZILIAN CONST. (1988), article 222. See *infra* Chapter VII on Economic Rights.

ordinary legislation because the Constitutional text so authorizes.<sup>48</sup> Thus, an alien has capacity to acquire rights (personality) in general, may have capacity to exercise rights in general in accordance with conflicts of law rules, which in Brazil is regulated by the law of the domicile of the individual,<sup>49</sup> but has some restrictions as regards acquisition of specific rights.

### *III. Right to Family Life*

#### International Law

Most of the international conventions on human rights deal with the right to family life in general, without specifying its content very much.

The American Declaration of 1948 quotes:

*Article V - Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.*

*Article VI - Every person has the right to establish a family, the basic element of society, and to receive protection therefor.*

The Universal Declaration establishes:

*Article 12 - No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

*Article 16 - (1) - Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family....*

*(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

The European Convention, concluded in 1950, guarantees that:

*Article 8(1) - Everyone has the right to respect for his private and family life, his home and his correspondence.*

*(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

<sup>48</sup> Art. 190 - "The law shall regulate and limit the acquisition or leasing of rural property by foreign individuals or legal entities and shall determine which cases shall require authorization from the National Congress." BRAZILIAN CONST. (1988), article 190. See *infra* in this chapter the item referring to the Right to Property.

<sup>49</sup> Introductory Law to the Civil Code of 1942, article 7 – "The law of the country in which the person is domiciled establishes the legal rules concerning the beginning and end of legal personality, his name, capacity, and family rights."

*Article 12 - Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*

The C.P.R. Covenant establishes that:

*Article 17- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.*

*(2) Everyone has the right to the protection of the law against such interference or attacks.*

*Article 23-(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

*(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.*

*Article 24(1) Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*

The American Convention guarantees:

*Article 11- Right to privacy-*

- 1) Everyone has the right to have his honor respected and his dignity recognized.*
- 2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.*
- 3) Everyone has the right to the protection of the law against such interference or attacks.*

*Article 17- Rights of the family*

- 1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.*
- 2) The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this convention.*

*Article 19- Rights of the child*

*Every minor has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.*

The African Charter of 1981 declares that:

*Article 18-1- The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.*

The Convention on the Rights of the Child, signed in 1989, determines that:

*Article 2.2- States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the*

*basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*

*Article 9.1- States Parties shall ensure that a child shall not be separated from his or her parents against his will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interest of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*

*4- Where such separation results from any action initiated by a State Party, such as detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.*

*Article 10.1- In accordance with the obligation of States Parties under art. 9, para. 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.*

*2- A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under art. 9, para. 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.*

*Article 21- States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration...*

All these conventions expressly guarantee the right to marry, with the exception of the American Declaration and the African Charter. Thus, it can be said that the right to marry should be granted to all and is part of general international law. Along these lines, all domestic legislation which prohibits or even makes it difficult for an alien to get married without proper justification can be classified as against a basic rule of international law. The American Convention admits the existence of restrictions imposed by domestic legislation, insofar as they do not conflict with the rule of non-discrimination, which emphasizes the principle that aliens cannot suffer any sort of limitation, just because of alienage.

The right to adopt is mentioned expressly only in the Convention on the Rights of the Child.

The right to family reunification is expressly guaranteed only in the Convention on the Rights of the Child. This convention stresses that the policy of the States when conferring visas should be to allow family reunification, and it also mentions that a child should not be punished because of the parent's attitudes. Therefore expulsion should only happen to the person involved, not to the child, if possible, and the child should be kept informed of the whereabouts of his or her parents.

Thus, in accordance with the Convention, expulsion can still happen to the father or mother of the child and the only right granted to the child is the knowledge of the whereabouts of the parent expelled.

In brief, the preceding conventions protect the right to family life in general terms, but the contents of this right are rather vague and of difficult application and it has been the role of legal commentators, specific organizations, domestic and international tribunals to interpret these rules. Additionally this right may be abridged under several circumstances due to reasons of national security, public order, public health or morals or the rights and freedoms of others.

The Human Rights Committee stated that: "*In certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*"<sup>50</sup>

In 1972, the Strasbourg Commission of Human Rights was asked to decide the case *X & Y v. UK* involving a Cypriot husband of British national who was denied permission to stay in the UK. The Commission determined that there was no violation of article 8 of the Convention, for there were no legal obstacles for the family to establish their family life in Cyprus.<sup>51</sup> It should be noted that in this case, as a British national would be obliged to live abroad to go on with her marital life, it would mean denying the national the right to live in the country of her nationality, in disagreement with international law standards.

The Human Rights Committee in 1978<sup>52</sup> decided on a similar case, concerning immigration legislation of Mauritius, which treated differently the alien husbands of national wives from the alien wives of national husbands. In their decision, the Committee emphasized that the claim was "*not concerned primarily with the rights of non-citizens (foreign husbands), but of Mauritius citizens (wives)*". It decided that the legislation was in violation of the Covenant because:

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<sup>50</sup> Human Rights Committee, General Comment 15, 27th Sess., para. 5-7, at 20, HRI/GEN/1/Rev. 1(1986).

<sup>51</sup> Quoted by Goran Cvetic, *Immigration Cases in Strasbourg: The Right to Family Life under Article 8 of the European Convention*, 36 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 648-49 (1987).

<sup>52</sup> *The Mauritian Women Case*, Communication No 35/1978, reprinted in Human Rights Committee, Selected Decisions Under the optional Protocol 67, U.N. Doc CCPR/C/OP/1.(1985) as quoted by Stephen Knight, *Proposition 187 and Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HASTINGS INT'L & COMP. L. REV.183, 205, n138 (1995) at 205, n.138.

*"The exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of article 17. In principle, article 17 (1) applies also when one of the spouses is an alien. Whether the existence and application of immigration laws affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either "arbitrary or unlawful" as stated in article 17(1), or conflicts in any other way with the State party's obligations under the Covenant".<sup>53</sup>*

In brief, the Committee decided that since wives could be accepted for settlement in Mauritius more easily than husbands, the applicants had been victims of discrimination on grounds of sex.

Another case, the first in which immigration control was considered by the European Court, involved three women who were settled immigrants in the UK and whose husbands had had entry to the country denied. In that case the Court declared that these women did not have a right to demand entry for their husbands because, as immigrants themselves, they could reside with their husbands in their States of origin.<sup>54</sup> Thus, the idea that only nationals had a right to live in the country of their nationality was firmly established.<sup>55</sup>

The European Court in 1988 decided that expulsion of an alien, divorced from a Dutch woman, who had a Dutch daughter living in the Netherlands, violated the right to family life granted by the European Convention, for after expulsion, it would become very difficult for him to visit his daughter. Thus, the Court ordered the Netherlands to pay him damages<sup>56</sup> and considered the relationship between a father and a small child to be under the protection of the Convention.

The European Court of Human Rights analyzed a case in 1991 involving a Moroccan national, Mr. Mousquaquin, who came to Belgium before the age of two, and lived in Belgium for more than twenty years. All his family were Belgian residents and one of his brothers had received Belgian nationality. Because of crimes committed while he was still a minor he was convicted, served the sentence imposed on him and was expelled from Belgium.

The Court decided that, in this case, there had been a violation of article 8 of the European Convention, which guarantees the right to family life and that the measure taken by the Belgian government was disproportionate to the aim pursued.<sup>57</sup>

It should be observed that the reasoning of the Court in this case, that expulsion of an alien, who has family living in the country, violates the right to family life, should not be understood as the prevailing rule in accordance with international law patterns.

This right to family life should be understood together with the right of the State to expel aliens, whose behavior is against local public order. Additionally, aliens

<sup>53</sup> *Id.* para. 9.2(b)(2)(i)(2) of the decision of the Committee. This case in reality had much more to do with discrimination against women as opposed to men, because alien wives of nationals were granted more rights than alien husbands of nationals.

<sup>54</sup> *Case of Abdulaziz, Cabales and Balkandali*, 94 Eur.Ct.H.R. (ser. A) at 8-11 (1985), Knight, *supra* note 52 at 247-48. A summary of this case was printed in 56 BYIL 352 (1985).

<sup>55</sup> See *infra* Chapter IX, Public Rights under the heading title of Freedom of Movement.

<sup>56</sup> *Berrehab Case*, 138 Eur.Ct.H.R (ser. A) (1988) as quoted by John Quigley *Family Reunion and the Right to Return to Occupied Territory* 6 GEORGETOWN IMMIGRATION LAW JOURNAL 247 (1992).

<sup>57</sup> *Mousquaquin Case*, 12 HUM.RTS. L. J. 85-92 (1991).

have no right of abode, for only nationals have the right to enter and reside in the country of their nationality.

Thus, in this case, Belgium expelled an individual who was an alien and whose behavior was against public order, which does not violate international law. The family members of this individual, except for one brother who had Belgian nationality, are aliens, and these individuals do not have the right to reside in Belgium, according to international law.<sup>58</sup>

The Belgian government, exactly because of these ties, decided to suspend the expulsion order for two years, allowing Mr. Moustaqin to return to the country. Even so, the Court decided, except for one dissenting vote, that because of the time he spent away he should be awarded pecuniary compensation.

The Court's decision was based on two arguments: 1) the right to family life and 2) the principle that administrative decisions have to be proportionate to the aim pursued.

I would not hesitate to agree with the Court if the case involved a family of Belgian nationals, who have the right to reside in the country. As this case involved alien family members, who do not have this right of abode, I think the Court went too far in guaranteeing the right to family life in the present context, under the argument that this is based on international law rules. International human rights instruments, and in this case the European Convention, guarantee the right to family life with some limitations, insofar as these limitations are imposed in accordance with the law and in the interests of national security, public safety or the economic well-being of the country. Additionally, as seen, the faculty of the State to expel an undesirable alien should also be considered together with the rule that aliens do not have the right of residence. Therefore, family life could still exist in their country of nationality, unless if proved that this would be entirely impossible.

Later, in 1992, the European Court analyzed another case, also related to violation of the right to family life, involving an Algerian, Mr. Beldjoudi born in France, married to a Frenchwoman, and who had received an expulsion order.<sup>59</sup>

In this case, in spite of the fact that Mr. Beldjoudi's criminal record appears to be much worse than Mr. Moustaqin's, for he was sentenced to nearly eleven years' imprisonment, the Court reached the same decision as in the previous case, namely, that expulsion of an alien, who has family in the country of residence, violates the right to family life.

It is interesting to observe though, that two judges of the Court understood that Mr. Beldjoudi was protected by the Convention and its Protocols according to a broad concept of nationality, for he was born in France, lived there all his life and was completely integrated in the country, thus he should not be expelled, as he has to be considered and treated like a national. In accordance with these two judges,

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<sup>58</sup> See *infra* Chapter IX on Public Rights, under the title of Freedom of Movement.

<sup>59</sup> *Beldjoudi Case*, 13 HUM.RTS. L.J. 413 (1992).

Mr. Beldjoudi should remain in the country, not because of the right to family life, but because he should be treated like a national, who can never be expelled.<sup>60</sup>

Additionally, it should be pointed out that this case concerns the ties between a husband and a wife, not those between a young man and his family, as in the case of Mr. Moustaqin. Mr. Beldjoudi was married to a French national for over twenty years and, in this situation, pursuant to his expulsion, either his wife would be obliged to live abroad with him, in order for them to be together, or he would live abroad and his wife, who has the right to remain and live in the country of her nationality, would stay. Undoubtedly, in this situation there would be a violation either of the international law rule that nationals have the right to remain in the country of their nationality, or of the rule that guaranteed the right to family life.

In 1995, the European Court examined the case *Nasri v. France* which concerned an Algerian deaf-mute who came with his family to France when he was 5 years old and had lived there ever since. Due to his involvement in several criminal activities he was ordered expelled and the Court had to examine whether his expulsion could be regarded as necessary in a democratic society. In this case, the Court took into account his handicap, his illiteracy, his dependence on his family and his lack of ties with Algeria to conclude that there would be a violation of article 8 of the Convention if the decision to expel Mr. Nasri were implemented.<sup>61</sup>

In 1996, the European Court analyzed several cases which deal with the concept of protecting family life in the context of migration cases.

In the case *Gül v. Switzerland*, the Court analyzed the application of Mr. Gül, a Turkish Kurd, who entered Switzerland in 1983. Until then, he had lived in Turkey with his wife and sons. On arrival, he presented a request for political asylum and afterwards his wife, who had serious health problems, joined him in Switzerland. Subsequently, Mr. Gül also became ill and started to receive a pension from the government. The couple gave birth to a daughter, born in this country, but who did not live with them because of the above mentioned health problems.

Mr. Gül then requested from the Swiss government authorization for entry into Switzerland of his other two sons, both born in Turkey. Switzerland denied such authorization under the argument that his apartment was unsuitable and his means insufficient to provide for his family. The matter was then submitted to the Court, which decided that there is no violation of article 8, firstly because in this case there has never been family life before and secondly, because if the couple so decide they

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<sup>60</sup> Judge De Meyer considers that his expulsion would be inhuman treatment for "he would be ejected, after over forty years, from a country which has always in fact been 'his' since birth, even though he does not possess its nationality." *Id.* at 418. Judge Martens reasons: "Paragraph 1 of Article 3 of Protocol 4 to the Convention forbids the expulsion of nationals. In a Europe where a second generation of immigrants is already raising children (and where violent xenophobia is increasing to an alarming extent), it is high time to ask ourselves whether this ban should not apply equally to aliens who were born and bred in a member State or who have otherwise, by virtue of long residence, become fully integrated there (and, conversely, become completely segregated from their country of origin)."

<sup>61</sup> *Decisions on the European Convention on Human Rights During 1995*, LXVI THE BRITISH YEAR-BOOK OF INTERNATIONAL LAW 556 (1995).

can go back to Turkey and all live together there; also, even Mr. Gül's social security benefits could be received in Turkey.<sup>62</sup>

Another decision of the European Court *Ahmut v. the Netherlands*<sup>63</sup> deserves criticism for the Court upheld a decision of the Dutch government to deny entry to a 9 year old Moroccan child, whose father had both Dutch and Moroccan nationality. The Court concluded that the child had lived in Morocco all his life, did not have Dutch nationality and that family life could be reestablished there. The Court also stressed the dual nationality of the father to weaken his request to bring his son to live with him and concluded that they were only apart because of the father's decision to live in the Netherlands: he could move back to Morocco as he had retained Moroccan nationality.

With all due respect to the Court, this decision completely violates all international standards regarding protection to family life. As the father has Dutch nationality, he has the right to live in the Netherlands, guaranteed by all human rights instruments. Therefore, if the father has the right to live in the Netherlands, in order to have his family life protected, and considering that there are not any compelling reasons of national security to prevent entry, this case clearly represents a situation where family life should prevail. It is interesting to observe that one dissenting judge suggests that the prevailing factor in this case is the fact that the individual is called "Ahmut", implying that there has been a discriminatory treatment.<sup>64</sup>

As regards expulsion, the Court decided the cases *C. v. Belgium* and *Boughanemi v. France*<sup>65</sup> and in both cases the Court concluded that there is no violation of the right to family life protected by the Convention when the State of residence expels an alien, even if that alien has lived all his/her life in that country.

Actually, the factual situation is different in each of the cases. In the first case, Mr. Boughanemi lived in France all his adult life but lived together with a French woman and after his expulsion recognized her child. In this case, even if the Court reasoned that this recognition should not be effective because it could be in fraud to French legislation in order to avoid expulsion, he had a marital life with a national, which should be taken into account. Notwithstanding, the Court understood that the interests of the State should prevail.<sup>66</sup>

In the second case, the alien lived all his adult life in Belgium, but had in this country only brothers and sisters and three of them had Belgian nationality. He also

<sup>62</sup> This decision is criticized by Sudre et al, *Chronique de la Jurisprudence de la Cour Européenne des Droits de L'Homme en 1996*, RUDH 4-39, 22 (1997). See a summary of the case in *Decisions on the European Convention on Human Rights During 1996*, LXVII THE BRITISH YEARBOOK OF INTERNATIONAL LAW 623-624 (1996).

<sup>63</sup> *Id.* at 26. See also *Decisions on the European Convention on Human Rights During 1997*, LXVIII THE BRITISH YEARBOOK OF INTERNATIONAL LAW 392-393 (1997).

<sup>64</sup> Comment of the judge Valticos: "Comment se fait-il que, dans le présent cas, ce droit lui ait été refusé? Je ne peux pas penser que c'est parce que le père néerlandais s'appelait "Ahmut". Cependant, il est inévitable qu'un soupçon de discrimination naîsse dans les esprits". RUDH (1997) 22.

<sup>65</sup> *Id.* at 22.

<sup>66</sup> In the *Boughanemi* case the Court reasoned: "le souci légitime de la protection de l'ordre public donne aux Etats le droit de contrôler, en vertu d'un principe de droit international bien établi, l'accès des étrangers à leur territoire (ainsi que leur séjour) et notamment d'expulser les délinquants parmi ceux-ci." *Id.* at 22.

had a child born in Belgium, from a marriage to a Moroccan national. In this case, the Court considered that expulsion was necessary, due to the seriousness of the offence – possession of drugs – and concluded that the authorities did not act disproportionately to the end pursued.<sup>67</sup>

In another case, *Bouchelkia v. France*, the Court examined the application of Mr. Bouchelkia, an Algerian national who came to France at the age of two under the French rules of family reunion. Due to his involvement in various crimes he was imprisoned and sentenced. After that, he was expelled in 1990 but he returned to France illegally. He fathered a child born of a French mother and also married the mother. In the meanwhile he was arrested again and an expulsion order was pending.

The Court concluded that there would be no violation of article 8 because the relevant time to be taken into account to determine whether family life existed was the time of the first expulsion order. At that time, he was single and had no children. Additionally, the Court also stressed the fact that he had maintained links with his country of origin of which he was a national and had close relatives living there.<sup>68</sup>

The case *Mehemi v. France* refers to an Algerian national, born in France, where he had lived all his life. Mr. Mehemi's parents lived in France as well as his brothers, one of French nationality, and he had three French children and was married to the mother of the children, an Italian national residing in France for a long time. He was deported to his country of origin due to his involvement in the import of a very large quantity of hashish. In this case, the Court concluded that France violated article 8 of the Convention.<sup>69</sup>

In the case *El Boujaïdi v. France* and in the case *Boujlifa v. France*, the Court examined the situations of foreigners who lived all their adult lives in France and who allegedly had family lives with French women. The Court did not consider these relationships worthy of protection under the Convention because they had only been initiated after the order of expulsion. Therefore in both cases there was no family life to be protected under the Convention because family life should exist at the time the expulsion order is enacted.<sup>70</sup>

The Court also examined the expulsion of an alien married to a French national due to his involvement in criminal activities. In this case the Court understood the measure of expulsion was not disproportionate to its aims.<sup>71</sup>

In a recent decision, the Court analyzed the situation of an Algerian, mother of a French child, subject to expulsion due to her involvement in the commerce of heroin and determined that in this case expulsion should be admitted.<sup>72</sup>

<sup>67</sup> See *Decisions on the European Convention on Human Rights During 1997*, LXVIII THE BRITISH YEARBOOK OF INTERNATIONAL LAW 415-416 (1997) See also Sébastien Van Drooghenbroeck, *L'Égalité entre Etrangers dans la Jurisprudence de la Cour Européenne des Droits de l'Homme*, 92 REVUE DU DROIT DES ÉTRANGERS 3-18(1997).

<sup>68</sup> LXVIII B.Y.I.L. (1997) 429-430.

<sup>69</sup> See Sudre et al, *Chronique de la Jurisprudence de la Cour Européenne des Droits de l'Homme en 1997*, 10 RUDH 81- 118, 101 (1998).

<sup>70</sup> *Id.* at 101-102.

<sup>71</sup> Decision of January 29, 1997, 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 680 (1998).

<sup>72</sup> Case *Dalia v. France*, decided by the European Court on February 19, 1998, JOURNAL DE DROIT INTERNATIONAL 217-218(1999).

In conclusion, it can be observed from the above decisions that the European Court has not yet established a clear pattern to follow as regards guarantees to be granted to aliens. The existence of a national family, which could be an objective and clear pattern to follow, has not played a very important role so far. Sometimes the Court denies expulsion based on the fact that the alien has a national family and sometimes this aspect is entirely disregarded, as in the Ahmut or the Dalia case. According to international law, the existence of a national family should definitely have more weight than the existence of a family of resident aliens.

It also derives from the Conventions that the right to family life is not absolute, for it can be derogated under special circumstances, if the alien subject to expulsion is a threat to national security and local interests.

However, it is imperative that the Court adopt clearer patterns as regards expulsion of aliens, for essentially as the Conventions do not state clearly the contents of this right, it is up to the courts to determine its scope and applicability. Although admitting the possibility of a case-by-case examination, it is essential that some basic criteria are set, otherwise there is a risk that this guarantee becomes ineffective and the countries find it hard to follow the criteria established by the Court.<sup>73</sup>

Additionally, it can also be noted that the Court established quite clearly that the criteria for expulsion of aliens part of the European Union does not need to be necessarily the same as those applicable to ordinary aliens.<sup>74</sup>

Along these lines it would be essential to define which relationships should be considered as within the concept of family and therefore should be protected, because international law is silent on this issue. Undoubtedly, husbands and wives, and minor and dependent children with their parents, comprise relationships within the meaning of the conventions, and therefore, under its protection. However, relationships involving older parents with adult children, uncles and aunts with nephews or nieces, sisters with brothers, and grandparents with their grandchildren, raise doubts as to whether they should be equally protected and are within the protection of international instruments.

This question relates to the concept of family: if it should be defined under the *lex fori*, or if it should be understood in accordance with the culture of the family under analysis. This is a problem of characterization under international law,<sup>75</sup> of defining an institution protected both under international and domestic law – the family, and of establishing which relationships fall into this category.

Legal commentators disagree as to the law applicable for characterization. One school suggests the application of the *lex fori* and the other, the application of the

<sup>73</sup> As regards this aspect Judge Martens of the European Court argues that the decisions of the Court related to expulsion of aliens have become a real lottery. In his dissenting vote in the case *Boughanem v. France* of April 24, 1996, 22 EUROPEAN HUMAN RIGHTS REPORTS 251 (1996).

<sup>74</sup> See *C.v. Belgique*, 92 REVUE DU DROIT DES ETRANGERS 37-40 (1997), especially at 40, *in verbis*: "La Cour estime que pareil traitement préférentiel repose sur une justification objective et raisonnable, dès lors que les Etats membres de l'Union Européenne forment un ordre juridique spécifique, ayant instauré de surcroît une citoyenneté propre. Pourtant, il n'y a pas eu infraction à l'article 14 combiné avec l'article 8."

<sup>75</sup> As for the problem of characterization in private international law see Ernest G. Lorenzen, *The Theory of Qualifications and the Conflict of Laws* 20 Colum. L. Rev. 247 (1920); EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 52 (1982); ROGER C. CRAMTON ET AL., *CONFLICT OF LAWS* 75 (3rd ed. 1981).

foreign law. Despite this doctrinal controversy, I think it makes more sense to characterize the term "family" in accordance with the system of the forum, as a general rule. When local legislation allows for concession of visas as regards family reunification, obviously local legislators had in mind the concept of family according to the *lex fori*. If the applicators of the law adopted the meaning of the term according to foreign law, it would be against the will which gave birth to the rule.

Additionally, the concept of family would also raise difficulties as regards local public policy, such as when it involves a man legally married to four women in Kuwait, having several children. If the husband is allowed entry in a certain country, or if he acquires local nationality through naturalization, would it mean that in accordance with the rule established by international law of respect to family life, that the State of residence or nationality would be obliged to receive the whole polygamous family, even if it violates basic local moral principles?

Another interesting situation could happen if a couple of men (or women), legally married in a country where such marriage is valid, and one of them is a national of a country which allows for family reunification. Can this country deny entry to the other partner in spite of 1)local legislation which allows entry to the married partner of the national and 2) the fact that the marriage was validly celebrated elsewhere?

These situations deal with public policy, another so-called escape device in international law. In these cases, if the result to be reached in accordance with the law is against local basic moral principles, because of public policy, which is basically an exception, the undesired result can be avoided.<sup>76</sup>

Along these lines, the Human Rights Committee decided a case against Canada, brought by a naturalized Canadian. In this case, a woman wanted her daughter and grandson to join her in Canada and her request was denied. The Committee focused on the definition of family and concluded that in this case, "*after 17 years of separation, family life did not exist, and the State was not obligated to re-establish conditions of family life...*"<sup>77</sup>

International decisions make it clear that there must exist a close and real relationship between the alien and his or her national family. Along these lines, we can conclude that in accordance with international law patterns, when couples of different nationalities are concerned as nationals as a rule have the right to enter and live in the country of their nationality, in order to grant these couples the benefit of the right to family life, they should be allowed to stay in either of the States of their nationalities, mainly if it can be proved that it is impossible for the family to establish residence elsewhere but in the country of residence. Additionally, the alien will only be allowed to stay out of respect to the right to family life, if the expellee has a family of nationals living in the country, not of aliens.

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<sup>76</sup> See CRAMTON ET AL., *supra* note 75, at 141. See also Jacob Dolinger, *supra* note 28.

<sup>77</sup> A.S. v. Canada, Communication No 68/ 1980, reprinted in HUMAN RIGHTS COMMITTEE, SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL 27, U.N. Doc CCPR/C/OP/1 (1985), quoted by Knight, *supra* note 52 at 205n138.

*b) Comparative Law*

In France, the right to marry has traditionally been subject to certain conditions, as the authorities could only celebrate the wedding of an alien who was not a permanent resident, with authorization from the mayor.<sup>78</sup>

An alien who marries a French national has the right to enter<sup>79</sup> and reside in France and not to be expelled, if the marriage is not a sham marriage,<sup>80</sup> and if public order is not threatened.<sup>81</sup> Thus, the right to family life is taken into account by the government when issuing visas and deporting aliens. However this right is not deemed to be absolute, as higher interests, such as national security and public order, may outweigh it.

The recent 1998 Amendment to the Aliens Act determines that even resident aliens have the right to bring in family members, under certain conditions.<sup>82</sup> As a matter of law, the right to family life was formally introduced by the 1993 Amendment to the Aliens Act and was basically maintained by the recent 1998 Amendment.<sup>83</sup>

As an example of respect of the right to family life, the *Conseil d'Etat* decided on April 19, 1991, that expulsion of an individual born in France and living in that country since his birth, with his 12 brothers and sisters, whom he partially supports, after being condemned for several thefts, would amount to a disproportionate punishment.<sup>84</sup>

The French *Conseil D'Etat* in a decision issued in 1994 in the case *Ministre de L'Interior v. Kaya* established that before denying entry to a foreigner, the French administrative authority should verify whether this denial would amount to a viola-

<sup>78</sup> See DERRUPPÉ, *supra* note 40, at 38. See also MAYER, *supra* note 43, at 675. In 1938 France enacted a legislation which prohibited the celebration of a marriage involving foreigners who did not have the authorization to stay in the country for more than one year; Didier Rouget, *L'Interdiction Administrative des Ecrits Etrangers en France- une censure discriminatoire injustifiée*, 9 RUDH 169-193, 171 n15(1997).

<sup>79</sup> DERRUPPÉ, *supra* note 40, at 38. See also MAYER, *supra* note 43, at 675. The *Conseil d'Etat* decided it violates article 8 of the European Convention denying a visa to a Tunisian alien married to a French national, decision of January 27, 1997, 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 678 (1998).

<sup>80</sup> See *infra*, note 126 and accompanying text.

<sup>81</sup> The *Conseil d'Etat* has decided that the refusal of a visa to a Turkish national condemned to a 4 year term in prison for drug trafficking, married to a French national, because taking into account interests of public order, should be maintained. Decision of April 10, 1992, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 974 (1993). Along the same lines the *Conseil* maintains an administrative decision denying a visa to a Moroccan national, who lived abroad for 15 years and who has relatives in France. In this case, the *Conseil* decided that the decision was not disproportionate. Decision of April 10, 1992. Also decision of the *Conseil d'Etat* of April 10, 1992 in ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 982 (1993). In this case the alien had been condemned to 10 years imprisonment, was married to a Frenchwoman and had a child of French nationality and was expelled because he was considered a menace to public order. See also the decision of the *Conseil d'Etat* of February 14, 1992. *Id.* at 979.

<sup>82</sup> Article 5 and 21 of Law 98-349 of May 11, 1998, 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 489-500 (1998). The Administrative Tribunal of Lyon in March 19, 1996 decided that article 8 of the European Convention would be violated if a resident permit is denied to a 70 year old Moroccan woman, whose children as well as grand-children are all French residents. *Id.* at 679.

<sup>83</sup> Hugues Fulchiron, *La Réforme du Droit des Étrangers. Commentaire de la loi n° 98-349 du 11 Mai 1998 relative à l'Entrée des Étrangers en France et au Droit d'Asile, dite loi 'Chevènement' ou loi 'Reseda'*, JOURNAL DE DROIT INTERNATIONAL 5-83, esp. 56-64(1999).

tion of the right to family life protected by the European Convention, which would confer illegality to the act.<sup>85</sup>

Additionally, if there is a child involved, even if the child entered the country illegally, the right to family reunification should be respected.<sup>86</sup> That is to say that the right to family life is in principle respected.<sup>87</sup> Thus, the administrative judge takes into account the principle of proportionality: on one side there is the right to family life, which should be respected, on the other there is the interest of the State. The judge then has to verify whether the measure imposed on the alien (expulsion/deportation/denial of a visa) is proportionate to the risk on national security. It is a case-by-case decision.<sup>88</sup>

Notwithstanding, after the analysis of the factual circumstances of the case, even if there is a national family or a family of resident aliens, the country may expel the alien.<sup>89</sup>

In Australia, there is a policy of family reunification as regards concession of visas, priority being given to spouses and minor children, parents, intended spouses, and brothers, sisters and non-dependent children of nationals.

As regards expulsion, no limitations are established by law on the expulsion of an alien whose spouse or other family members are Australian nationals. These factors however are taken into account by the Minister in each individual case.<sup>90</sup> It should be noted, however, that a recent decision of the High Court *Minister for Immigration*

<sup>84</sup> RUDH 250 (1991).

<sup>85</sup> Decision of December 9, 1994. *Jurisprudence Française relative au Droit International*, XLI ANNUAIRE FRANÇAISE DE DROIT INTERNATIONAL number 60 (1995). As a rule, consular decisions denying a visa do not need to be motivated, in accordance with the decision of the *Conseil d'Etat* of February 28, 1986, case *Ngako Jeuga*. The 1998 Amendment to the Aliens Act established, however, that some denials of visa have to be motivated, such as in the case where the right to family life is at stake or as regards some categories of aliens listed in the law. See RUDOLPH D'HAËM, L'ENTRÉE ET LE SÉJOUR DES ÉTRANGERS EN FRANCE 80 (1999, Que sais-je?).

<sup>86</sup> Case involving a Turkish resident alien mother, who brings in illegally her 4 year old son from Turkey and the Mayor and the Administrative Tribunal denied a resident alien visa to the child based on the fact that the entry was illegal. The *Conseil d'Etat* declared these decisions void and determined that entry should be admitted based on art 3.1 of the Convention on the Rights of the Child. Decision of September 22, 1997, JOURNAL DE DROIT INTERNATIONAL 721-730 (1998).

<sup>87</sup> Decisions of the *Conseil d'Etat* of January 27, 1997 and of February 21, 1997, 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 688 (1998).

<sup>88</sup> See several decisions of the *Conseil d'Etat* cited in RUDOLPH D'HAËM, *supra* note 85 at 67-68.

<sup>89</sup> Decisions of the *Conseil d'Etat* of November 20, 1996 and of February 21, 1997, 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 678-9 (1998). See also Decision of the *Conseil d'Etat* of November 9, 1992 in ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 979 (1993). As regards a minor type of expulsion "reconduite à la frontière", which does not prevent the alien from returning to France, the *Conseil d'Etat* decided on February 13, 1991 that according to the 'ordinance' of November 2, 1945 as modified by the law enacted on August 2, 1989, art. 25, the alien, who is a father or a mother of a child of French nationality, who depends economically on the alien parent, will not suffer this punishment, *id* at page 1057. On a contrary sense, the same court decided that an alien woman, pregnant and mother of a child born in France, but not of French nationality, could be imposed this measure. Decision of April 19, 1991, RUDH 250 (1991).

<sup>90</sup> See Human Rights Commission, Report no. 13 – Human Rights and the Migration Act 1958 22 (1985). See also I. A. Shearer, The Legal Position of Aliens in National and International Law in Australia, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 41, 52-61 (1987).

and *Ethnic Affairs v. Ah Hin Teoh* had the effect of requiring discretionary decision-makers— including the Minister— to take into account the rights of children as set out in the 1989 UN Convention on the Rights of the Child.<sup>91</sup>

In the UK, family admissions are: a) family members of persons in the UK for a limited period of time, such as students, businessmen and so forth; b) relatives coming on a permanent basis, such as minor children under 18, under special circumstances parents and older children and very exceptionally sisters, brothers, uncles and aunts; c) those who want to settle in the UK because of marriage.<sup>92</sup>

The alien family of the individual who is expelled may be subjected to expulsion as well. However, this power should only be used when all the family has received settlement in the country by accompanying the alien, for the revocation of his permission to stay in the country would affect all members of the family. Exceptionally, spouses of British nationals may be expelled and occasionally, someone who fathered or gave birth to a British citizen may also be expelled.<sup>93</sup>

It is interesting to observe that the above mentioned decisions of the European Court of Human Rights and the concrete possibility of the issuance of decisions against the States, have highly influenced European States as regards their decisions concerning entry, residence and expulsion of aliens. Recently, Great Britain, after decreeing expulsion of an alien, who had lived in Britain for almost twenty years with all his family, decided, when the case was submitted to the European Court, to settle the affair and revoke the decree.<sup>94</sup>

In Germany, expulsion of an alien spouse of a German national is forbidden, unless as a consequence of a major offense, and the same rules apply to the expulsion of alien parents of minor German nationals.<sup>95</sup>

Because Germany is a party to the European Convention and to the European Convention on Establishment, and because of the special protection granted to the right of family life, the Federal Administrative Court in 1956 annulled an expulsion because the alien was married to a German woman who had children.<sup>96</sup>

Under paragraph 23 of the German Aliens' Act, spouses and unmarried minor children of German citizens residing in Germany are entitled to a resident permit. The same benefit applies to alien parents who care for a German child resident in Germany.<sup>97</sup>

<sup>91</sup> (1995) 128 ALR 353 or (1995) 183 CLR 273. The reason was not that the Convention is part of Australian law (it isn't) but that ratification by Australia had created a 'legitimate expectation' in the population that it would be respected. The Government immediately started work to undo this legitimate expectation but has not yet succeeded. A Bill determining Australians have no 'legitimate expectation' is currently before the Parliament and, if approved, will have the effect of overriding the High Court's decision.

<sup>92</sup> JAN MACDONALD, IMMIGRATION LAW IN PRACTICE IN THE UNITED KINGDOM 215 (1987).

<sup>93</sup> Richard Plender, *The Legal Position of Aliens in National and International Law in the United Kingdom*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1675, 1705 (1987).

<sup>94</sup> Case *Lamguidaz v. Great Britain*, Eur. Ct. H. R., RUDH 429 (1993).

<sup>95</sup> Decisions quoted by RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 368 (1987).

<sup>96</sup> As quoted by GUY GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 285 (1978).

<sup>97</sup> Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AJIL 511-544, 514 (1995).

Resident aliens are also allowed to bring in family members, under certain circumstances,<sup>98</sup> without any numerical limits.<sup>99</sup>

In Canada, nationals may sponsor the entry of relatives into the country, comprising spouses, children and a wide range of relatives, such as parents, brothers and sisters, nephews, nieces, grandsons and others. Resident aliens also may sponsor some relatives, but on a smaller scale than nationals.<sup>100</sup> As a matter of law, the Immigration Act of 1976 determines as one of its objectives: "3-c- to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad."

In a case decided in 1976, *Denis v. The Queen*, it was held that it is not cruel or unusual punishment, or arbitrary exile pursuant to the Canadian Bill of Rights, to expel a parent of a Canadian citizen.<sup>101</sup> As such, the local courts considered the relationship between a father and a son, especially an adult son, not important enough to set aside immigration regulations.

As regards the concept of family, in Canada the Family Law Act grants the right to alimony support to the spouse, comprehending only a man or woman of married and unmarried couples. In the case *The Attorney General for Ontario v. M. and H.*, the Supreme Court concluded that this definition meant a discrimination under section 15(1) of the Charter and determined that:

*"The inclusion of same-sex couples in section 29 of the Family Law Act would in fact better achieve the objectives of the legislation while respecting the Charter rights of individuals in same-sex relationships".<sup>102</sup>*

We may speculate whether this decision would also apply in the immigration context and allow same-sex couples to bring in their mates.

In a recent extradition case, the Federal Tribunal of Switzerland applied the concept of protecting family life. This is somewhat unusual in the context of extradition, for traditionally this right is taken into account to prevent expulsion and deportation, not extradition. In this case, the Swiss Court denied the request of extradition of an Italian national, made by Germany, despite the fact that there is an extradition treaty between the two countries, under the argument that allowing the requested extradition would amount to a violation of article 8 of the European Convention, which protects the right to family life, for this Italian was residing in Switzerland with his handicapped pregnant mate, her daughter, and their daughter. The Court, relying on the fact that his companion is invalid and for this reason, both children depend on him, denied the extradition requested by Germany.<sup>103</sup>

Italy, in its recent Aliens Act of 1998, also takes into account the right to family life, both as regards entry as well as expulsion. The law determines that an alien who

<sup>98</sup> *Id.* at 515.

<sup>99</sup> *Id.* at 525.

<sup>100</sup> CHRISTOPHER J. WYDRZYNSKI, CANADIAN IMMIGRATION LAW PROCEDURE 105 (1983).

<sup>101</sup> 1 F.C. 499 (C.A.)

<sup>102</sup> Decided on May 20, 1999, file n. 25838.

<sup>103</sup> Decision of the 1ère Cour du Droit Public, of November 1, 1996, case 1A.263/1996, published in the RUDH 437(1997).

is married to, or if a father, a son a daughter of an Italian national, has the right to enter the country.<sup>104</sup>

Concerning expulsion, the alien who has close relatives of Italian nationality or is married to an Italian national, can only be expelled for reasons of public policy and in accordance to an order issued by the Secretary of Justice.<sup>105</sup>

In fact, the law expressly mentions that one of its goals is to guarantee the right to family life.<sup>106</sup>

The Italian Constitutional Court decided in 1997 as regards an Italian legislation of 1986<sup>107</sup>, which allows entry to the alien spouse of a resident alien who has minor children living in Italy, that this right should also be granted to couples who are not legally married. Thus, in accordance with Italian legislation and court decision, an alien, legally married or not, to a resident alien who has children in Italy has the right to enter and live in the country.<sup>108</sup>

In sum, Italian legislation grants the right to family life to aliens, both with a national family or a family of resident aliens with regard to entry. However, this right is not granted to the same extent as in regard to expulsion. In this case, aliens even with a national family, may be expelled for reasons of national security and public policy.

In Denmark, the Aliens' Act establishes that an alien who cohabits a shared residence, either in marriage or in regular cohabitation of prolonged duration, with a person permanently resident in Denmark, has a right to enter and reside in the country. The same applies to minor children of the resident alien or of the resident alien's companion, as well as parents over 60 of a Danish or Nordic child, or of an alien who has been issued an open-ended residence permit.<sup>109</sup> Thus, in Denmark this right is granted not only to family members of nationals but also of resident aliens.

In Sweden, even when a foreigner marries a Swedish resident, he or she may be subject to expulsion.<sup>110</sup>

Predominant among the goals of immigration policy in the US is family reunification- preferential admission of immediate and extended family members of citizens

<sup>104</sup> Article 7.2 of the Law, Legge 6 marzo 1998 n. 40, *Legislation*, LXXXI RIVISTA DI DIRITTO INTERNAZIONALE 878-918 (1998)

<sup>105</sup> Article 11.1 of the Law, *id.*

<sup>106</sup> Article 26 of the Law and title IV- Right to family union.

<sup>107</sup> Legge 943 of 1986, as quoted in 80 RIVISTA DI DIRITTO INTERNAZIONALE 846-851 (1997).

<sup>108</sup> Case *Vladimorova v. Ministero dell'interno*, decision of the Constitutional Court of June 26, 1997, *id.* The current Aliens'Act of 1998 reproduces this same rule at article 7.1.

<sup>109</sup> L. Langkjær & D. Stummel, Review of the Principal Features of the Legal Position of Aliens in Denmark, *DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 237, 249 (1987). The author has no more recent information.

<sup>110</sup> Göran Melander, The Legal Position of Aliens in Sweden *DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 1303, 1325 (1987).

and legal residents. This goal has been present in nearly four decades of immigration legislation. Kinship has been considered the bulk of US immigration selection.<sup>111</sup>

If an alien marries a US citizen, he or she will be classified as an immediate relative and can be admitted for permanent residence free of any quota, and the same rule applies to minor children.<sup>112</sup> If the alien marries a permanent resident, second preference status is acquired and the alien will have the right to immigrate, but may have to wait several years.<sup>113</sup>

In India, if an alien marries an Indian citizen, entry and residence to the former is almost automatically ensured, so long as the marriage subsists. However, it is subject to reciprocity – that is, how the Indian spouse of a national of the alien's land is treated in that country for the purpose of entry and residence.<sup>114</sup>

Israel allows entry to non-Jewish spouses, children and grandchildren.<sup>115</sup>

In the Netherlands, spouses and minor children, who have their title of residence obtained as a consequence of family tie, cannot be expelled while the tie still subsists and the family lives together.<sup>116</sup>

In the case of *RG v. the State of the Netherlands* analyzing the expulsion of a Moroccan national, who was separated from his Dutch wife and who had a son, the Supreme Court held that his relationship with his son should qualify as family life within the meaning of article 8 of the Convention. The Supreme Court held that in assessing the seriousness of the violation, relevant factors could include how long the persons concerned had lived together, the nature and intensity of the contacts maintained after they ceased to live together and whether the expulsion threatened the parent or the child.<sup>117</sup>

Thus, it seems that the Court understands that in the event there is family life, it is up to the State to prove circumstances which would justify expulsion. If there is family life a presumption is established in favor of the alien and the State needs to

<sup>111</sup> See Center for Immigration Studies, *Rethinking the Purposes of Immigration Policy*, Otis Graham, Jr. paper no 6, (reprinted July 1992). In 1988 of the 643,000 legal immigrants admitted to the US, approximately 420,000 came in under the 'family reunification' provisions, permitting the immigration of spouses, parents, brothers and sisters, and adult children of citizens. This criterion is highly criticized according to this Center, for it is stated that selection should primarily reflect consciously chosen national needs, not family and kinship relations. Their objection remains basically on the fact that the individual desires of foreigners, seconded by their American relatives, to live in the US, rather than in their country of origin are taken into account before any national interest may be. *Id.* at 20. They think that US immigration policy historically has prioritized economic development instead of family reunification and refugee admissions, thus immigration should be seen first and foremost as a source of labor. *Id.* at 23. It should be noted though that the US when pursuing this family reunification policy is in accordance with international law patterns.

<sup>112</sup> INA sec.201(b)(2)(A), 8 U.S.C. sec. 1151 (b)(2)(A).

<sup>113</sup> INA sec.203(a)(2), 8 U.S.C. sec. 1153 (a) (2).

<sup>114</sup> M. P. Singh, *Position of Aliens in Indian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 569, 588 (1987).

<sup>115</sup> Claude Klein, *Le régime juridique des étrangers en droit israélien*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 635, 646 (1987).

<sup>116</sup> A. H. J. Swart, *The Legal Position of Aliens in Dutch Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 869, 890 (1987).

<sup>117</sup> *Netherlands Judicial Decisions*, NYIL 337n142 (1989)

prove that his or her presence in the country is contrary to national interest.<sup>118</sup> Additionally, the Court does not rely heavily on the existence of a national family in order to grant protection.<sup>119</sup>

In Poland, the existence of a Polish family does not prevent expulsion—there is no express legislation on the matter.<sup>120</sup>

There are no legal limitations in Turkey as regards expulsion of aliens who have family in the country. Nevertheless, the authorities take into consideration the existence of family in Turkey before reaching a decision.<sup>121</sup>

Brazil has a long tradition of protecting the Brazilian family of aliens, and currently prohibits expulsion of aliens who have Brazilian family living in the country.<sup>122</sup> Coherently, immigration authorities admit entry to aliens married to Brazilian spouses or who have Brazilian children, despite the fact that legislation is silent on this topic.<sup>123</sup>

It is worth mentioning that the better known cases involving the right to family life, decided by Brazilian authorities, have had opposite results. The first one was the case of Olga Benario, a German national who lived with Luis Carlos Prestes, a Brazilian communist leader. Olga came to Brazil with false documents and in 1936, when she was pregnant, was arrested and deported from Brazil. As Brazilian legislation and the courts have always treated differently the hypothesis of expulsion and

<sup>118</sup> *Id*, case *H.Ö v. The State of the Netherlands*, decision of the Supreme Court of the Netherlands on December 12, 1986. The author has no more recent information.

<sup>119</sup> For the Netherlands policy on family reunion see *Netherlands State Practice*, NYIL 393-397 (1994).

<sup>120</sup> Zdzisla W. Kedzia, *Die Rechtsstellung von Ausländern nach Polnischem Recht*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1195, 1226 (1987). For an update of the status of aliens in Poland see Mieczyslawa Zdanowicz, *Legal Status of Aliens in Poland in the Light of International Obligations*, 22 POLISH YEARBOOK OF INTERNATIONAL LAW 49-64 (1996).

<sup>121</sup> Ergun Özsüñay, *The Legal Postition of Aliens in Turkey*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1489, 1505 (1987). The author has no more recent information.

<sup>122</sup> Since Brazil became independent from Portugal, its legislation as a rule has reflected this idea of protecting the Brazilian family. Exceptionally, for some short periods, the legislation referred to in this note was revoked and no protective legislation was in force. Firstly, the Decree 1566 of 1893, prohibited the expulsion of an alien married to a Brazilian woman and of an alien widower with Brazilian children, and also that of an alien having immovable property in Brazilian territory. Afterwards, Decree 1641 of 1907 prohibited the expulsion of aliens who lived for more than two years in the country, or if married to a Brazilian and widower with Brazilian children. In 1921, Decree 4247 prohibited the expulsion of aliens residing in the country for more than 5 years. Decree-Law 479 of 1938 prevented expulsion of resident aliens living in the country for more than 25 years, or who had Brazilian children alive, born within wedlock. This protective rule was also reproduced in the 1946 Brazilian Constitution, art. 143, which stated that the federal government did not have the power to expel an alien, who had a Brazilian spouse or a Brazilian child, economically dependent on the alien. Afterwards, Decree-law number 417 of 1969, article 3, and Decree-law number 941 also of 1969, article 74, likewise prohibited expulsion in the event of the existence of a Brazilian spouse or children. Finally, Law 6815 presently in force, as amended, at article 75, prevents expulsion if the alien has a Brazilian spouse, is married for at least 5 years or has Brazilian children economically dependent and under the custody of the alien. See Jacob Dolinger, *Das Limitações ao Poder de Expulsar Estrangeiros*, ESTUDOS JURÍDICOS EM HOMENAGEM AO PROFESSOR HAROLDO VALLADÃO 119-50 (1983).

<sup>123</sup> Interview with the staff of the Minister of Justice in December, 1996, when it was clearly stated that there is no specific legislation regarding entry of spouses of nationals, but as an extensive interpretation of article 75 of the Aliens Law, which deals with expulsion, the same rules apply to entry.

deportation regarding the right to family life, Olga was sent back to Nazi Germany, as a result of deportation proceedings, where she was incarcerated and gave birth to a Brazilian daughter. In the end, because of her Jewish origin, she was held in a concentration camp and killed.<sup>124</sup>

The other famous decision was the case of Ronald Biggs, responsible for the robbery of the pay train in Britain, who was not expelled from Brazil because his Brazilian girlfriend was pregnant and Brazilian legislation, at the time, protected the right of family life as regards Brazilian children, even before birth. It should be observed that this benefit only applied with regard to expulsion, not to deportation nor extradition.<sup>125</sup>

Recently, however, due to stricter rules on immigration matters, many countries have issued provisions restricting the almost automatic right conferred upon the alien spouse to enter and fix residence in the country, because many marriages were proven to have been contracted in order to seek admission.<sup>126</sup>

It should be noted that this exception is very difficult to apply, because the intentions of the parties at the time the marriage was celebrated have to be verified. Consequently, it is a matter of subjective analysis, rather than objective. Additionally, it has been argued against this measure that, as regards marriages celebrated abroad, it is not for the authority of one State to invalidate a marriage celebrated elsewhere.

While the difficulties in applying this exception should be taken into account, immigration authorities can never declare a marriage void, no matter if it was cele-

<sup>124</sup> Data extracted from a romance RUTH WERNER, OLGA BENARIO, A HISTÓRIA DE UMA MULHER CORAJOSA (trans. Reinaldo Mestrinol 4th ed. 1990). As for the distinction between expulsion, deportation and extradition see *infra* chapter IX on Public Rights, title referring to freedom of movement.

<sup>125</sup> Biggs was not extradited to Britain because there was no treaty between Brazil and Britain at that time, and because Britain did not want to promise reciprocity, a requirement of our legislation. He could not be deported because deportation, in his case, would amount to an extradition, prohibited by our legislation. JACOB DOLINGER, DIREITO INTERNACIONAL PRIVADO 227 (5th ed. 1997).

<sup>126</sup> US, Germany, Belgium are among of the countries which took this measure. See PLENDER, *supra* note 93, at 380-81. The UK, after 1977, enabled the Home Secretary to refuse applications to enter or remain where the Secretary had reason to believe the marriage was one of convenience. These rules have proved to be of difficult enforcement. See MACDONALD, *supra* note 92, at 228. In Canada, the same practice has been adopted with the argument that there would be an attempt to circumvent Immigration Rules. See WYDRZYN SKY *supra* note 100 at 101. The US passed in 1986 the Marriage Fraud Amendments of 1986, Public Law number 99-639 (Nov. 10, 1986) which deals with the problem of "sham marriages". Traditionally in the US, an alien who married a national could enter the country and receive permanent resident status. After this legislation, aliens receive such status on a conditional basis for a period of two years. After that period, the alien must often pass an interview in order to receive permanent status. In France, the 1993 Amendment to the Migration Act introduced several modifications as regards marriage to a French national and made it harder to the alien spouse of the national to obtain the residence permit. The 1998 Amendment of the Act Law 98.349 of May 11, 1998 reintroduced the traditional system, allowing the alien spouse to obtain automatically the resident permit. See Hagues Fulchiron, *supra* note 83 at 26-29. However, the administration has two tools to fight sham marriages: first the possibility that an Attorney General Representative opposes the validity of the marriage and secondly the mayor may refuse the issuance of a residence permit or determine the alien's deportation in case of fraud. See case *Abihitali*, decided by the *Conseil D'État* on October 9, 1992, as quoted by RUDOLPH D'HAËM, *supra* note 85 at 42. In addition, Australia in section 240 of the 1958 Migration Act.

brated abroad or within the same country. Immigration authorities, in the great majority of countries, do not have competence to adjudicate on matters related to marriages or adoptions. They can only consider the marriage or adoption ineffective for the purposes established in the immigration legislation.<sup>127</sup> Therefore, this situation cannot be understood as an exception to the rule which grants admission to the alien spouse, because there is not a real marital relationship, but a fraud which is committed in order to gain automatic admission, which would otherwise be denied.

Consequently, even if there is a legally valid marriage, either abroad or locally, it will be ineffective as regards granting automatic admission, if it is a sham marriage, e.g., if it was entered into with the sole purpose of granting the alien admission to the country of the national spouse. The purpose of the legislation is to allow family life, family reunification, and if there is no family, this idea cannot be achieved.<sup>128</sup> Along the same lines, in my opinion, if there is not a valid marriage certification, but if there is real family life, entry should be allowed.<sup>129</sup> Thus, couples who live together for many years, have children together, even if not legally married, should be equally protected.

It should be pointed out, that these rules which allow for discretion in observance of marriages of convenience should be enforced with care. Decisions of immigration authorities should be based on real evidence and not on presumptions, and should not be made arbitrarily due to the importance of the consequences of their decisions.

In sum, in comparative law, as regards entry, aliens who are married, are children or parents of nationals, have either the guarantee or a preference to enter the country. This immediate right or preference is granted, as a rule, only to aliens who are family members of nationals, not of resident aliens. Notwithstanding, there is a growing tendency to grant this right also to family members of resident aliens.

Concerning expulsion, because it involves an alien who committed a crime or whose presence is considered to be against national interests, the countries have to weigh national interests against the individual right of the national (spouse, child or parent of the alien) to stay in the country.

<sup>127</sup> See the decision of the Belgium *Cour de Cassation* of February 23, 1995, voiding a marriage celebrated in Morocco between a couple of Moroccan nationality, in accordance with their national law, as one of the spouses did not have the intention to establish marital life but facilitate his entry in Belgium, 85 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 305 (1996). See also 7 decisions of several French courts in the same sense in 84 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 783 (1995). The 1993 Amendment to the French Aliens' Act created another situation of a void marriage for marriages celebrated in France—when it was entered into as a result of fraud (art 190-1 of the Civil Code). See François Fourment, *L'Article 190-1 du Code Civil et les Mariages Naturalisants, un Exemple de Disposition Législative Inutile*, JOURNAL DE DROIT INTERNATIONAL 945-961 (1998).

<sup>128</sup> Thus, even if the alien married a national, in the event this marriage does not subsist anymore—due to death or divorce—for instance, then there is no family life to be protected. See the decision of the French *Conseil d'État* of July 29, 1994 which admitted the expulsion of an alien widow of a French national, *Jurisprudence Française relative au Droit International*, XLI ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 832 (1995).

<sup>129</sup> MACDONALD, *supra* note 92, at 221, reports some cases in which British courts have admitted entry based on presumptions of marital life in accordance with Muslim law. Accordingly, in these cases, there was no marriage certificate, but the couples truly lived together, therefore there was family life to be protected.

Notwithstanding, in expulsion cases, the right to family life is not respected to the same extent as with regard to permission of entry, as in this last hypothesis it involves no concrete situation that may be against local interests. Even so, the great majority of countries do take into account the existence of a local family before issuing an expulsion order, but it does not mean that expulsion will not take place. In some countries immigration authorities are advised to take into account the existence of a local family, but it is left entirely at the discretion of the immigration official to finally decide. Other few countries expressly forbid expulsion of individuals who have a national family.

In conclusion, we can observe that, in comparative law, the right to have a family life is, as a rule, respected, with the exception of when national security, public policy, morals or public health is at stake.

As regards international adoption, it is to be noted that Brazilian legislation admits adoption of Brazilian children by alien parents, establishing though, the need of a short period of experience in the country.<sup>130</sup>

In the UK, if a foreign child is adopted by a British national and an adoption order is made by a court, legislation confers British nationality upon that child. Similarly, the right of abode and permanent settlement are granted to an adopted minor.<sup>131</sup>

The South African Child Care Act which regulates adoption provides that persons who are not South African citizens may not adopt a South African born child unless at least one of the adoptive parents has the necessary residential qualifications for naturalization and has applied for South African citizenship.<sup>132</sup>

In the Philippines, the Family Code determines that foreign spouses are disqualified to adopt Filipino children under Philippine law.<sup>133</sup>

#### *IV. Right to property*

The right to property comprises the right to own fixed and movable assets and the right to inherit and to dispose of one's property.

##### *a) International Law*

Most of the international conventions on human rights mention the right to private property, but subject to limitations. International instruments also mention the right to property in the context of protection against expropriation.

The American Declaration of the Rights and Duties of Man determines that:

*Article XXIII- Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.*

<sup>130</sup> Statute on Child's and Adolescent's Rights, Law number 8069 of July 1990, articles 31 and 46 para. 2.

<sup>131</sup> A. N. Khan Ma, *Adoption and Immigration*, 130 SOLICITORS JOURNAL 213 (1986). The author has no more recent information.

<sup>132</sup> Rika Pretorius, *Protecting the Rights of Aliens in South Africa: International and Constitutional Law Issues*, 21 SAYIL 130-146, 135 (1996).

<sup>133</sup> *Republic v. Toledoano*, G.R., n.94147, June 8 1994, 233 SCRA 9, decision of the Philippine Supreme Court, 5 ASIAN YEARBOOK OF INTERNATIONAL LAW 260-1 (1995).

This Declaration, although establishing the right to own private property, does not grant this right broadly, for it guarantees the right to own private property only to the extent of satisfying the essential needs of a decent living.

The Universal Declaration admits the right to own property individually as well as with others, without any sort of restrictions, *in verbis*:

*Article 17(1)- Everyone has the right to own property alone as well as in association with others.*

(2) *No one shall be arbitrarily deprived of his property.*

In Europe, emphasis is on the enjoyment of the right and not on its acquisition. Protocol 1 of the European Convention determines that:

*Article 1- Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

The American Convention establishes:

*Article 21- Right to Property*

- 1) *Everyone has the right to the use and enjoyment of his property. The law may subordinate such uses and enjoyment to the interest of society.*
- 2) *No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law,*
- 3) *Usury and any form of exploitation of man by man shall be prohibited by law.*

This convention assures the right of use and enjoyment by the owner, and not the right to acquire. It also guarantees the right to an indemnity in cases of expropriation.

The European Convention on Establishment, in its article 4, places aliens on an equal footing to that of nationals “*in respect to the possession and exercise of private rights, whether personal rights or rights relating to property*”. However, article 5 of the same convention admits restrictions imposed on aliens as regards acquisition, possession or use of property on grounds of national security or defense.

The African Charter protects the right to property more broadly, not distinguishing between the use, enjoyment or disposal of the property, although it expressly admits limitations to this right when public interest so requires. It rules:

*Article 14- The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*

The UN Convention on Migrant Workers, in article 15, grants migrant workers, and members of their family, the right not to be arbitrarily deprived of their property.

It should be observed that these conventions do not distinguish between fixed or movable property; thus both are protected under the same rules.

The right to property as such, as we have seen, is not granted without limits. Therefore, an alien can be excluded from acquiring property if public interest so requires. Once acquired, if allowed by local laws, the property cannot be expropriated without recompense.<sup>134</sup>

The right to inherit is not protected as such, and it should be observed that most of these provisions, as we have seen, only guarantee the right to the use and enjoyment of the property. They do not mention disposal or acquisition.

The American Declaration only protects the right to property to provide for the basic needs of the person. Consequently, the right to inherit is not expressly protected by this convention. The Universal Declaration guarantees the right to own property in general, without restriction. Inheritance then, is included. The Fourth Protocol to the European Convention, as it only mentions the enjoyment of property, excludes the right to inherit. The American Convention mentions the use and enjoyment of property. It does not mention disposal. Therefore this right is also excluded.

In brief, not only the right to inherit is excluded from most of these conventions, but also the right to acquire property. Thus, at international level, protection is granted for the use and enjoyment of property, once it is acquired, but not for its acquisition, in accordance with most international instruments.<sup>135</sup>

#### *b) Comparative Law*

In general, the great majority of restrictions imposed on aliens lie in the area of holding real estate. Allowing an alien to own part of the soil of a foreign country deals

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<sup>134</sup> Questions regarding distinctions between aliens and nationals concerning expropriation would be open to debate. Would these distinctions purely on the grounds of alienage, violate the international law rule which prevents discrimination, or would they be within the exceptions admitted under international law, that is, national security, national interests and public order? I believe that as a rule distinctions based on domicile and residence may eventually be legal and valid, but not those based merely on the national status of the individual. As for the patterns for compensation see Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM.J.INT'L LAW 474 (1991).

<sup>135</sup> See Dennis Campbell and David S. Tenzer, *Alien Acquisition of Real Property: A Practitioner's Perspective*, *LEGAL ASPECTS OF ALIENS ACQUISITION OF REAL PROPERTY*(Dennis Campbell ed.) (1980) at 6/7: "...the well-established principle of international law that a nation may absolutely prohibit an alien from taking, holding or owning land within its sovereign territory. Because an alien does not necessarily have any rights in this regard, it follows that whatever rights are granted may be conditioned as the sovereign authority chooses. Furthermore, any economic activity conducted within the territorial borders can be similarly regulated or conditioned."

with the concept of sovereignty and national security.<sup>136</sup> Ownership of boats, ships and airplanes is also often limited for the same reasons.<sup>137</sup>

National laws vary but, in general, the difference lies in the degree of limitations imposed on aliens, for all of them have limitations. As a rule, making wills and transmitting property are not denied to aliens, but one has to observe the restrictions on alien property, if the heir is also an alien. Therefore, these two items are closely linked.

It should also be considered that the right to own property suffers limits even as regards nationals in many countries, mainly in Latin America, where there are several restrictions to land ownership, specifically in rural areas. There has been a widespread policy of agrarian reform and a consequent denial of *latifundios*, even among locals.<sup>138</sup> Additionally, in Latin America, property of the soil is differentiated from property of the subsoil and, while the former may belong to a single individual, the latter as a rule belongs to the State.<sup>139</sup>

It should be observed that when agrarian reform takes place, its main purpose is to make it possible for a greater part of the population to enjoy the benefits of owning private property, to live and to exploit it economically, by planting on it, for instance. Thus, taking into account the objectives of land reform, it should not be considered discrimination if directed towards individuals who do not use their property. For this reason, aliens can also be affected when they do not use their property, but it should be considered discrimination if these measures are directed only towards aliens. If the criterion is to foster the use of the soil and keep the property productive, no matter if by foreigners, then the goal of the policy of land reform is already fulfilled.

Decision 24 of the Cartagena Agreement<sup>140</sup> includes restrictions on foreign ownership of land. Peru adopted these rules in 1971, and aliens in this country cannot acquire or hold lands, waters, mines, or minerals within a fifty kilometer zone along the frontiers. Aliens cannot hold or acquire rural property in the border provinces, or in the immediate vicinity of military installations. Foreign investment in assets is permitted subject to prior authorization and it should be registered with the competent authority.<sup>141</sup>

As regards real estate, legislation of the countries which refer to alien ownership vary substantially. In some cases, legislation mentions alien ownership in order to grant or deny this right.

<sup>136</sup> As BORCHARD, *supra* note 7, at 86 puts it: "fear that control of national territory by foreigners opened too great a danger of foreign influence, domination or conflict."

<sup>137</sup> Roberto Mayorga, Die Rechtsstellung von Ausländern nach Staatlichen Recht und Völkerrecht in Chile, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 187, 225 (1987); Shigeki Miyazaki, Die Rechtsstellung von Ausländern nach Staatlichen Recht und Völkerrecht in Japan, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 727, 742 (1987), Daniel Thürer, Die Rechtsstellung des Ausländers in der Schweiz, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1341, 1404 (1987).

<sup>138</sup> See Steven E. Hendrix, *Property Law Innovation in Latin America with Recommendations*, 18 B.C. INT'L & COMP. L. REV. 1-58 (1995).

<sup>139</sup> *Id.* at 12.

<sup>140</sup> Agreement for Sub-regional Integration, known as the Andean Common Market, May 26, 1969, which includes Bolivia, Colombia, Chile, Ecuador, Peru.

<sup>141</sup> Hendrix, *supra* note 138, at 25-26.

Examples of this category are Argentina and Brazil. Brazil, among others.<sup>142</sup> The Argentinean Constitution of 1853 determines:

*Article 20- Foreigners enjoy in the territory of the Nation all of the civil rights of a citizen; they may engage in their industry, commerce or profession; own real property, purchase it and alienate it; navigate the rivers and coasts; freely practice their religion; make wills and marry in accordance with the laws...<sup>143</sup>*

The 1988 Brazilian Constitution mandates that:

*Article 5- Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners resident in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms: XXII- the right of property is guaranteed.*

This is the rule which contains the principle of equality before the law to nationals and resident aliens. According to this provision, nationals and aliens residing in the country should be treated alike. As one of the paragraphs guarantees the right to property, so aliens and nationals alike have the same rights regarding property. As a conclusion to this provision, ordinary legislation cannot discriminate where the Constitution does not.<sup>144</sup>

Thus, the only distinctions which should be deemed in accordance with the Constitution are the ones included in the text of the Constitution itself. Those excep-

<sup>142</sup> See also GERMAN CONST. (1949), article 14.1; BELIZEAN CONST. (1981), article 3.c; CAPE VERDIAN CONST. (1992), article 66.1; CHILEAN CONST. (1980), article 19.24; COSTA RICAN CONST. (1949), article 45; GREEK CONST. (1975), article 17.2; DUTCH CONST. (1983), article 14; HONDURAN CONST. (1982), article 103; HUNGARIAN CONST. (1949), article 13.1; INDIAN CONST. (1950), article 300 a; ISRAELI CONST. (Basic Law 13, Human Dignity and Liberty, 1994), section 3; ITALIAN CONST. (1948), article 42.2; JORDANIAN CONST. (1952), article 11; LIBERIAN CONST. (1984), article 20.a.22; LUXEMBURG CONST. (1868), article 16; NORWEGIAN CONST. (1814), article 104; POLISH CONST. (1997), article 21; SWEDISH CONST. (1975), chapter 2, article 20.1.9; SWISS CONST. (1874), article 22.1; THAI CONST. (1997), article 48; TURKISH CONST. (1982), article 35.

<sup>143</sup> There are restrictions regarding the right to own real estate in security areas along the frontiers, established by an act of June 1944. Sylvia Maureen Williams, *The Legal Position of Aliens in National and International Law in Argentina*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 3, 20 (1987).

<sup>144</sup> Legal commentators are not unanimously in accordance with this statement. This idea is defended by Carmen Tiburcio in a previous article, *Nationality and the Status of Aliens in the 1988 Brazilian Constitution*, PANORAMA OF BRAZILIAN LAW (ed. Jacob Dolinger and Keith Rosem, 1992) and by I HAROLDO VALLADÃO, DIREITO INTERNACIONAL PRIVADO 424( 5th ed. 1980) and Guido F.S. Soares, *Os Estrangeiros e as Atividades a eles Vedadas ou Restringidas Proibição Constitucional a Discriminação pela Lei Ordinária de Brasileiros Naturalizados*, A NOVA CONSTITUIÇÃO E O DIREITO INTERNACIONAL, 118-23 (ed. J. Dolinger 1987) and by Jacob Dolinger, 2 COMENTÁRIOS À CONSTITUIÇÃO, 114-119 (1991). In contrast, I OSCAR TENÓRIO, DIREITO INTERNACIONAL PRIVADO, 268-69 (11th ed. rev. J. Dolinger 1976); 2 WILSON DE SOUZA CAMPOS BATALHA, DIREITO INTERNACIONAL PRIVADO 28-29 (2nd ed. 1977) defend the opposite viewpoint.

tions deal with specific types of property, such as in rural areas, or of communications networks.<sup>145</sup> The right of property in general cannot thus be denied.

Article 190 of the Constitution reads:

*"The law shall regulate and limit the acquisition or leasing of rural property by foreign individuals or legal entities and shall determine which cases shall require authorization from the National Congress".*

As the Constitution itself admits that ordinary legislation may establish criteria for alien ownership in the rural area, laws which create distinctions against aliens regarding this subject are considered constitutional.<sup>146</sup>

Aliens are assimilated to nationals as regards acquisition of property *mortis causa*. Consequently, the fact that the heir is an alien will not *per se* prevent acquisition. Notwithstanding, the Brazilian Constitution has a rule which states that: "*inheritance of foreigners' assets located in the Country shall be governed by Brazilian law, for the benefit of the Brazilian spouse or children, whenever the personal law of the deceased is not more favorable to them.*"<sup>147</sup>

This rule is a tradition in the Brazilian civil system, which has the objective of protecting the Brazilian family of the deceased, having as its origin the Consolidation of 1890, soon after Brazil became a Republic.<sup>148</sup> Consequently,

<sup>145</sup> Art. 222 – "The ownership of journalism firms and radio and television broadcasting firms is restricted to native-born Brazilians or those naturalized more than ten years ago, who shall be responsible for management and intellectual orientation". BRAZILIAN CONST. (1988), article 222. See also article 190 of the Brazilian Constitution *infra* in the text.

<sup>146</sup> This is the case regarding Complementary Act number 45, of Jan. 30, 1969, which admits acquisition of property in rural areas only to resident aliens, establishing though that this exigency does not apply to inheritance. Additionally, there is Law 5709 of October 7, 1971, which fixes a size limit for land acquisition by aliens and determines that authorization from the National Security Council will be necessary in certain cases even in the case of inheritances.

<sup>147</sup> CONSTITUIÇÃO FEDERAL [Constitution] [C.F.] art. 5, XXXI (Brazil). BRAZILIAN CONST. (1988), article 5, XXXI. This rule was also contained in the 1969 Constitution, art. 153, para. 33 and the Constitution of 1967, article 150. The 1946 Constitution, article 165; the Constitution of 1937, article 152; Constitution of 1934, article 134 also adopted the same rule, with minor distinctions. The Introductory Law to the Brazilian Civil Code, dated 1942, also contains this rule, at article 10, para. I. Therefore, after 1942, this rule protecting the Brazilian family existed both in the constitutional text and in ordinary legislation. The previous Introduction to the Brazilian Civil Code of 1917, article 14, did not establish the possibility of choice between Brazilian law and the personal law of the deceased, but determined the applicability of Brazilian law. Brazilian legislation also protects the Brazilian widow, married to a man under a different regime as community property. According to the legislation, Decree Law 3200 of 1941, article 17 and Brazilian Civil Code, article 1611 para. 1, as amended in 1962, the Brazilian spouse has a right to 1/4 of the marital property, if there are Brazilian children of the marriage, and to 1/2, if there are no children. This protective rule to the Brazilian widow is necessary because, according to our legislation, the spouse is not necessarily an heir, and can be excluded in the event that the deceased spouse made a will benefiting another person, or if he has children or parents. This rule can be explained by the American theory of interest analysis in conflicts of laws, elaborated by Brainerd Currie, for the Brazilian widow, as a rule, living in Brazil, if left without anything, may become a public charge. As for the interest analysis doctrine see BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, Duke University Press, North Carolina (1963).

<sup>148</sup> Compilation of Carlos Augusto de Carvalho, dated 1890, art. 31 sole para.

Brazilian legislation comprises a certain contradiction. It does not establish any prohibition to aliens as regards acquisition by inheritance, but it does contain a rule of conflict of laws that favors Brazilian heirs.

This provision reflects the so called *droit de prélèvement* adopted by French legislation, as amended in 1819,<sup>149</sup> which favored French heirs. It should be observed that this rule made sense when promulgated, because at that time, as seen, France had abolished the *droit d'aubain*—according to which an alien had no rights at all—, but it still existed in many other countries. Therefore, if an alien who had property both abroad and in France died, the French heir could be completely excluded from the inheritance abroad, because he or she would have been an alien there. Accordingly, in order to prevent the French heir from receiving much less than the other heirs, French legislation established a preference for the French heir in matters of succession regarding property located in France.

Nowadays, this rule does not make sense anymore, neither in France nor in Brazil, because alienage *per se* is not a factor which may exclude an heir. It is an international law rule that everyone should be recognized as having legal personality, without any distinction between nationals and aliens, as seen *supra*. Thus, the existence of this rule nowadays represents a differentiated treatment without a reasonable reason for this distinction. *Ad argumentandum*, if the rule protected those domiciled in the country, not just nationals, it could be explained under the interest analysis doctrine, developed by the Americans, for its objective would be to avoid that those domiciled in the country become a public burden. But distinctions based solely on alienage would amount to an unfair distinction, to discrimination under international law.

In Greece, according to article 4 of the Civil Code, aliens are granted the same rights as nationals in respect to the acquisition of real estate in Greece. However, internal legislation<sup>150</sup> forbids alien individuals or legal entities to realize acquisition or leasing of real estate situated in border areas.

Aliens in Australia<sup>151</sup> and in Belgium<sup>152</sup> also have the same rights as nationals as regards private property, with rare exceptions.

Other countries, in their legislation, establish that distinctions may be created by further legislation in general terms.

<sup>149</sup> Law of July, 14, 1819, article 2: “*Dans le cas de partage d'une même succession entre cohéritiers étrangers et français, ceux-ci prélèveront sur les biens situés en France une portion égale à la valeur des biens situés en pays étranger dont ils seraient exclus, à quelque titre que ce soit, en vertu des lois et coutumes locales.*” This rule was first adopted to protect the French heir in the event inheritance abroad was denied to him or her, but French courts enlarged its scope to apply not only when the French heir was excluded abroad, but to any inheritance in France when the foreign applicable law granted the French national fewer rights than those granted by French law. See BATIFFOL & LAGARDE, *supra* note 16 at 319-20.

<sup>150</sup> Law number. 3250 of 1924, E.L. 1366 of 1938. The author has no more recent information.

<sup>151</sup> New South Wales, Naturalization and Denaturalization Act, 1898, section 4; Victoria, Property law Act, 1955, section 27; Tasmania, Aliens Act, 1913, section 3; South Australia, Law of Property Act, 1936, section 24; Western Australia Naturalization Act, 1871, section 2; Queensland, Aliens Act, 1965, section 2, as quoted by Shearer, *supra* note 90, at 66.

<sup>152</sup> Michel Melchior, Sabine Lecrenier, *Le Régime Juridique des Étrangers en Droit Belge*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 91, 151 (1987). See also BELGIAN CONST. (1970) article 191.

Denmark, in its Constitution of 1953, states: "article 44(2) *The extent of the right of aliens to become owners of real property shall be laid down by statute.*"

Statute requires aliens, who do not have their domicile in Denmark and those who have not had their domicile in the country for the last 5 years, to only obtain title to real estate subject to permission from the Ministry of Justice. If the alien acquires title to the land as an heir, permission is not required.<sup>153</sup>

Therefore, legislation imposes more restrictions on original acquisition than on secondary acquisition, respecting the title and the right of the person who had legally acquired land.

Canada grants aliens the same rights as are granted to British subjects, which is less than those which are granted to Canadians.<sup>154</sup> The Citizenship Act of 1974 provides that real and personal property can be held by an alien in the same manner as by a national. However, the Act grants the Governor in Council the authority to prohibit acquisitions of land by aliens. Therefore there is extensive provincial legislation restricting ownership of property to aliens.<sup>155</sup>

In Mexico, as regards land ownership in general, the Constitution, dated 1917, in art 27(I) determines:

*"Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mines or waters. The State may grant the same right to foreigners, provided they agree before the Minister of Foreign Affairs to consider themselves nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto: under penalty, in case of noncompliance with this agreement, of forfeiture of the*

<sup>153</sup> Langkjaer & Stummel, *supra* note 109, at 257.

<sup>154</sup> Civil Code of "Lower Canada", of 1866, article 25 "*L'étranger a droit d'acquérir et de transmettre, à titre gratuit ou onereux, ainsi que par succession ou par testament, tous biens meubles et immeubles dans le Bas-Canada, de la même manière que le peuvent faire les sujets britanniques nés ou naturalisés.*"

<sup>155</sup> A. L. C. De Mestral, *Position of Aliens in Canadian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 765, 820 ( 1987). Dennis Campbell and David S. Tenzer, *supra* note 135 at 18 n113 inform several of those restrictions. The Citizenship Act of 1974 determines:

*"34 Rights Subject to section 35.*

*(a) real and personal property of every description may be taken, acquired, held held and disposed of by a person who is not a citizen in the same manner in all all respects as by a citizen; and*

*(b) a title to real and personal property of every description may be derived derived through, from or in succession to a person who is not a citizen in the same same manner in all respects as though through, from or in succession to a citizen.*

*Authority to prohibit or restrict acquisitions of property in a province by non-Canadians*

*35. (1) Subject to subsection (3), the Lieutenant Governor in Council of a province or such other person or authority in the province as is designated by by the Lieutenant Governor in Council thereof is authorized to prohibit, annul or or in any manner restrict the taking or acquisition directly or indirectly of, or or the succession to, any interest in real property located in the province by by persons who are not citizens or by corporations or associations that are are effectively controlled by persons who are not citizens."*

*acquired property to the Nation. Under no circumstances may foreigners acquire direct land ownership of lands or waters within a zone of 100 km along the frontiers and of 50 km along the shores of the country".*

As regards acquisition *causa mortis*, the 1870 Civil Code of Mexico adopts a stricter criterion, for it demands reciprocity.<sup>156</sup>

The US also has several restrictions on land ownership. The Oklahoma Constitution, at article 22, para. 1 states that:

*"No aliens or persons who are not citizens of the US, shall acquire title to own land in this state, and the Legislator shall enact laws whereby all persons not citizens of the US, and their heirs, who may hereafter acquire real estate in this state by devise, descent, or otherwise, shall dispose of the same within 5 years upon condition of escheat or forfeiture to the State".*

This rule is not applied to Oklahoma resident aliens; it is applied both to foreign corporations or corporations owned by foreign individuals. In Wisconsin, there is also a statute limiting nonresident alien land ownership to 640 acres.<sup>157</sup> Some Supreme Court decisions in 1923 upheld state statutes which imposed restrictions on alien ownership.<sup>158</sup>

Additionally, some states in the US used to deny to inhabitants of some iron-curtain countries, the right to receive legacy of property in US territory.<sup>159</sup>

As regards foreign ownership of broadcasting entities, the Communication Act of 1934, which included requirements for the issue of radio and television broadcast licenses, determined that no alien or representative of an alien would be granted such licenses.<sup>160</sup>

Thus, in many countries acquisition of real estate is restricted to aliens in several ways. Some countries determine that acquisitions of immovable property are subject to the prior approval of the competent authorities.<sup>161</sup> Other countries

<sup>156</sup> Article 3437: "Por falta de reciprocidad internacional son incapaces de heredar por testamento o por intestado, a los habitantes del Estado, los extranjeros que segun las leyes de su pais no puedan testar o dejar por intestado sus bienes a favor de los mexicanos." These harsh provisions of the legislation have been mitigated by law enforcement measures. As informed by Dennis Campbell and David S. Tenzer *supra* note 135 at 13.

<sup>157</sup> Michael Kuzow, *Corporate Aliens and Oklahoma's Alien Landownership Restrictions*, 16 TULSA L.J. 528-39 (1981).

<sup>158</sup> *Id.* at 543 n86. US courts have struck down some state statutes which discriminate against aliens after the Supreme Court decision, *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>159</sup> FRANK G. DAWSON & IVAN L. HEAD, *INTERNATIONAL LAW, NATIONAL TRIBUNALS, AND THE RIGHTS OF ALIENS* 54 (1971). This legislation was also struck down or limited by a Supreme Court decision *Zchernig v. Miller*, 389 U.S. 429 (1968). It should be observed, though, that this Supreme Court decision was based on the argument that Oregon law was an intrusion by the state into the field of foreign affairs which the Constitution entrusts to the President and the Congress.

<sup>160</sup> 48 Stat. 1064, 47 U.S.C. paras. 151-610 (1982).

<sup>161</sup> Austria: Michael Geistlinger, Gerhard Lebitsch, Harald Stolzlechner, *Zur Rechtsstellung der Ausländer nach österreichischem Recht, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN*

expressly forbid acquisition in certain areas, such as frontiers or other areas considered important to national security.<sup>162</sup> Total prohibition of or severe restrictions on alien land ownership is almost non-existent.<sup>163</sup>

As such, we may reach the conclusion that, in international law, all civil rights do not have the same level of protection for aliens. The right to be recognized as a person before the law, that is the right to acquire rights in general, has been raised to the category of a very basic individual right and both the C.P.R. Covenant and the American Convention qualify this right as non-derogable. Therefore, no one can be denied personality, and this right cannot be limited.

The right to family life has also been widely guaranteed and, under some circumstances, it may even outweigh the interest of the State to expel an alien, for instance. However, the first (the right to be recognized as a person before the law), should be part of the category of fundamental rights, where no derogation should be admitted, while the second (the right to family life), while very basic, may be limited under very circumstances, such as when national security, public policy or health so requires.

On the other hand, the right to own property has received a lower degree of enforcement, and some conventions either limit the extent of the right – as the American Convention does – which guarantees this right only to the extent of satisfying the basic needs of the individual, while others only grant the right to enjoy one's property. Therefore, the right to acquire may be limited. Additionally, this right may suffer other limitations, connected with national security interests and public policy.

Domestically, these patterns established by international law have been widely accepted. Recognition as a person before the law is granted to all, without distinctions. The right to family life has also been assured by domestic legislation and is taken into account as regards the concession of visas and expulsion proceedings, although with somewhat different patterns. The right to own property is subject to several limitations and many countries deny to aliens the right to own real estate in certain areas or condition it upon certain requirements.

RECHT UND VÖLKERRECHT 1009, 1099 (1987); Denmark: Langkjær & Stummel, *supra* note 109, at 257; India: Singh, *supra* note 114, at 603; Poland: Kedzia, *supra* note 120, at 1238; Switzerland: Thürer, *supra* note 137, at 1404. In the US there is a special duty to notify the federal government if aliens hold interest in agricultural land. See T. Alexander Aleinikoff, *United States Immigration Nationality and Refugee Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1545, 1621 (1987). In Sweden, see Dennis Campbell and David S. Tenzer *supra* note 135 at 9. The Polish Act of 15th March 1996 concerning amendments to the act referring to the acquisition of real property by aliens sets up some cases in which permission is not required, such as: 1) Acquisition of an independent residential unit; 2) acquisition of real estate by an alien residing in Poland for more than 5 years; 3) acquisition of real estate by an alien married to a Polish national and residing in Poland for more than 2 years; 4) acquisition due to inheritance; 5) acquisition by a legal entity with headquarters in Poland owned by aliens. See Mieczyslawa Zdanowicz, *supra* note 120 at 58-59.

<sup>162</sup> Argentina: Maureen Williams, *supra* note 143, at 30; Chile: Mayorga, *supra* note 137, at 225; Greece: P. D. Dagtoglou, *Die Rechtsstellung von Ausländern nach Staatlichen Recht und Völkerrecht in Griechenland*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 529, 557 (1987). Dennis Campbell and David S. Tenzer *supra* note 135 at 18n99 inform that more than 40% of the countries surveyed had enacted one or more "key sector" restriction.

<sup>163</sup> Dennis Campbell and David S. Tenzer inform that in 1980 only the Union of Socialist Republic and Yugoslavia were included in this category. See *supra* note 135 at 8.

## Social and Cultural Rights

### 1. INTRODUCTION

At first, only civil and political rights were guaranteed. In the 18<sup>th</sup> and 19<sup>th</sup> centuries, internal legislation and doctrine primarily mentioned such rights as the ones to deserve protection. Social rights, when mentioned, were understood as a consequence to them. Only at the beginning of the 20<sup>th</sup> century did some constitutions announce the general protection of social rights in express terms, such as the Mexican Constitution of 1917, the Declaration of Rights of the People of 1918, later incorporated in the Soviet Constitution, the German Constitution of Weimar of 1919, the Spanish Constitution of 1931, the USSR Constitution of 1936, and the Irish Constitution of 1937. As an exception, it should be mentioned that the French Jacobean Constitution in the 18<sup>th</sup> century already mentioned the right to social assistance.<sup>1</sup>

In the international arena, with the creation of the International Labor Organization in 1919 and the adoption of its Constitution, many principles and basic conditions regarding work conditions were settled. Thus, the opposite occurred at international level, to that which happened nationally. Recognition of many social rights took place before civil and political rights were guaranteed, for these started to be protected internationally only after the adoption of the Universal Declaration and the American Declaration, dated 1948, almost thirty years later.

After World War II, with the adoption of the Universal Declaration, social rights were raised to the status of human rights deserving protection. On a regional level, the European Social Charter of 1961 and the American Declaration and American Convention also adopted the same criterion. Thus, social rights were first, and still are, protected by specific organizations, mainly the International Labor Organization, but together with this protection one should take into account the existence of conventions and declarations, elaborated by organizations of universal and regional scope, which protect civil and political rights and also contain a long list of social rights.

The exact meaning and content of these social rights are not expressly determined in these international generic instruments. As an example, one can cite article XIV of the American Declaration, in which the right to work and the right to receive payment

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<sup>1</sup> Declaration which preceded the Constitutional Act of June 24<sup>th</sup>, 1793, art. 21: “*les secours publiques sont une dette sacrée. La société doit la subsistance aux citoyens malheureux, soit en leur procurant du travail, soit en assurant les moyens d'exister à ceux qui sont hors d'état de travailler.*” Quoted by Albrecht Weber, *L'État Social et les Droits Sociaux en RFA* 24 REVUE FRANCAISE DE DROIT CONSTITUTIONNEL 677, 678 (1995).

for it to assure a suitable standard of living are guaranteed, but this Declaration does not expressly state the exact extent of 'the right to work' and how it should be understood. Should we interpret this rule in the sense that everyone, including aliens, has the right to find a job and work for a living and therefore no restrictions can be imposed by the State because the individual is an alien, unless for exceptional reasons of national security or public policy? This is an important point, for almost every country in the world imposes several limitations on the exercise of certain professions by aliens.

It should also be observed that the implementation of social rights is costly to the State, while the implementation of many civil and fundamental rights need only a negative attitude from the State, and imply, at most, negligible cost. For this reason the implementation of social rights is much more difficult and complex than the implementation of civil, political and public rights.

Consequently, because of the cost involved in the implementation of these rights, there may be a variation from country to country, depending on the level of development and financial possibilities of each.<sup>2</sup> Also because of the cost involved in their implementation, they are not of universal observance and may be limited under some circumstances.

It is also interesting to observe that some experts think that the rights laid down in the E.S.C.R. Covenant are not mandatory. This reasoning derives from article 2 of the Covenant according to which, the rights established in the Covenant are to be progressively achieved by the States. According to this viewpoint, the Covenant adopts programmatic rights, intentions to be followed by the States,<sup>3</sup> to be adopted progressively, while implementation of fundamental, civil and procedural rights is immediate. For this reason, many commentators argue that social rights have to be implemented by internal legislation, in order to become enforceable.<sup>4</sup>

In brief, we may conclude that the main problem regarding the implementation of these rights is not legislative, but depends on the economic and social policies and on the development of the State. For this reason, we find domestic Constitutions elaborated under the influence of "social liberalism", or under the influence of populism, that express in generic terms the right to education, to social assistance and to work, as in the case of the Brazilian Constitution of 1988. In practical terms, though, the implementation of these rights is not as easy as the law implies it to be. Consequently, it can be understood as an irresponsibility of the legislator to assure to everyone a right which, in concrete and objective terms, the State cannot assure.

The E.S.C.R. Covenant determines in general terms that everyone will have equal rights as regards the enjoyment of all economic, social and cultural rights set forth in the convention.<sup>5</sup> It also states a limitation to non-nationals in the following terms:

<sup>2</sup> MARC BOSSUYT, L'INTERDICTION DE LA DISCRIMINATION DANS LE DROIT INTERNATIONAL DES DROITS DE L'HOMME 186 (1976) classifies social rights as rights of variable content.

<sup>3</sup> A.H. ROBERTSON, HUMAN RIGHTS IN THE WORLD 35 (1972) AND A. P. MOVCHANA, PROTEÇÃO INTERNACIONAL DOS DIREITOS DO HOMEM (1958), both quoted by Vladimir Kartashkin, *Os Direitos Económicos, Sociais e Culturais, As Dimensões Internacionais dos Direitos do Homem* 130, 133 n2 (ed. Karel Vasak, 1983).

<sup>4</sup> BOSSUYT, *supra* note 2, at 187.

<sup>5</sup> The E.S.C.R. Covenant article 2(2) sets forth the prohibition of discrimination regarding the enjoyment of the rights enunciated in the Convention and article 3 determines the rule of equality before the law.

*Art 2(3)- Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.*

It should be observed that this limitation, as an exception to the rule of equality before the law and prohibition against discrimination, can be resorted to only by developing countries and specifically regarding economic rights. Therefore, this exception does not apply either as regards social and cultural rights nor for developed countries.

Apart from this exception, discrimination based on alienage is forbidden, unless the distinction is justified as necessary for reasons of national security, public policy, morals or public health or the rights and freedoms of others.

## 2. DEFINITION

The concept of social rights is rather controversial. While the great majority of fundamental and civil rights comprise defensive attitudes for the individual by limiting the scope of State's influence and maintaining the State authority out of the individual's private sphere of action and personal development, social rights generally imply a positive attitude by the State to guarantee the individual's enjoyment of these rights. They aim at State involvement, obliging the State to provide services to the people,<sup>6</sup> and their goal is to improve living conditions and to promote better distribution of wealth among the individuals.

Social rights are, in general, complementary to civil rights as private society alone cannot provide individuals with employment, education, and unemployment benefits. Hence, some authors point out that totalitarian States have a tendency to assure more expressly and broadly the enjoyment of these rights than the enjoyment of individual civil rights, because it enlarges their sphere of influence.<sup>7</sup> Additionally, social rights are a pre-requisite to the enjoyment of civil and political rights, because they guarantee the basic needs of the individuals.

In this context, the right to work, the right to education and the right to social assistance are the most important benefits that the State can provide to the individual. Another aspect worth mentioning, is that, according to some commentators, the enjoyment of social rights should guarantee the individual a protection against the economic exploitation of other individuals.<sup>8</sup>

The definition of social rights adopted in this work does not comprise the right to strike and the right to associate, for these are defensive rights, limiting the sphere of the State to act. Notwithstanding, some legal commentators classify them under

<sup>6</sup> WEBER, *supra* note 1, at 679.

<sup>7</sup> *Id.* at 681, quoting the example of the Soviet Constitution of 1936, the Portuguese Constitution of 1933; the Fundamental Laws of Franco - 1938 and 1945, and the Italian legislation of 1927 regarding the right to work.

<sup>8</sup> CELSO ANTONIO BANDEIRA DE MELLO, EFICÁCIA DAS NORMAS CONSTITUCIONAIS SOBRE A JUSTIÇA SOCIAL 8 (1982), as quoted by LUIS ROBERTO BARROSO, O DIREITO CONSTITUCIONAL E A EFETIVIDADE DE SUAS NORMAS: LIMITES E POSSIBILIDADES DA CONSTITUIÇÃO BRASILEIRA 95 (1996).

the category of social rights, because they permit the enjoyment of the typical social rights - right to work, right to social assistance and right to education. For the purposes of this work though, the right to strike and the right to associate are considered public rights and not social rights.

### 3. CONTENTS OF SOCIAL RIGHTS

#### *I) Right to Work*

##### *a) International Law*

The American Declaration establishes a right and an obligation as regards the right to work:

*Article XIV- Every person has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit.*

*Every person who works has the right to receive such remuneration as will, in the proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.*

and

*Art XXXVII- It is the duty of every person to work, as far as his capacity and possibilities permit, in order to obtain the means of livelihood or to benefit his community.*

Therefore, this Declaration, despite establishing a general right to work to every person, also establishes a condition to the enjoyment of this right, for it is subject to “*in so far as existing conditions of employment permit.*”

The Universal Declaration guarantees:

*Article 23(1)- Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.*  
*(2)- Everyone, without any discrimination, has the right to equal pay for equal work.*  
*(3)- Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.*

Thus, the right to work, in broad terms, is granted to everyone.

The 1954 Convention of Stateless Persons guarantees to stateless persons the same treatment as “*aliens generally in the same circumstances*” as regards wage-earning employment (article 17), self-employment (article 18) and the liberal professions (article 19).

The European Social Charter deals with the right to work and to social security and, according to the terms of this convention, these rights should be guaranteed to everyone, without any discrimination. Despite this rule of equality, the rights of aliens are specifically treated in the following terms:

*Article 18: The Right to Engage in a Gainful Occupation in the Territory of Other Contracting Parties*

*With a view to ensuring the effective exercise of the right to engage in gainful occupation in the territory of any other Contracting Party, the Contracting Parties undertake:*

- 1) *to apply existing regulations in a spirit of liberality;*
- 2) *to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;*
- 3) *to liberalize, individually or collectively, regulations governing the employment of foreign workers; and recognize*
- 4) *the right of their nationals to leave the country to engage in a gainful occupation of foreign workers.*

Hence, although the terms of the Convention are very liberal for it mentions “*everyone has the right*”, thus admitting theoretically these rights to everyone, without discrimination, this above mentioned provision has a very narrow scope, almost contradicting the broad language of the convention.

This article determines the obligation of the States to liberalize, to simplify, to apply regulations with broad-mindedness, but it does not guarantee to aliens rights such as equality of treatment or the right to exercise a profession. This article only mentions the subjective right of the individual as regards the right to leave one's country of origin to work elsewhere. Thus, it is the right of the individual to leave his or her country of origin, the country of which he or she is a national, which is expressly guaranteed. This provision only reproduces a right which has already been granted in other international instruments, that is the right to leave one's country of nationality and, as regards the right to work, which should be the main concern of this Convention, the alien is not granted this right, but the States are advised to apply the existing rules with liberality.

The E. S. C.R. Covenant guarantees the right to work in the following terms:

*Article 6(1)- The States parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work, which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

V. Kartashkin defends the applicability of the rule of equal treatment as regards the right to work, and he affirms that with a few exceptions, aliens are granted the same guarantees as regards work conditions as nationals. As an example, he mentions the conventions on salaries, on extension of the work period, weekly rest, paid holidays, employment of women and teenagers, safety and hygiene in the work environment, abolition of slave work and the right to organize, which are all applicable both to nationals and aliens. However, it seems somewhat contradictory, for later, he also admits the possibility of the States to regulate alien work, affirming that the States have the faculty to regulate access to work concerning alien workers.<sup>9</sup>

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<sup>9</sup> Kartashkin, *supra* note 3, at 153. Contrarily, see ILO Convention number 143 concerning equality for migrant workers.

Therefore, it seems that Kartashkin admits that States are free to forbid an alien to exercise a certain profession, but once the alien is allowed to work, the State should guarantee equality of treatment with nationals as regards work conditions.

I entirely disagree with his reasoning, firstly, because the right to work is assured to everyone under international law, as seen, without the possibility of discrimination, except for reasons of national security, public policy, morals or public health. Secondly, guaranteeing equality solely concerning work conditions is assuring only a partial guarantee of equality for, if the States may deny access to work, what is the use of all these guarantees regarding working conditions?

Along the same lines, the African Charter rules:

*Article 15- Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.*

The International Labor Organization has produced several instruments dealing with access to work and work conditions. Among the several instruments elaborated by this organization, we can quote the ILO Convention number 97 on migrant workers of 1949,<sup>10</sup> which assimilates the migrant worker to the national as regards remuneration, hours of work, minimum age for employment, membership of trade unions, social security, among others.<sup>11</sup> Additionally, Convention number 111 (Discrimination in Employment and Occupation), number 118 (Equality of Treatment on Social Security), number 143 (Migrant Workers)<sup>12</sup>, number 157 (Maintenance of Social Security Rights) and Recommendations 169 (Employment Policy) and 151 (1980)<sup>13</sup>, among many others.

At regional level, the European Convention on the Status of Migrant Workers of 1977 was elaborated by the Council of Europe.<sup>14</sup> The European Committee on Migration, an organization of the Council of Europe, has focused its attention on matters related to migrant work, for most of the Resolutions it has approved deal with this situation.<sup>15</sup>

Recently, the UN Convention on Migrant Workers was approved.<sup>16</sup> This Convention grants equality with nationals as regards procedural rights, remuneration,

<sup>10</sup> See RICHARD PLENDER, *INTERNATIONAL MIGRATION LAW* 299 (1987).

<sup>11</sup> Article 6.

<sup>12</sup> It obligates each State Party to respect the basic human rights of all migrant workers, including migrants who are not legal. It also determines equality of treatment between nationals and illegal migrants as regards social security in employment. Ved P. Nanda, *The Protection of the Rights of Migrant Workers: Unfinished Business* 2 ASIAN AND PACIFIC MIGRATION JOURNAL 161, 165 (1993).

<sup>13</sup> *Id.* It provides protection of the health of migrants, protection from expulsion upon loss of employment of migrants.

<sup>14</sup> Approved November 24, 1977.

<sup>15</sup> Resolution 7 on Return of Migrant Workers to their Home Country; Resolution 35 on School Education for the Children of Migrant Workers; Resolution 15 on Equal Treatment of National and Migrant Workers in the Following Sectors: Working Conditions, remuneration, Dismissal, Geographical and Occupational Mobility; Resolution 44 on Clandestine Immigration and the Illegal Employment of Foreign Workers. Quoted by MURRAY AND NIESSEN, THE COUNCIL OF EUROPE AND MIGRATION 2-3 (1991).

<sup>16</sup> Approved December 18, 1990.

conditions of work, such as overtime, weekly rest, holiday pay, safety and termination of employment. However, this Convention does not guarantee the right to access to work, because it limits its scope to those who "are authorized to enter, to stay and to engage in a remunerated activity in the State of employment ..." <sup>17</sup>

In brief, it can be concluded that the right to work is to be granted to everyone, without distinctions, in accordance with international law conventions. The States may, however, restrict the enjoyment of this right to nationals and aliens alike, for reasons of national security, public health, public morals or public policy. Therefore, States may not as a rule deny aliens the right to work and to exercise a certain profession, for this denial is undoubtedly contrary to international law. This denial may be admitted though if the State is able to justify this prohibition in accordance with one of these escape clauses.

#### b) Comparative Law

Many countries guarantee to all, both nationals and aliens, the right to work, but with several limitations.

In Spain, the decision of October 6<sup>th</sup>, 1982 establishes conclusively that the right to work, guaranteed in the E.S.C.R. Covenant, to which Spain is a party, when limited by the exigency of a work permit implies a limitation to a subjective right.<sup>18</sup> This means that the permit may be denied, but if so, the decision has to give reasons.<sup>19</sup>

Permanent residents, pursuant to article 26 of the Migration Law in Argentina may work as employees or be self-employed without restriction and are protected by all laws relating to this question.<sup>20</sup>

In Denmark, there are no restrictions as to aliens right to work, for they may engage in any profession or trade, with the exception of some posts related to national security.<sup>21</sup>

In Portugal, aliens are not required to have work permits. The Portuguese Constitution determines that everybody has the right to work and it also settles that this right is assured to all, without any discrimination whatsoever.<sup>22</sup>

Permanent resident aliens in the US are eligible for almost all public and private jobs. The Supreme Court has interpreted the 14<sup>th</sup> Amendment, in the Equal Protection clause as forbidding most state restrictions on employment based on alienage.<sup>23</sup>

<sup>17</sup> Article 5(a).

<sup>18</sup> Jose Olivares D'Angelo, *Algunas observaciones sobre la Reciente Jurisprudencia del Tribunal Supremo acerca de la Condicion Juridica del Extranjero*, 36 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 103-108 (1984).

<sup>19</sup> This means that Spain interprets the ESC Covenant as assuring in general terms the right to work to everyone.

<sup>20</sup> Sylvia Maureen Williams, *The Legal Position of Aliens in National and International Law in Argentina*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 3, 29 (1987).

<sup>21</sup> ASYLUM IN EUROPE, European Consultation on Refugees and Exiles 110 (1983). The author has no more recent information.

<sup>22</sup> Luís Silveira, *Le régime juridique des étrangers en droit portugais*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1257, 1285 (1987), quoting article 59 of the 1976 Constitution.

<sup>23</sup> T. Alexander Aleinikoff, *United States Immigration, Nationality and Refugee Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1545, 1617 (1987).

In this sense, the Supreme Court held in 1915, that a state provision requiring that 80% of the employees of certain businesses be citizens, infringed the aliens' "right to work for a living in the common occupations of the community."<sup>24</sup>

In this case – *Truax v. Raich* – the reasoning of the Court was that a state cannot deny the ordinary means of earning a livelihood to lawful inhabitants, on the grounds of their race or nationality. The Court also made the point, that the right to work for a living in the common occupations of the community is of the very essence of personal freedom and opportunity, that the Fourteenth Amendment aimed to assure.<sup>25</sup>

Along the same lines, in the cases *Oyama v. California* and *Takahashi v. Fish and Game Commission*<sup>26</sup>, the Court determined that a state's interest in conserving fish in coastal waters was found inadequate to justify a statute that prevented "lawfully admitted aliens within its borders from earning a living in the same way other state inhabitants earn their living."

As regards restrictions imposed on the exercise of the legal profession thirty-eight States plus Washington DC had excluded foreigners from the bar, before 1973 when the US Supreme Court decided in the *Griffiths* case<sup>27</sup> that Connecticut could not make nationality a requirement for admission to the bar.<sup>28</sup>

This case involved a national of the Netherlands who attended an American law school and applied to the Connecticut bar. Connecticut refused application on the basis of a state statute requiring bar applicants to be US nationals. The Connecticut Supreme Court upheld the state law, but the Supreme Court reversed it, because Connecticut had not fulfilled its requirement to demonstrate that "the citizenship classification was necessary to the accomplishment of its purpose or the safeguarding of its interest."<sup>29</sup>

In 1976, the Supreme Court invalidated the exclusion of aliens from the right to practice civil engineering in Puerto Rico<sup>30</sup>, and in 1984 it also invalidated the exclusion of aliens from becoming public notaries.<sup>31</sup>

In sum, these US court decisions are entirely in agreement with international law patterns since generally aliens should be granted the same rights as nationals as regards the right to work, provided they are not understood as forbidding distinctions established by the state but allowing federal distinctions. However, if there are substantive grounds based on public policy, national security, morals or public health, specific activities may be denied to aliens.

The Immigration Act of 1990, which significantly amended the INA, allows US businesses to utilize the US immigration system to recruit and hire foreign high-skilled workers on a temporary or permanent basis. It changed the provisions for the H-1B Visa, which allows US businesses to hire foreign professionals to fill specialist

<sup>24</sup> *Truax v. Raich*, 239 U.S. 41 (1915).

<sup>25</sup> Quoted by the Restatement of Foreign Relations § 722, Reporter's Notes No 5.

<sup>26</sup> *Oyama v. California*, 332 U.S. 633 (1948) and *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

<sup>27</sup> *In re Griffiths*, 413 U.S. 717 (1973).

<sup>28</sup> Chin Kim and Sonya Siemer, *Foreign Lawyers in Japan and the United States*, 20 THE KOREAN JOURNAL OF COMPARATIVE LAW 67, 88 (1992).

<sup>29</sup> See *supra* note 27.

<sup>30</sup> *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976).

<sup>31</sup> *Bernal v. Fainter*, 467 U.S. 216 (1984).

occupations and permits foreigners to stay in the US for up to six years in this status. US legislation has other types of non-immigrant visas allowing the foreigner to work in the country.<sup>32</sup> The 1990 Act also expanded the number of permanent immigrants admitted based on their skills and intended employment. For most of these categories, however, the intended employer must obtain a 'labor certification' that is, a finding that there are no available, qualified, able, willing American nationals to fill these positions, before the immigrant visa can be issued.<sup>33</sup>

Therefore, there is a clear intention to protect US workers, guaranteeing that, as regards permission to work, nationals will have preference over aliens. In this situation, however, I would not consider it a limitation on alien's right to work in the US, for these aspects are examined before a visa is issued, that is, before the alien enters the country. It is a well-accepted rule of international law that aliens do not have the right to enter a specific country, for only nationals have such a right. If this criterion is applied before entry, as long as it is not discriminatory against, for instance, a specific nationality, it is in accordance with the principles established by international law. However, if this preference is applied after entry has been granted, then it would violate the alien's right to work.

As regards employment in the Smithsonian Institute, the United States Code establishes a clear preference in favor of nationals over aliens, for the employment of aliens in a scientific or technical post is only admitted if no qualified US national is available for that particular position.<sup>34</sup> Thus, if this criterion is applicable at all times, not only before issuing visas, there would be a distinction between the right of the States to admit or not aliens, and the right of the individual to work for a living. Therefore, any limitation on this right would only be acceptable if it can be proved that the function to be performed is connected with national security, public policy or any other escape clause.

Not all aliens working in the US need a labor certification. Aliens entering the US on the basis of family relationships, those who were granted asylum and refugee status, as well as those entering under the first (priority workers) and fifth (employment creation immigrants) employment-based preferences, do not require labor certification.<sup>35</sup>

Additionally, aliens who received labor certification do not need to remain in the original job for which it was obtained; neither is the alien required to stay for a certain period of time working for the employer.<sup>36</sup>

In the UK there are interesting criteria concerning the work as an 'au pair'.

According to UK Immigration Rules an 'au pair' is an arrangement under which an unmarried young person and without dependents, who is a national of one of the following countries: Andorra, Bosnia Herzegovina, Croatia, Cyprus, Czech Republic, The Faroes, Greenland, Hungary, Macedonia, Malta, Monaco, San Marino, Slovak Republic, Slovenia, Switzerland, or Turkey may come to the UK to learn English and

<sup>32</sup> See Steven Klearman, *Hiring Foreign Talent Nonimmigrant Business Visas after the 1990 Act* 4 COMPARATIVE LAW REVIEW 45-57 (1993).

<sup>33</sup> Heather Brown, *The Paradoxical Nature of the Department of Labor's Labor Certification Procedures as Applied to Self-Employed Aliens*, 16 HOUSTON JOURNAL OF INTERNATIONAL LAW 43, 50 (1993).

<sup>34</sup> United States Code, 20 U.S.C. section 46 a. There are a number of other federal statutes that limit government jobs to US citizens and to aliens with which the US has a defense treaty.

<sup>35</sup> Brown, *supra* note 33, at 69-71.

<sup>36</sup> *Id.* at 71.

to live for a time with an English-speaking family in exchange for help with domestic work.<sup>37</sup>

MacDonald shows his surprise as regards this rule, stressing that applications for full-time domestic employment require work permits, while this arrangement does not. He wonders if this is “an official form of cheap labor,” as, in exchange for the domestic labor the young person performs, he or she gets “pocket money”.<sup>38</sup> He also opposed the original ideal of this type of arrangement as it was an opportunity only open to girls and asked “why not boys?”<sup>39</sup>

This was clearly a discriminatory provision, for it only admitted girls from Western European countries, as if implying that girls coming from other countries would be considered unacceptable and could not perform these tasks living in the home of an English speaking family. Additionally, the employment nature of this arrangement is also questioned because previous legislation refers to the terms “employer” and “au pair.”<sup>40</sup>

In Brazil, the right to work is guaranteed both to Brazilians and resident aliens.<sup>41</sup> Therefore, in my understanding any legislation establishing limitations on the right of aliens to work is unconstitutional.<sup>42</sup> Consequently, the former statute of the Brazilian Bar Association that conditioned the practice of law by aliens on reciprocity is unconstitutional<sup>43</sup>, as well as all the provisions of the Aliens’ Act prohibiting the exercise of all functions not expressly mentioned in the Constitution,<sup>44</sup> and all prohibitions to exercise certain professions specified in ordinary legislation such as public interpreter,<sup>45</sup> customs dispatcher,<sup>46</sup> insurance agent,<sup>47</sup> auctioneer<sup>48</sup> journalists<sup>49</sup> and airplane pilots.<sup>50</sup> Along the same lines, the provision of the Code of Brazilian Labor Law which require that two-thirds of all workers be Brazilian nationals is also unconstitutional.<sup>51</sup>

<sup>37</sup> UK Immigration Rules of 1971 with the changes introduced in 1994, part 4, section 88.

<sup>38</sup> IAN MACDONALD, *IMMIGRATION LAW AND PRACTICE IN THE UNITED KINGDOM* 180 (2nd ed. 1987).

<sup>39</sup> *Id.* at 179.

<sup>40</sup> *Id.* at 180.

<sup>41</sup> BRAZILIAN CONST. (1988), article 5, XIII.

<sup>42</sup> See *supra* Chapter V on Private Rights, note 144, where the position of Brazilian legal commentators is described.

<sup>43</sup> Statute of the Brazilian Bar Association, Law number 4211 of 1963, articles. 48, 49 and 51. The present statute does not contain this requirement, Law number 8906 of 1994.

<sup>44</sup> Alien’s Act, articles 106 (VI), (VII), (VIII), and (IX).

<sup>45</sup> Decree 13609 of 1943.

<sup>46</sup> Decree Law 4014 of 1942, article 19.

<sup>47</sup> Law 4594 of 1964, article 3, para.1.

<sup>48</sup> Decree 21981 of 1932.

<sup>49</sup> Decree 53263 of 1963.

<sup>50</sup> Law 7183 of 1984.

<sup>51</sup> Brazilian Labor Laws, article 354. The unconstitutionality of this provision is explained by the argument that the 1969 Brazilian Constitution, article 165 (XII) expressly determined proportionality of Brazilian workers in all enterprises. The present BRAZILIAN CONST. (1988) article 5, XIII establishes equality between Brazilians and resident aliens and is silent on this topic of proportionality. The current constitutional text only admits requirements based on the professional ability of the individual: “*exercise of any job, trade or profession is free, observing the professional qualifications that the law establishes*”, while the former text, of the 1969 Constitution, which determined proportionality, instead of mentioning ‘*professional qualifications*’ in the corresponding article, mentioned ‘*conditions of capacity*’, which could include alienage.

In brief, in the great majority of countries aliens require a work permit or other specific government permission to start working. Such has been the case in Belgium<sup>52</sup>, Brazil<sup>53</sup>, Canada<sup>54</sup>, Denmark<sup>55</sup>, France<sup>56</sup>, Germany<sup>57</sup>, Ghana<sup>58</sup>, Greece<sup>59</sup>, Ireland<sup>60</sup>, Israel<sup>61</sup>, The Netherlands<sup>62</sup>, Norway<sup>63</sup>, Sweden<sup>64</sup>, Turkey<sup>65</sup>, UK<sup>66</sup>, US<sup>67</sup>.

As regards the right to work, the legislation of many countries only guarantee this right to nationals or establish that these have preference over aliens. Such has been the

<sup>52</sup> Michel Melchior, Sabine Lecrenier, *Le Régime Juridique des Étrangers en Droit Belge*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 91, 146 (1987).

<sup>53</sup> See Government Directive of the Labor Ministry number 3721 of October, 31, 1990.

<sup>54</sup> A. L. C. De Mestral, *Position of Aliens in Canadian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 765, 797 (1987).

<sup>55</sup> L. Langkjær & D. Stummel, *Review of the Principal Features of the Legal Position of Aliens in Denmark*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 237, 256 (1987).

<sup>56</sup> J. Y. Vincent , *Le Régime Juridique des Étrangers en Droit Français*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 433, 475-78 (1987). After 1984 aliens are given an authorization to work together with an authorization to stay in the country. For nationals of the European Union, the national treatment rule forbids the host country to make it mandatory to have a work permit.

<sup>57</sup> Kay Hailbronner, *Die Rechtsstellung von Ausländern in der Bundesrepublik Deutschland*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 323, 390 (1987).

<sup>58</sup> An alien can only be employed in Ghana if granted a license and if accommodated on an employer's quota. G. K. Ofosu-Amaah, *The Legal Position of Aliens in National and International Law in Ghana*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 501, 519 (1987).

<sup>59</sup> P. D. Dagloglou, *Die Rechtsstellung von Ausländern nach Staatlichen Recht und Völkerrecht in Griechenland*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 529, 554 (1987).

<sup>60</sup> Mary Robinson, *Report on Legal Position of Aliens in Ireland*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 615, 623 (1987).

<sup>61</sup> Claude Klein, *Le Régime Juridique des étrangers en droit israélien*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 635, 651 (1987).

<sup>62</sup> A. H. J. Swart, *The Legal Position of Aliens in Dutch Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 869, 897 (1987). See also the Act of December 21 of 1994 to implement the Act on the Employment of Aliens, article 2 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 299(1996)

<sup>63</sup> Atle Grahl-Madsen, *The Legal Position of Aliens in Norway*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT, 983, 1002 (1987).

<sup>64</sup> Göran Melander, *The Legal Position of Aliens in Sweden*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1303, 1329 (1987).

<sup>65</sup> Ergun Özsüney, *The Legal Position of Aliens in Turkey*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1489, 1509 (1987).

<sup>66</sup> Richard Plender, *The Legal Position of Aliens in National and International Law in the United Kingdom*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1675, 1690 (1987).

<sup>67</sup> Brown, *supra* note 33, at 50.

case in Algeria<sup>68</sup>, Cape Verde<sup>69</sup>, China<sup>70</sup>, Congo<sup>71</sup>, Cuba<sup>72</sup>, Denmark<sup>73</sup>, Honduras<sup>74</sup>; India<sup>75</sup>; Italy<sup>76</sup>; Jordan<sup>77</sup>; Liberia<sup>78</sup>, Luxemburg<sup>79</sup>, Monaco<sup>80</sup>; The Netherlands<sup>81</sup>, Nicaragua<sup>82</sup>, Portugal<sup>83</sup>, Spain<sup>84</sup>; Taiwan<sup>85</sup> and the United Arab Emirates.<sup>86</sup>

Some professions are, as a rule, denied to aliens, as in the case of jobs or activities related to the legal profession, such as being lawyers and notaries. This is or has recently been the case in Australia<sup>87</sup>, Canada<sup>88</sup>, Chile<sup>89</sup>, France<sup>90</sup>, Italy<sup>91</sup>,

<sup>68</sup> ALGERIAN CONST. (1976), article 55.

<sup>69</sup> CAPE VERDIAN CONST. (1992), article 58.1.

<sup>70</sup> CHINESE CONST. (1982), article 42.

<sup>71</sup> CONGOLESE CONST. (1976), article 55.

<sup>72</sup> CUBAN CONST. (1976), article 45.

<sup>73</sup> DANISH CONST. (1953), section 75.

<sup>74</sup> HONDURAN CONST. (1982), article 137.

<sup>75</sup> M. P. Singh, *Position of Aliens in Indian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 569, 596 (1987).

<sup>76</sup> ITALIAN CONST. (1948), article 4.

<sup>77</sup> JORDANIAN CONST. (1952), articles 6 (II) and 23.

<sup>78</sup> LIBERIAN CONST. (1984), article 18.

<sup>79</sup> LUXEMBURG CONST. (1868), article 11.4.

<sup>80</sup> MONEGASQUE CONST. (1962), article 25.

<sup>81</sup> DUTCH CONST. (1983), article 19.

<sup>82</sup> NICARAGUAN CONST. (1987), article 57.

<sup>83</sup> Law Decree 97 of 1977 fixes a quota of at least 90% of nationals in every business with more than 5 employees. Silveira, *supra* note 22, at 1285.

<sup>84</sup> SPANISH CONST. (1978), article 35 (I).

<sup>85</sup> TAIWANESE CONST. (1946), article 15.

<sup>86</sup> Federal Law no. 8 of 1980 relating to the Organization of Employer and Employees Relationships of the United Arab Emirates, article 9 provides that non-nationals may be employed only if there are no UAE nationals available or suitable for the job. Article 10 determines that in such event, preference is to be given to non-UAE Arab nationals. The Ministry of Labor has imposed quotas or ratios on some commercial enterprises and banks requiring either that they employ a certain number of UAE nationals or that the number of nationals be not less than a specified proportion of the total employees. Amjad Ali Khan, *A Guide to the Employment and Immigration of Foreigners*, MIDDLE EAST EXECUTIVE REPORTS 24 (Feb. 1983).

<sup>87</sup> The only profession which had a citizenship requirement was the legal profession. This rule has been progressively changed in many States: New South Wales in 1977; Queensland in 1976; South Australia in 1976; Western Australia in 1981, I. A. Shearer, *The Legal Position of Aliens in National and International Law in Australia*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 41, 65 (1987).

<sup>88</sup> Aliens are denied access to all jobs connected to the administration of justice. Aliens cannot be lawyers, notaries or judges. De Mestral, *supra* note 54, at 797.

<sup>89</sup> Roberto Mayorga L., *Die Rechtsstellung von Ausländern nach Staatlichen Recht und Völkerrecht in Chile*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 187, 229 (1987).

<sup>90</sup> The 1971 French Conseil Juridique Law enacted a legislation determining that foreign lawyers would only be allowed to practice law in France if they came from a country which granted French lawyers reciprocity within five years from the adoption of the law. Article 11, para. 1, of Act Number 71.1130 of December 31, 1971 stipulates that "no one may enter the legal profession if he is not French, except as provided for in international Conventions." Vincent, *supra* note 56, at 475-78.

<sup>91</sup> Bruno Nascimbene, *Le régime juridique des étrangers en droit italien*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 659, 693 (1987). Law number 89 of February 16, 1913, art. 5.

Japan<sup>92</sup>, Netherlands<sup>93</sup>, Poland<sup>94</sup> Turkey<sup>95</sup> and the US until the 1973 Supreme Court decision *In re Griffiths* ( lawyers) and 1984 in the decision *Bernal v. Fainter* (notaries).<sup>96</sup>

Other liberal professions also may be restricted to aliens- engineers, architects, doctors, pharmacists, accountants or journalists as is or has recently been the case in France<sup>97</sup>, Italy<sup>98</sup>, the Netherlands<sup>99</sup>, Poland<sup>100</sup> and Turkey<sup>101</sup>.

The Italian *Corte de Cassazione* in a case of 1997, *Abdullahi Ahmed Mohamed v. Ordine dei Medici Chirurghi e degli Odontoiatri della Provincia di Firenze*, decided that the citizenship requirement for the exercise of liberal professions found in ordinary legislation in Italy shall be deemed as non-existent and this rule was reproduced in the 1998 Alien's Act.<sup>102</sup>

Therefore, international law clearly establishes that everyone has the right to work for a living and that aliens have the same rights as nationals as regards working conditions. Aliens can only be denied the right to work for a living in accordance with the exceptions adopted in all human rights instruments, such as national security, public policy, morals or public health. Hence, the right to work can be limited only in situations where these exceptional circumstances are involved. If the right of the alien to work for a living is denied for no just reason, the State would be violating international law provisions which grant this right to everyone, as well as the

<sup>92</sup> Until 1990, with the passing of Law Number 66, foreign lawyers could not practice law in Japan. The only way to become an attorney in Japan is to pass the national judicial examination and enter the Institute, for which the percentage rate of approval is two percent. After approval, the successful applicants spend two years in the Institute, which does not admit aliens. Currently, there is a special category named "foreign law solicitor" and in order to admit foreigners to practice law Japan calls for reciprocity in the home state of the foreign attorney. It also only admits foreign lawyers to give advice on the laws of their country, not of Japanese law, besides several other restrictions. 1- Consultants may not represent clients in the courts and public agencies; 2- consultants may not represent clients in cases which involve Japanese property rights, or which involve marital rights of Japanese nationals; 3- consultants may not represent clients in a criminal case. Kim & Siemer, *supra* note 28, at 85.

<sup>93</sup> Swart, see *supra* note 62 at 897, aliens cannot be lawyers, judge or accountants.

<sup>94</sup> Aliens cannot be judges nor public prosecutors. Mieczyslawa Zdanowicz, *Legal Status of Aliens In Poland in the Light of International Obligations*, 22 POLISH YEARBOOK OF INTERNATIONAL LAW 49; 58 (1996)

<sup>95</sup> Özsüney, *supra* note 65, at 1509. TURKISH CONST. (1982), article 49 para. 1, determines that everyone has the right and duty to work. However in ordinary legislation- Act on Professions and Crafts Exclusive Only to Turkish Citizens in Turkey-- aliens are not allowed to carry out some professions such as law and notary.

<sup>96</sup> See *supra* note 27 and 31 and accompanying text.

<sup>97</sup> ASYLUM IN EUROPE, *supra* note 21, at 137. In France aliens have suffered limitations as regards being pharmacists or accountants.

<sup>98</sup> Nascimbene, *supra* note 91, at 79.

<sup>99</sup> Aliens cannot be accountants, see Swart, *supra* note 62,at 899.

<sup>100</sup> As regards the medical profession, aliens need permission of the proper organs. Mieczyslawa Zdanowicz, see *supra* note 94 at 58 .

<sup>101</sup> See *supra* note 65. Aliens are not allowed to carry out some professions such as chemistry and engineering, pharmacology and pharmacies and veterinary medicine. Other activities need the approval of the authorities.

<sup>102</sup> Case decided in October 3, 1997, LXXXI RIVISTA DI DIRITTO INTERNAZIONALE 247-249 (1998).

principle of non-discrimination. In brief, alienage can only be considered a status which can prevent access to certain professions under exceptional circumstances.

However, if the alien is denied access to a certain job before the visa is issued, that is, when the alien is still abroad, I would not consider this situation as contrary to international law rules and principles. In this case, as the alien has no right to enter a foreign country, denial of a work permit would amount to a denial of entry, which is not contrary to international law rules.

In comparative law, this right granted at international level is not entirely respected. Many countries deny aliens access to the legal profession, which has nothing to do with national security or public policy, as well as, for instance, to the profession of accountant, which is still more difficult to characterize as a risk to national security. Along these lines, legislation which establishes a preference for national workers, without any good reason, is also discriminatory, and as such, contrary to international law rules.

## *II) Right to Education*

Cultural rights are those related to the right to an education, to the right to participate in the cultural life of the community and to the right to information.<sup>103</sup>

The term right to education should not be confined to the “technical” aspects of learning skills of survival. The term education spans the whole intellectual, spiritual and emotional development of the human being, of his or her intellectual, spiritual, and emotional potential.<sup>104</sup>

In its broader meaning, the right to education should be understood not as a social right, but as an individual civil right, determining that the State may not interfere in the religious and philosophical approach to education.

The right to education, in more strict terms, guarantees that everyone is entitled access to educational facilities and to a quantitatively and qualitatively adequate education. This determines an obligation on the part of the State to provide the necessary financial resources for schools and other learning institutions. Moreover, the State has an obligation to supervise the quality of private and public schools.<sup>105</sup>

### *a) International Law*

The American Declaration establishes in its preamble and in certain provisions:

*“Since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.*

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<sup>103</sup> Kartashkin, *supra* note 3, at 148.

<sup>104</sup> Jost Delbrück, *The Right to Education as an International Human Right* 35 GERMAN YEARBOOK OF INTERNATIONAL LAW 92, 94 (1992).

<sup>105</sup> *Id.* at 101.

*Article XII- Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.*

*Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.*

*The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and desire to utilize the resources that the state of the community is in a position to provide.*

*Every person has the right to receive, free, at least primary education.*

*Article XIII- Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.*

*He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific works of which he is the author.*

*Article XXXI- It is the duty of every person to acquire at least an elementary education.*

The Universal Declaration determines the following principles:

*Article 26(1)- Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*

*Article 27(1)- Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*

The Protocol I to the European Convention determines:

*Article 2- No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*

The E. S. C. Covenant also establishes:

*Article 13(1)- The States Parties to the present Covenant recognize the right to education...*

*Article 15(1)- The States Parties to the present Covenant recognize the right to everyone:*

- a) *To take part in the cultural life;*
- b) *To enjoy the benefits of scientific progress and its application;*
- c) *To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

The African Charter guarantees these rights on the following terms:

*Article 17-1- Every individual shall have the right to education.*

- 2- *Every individual may freely, take part in the cultural life of his community;*
- 3- *The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.*

The Convention on the Rights of the Child determines:

*Article 28- States Parties recognize the right of the child to education...*

- a) *Make primary education compulsory and available free to all;*
- b) *Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;*
- c) *Make higher education accessible to all on the basis of capacity by every appropriate means;*

The UNESCO Convention Against Discrimination in Education and its Recommendation of 1960 entered into force in 1962 and, according to these instruments, the States Parties agree to eliminate any discriminatory practice, and agree to “*give foreign nationals resident within the territory the same access to education as that given to their own nationals*”.

The OAS Charter mentions this right in article 47, as well as in five other articles.

The Declaration on the Human Rights of Individuals who are not citizens of the country in which they live sets forth the right to education to aliens lawfully residing in the territory of a State.<sup>106</sup>

The Convention on Refugees determines that State parties should grant refugees the “*same treatment as is accorded to nationals with respect to elementary education*.<sup>107</sup>

The UN Convention on Migrant Workers determines:

*Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.*<sup>108</sup>

Knowledge is one of the basic human goods. Consequently denying education to someone may be extremely harmful, for that denial effectively condemns the child to lifelong impoverishment - intellectual, emotional and material. Thus, there might result a twofold damage: 1) for the individual, for he or she will suffer the individual consequences of this denial and 2) for the community, as it would suffer the consequences of having uneducated persons living within its borders, adding to the problems and costs related to unemployment, welfare and crime.

<sup>106</sup> Article 8.

<sup>107</sup> Article 22(1).

<sup>108</sup> Article 30.

Thus, access for all children to free elementary education is a mandate under international law, while secondary and higher education are defined in less obligatory terms.

As regards prohibiting access to elementary education for children of illegal aliens, international law does not establish a definite rule. The OAS Charter determines that "*jurisdiction of States within the limits of their national territory is exercised equally over all inhabitants, whether nationals or aliens,*" whereby inhabitants may be understood as those who are legally residing in a specific country. Along the same lines, the Unesco Convention Against Discrimination in Education guarantees equality of treatment to foreign nationals resident within their territory. Thus, it may also be understood to exclude illegal aliens.

In contrast, the UN Convention on Migrant Workers expressly grants this right to children even when parents are irregularly in the country. However, it should be mentioned that this convention has only a very small number of State Parties and cannot be understood as a convention of widespread acceptance.

#### *b) Comparative Law*

As a rule, in the Netherlands, aliens are not discriminated against with regard to primary and secondary education. However, as regards universities, the Minister of Education may determine the number of aliens permitted to be accepted annually. Maximum numbers have been set for medicine, dentistry and veterinary studies.<sup>109</sup>

In Canada, some provinces establish a higher fee to aliens than to nationals.<sup>110</sup>

In the US, there is no question that legally resident aliens have the same rights as nationals regarding the right to have an education. However, the main issue is related to the possibility of excluding illegal alien's children from this right.

On November 8, 1994, Californian voters approved Proposition 187, according to which there would be a state-run system to verify the legal status of all persons seeking public education, health care and other public benefits. There would be no reimbursement of public funds for services rendered to persons without legal status. As regards emergency health care, although it would be still necessary to verify the legal status of beneficiaries, everybody, including illegal aliens, would be provided with these services. It also provided that illegal aliens and their children are ineligible for public education, from kindergarten to university.<sup>111</sup>

Federal courts have blocked the implementation of Proposition 187 and the new Democratic governor of the state of California decided to drop further appeals of these decisions as well as prepare regulations to implement it.

<sup>109</sup> Swart, *supra* note 62, at 900-01.

<sup>110</sup> This power to establish higher fees has been understood as within the power of the provinces. *Re Redlin and the Board of Governors of the University of Alberta*, (1980), 110 D.L.R. (3d) 146 (Alta. C.A.). The Court stated: "Without suggesting that aliens in Canada or Alberta may not have 'rights' which may be considered as coming within the protection of these Bill of Rights [the Alberta Bill of Rights S.A. c.I and the Individual Rights Protection Act S.A. 1972 c.2], in the present situation where the issue is the right to education they have to be treated as coming under the 'privilege' aspect rather than that of 'right'" quoted in De Mestral, *supra* note 54, at 824.

<sup>111</sup> See Philip Martin, *Proposition 187 in California* 24 IMR 255 (1995).

The denial of public education to illegal alien children was the most controversial section of Proposition 187. In 1982, the Supreme Court in *Plyler v. Doe* struck down a Texas statute which impeded access to public schooling by children of illegal aliens.<sup>112</sup> The Court declared that the equal protection clause of the Fourteenth Amendment protects everyone, regardless of immigration status, for this clause was intended to protect all persons physically within the territorial boundaries of a state.<sup>113</sup> However, the Court split 5-4 on whether the 'equal protection clause' required equal treatment between US citizens' children and illegal aliens' children with regard to public education.

In practical terms, this is also a controversial issue, for public education is the most costly service used by illegal aliens (an estimated 300,000 to 400,000 illegal aliens' children attend Californian schools).<sup>114</sup>

US President Clinton campaigned vigorously against Proposition 187, arguing that California is right to fight against illegal immigration, but these are not the right tools for it. He also urged the federal government to help California in this struggle, as well as to contribute more financially.

At the international level, this regulation also raised criticisms. Mexican President Zedillo condemned it in his first speech as president. Likewise, a special *Rapporteur* on human rights from the UN condemned Proposition 187 for containing discriminatory and anti-constitutional provisions.<sup>115</sup>

It should be pointed out that international law does not forbid distinctions but it forbids discrimination and that not every distinction can be classified as discrimi-

<sup>112</sup> The Texas Statute- TEX.EDUC.CODE ANN. para 21.031 (Vernon Supp. 1982) provided that:

"a) All children who are citizens of the US or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

b) Every child in this state who is a citizen of the US or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides at the time he applies for admission.

c) The board of trustees of any public free schools of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the US or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district", as quoted by Michael Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on and beyond, Plyler v. Doe*, 44 UNIVERSITY OF PITTSBURGH LAW REVIEW 330 (1983).

<sup>113</sup> It should be noted that Texas began its defense of the statute by arguing that "undocumented aliens, because of their immigration status, are not 'persons within the jurisdiction' of the state of Texas, and that they therefore have no right to the equal protection of Texas law" as quoted by Michael Perry *id.* This author makes very interesting considerations as regards the Supreme Court decision. In his opinion the decision was not based on juridical, economic or rational arguments but on moral ones for it would not be right to exclude children from this benefit. In addition he questions whether a Court is entitled to raise this type of argument based on moral grounds, considering the distinction between right and wrong.

<sup>114</sup> *Id.* at 257.

<sup>115</sup> Stephen Knight, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education* 19 HASTINGS INT'L & COMP. L.REV. 183, 184 (1995).

nation. Along these lines if the distinction (between nationals and illegal aliens) is fair and reasonable it cannot be qualified as discrimination. Additionally, as seen, international law does not have a clear pattern as regards the right to education on the part of children of illegal aliens. Thus I see no international law violation in this proposition.

However, doubts may arise under domestic US law as to whether state legislation may create such distinctions.

In brief, as regards the right to education, the general tendency is to assimilate aliens – at least lawfully admitted aliens – to nationals, therefore in accordance with international law patterns. This is the legislation in Australia<sup>116</sup>, Austria<sup>117</sup>, Argentina<sup>118</sup>, Belgium<sup>119</sup>, Brazil<sup>120</sup>, Cape Verde<sup>121</sup>, Chile<sup>122</sup>, Congo<sup>123</sup>, Costa Rica<sup>124</sup>, Cuba<sup>125</sup>, Denmark<sup>126</sup>, France<sup>127</sup>, Ghana<sup>128</sup>, Ireland<sup>129</sup>, Israel<sup>130</sup>, Italy<sup>131</sup>, Mexico<sup>132</sup>, Paraguay<sup>133</sup>, Peru<sup>134</sup>, Poland<sup>135</sup>, Portugal<sup>136</sup>, Spain<sup>137</sup>, Sweden<sup>138</sup>, Switzerland<sup>139</sup>, Thailand<sup>140</sup>, Turkey<sup>141</sup>, UK<sup>142</sup> and the US<sup>143</sup>. In contrast, other countries grant this

<sup>116</sup> Aliens are granted the same rights provided they are legally in the country. Shearer, *supra* note 87, at 67.

<sup>117</sup> AUSTRIAN CONST. (1929), article 14.6.

<sup>118</sup> ARGENTINEAN CONST. (1853), article 14.

<sup>119</sup> BELGIAN CONST. (1970), article 24.3.1.

<sup>120</sup> BRAZILIAN CONST. (1988), article 205.

<sup>121</sup> CAPE VERDIAN CONST. (1992), articles 73 and 77.1.

<sup>122</sup> CHILEAN CONST. (1980), article 19.10.

<sup>123</sup> CONGOLESE CONST. (1992), article 37.1.

<sup>124</sup> COSTA RICAN CONST. (1949), article 78.

<sup>125</sup> CUBAN CONST. (1976), article 51.

<sup>126</sup> Langkjaer & Stummel, *supra* note 55, at 259. Alien children staying in Denmark for more than 6 months must attend school. See also DANISH CONST. (1953), article 76.

<sup>127</sup> Mandatory for both nationals and aliens until the age of 16. Vincent, *supra* note 56, at 482.

<sup>128</sup> Oforosu-Amaah, *supra* note 58, at 521. As regards public schools there is a specific provision prohibiting discrimination against aliens.

<sup>129</sup> Aliens are granted the same treatment as nationals as regards basic education. However, as regards vocational training and universities there are quotas for aliens. Robinson, *supra* note 60, at 632.

<sup>130</sup> Klein, *supra* note 61, at 652.

<sup>131</sup> Article 36 of the 1998 Alien's Act. See also ITALIAN CONST. (1948), article 34.

<sup>132</sup> MEXICAN CONST. (1917), article 3, VII and VIII.

<sup>133</sup> PARAGUAYAN CONST. (1967), article 89.

<sup>134</sup> PERUVIAN CONST. (1993), article 17.

<sup>135</sup> POLISH CONST. (1997), article 70.

<sup>136</sup> Silveira, *supra* note 22, at 1289. PORTUGUESE CONST. (1976), article 73.1 and Portugal has ratified the UNESCO convention against discrimination in education, of December 14, 1960, ratified by Decree 112/80, of October 23, 1980.

<sup>137</sup> SPANISH CONST. (1978), article 27.

<sup>138</sup> Melander, *supra* note 64, at 1329.

<sup>139</sup> SWISS CONST. (1874), article 27.2.

<sup>140</sup> THAI CONST. (1997), section 43.1

<sup>141</sup> TURKISH CONST. (1982), article 42.

<sup>142</sup> Plender, *supra* note 66, at 1710.

<sup>143</sup> Aleinikoff, *supra* note 23, at 1623.

right only to nationals, despite the fact that sometimes in practice aliens may be granted the same opportunities. Such is the case with Canada<sup>144</sup>, China<sup>145</sup>, Hungary<sup>146</sup>, Greece<sup>147</sup>, India<sup>148</sup>, Jordan<sup>149</sup>, Luxemburg<sup>150</sup>, Monaco<sup>151</sup>, Nicaragua<sup>152</sup> and Taiwan<sup>153</sup>.

### *III. Right to Social Services*

#### *a) International Law*

The American Declaration rules:

*Article XVI- Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.*

The E.S.C. Covenant also guarantees:

*Article 9- The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.*

The Convention on the Rights of the Child determines:

*Article 26- 1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law. 2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.*

At the European level, the Convention on Social Security of 1974 guarantees equality of treatment between nationals and non-nationals.

<sup>144</sup> CANADIAN CONST.(1982), article 23. De Mestral, *supra* note 54, at 824.

<sup>145</sup> CHINESE CONST. (1982), articles 19 and 46.

<sup>146</sup> HUNGARIAN CONST.(1949), article 70F.

<sup>147</sup> GREEK CONST. (1976), article 16.2.

<sup>148</sup> INDIAN CONST. (1949), articles 14 and 29(2). Therefore aliens do not have this constitutional guarantee, although in practice they are allowed to seek admission to educational institutions on the same basis as nationals. Singh, *supra* note 75, at 605 .

<sup>149</sup> JORDANIAN CONST. (1952), article 6.ii.

<sup>150</sup> LUXEMBURG CONST. (1868), article 23.1.

<sup>151</sup> MONEGASQUE CONST. (1962), article 27.

<sup>152</sup> NICARAGUAN CONST. (1987), article 58.

<sup>153</sup> TAIWANESE CONST. (1946), article 21.

The European Charter establishes:

*Article 19- The Right of Migrant Workers and their Families to Protection and Assistance*

*With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake:*

- 1) *to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;*
- 2) *to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;*
- 3) *to promote cooperation, as appropriate, between social services, public and private, in emigration and immigration countries;*
- 4) *to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favorable than that of their own nationals in respect of the following matters...*

Therefore, under international law there is a clear rule which guarantees to everyone, without discrimination, the right to social assistance. However, the contents of this rule are not clearly established, and the definition of which rights should be included in this category is left to legal commentators, national legislation, international and domestic tribunals and organs. Imprecision and lack of objectivity have made this rule somewhat ineffective under international law.

The European Court, in the case *Gaygusuz v. Austria*,<sup>154</sup> examined the refusal of Austrian authorities to provide a Turkish unemployed with an advance on his pension in the form of "emergency assistance". In this case the individual complied with all legal requirements to benefit with this measure and the Court verified that the refusal was due only to the fact that he did not have Austrian nationality, which was required under the Emergency Insurance Act, and thus concluded that it is discriminatory treatment, in accordance with art 14 of the Convention combined with article 1 of the First Protocol.

Notwithstanding, the European Court of Justice has deemed non-discriminatory distinctions based on residence.<sup>155</sup>

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<sup>154</sup> Sudre et al, *Chronique de la Jurisprudence de la Cour Européene des Droits de L'Homme en 1996*, RUDH 4-39, 37 (1997). See also *Decisions on the European Convention on Human Rights during 1997*, LXVIII BRITISH YEARBOOK OF INTERNATIONAL LAW 379 (1997).

<sup>155</sup> Cases decided on February 12, 1974 and on January 23, 1997, mentioned in JOURNAL DE DROIT INTERNATIONAL 512 (1998).

*b) Comparative Law*

The Netherlands Government has repeatedly stated that neither illegal residence nor the lack of a work permit affects the rights deriving from Dutch social security legislation.<sup>156</sup>

Aliens receive equal treatment as nationals in Argentina as regards sickness, accident, unemployment and retirement benefits. These are fundamental rights recognized to every inhabitant of the country by the Constitution.<sup>157</sup>

Old-age and invalid pensions are paid to aliens only if resident in Australia for not less than 2 years; unemployment and sickness benefits are payable to aliens who have resided continuously in Australia for the same period.<sup>158</sup>

In Belgium, aliens are assimilated to nationals as long as they are in the country legally, have a work permit and contribute to social security.<sup>159</sup>

The 1988 Brazilian Constitution expressly states that the benefits of social security are open to everyone, conditioned on payment of contributions,<sup>160</sup> while social assistance is equally open to all, regardless of contributions of any nature.<sup>161</sup>

Anybody who is in Denmark is entitled to the National Aid Act. Pensions are reserved to nationals, as a rule, but aliens living in the country for a long time are also granted this benefit. Additionally, if a person is in the country as a tourist or illegally, aid can be granted only for a short period or for the home journey.<sup>162</sup>

In France, the subject has traditionally been mostly regulated in bilateral conventions or EEC treaties.<sup>163</sup>

The French Constitutional Court decided on January 22, 1990 that one law referring to social security and health, which excluded resident aliens from certain benefits, was against the French Constitution, for all individuals of a certain age,

<sup>156</sup> Report of the 66<sup>th</sup> session of the ILO, 1980, p. 71, Netherlands Judicial Decisions - *A.I.B. et H. v. DETAM*, Raad van Beroep Amsterdam, 2 December 1981, *Rechtspraak Vreemdelingerecht* (1981) No 102.

<sup>157</sup> Williams, *supra* note 20, at 30.

<sup>158</sup> Social Security Act of 1991, section 549D.

<sup>159</sup> Melchior & Lecrenier, *supra* note 52, at 151. See art. 23 of the 1994 Constitution. BELGIAN CONST. (1970), article 23.

<sup>160</sup> BRAZILIAN CONST. (1988), article 201, para.1.

<sup>161</sup> BRAZILIAN CONST. (1988), article 203.

<sup>162</sup> Langkjaer & Stummel, *supra* note 55, at 258.

<sup>163</sup> The disabled adult's allowance was only available for French nationals and for aliens, nationals of countries which had concluded a convention with France. This limitation is criticized by the UN Committee on Economic, Social and Cultural Rights because of in contradiction with article 2 of the E.S.C.R. Covenant, which determines that the enjoyment of rights mentioned in the Covenant shall be exercised without discrimination of any kind as to... national or social origin. U. N. Doc. E/C.12/1989/SR.12.

<sup>164</sup> Constitutional Court, January 22, 1990, R.G.D.I.P, 1990, at 281, as quoted by ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 910 (1991): "À cet égard, aucune distinction ne doit être opérée, par la loi, entre les nationaux français et les étrangers car, en la matière, le principe d'égalité postule que soient traitée de façon identique toutes les personnes qui résident sur le territoire de la République sans considération de nationalité." Previously, a decree dated January, 1974 on social assistance granted aliens the same rights as nationals as regards being treated in hospitals in France. Quoted by I HENRI BATIFFOL & PAUL LAGARDE, DROIT INTERNATIONAL PRIVÉ 204 (7th ed., 1981).

residing in France for a specific period, should be treated alike.<sup>164</sup> Presently, the 1998 Amendment to the Alien's Act put an end to all distinctions between nationals and legally resident aliens as regards social security.<sup>165</sup>

In Ghana, aliens are granted treatment equal to nationals.<sup>166</sup>

There is no general social security scheme operative in India. There are laws made for the protection of specific groups, such as the employees in mines, in railway companies, factories and so on. As long as the alien is within one of these categories, he or she may enjoy the benefits.<sup>167</sup>

In Ireland, aliens in insured employment receive equal treatment in the field of sickness, accident, unemployment and retirement benefit.<sup>168</sup>

Israeli legislation grants equal rights for sickness, accident and retirement benefits<sup>169</sup>.

The Italian Constitution guarantees the right to social security only to citizens,<sup>170</sup> but ordinary legislation grants many of these rights also to aliens.<sup>171</sup>

Aliens resident in Norway are covered by the Social Security Act. It also covers aliens serving on a Norwegian ship, fishing vessel or hunting station, and in-flight personnel of Norwegian airlines<sup>172</sup>.

In the US, permanent resident aliens, refugees and others allowed to work in the country, are entitled to the benefits of federal old-age pension and hospital insurance under the Medicare program.<sup>173</sup>

In the case of *Graham v. Richardson*,<sup>174</sup> the Supreme Court struck down several state statutes that excluded aliens from eligibility for welfare benefits. Arizona was requiring 15 years residence for participation in the federally funded program for the permanently and totally disabled; Pennsylvania sought to limit state-funded general assistance benefits to US citizens. In this case the Supreme Court held that state restrictions on welfare benefits for lawfully resident aliens as a class, are inherently suspect and thus subject to being overturned using strict scrutiny analysis under the equal protection clause. These restrictions were also held to violate the supremacy clause because they interfered with Congress's power to establish the conditions for alien residence in the US.<sup>175</sup>

As regards federally funded programs, the Court has been more permissive. First, in the case *Mathews v. Diaz*, the Court upheld federal restrictions disqualifying

<sup>165</sup> See article 41 of the 1998 Act which inserts an article in the Social Security Code. See Dominique Turpin, *La Loi n° 98-349 du 11 Mai 1998 relative à l'Entrée et au Séjour des Étrangers en France et au Droit d'Asile*, 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 521; 544(1998).

<sup>166</sup> Oforso-Amaah, *supra* note 58 at 521.

<sup>167</sup> Singh, *supra* note 75 at 604.

<sup>168</sup> Robinson, *supra* note 60 at 632.

<sup>169</sup> Klein, *supra* note 61 at 652.

<sup>170</sup> ITALIAN CONST. (1948), article 38.

<sup>171</sup> Article 32 of the 1998 Alien's Act..

<sup>172</sup> Grahl-Madsen, *supra* note 63 at 1003.

<sup>173</sup> Aleinikoff, *supra* note 23 at 1622. This rule has changed to require longer waiting periods under the 1996 Welfare Act.

<sup>174</sup> *Graham v. Richardson*, 403 U.S. 365 (1971)

<sup>175</sup> Susan Drake, *Immigrants' Rights to Health Care*, CLEARINGHOUSE REVIEW 504 Special issue (1986).

aliens from health insurance for the aged and disabled until they had lawfully resided in the US for five years because of the plenary federal authority over immigration. The Court reasoned that, even though all aliens are protected by the fourteenth and fifth amendments, there was no violation of these protections when Congress made legitimate distinctions between citizens and aliens, or between classes of aliens.<sup>176</sup>

Before the 1996 Welfare Act, Medicaid, the basic federal-state program which reimburses Medical services, provided to the needy who 'reside in the US permanently under color of law',<sup>177</sup> and US Courts used to interpret this expression broadly. Case law under the now-repealed provision suggested that, whenever the INS had knowledge of the alien's presence and the alien was not enforcing deportation, the person was in the US under color of law. Medicaid eligibility has been established by NY Courts for aliens with visa petitions pending<sup>178</sup> and for aliens petitioning for deferred action status.<sup>179</sup> The qualifications for eligibility are now considerably tighter.<sup>180</sup>

Additionally, there is the Hill-Burton Program<sup>181</sup>, by which, in exchange for receiving federal funds for construction and modernization, private hospitals agree to 1) provide a reasonable volume of free and low-cost services; 2) serve their community without discrimination.<sup>182</sup>

These aspects have considerably changed in accordance with the 1996 Welfare Act and presently all these requirements of time and conditions of residence have been toughened considerably.<sup>183</sup>

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<sup>176</sup> *Mathews v. Diaz*, 426 U.S. 67 (1976)

<sup>177</sup> 42 C.F.R. para. 435.402.

<sup>178</sup> *St. Francis Hosp. v. D'Elia* 422 N.Y.S.2d 104 (App.Div.1979).

<sup>179</sup> *Papadopoulos v. Shang*, 414 N.Y.S.2d 152 (App. Div. 1979).

<sup>180</sup> Some cases discuss these changes and uphold them against constitutional challenge. See *Rodriguez v. US*, 169 F.3d 1342 (11<sup>th</sup> Cir. 1999) and *Abreu v. Callahan*, 971 F. Supp. 799 (SDNY 1997).

<sup>181</sup> Public Health Services Act, Titles VI and XVI.

<sup>182</sup> Drake, *supra* note 175.

<sup>183</sup> 42 USC para. 1436 a, dealing with restriction on use of assisted housing by non-resident aliens, determines that only resident aliens, complying certain conditions, are entitled to these benefits. These conditions do not apply to nationals. As regards compensation for permanent total or permanent partial disability or for death, at 42 USC § 1652 also establishes conditions not established to nationals. Along the same lines at 5 U.S.C. annotated section 8138 regarding payment for death compensation, different rules apply to non-citizen employees. Much of these requirements were toughened in accordance the 1996 Welfare Act, specially as regards post-1996 immigrants.

In brief, the great majority of countries, as a rule assimilate lawfully resident aliens to nationals with regard to the enjoyment of certain social assistance benefits. Such is the case with Argentina,<sup>184</sup> Australia, Belgium, Brazil, Canada,<sup>185</sup> Chile<sup>186</sup> Denmark, France, Ghana, Honduras<sup>187</sup> India, Ireland, Israel, Italy, the Netherlands<sup>188</sup>, Norway, Paraguay<sup>189</sup>, Peru<sup>190</sup> Portugal<sup>191</sup>, Sweden<sup>192</sup>, Thailand<sup>193</sup> Turkey<sup>194</sup> and the UK<sup>195</sup>.

As there is no rule in international law as to which social benefits should be granted aliens, to what extent and which limitations can be imposed on them, we can conclude that, in this matter, these countries are in accordance with international law patterns, because they grant aliens some social services. Therefore, it is up to international and domestic tribunals to define the contents of this right and determine its compliance.

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<sup>184</sup> ARGENTINEAN CONST. (1853), article 14 bis.3.

<sup>185</sup> De Mestral, *supra* note 54, at 821.

<sup>186</sup> CHILEAN CONST. (1980), article 19.9.

<sup>187</sup> HONDURAN CONST. (1982), articles 142 and 145.

<sup>188</sup> Swart, *supra* note 62, at 899.

<sup>189</sup> PARAGUAYAN CONST. (1967), article 88.

<sup>190</sup> PERUVIAN CONST. (1993), article 10.

<sup>191</sup> PORTUGUESE CONST. (1976), article 59.1 and 63.1. Silveira, *supra* note 22, at 1288. Constitutionally, aliens have the same rights as nationals, deriving from article 15 (equality principle). Besides that, art. 63 of the Constitution of 1976 determines that everybody has the right to social security.

<sup>192</sup> Melander, *supra* note 64, at 1328.

<sup>193</sup> THAI CONST. (1997), section 52.

<sup>194</sup> Özsüñay, *supra* note 65, at 1512. TURKISH CONST. (1982), article 60 determines that everyone has the right to social security.

<sup>195</sup> Plender, *supra* note 66, at 1708.

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## Economic Rights

### a) International Law

The E.S.C.R. Covenant, in its article 2(3), establishes an express exception to the rule of non-discrimination. It sets forth that, as regards economic rights, developing countries may exclude non-nationals from the enjoyment of these rights.

Preliminary works of the E.S.C.R. Covenant show that the purpose of this exception was to avoid that non-nationals owned important sectors of the economy of the country, in order to allow each country to freely dispose of its wealth and natural resources.<sup>1</sup>

In Resolution 3201, the Declaration on the Establishment of a New International Economic Order (the NIEO), a large majority of the General Assembly proclaimed the right of each State to exercise control over and exploit its natural resources, “*including the right to nationalization or transfer of ownership to its nationals.*”<sup>2</sup>

Additionally, the UN Convention on Migrant Workers, expressly denies application of its rulings to ‘*persons taking up residence in a State different from their State of origin as investors*’.<sup>3</sup> Therefore, under this convention, only the alien worker is protected, not the alien investor.

As a rule, economic activities may be admitted in accordance with bilateral treaties. Consequently, these rights will be granted not to all individuals, but only to nationals of certain States, nationals of those countries which are parties to the treaties.

It is interesting to observe that the rule which denied access to aliens to economic activities already existed in 1931<sup>4</sup>, when Verdross ministered his course at the Hague and has not changed to this day.

Additionally, as seen in the chapter on private rights, the right to own property is guaranteed in international law with several limitations. It is guaranteed as regards its enjoyment, not as regards its acquisition, as a rule, and only to the extent of satisfying basic human needs. Therefore, this protection cannot be applied in the context of economic activities.

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<sup>1</sup> Vladimir Kartashkin, *Os Direitos Econômicos, Sociais e Culturais, As DIMENSÕES INTERNACIONAIS DOS DIREITOS DO HOMEM* 130, 153 (ed. Karel Vassak 1983).

<sup>2</sup> Note S-6 UN GAOR Supp. (N.1) at 3, UN Doc. A/9559 (1974).

<sup>3</sup> Article 3 (c).

<sup>4</sup> A. Verdross, *Les Règles Internationales Concernant le Traitement des Étrangers*, 37 RECUEIL DES COURS 389-395 (1931).

Thus, international law establishes a difference between the right to work for a living as an employee and the right to perform economic activities in search of profit. International conventions grant the right to work for a living to everyone (even though discriminations still exist in domestic legislation as regards access to work), but does not recognize the right of aliens to perform economic activities. Hence, the right to work of the alien can only be denied under exceptional circumstances, if the States justify this denial due to reasons of national security, public policy, public health or morals or the rights and freedoms of others,<sup>5</sup> whereas the right to perform economic activities is not protected under international law. The States are free to grant this right, or not, to aliens and to establish limitations to the enjoyment of this right and neither the denial nor the limitations need to be justified.<sup>6</sup>

### *b) Comparative Law*

As a result of widespread fear that aliens may control essential parts of the local economy, the great majority of countries impose several limitations on the exercise of economic activity by aliens.

Canada, for example, in accordance with the "*Loi sur l'Investissement au Canada*" of 1985, permits the federal government to forbid aliens to acquire ownership of a Canadian company or to create a Canadian company, unless it is proved that it may be in Canada's interest. Generally, resident aliens are exempt from this ruling.<sup>7</sup>

This legislation was enacted to replace the Foreign Investment Review Act of 1973, which was very stringent and aimed at 'ending foreign economic domination in Canada'. By 1968, 60% of the local economy was foreign owned and, prompted by the fear that foreign owned companies could control Canada's economy, the 1973 legislation required government approval for all transactions realized by non-resident aliens. Because of that legislation, US control in the Canadian economy fell from 51% to 41%, and the economy lapsed into recession. Thus, a more liberal legislation was approved.<sup>8</sup>

Some activities are restricted to aliens, such as telecommunications.<sup>9</sup>

By 1975, Australia passed the Foreign Acquisitions and Takeovers Act of 1975, which introduced a comprehensive bureaucracy, headed by the Treasurer, which reviews certain foreign acquisitions to ensure that they do not offend the 'national

<sup>5</sup> See previous Chapter, where the right to work is analyzed.

<sup>6</sup> Along these lines Dennis Campbell and David S. Tenzer, *Alien Acquisition of Real Property: A Practitioner's Perspective*, *LEGAL ASPECTS OF ALIEN ACQUISITION OF REAL PROPERTY* (Dennis Campbell ed., 1980) at 6.... "the well-established principle of international law that a nation may absolutely prohibit an alien from taking, holding or owning land within its sovereign territory. Because an alien does not necessarily have any rights in this regard, it follows that whatever rights are granted may be conditioned as the sovereign authority chooses. Furthermore, any economic activity conducted within the territorial borders can be similarly regulated or conditioned." (my emphasis).

<sup>7</sup> Brun and Brunelle, *Les statuts Respectifs de Citoyen, Résident et Étranger; à la lumière des Charters des Droits*, 29 *LES CAHERS DE DROIT* 720 (1988).

<sup>8</sup> Christopher T. Vrontas, *The Necessity and Effectiveness of Barriers to Foreign Direct Investment*, 13 *B.C. INT'L & COMP. L. REV.* 167, 177-79 (1990).

<sup>9</sup> See Telecommunications Act, 1996, article 16.

interest.' It is still effective in Australia, despite the fact that the government has since liberalized some aspects of the Act.<sup>10</sup>

The Indian Reserve Bank has traditionally had to approve the acquisition of companies or shares by aliens.<sup>11</sup>

Many states in the US hold restrictions on alien land ownership. All but 16 US states hold restrictions against foreign land ownership (land restrictions do not exist in Alabama, Colorado, Michigan, West Virginia, Delaware, Florida, Maine, Massachusetts, Missouri, Nevada, North Dakota, Ohio, Rhode Island, Tennessee, Washington and Vermont).<sup>12</sup>

Some States, such as Minnesota, also deny ownership of companies to aliens.<sup>13</sup>

Many US leaders want to prevent the US from becoming economically dependent on foreign investors.<sup>14</sup> Therefore, in 1988, Congress passed the Omnibus Trade and Competitiveness Act<sup>15</sup>, which provides the chief executive with authority to review and deny applications for foreign investment or ownership in the economy.<sup>16</sup> If the President denies a foreign investment application, this decision is not subject to review in Court.<sup>17</sup>

Brazil has gone through several changes in this area in recent times, due to the approval of several Constitutional Amendments to the 1988 Brazilian Constitution. These Amendments eliminated most of the restrictions to the participation of foreign investors in certain activities, traditionally restricted to companies of national capital or state monopolies.

Besides these Constitutional Amendments of specific nature, there has also been a major change regarding the elimination of the differentiation between a "Brazilian company" and a "Brazilian company of national capital".

A Brazilian company of national capital was defined in Article 171 of the 1988 Constitution as a company which was effectively controlled on a permanent basis by individuals domiciled and resident in the country. A Constitutional Amendment eliminated this definition<sup>18</sup> and the Constitution now in force does not differentiate between companies owned by Brazilians and Brazilian subsidiaries of multinational corporations. Currently, "Brazilian company" is defined as a company which is organized under Brazilian law and has headquarters and administration in the country.<sup>19</sup>

<sup>10</sup> See *supra* note 8 at 180-81

<sup>11</sup> M. P. Singh, *Position of Aliens in Indian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 569, 603 (1987).

<sup>12</sup> Vrontas, *supra* note 8, at 172. See *supra* chapter V on Private Rights where this prohibition is analyzed. See also *Graham v. Richardson*, 403 U.S. 365 (1971) where the US Supreme Court has scrutinized vigorously most state legislation that discriminates against aliens.

<sup>13</sup> Vrontas, *supra* note 8, at 173

<sup>14</sup> Michael Dukakis, during the 1988 presidential campaign declared: "maybe the Republican ticket wants our children to work for foreign owners and pay rent to foreign owners and owe their future to foreign owners, but that's not the kind of future I want for America." As quoted by Vrontas *supra* note 8, at 181n106.

<sup>15</sup> Public Law 100-418, 102 Stat 1107 (1988).

<sup>16</sup> *Id.* para. 5021.

<sup>17</sup> *Id.* para. 2170 (d) (1)-(2)

<sup>18</sup> Constitutional Amendment 6 of 1995.

<sup>19</sup> Corporations Law in Brazil, Decree Law 2627 of 1940 kept in force by Law 6404 of 1976, Article 60.

With this change, some activities previously restricted to national companies are now open to foreign investors through their Brazilian subsidiaries.

At present the following activities are open to foreign investments: coastal trade navigation,<sup>20</sup> exploitation of hydroelectric power and mining activities,<sup>21</sup> exploitation, extraction, refining and transportation of oil and natural gas,<sup>22</sup> telecommunications (partially),<sup>23</sup> insurance and banking.<sup>24</sup> However, some activities are still forbidden, such as participation in broadcasting corporations<sup>25</sup>, in health services<sup>26</sup> and acquisition of land in rural areas.<sup>27</sup>

At present, foreign investors should be seen as individuals or companies looking for profits everywhere in the world. They are not agents for their country of origin looking to dominate the world through the economy. In fact, multinational corporations have a logic of their own and produce where it is most profitable for the company, not for the country of origin of the main company. For this reason, a French investor or company generally will act no differently than a British or American one, because if they all seek profits in their businesses, their decisions will not differ substantially.

Additionally, there should be a differential treatment between foreign investors who live abroad and seek better business opportunities, and resident aliens who live in a certain country and want to invest their time and money in their country of residence.

In this last case, the individual is living in the country and should not be treated differently from any national. The economic activity performed by the alien should be seen on an equal footing as any economic activity performed by the national, mainly because, as a rule, the profits of the activity will be kept locally. Thus, any distinction between foreign and national capital, if made, should be made taking into account the residence of the investor and not solely on alienage.

Therefore, despite the fact that these distinctions based on the non-resident and alien status of the investor as a rule do not make much sense, it cannot be said that they are against international law rules, because international law is either silent on the subject or admits these differentiations.

International law rules have to be adapted to the new global reality and, as a consequence, domestic legislation will follow, raising the limitations barriers imposed on aliens with regard to economic activities. In this arena, it should be pointed out that, in most countries, domestic legislation, together with many bilateral

<sup>20</sup> Constitutional Amendment 7 of 1995.

<sup>21</sup> BRAZILIAN CONST. (1988), article 176 para. I requires that the investments have to be made through companies incorporated in Brazil- Brazilian companies.

<sup>22</sup> Constitutional Amendment 9 of 1995, which admitted that the federal government may contract private companies to perform these activities. See also BRAZILIAN CONST. (1988), article 177 para. 1 of the Constitution.

<sup>23</sup> Law 9472 of July 16, 1997, Article 86. The legislation requires though that investments in this sector be made through Brazilian companies.

<sup>24</sup> See BRAZILIAN CONST. (1988), article 192, III.

<sup>25</sup> BRAZILIAN CONST. (1988), article 222.

<sup>26</sup> BRAZILIAN CONST. (1988), article 199 para. 3, exceptionally allows infra-constitutional legislation to permit direct or indirect participation of foreign capital in health services. In the absence of a specific legislation, participation is forbidden.

<sup>27</sup> BRAZILIAN CONST. (1988), article 190.

and some regional agreements, are taking the lead and are lifting such restrictions while international law of widespread acceptance is still silent on this important issue. It remains to be seen whether the proliferation of liberal legislation towards aliens as regards economic activities will become customary international law many years from now.

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## Political Rights

### I. DEFINITION

Political Rights are those rights which grant individuals the power to participate directly or indirectly in the establishment or administration of the government.<sup>1</sup> They are not only related to the management of affairs of the State, to the exercise of functions vested in those charged with the conduct of the government, but also to the appointment of those who manage affairs of a State and to the determination or control of the public policy of a country.

Rights which are comprised in that definition are the right to exercise public service in general; the right to vote and to be elected;<sup>2</sup> the right to perform specific functions in the Executive; participation in juries and the right to participate in the military forces.

Liberty of thought and opinion are not dealt with under this category, for they cannot be understood as a political right. Thinking is an activity inherent to human nature and consequently, expressing thoughts is also something which should be considered as basic to the individual and which therefore cannot be classified under the same heading as voting, being elected, or other similar activity and consequently suffer the same restrictions.

Thus, a clear and definite distinction between a political right and the freedom of expression with a political content has to be established. The first implies a *direct* influence in the structure of the State, such as when voting, when being elected, when performing specific functions in the Executive. With these activities the individual may definitely influence the behavior of the State domestically and internationally. Therefore, as these rights can be denied to aliens, the interpretation of which rights are comprised in this category has to be carefully and restrictively made.

Political rights, as a rule, are granted only to citizens. Therefore citizenship is a specific concept in international law, applying to the individual national of a certain State, who is in full enjoyment of political rights. Citizen is not a synonym for

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<sup>1</sup> BLACK'S LAW DICTIONARY, Political Right.

<sup>2</sup> These first three rights are the classical political rights, the fundamental and original political rights, as opposed to the others, defined as derivative political rights.

national. It means the person who has enjoyment of political rights, and, as seen, not necessarily all nationals are citizens.<sup>3</sup>

As such, in the sphere of political rights, the existence of a distinction between citizens and aliens has been widely accepted.<sup>4</sup> Moreover, a distinction also exists between nationals and citizens, because nationals can be denied the enjoyment of political rights, if they are not citizens.<sup>5</sup> These distinctions are not seen as arbitrary, and cannot therefore be classified as discrimination.

## 2. HISTORICAL DEVELOPMENT OF POLITICAL RIGHTS

Chronologically speaking, political rights were the first human rights of importance, the *ius suffragii et honorum*, which comprised the rights to vote and to be elected and the right to work for the public service. Those who had these rights, also had the civil rights, the *ius connubium* and the *ius commercii*.

As we have seen before, in ancient times religion was the basis of the community and, as such, religion was central to the individual's life. The man who did not join the religion of the city was considered an outlaw.

In Rome, when Rome conquered Latium in the fourth century BC, the conquered people struggled for equality, to become Romans as well. The reaction was very harsh, for this was contrary to the religion and the law.<sup>6</sup> Foreigners could not become citizens at all, because this was a sacrilege to the Roman gods.

Later, gradually, the Latin people obtained some rights, which in the end gave them Roman citizenship. Finally, they were able to become consul and commander

<sup>3</sup> CHARLES GORDON & HARRY N. ROSENFIELD, *IMMIGRATION LAW AND PROCEDURE*, observe that some citizens have not enjoyed full political rights, such as minors (*Oregon v. Mitchell*, 400 US 112 (1970)), women (*Minor v. Happersett*, 88 U.S. 162, 22 L. Ed. 627 (1874)); persons convicted of certain crimes and residents of the District of Columbia (Reorganization Plan no. 3 of 1967, 5 USC App). It should be remarked that it is not that some citizens do not enjoy political rights, but that some nationals are not citizens. See *supra* Chapter on Nationality, title 2.

<sup>4</sup> Paul Lagarde in *Studi Emigrazione. Etudes Migrations* 10 (1978), stresses the idea that denying political rights to aliens is a tradition in almost all democracies and says: "le refus de tout droit politique aux étrangers est un tabou sur lequel se sont constitués la plupart des régimes démocratiques du monde occidental." As quoted by FRANCIS DELPÉRÉE, *LES DROITS POLITIQUES DES ÉTRANGERS* 3 n1 (Que sais-je?, 1995).

<sup>5</sup> Louis Henkin seems to disagree with the classification of political rights within the category of human rights, because according to his definition, human rights are the rights inherent to all human beings and therefore extraneous qualities such as citizenship cannot affect them. LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 3 (1978). This is an interesting argument and doubts may arise as regards his opinion when applied to the freedom of movement of an individual, that is, the right to enter a country, which is only granted to nationals. Does it mean that this is not a human right either?

<sup>6</sup> At that time Manlius, the city consul, promised that if equality was to be granted he himself would cut off the hands of the first Latin who would take a seat at the Roman senate. As the senate was considered to be a temple, the presence of a foreigner in their sanctuary could not be imposed on the Roman gods. In his words: "Thou hast heard, O Jupiter, the impious words that have come from this man's mouth. Canst thou tolerate, O Jupiter, that a foreigner should come to sit in thy sacred temple as a senator, as a consul?", quoted by NUMA DENIS FUSTEL DE COULANGES, *THE ANCIENT CITY* 373 (1980).

of the legions,<sup>7</sup> and they could vote in the forum. This change in attitude however, took five and a half centuries.

In Greece, several early legislators were foreigners, called when the situation among the ruling class became so bad that no impartial citizen could be found to accomplish the task. Thus Demonax the Martinean was lawgiver for Cyrene; Andromadas of Rhegium became the lawgiver for Thracian Chalcis and Philolaus, a member of the ruling family of Corinth, left that city and wrote laws for Thebes.<sup>8</sup>

Aristotle defined a citizen as someone who "permanently shares in the administration of justice and the holding of office,"<sup>9</sup> and resident aliens were considered as those who "could not share in the offices and honors of the state."<sup>10</sup>

Grotius wrote that every State possessed the sovereign right to expel aliens who challenged its established political order and indulged in seditious activities.<sup>11</sup> Pufendorf expressed similar views.<sup>12</sup>

In the UK, in 1624, in the *Monmouth Election Case*, an alien was found ineligible to become a Member of Parliament. This prohibition was confirmed by a Resolution of the House of Commons in 1698 and the Act of Settlement in 1700. At present, the Representation of the People Act of 1949, as amended by the Representation of the People Act of 1969, governs the subject. According to this legislation, all aliens are denied the right to participate in parliamentary elections.<sup>13</sup>

At the end of 19th century, in the *Tillet case*, Belgian authorities had expelled a Briton wishing to address a public meeting in furtherance of the cause of trade unionism. This case was submitted to arbitration and the power of Belgium to expel this alien under such circumstances was upheld.<sup>14</sup>

The French Declaration of the Rights of Men and Citizens<sup>15</sup> outlines the distinction between political rights and fundamental rights. As regards the right of equality before the law,<sup>16</sup> the right of liberty,<sup>17</sup> due process,<sup>18</sup> among others, the Declaration grants these rights to all men, while the right to make laws,<sup>19</sup> freedom

<sup>7</sup> *Id.* at 374.

<sup>8</sup> MICHEL GAGARIN, *EARLY GREEK LAW* 60 (1986).

<sup>9</sup> ARISTOTLE, *THE POLITICS* 92, bk. 3, ch. 1, at 94. This author mentions the office of judge in courts and the office of member of the popular assembly as peculiar of citizens.

<sup>10</sup> *Id.* Bk. 3, chs. 5 and 9.

<sup>11</sup> *De Jure Belli Ac Pacis Libri Tres*, The Legal Classics Library, XVI, book II, Chapter II (1984).

<sup>12</sup> *De Jure Naturae et Gentium Libri Octo*, The Classics of International Law, X, book III, Chapter III (1934).

<sup>13</sup> As quoted by A. C. Evans, *The Political Status of Aliens in International Law, Municipal Law, and European Community Law*, 30 INT'L & COMP. L. Q. 20, 30 (1981).

<sup>14</sup> Evans, *id.* at 21 n3.

<sup>15</sup> The "Déclaration des Droits de l'Homme et du Citoyen" of 1789, was embodied in the French Constitution of 1791. This Declaration has also been embodied by the French Constitution in force, of 1958, as well as by the 1946 Constitution.

<sup>16</sup> Article 1 of the Declaration.

<sup>17</sup> Article 4 of the Declaration.

<sup>18</sup> Article 7 of the Declaration.

<sup>19</sup> Article 6 of the Declaration.

of expression,<sup>20</sup> right to control the establishment and employment of public taxes<sup>21</sup> are granted only to citizens. Although the dividing line between men and citizens is not clearly defined in the great majority of cases, provisions which mention citizens' rights have more a political connotation.

It is also interesting to observe that, as originally rights were essentially of political nature, in the US, for instance, the system of government established by the Constitution and the Bill of Rights was addressed primarily to "the people", not to the whole population. Additionally, other rights of more universal scope were still ignored, such as freedom from slavery and prohibition against discrimination.<sup>22</sup>

Notwithstanding, presently some countries encourage the political participation of aliens *stricto sensu* at a local level. This policy involves migrants in local affairs where they are tax payers and have interests.

In 1992, the Treaty on the European Union established the participation of aliens – nationals of other European countries – in the public life of the community. This convention grants resident aliens, nationals of other EU countries, the right to freedom of expression, the right to reunion and the right to associate. Additionally, the Convention stimulates the States which are party to this Convention to create organizations to represent the alien at local level. Finally, the Convention also allows aliens, residing for more than 5 years in a specific European member country, the right to vote and be elected at local level.<sup>23</sup> It is interesting to observe that this provision was considered by the *Conseil Constitutionnel* to be contrary to the French Constitution,<sup>24</sup> and led to the Constitution being amended.<sup>25</sup>

It should be pointed out that, as a rule, political rights are still only granted to nationals. The exceptions do nothing but confirm the rule. In Europe, for instance, an Italian in France is not an alien in the traditional meaning of the term. The Preamble as well as article 8 of the above mentioned Treaty determine the creation of a common citizenship among the State Parties; thus, the Italian and the French would share a common nationality, that of the European.<sup>26</sup>

<sup>20</sup> Article 11 of the Declaration.

<sup>21</sup> Article 14 of the Declaration.

<sup>22</sup> As observed by HENKIN, *supra* note 5 at 40-41.

<sup>23</sup> See *Informations et Documents*, 69 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 365-367 (1992). See also DELPERÈE *supra* note 4 at 17. Treaty on the European Union and Final Act, done at Maastricht, February 7, 1992- article 8 b-1: "Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State". 31 I.L.M.247 (1992)

<sup>24</sup> Decision no 92.308 DC of Apr. 9, 1992, quoted in Kovar & Simon, *La Citoyenneté Européenne* 3-4 CAHIERS DE DROIT EUROPEEN 285-315 (1993).

<sup>25</sup> Constitutional law number 92-554 of June 25, 1992. Presently the exercise of political rights by aliens, EU nationals, is regulated by Law n° 98-404 of May 25, 1998, 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 502-506 (1998)

<sup>26</sup> For the evolution of this concept, see Kovar & Simon *supra* note 24, at 304. For instance, France does not allow aliens, non-nationals of non-EU members, to participate in the political life of the community, decision of the *Conseil d'État* of April 2, 1993, 82 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 591 (1993).

Additionally, the Portuguese resident in Brazil,<sup>27</sup> the Irish in the UK and the Icelandic in Denmark<sup>28</sup> are also granted the benefit of political rights. In these cases, because of a common history, common language and cultural factors, these individuals are assimilated to nationals, and thus enjoy the same rights and duties. In these cases, it is not that aliens in general are granted political rights, but some aliens, because of strong links, are assimilated to nationals, and therefore have political rights. These exceptions should be understood as taking into account the concept of nationality, stressing its sociological aspect, rather than the political-legal aspect.

Other countries allow foreigners to vote in local elections, but this fact should not be seen as an exception to the rule of denying political rights to aliens as well.<sup>29</sup> This is the case with Denmark, which in its ordinary legislation, since 1981, grants aliens who reside in the country for more than three years, without regard to their nationality, the right to participate in local elections.<sup>30</sup> Spain, in its Constitution, admits that, on condition of reciprocity, aliens may participate in elections at local level.<sup>31</sup> Hungary also grants resident aliens the right to participate in local elections.<sup>32</sup> Ireland grants aliens who reside in the country for more than 6 months the right to vote in local elections.<sup>33</sup> The Netherlands' Constitution admits that aliens who have been living in the Netherlands for more than 5 years can vote at local level.<sup>34</sup> The Portuguese Constitution provides for the participation of aliens in local elections on condition of reciprocity.<sup>35</sup> The Paraguayan Constitution allows foreigners to vote in municipal elections.<sup>36</sup> South Australia removed all alien disqualification from the right to vote as regards local elections in 1976;<sup>37</sup> Israel allows aliens residing in the country for more than 5 years to participate in local elections;<sup>38</sup> Norway allows aliens who have stayed in the country for more than 3 years the right to vote in and

<sup>27</sup> BRAZILIAN CONST. (1988), article 12 para. 1.

<sup>28</sup> DANISH CONST. (1953), article 87.

<sup>29</sup> See *supra* Chapter I on Nationality.

<sup>30</sup> DELPERÉE *supra* note 4 at 19.

<sup>31</sup> SPANISH CONST. (1978), article 13-2.

<sup>32</sup> HUNGARIAN CONST. (1949), article 70.2.

<sup>33</sup> DELPERÉE, *supra* note 4, at 21.

<sup>34</sup> This was reintroduced by 1985 legislation. From 1798 to 1848 aliens were allowed to vote at local level, after 1848 and until 1985, only nationals were granted the right to vote. *Id.* at 23-24. The revised Constitution of 1983, article 130 reads: "The right to elect members of a municipal council and the right to be a member of a municipal council may be granted by Act of Parliament to residents who are not Netherlands nationals provided they fulfil at least the requirements applicable to residents who are Netherlands nationals". A subsequent Act of August 29, 1985 determined that the right to vote and stand for election in municipal election was granted to aliens. See *Netherlands State Practice*, NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 335 (1992). See also Dirk Jacobs, *Discourse, Politics and Policy: The Dutch Parliamentary Debate about Voting Rights for Foreign Residents*, 32 IMR 350 (1998).

<sup>35</sup> PORTUGUESE CONST. (1976), article 15.

<sup>36</sup> PARAGUAYAN CONST. (1967), article 112.

<sup>37</sup> I.A. Shearer, *The Legal Position of Aliens in National and International Law in Australia*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 41, 44 (1987).

<sup>38</sup> Claude Klein, *Le régime juridique des étrangers en droit israélien*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 635, 651 (1987).

to be eligible for municipal elections;<sup>39</sup> aliens in Argentina have also occasionally been allowed to vote at local level.<sup>40</sup> The right to vote for local councils in Poland is also accorded to persons who cannot prove their Polish citizenship, if they are not citizens of another State and have been permanently resident in Poland for at least 2 years.<sup>41</sup>

In these cases, foreigners are not granted political rights in general, but very limited rights to participate in the political process at local level by voting. At local level, the political process pertains only to matters which may affect normal living, such as urbanization, matters related to education and health services, for instance, while participation at national level would mean giving access to the alien to influence the foreign policy of the country, national security, public debt, the making of national legislation and other issues, considered beyond aliens' interests.<sup>42</sup>

In the 1980s, a new concept called secondary citizenship emerged, which means political participation in non-political institutions, such as churches, schools and work.<sup>43</sup> As these activities are not considered political in nature, they are not restricted to citizens, and aliens should not be excluded from participating in them.

### 3. INTERNATIONAL AND COMPARATIVE LAW

#### *I. Political Activities*

##### *a) International Law*

Few international law instruments mention the generic category of political rights, either granting or denying them to aliens. In general, international conventions deal with the right to vote, to be elected, to be a public servant and so on, perhaps because of the difficulty of defining political activities and political rights.

The Havana Convention on Aliens of 1928, as an exception, determines that aliens should refrain from participating in political activities, in the following terms:

*Article 7- Foreigners must not mix in political activities, which are the exclusive province of citizens of the country in which they happen to be; in cases of such interference, they shall be liable to the penalties established by local law.*

<sup>39</sup> Atle Grahl-Madsen, *The Legal Position of Aliens in Norway*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 983, 995 (1987).

<sup>40</sup> Sylvia Maureen Williams, *The Legal Position of Aliens in National and International*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 28-29 (1987).

<sup>41</sup> Mieczyslawa Zdanowicz, *Legal Status of Aliens in Poland in the Light of International Obligations*, 22 POLISH YEARBOOK OF INTERNATIONAL LAW 49, 57 (1996).

<sup>42</sup> In the opinion of Hellmut Sieglerschmidt, a member of the European Parliament, in COUNCIL OF EUROPE, COLLOQUE DES DROITS DE L'HOMME DES ETRANGERS 263, for purposes of election at local level, only the status of a resident individual should be taken into account, while for national elections the status of a national is essential: "Il y a une différence capitale entre des élections au niveau national et des élections municipales. Ce n'est pas la qualité de citoyen d'un État qui compte dans les élections municipales, mais la qualité d'habitant d'une ville; c'est pourquoi la nationalité n'est pas importante dans les élections municipales."

<sup>43</sup> OECD, THE FUTURE OF MIGRATION 24 (1987).

In the terms of the convention, local legislation may impose certain punishments on the alien, such as expulsion, in the event of the alien performing political activities denied to aliens in general.

It should be observed, however, that this Convention admits punishment only if the alien performs some political activity contrary to local legislation.

The Bustamante Code, also of 1928, follows the same trend, not guaranteeing to aliens equal treatment with nationals as regards political rights in general, as well as mentioning specific political rights such as suffrage and public service. It states:

*Article 2- Foreigners belonging to any of the contracting States shall also enjoy in the territory of the others identical individual guarantees with those of nationals, except as limited in each of them by the Constitution and the laws.*

*Identical individual guarantees do not include, unless especially provided in the domestic legislation, the exercise of public functions, the right of suffrage, and other political rights.*

This convention expressly mentions that situations which are outside the assimilation rule are those defined as political rights.

Along the same lines, the American Declaration also mentions political activities, determining that aliens can be excluded from practicing them. It determines:

*Article XXXVIII- It is the duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively to the citizens of the State in which he is an alien.*

The European Convention for the Protection of Human Rights and Fundamental Freedoms sets forth:

*Article 16- Nothing in articles 10 [freedom of expression], 11 [freedom of assembly] and 14 [prohibition of discrimination] shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.*

This article can be interpreted in the context that in spite of the fact that the rights of freedom of expression and freedom of assembly are not included in the category of political rights, the States can examine the purposes of these activities: if they have political objectives, this should be taken into account and the States may limit the exercise of these rights with regard to aliens.

The European Court of Human Rights decided on several occasions that States are free to expel undesirable aliens for reasons of public policy or national security, when their presence manifestly constitutes a threat to the fundamental interests of the society.<sup>44</sup>

Hence, aliens may be subjected to expulsion because of the exercise of political activities, as this behavior is often understood as contrary to local public policy and national security.

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<sup>44</sup> *Rutili case and Bouchereau case*, respectively case 36/75, E.C.R. 1219 and case 30/77, E.C.R. 1999.

Legal commentators acknowledge the existence of a general prohibition established in international law as regards political activities of aliens. However, despite the existence of this prohibition, there is no consensus concerning the definition of the activities and rights comprised in this category.

Liszt classifies the right of association, freedom of the press and the right of residence as political rights.<sup>45</sup> Borchard narrows the definition to include only the right to vote and hold office and the rights incident to citizenship, such as military service, jury service and the competency to fill certain public offices, such as judges, notaries, public advocates.<sup>46</sup> Evans defines political activities as those which contribute to the formation of State policy, therefore including freedom of opinion, expression, association, and assembly.<sup>47</sup>

Bossuyt defines political rights as the right to vote, the right to be elected and the right to be a civil servant.<sup>48</sup> Van Boven classifies as political rights the right to freedom of opinion and expression, freedom of peaceful assembly and association, the right to take part in the conduct of public affairs, the right to vote, the right to be elected, the right to have access to public jobs.<sup>49</sup>

Westlake accepted the idea that aliens should be denied electoral rights,<sup>50</sup> as did Verdross.<sup>51</sup>

Goodwin-Gill admits that an alien indulging in 'undesirable' political activity is liable to expulsion.<sup>52</sup>

Batifol and Lagarde also accede to this same rule, that aliens should not be accorded political rights in the State of their residence, because the alien would still be more connected to the country of nationality than to the country of residence.<sup>53</sup>

### *b) Comparative Law*

The German Constitution declares:

*Article 33(1) Every German shall have in every State the same political rights and duties.*

<sup>45</sup> VÖLKERRECHT 193 (9th ed. 1918).

<sup>46</sup> DIPLOMATIC PROTECTION OF CITIZENS ABROAD 63 (1916).

<sup>47</sup> See *supra* note 13, at 20.

<sup>48</sup> L'INTERDICTION DE LA DISCRIMINATION DANS LE DROIT INTERNATIONAL DES DROITS DE L'HOMME 194 (1976).

<sup>49</sup> *Síntese do Direito Internacional Positivo do Homem, As DIMENSÕES INTERNACIONAIS DOS DIREITOS DO HOMEM* 109 ( Karel Vasak ed., 1983)

<sup>50</sup> INTERNATIONAL LAW 211, vol I (1904).

<sup>51</sup> Verdross, in his course at the Hague in 1931, discussing the basic rules for the treatment of aliens, recognizes that aliens do not have political rights. Alfred Verdross, *Les Règles Internationales Concernant le Traitement des Étrangers*, 37 RECUEIL DES COURS (1931).

<sup>52</sup> GUY GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 255 (1978).

<sup>53</sup> 1 DROIT INTERNATIONAL PRIVÉ 198 (5th ed. 1980).

Therefore the German Constitution grants political rights only to nationals.

In Brazil, the Constitution does not mention this generic prohibition, but ordinary legislation clearly forbids aliens from practicing political activities.<sup>54</sup>

The Nicaraguan Constitution states that aliens are prohibited from intervening, directly or indirectly, in the country's political affairs.<sup>55</sup> The Constitutions of Cape Verde, Nicaragua and Peru also contain similar provisions.<sup>56</sup>

The US Supreme Court has held that restrictions on aliens will not be considered suspect and will not be examined under a high level of scrutiny in subjects dealing "with matters firmly within a State's constitutional prerogatives", for example, "a state's historical power to exclude aliens from participation in its democratic political institutions" and "to preserve the basic conception of a political community".<sup>57</sup>

In the UK, the 1971 Immigration Act makes it clear that the power of expulsion may be exercised on grounds of a political nature.<sup>58</sup>

Therefore, as a general rule in international and comparative law, aliens are denied in broad terms the exercise of political rights in their country of residence.

As a consequence, some countries allow their nationals, even when living abroad, to vote from their country of residence. This is the case with Denmark, Spain and France and also, under certain circumstances, with Germany and Greece.<sup>59</sup>

<sup>54</sup> Article 107 of the Law 6815, enacted in 1980 and still in force, determines: "*O estrangeiro admitido no território nacional não pode exercer atividade de natureza política, nem se imiscuir, direta ou indiretamente, nos negócios públicos do Brasil, ...*" As we will see later on, the Brazilian Constitution forbids aliens from specific political rights such as voting and being elected. The 19<sup>th</sup> Amendment to the Brazilian Constitution approved on June, 4<sup>th</sup>, 1998 admits that aliens may have access to public service, in accordance with infra-constitutional legislation.

<sup>55</sup> NICARAGUAN CONST. (1987), article 27.

<sup>56</sup> CAPE VERDIAN CONST. (1992), article 54; NICARAGUAN CONST. (1987), article 47; PERUVIAN CONST. (1993), article 31.

<sup>57</sup> *Foley v. Connelie*, 435 U.S. 291 (1978). In *Foley* the Court upheld the exclusion of aliens from the state police, in *Ambach v. Norwick*, 441 U.S. 68 (1979), from teaching in public schools and in *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), from serving as 'peace officers', including deputy probation officers, and in *Perkins v. Smith*, 426 U.S. 913 (1976), from state and federal jury service. In the *Ambach* case, the Supreme Court decided that public school education was a governmental function because of its social function and the civic responsibility and influence of teachers. It also states that teachers influence "*the attitude of students towards government, the political process and citizen's social responsibility*". Additionally, the Court emphasized the "*importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests..*" See also James A.R.Naftziger, *Restating the Rights of Aliens*, 25 VA J. INT'L L. 138-139 (1984). For these decisions to be in accordance with international law patterns, they should be interpreted either as being applicable when these activities are public functions, and therefore they can be denied to aliens, or applicable because the activity is deemed to be connected with public policy and national interest. If it is not understood as a public office, I hardly see how the profession of teacher relates to these exceptions.

<sup>58</sup> Part 13 of the 1971 UK Immigration Rules, with the changes introduced in 1994, deals with the circumstances in which a person is liable to be deported and section 363 lists those cases. Section 363,ii, mentions when "*the Secretary of State deems the person's deportation to be conducive to the public good*", defined on section 374 as a deportation "*being in the interests of national security or of the relations between the UK and any other country or for other reasons of a political nature*".

<sup>59</sup> DELPÉRÈE *supra* note 4 at 110-111. Other countries, such as Luxembourg, the Netherlands, Ireland, Belgium and Portugal expressly forbid their nationals to vote when living abroad, *id. at 111*.

In France, aliens can be expelled for activities contrary to local public policy. Several political activities have been considered as conducive to expulsion, such as possession of left-wing documents, working with North-African immigrants, being the leader of an immigrant organization, and involvement in the future of Western Sahara. In these cases the alien is deemed to have breached the 'political neutrality' imposed on all aliens when in France, and is therefore liable to expulsion.<sup>60</sup>

Consequently it can be said that, both under international law rules and the legislation of various foreign countries, aliens are denied political rights and the exercise of political activities.

However, defining what is a political right and a political activity and thus which activities can be denied to aliens is not easy. There is no consensus either in human rights instruments or according to legal commentators regarding these concepts. Therefore their definition is not clearly established in international law.

Can the legitimate exercise of freedom of expression be regarded as a political activity and therefore subject the alien to the corresponding penalties? Likewise, can the right to meet be classified as a political activity and subject an alien to expulsion if he participates in a meeting?

The answer to these questions is not clear.

First of all, we have to bear in mind the consequences of the definition of political right and political activity. As a result of it, some basic human rights may be limited and the individual may be subject to punishment.

It is a basic rule of interpretation that limitations of rights have to be interpreted restrictively and not extensively.<sup>61</sup> Therefore, as there is no definition in human rights instruments regarding what is a political right and a political activity, it should be interpreted as restrictively as possible, as these activities may be denied to aliens, without any justification from the State.

Admitting that when the individual publishes criticisms of the established government, or when there is a meeting which aims to discuss specific ideas, the individual would be performing political activities and therefore is bound to be expelled without the need of justification by the State is to interpret this category too broadly, entirely against the principles of interpretation and may result in arbitrary decisions being taken.

What would be the border line between a forbidden political activity and the exercise of one's legitimate freedom of expression? Would an individual in a school meeting who complains about the cost of living be performing a political activity and be bound to expulsion? Would an individual who complains in a newspaper article about the way a specific investigation regarding mishandling of public funds is

<sup>60</sup> Evans, *supra* note 13, at 27. In France, there are two measures leading to the compulsory exit of the alien: expulsion and deportation (*reconduite à la frontière*). Deportation is the measure applicable to the alien who is illegally in the country whereas expulsion is the proceeding applicable to the alien who is a menace to the public policy. See RUDOLPH D'HAEM, L'ENTRÉE ET LE SÉJOUR DES ETRANGERS EN FRANCE 110-122 ( Que sais-je?, 1999).

<sup>61</sup> As regards strict and liberal construction see generally WALTER F. MURPHY ET AL, AMERICAN CONSTITUTIONAL INTERPRETATION 314 (1986), and more precisely Luís ROBERTO BARROSO, INTERPRETAÇÃO E APLICAÇÃO DA CONSTITUIÇÃO 114-115 (1996).

leading be performing a political activity and be bound to expulsion? And what about an individual who participates in a protest march aiming at changes in the criminal laws of the country of residence, would that be a political activity?

Several other examples can be presented of situations according to which a resident alien can be expelled solely because of expressing ideas on a certain issue, which, according to my view, is entirely against basic principles of humanity and fair treatment, and can lead us to conclude that, if these measures can be taken, the right to freedom of expression is not granted to aliens at all. Moreover, as expulsion is a measure of extreme hardship to the alien, it should only be resorted to in cases the attitude of the alien puts the national security or public interest at risk. In this case, the principle of proportionality should be taken into account, for the penalty imposed on the alien has to be proportionate to the risk his or her presence causes onto the State.

Therefore, political activities should be understood solely as those activities which grant individuals the power to participate directly or indirectly in the administration of a country, such as voting, being elected and performing a public function. A restrictive interpretation should be adopted and, therefore, any limitation on the freedom of expression, freedom of association and freedom of assembly of the individual should only be accepted exceptionally and if, verifiably, the national security or public policy of the country is at stake, and not because these activities happen to be comprised in a broad definition of political rights.

However, as regards the right to associate, it can be exceptionally classified as a political right when it refers to the creation of a political party.

Undoubtedly, a political party is a political activity because it aims at creating or influencing the public policy of a country. Accordingly, this right can be denied to aliens.

## II. RIGHT TO VOTE AND TO BE ELECTED

### a) International Law

The American Declaration guarantees participation in popular elections only to citizens, in the following terms:

*Article XX – Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.*

This convention grants the right to vote and to be elected only to nationals. Although it mentions at the beginning “every person”, it clearly only includes nationals, when it follows with “government of his country”, clearly it comprises only nationals.<sup>62</sup>

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<sup>62</sup> The American Declaration also determines in article XXXII- “*It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so*”. Therefore the duty to vote is imposed only on nationals.

As a matter of law, although the Declaration mentions that the right to vote and to be elected are granted to nationals, these rights are granted only to citizens, a smaller group among the nationals.

The Universal Declaration, along the same lines, determines:

*Article 21(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*

The letter of the article follows the same pattern of the American Declaration.<sup>63</sup> Only nationals are granted the right to vote.

The UN Covenant adopts the same trend, in more objective terms, prescribing

*Article 25- Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2, and without unreasonable restrictions:*

- a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

The American Convention ordains:

*Article 23- Right to Participate in Government*

- 1) *Every citizen shall enjoy the following rights and opportunities:*
  - a. *to take part in the conduct of public affairs, directly or through freely chosen representatives;*
  - b. *to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and*
- 2) *The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.*

This Convention equally grants only to citizens the right to vote and to be elected.

The African Charter rules that:

*Article 13.1- Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.*

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<sup>63</sup> Hernán Santa Cruz, STUDY OF DISCRIMINATION IN THE MATTER OF POLITICAL RIGHTS 26, UN (1962) reaches the same conclusion but without taking into account the terms of the article. Undoubtedly, when the convention mentions "of his country", it refers to the concept of nationality.

Additionally, the Bustamante Code, as we have already seen, although assimilating nationals to aliens with regard to fundamental rights, excludes complete assimilation for the right of suffrage.

Hence, international law clearly grants the right to vote only to nationals, and does not differentiate between the right to vote and to be elected.

*b) Comparative Law*

The conditions to exercise the right to vote and the right to be elected at domestic level are different, even among nationals.<sup>64</sup>

*Right to Vote*

Austria allows only citizens to take part in national or communal elections<sup>65</sup>; in Belgium aliens may not vote, are not eligible for public office and have no access to public service,<sup>66</sup> Brazil does not allow aliens to vote either in federal or in municipal elections;<sup>67</sup> Canada does not grant aliens the right to vote in local or federal elections and they cannot be eligible either<sup>68</sup>; Cuba also only grants the right to vote to citizens<sup>69</sup>; Denmark, as regards national elections, grants the right of participation only to Danish citizens<sup>70</sup>. Greece adopts the same criterion<sup>71</sup> as do Hungary<sup>72</sup>, India<sup>73</sup>;

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<sup>64</sup> This distinction was emphasized by the Spanish Constitutional Court in its 1991 decision, which established that, in accordance with the Spanish Constitution, article 13, which only grants political rights to nationals, and, as an exception, grants to aliens, on condition of reciprocity, the right to vote in local elections, but the right to be elected is not included. Decision 112/91 of May 20, 1991. See DELPÉRÉE *supra* note 4 at 51. Along the same lines, the French Constitutional Court, in 1992, decided on very objective terms that the right of passive suffrage - to be elected - is completely different from the right of active suffrage - to vote. *Id.* at 52.

<sup>65</sup> AUSTRIAN CONST. (1929), articles 26(4); 46(2) and 117(2).

<sup>66</sup> BELGIAN CONST. (1970), article 10.2.

<sup>67</sup> BRAZILIAN CONST. (1988), article 14 para.2.

<sup>68</sup> Loi Electorale du Canada, (1970) articles 14 and 20, as quoted by Brun and Brunelle, *Les Status Respectifs de Citoyen, Résident et Étranger à la Lumière des Charters des Droits*, 29 LES CAHIERS DE DROIT 717 (1988) See also CANADIAN CONST. (Constitution Act, 1982), article 3.

<sup>69</sup> CUBAN CONST. (1976), article 131.

<sup>70</sup> DANISH CONST. (1953), article 29.

<sup>71</sup> GREEK CONST. (1975), article 55.

<sup>72</sup> HUNGARIAN CONST. (1949), article 70.1.

<sup>73</sup> M.P. Singh, *Position of Aliens in Indian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 569, 599 (1987).

Israel<sup>74</sup>; Monaco<sup>75</sup>; Norway<sup>76</sup>; Poland<sup>77</sup>; Portugal<sup>78</sup>; Sweden<sup>79</sup>; Switzerland<sup>80</sup>; Thailand<sup>81</sup>; Turkey<sup>82</sup>; UK<sup>83</sup> and US<sup>84</sup>, among others.

As such, the right to vote at national level is granted only to citizens, that is nationals with full political rights, and aliens are left outside the electoral process entirely.

#### *Right to be Elected*

The great majority of countries deny to aliens the possibility of being elected Senator, Deputy, President, Vice-President and Minister (when these are elected), whereas some others require a certain length of time as a national before qualifying for some of these functions.

In this sense, the Argentinean Constitution determines that only nationals have access to these functions.<sup>85</sup> Additionally, Antigua and Barbuda,<sup>86</sup> Australia<sup>87</sup>, Austria<sup>88</sup>; Belgium<sup>89</sup>; Brazil<sup>90</sup>; Canada<sup>91</sup>; Germany<sup>92</sup>; Greece<sup>93</sup>; Honduras<sup>94</sup>; India<sup>95</sup>; Israel<sup>96</sup>; Italy<sup>97</sup>; Jordan<sup>98</sup>; Liberia<sup>99</sup>; Luxemburg<sup>100</sup>; Mexico<sup>101</sup>; The

<sup>74</sup> ISRAELI CONST. (Basic Law 3, The Knesset, 1987), articles 5 and 6.

<sup>75</sup> MONEGASQUE CONST. (1962), article 53.

<sup>76</sup> NORWEGIAN CONST. (1814), article 50.

<sup>77</sup> POLISH CONST. (1997), article 99. See also Mieczyslawa Zdanowicz, *supra* note 41 at 57. Exceptionally stateless people resident in Poland for more than 5 years are granted the right to vote.

<sup>78</sup> PORTUGUESE CONST. (1976), article 49-1.

<sup>79</sup> SWEDISH CONST. (1975), chapter 3, article 2.

<sup>80</sup> SWISS CONST. (1874), article 74.2.

<sup>81</sup> THAI CONST. (1997), section 105.

<sup>82</sup> TURKISH CONST. (1982), article 67.

<sup>83</sup> Richard Plender, *The Legal Position of Aliens in National and International Law in the United Kingdom*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1675, 1708 (1987).

<sup>84</sup> U.S. CONST. (Amendment XXVI)- section 1.

<sup>85</sup> ARGENTINEAN CONST. (1853), articles 48, 55, 89 and 111.

<sup>86</sup> ANTIGUAN CONST. (1981), articles 29, 33 and 38.

<sup>87</sup> AUSTRALIAN CONST. (1900), sections 34 and 44.

<sup>88</sup> AUSTRIAN CONST. (1929), article 26.

<sup>89</sup> BELGIAN CONST. (1970), articles 64 and 69.

<sup>90</sup> BRAZILIAN CONST. (1988), article 14 para 3.

<sup>91</sup> CANADIAN CONST. (Constitutional Act, 1897), article 23.

<sup>92</sup> GERMAN CONST. (1949), article 54.1.

<sup>93</sup> GREEK CONST. (1975), article 31.

<sup>94</sup> HONDURAN CONST. (1982), articles 198 and 238.

<sup>95</sup> INDIAN CONST. (1950), articles 58, (1); 66; 84; 102, (1).

<sup>96</sup> ISRAELI CONST. (Basic Law 3, The Knesset, 1987), section 6.

<sup>97</sup> ITALIAN CONST. (1948), article 84.1

<sup>98</sup> JORDANIAN CONST. (1952), article 75.i.

<sup>99</sup> LIBERIAN CONST. (1984), article 81.

<sup>100</sup> LUXEMBURG CONST. (1868), article 52.3.

<sup>101</sup> MEXICAN CONST. (1917), articles 55 and 82.

Netherlands<sup>102</sup>; Portugal<sup>103</sup>; Sweden<sup>104</sup>; Switzerland<sup>105</sup>; Thailand<sup>106</sup>, Turkey<sup>107</sup>; US<sup>108</sup> and Poland<sup>109</sup> adopt the same criterion.

Domestic legislation of the great majority of countries, which only allow to nationals access to these functions, are therefore in accordance with international law patterns.

### III. RIGHT TO HOLD PUBLIC OFFICE OR PERFORM SOME SPECIFIC TASKS

Holding public office should be understood as working for the government in functions which, in the great majority of countries, do not require election, such as being a civil servant or a judge or a public attorney, but which require public decision making. Participation in jury service may also fit this category.

#### a) International Law

The American Declaration states the duty of every citizen to hold public office in the following terms:

*Article XXXIV- [...] It is likewise his duty to hold any public office to which he may be elected by popular vote in the State of which he is a national.*

The Universal Declaration guarantees:

*Article 21(2)- Everyone has the right of equal access to public service in his country.*

The C.P.R.Covenant, along the same lines, rules:

*Article 25- Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

*c) To have access, on general terms of equality, to public service, in his country.*

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<sup>102</sup> DUTCH CONST. (1983), article 56.

<sup>103</sup> PORTUGUESE CONST. (1976), article 125.

<sup>104</sup> SWEDISH CONST. (1975), chapter 3, article 10 .

<sup>105</sup> SWISS CONST. (1874), article 108.

<sup>106</sup> THAI CONST. (1997), article 107.

<sup>107</sup> TURKISH CONST. (1982), article 76.

<sup>108</sup> U.S. CONST. (1787), article 1, Section 2 para. 2, section 3 para. 3, article II, Section 1, para. 5.

<sup>109</sup> See Mieczylawa Zdanowicz, *supra* note 41 at 57.

The American Convention, with approximately the same wording, also assures the right to access to public service only to citizens.<sup>110</sup>

The African Charter determines:

*Article 13-2- Every citizen shall have the right of equal access to the public service of his country.*

The Bustamante Code does not guarantee assimilation with nationals as regards the right to exercise public functions.<sup>111</sup>

The European Convention on Establishment determines that the States Parties are free to exclude aliens from public service.<sup>112</sup>

Thus, as a rule, aliens are denied access to public office, and the reason for this is far more political than social, for this prohibition has nothing to do with fear of unemployment among nationals, as in the case of the right to work in general. It is due far more to the nature of the task to be performed, often connected with public security and national interest.

However, it should be taken into account that not all jobs in the public service are of this nature. Functions which require authority should not receive the same treatment as merely bureaucratic functions. However, legislation generally prohibits aliens from exercising any sort of public office, from being a judge to a simple clerk, with no authoritative role.

As the prohibition derives from the political nature of the job to be performed, then jobs which belong to the public service, but do not have such political content, such as jobs of technical nature, should not be included in this prohibition. In other words, the nature of the task to be performed should be taken into account, not the status of the institution offering the employment. This approach is already being taken by the legislation of various countries, as we will see *infra*.

It is interesting to observe though that this tendency of denying access to aliens to public service is so widespread that the Rome Treaty, which in article 48 establishes complete freedom of movement among workers, in paragraph 4 excludes from this freedom the right to employment in the public services, even among nationals of other European Union countries, without making this above distinction, that is, that the nature of the activity to be performed should be taken into consideration.

Interpreting this provision, the European Court of Justice issued a decision based on this article 48, paragraph 4, which determined that this provision refers to these services which imply a direct or indirect participation in the exercise of public powers(activities) and in the functions which aim at safekeeping the general interests of

<sup>110</sup> Article 23- "Right to Participate in Government

*1- Every citizen shall enjoy the following rights and opportunities:*

*c- to have access, under general conditions of equality, to the public service of his country.*

*2- The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."*

<sup>111</sup> Article 2 of the Code, quoted above in the text.

<sup>112</sup> Article 13 of the Convention.

the State or other public entities and which imply, as regards those who exercise these functions, the existence of a bond towards the State, as well as a reciprocity of rights and duties corresponding to the foundation (basis) of the link of nationality.<sup>113</sup>

In a recent decision of the Court, in the case involving the *Commission v. Greece*, the Court ruled that the fact that Greece reserved to citizens jobs in the public or semi-public companies related to services of water, electricity and gas distribution as well as to public health, education and transportation among others, amounts to a violation of obligations assumed under the EEC Convention, article 48.

The Court reasoned that the nature of the task to be performed has to be taken into account for the exception established under article 48, para. 4 to apply. As in all these situations there was a general prohibition which prohibited aliens— including those originating from EEC countries— from exercising these tasks, Greece was condemned by the Court.<sup>114</sup>

### b) Comparative Law

In France, aliens cannot as a rule be public servants, although they are allowed to perform temporary functions, on a contractual basis. Legislation sets down which functions are denied to aliens even on a temporary basis.<sup>115</sup>

Belgium grants access to civil and military service, without exception, only to nationals.<sup>116</sup> Denmark, Jordan, Luxembourg, Spain, the Netherlands, Germany, Italy, Greek, Monaco and Turkey adopt the same ruling.<sup>117</sup> India<sup>118</sup>, Sweden<sup>119</sup> and the UK also follow this criterion.<sup>120</sup>

<sup>113</sup> Decision issued in December 17, 1980, *Commission v. Belgium*, 149/79, Rec. 3883, items 10 and 11, mentioned in RUDH 429(1997).

<sup>114</sup> RUDH 429-432 (1997), decision of the European Court of Justice, which in brief decided: "En ne limitant pas l'exigence de la nationalité hellénique à l'accès aux emplois comportant une participation, directe ou indirecte, à l'exercice de la puissance publique et aux fonctions qui ont pour objet la sauvegarde des intérêts généraux de l'Etat ou des autres collectivités publiques dans les secteurs publics de la distribution d'eau, de gaz et d'électricité, dans les services opérationnels de santé publique, dans les secteurs de l'enseignement public, des transports maritimes et aériens, des chemins de fer, des transports publics urbains et régionaux, de la recherche effectuée à des fins civiles, des postes, des télécommunications et de la radiotélévision, ainsi qu'à l'opéra d'Athènes et dans les orchestres municipaux et communaux, la République hellénique a manqué aux obligations qui lui incombent en vertu du traité CEE"

<sup>115</sup> J.Y. Vincent, *Le Régime Juridique des Étrangers en Droit Français*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 479 (1989). See Law n. 91-715 of July 26, 1991.

<sup>116</sup> BELGIAN CONST. (1970), article 10,2.

<sup>117</sup> DANISH CONST. (1953), article 27, 1; JORDANIAN CONST. (1952), article 22.1 ; LUXEMBURG CONST. (1868), article 11, 2; SPANISH CONST. (1978), article 23,2; DUTCH CONST. (1983), article 3; GERMAN CONST. (1949), article 33,2; ITALIAN CONST. (1948), article 51; GREEK CONST. (1975), article 4.4; MONEGASQUE CONST. (1962), article 25; TURKISH CONST. (1982), article 70.

<sup>118</sup> Singh, see *supra* note 73, at 692.

<sup>119</sup> Gören Melander, *The Legal Position of Aliens in Sweden*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1303, 1328 (1987).

<sup>120</sup> Plender, see *supra* note 83.

The Portuguese Constitution grants the right to exercise public jobs to nationals, however it establishes an exception if the nature of the job is eminently technical.<sup>121</sup> Brazil has recently adopted similar criterion.<sup>122</sup> Argentina<sup>123</sup>; Cape Verde,<sup>124</sup> Norway<sup>125</sup>, and Poland<sup>126</sup> also follow this same trend.

In the US, the New York Civil Servant Law section 53(1) reads: "Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."

The constitutionality of this rule was examined in the case *Sugarman v. Dougall*<sup>127</sup> and the Court struck down NY legislation and decided that these functions are to be examined on a case-by-case basis and stated:

*"in an appropriately defined class of positions, require citizenship as a qualification for office...Such power inheres in the state by virtue of its obligation...to preserve the basic conception of a political community. And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important non-elective executive, legislative, and judicial positions for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."*<sup>128</sup>

The US Supreme Court adopted this criteria in the *Foley* case when an individual from Iceland wanted to join the NY police and the Court upheld the restriction.<sup>129</sup>

In *United States v. Gordon-Nikkor*<sup>130</sup> it was held that resident aliens have no constitutional right to perform jury service and in *Perkins* the Supreme Court upheld exclusion of aliens from state and federal jury service.<sup>131</sup>

In brief, some countries only assure the right of exercise of any public service to nationals, while others make a distinction regarding the nature of the service to be performed, which is the correct approach to take.

<sup>121</sup> PORTUGUESE CONST. (1976), article 50.

<sup>122</sup> The 19<sup>th</sup> Amendment to the Brazilian Constitution approved on June, 4, 1998 allows aliens to hold public office in accordance with infra-constitutional legislation.

<sup>123</sup> Maureen Williams, see *supra* note 40, at 29.

<sup>124</sup> CAPE VERDIAN CONST. (1992), article 23.2.

<sup>125</sup> Grahl-Madsen, see *supra* note 39, at 1002.

<sup>126</sup> See Mieczyslawa Zdanowicz, *supra* note 41 at 58.

<sup>127</sup> *Sugarman v. Dougall*, 413 U.S. 634.

<sup>128</sup> Ahcene Boulesbaa, *A Comparative Study Between the International Law and the United States Supreme Court Standards for Equal and Human Rights in the Treatment of Aliens* 4 GEO. IMMIGR. L. J. 445, 468 (1990). This author criticized the Supreme Court for it has not differentiated political issues, where close scrutiny will not be applied, for it rests within state's constitutional prerogatives, from non-political issues, where it will be applied.

<sup>129</sup> *Foley*, 435 U.S. 291.

<sup>130</sup> *United States v. Gordon-Nikkor*, 518 F. 2d 972 (5th Cir. 1975).

<sup>131</sup> *Perkins v. Smith*, 426 U.S. 913 (1976).

Many countries also deny aliens the possibility of being judges or participating in jury service, due to the nature of the tasks to be performed.<sup>132</sup>

Since international and domestic law admit exclusion of aliens from political activities and from being public servants, the exact definition of a political activity and public service is of extreme importance, as activities which are not comprised in these concepts and are denied to aliens without a reasonable justification may be considered a denial of the right to work, which is contrary to international law.

Finally, it is difficult to accept that international law admits the function of being a primary school teacher as being of political nature and which therefore may be denied to aliens. The idea behind this prohibition lies not in the political nature of the activity (which does not exist), but in the surmise that aliens may be a bad influence on young people. It is interesting to observe that this idea was preached as early as in the 18<sup>th</sup> century by Rousseau and at present, despite evolution of the rights of individuals, we still have the same mistrust towards aliens. However, under some circumstances, the activity of being a school teacher may be denied to aliens under the argument that this activity may be only performed by public civil servants and, as international law still admits that aliens may be denied access to public functions in general, this prohibition may be considered valid under international law patterns.

#### IV. MILITARY SERVICE

##### a) International Law

Technically, as a rule, the exercise of military service should be comprised as within the exercise of public functions.

The exercise of a non-career policy making position in the government does not entail a permanent link between the individual and the State as a career civil service does. The individual will perform an specific task, and at the end of the mandate, the individual retires to private life. In this category are classified the exercise of posts in the Executive, for instance, such as President and Vice President, Governors and Mayors.

Military service also does not imply a more permanent link between the individual and the State. It should be mentioned though, that under some circumstances, the individual may join the armed forces as a career, as well. However, being in the military service voluntarily implies a very strong bond between the individual and the State and it is also strongly related to national security and public order.

The Hague Convention on Nationality of 1930 has a Protocol which deals specifically with military service, but it focuses on the problems of binationalis who have

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<sup>132</sup> Australia- Shearer, see *supra* note 37, Canada, A.L.C. De Mestral, *Position of Aliens in Canadian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 765, 797 (1987), Israel, ISRAELI CONST. (Basic Law 4, Judicature, 1984), section 5 and Poland, Mieczyslawa Zdanowicz, *supra* note 41 at 58.

to choose which army to serve. This convention is silent about aliens serving in the military.<sup>133</sup>

The American Declaration of Human Rights in article XXXIV mentions that it is a duty of every national to render military service whenever his country needs it. Therefore, according to this Declaration it is not a right of the individual, but his duty, and it only applies to nationals.

The Havana Convention of 1928 in article 3 establishes that aliens may not be obliged to perform military services and determines that aliens, unless they prefer to leave, may be obliged to perform services required as a result of natural disasters, but not as a result of war.

#### *b) Comparative Law*

Aliens may volunteer for military service in several countries.<sup>134</sup> In general, though, aliens are exempt from military service.

As there are not many provisions in international law which deal with the subject there are no patterns to be followed.

However, as serving in the army has a strong connotation of public policy and national security, domestic legislation which denies aliens access to the military cannot be understood as comprising unlawful discrimination.

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<sup>133</sup> Protocol Relating to Military Obligations in Certain Cases of Double Nationality, Apr. 12, 1930, 178 L.N.T.S. 227.

<sup>134</sup> Australia- Shearer, *supra* note 37, at 67.

France- Vincent, *supra* note 115, at 484 (foreign legion),

Norway- Grahl-Madsen, *supra* note 39, at 1004.

Turkey- Ergun Özsüney, *The Legal Position of Aliens in Turkey*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT (1987), at 1514 (they may be obliged to perform military service);

United States- T. Alexander Aleinikoff, *United States Immigration, Nationality and Refugee Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1627 (1987).

## Public Rights

### I. DEFINITION

Public rights are the rights of the individual with regard to the State, but which do not require the status of a citizen for their enjoyment. Additionally, these rights also require a neutral stance – non-interference – by the State, similar to that for fundamental rights and private rights. In addition, this category of public rights should be understood as comprising the rights granted in accordance with the public legislation of the State, that is constitutional legislation as a rule, and means what the French legal commentators call “*libertés publiques*”. Freedom of expression, religious freedom, freedom of movement, the right to assemble, the right to associate and the right to strike are classified within this category.

The freedoms of thought and opinion are exercised in the private sphere of the individual's life and are inherent to the human condition. As such, the State has only to guarantee assurance to the right of freedom of expression, which is the exteriorization of these rights.

The right to associate and the right to meet are also classified within the category of public rights, for they are rights of the individual with regard to the State, and they all demand an attitude of non-intervention by the State. They do not require the status of a citizen and may suffer some limitation.

In practice, the right to meet and the right to associate may be considered as political rights, social rights or public rights, depending on the purpose of the meeting and the association. According to some legal commentators if the purpose of the meeting is to obtain improvements to the individual life, such as regards the status of a worker, the right to meet will be assimilated to a social right. It can also be understood within the freedom of expression, if the meeting has as its purpose the discussion and diffusion of ideas or it can be understood as a political right if it involves the right of the individual to form a political party. We will see *infra* that international law does not differentiate as regards the purpose of the meeting or the association, as it sets forth a general rule guaranteeing both the right to meet and the right to associate in general terms.

## 2. THE PUBLIC RIGHTS

### *I. Freedom of Expression*

Historically, the right to freedom of expression has been declared for a long time. The 1789 Declaration of the Rights of the Man and Citizen, in article 11, grants this right to everyone.

The right to freedom of expression is the verbal expression of the right to freedom of thought and it corresponds to the freedom of information. Thus, this freedom is linked to the freedom to receive information, either written or orally. It also comprises the freedom to adopt any intellectual approach.

It is natural to mankind that men think differently; therefore the freedom to externalize these different ideas has to be guaranteed.

Some legal commentators classify this freedom as a primary one, since other freedoms are protected as a consequence of this right.<sup>1</sup> In accordance with this reasoning, freedom of religion is only guaranteed because it derives from the freedom of individuals to think differently.

#### *a) International Law*

Most human rights instruments protect this right not only because of its historical role but also because of its enormous importance to human nature: the idea that men think differently and should be free to manifest their thoughts.

Due to its importance, the Universal Declaration mentions this right both in its Preamble and in a provision.

*Preamble- (2) Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people;*

*Article 19- Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

The International Covenant on Civil and Political Rights also emphasizes the importance of this right:

*Article 19- (1) Everyone shall have the right to hold opinions without interference.*

*(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

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<sup>1</sup> CLAUDE-ALBERT COLLIARD, LIBERTÉ PUBLIQUE, as quoted by 2 CELSO RIBEIRO BASTOS AND YVES GANDRA MARTINS, COMENTÁRIOS À CONSTITUIÇÃO DO BRASIL 41 (1989).

- (3) *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
- (a) *For respect of the rights or reputations of others;*
  - (b) *For the protection of national security or of public order (ordre public), or of public health and morals.*

*Article 20- (1) Any propaganda for war shall be prohibited by law.*

- (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

The Human Rights Committee has interpreted this limitation clause of article 19(3) in the following manner: the restrictions must be provided by law; they may only be imposed for one of the purposes set out in article 19(3) (a) and (b); and they must be justified as being necessary for that State Party for one of those purposes.<sup>2</sup>

The European Convention rules that:

*Article 10.1- Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2-The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The International Covenant on the Elimination of All Forms of Racial Discrimination also guarantees this right, in so far as it does not violate another basic principle of the UN: the rule of non-discrimination.

*Article 4- States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:*

- (a) Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well*

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<sup>2</sup> THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 116 (1986).

*as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;*

*Article 5- In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*

*(VII) The right of freedom of thought, conscience and religion;*

*(VIII) The right to freedom of opinion and expression;*

The Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War also emphasizes this same right of freedom of expression limited by some international law principles.

*Article II- (1) The exercise of freedom of opinion, expression and information, recognized as an integral part of human rights and fundamental freedoms, is a vital factor in the strengthening of peace and international understanding.*

*(2) Access by the public to information should be guaranteed by the diversity of the sources and means of information available to it, thus enabling each individual to check the accuracy of facts and to appraise events objectively. To this end, journalists must have freedom to report and the fullest possible facilities of access to information. Similarly, it is important that the mass media be responsive to concerns of peoples and individuals, thus promoting the participation of the public in the elaboration of information.*

*Article V- In order to respect freedom of opinion, expression and information and in order that information may reflect all points of view, it is important that the points of view presented by those who consider that the information published or disseminated about them has seriously prejudiced their effort to strengthen peace and international understanding, to promote human rights or to counter racism, apartheid and incitement to war be disseminated.*

The Convention on the Rights of the Child also stresses the same rule:

*Article 12- (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*Article 13- (1) The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.*

*(2) The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

*(a) for respect of the rights or reputations of others; or*

(b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

This right is therefore protected at international level by major all human rights instruments, both of wide and less wide acceptance. Thus, in case of non-compliance of this right by the States international law requires that this non-compliance be justified in accordance with one of these escape clauses.

The European Court in the case *Piermont v. France*<sup>3</sup> held that administrative measures taken against a visiting member of the European Parliament in French Polynesia and New Caledonia violated article 10 of the Convention. The applicant, a German national and a member of the European Parliament, visited French Polynesia for a week in 1986 and during her visit she took part in an independence and anti-nuclear demonstration and made a speech. As she was about to leave she was served with an expulsion order which also banned her from re-entering the territory. Thus, the Court decided that the restriction on the freedom of speech was admitted by law and had legitimate aims, namely the preservation of order and its territorial integrity. However, it also decided that because the applicant had been contributing to a democratic debate, which is an especially important activity for an elected representative, the restriction had been disproportionate.

Therefore, it seems that the Court in this case decided that there had been a violation of the right to freedom of speech apparently relying mainly on the fact that the applicant was a member of the European Parliament. Consequently, we can not reach the conclusion that this case sets the standard that the democratic exercise of the right to freedom of speech cannot lead to expulsion.

#### b) Comparative Law

In Brazil, freedom of expression is constitutionally guaranteed both to nationals and resident aliens, with no limitations whatsoever, in the following terms:

*Article 5- Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners resident in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms:*

*IV- the manifestation of thought is free, but anonymity is forbidden;*

*IX- expression and communication of intellectual, artistic and scientific activity are free, independent of any censorship or license;*

*Article 220- The expression of thoughts, creation, speech and information, through whatever form, process or vehicle, shall be subject to no restrictions, observing the provisions of this Constitution.*

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<sup>3</sup> Judged on April 27 1995, *Decisions on the European Convention on Human Rights During 1995*, LXVI THE BRITISH YEARBOOK OF INTERNATIONAL LAW 540 (1995).

It should be mentioned that freedom of expression is constitutionally guaranteed since the 1824 Imperial Constitution, but at that time, only to nationals. Since 1891 this right is guaranteed both to nationals and resident aliens.<sup>4</sup>

In the US, the Supreme Court in the case *Schenck v. U.S.*<sup>5</sup> established that the right to freedom of expression is to be guaranteed to everyone with the sole limitation being when it presents a clear and present danger. The Supreme Court often applied this protection narrowly, principally during the Cold War period in which there was an enormous fear of communism, and therefore the freedom of expression was curtailed. Currently, the Court employs a more liberal understanding.<sup>6</sup>

In South Africa, in the case *Nyamakazi v. President of Bophuthatswana*, section 31B of the Internal Security Amendment Act of 1991, which prohibited aliens attending gatherings from participating in speeches, addresses, discussions, debates or campaigns on the internal politics of Bophuthatswana, was judicially challenged. The Court decided that the above mentioned provision discriminated against aliens as a class. It infringed on non-national's right to freedom of expression and association, assembly and information to such a degree that it rendered these rights ineffective. In the absence of a compelling government interest, the court declared section 31B of the Internal Security Act unconstitutional.<sup>7</sup>

In France, the association EKIN, which has its seat at Bayonne and aims at safe-keeping the culture and specificity of the Basque people, published in 1987 a book entitled "Euskadi at war" in four languages and which was distributed in several countries. In 1988 the distribution of this book was prohibited in France by the Minister of Justice, based on a 1939 legislation which grants the Minister the faculty to prohibit the circulation, distribution and commerce of foreign writings which have a strong connotation of public policy. Nine years afterwards the French *Conseil D'État* in 1997 declared void this decision of the Minister under the argument that this publication was not contrary to French public policy, therefore admitting that the administrative judge has the power to review the decision of the Minister as regards its merits. Notwithstanding, the *Conseil D'État* did not consider the legislation discriminatory and consequently contrary to article 14 of the European Convention.

This decision, with all due respect, is in itself contradictory for adopts different criteria depending on the origin and language of the publication. As seen, freedom of the press and of speech are subject to limitations in accordance with international human rights instruments, but the origin of publication is of no importance at all. If the publication strongly violates local public policy then it should be forbidden, no matter its origin or language.<sup>8</sup>

<sup>4</sup> The 1824 Constitution, article 179, IV; the 1891 Constitution, article 72, para.12; the 1934 Constitution, article 113, para.9; the 1937 Constitution, article 122, para.15; the 1946 Constitution, article 141 para. 5; the 1967 Constitution, article 150 para. 8; the 1969 Constitution, article 153 para. 8.

<sup>5</sup> *Schenck v. U.S.*, 249 U.S. 47 (1919).

<sup>6</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>7</sup> Rika Pretorius, *Protecting the Rights of Aliens in South Africa: International and Constitutional Law Issues*, 21 SAYIL 130, 136-7 (1996).

<sup>8</sup> Decision rendered on July 9, 1997, 9 RUDH 297 (1997). This decision is highly criticized by Didier Rouget, *L'Interdiction Administrative des Écrits Étrangers en France – Une Censure Discriminatoire Injustifiée*, 9 RUDH 169-181 (1997) who considers that this legislation should be entirely revoked, for there is no justification for this discriminatory treatment.

Legislation of various foreign countries differ, either granting this right to everyone, as is the case in the great majority of countries, such as Antigua and Barbuda<sup>9</sup>, Argentina<sup>10</sup>, Belgium<sup>11</sup>, Belize<sup>12</sup>, Brazil<sup>13</sup>, Canada<sup>14</sup>, Cape Verde<sup>15</sup>, Chile<sup>16</sup>, Costa Rica<sup>17</sup>, Denmark<sup>18</sup>, Egypt<sup>19</sup>, Germany<sup>20</sup>, Greece<sup>21</sup>, Honduras<sup>22</sup>, Hungary<sup>23</sup>, Italy<sup>24</sup>, Liberia<sup>25</sup>, Luxemburg<sup>26</sup>, Mexico<sup>27</sup>, Norway<sup>28</sup>, Paraguay<sup>29</sup>, Peru<sup>30</sup>, Poland<sup>31</sup>, Portugal<sup>32</sup>, Spain<sup>33</sup>, Sweden,<sup>34</sup> Thailand,<sup>35</sup> The Netherlands<sup>36</sup>, US<sup>37</sup>, Turkey,<sup>38</sup> or

<sup>9</sup> ANTIGUAN CONST. (1981) article 12.1.

<sup>10</sup> ARGENTINEAN CONST. (1853) section 14.

<sup>11</sup> BELGIAN CONST. (1970) article 19.

<sup>12</sup> BELIZEAN CONST. (1981) article 12.1.

<sup>13</sup> BRAZILIAN CONST. (1988) article 5, IX and article 220 grants this right to both nationals and resident aliens alike.

<sup>14</sup> CANADIAN CONST. (Constitution Act, 1982) article 2.

<sup>15</sup> CAPE VERDIAN CONST. (1992) article 45.1.

<sup>16</sup> CHILEAN CONST. (1970) article 19.12.

<sup>17</sup> COSTA RICAN CONST. (1949) article 29.

<sup>18</sup> DANISH CONST. (1953) section 77.

<sup>19</sup> EGYPTIAN CONST. (1971) article 47.

<sup>20</sup> GERMAN CONST. (1949) article 5.

<sup>21</sup> GREEK CONST. (1975), article 14(1).

<sup>22</sup> HONDURAN CONST. (1982) article 72.

<sup>23</sup> HUNGARIAN CONST. (1949) article 61.1.

<sup>24</sup> ITALIAN CONST. (1948) article 21.1.

<sup>25</sup> LIBERIAN CONST. (1984) article 15.

<sup>26</sup> LUXEMBURG CONST. (1868) article 24.

<sup>27</sup> MEXICAN CONST. (1917) articles 6 and 7.

<sup>28</sup> NORWEGIAN CONST. (1814) article 100.

<sup>29</sup> PARAGUAYAN CONST. (1967) article 72.

<sup>30</sup> PERUVIAN CONST. (1993) article 2.4.

<sup>31</sup> POLISH CONST. (1997) articles 25.2 and 54.1.

<sup>32</sup> PORTUGUESE CONST. (1976) article 37.1.

<sup>33</sup> SPANISH CONST. (1978) article 20.1.a.

<sup>34</sup> The 1949 Freedom of the Press Act, chapter 2, article 20: "(...) Unless otherwise provided by special rules of law, any foreigner within the Realm shall be on equality with a Swedish citizen also with regard to the freedom of expression, the freedom of information, the freedom of assembly, the freedom of demonstration, the freedom of association, and the freedom of religion." See also SWEDISH CONST. (1975) section 2, article 20.2.1.

<sup>35</sup> THAI CONST. (1997) article 39.

<sup>36</sup> DUTCH CONST. (1983)- article 7.

<sup>37</sup> U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

<sup>38</sup> Ergun Özsüñay, *The Legal Position of Aliens in Turkey*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1489, 1507 (1987). See also TURKISH CONST. (1982), articles 25 and 26.

granting this right in express terms only to nationals, as in Algeria<sup>39</sup>, Congo<sup>40</sup>, Cuba<sup>41</sup>, India<sup>42</sup>, Jordan<sup>43</sup>, Nicaragua<sup>44</sup> and Taiwan.<sup>45</sup>

According to human rights instruments, as seen, this right should be granted to everyone, without the possibility of discrimination. Therefore this right can only be limited by exceptional circumstances of public safety, public order, public health or morals or the rights and freedoms of others and these exceptions should be applied to aliens and nationals alike. If aliens are submitted to stricter criteria, without a reasonable justification, it would be unlawful discrimination and, consequently, against international law.

As such, those countries which do not grant freedom of expression to all, and which may expel aliens for reasons connected with ideas or opinions expressed by the alien, are contrary to international law patterns. The right to freedom of expression can only be abridged in accordance with those limitations expressed by the conventions and the States have to justify why such attitude of the alien, which may subject him or her to expulsion, is contrary to local national security or public policy. Only after such justification can the alien be expelled.

## *II. Freedom of Religion*

### *i) Introduction*

As religion is defined as a collection of beliefs, it is for each individual to decide in which to believe, without any interference whatsoever. However, sometimes a religion is much more than a collection of beliefs, because it leads to certain types of behavior, and may therefore have repercussions on other people's lives.

In this case, legislation may impose limitations upon the external manifestation of the freedom of religion, but not as regards its inner expression. Of course, these limitations imposed by law only apply in extreme situations, when in the name of religion, atrocities are committed, such as human sacrifices and mutilations of women,<sup>46</sup> for instance, or when attitudes preached by a certain religion lead to the adoption of a behavior understood as against local morality, such as polygamy.

Additionally, limitations may also be imposed on the enjoyment of this right if basic principles of international law are violated; such as the principle of non-

<sup>39</sup> ALGERIAN CONST. (1976) article 41.

<sup>40</sup> CONGOLESE CONST. (1992) article 27.

<sup>41</sup> CUBAN CONST (1976) article 53.

<sup>42</sup> M. P. Singh, *Position of Aliens in Indian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 569, 598 (1987). See also INDIAN CONST. (1950) article 19.1.a.

<sup>43</sup> JORDANIAN CONST. (1952) article 15(l).

<sup>44</sup> NICARAGUAN CONST( 1987) article 30.

<sup>45</sup> TAIWANESE CONST, 1947, article 11.

<sup>46</sup> Currently mutilation of women is a widespread practice in 28 African countries and in the US, among the African immigrants. See the Brazilian newspaper O GLOBO, March 2, 1997, at 56 reproducing an article of the NY Times.

discrimination for reasons of belief or sex, for instance. Apart from these cases, diversity of religion and its practice contribute to the building of a pluralistic society.

Notwithstanding, in many cases religious practices are questioned when they conflict with the practices of the majority, sometimes leading to difficult legal questions regarding when government regulation of the practice violates religious freedom. This happens in a school environment, when Muslim children wear head-scarves or when orthodox Sikhs wear turbans and long hair and the school rules do not accept such behavior. Another example of this difference in attitudes regarding religious practices is Jewish children's observation of the sabbath or other religious holidays, which could prevent them from attending school and exams on these days in a country where the great majority of the population are catholic, for instance. Additionally, Jehovah's Witnesses with regard to blood transfusions and the Catholic rule of confessional secrecy and the prohibition to sell goods on a Sunday can also be mentioned as examples of different behaviors as a result of religious beliefs, which can come into conflict with the behavior of the majority.

#### *ii) Historical Development of the Rule of Freedom of Religion*

The struggle for freedom of religion precedes every other, in the history of human rights. In modern times, the Treaty of Westphalia of 1648 guaranteed equality of rights for both Roman Catholics and Protestants; in 1774, Turkey granted protection to the Christian religion within Russian territory; and in 1815 the Congress of Vienna provided for freedom of religion in several cantons of Switzerland.<sup>47</sup>

Human Rights Instruments contain several provisions dealing with freedom of religion. The rule of non-discrimination expressly states that any differential treatment based on the religion of an individual is prohibited.

Freedom of religion, as regards beliefs and practices, is thereby granted, and the State has to guarantee the pacific enjoyment of this right, subject, as seen, to exceptional limitations. Additionally, the individual is free to keep his or her beliefs or to change them, without any external interference whatsoever.

It often happens that foreigners do not profess the same religion as local inhabitants. Thus, foreigners follow different beliefs and hold different religious practices than nationals. As such, we find the same prejudice being directed against those who are not equals, who dress differently and who hold different practices. In fact, the prejudice against those who follow a different religion originates from the same basis as the prejudice against those who are not nationals, for the main prejudice is rejecting those who are different.

One can even go further as to say that, historically, freedom of religion was one of the first human rights to deserve protection, because religion in ancient times was very much connected to the enjoyment of civil and political rights. As aliens did not profess the same religion as nationals, they were denied these rights, not because of alienage, but because of their different religion. In the Middle Ages, for example, people looked at everything, not from the point of view of their race or nationality,

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<sup>47</sup> See Brice Dickson, *The United Nations and Freedom of Religion*, 44 INT'L & COMP. L. Q. 330 (1995).

but from the point of view of their religion. Mankind was divided, not into Germans or French, but into Christians and Infidels.<sup>48</sup> At that time, the Church regarded itself as a State, to which everybody had to belong. The Modern Age brought with it the progressive depolitization of religion and the national State became the most important political power.<sup>49</sup>

As such, I believe that one of the first signs of non-discrimination between nationals and aliens was the idea of freedom of religion, as it implies the idea of tolerance towards others who are not our equal.

Due to the fact that historically religion was linked to the idea of enjoyment of civil and political rights, some domestic Constitutions determine that, as a condition to the exercise of some public functions, such as occupying the post of President or chief of State of the country, besides being a national, the individual has to profess the local religion.<sup>50</sup>

In 1981, the UN General Assembly unanimously proclaimed the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. This Declaration determines, in general terms, that religion or belief “*is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed.*”

#### *a) International Law*

The Universal Declaration guarantees this right broadly, as follows:

*Article 18- Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, worship and observance.*

The C.P.R. Covenant in more objective and specific terms assures the following:

*Article 18- (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

<sup>48</sup> HANS KOHN, THE IDEA OF NATIONALISM 79 (1967).

<sup>49</sup> *Id.* at 104.

<sup>50</sup> ARGENTINEAN CONST. (1853) section 76 established, “*To be elected President or Vice-President of the Nation, it is necessary to have been born in Argentine territory or if born in a foreign country to be the son of a native-born citizen, to belong to the Roman Catholic Apostolic Church and to possess the other qualifications to be elected a Senator.*” Presently, this requirement does not exist anymore in Argentina. Additionally, article 73 of the Constitution of the People’s Democratic Republic of Algeria, ALGERIAN CONST. (1976) requires the candidate for the Presidency of Republic to be a Muslim. See also article 4 of the NORWEGIAN CONST. (1814), which determines that the King shall profess the evangelical Lutheran religion.

(2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

(3) Freedom to manifest one's beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 27- In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The European Convention sets forth:

*Article 9.1- Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

*2- Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

The Convention on the Rights of the Child sets forth:

*Article 30- In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.*

The Convention which sets the Standard Minimum Rules for the Treatment of Prisoners guarantees to prisoners the right to profess a religion of their choice and be attended by a corresponding religious representative, as follows:

*Article 41- (3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.*

*Article 42- So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.*

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities also guarantees the right of freedom of religion:

*Article 2- (1) Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.*

*(2) Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.*

The United Nation Rules for the Protection of Juveniles Deprived of their Liberty also guarantee:

*Article 48- Every juvenile should be allowed to satisfy the needs of his or her religious and spiritual life, in particular by attending the services or meetings provided in the detention facility or by conducting his or her own services and having possession of the necessary books or items of religious observance and instruction of his or her denomination. If a detention facility contains a sufficient number of juveniles of a given religion, one or more qualified representatives of that religion should be appointed or approved and allowed to hold regular services and to pay pastoral visits in private to juveniles at their request. Every juvenile should have the right to receive visits from a qualified representative of any religion of his or her choice, as well as the right not to participate in religious services and freely to decline religious education, counseling or indoctrination.*

Besides the fact that all human rights instruments grant the freedom of faith to all without discrimination, there are several other specific instruments that grant this right specifically, due to its importance, including to people of minority groups.

Therefore, the rule assuring freedom of religion is patently guaranteed at international level in very broad terms to everyone and can only exceptionally be limited, for reasons of public safety, public order, public health or morals or the rights and freedoms of others.

#### *b) Comparative Law*

The Australian Constitution of 1900 rules in section 116:

*"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."<sup>51</sup>*

The Brazilian Constitution determines that:

*Article 5- Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners resident in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms:*

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<sup>51</sup> See Dickson, *supra* note 47, at 335.

*VIII- No one shall be deprived of any rights because of religious beliefs or philosophical or political convictions, unless invoked in order to be exempted from a legal obligation imposed upon all by one refusing to perform an alternative service established by law;*

In the US, the First Amendment prevents Congress from making laws concerning any established religion or prohibiting the free exercise of a religion, a guarantee applicable to everyone.

Recently, however, federal legislation in the US, in force since March 1997, prohibits the mutilation of women or circumcision in the country and considers it a crime for which a penalty of five-year imprisonment is established.<sup>52</sup>

Thus, the rule has been to grant freedom of religion and impose limitations only under extreme circumstances, such as in the case of women mutilation.

Despite this widespread acceptance of the freedom of religion under international law instruments, many countries, in their legislation, grant religious freedom only to nationals. This is the case with Denmark<sup>53</sup>, India<sup>54</sup>, Taiwan<sup>55</sup>, China<sup>56</sup>, Cuba<sup>57</sup> and Jordan<sup>58</sup>. In contrast, the great majority of countries expressly grant this right to everyone, without distinctions, such as Germany<sup>59</sup>, Hungary<sup>60</sup>, Poland<sup>61</sup>, the Netherlands<sup>62</sup>, US<sup>63</sup>, Brazil<sup>64</sup>, Argentina<sup>65</sup>, Australia<sup>66</sup>, Belgium<sup>67</sup>, Cape Verde<sup>68</sup>, Chile<sup>69</sup>, Congo<sup>70</sup>, Egypt<sup>71</sup>, Spain<sup>72</sup>, Greece<sup>73</sup>, Honduras<sup>74</sup>, Hungary<sup>75</sup>, Italy<sup>76</sup>,

<sup>52</sup> 18 U.S.C. sec.116.

<sup>53</sup> DANISH CONST. (1953) article 67.

<sup>54</sup> INDIAN CONST. (1950), article 29.

<sup>55</sup> TAIWANESE CONST. (1978), article 13.

<sup>56</sup> CHINESE CONST. (1982), article 36.1.

<sup>57</sup> CUBAN CONST. (1976), article 55.

<sup>58</sup> JORDANIAN CONST. (1952), article 6(i).

<sup>59</sup> GERMAN CONST. (1949), article 4.

<sup>60</sup> HUNGARIAN CONST. (1949, consolidated in 1997) article 70/A (1).

<sup>61</sup> POLISH CONST. (1997), article 53 grants this right to everyone.

<sup>62</sup> DUTCH CONST. (1983), article 1.

<sup>63</sup> U.S. CONST. amend. I.

<sup>64</sup> BRAZILIAN CONST. (1988) article 5, VI.

<sup>65</sup> ARGENTINEAN CONST. (1853), section 14.

<sup>66</sup> AUSTRALIAN CONST. (1900), section 116.

<sup>67</sup> BELGIAN CONST. (1970), article 20.

<sup>68</sup> CAPE VERDIAN CONST. (1992), article 48.1.

<sup>69</sup> CHILEAN CONST. (1980), article 19.6.

<sup>70</sup> CONGOLESE CONST. (1992), article 26.

<sup>71</sup> EGYPTIAN CONST. (1971), article 46.

<sup>72</sup> SPANISH CONST. (1978), article 16.1.

<sup>73</sup> GREEK CONST. (1975), article 13.1.

<sup>74</sup> HONDURAN CONST. (1982), article 77.

<sup>75</sup> HUNGARIAN CONST. (1949), article 60.1.

<sup>76</sup> ITALIAN CONST. (1948), article 19.

Jordan<sup>77</sup>, Liberia<sup>78</sup>, Luxemburg<sup>79</sup>, Mexico<sup>80</sup>, Nicaragua<sup>81</sup>, Norway<sup>82</sup>, Paraguay<sup>83</sup>, Peru<sup>84</sup>, Portugal<sup>85</sup>, Sweden<sup>86</sup>, Switzerland<sup>87</sup>, Thailand<sup>88</sup> and Turkey.<sup>89</sup>

### *III. Freedom of Movement*

#### *a) Historical Development*

Francisco de Victoria, when dealing with the right of the Spaniards to travel into the lands of the New World, argues that they have this right providing that they do no harm to the natives and the natives do not prevent them.<sup>90</sup> Thus, they do not have an unlimited right to enter and live in a foreign land. In his own words, "*For, congruently herewith, it is reckoned among all nations inhumane to treat visitors and foreigners badly without some special cause, while, on the other hand, it is humane and correct to treat visitors well; but the case would be different, if the foreigners were to misbehave when visiting other nations.*"<sup>91</sup>

He also mentions the right of the State to expel an unwanted alien but, according to his viewpoint, there must be a reason to justify this serious measure: "... banishment is one of the capital forms of punishment. Therefore it is unlawful to banish strangers who have committed no fault".<sup>92</sup>

Hugo Grotius also deals with the right to enter and live in a foreign country and he emphasizes the fact that it is not an unlimited right of the individual unless under exceptional circumstances, such as *force majeure*. He argues that the right of temporary stay should be granted "to those who pass through a country, by water or by land, it ought to be permissible to sojourn for a time, for the sake of health, or for any other good reason; for this also finds place among the advantages which involve no detriment".<sup>93</sup>

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<sup>77</sup> JORDANIAN CONST. (1952), article 14.

<sup>78</sup> LIBERIAN CONST. (1984), article 14.

<sup>79</sup> LUXEMBURG CONST. (1868), article 19.

<sup>80</sup> MEXICAN CONST. (1917), article 24.

<sup>81</sup> NICARAGUAN CONST. (1987), article 29 and 69.

<sup>82</sup> NORWEGIAN CONST. (1814), article 2.1.

<sup>83</sup> PARAGUAYAN CONST. (1967), article 70.

<sup>84</sup> PERUVIAN CONST. (1993), article 2.3.

<sup>85</sup> PORTUGUESE CONST. (1976), article 41.

<sup>86</sup> SWEDISH CONST. (1975), chapter 2, article 1.1, and 20.2.1.

<sup>87</sup> SWISS CONST. (1874), article 49 and 50.

<sup>88</sup> THAI CONST. (1997), section 38.

<sup>89</sup> TURKISH CONST. (1982), article 24.

<sup>90</sup> *De Indis et de Iure Belli Rerumque Belli* *Reflectiones*, CLASSICS OF INTERNATIONAL LAW, third section, para. 386, at 151 (Carnegie Endowment, 1917)

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, para. 387.

<sup>93</sup> HUGO GROTIUS, *The Law of War and Peace*, THE LEGAL CLASSICS LIBRARY, bk. 2, ch. 2, no. XV, at 200 (1984).

Along the same lines he sets the basis of the right of refugees to be admitted in the following terms: "furthermore a permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strife."<sup>94</sup>

Puffendorf, as regards expulsion, says, "to expel without probable cause guests and strangers, once admitted, surely savors of inhumanity and disdain."<sup>95</sup>

Christian de Wolff, as regards the right to emigrate, argues that it arises either from agreement or from fundamental law, or depends upon the will of the ruler.<sup>96</sup>

Emmer de Vattel in 1757 wrote,

*"every nation has a right of refusing to admit a stranger into the country, when he cannot enter it without putting it in evident danger, or without doing it a remarkable prejudice."* Along the same lines he says: *"since the lord of the territory may forbid its being entered when he thinks proper he has, doubtless, a power to make the conditions on which he will admit of it. This as we have already said, is a consequence of the right of domain."*<sup>97</sup>

As regards the right of individual to leave, he also says, *"every man has a right to quit his country, in order to settle in any other, when by that step he does not expose the welfare of his country"*.<sup>98</sup>

Blackstone stated that it is an absolute right of Englishmen "... to go out of the realm for whatever reason he pleaseth, without obtaining the King's leave, providing he is under no injunction of staying home..."<sup>99</sup>

Although the formulation of the right of freedom of movement takes into account the right of the individual to emigrate, in reality it is not for the individual to decide where and when to go, but for the State to decide whom to accept in its territory. This understanding has been espoused by the International Law Institute as early as in 1888, in Lausanne, according to which every State is free to decide on matters related to entry and expulsion of foreigners, in whatever manner it considers convenient.

Later in 1892, the same Institute recommended that access by foreigners to the territory of a certain country should not be denied permanently, unless in accordance with common interest and for the most serious of reasons. In reality, these two resolutions have the same meaning: a State is free to determine under which conditions it will accept aliens, for it is obliged to accept only its nationals. However, the

<sup>94</sup> *Id.*, no. XVI.

<sup>95</sup> Samuel Pufendorf, *De Jure Naturae et Gentium- Libri Octo*, CLASSICS OF INTERNATIONAL LAW, vol II, no. 248 (1934).

<sup>96</sup> Christian De Wolff, *Jus Gentium-Methodo Scientifica- Per Tractatum*, THE CLASSICS OF INTERNATIONAL LAW, para. 154 (1934).

<sup>97</sup> EMMER DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, bk. 1, ch. 19, para. 230 and *Id.*, bk. 2, ch. 8, para. 100 (1820).

<sup>98</sup> *Id.*, bk. 1, ch. 19, para. 220.

<sup>99</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND I, bk. 1, ch. 1, § 2, ch. 7.

State cannot simply refuse acceptance of all aliens, and has to use this capacity in a thoughtful manner, in accordance with international rules and principles.

In 1897, the Institute also approved a convention on immigration which determines that States recognize the freedom of movement of individuals either at individual or collective level without any distinction based on nationality. This freedom can only be limited by legislation and under special circumstances of political and social necessity.

Along the same lines, the American Law Institute, in 1924, proclaimed that it is for each American Republic to decide, according to local circumstances, which persons or which category of persons should be allowed entry in its territory<sup>100</sup>.

### *b) International Law*

Within the concept of freedom of movement are included the right to enter a country, the right to fix residence and the right to leave at one's own will, as expressed in international conventions.

The Havana Convention on the Status of Aliens of 1928 determines that States are free to determine, through legislation, the conditions of entry and residence of aliens in their territory.<sup>101</sup>

The American Declaration, in its article VIII determines that: "*Every person has the right to fix his residence within the territory of the State of which he is a national, to move about freely within such territory, and not to leave it except by his own will*". Thus, this Declaration guarantees the right to enter, fix residence, move and leave only to nationals.

The Universal Declaration sets forth:

*Article 13- (1) Everyone has the right to freedom of movement and residence within the borders of each State.*

*(2) Everyone has the right to leave any country, including his own, and to return to his country.*

The Universal Declaration assures the right to leave to everyone, not only to nationals, as well as the right to move within the borders of each State. However, the right to return is only granted to nationals.

The C.P.R. Covenant establishes, in more objective terms, that only those who are legally in the country have the right to move freely within the borders of a State and choose their place of residence. It also determines that only nationals have the right to enter their country of nationality, while the right to leave should be granted to

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<sup>100</sup> See A. Verdross, *Les Règles Internationales concernant le Traitement des Étrangers* 37 RECUEIL DES COURS 327, 342 (1931) where he quotes all these conventions and resolutions.

<sup>101</sup> Article 1 – "States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory."

anyone. Additionally, as regards expulsion of lawful resident aliens, the Covenant determines that the decision should not be arbitrary and that the alien should be granted some specific procedural rights.

*Article 12- (1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

*(2) Everyone shall be free to leave any country, including his own.*

*(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*

*(4) No one shall arbitrarily be deprived of the right to enter his own country.*

*Article 13- An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

The Fourth Protocol to the European Convention, 1968, along the same lines, guarantees the right to enter and to reside only to nationals. The right to leave is assured to everyone and the right to move freely is guaranteed to those lawfully in the territory of the State. Additionally, collective expulsion of aliens is forbidden, *in verbis*:

*Article 2(1)- Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

*(2)-Everyone shall be free to leave any country, including his own.*

*(3)- No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of "ordre public", for the prevention of crime, for the protection of the rights and freedoms of others.*

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

*Article 3(1)- No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.*

*(2)- No one shall be deprived of the right to enter the territory of the State of which he is a national.*

*Article 4- Collective expulsion of aliens is prohibited.*

Protocol No. VII of the European Convention provides, in article 1, that aliens lawfully residents in the territory of a State shall not be expelled other than in consequence of a decision reached in accordance with the law and the alien should be accorded some basic procedural rights. These procedural rights, however, can be abridged when the expulsion is necessary in the interests of public order or when it is based on reasons of national security, which makes this guarantee somewhat empty.

Thus, the faculty of the States to expel resident aliens is not questioned, but this Protocol determines that limitations are imposed on this faculty of the States.

Despite the fact that the UN Convention Against Racial Discrimination, in article 5 prohibits discrimination as regards the right to freedom of movement and residence within the border of the State and the right to leave any country, including one's own, and to return to one's own country, the Convention, in article 1(2) determines that discrimination within the meaning of the Convention does not comprise the distinctions made between citizens and non-citizens.

The Committee on Racial Discrimination will have then to analyze on a case-by-case basis to determine whether it is unlawful discrimination. If measures are taken against one specific racial group or against one specific nationality, without a reasonable justification, it will be characterized as discrimination.<sup>102</sup>

The UN Convention on Elimination of Discrimination Against Women establishes equal rights both to men and women concerning freedom of movement:

*Article 6- Without prejudice to the safeguarding of the unity and the harmony of the family, which remains the basic unit of any society, all appropriate measures, particularly legislative measures, shall be taken to ensure to women, married or unmarried, equal rights with men in the field of civil law, and in particular:*

*(c) The same rights as men with regard to the law on the movement of persons.*

The Strasbourg Declaration on the Right to Leave and Return of 1986 determines:

*Article 8- Permanent legal residents who temporarily leave their country of residence shall not be arbitrarily denied the right to return to that country.*

The UN Convention on Migrant Workers, elaborated by the UN in 1990, guarantees the right to leave to anyone and the right to enter only to nationals.

*Article 8-1- Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.*

*2- Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.*

The Colloquium on the Right to Leave and to Return, which took place in Upsalla, elaborated a declaration which affirmed that "*Everyone has the right to leave any country, including his own. As regards freedom of movement within a specific territory international law determines that everyone, nationals and legal resident aliens, have the right to choose their residence and to freely move inside State borders*"<sup>103</sup>.

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<sup>102</sup> See MERON, *supra* note 2, at 44.

<sup>103</sup> HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 150 (1987), reproduces the entire declaration.

### a) Right to Enter and to Reside

Hence, in accordance with the above mentioned conventions, international law has settled the rule that only nationals have the right to enter and reside in their country, while the right to leave is assured to everyone.<sup>104</sup> That is to say, that nationals have the right to enter and reside in their country of nationality, except in cases of breach of national security or public order, or under very exceptional circumstances. Consequently, even nationals may be prevented to enter their country of origin under certain justifiable circumstances, whereas aliens do not have this right of entry at all.

This right of the national to enter his or her country of nationality is both a right of the individual and a guarantee of the receiving State. In other words, if an individual, national of a certain State, enters one State to reside there and after a while is expelled, the State of residence has a guarantee that the State of the nationality of the individual will receive him or her.<sup>105</sup>

Along these lines, in 1974 when Turkish forces displaced many Greek Cypriots from northern Cyprus, the Cypriot government raised a legal claim before the European Commission in order to assure the right of nationals to return to their country of nationality.

At that time, Fourth Protocol to the European Convention, which assures this specific right, was not in force for Cyprus and Turkey, but the Commission decided that Turkey was wrong in refusing to permit the repatriation of 170,000 Greek Cypriots to northern Cyprus, based on article 8 of the European Convention, which assures the right to respect for private and family life.<sup>106</sup> This decision applied the criteria set forth in the Universal Declaration, Article 13 (2) and in the C.P.R. Covenant (Article 12 (4)).

The Court of Justice of the European Communities held that "*it is a principle of international law...that a State is precluded from refusing its own nationals the right of entry or residence.*"<sup>107</sup>

Thus, as only nationals have the right to enter and reside in a certain country, aliens may be denied entry. Additionally, as they do not have the right to reside in a country, they may be subjected to deportation and expulsion.

In sum, it can be concluded that international law grants the right to enter to nationals only, whereas the right to freedom of movement within national boundaries

<sup>104</sup> The *travaux préparatoires* of the C.P.R. Covenant indicate: "that the right to leave a country could not be claimed in order to escape legal proceedings or to avoid such obligations as national service and the payment of fines, taxes or maintenance allowances." UN. Doc A/2929, as quoted in Goran Cvetic, *Immigration Cases in Strasbourg: The Right to Family Life under Article 8 of the European Convention*, 36 INT'L AND COMP. L. Q. 647 (1987).

<sup>105</sup> This aspect is so important that if the individual becomes stateless and is afterwards expelled, the State of the last nationality should be obliged to receive him or her. Harvard Research in International Law- Draft Convention on Nationality, Article 20; Special Protocol on Statelessness of 1930 (not in force). See *supra* Chapter I, Definition of Alien: The Importance of Nationality, part 8, rule 8. Notwithstanding, this rule has not received acceptance.

<sup>106</sup> *Cyprus v. Turkey*, App Nos 6780/74 & 6950/75 as quoted by John Quigley, *Family Reunion and the Right to Return to Occupied Territory* 6 GEORGETOWN IMMIGRATION LAW JOURNAL 237-38 (1992).

<sup>107</sup> [1974] ECR 11337 at 1351. That rule is also stated by GUY GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 136-37 (1978).

and the right to choose one's place of residence is to be granted to nationals and aliens alike, subject only to limitations imposed due to reasons of national security, public policy, public health or morals.

Along these lines, the Human Rights Committee of the UN, in a decision of July 18, 1994 regarding the right of freedom of movement inside one country and the right to fix one's residence, decided that Sweden, when limiting this right to a Turkish individual, suspected of participation in terrorist activities, acted legally in accordance with the exceptions set forth in article 12, paragraph 3 of the Covenant, due to reasons of national security, public order, public health or morals or the rights and freedoms of others.<sup>108</sup>

Since aliens do not have the right to enter a country, States are free to establish rules regarding entry and expulsion of aliens, but international law imposes some restrictions on this right.<sup>109</sup> In this sense, the Human Rights Committee decided, as regards the context of the C.P.R. Covenant, that "*the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide whom it will admit to its territory. However, in certain circumstances, an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family law arise.*"<sup>110</sup>

Thus, the State cannot discriminate against one specific nationality, race or religion, or even deny entry to women, without any justifiable reason, for it would violate the international law rule which forbids discrimination. Additionally, this faculty to deny entry at the State's discretion should not be exercised with regard to diplomats,<sup>111</sup> international officials<sup>112</sup>, crewmembers<sup>113</sup> or refugees<sup>114</sup>.

<sup>108</sup> *Celepli v. Sweden*, RUDH 395 (1994).

<sup>109</sup> This is quite a recent theory. At first it was understood that nothing in international law could prevent one country from excluding or expelling an alien at its own discretion. Currently, many international law commentators defend this limitation, imposed by international law on the faculty of the States to control immigration, namely, see GOODWIN GILL, *supra* note 107; James A. R. Nafziger, *The General Admission of Aliens under International Law*, 77 AM. J. INT'L L. 804, and *A Commentary on American Legal Scholarship Concerning the Admission of Migrants*, 17 U. MICH. J. OF L. REFORM 165 (1984); GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1984). RICHARD PLENDER, *INTERNATIONAL MIGRATION LAW* (1972).

<sup>110</sup> Human Rights Committee, General Comment 15, 27th Sess, para.5-7, at 20.

<sup>111</sup> GOODWIN-GILL, *supra* note 107, at 147-51 and PLENDER, *supra* note 109, at 163.

<sup>112</sup> It is widely accepted in both ancient and modern international law that diplomats and consuls, after being accredited, should be accepted into the territory of the receiving State, unless some event of major importance prevents it. See PLENDER, *supra* note 109 at, 162-70 and GOODWIN-GILL, *supra* note 107, at 152-55.

<sup>113</sup> GOODWIN-GILL, *supra* note 107, at 156.

<sup>114</sup> *Id.* at 137 and PLENDER, *supra* note 109 at 69. However, it should be observed that, as regards this exception imposed by international law as a result of the rule of "*non-refoulement*", the great difficulty in practical terms is the characterization of an individual as a refugee. Thus, the presumption is that the individual is a ordinary alien until proved that he or she is suffering persecution in his or her country of nationality. Consequently, until this moment, the individual could be denied entry because under international law he or she would not be a real refugee.

The right to family life, as assured by international law, also imposes another limitation on this power of the States.

Consequently, as a general rule, if the alien, who is denied entry or expelled, has a family of nationals living in the country, he or she should be allowed to remain in the country on the basis of the right to family life. It should be pointed out, that in my view, this right is only of mandatory applicability when the family of the alien has the nationality of the country of residence. As we have seen, only nationals have the right to live in a specific country and, if the alien is denied entry or expelled, in order to assure the right to family life to be respected, the national would have to live abroad, away from his or her country of nationality. As regards resident aliens, international law does not have clear and mandatory standards concerning their right to family life.<sup>115</sup>

In sum, while, on the one side, international law grants States freedom to establish rules as regards immigration, on the other, it also grants individuals certain rights, that could eventually limit the power of the States to control entry to aliens.

Moreover, an alien has to have a valid travel document, which is usually a passport,<sup>116</sup> whose principal purpose is to establish the identity and nationality of those who seek admission to the State, and which is issued by the country of nationality, plus a visa, issued by the country of visit. The issuance of passports and visas are both regulated by the domestic laws of the State in question (respectively, the national State and the receiving State).

International law does not distinguish between the individual who already was granted a visa abroad and is denied entry and the individual who was denied a visa, but I think these situations cannot be treated in the same manner.

It has been admitted by domestic legislation of States as well as by legal commentators that possession of a visa does not confer on the individual the right to enter a specific country, for he or she may be denied admission at the discretion of the State.<sup>117</sup>

As a matter of fact, an individual may be submitted to several inquiries realized by the Consulate of the foreign country before issuance of the visa, may travel and

<sup>115</sup> It should be observed that international and domestic tribunals are more protective of the individual in the context of expulsion as opposed to cases related to denials of entry, because generally they deal with resident aliens. However, State practice shows that as regards entry, generally the mere existence of a national family will assure admission, whereas in the context of expulsion, the existence of a national family will not necessarily prevent it. See also *supra* Chapter V on Private Rights, specifically the item concerning the right to family life. See also in this Chapter decisions of international and national tribunals concerning the right to family life of resident aliens.

<sup>116</sup> See GOODWIN-GILL *supra* note 107, at 24-50.

<sup>117</sup> As regards the US see GOODWIN-GILL, *supra* note 107, at 130, 8 U.S.C. section 1225 (a). Brazil adopts similar legislation, as Article 26 of the Aliens Act, Law number 6.815 of August 19, 1980, determines that possession of a visa does not mean an acquired right to enter the country but mere expectation and so does Canada, Immigration Act of 1976, section 12 (1). France adopts the same criterion see Dominique Turpin, *La Loi n° 98-349 du 11 Mai 1998 Relative à l'entrée et au séjour des Étrangers en France et au Droit d'Asile*, 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 521, 529 (1998) and Australia, *Rosalina Melena Louis v. the Commonwealth of Australia and Qantas Airways Limited*, Supreme Court n. 1029 of 1985.

finally some immigration authority may forbid entry for no specific reason. What is the use of all the guarantees expressed in the human rights instruments and the principle prohibiting discrimination, if in practice, a minor authority may arbitrarily prohibit entry, based on the suspicion, for example, that the alien will get involved in prostitution?

Undoubtedly, it is a widely accepted maxim of international law that no alien has the right to enter a foreign country, but this discretionary power of the State to accept or not aliens should be exercised until the issuance of a visa, according to my viewpoint. After that moment, only for concrete and objective reasons should an alien be denied entry to a country, not for mere suspicions or on arbitrary grounds. In my view, this unjustifiable denial can be understood as cruel and degrading treatment, besides the possibility of comprising discrimination.

Therefore, before issuance of a visa, aliens can be denied entry and, in accordance with international law patterns, the State does not need to justify this denial and this attitude would be understood as within the discretionary power of the States to control immigration.

It should be observed, though, that some countries are already requiring justification even in cases of denial of entry, at least in certain specific situations, such as when there is a national or a resident alien family, such as France and UK.<sup>118</sup>

However, after the visa is issued, my understanding is that the State may only deny entry for objective and concrete reasons and never arbitrarily, for the individual would have a reasonable expectation that he or she would be allowed entry.

Along the same lines, if an alien has a permanent resident visa and leaves the country of residence for a while, after living there for many years and wishes to reenter, he should be treated in the same manner mentioned above, based on the possession of a visa. Thus, only under very special, concrete and objective circumstances should the State be able to deny entry to this individual. In these cases, the discretionary power of the State should not be used.<sup>119</sup>

Adopting this understanding, the Strasbourg Declaration on the Right to Leave and Return, already mentioned, grants the right to enter to permanent legal resident aliens.

### *b) Right to Leave*

Concerning voluntary departure, individuals are free to leave any country, “*including their own*”, provided they are not subject to any limitation which can be imposed

<sup>118</sup> See Dominique Turpin, *supra* note 117 at 530. The UK has adopted a very interesting method to avoid difficulties at the port of entry. In 1968, in order to avoid problems at entry, the system of entry clearance was created for family members of Commonwealth citizens. Recently, entry clearance has become mandatory in all cases of family reunification, fiancés, the self-employed and persons of independent means. This procedure practically extinguishes the use of discretionary powers at the port of entry. All inquiries are made by the official abroad who grants the clearance. Once this stage is passed and the alien is at the port of entry with the clearance, entry will not be allowed only in cases involving fraud, and discretion will not need to be used. See IAN MACDONALD, *IMMIGRATION LAW AND PRACTICE IN THE UNITED KINGDOM* 32 (2nd ed. 1987).

<sup>119</sup> GOODWIN-GILL calls it “legitimate expectations of an alien”, *see supra* note 107, at 258 and PLENDER treats this situation within the chapter of acquired rights. PLENDER, *supra* note 109, at 159-63.

on anyone, such as bail or legal custody, and possess a valid travel document – generally a passport – and a visa to enter any other country.<sup>120</sup>

The Inter-American Commission on Human Rights decided in 1979 in its Report on the Situation of Political Prisoners in Cuba that “*No State has the right to prevent an individual from leaving the country, except when that individual is accused of a common law crime*”.<sup>121</sup>

As regards the freedom of nationals to leave their country of origin, some commentators argue that international law admits some limitations to this rule, as follows:

- 1) interests of national security and compelling performance of military or civilian service;
- 2) public order, in the event of perpetration of a crime and the need of subsequent punishment;
- 3) debt towards the State of nationality for costs due to his or her repatriation;
- 4) collection of taxes;
- 5) protection of members of the family of the individual;
- 6) in order to evade civil responsibility because of a debt or for court purposes;
- 7) repaying the community where he or she was trained for the costs of education.<sup>122</sup>

Some commentators argue that the right to leave a country may also be abridged for reasons of incapacity (a minor may be denied the right to leave or to enter unaccompanied by an adult) or professional ability, in the case of developing countries.<sup>123</sup>

With regard to the prohibition to leave due to reasons of professional ability, it should be noted that since the attitude of former Socialist countries and Cuba of denying the right to leave to their nationals for political reasons was much criticized, there is not much difference between that attitude and the one which aims to deny the right to leave to the individuals, in order to avoid the phenomenon known as the ‘brain drain’. The individual skills and abilities belong to him or herself and not to the community where he or she was educated. It is totally unacceptable to me that the knowledge of an individual, an example of something which is due to one’s own effort and abilities and known as something which cannot be taken from oneself, can be interpreted as belonging to someone or something else, other than the individual.

<sup>120</sup> As a matter of law, possession of a passport is both a requirement to leave a country, for if the individual does not comply with the requirements to be allowed to leave (such as military service or collection of taxes) the passport will not be issued, as well as a requirement to enter a country. A visa, on the other hand is a requirement to enter a country together with a passport, which is also an identity document of the individual. It is quite obvious that a refusal by the national State to issue a passport without a reason will limit the individual as regards his or her right to travel, therefore these domestic requirements to issue a passport, if unreasonable, may be considered as a violation of the right to leave a country guaranteed by international law rules.

<sup>121</sup> As quoted by PLENDER, *supra* note 109, at 122

<sup>122</sup> *Id* at 120-21.

<sup>123</sup> THELMA CAVARZERE, DIREITO INTERNACIONAL DA PESSOA HUMANA: A CIRCULACAO INTERNACIONAL DE PESSOAS 65 (1995). This happens in several developing countries, such as Chad, Sudan, Tanzania and Togo, among others. *Id.* at 148 and 182.

Notwithstanding, in cases when the government of a certain country finances the study abroad of an individual and if this individual decides not to come back home, I believe that the country of his or her nationality has a civil and moral right to demand compensation. But, even so, the individual has the right to decide not to come back to his or her country, after the financial settlement.

This idea of imposing limitations on the exit of skilled professionals from developing countries, based on the argument that the community has some legal claim on the skills and talents developed by members of that community, apparently has been accepted by Judge Ingles in his Report<sup>124</sup>, as well as by Richard Pledger,<sup>125</sup> even though contrary to the terms of the European Social Charter, at article 18.

In reality, all these situations are exceptions to the enjoyment of the rights established in the Covenant, and thus have to be expressly stated and interpreted restrictively. To admit that States may limit, for instance, the right of nationals to leave their country, because of their professional ability, in my understanding, would violate the rule of the Covenant of freedom to leave any country including one's own without any justifiable reason. Admitting that these limitations may be freely imposed by the States without any sort of external control would almost invalidate the right conferred upon the individuals by the Convention. As these limitations are expressed in somewhat broad terms, if they are not interpreted narrowly, these limitations could comprise almost anything and the provisions could be deemed useless.

As regards non-voluntary exit, it is also understood to be within the discretionary power of the State, for its aim is to protect the State and preserve the public order, but it also should be understood as subject to limitations imposed by international law, as every individual is assured the right to be treated accordingly, not only under general human rights instruments, but also because this individual is a national of a certain State.

As regards expulsion, there are some grounds according to which individuals will be liable to this measure, such as entry or permanence against immigration laws; becoming a "public charge", involvement in criminal activities; involvement in undesirable political activities or otherwise offending local public policy. Additionally, there is a wide margin of discretion left to the administrative authorities.

International law subjects the faculty of the States to expel aliens to more limitations than as regards its faculty to deny entry, because in that first case it would involve resident aliens.

Consequently, besides the respect to family life, which, as a rule, should prevent expulsion of an alien who has family possessing the nationality of the State of residence, international law also prohibits collective expulsion of aliens, that is expulsion of a large group of people, in accordance with article 4 of the Fourth Protocol to the European Convention; article 22 (9) of the American Convention; article 12(5) of the African Charter; article 22 (1) of the UN Convention on Migrant Workers.

The definition of collective expulsion has been set in somewhat strict terms by the European Commission in the case *Becker v. Denmark*, as follows: "any measure

<sup>124</sup> *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and To Return to His Country*, U.N. Doc. E/CN.4/Sub.2/220/Rev.1 (1963).

<sup>125</sup> PLENDER, *supra* note 109, at 101.

*the competent authority compelling aliens as a group to leave the country except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group.*<sup>126</sup>

Thus, according to this criterion established by the Commission, if the expulsions have been decided after a "reasonable and objective" case-by-case review, even if it amounts to a considerable number of aliens being expelled, it will not be prohibited under the Convention.

Additionally, international law also imposes limitations concerning the expulsion of stateless persons. As an example, the 1954 Convention of Stateless Persons, article 31, determines that expulsion of stateless persons should only occur in cases of national security. Furthermore, the expellee should be granted procedural rights, in order to review the expulsion and some additional time should be accorded to the alien to find admission to another country.

Likewise, the expulsion of refugees also suffers limitations imposed by international law, as they cannot avail themselves of the protection of their country of nationality. The 1951 Convention relating to the Status of Refugees grants them procedural rights in expulsion proceedings and assures lawfully admitted refugees the right to be expelled only on grounds of national security or public order and, for the sake of respect to human rights, these exceptions should be applied only exceptionally and can never be the rule.

Some legal commentators also argue that expulsion should only take place as a consequence of a serious event, that is, there has to be a strong justification.<sup>127</sup> It cannot take place in an arbitrary manner, for the right of States to expel aliens would become an abuse of right.<sup>128</sup>

This same criterion should be applied to freedom of expression and opinion, granted at international level to everyone. This individual right has to be considered together with the need of the States to protect national security. When a State determines the expulsion of an individual because he or she was or is a member of the Communist Party or an anarchist, the individual right is not taken into account or, if considered, it is not deemed as important as the faculty of the States to control immigration.

It seems quite obvious that if the individual is a risk to the local national security, then the right of the States to control immigration should prevail, but, expelling

<sup>126</sup> Decision of the European Commission of Human Rights as to Admissibility of Application 7011/75, 19 Y.B. EUR. CONV. ON H. R. 416, 454 (1976), as quoted by Jean-Marie Henckaerts, *The Current Status and Content of the Prohibition of Mass Expulsion of Aliens*, 15 HUM. RTS. L. J. 301, 302 (1994).

<sup>127</sup> GOODWIN-GILL, *supra* note 107, at 208. See also the C.P.R. Covenant, article 13. The Fourth Protocol to the European Convention only deals with collective not individual expulsion, although at its inception the Assembly proposed to deal with it and adopt a rule limiting individual expulsion of resident aliens to cases where there were serious reasons of national security. *Id.* at 289. Judge Lauterpacht has affirmed that "*their conspicuous feature is the view that the undoubtedly right of expulsion degenerates into an abuse of rights whenever an alien who has been allowed to take up residence in the country, to establish his business and set up a home, is expelled without just reason, and that such an abuse of rights constitutes a wrong involving a duty of reparation*". Quoted by Garcia Amador, *State Responsibility-Some New Problems*, 94 RECUEIL DES COURS 370, 378 (1958).

<sup>128</sup> GOODWIN-GILL, *supra* note 107, at 209-10 calls it an abuse of rights. It should be observed, however, that the idea itself of the existence under international law of such thing as an abuse of right is highly controversial. See Garcia Amador, *supra* note 127, at 378-80.

an individual based only on the fact that he or she is a theoretical Marxist or a Communist should be considered against international law. In my opinion, it is unreasonable to suppose that just because someone is a member of the Communist party that person could influence local administration and, under normal circumstances, be considered a threat to national security.

In this sense, the US Supreme Court decision on *Kleindiesnt v. Mandel* could be analyzed, although in this case it was not the freedom of expression of the individual alien which was at stake, but the right of US citizens to listen to him. The court elaborated that denying entry to this individual did not violate this right of US nationals, and it noted that they could be in touch with his ideas by several other ways.<sup>129</sup>

One can wonder what the decision of the Supreme Court would have been if the claim was based on the fact that a resident alien was expelled from the US just because of his opinions and thoughts. This expulsion should be understood as discrimination based on political opinions, forbidden in accordance with international law, unless if the State's attitude is reasonably justifiable.

It should be argued that, for the sake of coherence, resident aliens should not be treated arbitrarily and be denied permission to stay without any concrete reason, a situation that may occur on entry. My understanding is that, after the issuance of a visa, the alien should not be denied entry except in the event of a concrete reason, due to reasons of public safety, public order, public health or morals or the rights and freedoms of others. Thus, a resident alien, who received an authorization granted by the authorities of the State to fix residence in the territory of the country, should only suffer expulsion, or revocation of this right of abode, when there are major justifiable reasons, without arbitrariness.<sup>130</sup> Additionally, the individual should be granted some procedural guarantees, such as being informed of the allegations against him or her and should be given the opportunity of defense.<sup>131</sup>

International law also determines that expulsion must be permitted by local legislation, and be effected only in pursuance of a decision reached in accordance with law.<sup>132</sup>

Finally, international law also imposes obligations on the States as regards the manner of the expulsion, such as prohibiting cruelty or short notice.<sup>133</sup>

<sup>129</sup> *Kleindiesnt v. Mandel*, 408 U.S. 753 (1972). In connection with the First Amendment rights of aliens, see also the recent Supreme Court decision *Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct 936 (1999).

<sup>130</sup> PLENDER argues that expulsion of a lawfully resident alien without good cause would amount to a treatment below the minimum standard. See *supra* note 109, at 460-63. US legislation lists the grounds on which expulsion may take place. However, in some situations, such as in Brazil, expulsion may take place in the event of situations defined as within national interest, public order or national security, terms of very difficult definition and which could comprise almost anything. This is the system adopted in France and UK as well, contrarily to what happens in the US where objective criteria are set forth.

<sup>131</sup> PLENDER, *supra* note 109, at 472.

<sup>132</sup> GOODWIN-GILL, *supra* note 107, at 263, quoting Whiteman and Hackworth.

<sup>133</sup> *Dillon's case* in 1928 before the *Mexico-US General Claims Commission*, Commissioner Nielsen observed that the sovereign right of expulsion was not denied by the US, but the complaint was based on the manner of the expulsion. In *Gourrier's case* (1868) an American national expelled from Mexico was awarded an indemnity despite the fact that expulsion was based in proper grounds, because of the unnecessary cruelty of the expulsion. See GOODWIN-GILL, *supra* note 107, at 276-77.

Extradition and Deportation are other measures taken by the State to compel aliens to leave their country of residence. However, their nature is different from expulsion, because in the latter there is, as a rule, the use of discretionary power while, in the case of deportation and extradition, the criteria are more objective. Deportation generally takes place when an individual enters illegally or overstays the visa period;<sup>134</sup> and extradition is the process of surrendering an individual, accused or convicted of an offence (crime) outside the State of residence, to another jurisdiction, competent to try and punish the individual. Additionally, the individual alien after having been deported may return to the country once he or she has legalized his situation, and extradition presupposes the practice of a crime and therefore puts the individual in the condition of a criminal. It should also be observed that extradition might occur also to nationals, in some countries. For this reason human rights instruments do not mention any guarantees with regard to extradition or deportation, only as regards expulsion.<sup>135</sup>

In sum, international law establishes a distinction as regards the resident and non-resident aliens with regard to freedom of movement. As regards entry, in situations concerning non-resident aliens, the freedom of the States to deny entry is almost unlimited, while as regards resident aliens there is a tendency to consider them worthy of more guarantees as imposed by international law. As a consequence, resident aliens should be granted procedural guarantees in expulsion proceedings, expulsion cannot be arbitrary, authorities should take into account the existence of a national family, collective expulsion of aliens is not allowed and aliens can only be expelled for reasons of national security, public order, public health or morals and in accordance with the other rights recognized in human rights instruments.

#### *b) Comparative Law*

Jose Ingles elaborated the principal study on the issue of the right to leave and to return to one's country, in 1963<sup>136</sup>, and at that time he concluded that 1) as regards the right of a national to leave his or her country, this right is granted in 24 countries' constitutional provisions and in 12 by judicial interpretation. 50 countries do not expressly recognize this right in their legislation;

2) as regards the right of a national to return to his or her country: in 24 countries, this right is constitutionally assured, in 12 by judicial interpretation. 49 countries do not expressly recognize this right;

3) as regards the right of a foreigner to leave his or her country of residence: 20 countries recognize this right in constitutional provisions and 4 by judicial interpretation. 56 do not recognize this right expressly.

In updating this study, the Sub-Commission of Human Rights conducted research and found that some countries, because of later accessions to International

<sup>134</sup> See GOODWIN-GILL, *supra* note 107, at 201 and 236. The US adopt a different terminology as deportation deals with the compulsory exit of lawfully admitted aliens.

<sup>135</sup> Although some guarantees, such as the right to life, to physical integrity and to family life are being granted also in the context of extradition. See *supra* Chapter IV.

<sup>136</sup> See Ingles, *supra* note 124.

Conventions, which expressly recognize these rights, grant the right to leave in their legislation.<sup>137</sup>

Although not expressly stated in international law instruments, the States, in order to allow entry into their territory, require that individuals possess a passport and a visa. Thus, sometimes individuals may have their right to enter or leave a specific country denied, because they cannot obtain a passport. In this case, if the national State of the individual cannot present a justifiable reason for this refusal, this country would be violating the international rule which grants individuals the right to leave their country.

In Brazil, since the Imperial Constitution of 1824, nationals are granted the right to leave the country.<sup>138</sup> The Constitution of 1891, in a period of encouragement of immigration, admitted that nationals and aliens could enter the country at any time, independently of a passport.<sup>139</sup> The 1934 Constitution also permitted that aliens enter and leave the country, provided that they complied with the requirements of the law.<sup>140</sup> This Constitution also adopted the quota system, admitting that only 2% of each nationality that was in Brazil for the last fifty years were allowed to enter the country.<sup>141</sup> The 1937 Constitution maintained the same rules.<sup>142</sup> The 1946 Constitution kept the same rules as regards entry and exit of the country and abandoned the quota system.<sup>143</sup> The 1967, 1969 and 1988 Constitutions adopt similar rules as regards entry, exit and movement within the Brazilian territory and applicability of the requirements established by ordinary legislation.<sup>144</sup>

Ordinary legislation that is, infra constitutional legislation, currently in force,<sup>145</sup> establishes that an alien does not need an exit visa to leave the country,<sup>146</sup> and that an alien has to possess a visa and a passport in order to enter the country.<sup>147</sup> It also deter-

<sup>137</sup> Ved Nanda, *The Right to Movement and Travel Abroad: Some Observations on the U.N. Deliberations*, I DENV. J. INT'L L. & POL'Y 119-20 (1971). More recently, ARGELIAN CONST. (1976), article 44, I admits the right to leave the country; CAFE VERDIAN CONST. (1992), article 50.1 grants to nationals the right to leave the country; CONGOLESE CONST. (1992), article 22.3 grants the right to leave; EGYPTIAN CONST. (1971) article 52 recognizes to nationals the right to leave the country; LIBERIAN CONST. (1984), article 13.b grants the right to nationals to enter and leave the country; CONSTITUTION OF BELIZE (1981), article 10 grants to everyone the right to leave the country; CANADIAN CONST.(Constitutional Act, 1982) § 6 grants nationals the right to leave the country; ANTIQUAN CONST (1981) article 8 grants to nationals the right to enter and leave the country; DUTCH CONSTITUTION (1983) article 2 grants everyone the right to leave the country. Additionally, the HUNGARIAN CONST. (1949, consolidated in 1997), at article 58 grants this right to everyone; and POLISH CONST. (1997) article 52.2 also grants this right to everyone.

<sup>138</sup> Article 179, VI.

<sup>139</sup> Article 72, para. 10.

<sup>140</sup> Article 113, para. 14. This Constitution of 1934 suppressed the expression "independently of a passport".

<sup>141</sup> Article 121.

<sup>142</sup> Article 122.

<sup>143</sup> Article 142.

<sup>144</sup> Article 150, para. 26; Article 153, para. 26; Article 5, para. XV respectively of the 1967, 1969 and 1988 Brazilian Constitutions.

<sup>145</sup> Alien's Act, Law 6815 of 1980.

<sup>146</sup> *Id.* Article 50.

<sup>147</sup> *Id.* Articles 2 to 21 and Article 54.

mines the possibility of deportation, if an alien enters the country illegally,<sup>148</sup> of expulsion, if the alien's presence is considered contrary to national interest, public policy and good morals<sup>149</sup> and of extradition, if the alien committed a crime abroad.<sup>150</sup>

The issue on whether a national can be denied the right to return to his country arose in the Philippines when the late President Marcos, his family and supporters who were in Hawaii, requested travel documents to return to their country of origin. The President of the country then, President Aquino, decided against the return of the Marcoses. The Supreme Court found that the President had not acted arbitrarily in determining that the return of the Marcoses posed a threat to national interest and welfare and in prohibiting their return.<sup>151</sup>

The Canadian Bill of Rights and Liberties determines that every national has the right to reside, enter and leave Canada<sup>152</sup>

As regards the freedom of movement within Canadian borders as well as the freedom to fix residence at a certain province-area of the national territory, legislation grants these rights also to resident aliens.<sup>153</sup> Additionally, final determination of the admissibility of an immigrant is made at the port of entry and is decided by an immigration officer.<sup>154</sup>

The Immigration Act of 1976 determines the expulsion of persons who are considered threats to national security or to the democratic process.<sup>155</sup>

As regards aliens who are minors, if the head of the family is expelled then the departure note will include the dependent family member,<sup>156</sup> in order to avoid that the family member be left without means of support.

In the case *Canada (Minister of Employment and Immigration) v. Chiarelli* the Supreme Court of Canada analyzed an allegation that expelling a permanent resident would amount to cruel and unusual punishment and concluded by emphasizing the concept that aliens – even permanent residents – do not have the right to reside in a foreign country, in the following terms:

*The Court must look to the principles and policies underlying immigration law in determining the scope of principles of fundamental justice as they apply here. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. The common law recognizes no*

<sup>148</sup> *Id.* Articles 57-64.

<sup>149</sup> *Id.* Article 65-75.

<sup>150</sup> *Id.* Articles 76-94.

<sup>151</sup> *Marcos et al. v. Manglapus et al.*, 177 SCRA (1989), reproduced in 4 ASIAN YEARBOOK OF INTERNATIONAL LAW 298-299 (1994).

<sup>152</sup> Article 6(1) – "Every citizen of Canada has the right to enter, remain in and leave Canada". Brun and Brunelle, *Les Status respectifs de Citoyen, Resident et Etranger; a la Lumière des Charters des Droits*, 29 LES CAHIERS DE DROIT 692 (1988). Taking into account that nationals can be extradited from Canada, according to the Loi sur L'Extradition of 1970, therefore the right to reside is not so absolute. *Id.*, at 693, as confirmed by the Canadian Supreme Court in the *Case Schmidt* (1987).

<sup>153</sup> Section 4(1) and (2) of the 1976 Immigration Act.

<sup>154</sup> Immigration Act 1976, section 12(1).

<sup>155</sup> Immigration Act 1976, sections 19, 27, 39, 40.

<sup>156</sup> Immigration Act 1976 section 33.

*such right and the Charter recognizes the distinction between citizens and non-citizens. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right “to enter, remain in and leave Canada” in s. 6(1). Parliament therefore has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. It has done so in the Immigration Act.*

*A permanent resident has a right to remain in Canada only if he or she has not been convicted of a more serious offence – one for which a term of imprisonment of five years or more may be imposed. This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country. All persons falling within the class of permanent residents described in s. 27(1)(d)(ii) have deliberately violated an essential condition under which they were permitted to remain in Canada. Fundamental justice is not breached by deportation: it is the only way to give practical effect to the termination of a permanent resident’s right to remain in Canada. Compliance with fundamental justice does not require that other aggravating or mitigating circumstances be considered.*

*The deportation authorized by ss. 27(1)(d)(ii) and 32(2) was not cruel and unusual. The standards of decency are not outraged by the deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a serious criminal offence. Rather, those standards would be outraged if individuals granted conditional entry into Canada were permitted to violate those conditions deliberately and without consequence.*

*A deportation scheme applicable to permanent residents, but not to citizens, does not infringe s. 15 of the Charter. Section 6 of the Charter specifically provides for differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1).*<sup>157</sup>

In Belgium, the fact of “*having made lawful use of the freedom to manifest his opinions or to hold a peaceful meeting or of the freedom of association*” cannot be held against the alien and lead to expulsion.<sup>158</sup>

The Criminal Section of the French *Cour de Cassation* decided that, according to article 2 para. 3 of Fourth Protocol to the European Convention, States have the right to forbid entry into their territory to aliens when this measure aims to prevent criminal acts or when it is in the interest of public health.<sup>159</sup>

The *Conseil d’État* also decided that the right of freedom of movement, guaranteed by article 2 of Fourth Protocol to the European Convention is to be granted whenever national security is not threatened. In the case of an alien condemned to

<sup>157</sup> Decided by the Supreme Court of Canada on March 26, 1992, file n. 21920.

<sup>158</sup> ASYLUM IN EUROPE, European Consultation on Refugees and Exiles 85 (1983).

<sup>159</sup> *Cassation Criminelle*, May 3, 1990, *Miranda Rodriguez*, ANNUIAIRE FRANÇAIS DE DROIT INTERNATIONAL 436( 1991).

16 years of imprisonment for murder, the interests of national security should prevail.<sup>160</sup>

The recent Amendment to the French Aliens' Act of 1998 sets up four reasons to justify expulsion: 1) threat to national security; 2) absolute urgency; 3) necessity regarding the country national security or public safety; 4) absolute urgency and necessity regarding the country national security or public safety. Each of these cases lead to a different proceeding.

After 1981, the legislation defined 8 categories of aliens who should be protected from this measure taking into account the existence of family life, the health of the alien and the extension of his/her stay in France. However, the fact that these categories are protected does not mean that there is an absolute prohibition to expel or deport them. This means that they can only be expelled under the last two cases (3) and (4).<sup>161</sup>

Sweden's Aliens' law of 1980 determines that due to reasons of national security, the government may expel an alien or impose upon him or her some restrictions regarding the place in which he or she fixes residence or changes domicile, and sets an obligation that he or she present themselves to the police.<sup>162</sup> In July 1989, this rule of restricting one's place of residence was revoked.

In Portugal local courts may expel an alien if the alien takes part in political life without having been authorized to do so.<sup>163</sup>

China expelled an American scholar who acted as the adviser to a Chinese dissident who had returned to China from abroad and was arrested. The reason of the expulsion was "actions incompatible with his status as a tourist". A Hong Kong woman journalist was deported from China on November 1, 1992 on charges – to which she confessed – that she had bribed a government employee in exchange for classified documents.<sup>164</sup>

As a rule, the US Supreme Court has declined to interfere with congressional determinations in immigration matters because they are too inextricably related to foreign affairs. That was the case in *Kleindienst v. Mandel*, where the Court held that even the first amendment right to receive information as regards nationals is not so broad as to override the order of the Attorney General not to allow entry to the US to an alien who advocated (or wrote and published... the economic, international, and governmental doctrines of world communism) theories contrary to the US Government.<sup>165</sup>

This understanding had already been expressed by Justice Felix Frankfurter, as follows:

<sup>160</sup> Decision of the *Conseil d'État* of June 19, 1992, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 982 (1993).

<sup>161</sup> RUDOLPH D'HAEM, L'ENTRÉE ET LE SÉJOUR DES ÉTRANGERS EN FRANCE 111-115 (Que sais-je, 1999).

<sup>162</sup> Göran Melander, *The Legal Position of Aliens in Sweden*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1303, 1326 (1987).

<sup>163</sup> Luís Silveira, *Le régime juridique des étrangers en droit portugais*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1257, 1278 (1987).

<sup>164</sup> Decisions of 1992, 3 ASIAN YEARBOOK OF INTERNATIONAL LAW 344-345 (1993).

<sup>165</sup> See *supra* note 129.

*It is not for this Court to reshape a world based on politically sovereign States... Ever since national States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State... This policy has been a political policy, belonging to the political branch of the Government, wholly outside the concern and competence of the Judiciary.*<sup>166</sup>

This understanding was first expressed by the Court in 1892 when in the case *Nishimura Ekiu v. U.S.*, it declared “*an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.*”<sup>167</sup>

However, it should be pointed out that, in this case, only the general power of the State to control immigration was being discussed, and in *Kleindienst v. Mandel* this power was being discussed as opposed to the first amendment rights of university professors who were US nationals. Thus, as a conclusion, it can be said that, according to the U.S. Supreme Court, even when opposed to constitutionally protected rights, the right to control immigration is hierarchically superior.

US legislation used to prohibit entry to aliens who are Marxists or members or former members of the Communist Party. In my understanding, this prohibition violated the prohibition of discrimination for political reasons. Perhaps this prohibition made some sense during the Cold War, when communism was a (real or imaginary) threat. In fact, this rule was originated in 1901, after the assassination of President McKinley and has been kept alive until recently.<sup>168</sup> Nowadays, it makes no sense at all, unless the individual is without doubt a concrete threat to national security.

The US Supreme Court decided that the power to limit entry and remove aliens is “*an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare,*”<sup>169</sup>

Concerning expulsion, US legislation, contrarily to that which happens in France, Germany or UK, bases expulsion on objective criteria which can be determined as a matter of fact, but it leaves some room for the discretion of the Executive, admitting the request of “discretionary relief”. Despite the fact that there is still room for discretion, it should be observed that, in the US, discretion works pro alien, in the sense that after unequivocal evidence that the individual is subject to expulsion, the Executive may admit that the individual stay in the country, while in France and Brazil, for instance, discretion may also be exercised against the alien for there is no

<sup>166</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

<sup>167</sup> *Nishimura Ekiu v. U.S.*, 142 U.S. 651, 659 (1892).

<sup>168</sup> As the president was killed by an anarchist, mistakenly believed to be an immigrant, the Alien's Act in the US was passed to bar aliens from the US who advocated or belonged to organizations which advocated the violent overthrow of the government. In 1904 the US Supreme Court declared that this law was not open to constitutional objection. See GOODWIN-GILL, *supra* note 107, at 126.

<sup>169</sup> *Fong Yue Ting v. U.S.*, 149 U.S. 698,711(1893), *Nishimura Ekiu v. U.S.*, 1442 U.S. 651 (1892); *Kleindienst v. Mandel* 408 U.S. 753 (1972); *Perdroza-Sandoval v. INS*, 498 F. 2d 1254 (1974).

need to verify that the alien has committed a specific act considered against the local public policy<sup>170</sup> because the discretion of the authority is exactly to judge if the attitude of the alien should be considered contrary to local public policy.

Another aspect worth observing is the interesting debate in the US as regards the Constitution's Fourteenth Amendment, which grants US nationality to all those born in the US.<sup>171</sup> This debate has lots of implications as regards the right to enter and to stay in the country.

It all started with an academic proposal of Peter Schuck and Rogers Smith<sup>172</sup> when they suggested a re-interpretation of the Fourteenth Amendment "to make birthright citizenship for the children of illegal and temporary visitor aliens a matter of congressional choice rather than of constitutional prescription."<sup>173</sup>

Later, in 1993 Senator Reid of Nevada proposed a bill, according to which children of illegal aliens would not acquire American nationality, and the California Representative, following a suggestion of Governor Pete Wilson, proposed an Amendment to the US Constitution in the same sense.<sup>174</sup>

These proposals received numerous criticisms, both from the academic and the political community, under several arguments. The argument most employed by the critics of these proposals was that denying acquisition of US nationality to these children would mean to impose on innocent children punishments that should be meant for their parents.<sup>175</sup> This is an interesting argument, but from my viewpoint, not applicable to the situation, because the principle that the punishment should only be suffered by the individual who broke the law, deals only with criminal law and not with other branches of law. It so happens that in many situations, such as in immigration cases, when the father is expelled for illegal behavior, the whole family, if its members do not have the nationality of the country of residence, is obliged to leave as well. This is an example of a situation when the family, even though not 'at fault', suffers the consequences of the illegal attitude of the father. What if the children are studying in the UK and are denied abode because they are obliged to leave the country? Isn't this situation similar to the one mentioned before?

David Martin also raises objections to their proposal, among other reasons, afraid of the problem of the 'second generation' of aliens, so widespread in Europe. He

<sup>170</sup> Thus, I do not see why '*this first impression of control given by the US law is a little deceptive*' according to GOODWIN-GILL, *supra* note 107, at 242. In my view, legislation containing objective criteria, instead of broad terms which could comprise almost anything, is much more favorable to the alien.

<sup>171</sup> U.S.CONST. amend. XIV: "*all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside.*"

<sup>172</sup> PETER SCHUCK AND ROGERS SMITH, *CITIZENSHIP WITHOUT CONSENT* (1985).

<sup>173</sup> *Id.* at 5.

<sup>174</sup> See Michael Gunlicks, *Citizenship as a Weapon in Controlling the Flow of Undocumented Aliens: Evaluation of Proposed Denials of Citizenship to Children of Undocumented Aliens Born in the United States*, 63 THE GEO. WASH. L. REV. 552-53 (1995). The author also informs that Senator Reid proposal was withdrawn for according to the Senator his proposal was "clearly unconstitutional", *id.* at note 13.

<sup>175</sup> This was the argument employed by Senator Reid for the voluntary withdrawal of his proposed Act, as according to his viewpoint, the child is not at fault. See Gunlicks, *supra* note 174, at 553 n. 13.

fears the possibility of creating a class of people, born and raised in the US, but who do not have and probably would not obtain US nationality.<sup>176</sup>

With all due respect, I cannot see how this situation may occur in the US. It should be taken into account that in Europe, such as in France, Belgium, Italy<sup>177</sup> Portugal,<sup>178</sup> Spain, Monaco, Germany, among others, nationality is acquired mostly according to the *ius sanguinis* rule, that is the child acquires the nationality of the mother or father. Consequently, all immigrants (legal and illegal) in these countries cannot have children possessing local nationality, unless they marry a local national, and this situation can go on for generations. The only way it can change is if the alien acquires local nationality, through naturalization, which may turn out to be difficult, due to several requirements established in the domestic legislation of many States.<sup>179</sup>

The idea should not be to change the *ius soli* rule in the US or deny entry to all potential immigrants to the US, nor to change the view America has of itself, of being a 'nation of immigrants'. On the contrary, I believe that this diversity of cultures, religions and languages is part of the American cultural wealth and has made an enormous contribution to the building of the country. But most important of all, another principle basic to the American heritage should be taken into account: the respect for the law. By admitting that one who violates the spirit of law, would be able to acquire American nationality and live in the country, would it not foster the idea to find ways to break the law?

Schuck and Smith's proposal should also be analyzed from the viewpoint of its direct consequences under international law. As only the national has the right to enter and live in the country of his or her nationality, the consequence of the Fourteenth Amendment, some years from now, will be that all these children born in the US will have the right to enter and live in the country, and if the legislation does not change, will have the right to bring his or her alien family along. Thus, the consequence of this rule will affect the right to enter and live in the US, as well as the right to family life, resulting in problems of enormous practical importance.

Thus, this situation should be analyzed under the theory of acts perpetrated under fraud, because these situations unequivocally should be understood as such.

As originated in the civil law system, the statutory law is the pattern to be followed by the people and the Judiciary will solve all conflicts based on it. However, as law is the result of human effort, it does not deal with all possible situations, for

<sup>176</sup> David Martin, *Membership and Consent: Abstract or Organic* (Book Review), 11 YALE J. INT'L L. 278, 282-84 (1985).

<sup>177</sup> Bruno Nascimbene, *Le régime juridique des étrangers en droit italien*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 659, 665 (1987). See also the new Italian legislation on nationality, adopted on February 5, 1992, which reproduces the same basic criterion. See ANTONIETTA DI BLASE & ANDREA GIARDINA, *DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE* 14-19 (1994).

<sup>178</sup> Rui Moura Ramos, *O Novo Direito Português da Nacionalidade*, ESTUDOS EM HOMENAGEM AO PROFESSOR FERRER CORREIA 563 (1986).

<sup>179</sup> The following periods of residence are or were established: Denmark- at least 7 years, France- at least 5 years; the Netherlands- 5 years, Portugal- 6 years; Sweden- 5 years; Turkey- 5 years; UK – 5 years.

the legislator has to elaborate these rules in abstract terms. For this reason the role of the interpreter makes him or her go beyond the letter of the law, looking for its intent and goal at the same time.<sup>180</sup>

This idea of fraud is originated in Roman law according to the *Lex Licinia de Modus Agris et Pecoris* which was in force at the time, and determined that no Roman citizen was allowed to own more than 500 acres of land, aiming at avoiding “*latifundios*”. However, Licinio, prætor who was one of the authors of the legislation emancipated his son for him to acquire the status of citizen and be able to acquire land as well. This was an example of fraud, because his emancipation aimed only at the acquisition of more land than legally was permitted.<sup>181</sup>

Thus, legal commentators make a distinction between acts perpetrated in violation of the letter of the law, clearly against the law – *contra legem*, and acts which violate the law, albeit indirectly, that is, the individual uses means permitted by the law to reach a result prohibited by the law. These acts, despite their apparent formal legality should be considered *in fraudem legis* and therefore cannot produce a legal result.<sup>182</sup>

For the characterization of acts *in fraudem legis* there must be a contradiction in the system between rules applicable to the same factual situation. Firstly, there must be a prohibitive rule, which prohibits the consequence of the act and secondly, a permissive rule, which would lead to the adaptation of the act to the legislation, making the consequence originally illegal possible.

Thus, there is little difference between the acts *in fraudem legis* and acts *contra legem*. The real distinction rests on the fact that the violation of the law happens indirectly, but still there is violation. Additionally, it should be observed that the problem of the fraud is solved by interpreting the rule that was violated. Consequently it is all a matter of extensive interpretation.<sup>183</sup>

Transposing this theory to the situation under analysis, I would say that presently, an illegal alien cannot reside in the US and bring in his or her family, because of

<sup>180</sup> The letter of the law- *verbum legis*, and the intent of the law- *voluntas legis*. See FERRARA, INTERPRETAÇÃO E APLICAÇÃO DAS LEIS 141 (3rd ed. 1978). Along the same lines ANTONIO BUTERA, DELLA SIMULAZIONE NEI NEGOZI GIURIDICI E DEGLI ATTI IN FRAUDEM LEGIS 196 (1936), “Tutto il problema della interpretazione consiste nel fissare i criteri e i limiti entro i quali la giurisprudenza è autorizzata a ricercare, attraverso le espressioni del testo legislativo, il suo pensiero, ossia il contenuto effettivo della legge. Or la teoria degli atti *in fraudem legis* non è che un'applicazione normale del seguente principio: nel dissidio tra i *verba legis* e la *mens legis* deve prevalere que'ultima”, both quoted by REGIS FICHTNER, A FRAUDE À LEI (1994).

<sup>181</sup> ROTONDI, ATTI IN FRODE ALLA LEGGE NELLA DOTTRINA ROMANA N2 (1911), as quoted by ENCICLOPEDIA SARAIVA DE DIREITO, vol 38, under the title Fraude à Lei.

<sup>182</sup> See PANDECTES BELGES (compilation by Edmond Picard; N. d'Hoffschmidt and Jules de le Court, 1890) where the fraud is mentioned to invalidate an act in several situations, such as donating what cannot be sold (*donation deguisée*), marrying abroad to evade local prohibitions (*empêchement au mariage*), celebrating a contract abroad to evade local laws applicable to the formalities of the contract (*forme des actes*); or donating to evade local tax laws applicable in case of regular purchase. See also CARL FRIEDRICH VON SAVIGNY, SISTEMA DEL DERECHO ROMANO ACTUAL 329 (1878 ).

<sup>183</sup> NOVISSIMO DIGESTO ITALIANO, vol VI (Ed. Antonio Azarra and Ernesto Eula) under the title Frode alla Legge.

immigration laws, but can legally have children in the US and these will have American nationality, according to the *ius soli* rule. Additionally, also in accordance with the law, these children when they grow older, will be able to sponsor their whole family coming to the US. Therefore, the final result, that is allowing the child, when older, to live in the US and bring the whole alien family to the US, would be in violation to the spirit of the law, of its intent, in spite of the legal means used to attain it.

For these reasons, I would not hesitate to consider these acquisitions of American nationality *in fraudem legis* and therefore unable to produce any legal effect. Accordingly, if this theory is taken into account, the US Constitution does not need to be changed for, as explained, the violation is to the spirit of the law and not to its letter.

In the UK, before the Immigration Act of 1971 there was a distinction between aliens and Commonwealth citizens, which after the Act, have been somewhat assimilated as regards expulsion, and to a certain extent as regards entry as well.

This Act, together with British Nationality Act of 1981, which entered into force in 1983, created a wider category of British nationality, which comprises British citizenship, British Dependent Territories citizenship and British Overseas citizenship. Those within the category of British citizenship reproduces the classification of patriality of the 1971 Act which grants them the right to come and reside freely in the UK, while those in the other categories are fully subjected to UK immigration laws and therefore do not have the right of abode in the country.<sup>184</sup>

Thus, introduction of a visa requirement for visitors to the UK from selected Commonwealth or former Commonwealth countries – Bangladesh, India, Ghana, Nigeria, Pakistan, and Sri Lanka – is deemed to be racist, aiming at avoiding unlimited entry of non-whites.<sup>185</sup>

After the Immigration Act of 1971, a general power to deport Commonwealth nationals independently of their time of residence in the country, for reasons of public good was introduced (it is applied to all non-patrials).<sup>186</sup> The grounds for expulsion can be summarized as follows: a) entry in breach of law; b) breach of the conditions attached to permission to land; c) involvement in criminal activities; d) offenses against “ordre public”, including political matters and matters affecting national security.<sup>187</sup>

In Israel, as regards the right to leave a country, the Supreme Court confirmed, in the case *Howard v. Howard* in 1963, a court order prohibiting an Australian national to leave the country on account of outstanding maintenance payments to his 18 year old daughter, which cannot be considered as illegal limitation on the right to leave the country.<sup>188</sup>

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<sup>184</sup> For further details see MACDONALD, *supra* note 118.

<sup>185</sup> *Id.* at preface and 11. See also the Immigration Act of 1971 with the changes introduced in 1994, in the appendix of the Act, where all these countries are listed as requiring visa to enter the UK.

<sup>186</sup> GOODWIN-GILL, *supra* note 107, at 246.

<sup>187</sup> *Id.* at 251.

<sup>188</sup> Paul Weis, *The Middle East, THE RIGHT TO LEAVE AND RETURN* 299 (Upsalla Colloquium).

Some countries when issuing residence permits may establish that aliens should be restricted to a particular region of the country. This happens or have happened in Belgium<sup>189</sup>; Brazil<sup>190</sup> France<sup>191</sup>; Ghana<sup>192</sup> and India.<sup>193</sup>

As regards the freedom to leave any country the great majority of countries do not require exit visas. However there are requirements which have to be met, such as non-existence of criminal condemnation in the country and non-existence of debts. Such is or was the case in Australia<sup>194</sup>; Belgium<sup>195</sup>; Brazil<sup>196</sup>; Ghana<sup>197</sup>; the Netherlands<sup>198</sup>; Poland<sup>199</sup> and the US.<sup>200</sup> Adopting stricter rules, France<sup>201</sup> used to require exit visas and India, proof that the last rent was paid.<sup>202</sup>

In brief, freedom of movement is in general guaranteed only to nationals. Such is the case in Germany<sup>203</sup>, Algeria,<sup>204</sup> Cape Verde<sup>205</sup>, Congo<sup>206</sup>, Costa Rica<sup>207</sup>, Spain<sup>208</sup>, India<sup>209</sup>, Israel<sup>210</sup>, Italy<sup>211</sup>, Nicaragua<sup>212</sup>, Sweden<sup>213</sup>, Taiwan<sup>214</sup>. Other countries expressly grant this right to everyone— including legal residents—, with some limits to

<sup>189</sup> Michel Melchior, Sabine Lecrenier, *Le Régime Juridique des Étrangers en Droit Belge*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 91, 119 (1987).

<sup>190</sup> Alien's Act, Law 6815, 1980, Article 18

<sup>191</sup> J. Y. Vincent, *Le régime juridique des étrangers en droit français*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 433, 459 (1987).

<sup>192</sup> G. K. Oforso-Amaah, *The Legal Position of Aliens in National and International Law in Ghana*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 501, 509 (1987).

<sup>193</sup> The alien is prohibited to visit some sacred places for religious reasons. Singh, *supra* note 42, at 583.

<sup>194</sup> J. A. Shearer, *The Legal Position of Aliens in National and International Law in Australia*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 41, 63 (1987).

<sup>195</sup> Melchior, Lecrenier, *supra* note 189, at 141.

<sup>196</sup> Alien's Act, Law 6815, 1980, article 50.

<sup>197</sup> Oforso-Amaah, *supra* note 192, at 517.

<sup>198</sup> See A. H. J. Swart, *The Legal Position of Aliens in Dutch Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT, 869, 893 (1987).

<sup>199</sup> Zdzisla Kedzia, *Die Rechtsstellung von Ausländern nach polnischem Recht*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1195, 1228 (1987).

<sup>200</sup> T. Alexander Aleinikoff, *United States Immigration, Nationality and Refugee Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1545, 1611 (1987).

<sup>201</sup> Vincent, *supra* note 191, at 470

<sup>202</sup> Singh, *supra* note 42, at 593.

<sup>203</sup> GERMAN CONST. (1949)- article 11.1.

<sup>204</sup> ALGERIAN CONST. (1976)- article 44.

<sup>205</sup> CAPE VERDIAN CONST. (1992)- article 50.1.

<sup>206</sup> CONGOLESE CONST. (1992)- article 22.

<sup>207</sup> COSTA RICAN CONST. (1949)- article 22.

<sup>208</sup> SPANISH CONST. (1978)- article 19.

<sup>209</sup> INDIAN CONST. (1950)- article 19.1.d.

<sup>210</sup> ISRAELI CONST. (Basic law 13, 1992)- section 6.b grants the right to enter only to nationals, whereas the right to leave is granted to anyone in section 6.a.

<sup>211</sup> ITALIAN CONST. (1948)- article 16.1

<sup>212</sup> NICARAGUAN CONST. (1987)- article 31.

<sup>213</sup> SWEDISH CONST. (1975)- chapter 2, article 8.

<sup>214</sup> TAIWANESE CONST. (1978)- article 10.

be established by infra-constitutional legislation. This is the case with Antigua and Barbuda<sup>215</sup>, Argentina<sup>216</sup>, Belize<sup>217</sup>, Brazil<sup>218</sup>, Chile<sup>219</sup>, Honduras<sup>220</sup>, Hungary<sup>221</sup>, Liberia<sup>222</sup>, Mexico<sup>223</sup>, Paraguay<sup>224</sup>, Peru<sup>225</sup>, Poland<sup>226</sup>, Thailand<sup>227</sup>, Turkey<sup>228</sup>.

In sum, it is a widespread rule of international law, adopted by the great majority of countries, that only nationals have the right to enter the country of their nationality, and that, as a consequence, aliens do not have the right to enter a country of which they are not nationals. It is also widely accepted that States may establish conditions of admission to aliens, and as a rule States require that they possess a document of identity, generally a passport, and often a visa as well. Consequently, individuals who want to travel abroad, either for the purpose of tourism or emigration need a visa issued by the State of destination.

In conclusion, it should be said that there is a difference between theory and practice in most of these countries. Despite the fact that legislation allows for excluding aliens from exercising political rights, either in general or specifically or expelling aliens because of exercise of political activities, these possibilities are not often used. The practice seems to be much more liberal than the theory.<sup>229</sup>

Conversely, it should be observed that other countries allow in their legislation political activities to aliens, but do not impose limitations as to the grounds of expulsion. Thus, if on the one hand political activities are allowed, these States can at any time expel those who are practicing activities deemed undesirable, without the need of justifying it.<sup>230</sup>

#### *IV. Right to Assembly*

##### *a) International Law*

As regards the right to assembly the American Declaration gives the following direction:

<sup>215</sup> ANTIGUAN CONST. (1981)- article 8.1.

<sup>216</sup> ARGENTINEAN CONST. (1853)- section 14.

<sup>217</sup> BELIZEAN CONST. (1981)- article 10.1.

<sup>218</sup> BRAZILIAN CONST. (1988)- article 5, XV.

<sup>219</sup> CHILEAN CONST. (1980)- article 19.7.a.

<sup>220</sup> HONDURAN CONST. (1982)- article 81.

<sup>221</sup> HUNGARIAN CONST. (1949)- article 58.1.

<sup>222</sup> LIBERIAN CONST. (1984)- article 13.a.

<sup>223</sup> MEXICAN CONST. (1917)- article 11.

<sup>224</sup> PARAGUAYAN CONST. (1967)- article 56.

<sup>225</sup> PERUVIAN CONST. (1993)- article 2.11.

<sup>226</sup> POLISH CONST. (1997)- article 52.1.

<sup>227</sup> THAI CONST. (1997)- section 36.

<sup>228</sup> TURKISH CONST. (1982)- article 23.

<sup>229</sup> Remarks made by Frowein, *Concluding Report to the Heidelberg Colloquium on the Legal Position of Aliens in National and International Law. DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 2081, 2087 (1987).

<sup>230</sup> *Id.* at 2088

*Article XXI- Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.*

The Universal Declaration determines:

*Article 20(1) Everyone has the right to freedom of peaceful assembly and association.*

The European Convention also guarantees this right to everyone, but it expressly admits limitations on the exercise of this right by the State, on the following terms:

*Article 11- (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

The C.P.R. Covenant also guarantees this right to everyone, but with the limitations deemed necessary. It states:

*Article 21- The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

The American Convention, with approximately the same wording, adopts the same understanding, adding to the article that only the right of peaceful assembly "without arms" will be protected.<sup>231</sup>

The African Charter ordains:

*Article 11- Every individual shall have the right to assemble freely with others. The exercise of this shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.*

Therefore, as regards the right to assembly, these conventions grant this right to everyone, including aliens. The American Declaration and the Universal Declaration

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<sup>231</sup> American Convention, article 15.

grant this right in broad terms. The other conventions, although guaranteeing this right, expressly admit the imposition of limitations on this right by the States.

The European Convention, at article 16, already mentioned, admits that countries may impose limitations on the political activities of aliens and it expressly includes the right to assembly.<sup>232</sup>

Another aspect worth considering is that these conventions generally do not distinguish between meetings for cultural, social or political purposes, with the exception of the European Convention. This fact may lead to the conclusion that the right to assembly is granted to everyone, including aliens, and aliens may participate in any meeting, irrespective of its objective.

Consequently, as a matter of law, international law grants this right to everyone, and it can only be denied through the application of escape clauses, by virtue of national security, public policy or other exception clauses. The State, when denying this right to an alien, has to justify it or else would be violating international law rules.

### *b) Comparative Law*

Some countries in their legislation grant or have granted this right only to nationals while others grant it to everyone. In the first category there are the examples of Belgium<sup>233</sup>, Cape Verde<sup>234</sup>, Egypt<sup>235</sup>, Italy<sup>236</sup>, Luxemburg<sup>237</sup>, Taiwan<sup>238</sup>, Denmark<sup>239</sup>, Greece<sup>240</sup>, India<sup>241</sup>, Jordan<sup>242</sup>, Monaco<sup>243</sup> and Portugal<sup>244</sup>. Belize<sup>245</sup>, Chile<sup>246</sup>, Costa Rica<sup>247</sup>, Spain<sup>248</sup>, The Netherlands<sup>249</sup>, Honduras<sup>250</sup>, Liberia<sup>251</sup>,

<sup>232</sup> Article 16—"Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

<sup>233</sup> BELGIAN CONST. (1970), Article 26 (1).

<sup>234</sup> CAPE VERDIAN CONST. (1992), article 52.1.

<sup>235</sup> EGYPTIAN CONST. (1971), article 54.

<sup>236</sup> ITALIAN CONST. (1948), article 17.

<sup>237</sup> LUXEMBURG CONST. (1868), article 25.

<sup>238</sup> TAIWANESE CONST. (1978), article 14.

<sup>239</sup> DANISH CONST (1953), section 79.

<sup>240</sup> GREEK CONST. (1975), article 11(1).

<sup>241</sup> Singh, *supra* note 42, at 598. INDIAN CONST. (1949), article 19.

<sup>242</sup> JORDANIAN CONST. (1952), article 16(I).

<sup>243</sup> MONEGASQUE CONST. (1962), article 27.

<sup>244</sup> PORTUGUESE CONST. (1976), article 45(1).

<sup>245</sup> BELIZEAN CONST. (1981), article 13.1.

<sup>246</sup> CHILEAN CONST. (1980), article 19.13.

<sup>247</sup> COSTA RICAN CONST. (1949), article 26.

<sup>248</sup> SPANISH CONST. (1978), article 21.

<sup>249</sup> DUTCH CONST. (1983), article 9.

<sup>250</sup> HONDURAN CONST. (1982), article 79.

<sup>251</sup> LIBERIAN CONST. (1984), article 17.

Peru<sup>252</sup>, Poland<sup>253</sup>, Sweden<sup>254</sup>, Thailand<sup>255</sup>, Canada<sup>256</sup>, Mexico<sup>257</sup>, Brazil<sup>258</sup> and Turkey<sup>259</sup> are examples of the second category. Hence, in actual State practice the right to assembly is significantly constrained for aliens.

#### *V. Right to Associate*

##### *a) International Law*

As a rule, this right is classified as a social right, because it is related to membership in trade unions. Thus, this right may comprise: 1) the freedom to form and join an association (when the creation of trade unions and political parties do not depend on governmental authorization; 2) the right to remain within and to be active in an organization; 3) the freedom not to join or to resign from an organization; 4) the freedom to strike, with its corollary of freedom not to participate in strikes.<sup>260</sup>

When the International Labor Organization was created in 1919, the right to associate was considered one of the main tools to eradicate injustice and promote equality. It was defined as the right of association for all lawful purposes by the employed as well as by the employers. Therefore, at its inception, the principle was considered as related to the rights of employees and employers.<sup>261</sup>

The American Declaration adopts a broader definition of this term in the following terms:

*Article XXII- Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.*

Both the right of reunion and the right of association are treated by this Declaration in generic terms, therefore granting the right for whatever purpose.

The Universal Declaration in a more succinct text assures:

*Article 20(1)- Everyone has the right to freedom of peaceful assembly and association.*

*(2) No one may be compelled to belong to an association.*

<sup>252</sup> PERUVIAN CONST. (1993), article 2.12.

<sup>253</sup> POLISH CONST. (1997), article 57.

<sup>254</sup> SWEDISH CONST. (1975), chapter 2, article 20.2.1.

<sup>255</sup> THAI CONST. (1997), article 44.

<sup>256</sup> CANADIAN CONST. (Constitution Act, 1982), article 2.

<sup>257</sup> MEXICAN CONST. (1917), article 9.

<sup>258</sup> BRAZILIAN CONST. (1988), article 5, XVI.

<sup>259</sup> TURKISH CONST. (1982), article 34.

<sup>260</sup> DIE KOALITIONSFREIHEIT DES ARBEITSNEHMERS XXVIII (1980).

<sup>261</sup> In French the translation is 'liberté syndicale'. So, it is related to relations between employees and employers.

*Article 23(4)- Everyone has the right to form and join trade unions for the protection of his interests.*

It is interesting to observe that the Universal Declaration does not mention that the right to associate for whatever purposes will be equally protected, but guarantees this right broadly, without any specific mention of possible political goals. Article 23 deals with the right to associate in a narrower context, because it expressly mentions that the individual is free to join trade unions for the protection of his interests. Therefore, this right is protected both in a general context and with the purpose of defending the individual's interests.

This right is better developed in the European Convention, which settles:

*Article 11- (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

Hence, in the European context, this right is also broadly guaranteed but specific mention is made concerning the right to associate in a social context, i.e., to join trade unions.

The International Covenant on Civil and Political Rights establishes:

*Article 22(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

*(2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

*(3) Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

The C.P.R. Covenant adopts the same criterion as the European Convention focusing more specifically on the social aspect of the right, but guaranteeing the right to associate in general terms.

The International Covenant on Economic, Social and Cultural Rights also grants to everyone the right to associate, but exclusively for the purposes of forming and joining a trade union.<sup>262</sup>

The American Convention determines:

*Article 16- Freedom of Association*

*1- Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.*

*2- The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.*

*3- The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.*

The American Convention reproduces the criterion adopted in the American Declaration, mentioning expressly that the right to associate is protected for whatever purposes.

The African Charter guarantees:

*Article 10- Every individual shall have the right to free association provided that he abides by the law.*

The ILO Convention No. 87 lays down that this right shall be guaranteed to all workers and employers "without distinction whatsoever". This convention extends this right also to aliens, but because of its limited scope, applying only in the labor area, it cannot be regarded as freedom to associate in general.

Because most of these conventions do not limit the scope of the right of association to the right to join trade unions, the right to associate for political purposes is also protected. The American Convention and the Declaration clearly admits the right to associate for political purposes. The Universal Declaration grants it broadly. Both the International Covenant and the European Convention grant this right broadly and emphasize in the letter of the article expressly the protection of this right in a social context. Thus, this aspect is included in the right to form association, though it is not its only meaning.

In brief, we may conclude that the right to associate is protected at international level, both in the context of a social right and more broadly. The alien may be denied this right, though, due to the application of the exceptions admitted in the conventions, such as public safety, public order, public health or morals or the rights and freedoms of others. Thus, as a rule this right should be granted to everyone, only as an exception, if justified, can it be denied to aliens.

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<sup>262</sup> Article 8 (1) (a).

*b) Comparative Law*

In France, recent legislation has extended the right of association to aliens.<sup>263</sup>

Some countries expressly admit or have admitted that aliens may participate in trade unions, such as Australia<sup>264</sup>, Denmark<sup>265</sup>, France<sup>266</sup>, Ghana<sup>267</sup>, Nigeria<sup>268</sup>, Norway<sup>269</sup>.

Several States prohibit or have prohibited any activities of aliens within political parties such as Chile<sup>270</sup>, Japan<sup>271</sup>, Nigeria<sup>272</sup>, Portugal<sup>273</sup>, Turkey<sup>274</sup>, India<sup>275</sup>, Jordan<sup>276</sup>, Mexico<sup>277</sup>, Italy<sup>278</sup> and Paraguay<sup>279</sup> while others impose or have imposed some restrictions, such as Canada<sup>280</sup>, Germany<sup>281</sup>, US<sup>282</sup>. Other countries grant or have granted this right in their legislation only to nationals, even in general terms, such as Congo<sup>283</sup>, Denmark<sup>284</sup>, Greece<sup>285</sup>, India<sup>286</sup>, Italy<sup>287</sup>, Luxembourg<sup>288</sup>, Nicaragua<sup>289</sup>,

<sup>263</sup> Law No 81-09 of October 9 1981, ASYLUM IN EUROPE, *supra* note 58, at 136. Legislation dated July 1975, has permitted aliens access to syndicates, both as delegates and to management functions if they live in France for more than 5 years. I HENRI BATTIFOL & PAUL LAGARDE, DROIT INTERNATIONAL PRIVE 207 (7th ed. 1981).

<sup>264</sup> Shearer, *supra* note 194, at 65.

<sup>265</sup> L. Langkjær & D. Stummel, *The Legal Position of Aliens in Denmark*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 237, 257(1987).

<sup>266</sup> Vincent, *supra* note 191, at 478.

<sup>267</sup> Oforos-Amaah, *supra* note 192, at 521.

<sup>268</sup> B. O. Iluyomade, A. Popoola, *The Legal Position of Aliens in Nigerian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 919, 959 (1987).

<sup>269</sup> Atle Grahl-Madsen, *The Legal Position of Aliens in Norway*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 983, 1002 (1987).

<sup>270</sup> Roberto Mayorga L., *Die Rechtsstellung von Ausländern nach Staatlichen Recht und Völkerrecht in Chile*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 187, 228 (1987).

<sup>271</sup> Shigeki Miyazaki, *Die Rechtsstellung von Ausländern nach Staatlichen Recht und Völkerrecht in Japan*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 727, 741 (1987).

<sup>272</sup> Iluyomade, Popoola, *supra* note 268, at 958.

<sup>273</sup> Silveira, *supra* note 163, at 1284.

<sup>274</sup> Özsunay, *supra* note 38, at 1508.

<sup>275</sup> Singh, *supra* note 42, at 599.

<sup>276</sup> JORDANIAN CONST. (1952), Article 16 (II).

<sup>277</sup> MEXICAN CONST. (1917), article 35(III).

<sup>278</sup> ITALIAN CONST. (1948), article 49.

<sup>279</sup> PARAGUAYAN CONST. (1967), article 117.

<sup>280</sup> A. L. C. De Mestral, *Position of Aliens in Canadian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 765, 816 (1987).

<sup>281</sup> Kay Hailbronner, *Die Rechtsstellung von Ausländern in der Bundesrepublik Deutschland*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT, 323, 389 (1987).

<sup>282</sup> Aleinikoff, *supra* note 200, at 1616.

<sup>283</sup> CONGOLESE CONST. (1992), article 25.

<sup>284</sup> DANISH CONST. (1953), section 78.

<sup>285</sup> GREEK CONST. (1975), article 12.

<sup>286</sup> INDIAN CONST. (1950), article 19.1.c.

<sup>287</sup> ITALIAN CONST. (1948), article 18.

<sup>288</sup> LUXEMBURG CONST. (1917), article 26.

<sup>289</sup> NICARAGUAN CONST. (1987), article 49.

Switzerland<sup>290</sup>, Taiwan<sup>291</sup>, Monaco<sup>292</sup>, Portugal<sup>293</sup>, Belgium<sup>294</sup> and Germany<sup>295</sup>. Some other countries grant the right to associate in broad terms to both nationals and aliens. This is the case with Antigua and Barbuda<sup>296</sup>, Belize<sup>297</sup>, Brazil<sup>298</sup>, Cape Verde<sup>299</sup>, Chile<sup>300</sup>, Costa Rica<sup>301</sup>, Cuba<sup>302</sup>, Spain<sup>303</sup>, The Netherlands<sup>304</sup>, Honduras<sup>305</sup>, Hungary<sup>306</sup>, Mexico<sup>307</sup>, Peru<sup>308</sup>, Poland<sup>309</sup>, Sweden<sup>310</sup>, Thailand<sup>311</sup> and Turkey.<sup>312</sup>

Therefore, the right to form associations, which is widely guaranteed under international law, is not granted to aliens in many countries. However, this fact alone cannot be understood as contrary to international law, because in the great majority of cases the prohibition is related to participation in political parties or associations with political purposes. Therefore, in these cases the countries would be denying a right established in international law by applying escape clauses. Therefore, these denials should be analyzed on a case-by-case basis in order to see if the exceptions can really be applied to these situations. But the mere prohibition to associate for purposes other than political can hardly be defined as contrary to public policy and without any doubt it is entirely contrary to international law rules. Hence, an alien cannot be denied the right to associate for social, cultural or economic purposes.

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<sup>290</sup> SWISS CONST. (1874), article 56.

<sup>291</sup> TAIWANESE CONST. (1978), article 14.

<sup>292</sup> MONEGASQUE CONST. (1962), article 29.

<sup>293</sup> PORTUGUESE CONST. (1976), article 46 (1).

<sup>294</sup> BELGIAN CONST. (1970), article 27.

<sup>295</sup> GERMAN CONST. (1949), article 9.

<sup>296</sup> ANTIGUAN CONST. (1981), article 13.

<sup>297</sup> BELIZEAN CONST. (1981), article 13.1.

<sup>298</sup> BRAZILIAN CONST. (1988), article 5, XVII.

<sup>299</sup> CAPE VERDIAN CONST. (1992), article 51.1.

<sup>300</sup> CHILEAN CONST. (1980), article 19.15.

<sup>301</sup> COSTA RICAN CONST. (1949), article 26.

<sup>302</sup> CUBAN CONST. (1976), article 54.

<sup>303</sup> SPANISH CONST. (1978), article 22.1.

<sup>304</sup> DUTCH CONST. (1983), article 8.

<sup>305</sup> HONDURAN CONST. (1982), article 78.

<sup>306</sup> HUNGARIAN CONST. (1949), article 63.

<sup>307</sup> MEXICAN CONST. (1917), article 9.

<sup>308</sup> PERUVIAN CONST. (1993), article 2.13.

<sup>309</sup> POLISH CONST. (1997), article 58.1.

<sup>310</sup> SWEDISH CONST. (1975), chapter 2, article 20.2.1.

<sup>311</sup> THAI CONST. (1997), section 45.

<sup>312</sup> TURKISH CONST. (1982), article 33.

## VI. Right to Strike

### a) International Law

The ILO Conventions do not refer specifically to the right to strike. However, this term has been understood as a corollary of the right of association.<sup>313</sup>

The freedom to strike is defined as the voluntary refusal to work, limited to a certain duration, with which employees, in spite of previous contractually correct behaviour on the part of the employer, seek to achieve, in a legally admissible manner, certain aims, conceived freely by themselves or determined by the legal order, during the period of validity of a labor contract.<sup>314</sup>

The UN Covenant on Economic, Social and Cultural Rights, in article 8, para. 1 (d), determines the obligation of the States to ensure "*the right to strike, provided that it is exercised in conformity with the laws of the particular country.*" This article contains other rules regarding the freedom to organize – formation of trade unions and a general provision mentioning the ILO.<sup>315</sup>

The right to strike is also guaranteed at European level, according to the European Social Charter<sup>316</sup>, but its scope is clearly limited to "*the right of workers and employers to collective action in cases of conflict of interest*".

Therefore, in the international sphere, the right to strike, when protected, is understood as a consequence of the right to organize, only for labor questions. Therefore, it is exercised in order to obtain improvements in the work conditions, and in this case the right to strike should be guaranteed to every worker, independent of their national status.

The strike action can also be exercised in solidarity to another class of worker. In this case the right to strike would not be protected as such, for it would mean support to another category of worker, regardless of obtaining direct benefits to the category which is on strike. I believe that this situation should be protected by the guarantee of freedom of expression.

Another type of strike would be the strike for political goals, when the objectives of the strike are social or economic changes.

Thus, it can be said that when the right to strike is exercised for individual benefits, for improvement of work conditions, that is, in context of a social right, it is protected under international law, aliens and nationals alike should be able to strike, subject only to the general exceptions of public policy and national interest. It should be

<sup>313</sup> The right to strike is one of the essential means through which workers and their organizations may promote and defend their occupational interests, and which deals with the conditions for the exercise of this right according to the general principles of freedom of association. Geraldo von Potobsky, *The Freedom of the Worker to Organize According to the Principles and Standards of the International Labour Organization*, DIE KOALITIONSFREIHEIT DES ARBEITSNEHMERS 1119-152 (1980).

<sup>314</sup> Rudolf Dolzer, *The Freedom to Strike*, *id.*

<sup>315</sup> Article 8, (3): "Nothing in this article shall authorize States Parties to the International Labor Organization of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention."

<sup>316</sup> Article 6, para. 4.

remarked though that this international law rule is not of widespread acceptance as it is based on few international law instruments.

The strike in solidarity to another class of workers could be classified as within the freedom of expression, though nevertheless subject to the general limitations established by the conventions.

Finally, as regards the strike for political goals, aiming at social and economic changes, as it eventually could be classified as a political activity, aliens could be expelled or even punished because of exercising it, as aliens are not allowed to perform political activities. Additionally, expulsion can also take place if the States prove justifiably that the alien's activity is contrary to public policy and national interest.

#### *b) Comparative Law*

As the right to strike under international law has always been linked to the idea of improvement of labor conditions, any strike which does not have this purpose cannot be qualified as a strike, and protected as such. In this sense many countries allow for the exercise of the right to strike, but in the context of a social right. This is the case in Belgium<sup>317</sup>, Cape Verde<sup>318</sup>, Chile<sup>319</sup>, Denmark<sup>320</sup>, Spain<sup>321</sup>, Greece<sup>322</sup>, Hungary<sup>323</sup>, Italy<sup>324</sup>, Nicaragua<sup>325</sup>, Paraguay<sup>326</sup>, Peru<sup>327</sup>, Poland<sup>328</sup>, Portugal<sup>329</sup>, Sweden<sup>330</sup> and Turkey<sup>331</sup>.

French<sup>332</sup>, Ghanaian<sup>333</sup>, Nigerian<sup>334</sup> and Brazilian<sup>335</sup> legislation admit or have admitted the expulsion of an alien due to participation in strikes.

In brief, in accordance with international law patterns, the right to strike, especially when exercised for individual benefits, can be exercised by anyone and therefore without a justifiable reason, aliens cannot be denied the exercise of this right. As many countries grant resident aliens this right, their legislation is in accordance with international law patterns.

<sup>317</sup> Melchior, Lecrenier, *supra* note 189, at 150.

<sup>318</sup> CAPE VERDIAN CONST. (1992), article 64.

<sup>319</sup> CHILEAN CONST. (1853), article 19.16.

<sup>320</sup> Langkjær & Stummel, *supra* note 265 at 257.

<sup>321</sup> SPANISH CONST. (1978), article 28.2.

<sup>322</sup> GREEK CONST. (1975), article 23.

<sup>323</sup> HUNGARIAN CONST. (1949), article 70c.2.

<sup>324</sup> ITALIAN CONST. (1948), article 40.

<sup>325</sup> NICARAGUAN CONST. (1987), article 83.

<sup>326</sup> PARAGUAYAN CONST. (1967), article 110.

<sup>327</sup> PERUVIAN CONST. (1993), article 28.

<sup>328</sup> POLISH CONST. (1997), article 59.3.

<sup>329</sup> PORTUGUESE CONST. (1976), article 57.1.

<sup>330</sup> SWEDISH CONST. (1975), chapter 2, article 20.1.8 (aliens).

<sup>331</sup> TURKISH CONST. (1982), article 54.

<sup>332</sup> Vincent, *supra* note 191, at 479.

<sup>333</sup> Oforso-Amaah, *supra* note 192, at 521.

<sup>334</sup> Iluyomade, Popoola, *supra* note 268, at 961.

<sup>335</sup> Law 4330, 1964, Article 29.

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## Procedural Rights

### 1. DEFINITION

These are rights which guarantee the enforcement of all other rights. They represent the mode of procedure for enforcing a legal right, as distinguished from substantive law, which grants or defines the rights. These rights are of fundamental importance for they guarantee compliance of all other rights, including rights considered non-derogable and fundamental. In practice, their importance is so great that some legal commentators consider them also to be non-derogable.<sup>1</sup>

Within this category, I classify the right to due process of law in its broadest meaning, which comprises the right to access to courts, right to fair trial, right to counsel, right of confrontation, right to a hearing and right to an interpreter and throughout the chapter I deal separately with some of these rights. I also focus on the question of judicial review as well as on the need for security deposit as required by some countries.

These rights are analyzed in general terms, both in criminal and civil suits. These procedural rights are of great importance mainly in the context of immigration matters, such as denial of granting admission and expulsion proceedings. However, most of the procedural rights contained in international law instruments are granted only in the context of criminal suits and it has long been recognized that immigration legislation is a civil, not a criminal statute, and that the protections and safeguards established for the accused in a criminal case are not extended to immigration issues.<sup>2</sup>

### 2. HISTORICAL ASPECTS

Aristotle already recognized the right of aliens to access to courts and recommended that resident aliens should be allowed to sue and be sued without the intervention of a protector (someone to sue and be sued on their behalf).<sup>3</sup>

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<sup>1</sup> JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 115 (1996) and THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 186 (1986).

<sup>2</sup> The US courts have long defined deportation proceedings as civil in nature, *Argiz v. INS* 704 F. 2d 384 (7th Cir. 1983); consequently speedy trial guarantee of Sixth Amendment is not applicable.

<sup>3</sup> THE POLITICS OF ARISTOTLE, Book III, Chapter I, 1274 b 32 para.2 at 93 (Ernest Barker ed. 4th ed. 1961).

Christian Wolff and Emmer de Vattel thought that as aliens should be submitted to the laws of the place of residence, any disputes arising between them and a citizen should be submitted to the judges of the place in accordance with the local laws.<sup>4</sup>

The right to access to justice, as a duty of the States to be guaranteed to everyone, was first recognized by the Austrian Code of 1895.<sup>5</sup>

In fact, the idea that individuals have a right to resort to local courts whenever their rights are violated is the basis of the local remedies rule in the context of diplomatic protection, according to which aliens have first to vindicate their rights in local courts before invoking their national State protective apparatus.

### 3. PROCEDURAL RIGHTS IN INTERNATIONAL LAW INSTRUMENTS

The American Declaration sets forth:

*Article XVIII- Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.*

*Article XXIV- Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.*

It should be observed that this Declaration assures the right to access to courts in all cases, not only in criminal matters. However, the violated right has to be a 'fundamental constitutional right'. In the context of immigration cases, as aliens do not have a fundamental constitutional right to enter and reside in a country, because they do not have such rights, they cannot benefit from this rule. Therefore, the scope of this article as regards aliens is very narrow, to be applied only when, according to the domestic legislation, the alien has a fundamental constitutional right to be protected, such as in the case of a violation of the right to life, as a rule, granted to everyone.

The Universal Declaration determines:

*Article 8- Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*

*Article 10- Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*

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<sup>4</sup> Respectively *Ius Gentium – Method Scientifica-Pertractum*, THE CLASSICS OF INTERNATIONAL LAW vol. 2, para. 302 (Ed. James Brown Scott 1934), and THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS Book II, Chapter VIII, para. 103 (1820).

<sup>5</sup> MAURO CAPPELLETTI & GARTH, ACESSO A JUSTIÇA 11 n7 (Sergio Fabris, 1988).

*Article 11- 1- Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.*

The Universal Declaration also assures the right to access to courts in all cases, not only in criminal matters, and the violated right has to be a 'fundamental constitutional right granted either by the constitution or the law', admitting that noncompliance of rights granted by local legislation can also lead to this guarantee, differently from the American Declaration, seen above.

However, this provision is somewhat confusing as it determines that the individual has the right to access to courts whenever the legislation assures the substantive right in question. It should be the role of the courts to verify whether the individual has or has not the right under dispute, that is to say, the right to access to courts should be granted anyway.

The European Convention establishes:

*Article 6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly...*

- (3) *Everyone charged with a criminal offense has the following minimum rights:*
  - a) *to be informed promptly, in a language which he understands and in detail, of the nature and the cause of accusation against him;*
  - b) *to have adequate time and facilities for the preparation of the defense;*
  - c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
  - d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
  - e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

All the guarantees listed in this Convention, such as the right to have an interpreter, the right to free legal assistance, the right to know the charges against oneself, only apply in the context of criminal cases. However, as regards civil suits this Convention grants to everyone the right to a hearing, the right to access to competent courts and the right to publicity.

The European Court of Human Rights decided in the case *Lawless v. Ireland* and *Ireland v. UK* that, after the four non-derogable rights of the European Convention, article 6 (the right to a fair trial and to due process of law) is the most important of the Convention and should be subject to the strictest control to avoid derogation.<sup>6</sup>

The Protocol VII to the European Convention of 1984 deals basically with procedural rights: in article 1 it determines that resident aliens can only be expelled in

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<sup>6</sup> ORAA, *supra* note 1, at 107.

accordance with a decision based on local legislation and the alien should be granted some rights, such as being allowed to submit the reasons against the expulsion, having the case reviewed, and being represented, unless reasons of national security prevent it; article 2 guarantees the right to judicial review, but only in the criminal context; article 3 grants the right to compensation in cases of miscarriage of justice and article 4 sets forth the prohibition of *bis in idem*.

The C.P.R. Covenant guarantees:

*Article 2(3)- Each State Party to the present Covenant undertakes:*

- a) *to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- b) *to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- c) *to ensure that the competent authorities shall enforce such remedies when granted.*

*Article 9- 1- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

*2- Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

*3- Anyone arrested or detained on a criminal charge shall be brought before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgement.*

*4- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

*5- Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

*Article 13- An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

*Article 14- All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by the competent, independent and impartial tribunal established by law...*

This Covenant guarantees remedies as regards violations of all rights assured by this instrument. However, according to its terms, these remedies do not necessarily mean access to the Judiciary. Remedies are to be established by local legislation, and the State may provide that administrative authorities are the final authority to decide on a case. Additionally, the Covenant provides specific procedural guarantees whenever detention is involved, even if it is a civil suit, such as the right to know the charges against the person and access to the competent authorities. However, as regards the right to immediate judicial review, this right is only granted in the context of criminal cases. With regard to expulsion, the Covenant provides for specific guarantees to be granted only to lawful resident aliens, such as the right to present the reasons against this measure and the right to have the expulsion reviewed by the competent authority. Finally, the right to a public hearing is assured to everyone both in the context of criminal and civil suits.

The American Convention sets forth:

*Article 8- Right to a Fair Trial*

- 1) *Every person has the right to a hearing...*
- 2) *Every person accused of a criminal offense...the following minimum guarantees:*
  - a) *the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;*
  - b) *prior notification in detail to the accused of the charges against him;*
  - c) *adequate time and means for the preparation of his defense;*
  - d) *the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;*
  - e) *the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;*
  - f) *the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;*
  - g) *the right not to be compelled to be a witness against himself or to plead guilty;*
  - h) *the right to appeal the judgement to a higher court.*

Hence, also in accordance with the American Convention, the great majority of procedural guarantees are granted only in the context of criminal cases. In the context of civil cases, the Convention only refers to the right to a hearing.

In sum, international human rights instruments provide a wide set of procedural rights to be granted to everyone in the context of criminal cases. Thus, in these situations the alien is clearly protected and is assured all these guarantees on equal conditions as nationals. However, in the context of civil cases few guarantees are assured under international law instruments, namely, the right to a public hearing and the right to access to the competent authorities, not necessarily judicial. (The Universal Declaration, exceptionally, as seen, grants the right of access to courts broadly)

As regards expulsion cases, international law sets forth that resident aliens may be expelled, but they are granted some procedural rights, in accordance with Protocol VII of the European Convention and article 13 of the C.P.R. Covenant. These provisions, despite assuring them these rights, admits that these guarantees may be suspended on a case-by-case basis whenever the expulsion is based on reasons of national security. This exception makes this guarantee an empty one, as almost all expulsions are motivated by grounds of national security and public order. Moreover, in accordance with the decision of the European Court of Human Rights in the case *Lawless v. Ireland* and *Ireland v. UK*, already cited, the right of an individual to resort to national courts should not be limited, as this right is considered of utmost importance. In sum, the States may limit the substantive right under discussion, not the right to access to courts.

Despite the few procedural guarantees established by international law documents, in general legal commentators agree that the rights of access to judicial courts and to the equal application of justice are rights firmly established in general international law.<sup>7</sup> This position is absolutely correct but not always based on international human rights instruments, as seen. This conclusion can be better explained if based on general principles of law and rules accepted by the great majority of countries together with some international human rights instruments.

### *I. Right to due process of law*

This right cannot be defined in objective terms, for its contents are of difficult determination. Broadly, it means to be granted an opportunity to a fair judgement, with all the guarantees deemed necessary to be able to present one's defense. Therefore, in its broad meaning, it can comprise all the procedural rights, mentioned in this chapter.

The International Commission of Jurists, the ILA Paris Minimum Standards, the "Syracuse Principles" and the "Declaration on Internal Strife" prepared by Theodor Meron have established the following minimum rights of due process:

- 1) *the right to be informed promptly and in detail of the charges;*
- 2) *the right to all the rights and means of defense necessary;*
- 3) *the right to be present at one's trial;*
- 4) *the presumption of innocence;*
- 5) *the right not to be forced to give incriminatory evidence or to confess;*
- 6) *the right to a tribunal which offers the essential guarantees of independence and impartiality;*
- 7) *the right to appeal;*
- 8) *the principle of non-retroactivity of penal laws.*
- 9) *the right to obtain the attendance and examination of defense witnesses;*
- 10) *the right not to be retried after a final judgement;*
- 11) *the right to a lawyer of one's choice;*
- 12) *the right to free legal assistance if necessary.<sup>8</sup>*

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<sup>7</sup> GUY GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 293 (1978) and RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 231 (1987).

<sup>8</sup> As quoted by ORAA, *supra* note 1, at 115.

The Inter-American Commission of Human Rights established that the content of the right of due process comprises the following rights:<sup>9</sup>

- 1) *the right to be informed promptly and in detail of the charges;*
- 2) *the right to all the rights and means of defense necessary;*
- 3) *the right to be present at one's trial;*
- 4) *the presumption of innocence;*
- 5) *the right not to be forced to give incriminatory evidence or to confess;*
- 6) *the right to a tribunal which offers the essential guarantees of independence and impartiality;*
- 7) *the right to appeal;*
- 8) *the principle of non-retroactivity of penal laws;*
- 9) *the right to obtain the attendance and examination of defense witnesses;*
- 10) *the right not to be retried after a final judgement;*
- 11) *the right to a lawyer of one's own choice;*
- 12) *the right to free legal assistance if necessary.*

Both the Inter-American Commission of Human Rights and the International Commission of Jurists do not limit the application of all these guarantees in the context of criminal suits. However, due to the nature of many of these rights, they can only be applied in the context of criminal proceedings.

#### a) Comparative Law

In the US, in *Landon v. Plasencia*, the Supreme Court held that an alien seeking to reenter the US had due process rights, while “*an alien seeking initial admission to the United States ... has no constitutional rights regarding his application*” and “*once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly*”.<sup>10</sup>

Therefore, according to this Supreme Court decision, only resident aliens can benefit from the right of due process as regards exclusion proceedings, while non-resident aliens cannot.

In Brazil, the right to due process is constitutionally guaranteed both to nationals and resident aliens in the following terms:

*Article 5, LV: Litigants in judicial or administrative proceedings and those accused in general are assured the right to reply and an ample defense, with the measures and recourses inherent therein.*

Hence, the Brazilian Constitution guarantees the right to due process both in the context of criminal and civil suits. Moreover, local courts have extended these guarantees to non-resident aliens.<sup>11</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Landon v. Plasencia* 459 U.S. 34 (1982).

<sup>11</sup> As described by I HAROLDO VALLADÃO, DIREITO INTERNACIONAL PRIVADO 394 (5th ed. 1980) quoting several judicial decisions in which the right to due process, specifically the right to access to courts, has been granted to non-resident aliens.

As regards access to courts, the great majority of countries grant or have at one time granted this right to everyone, without distinctions, both in the context of civil and criminal suits, as a rule. This is the case in Antigua and Barbuda<sup>12</sup>, Argentina<sup>13</sup>, Australia<sup>14</sup>, Belgium<sup>15</sup>, Belize<sup>16</sup> Brazil, Canada<sup>17</sup>, Chile<sup>18</sup>, Ghana<sup>19</sup>, Honduras<sup>20</sup>, India<sup>21</sup>, Israel<sup>22</sup>, Italy<sup>23</sup>, Liberia<sup>24</sup>, Nicaragua<sup>25</sup>, Norway<sup>26</sup>, Poland<sup>27</sup>, Portugal<sup>28</sup>,

<sup>12</sup> ANTIQUAN CONST.(1981), article 5.

<sup>13</sup> ARGENTINEAN CONST.(1853), section 14.

<sup>14</sup> Aliens are accorded the same treatment as nationals, including the possibility of using interpreter services, free of charge in Australia. See I. A. Shearer, *The Legal Position of Aliens in National and International Law in Australia*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 41, 55 (1987).

<sup>15</sup> Aliens are assimilated to nationals. See Michel Melchior & Sabine Lecrenier, *Le Régime Juridique des Étrangers en Droit Belge*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 91, 156 (1987).

<sup>16</sup> BELIZEAN CONST.(1981), article 5.

<sup>17</sup> The right to sue has belonged to an alien at common law for a long time. The Citizenship Act of 1974, section 39, provides that a person who is not a Canadian citizen is triable at law in the same manner as a Canadian citizen -. See also A.L.C. de Mestral, *Position of Aliens in Canadian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 765, 825 (1987).

<sup>18</sup> CHILEAN CONST.(1980), article 21.

<sup>19</sup> Aliens, except alien enemies, have unlimited access to the authorities and courts. See G.K. Oforu-Amaah, *The Legal Position of Aliens in National and International Law in Ghana*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 501, 522 (1987).

<sup>20</sup> HONDURAN CONST.(1982), article 90.

<sup>21</sup> Courts and authorities are equally accessible to citizens and aliens. See M. P. Singh, *Position of Aliens in Indian Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 569, 606 (1987).

<sup>22</sup> "L'accès aux tribunaux est illimité. En cas de problèmes linguistiques les services de la traduction sont de droit." See Claude Klein, *Le régime juridique des étrangers en droit israélien*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 635, 653 (1987).

<sup>23</sup> L'étranger a les mêmes droits que le citoyen en ce qui concerne l'accès à la justice. See Bruno Nascimbene, *Le Régime juridique des étrangers en droit italien*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 659, 704 (1987).

<sup>24</sup> LIBERIAN CONST.(1984), article 20.a.

<sup>25</sup> NICARAGUAN CONST.(1987), articles 33 and 34.

<sup>26</sup> NORWEGIAN CONST.(1814), article 96.

<sup>27</sup> "Es gibt - mit einer Ausnahme - keine Unterschied zwischen In und Ausländern im Zugang zu Behörden und Gerichten." See Zdzisla W. Kedzia, *Die Rechtsstellung von Ausländern nach polnischem Recht*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1195, 1245 (1987).

<sup>28</sup> PORTUGUESE CONST. (1976) article 20, I. See also Luís Silveira, *Le régime juridique des étrangers en droit portugais*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1257, 1290 (1987).

Sweden<sup>29</sup>, Turkey<sup>30</sup>, UK<sup>31</sup>, US<sup>32</sup> and South Africa<sup>33</sup>. Hence, the legislation of many States grants this right to aliens, going beyond international law rules.

## *II. Right to counsel/Right to (free) legal assistance*

The idea that laws are becoming more and more complex and that legal proceedings are more and more complicated and mysterious, makes it impossible for the individual to have access to courts and to a trial without being assisted by a lawyer.<sup>34</sup>

It should be emphasized that, as a result of this right, three separate rights seem to be created: the right to be represented by counsel; the right to be informed of the right to counsel; and the right to a reasonable opportunity to obtain counsel at the person's own expense.<sup>35</sup> Additionally, there is the right to counsel of one's own choice and the right to free legal assistance when the person cannot afford to pay for it.

As regards free legal aid, the Hague Convention of Civil Procedure of 1954 establishes that it will be granted to aliens on equal conditions as to nationals, both in the context of civil and criminal cases.<sup>36</sup> However, human rights instruments grant this right in the context of criminal cases only to both nationals and aliens alike.<sup>37</sup>

An Italian national living in Switzerland, being investigated for drug possession and drug trafficking, petitioned to the Swiss court for the benefit of free legal assistance, as he could not afford to pay, being an assistant plumber living on social security benefits, and his request was denied. He was condemned to six months' imprisonment as a result of the judgment where, in the first instance, he was not represented by a lawyer.

This case was then submitted to the European Court of Human Rights because of a claimed violation of articles 6 and 3(c) of the European Convention. The Court, considering that Mr. Quaranta was "*a young adult of foreign origin from an underprivileged*

<sup>29</sup> Equal footing, however aliens are not exempted from *cautio judicatum solvi*. See Göran Melander, *The Legal Position of Aliens in Sweden*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1303, 1329 (1987). SWEDISH CONST.(1975), chapter 2, article 20.2.6.

<sup>30</sup> TURKISH CONST. (1982), articles 19 and 36.

<sup>31</sup> Aliens have unlimited access to authorities and courts. Richard Plender, *The Legal Position of Aliens in National and International Law in the United Kingdom*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1675, 1710 (1987).

<sup>32</sup> See T. Alexander Aleinikoff, *United States Immigration, Nationality and Refugee Law*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1545, 1625-1626 (1987).

<sup>33</sup> SOUTH AFRICAN CONST.(1994), article 22. See Rika Pretorius, *Protecting the Rights of Aliens in South Africa: International and Constitutional law Issues*, 21 SAYIL 130, 137 (1996).

<sup>34</sup> CAPPELLETTI & GARTH, *supra* note 5, at 32.

<sup>35</sup> CHRISTOPHER J. WYDRZYNSKI, *CANADIAN IMMIGRATION LAW PROCEDURES* 247 (1983).

<sup>36</sup> Article 20 - "En matière civile et commerciale, les ressortissants de chacun des États contractants seront admis dans tous les autres États contractants au bénéfice de l'assistance judiciaire gratuite, comme les nationaux eux-mêmes, en se conformant à la législation de l'État ou l'assistance judiciaire gratuite est reclamée. Dans les États où existe l'assistance judiciaire en matière administrative, les dispositions, édictées dans l'alinéa ci-dessus, s'appliqueront également aux affaires, portées devant les tribunaux compétents en cette matière".

<sup>37</sup> American Convention, Article 8.2; and the European Convention, Article 6.(3) (c).

*background, he had no real occupational training and had a long criminal record*<sup>38</sup>, condemned Switzerland to pay damages to the applicant as well as costs and expenses.

According to this decision of the European Court of Human Rights, this right to counsel is intrinsically linked to the right to have an opportunity to defend oneself.

However, it should be questioned whether the court would have taken the same decision if the case had not been a criminal suit.

#### a) Comparative Law

The Immigration Act of 1976 in Canada provides the right to counsel (not necessarily a lawyer) in the following terms: “*Every person with respect to whom an inquiry is to be held shall be informed that he has the right to obtain the services of a barrister or solicitor or other counsel and to be represented by any such counsel at his inquiry and shall be given a reasonable opportunity, if he so desires and at his own expense, to obtain such counsel.*”<sup>39</sup>

The Citizenship Act of Canada of 1974 at article 39 determines: “*A person who is not a citizen is triable at law in the same manner as if the person were a citizen.*”

Additionally, the Canadian Charter of Rights and Freedoms, sections 10(b) and 7, sets up a general right to counsel. In the case *Dehghani v. Canada (Minister of Employment and Immigration)* decided by the Supreme Court of Canada, the Court determined that this right applies only in the cases listed in the Charter. Thus, an alien, claiming refugee status at the port of entry, interviewed by the immigration officer at the airport, is not benefited by this right at that moment.<sup>40</sup>

In Belgium, under the “Code Judiciaire”, legal aid may be made available to any alien in respect of proceedings concerning the Aliens’ Law.<sup>41</sup>

In the Netherlands, nationals and resident aliens are entitled to legal aid.<sup>42</sup> Australia<sup>43</sup>, Brazil,<sup>44</sup> Cape Verde<sup>45</sup>, Chile<sup>46</sup>, Nicaragua<sup>47</sup>, Portugal<sup>48</sup> and Thailand<sup>49</sup> adopt the same criterion. Denmark does not provide legal aid for aliens,<sup>50</sup> nor does the UK.<sup>51</sup>

<sup>38</sup> Case *Quaranta v. Switzerland*, 12 HUMAN RIGHTS LAW JOURNAL 249-52 (1991).

<sup>39</sup> WYDRZYNISKI *supra* note 35, at 249. See section 30(1) of the 1976 Immigration Act.

<sup>40</sup> Decided on March 25, 1993, file n. 22153.

<sup>41</sup> ASYLUM IN EUROPE, European Consultation on Refugees and Exiles 78 (1983)....

<sup>42</sup> *Id.* at 255.

<sup>43</sup> Immigration: The facts- Information kit provided by the Australian Department of Immigration and Multicultural Affairs, July 1998.

<sup>44</sup> Law number 1060 of February 5, 1950, article 2: “*Gozarão dos benefícios desta lei os nacionais ou estrangeiros residentes no País, que necessitarem recorrer à justiça penal, civil, militar ou do trabalho.*” Therefore, legal aid is only available in judicial, not administrative proceedings.

<sup>45</sup> CAPE VERDIAN CONST.(1992), article 20.2.

<sup>46</sup> CHILEAN CONST.(1980), article 19.3.

<sup>47</sup> NICARAGUAN CONST.(1987), article 34.5.

<sup>48</sup> PORTUGUESE CONST.(1976), article 32.3. Right to legal aid available to all: article 20.2.

<sup>49</sup> THAI CONST.(1997), article 242.

<sup>50</sup> See *supra* note 41, at 108.

<sup>51</sup> *Id.* at 371.

### *III. Right to a Hearing/Right to a trial*

Although the idea that an individual cannot be punished or suffer any sort of constraint without having the opportunity to state his or her own case is often considered to be a matter of basic treatment, in situations dealing with expulsion, deportation or entry of aliens, this rule is not always taken into account.

The Institute of International Law adopted a code in 1892, and article 21 of this code declared that every individual expelled had the right to have recourse to a court or administrative tribunal passing judgement completely independent of the government. Such a hearing was to be granted in all cases in which the individual claimed to be a national or maintained that the expulsion was contrary to a law or treaty.<sup>52</sup>

More recently, article 13 of the C.P.R. Covenant determines that, except where compelling reasons of national security otherwise require, the alien shall be allowed to submit reasons against his expulsion and to have his case reviewed by the competent authority. In reality, this provision of the Covenant, although establishing the right to a hearing and the right to have the case reviewed by the competent authority, does not grant this right generally, because it admits the existence of 'compelling reasons of national security' to prevent it.

Notwithstanding, it should be observed that the right to a hearing in civil and criminal suits is guaranteed in broad terms by the American Convention, the European Convention, the Universal Declaration, and the American Declaration to both nationals and aliens alike.

The European Court of Justice has interpreted article 6 of the European Convention, which grants the right to a hearing, among others, in the criminal context, in very broad terms. Firstly, the Court does not consider this right to be limited to criminal cases and secondly, the Court interprets this provision as going far beyond the right to a hearing, that is, as if this provision assured the right to an effective remedy.

The European Court of Justice, in the case *Hornsby v. Greece*, analyzed the request of British nationals who resided in Greece and wanted to set up a private foreign language school but were denied permission to do so, on grounds of their nationality. The Court ruled in their favor, but the Greek education authorities still refused them permission to start the school. The situation was finally resolved when specific legislation was enacted which allowed Community nationals the right to establish such schools.

The Court concluded that execution of a judgement was part of the right guaranteed by article 6 and that the Greek authorities, by refraining from taking steps to execute the judgement for five years, deprived article 6 of all useful effect.<sup>53</sup>

Legal commentators argue that an order of expulsion will only be in accordance with the law if the alien is allowed a hearing and appeal on the merits.<sup>54</sup>

<sup>52</sup> XII Annuaire de L'Institut de Droit International (1892-4) 218-22 quoted by GOODWIN-GILL, *supra* note 7, at 264.

<sup>53</sup> *Decisions on the European Convention on Human Rights during 1997*, LXVIII THE BRITISH YEARBOOK OF INTERNATIONAL LAW 437 (1997).

<sup>54</sup> GOODWIN-GILL, *supra* note 7, at 280.

It should be observed that international law instruments determine the right to a hearing and review by the competent authorities – which can be administrative –, in accordance with local legislation. It does not determine that there is a right to have access to judicial courts.

### *Comparative Law*

In the US, deportation proceedings comprise a hearing in front of an immigration judge where the alien may be represented by a lawyer at his own expense, may present evidence and examine the evidence presented against him<sup>55</sup>

In 1953, the US Supreme Court decided the case *Shaughnessy v. United States ex rel. Mezei*, which involved a resident alien in the US for 25 years, who had left the country to visit his dying mother in Rumania and, on returning to the US, was denied entry and kept on Ellis Island. The US Attorney General based his decision on the “basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.” The Court upheld the decision of the Attorney General. Because Mezei had stayed away for 19 months in Europe, the Court held that he had lost his status as a resident alien, and therefore had no due process rights, including the right to a hearing.<sup>56</sup>

As a rule, the understanding of US courts is that individuals who have not entered the country are seeking a privilege, not a right, thus they are not granted the constitutional right of procedural due process in proceedings testing their right to enter and remain.<sup>57</sup> However, if the alien is a lawful permanent resident in the US, the courts have interpreted that the constitutional right of due process has to be granted, even in expulsion proceedings.<sup>58</sup> Therefore US courts grant procedural due process in expulsion proceedings while denies this right to aliens who have not been admitted.

It should be pointed out that the premise of the US courts is absolutely correct: there is no such thing as a right of an alien to enter the US; the US may allow or not

<sup>55</sup> INA sec 240, 8 U.S.C. sec 1229a.

<sup>56</sup> THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY, 240-44 (1985).

<sup>57</sup> The Supreme Court decided it in *Knauff v. Shaughnessy* 338 U.S. 537(1950); *Nishimura Ekiu v. United States* 142 U.S. 651(1892); *Fiallo v. Bell* 430 U.S. 787 (1977); *Kleindienst v. Mandel* 408 U.S. 753 (1972).

<sup>58</sup> This was first decided by the Supreme Court in *Yamataya v. Fisher*, 189 U.S. 86 (1903) and also in *Kwong Hai Chew v. Colding* 344 U.S. 590 (1953) and *Landon v. Plasencia* 459 U.S. 21 (1982). However, the exact content of the right of due process may greatly vary according to the circumstances. In the case of *Plasencia*, the Supreme Court after repeating the rule that she should be accorded due process, did not precisely define what this right comprised. In the case, *Plasencia* was granted less than eleven hours notice in which to prepare herself for the hearing, and additionally she was not informed of the availability of free legal counsel, which was not mandatory under the rules in force. Despite the obvious shortness of notice and clear impossibility for anyone to present one's defense and eventually look for a lawyer in such a short period of time, the Supreme Court decided: “whether the several hours' notice gave *Plasencia* a realistic opportunity to prepare her case for effective presentation in the circumstances of an exclusion hearing without counsel is a question we are not now in a position to answer.” This aspect was remanded by the Supreme Court to the lower courts for full analysis.

entry in some specific cases, at its entire discretion. However, this fact should not make any difference as regards the basic guarantees of due process.

It should be emphasized that we are dealing with procedural rights and not the right of an individual to admission, which has to do with the merits of the claim. It seems to me that there may be some confusion as regards procedural rights, which may comprise access to courts, right to a hearing, right to an appeal and so forth, and the right to enter the country, which has to do with the merits of the claim. The individual may have the right to access to courts, which should not be denied to anyone, under any circumstances, and finally the claim in the merits may be considered inadmissible, and he or she may be denied entry into the country.

Additionally, in many situations the individual who is seeking entry can do so more legitimately than one who has already entered the country illegally. An alien who has an immigrant visa, granted abroad and has family living in the US may be excluded and will have the right to due process denied, whereas one who has entered illegally is granted the constitutional right of due process, such as the right to a hearing, the opportunity to present evidence and cross-examine witnesses and the right to counsel.<sup>59</sup>

With the exception of immigration issues, US courts have upheld that aliens can raise constitutional issues and are protected by the Bill of Rights as the plenary authority of the political branches will not be implicated.<sup>60</sup> This distinction made by US courts and legal commentators makes it even more obvious that there is some confusion surrounding procedural rights and the rights discussed in the merits of the claim, because the criterion to distinguish between immigration cases and other cases is that in the first case, the alien has no constitutional right to enter the country. This distinction, as seen, may affect the merits of the claim but not necessarily the corresponding procedural right.

In the UK, appellate authorities have the power to set the time and place of the hearing and to determine whether there will be one.<sup>61</sup>

Along these lines, in 1962 the *Soblen* case was decided by the Court of Appeals involving an American national, convicted of a non-extraditable offense in the US, flying from Israel to the US, who cut his wrists in the plane and was taken to the hospital in London. The Home Secretary had decided on his deportation on 'public good' grounds and that he had to be sent to the US. Instead, he wanted to go to Czechoslovakia, but his request was denied without a hearing. The Court upheld the decision of the Home Secretary and affirmed that, despite the fact that any decision depriving the person of liberty should give that person an opportunity to be heard, this rule does not necessarily apply with regard to deportation.<sup>62</sup>

<sup>59</sup> This remark was made in ALENIKOFF & MARTIN, *supra* note 56, at 453.

<sup>60</sup> *Russian Volunteer Fleet v. United States* 282 U.S. 481 (1931), *Yick Wo v. Hopkins* 118 U.S. 356 (1886) and many others listed in ALENIKOFF & MARTIN, *supra* note 56, at 309.

<sup>61</sup> IAN MACDONALD, IMMIGRATION LAW AND PRACTICE IN THE UNITED KINGDOM 451 (2nd ed. 1987).

<sup>62</sup> As quoted by STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA, 43 (1987). The Court in this case repeated the arguments employed in the Venicoff case in 1920, whereby an alien who had been ordered deported because allegedly living on the earnings of a prostitute and, though according to him these were false allegations, was denied the right to a hearing. The Court upheld the decision with the argument that this was an executive decision and taking also into account the emergency circumstances of the 1<sup>st</sup> World War. *Id.* at 38.

In 1969, in the case *Schmidt v. Secretary of State for Home Affairs*, the Court of Appeals stated that "aliens are an exception to the rule that, before being deprived of liberty or property by a public official, a person has a right to be heard."<sup>63</sup>

In 1967, in the case *In re H. K.*<sup>64</sup>, a Commonwealth citizen wanted to enter the country with his father, a UK resident, under the statutory rule which allowed entry if the individual was under 16 years old. The immigration officer denied entry because, after some examinations, it was concluded that the boy was over 16. The courts upheld this decision and the boy was denied the right to a hearing.

It should be observed that in this last case the situation was much more serious, for if the boy really had been under 16 years of age, he would have had the right to enter the country, in accordance with domestic legislation. Therefore it should be observed that denying the right to a hearing under these circumstances, such as in the case above may invalidate the substantive right of the individual to enter the country, under domestic and international law.

The Immigration Appeal Board in Canada decided in the case *Cronan v. M.M.I.*, which was about the deportation of an alleged member of a subversive group, that the right to a "fair hearing" adopted in the Canadian Bill of Rights was not to be applied to aliens, because admission to Canada was a privilege and not a right in the following terms:

*In applying the Bill of Rights in the field of immigration, it must be noted that the Immigration Act and Regulations reflect the undisputed authority and responsibility of Parliament based on current social and political conditions in the country, to supervise and control the inflow of aliens to Canada. In order to achieve this justifiable objective, the basic character of the immigration legislation is exclusionary. The admission of aliens into Canada is, as stated above, by law, a privilege extended to persons seeking admission and it is not a right that is exercised quasi-unilaterally by them.*<sup>65</sup>

Later in 1974, along the same lines, the Immigration Appeal Board decided that aliens cannot claim any benefits conferred by the Canadian Bill of Rights as they do not have the basic right of abode in Canada. The Board concluded that:

*The Canadian Bill of Rights has no application to aliens, as aliens, because they lack an initial right: the right to come into or remain in the country. The Canadian Bill of Rights cannot and does not operate to destroy the sovereignty of the state in this field, to break down national boundaries 'surreptitiously'...*

*The Bill of Rights, then, does not apply to aliens, as aliens, and cannot be invoked in connection with any section of the Immigration Act, the Immigration*

<sup>63</sup> As quoted by LEGOMSKY, *supra* note 62. This case dealt with two students of scientology in the UK who applied for extension of their visas. The Minister of Health understood that scientology was harmful and decided that no extensions were to be granted. The Home Secretary refused both applications on the basis of the Minister's statement.

<sup>64</sup> *Id.* at 40-41.

<sup>65</sup> Decision of 1972, quoted by WYDRZYNSKI, *supra* note 35, at 462.

*Regulations, or the Immigration Inquiries Regulations. This is not to say that the alien has no rights vis-à-vis the state once his alien circumstance is directly in issue. However, the alien is granted many rights, mostly procedural, given to him by the Immigration Act itself, by Regulations made thereunder or by the courts, quite outside the Bill of Rights.*<sup>66</sup>

Once again it is difficult to understand why the Appeal Board justified the denial of application of the Bill of Rights with the basic premise that aliens do not have the right to stay in the country. It should be noted that the issue here was not whether aliens had the right of abode in Canada, but if the individual could have access to courts. As international law imposes limitations upon this basic right of the States, when prohibiting discrimination and prohibiting 'refoulement' of refugees, if individuals are not allowed access to courts and do not have the opportunity to discuss the expulsion, how can these limitations imposed by international law be effectively applied? It could have been a case dealing with expulsion of an individual who was a 'de facto' refugee, for instance, e.g. an individual who is a true refugee, as defined by law, but without a formal recognition of this status by the State of residence. The individual should be granted the opportunity to question, know the charges against him, present his evidence in order to have the expulsion order revoked. Therefore the argument of the Canadian Immigration Appeal Board is similar to the argument of the US Supreme Court and the UK courts and they are all unacceptable.

In Brazil, expulsion proceedings firstly comprise an inquiry, where the alien is granted the right to defense.<sup>67</sup> After expulsion is decided at the administrative level, the alien may still submit the expulsion order to the Judiciary, specifically the Brazilian Supreme Court. In Brazil, access to courts is constitutionally guaranteed both to nationals and aliens in civil and criminal suits and even decisions dealing with deportations may be submitted to the Judiciary.<sup>68</sup>

Extradition is also decided by the Brazilian Supreme Court and during this judicial proceeding the alien is allowed the right to be heard and may have a lawyer to assist him.<sup>69</sup>

Thus, all these countries which deny the right to a hearing to aliens in immigration cases are in disagreement with international law rules, which, as seen, grant this right both in the context of civil and criminal suits.

#### *IV. Judicial Review/ Right to Appeal*

The European Convention provides at article 5 (4) that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

<sup>66</sup> *Id.*

<sup>67</sup> Brazilian Aliens' Law, Law Number 6815 of 1980, articles 70, 71, 72.

<sup>68</sup> BRAZILIAN CONST.(1988), article 5, XXXV.

<sup>69</sup> BRAZILIAN CONST.(1988), article 102.

This rule should be applied also to administrative detentions following which there will be the right of recourse to a court to examine the legality of the detention.

This provision of the European Convention is therefore applicable in all situations where the individual is arrested, no matter if it is a criminal or an administrative suit and the C.P.R. Covenant adopts similar criteria in article 9, quoted above.

However, the applicability of this provision in expulsion proceedings is also of little impact, because expulsion proceedings are understood as within the discretionary power of the State. Thus, in the great majority of countries, the judicial or administrative courts do not have the power of unlimited judicial review, for they cannot question the reasons of the expulsion nor its opportunity. The courts may only examine the legality of the act, that is whether there has been an "*excès ou détournement de pouvoir*".<sup>70</sup>

That is to say that, in general, there is no uniformity as regards the grounds upon which the courts may invalidate an administrative decision, but apparently all grounds can be summarized under two arguments: a failure by the authority to exercise the discretion autonomously and an abuse or excess of discretionary authority.

Additionally, many immigration decisions are not subject to appeal in practice.

The Human Rights Committee in the case *Salgar de Montejo v. Colombia*<sup>71</sup> decided in 1979 that, despite the allegation of the State of a state of emergency, Colombia had violated article 14 (5) of the C.P.R. Covenant 'because Mrs. Consuelo Salgar de Montejo was denied the right to review of her conviction by a higher tribunal', apparently putting this right under very strict rules to admit its derogation. It should be observed though, that this decision of the Human Rights Committee was issued in the context of a criminal condemnation.<sup>72</sup>

Notwithstanding, the European Court seems to have decided that the right to access to judicial courts is part of international law. In the case *Chahal v. Royaume Uni*, involving an expulsion to India of a Indian Sikh, the Court decided that the expulsion proceedings- which is merely administrative in the United Kingdom- violated the rule comprised in article 13 of the European Convention, which guarantees the right to an effective remedy. As in this case the domestic courts could not review the Secretary of State's decision regarding the assessment of risk, the remedy was therefore not effective.<sup>73</sup>

Moreover, as regards judicial review of the lawfulness of the detention, the Court accepted that some discretion was necessary when issues of national security were concerned, but it emphasized that national authorities should not be free from all control when whey choose to assert such grounds.<sup>74</sup>

<sup>70</sup> HENRI BATIFFOL & PAUL LAGARDE, DROIT INTERNATIONAL PRIVÉ 194 (1970).

<sup>71</sup> ORAÁ, *supra* note 1, at 120.

<sup>72</sup> Article 14(5) of the C.P.R. Covenant- "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

<sup>73</sup> Sudre et al, *Chronique de la Jurisprudence de la Cour Européenne des Droits de L'Homme en 1996*, RUDH 4-39, 36 (1997). See *Decisions on the European Convention on Human Rights during 1997*, LXVIII THE BRITISH YEARBOOK OF INTERNATIONAL LAW 388-390 (1997).

<sup>74</sup> *Decisions on the European Convention on Human Rights during 1997*, LXVIII THE BRITISH YEARBOOK OF INTERNATIONAL LAW 390 (1997).

Along the same lines is the decision of the Human Rights Committee in the case *Torres v. Finland*, involving a French political activist who was arrested by the Finnish authorities twice to wait for extradition. As under the Alien's Act detention for a period of less than 7 days could not be challenged in court, the Committee understood that this provision violated article 9.4 of the Covenant – which guarantees access to courts in case of arrest or detention – in the following terms:

*"the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."*<sup>75</sup>

#### a) Comparative Law

In the US, the review of federal administrative decisions is governed by the Administrative Procedure Act of 11 June 1946<sup>76</sup> and according to that Act, final administrative decisions are generally subject to judicial review except to the extent that: (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. Additionally, the scope of the review depends on whether the decision is classified as based on fact, law or discretion. A discretionary decision will only be set aside if it is arbitrary, capricious or an abuse of discretion.<sup>77</sup>

Decisions of the Supreme Court have limited the right to judicial review in matters of immigration. In *Shaughnessy v. Mezei*, the US Supreme Court stated that previous cases: "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political department largely immune from judicial control"<sup>78</sup>, and in *Hampton v. Mow Sun Wong* that "*the power over aliens is of a political character and therefore subject only to narrow judicial review*".<sup>79</sup>

It should be understood, however, that this procedural right of judicial review still exists whenever there is a higher court examining the legality of the act.

In Britain, appellate bodies were created by the Immigration Appeals Act 1969 and continue to exist. In most cases, decisions are reviewed by one adjudicator and, as long as the decision was taken in accordance with the Immigration Rules, there is no place for an exercise of discretion by the adjudicator. In cases where the public good is involved, or when a deportation order is made against the wife or children under 18 of any person who is also ordered to be deported, the appeal goes directly to the Immigration Appeals Tribunal. In this case, the tribunal will weigh the interests of the State versus public good before rendering a decision.<sup>80</sup>

Moreover, almost every final administrative decision on immigration matters is subject to judicial review.<sup>81</sup>

<sup>75</sup> 15 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 551-2 (1994).

<sup>76</sup> 5 USC secs. 701-706.

<sup>77</sup> LEGOMSKY, *supra* note 62, at 143.

<sup>78</sup> *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

<sup>79</sup> *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

<sup>80</sup> GOODWIN-GILL, *supra* note 7, at 269.

<sup>81</sup> The decisions and the corresponding judicial recourse are quoted by LEGOMSKY, *supra* note 62, at 144.

In Canada, when a removal order is made against a person, this person has the right of appeal to the Immigration Appeal Board,<sup>82</sup> which is an administrative body designed to deal with cases of exclusion and expulsion. Federal courts are granted the power to review all cases connected with immigration matters.<sup>83</sup>

Brazil does not have administrative courts, but its Constitution, in article 5, XXXV, assures equally to nationals and resident aliens that: "*no law may exclude from appreciation by the Judiciary any injury or threat to a right,*" guaranteeing to all access to the Judiciary whenever necessary. Additionally, the Constitution admits that a writ of security be issued to protect a liquid and certain right not protected by *habeas corpus* or *habeas data* when the party responsible for the illegality or abuse of power is a public authority or an agent of a legal entity performing governmental duties.<sup>84</sup> There is also the *habeas corpus* to be granted whenever someone suffers or finds himself threatened with violence or coercion in his freedom of movement through illegality or abuse of power.<sup>85</sup>

The guarantee that administrative decisions should be reviewed by judicial courts is important mainly with regard to immigration decisions. However, in general, courts have limited review of these decisions. This tendency can be exemplified by Australia<sup>86</sup>; Brazil<sup>87</sup>; Canada<sup>88</sup>; UK and US.

In France, as in the majority of the countries, all decisions dealing with Aliens' Rights are within the discretionary power of the administration. Therefore, administrative judges have a limited review of these decisions. The scope of their review is limited to 1) external aspects, such as the competence of the authority who issued the decision, regularity of the proceedings and formalities; 2) internal aspects of the decision, restricted to the verification of the legality of the decision- if in accordance with the law, if all the facts were taken into account and if they were correctly analyzed.<sup>89</sup>

Notwithstanding, at least one important immigration decision, as a rule, is not reviewable in courts, which is the consular office's denial of an application for a visa.<sup>90</sup>

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<sup>82</sup> Immigration Act 1976 section 70. However, under certain circumstances there is no such right.

<sup>83</sup> See Federal Court Immigration Rules of 1993 and article 82 of the 1976 Immigration Act.

<sup>84</sup> BRAZILIAN CONST. (1988) article 5, LXIX .

<sup>85</sup> BRAZILIAN CONST.(1988), article 5, LXVIII.

<sup>86</sup> The Migration Reform Act of 1991 provides for a number of grounds upon which administrative decisions can be reviewed by the Courts. See 15 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 544-545 (1994).

<sup>87</sup> Brazilian Aliens' Act, Law 6815 of 1980, article 66 establishes that it is up to the President of the country to decide on the convenience and opportunity of the expulsion or its revocation.

<sup>88</sup> There are legal remedies available against the decisions of immigration authorities. These remedies take the form of appeal or of review. De Mestral, *supra* note 17, at 791.

<sup>89</sup> Cases *Ministre de l'Intérieur v. Pardov*, decided by the Conseil d'Etat in February 3, 1975, *Mme Olmos Quintero and Imanbaccus*, decided by the Conseil d'Etat in June 29, 1990 among many others, all cited by RUDOLPH D'HÄËM, L'ENTRÉE ET LE SÉJOUR DES ÉTRANGERS EN FRANCE, 66 (1999, Que sais-je? )

<sup>90</sup> LEGOMSKY, *supra* note 62, at 145, ALEINOFF & MARTIN, *supra* note 56, at 205-12.

*V. Right of the Person to be informed promptly and in detail  
of the charges (allegations)*

The European Convention and the American Convention grant this right at international level only in criminal suits, not in administrative or civil suits, as seen.

This right is closely connected to the possibility of the person responding appropriately at the inquiry.

In Canada, the inquiry must be held in the presence of the person concerned.<sup>91</sup>

The Supreme Court of Canada decided in the case *Canada (Minister of Employment and Immigration) v. Chiarelli* that the alien has the right to know all the allegations against him or her in an expulsion case, in the following terms:

*The various documents given respondent provided sufficient information to know the substance of the allegations against him, and to be able to respond. It was not necessary, in order to comply with fundamental justice in this context, that respondent also be given details of the criminal intelligence investigation techniques or police sources used to acquire that information.*<sup>92</sup>

In the US, the Supreme Court upheld in the *Mezei case*<sup>93</sup> an administrative decision of the Attorney General concerning the exclusion of Mezei based on “*information of a confidential nature, the disclosure of which would be prejudicial to the public interest.*” The same argument had been employed before in the *U.S. ex rel. Knauff v. Shaughnessy*<sup>94</sup>, when the wife of a US citizen was denied entry because the Attorney General concluded that her admission would be prejudicial to the interests of the US and, without a hearing, the Supreme Court upheld this decision.

*VI. Right to an Interpreter*

This right is a corollary of the former, because if the accused does not understand the accusations against him, he cannot present his defense fairly.

Additionally, the right to an interpreter is intrinsically linked to the right to access to courts and to the right to know the charges against oneself and to the right to confrontation, because if the person cannot understand the accusation against him, he cannot defend himself either. For these reasons, some countries already grant this

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<sup>91</sup> Immigration Act 1976, section 29 (1). In the case *Hung v. M.M.I.* 8 I.A.C.128 (1969), it was decided that the simple quotation of a statutory provision in a report as the basis for exclusion or expulsion could be meaningless in providing the person with adequate information as to the allegations against him.

<sup>92</sup> Decided by the Supreme Court of Canada on March 26, 1992, file n. 21920.

<sup>93</sup> See *supra* note 78.

<sup>94</sup> *Knauff v. Shaughnessy* 338 U.S. 537 (1950).

right as a matter of law, such as Canada<sup>95</sup>; Israel<sup>96</sup>; Australia<sup>97</sup>; Portugal<sup>98</sup>; US<sup>99</sup>; Ghana<sup>100</sup>; Turkey<sup>101</sup>, South Africa<sup>102</sup>, Italy<sup>103</sup>, France<sup>104</sup>.

### *VII. Security Deposit*

The origins of the security deposit –*cautio judicatum solvi*– lie in Roman Law, with the Corpus Juris Civiles, elaborated by Justinian in A.D. 528-534. At its origin, this deposit was due by any author, Roman or otherwise, as a guarantee to the defendant, who at the end of the suit could receive this money as payment for costs and expenses incurred, in the case of the author losing the plea. Thus, this caution was necessary whenever the author was not solvent– mainly when the author was an alien and his property was located abroad.

In the 16th century this institution changed its nature in most countries and was understood as linked to the status of being an alien. Additionally, only the national could benefit from it.

From that period on, three systems were adopted: 1- the French system, which was discriminatory only towards aliens, also adopted in Germany; 2- Those systems which were loyal to the origins of the institution and only applied it to the insolvent or suspected insolvents, such as in the UK, Argentina, Israel, Switzerland, US, Brazil; 3- Some countries completely ignored this possibility, such as Egypt, Finland, Portugal, France after 1972 and under certain specific circumstances Belgium, Germany, Norway and Austria.<sup>105</sup>

It should be observed though that all international conventions recognize the real nature of the institute. The Hague Conventions on Civil Procedure of 1896, 1905, 1954 and 1970 do not link it to alienage as well as the 1980 Hague Convention regarding Access to Courts.<sup>106</sup>

<sup>95</sup> Criminal Code - section 462.1 (2); Canadian Bill of Rights S.C. 1960, Purchases & Sales 44 section 2(9) grant all parties or witnesses, before judicial or quasi-judicial proceedings, the right to an interpreter. The Canadian Charter of Rights and Freedoms, article 14, gives a constitutional basis for the same right. Article 11(1) of the Adjudication Division Rules of 1993 also grants this right.

<sup>96</sup> Klein, *supra* note 22, at 653.

<sup>97</sup> HUMAN RIGHTS COMMISSION, HUMAN RIGHTS AND THE MIGRATION ACT 17(1958), Report number 13.

<sup>98</sup> Silveira, *supra* note 28, at 1290.

<sup>99</sup> Aliens and citizens alike are entitled to interpreters in criminal prosecutions here. Their inability to understand English renders the proceedings fundamentally unfair. See Aleinikoff, *supra* note 32, at 1626.

<sup>100</sup> Oforos-Amaah, *supra* note 19, at 522.

<sup>101</sup> Ergun Özsüney, *The Legal Position of Aliens in Turkey DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 1489, 1513 (1987).

<sup>102</sup> Section 25 (1)(a) of the Constitution requires that an individual arrested be informed promptly in a language which he/she understands of the reasons of his/her detention. See Rika Pretorius, *supra* note 33.

<sup>103</sup> Article 2.5 of the 1998 Alien's Act.

<sup>104</sup> Decision of the French *Cour de Cassation*, 2nd , of March 27, 1996. 87 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 634 (1998).

<sup>105</sup> Extracted from the comments to a decision of the European Court of Justice, made by Georges A.L. Droz, 83 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 633-643 (1994).

<sup>106</sup> *Id.*

The European Court of Justice has already established that the requirement of a *cautio judicatum solvi* towards non-resident aliens is discriminatory if this same requirement does not apply to non-resident nationals.<sup>107</sup>

The Hague Convention on Civil Procedure of 1954 determines that no security deposit should be required in States party to the Convention by virtue of nationality or domicile of the claimants.<sup>108</sup>

The Hague Convention on International Access to Justice, which was concluded in 1980 and entered into force in 1988, provides that persons, including legal persons, habitually resident in a Contracting State who are plaintiffs in proceedings before the courts or tribunals of another Contracting State cannot be required to provide any security, bond or deposit of any kind by reason only of their foreign nationality or of their not being domiciled or resident in the State in which proceedings are commenced.

Some countries require a security deposit, the *cautio judicatum solvi*, for aliens, which undoubtedly is differential treatment between nationals and aliens. This is or has once been the case in Sweden<sup>109</sup>, Turkey<sup>110</sup>, the Netherlands<sup>111</sup> and Germany<sup>112</sup>.

Brazil determines that this security deposit be made in cases in which the claimant is not domiciled in Brazil, no matter the nationality.<sup>113</sup>

In sum, it would be discriminatory treatment if this deposit be necessary only for aliens, regardless of their status. If they are domiciled or resident in the country or if they have property in the country, this deposit would not be serving its original purpose, i.e. to provide a guarantee to the defendant.

In conclusion, it can be said that as regards procedural rights, international law has set forth very low standards to be followed by the States. International law has established, as seen, a wide array of procedural guarantees to be granted to nationals and aliens alike in the context of criminal cases, such as the right to due process, the right to be assisted by a lawyer, the right to an interpreter and the right to have the decision reviewed by a higher court among others, while in the context of civil and administrative cases, international law establishes the right to a hearing and the right to access to the competent authorities as the sole guarantees to be granted to nationals and aliens alike, save for exceptional circumstances of public safety, public policy, morals and health. Moreover, because of these few guarantees set forth

<sup>107</sup> Case *D.Ch and J.K.Hayes* decided on March 20, 1997 and case *SA Saldanha and MTS Securities Corporation*, decided on October 2, 1997, *JOURNAL DE DROIT INTERNATIONAL* 508-509 (1998). See also decision of July 1, 1993, *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 633-643 (1994) and of September 26, 1996, *JOURNAL DE DROIT INTERNATIONAL* 538-539 (1997).

<sup>108</sup> Article 17.

<sup>109</sup> Melander, *supra* note 29, at 1329. See also the case *Data Selecta Aktiebolag and Ronny Forsberg*, decided by the European Court of Justice on September 26, 1996, *JDJ* 538-9 (1997).

<sup>110</sup> Under the Turkish Civil Procedure Code, an alien that initiates a lawsuit before a Turkish court is obliged to deposit a "security" with the court ( Article 97 ). Özsüney, *supra* note 101, at 1513.

<sup>111</sup> Article 152 of the Code of Civil Procedure, as quoted in *Netherlands Judicial Decisions*, *NETHERLANDS YEARBOOK OF INTERNATIONAL LAW* 328 (1996).

<sup>112</sup> As mentioned in the decision of the European Court of Justice of March 20, 1999, published in 86 *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 475-482 (1997).

<sup>113</sup> Brazilian Code of Civil Procedure (1973), article 835.

for administrative and civil cases, aliens may be doubly jeopardized mainly in the migration context, since immigration cases are generally within the discretionary power of the States to decide on the merits and, in addition, few procedural guarantees are assured to them. Notwithstanding, they are granted those two rights: the right to a hearing and the right to access to the competent authorities. Hence, it can be concluded that aliens in immigration cases and civil cases in general do not have the right to access to judicial courts guaranteed by international law, but they do have all the rights which are inherent to the right to a public hearing. Along these lines, even as regards those rights which are not expressly stated in the conventions, such as the right to know the charges against oneself and the right to present a timely defense, aliens should be assured these other guarantees as well. The right to a hearing would be meaningless and an empty guarantee without these other rights.

Finally, as the patterns established by international law are not very clear as regards administrative and civil cases States adopt different criteria. However, undoubtedly these countries which deny to aliens the right to a public hearing are contrary to international law patterns.

Concluding, it should also be noted that international and regional tribunals are elaborating on these procedural guarantees and they are starting to consider the right to access to judicial courts a right which should be guaranteed to all, even in civil and administrative cases, and principally in situations of deprivation of liberty.

## Conclusion

In 1923, in a course on International Law delivered at The Hague Academy, Lord Phillimore denied the existence of an international rule dealing with the rights of individuals. According to him, if an issue involves an individual and his country of nationality, it is within the domain of constitutional law, and if an issue involves a State and its resident alien, it is a matter of international law only if and when the State of the nationality of the individual acts on his or her behalf.<sup>1</sup> In his view, the individual has no rights under international law because he or she should not be considered a citizen of the world, but a national of a certain State.<sup>2</sup>

It has been a widely accepted rule of international law that States are free to restrict the admission of aliens to such cases and conditions as they see fit and to expel them at any time and for any reason they deem convenient.<sup>3</sup>

As a consequence to this rule, until recently, States were deemed to be free to deny entry to Jews, negroes or people of Asian origin, for this was within the domain of the States' immigration control.<sup>4</sup>

Presently aliens, as human beings, do have rights conferred upon them by international law and their treatment, by the country of their residence, is a matter of international law, independently of the interference of the country of their nationality (this does not mean however, that diplomatic protection has ceased to exist). Their treatment is no longer to be decided at the sole discretion of the State of residence, free of any international standards to be followed. Instead, there are some basic patterns to be observed, established by human rights instruments.

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<sup>1</sup> *Droits et Devoirs des États*, REUEIL DES COURS 33 (1923).

<sup>2</sup> *Id.* at 63" ... *L'Individu n'a pas le droit en jurisprudence internationale: il n'est pas civis mundi: il est le ressortissant d'un État.*"

<sup>3</sup> This is the opinion of Fenwick, Pitt Cobbett, Hyde, Jessup, Hackworth and Kelsen, among others, all quoted by RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 1 (1987).

<sup>4</sup> As examples, see the UK legislation of 1971, which denied entry to UK nationals due to the concept of patriality, with a view to deny entry to the UK of nationals of East Africa, because of their color, and formerly, the Aliens Act of 1905 aimed at restricting Jewish immigration from East Europe; in the US, Louisiana legislation in force in 1956 which prohibited free persons of color from entering the State by sea, and the Chinese Exclusion Act of 1882, which restricted entry to individuals of Chinese origin; Canadian legislation of 1910, which restricted entry to Indians and Japanese individuals; Australian legislation of 1901, the 'White Australia' policy, which aimed at favoring white European immigration.

Thus, it is not for the State of nationality to decide whether or not to espouse their claim. It is a matter of international concern, independently of the wills of the State of residence and of the State of nationality.

A great number of human rights instruments are now in force. Just to mention some of them, there is the C.P.R. Covenant and the E.S.C.R. Covenant; the European Convention and its Protocols; the American Convention; the UN Convention on the Elimination of Discrimination Against Women; the UN Convention Against Racial Discrimination and the Convention on the Rights of Child, and, as these conventions provide for guarantees for everyone, aliens are obviously included.

However, it should be noted that the rights provided for in each of these conventions are a reproduction of previous instruments. This technique, however, in my view, weakens the strength of previous instruments, giving the impression that rights already granted have to be repeated in order to guarantee their compliance. The UN Convention on Migrant Workers, for instance, recently adopted in 1991, reaffirms that all migrant workers have the right to leave any country (article 8 of the Convention); the right to enter their country of nationality (article 8); the right to life (article 9); the right not to be tortured (article 10); the right not to be held in slavery (article 11); the right to freedom of thought and religion (article 12); the right to freedom of expression (article 13); right to private life (article 14); right to private property (article 15); right to personal freedom (article 16); right to due process on equal terms with nationals (article 18); right not to be incriminated under *ex post facto laws* (article 19); prohibition of collective expulsion (article 22); right to be recognized as a person before the law (article 24); equal treatment as regards remuneration (article 25); right to association (article 26); right to a name and right to a nationality for their children (article 29), among others. All these rights have been firmly established in previously existing conventions.

The Declaration on the Human Rights of Individuals who are not Citizens of the Country in which they live adopts this same technique, for it determines that they are granted the freedom of thought, conscience and religion (article 4[vii]); freedom of opinion and expression (article 4[viii]); that no alien shall be subjected to arbitrary arrest or detention (article 5); no alien shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 6); no alien shall be subjected to arbitrary expulsion or deportation (article 7.1), rights already clearly granted in other instruments.

I see no point in the reiteration of all these provisions already contained in more general human rights instruments, such as the Universal Declaration, the UN Covenants, the American Convention and the European Convention. If these general human rights instruments grant these rights to everyone, then, migrant workers, children and women are obviously within the protection of the conventions. Why repeat all these rights already declared before? Their reiteration will either weaken the peremptory nature of these general conventions, implying that when they mention 'everyone' they do include migrant workers, women and children, as established by the specific conventions, giving to these last conventions the mere role of emphasizing what has already been guaranteed. Or, it can be understood that the expression 'everyone' mentioned by the Conventions is not enough to include every category of persons, thus requiring complementary conventions to make sure specific groups of people are included. This latter understanding leaves a question to be

answered, for if conventions are needed to protect these special categories of persons, what would be the situation of those left unprotected because no specific additional convention has been elaborated to protect them, such as the elderly, the handicapped or aliens?

Besides, also in accordance with this last understanding, doubts may arise as regards provisions which are not replicated, for if many provisions are repeated and if one specifically is not, we may conclude that this right was left outside the scope of the convention, despite the fact that it was granted to everyone in another human rights' instrument.<sup>5</sup>

The main argument is that if all these rights are granted to everyone, then obviously everyone is protected, without the need of further instruments to stress this protection. The existence of these specific conventions should be understood as to regulate only specific situations, peculiar to a particular class of people.

These specific conventions should mention that all human rights established by the Universal Declaration, for example, are to be understood as part of this convention and then, establish only rules which are specific to each category of persons to be protected and that were left outside the scope of the Universal Declaration, such as the right to the protection and assistance of the consular or diplomatic authorities of their State of origin, as mentioned in article 23 of the UN Convention on Migrant Workers or the right not to be separated from the parents, granted by article 9 of the Convention on the Rights of Child, or the right that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien shall affect the nationality of the wife, established by article 1 of the Convention on the Nationality of Married Women, just to quote some of these cases.

Additionally, if a certain topic has already been treated by one organ of widespread acceptance, the same topic should not be treated by another. As an example, the subject of migrant worker had exhaustively been regulated by the ILO (a Convention in 1949, another, supplementary convention in 1975, as well as a Recommendation of 1975). Notwithstanding these existing instruments, elaborated by a specialized agency, the UN decided to elaborate a convention on the same topic, which was finally approved in 1991.

This can lead to the possibility of conflict between conventions, which could mean difficulties as regards the determination of the applicable rule, because the rule *lex posterior derogat priori* is valid only among rules of the same hierarchical level and in the domestic sphere, not among provisions contained in various international conventions.

Along these lines, in 1973 the ILO proposed that conflicts between conventions should be avoided. In order to attain this goal, according to this agency, organizations should avoid dealing with topics that have already been treated by other organizations. Only the original organization should undertake revision of the original text, in the event there are lacunae or better standards of protection to be guaranteed. If that is not possible, the new text should refer to the previous instrument in the

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<sup>5</sup> This criticism was made by Lillich to Elles' Draft concerning certain protections granted when an individual is working, such as the right to equal pay for equal work, which was not mentioned in the Declaration. THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 54-5 (1984).

preamble or other clause, and mention that the existing provisions continue to apply. Consequently, there would be no question about the relationship between the obligations created by the two instruments.<sup>6</sup>

Another aspect which should be pointed out is that international human rights instruments, as a rule, do not specify the extent and the meaning of many rights which are guaranteed in these conventions, which also weakens the strength of these rules.

The provisions which assure the right to marry, for instance, guaranteed in the Universal Declaration, in article 16(1); the European Convention, article 12; the C.P.R. Covenant, article 23(2); and the American Convention, article 17(2), raise no doubts as to their interpretation and extent. Therefore, it can be concluded without any doubt that there is a clear rule in international law concerning the right to marry and no one may be denied this right, without proper justification.

Conversely, provisions elaborated in generic and abstract terms, such as the right to family life, the right to work and the right to social assistance may raise several doubts as to their real meaning. Consequently, in order to avoid that these provisions become innocuous, it is the role of international organizations, international courts, national courts, legislators and executive officials and legal commentators to establish their content and interpretation. That is, in order to avoid differences in interpretations and guarantee their compliance, international law rules have to be objective, clear and precise.

Besides these aspects, aliens have all the human rights enumerated in the human rights instruments, except those which are clearly denied to them, and cannot be excluded from the enjoyment of any of these rights without a good reason.

Additionally, besides the existence of these human rights instruments, of more widespread acceptance, aliens are also protected by international law in accordance with article 38 of the Statute of the International Court of Justice by the "general principles of law recognized by civilized nations", as many of the human rights granted by international instruments are also granted internally by the great majority of the countries, as we observed in the development of this work. It was also verified that quite often, as regards some topics, national States grant aliens a more extensive protection than that assured by human rights instruments.

Another aspect to be stressed is that, as a rule, immigration decisions, which lie at the core of the subject of aliens' rights, are of a very conservative nature and very seldom courts go against executive decisions. This fact can be explained by: 1) the political nature of the subject, traditionally understood as within the domain of the Executive to decide; 2) the background of the judges who review the decisions, of generally conservative nature;<sup>7</sup> 3) an inertia of the courts to go against previous conservative decisions, or *stare decisis*, as the common law tradition names it; 4) the very nature of the subject, for international law, as regards some subjects, has not

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<sup>6</sup> As quoted by THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 202 (1986).

<sup>7</sup> STEPHEN H. LEGOMSKY has focused on this aspect in detail in his book. See IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA (1987).

quite defined clearly what is a right of the national, and what is a human right, to be granted to everyone.

Therefore, despite the existence of several guarantees, both at domestic and international level, courts are somewhat reluctant to apply these guarantees in the context of immigration cases and to decide against administrative authorities. Consequently, most of the guarantees established both under international and municipal law, despite the fact that they exist in theory, are of difficult application.

Despite these conclusions that aliens are also beneficiaries of human rights instruments due to the broad terms employed, it should be borne in mind that, more important than concluding that aliens are protected by human rights instruments, is the way these instruments are applied by the national States. Many legal commentators show their enthusiasm in the development of a set of rules dealing with human rights, but it should be observed that the conventions themselves have several possibilities of limitations which can be imposed on the enjoyment of the rights guaranteed in them. War or public emergency are specific grounds mentioned in human rights instruments to derogate application of the guarantees established by the conventions. Additionally, in the very provision in which the right is guaranteed, the conventions determine a set of circumstances by which it may be restricted, such as public policy, public health, national security and good morals. All these escape clauses and limitations cannot be employed in such a way as to invalidate the whole of the conventions. As these limitations are not the rule, but rather exceptions admitted in the text of the conventions, they should be justifiable and not founded on arbitrariness and prejudice.

Consequently, aliens are granted most of the rights listed in human rights instruments. They are assimilated to nationals, as regards the enjoyment of these rights, and the limitations which may be imposed on the enjoyment of these rights on a case-by-case basis (in the interest of public policy, public health, good morals, national security) can be applied both to nationals and to aliens. Thus, any distinction based on alienage as such, without any reason to justify it, is both contrary to international rules and principles. In fact, the rule which prohibits discrimination, as seen, is comprised in all human rights instruments and its non-observance would amount to breaking an international law rule, and can entail sanction, as the breaking of any other international law rule would.

But even more important than that, the rule of non-discrimination is also a principle, a basic purpose of the system, defined as such by the UN Charter at article 1 (3), by the UN Convention Relating to the Status of Stateless Persons in its preamble, as well as by the Preamble of the Universal Declaration, and principles are on which all rules elaborated by the system are based.<sup>8</sup>

Principle is the spinal cord of a system and its nuclear structure. Thus, when a rule is not clearly formulated and doubts are raised as to its exact comprehension, we should interpret these rules in the light of the principles of the system.

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<sup>8</sup> CELSO ANTONIO BANDEIRA DE MELLO, ELEMENTOS DE DIREITO ADMINISTRATIVO, RT 230 (1986) defines principles in a system. See also Karl Josef Partsch *Os Princípios de Base dos Direitos do Homem: a Autodeterminação e a Não-Discriminação*, AS DIMENSÕES INTERNACIONAIS DOS DIREITOS DO HOMEM, 76-101 (Karel Vasak, 1983).

Consequently, disrespecting a principle is much more serious and dangerous to the whole system than disrespecting a rule, for, by disrespecting a principle on which the whole system is based, the whole system is disrespected and the fundamental values of the system are disregarded.

Moreover, some other basic principles of international law should be taken into account with reference to rights of aliens and immigration policies, as regards the applicability of the exceptions established in the conventions. One is the principle of proportionality, which states that all exceptions and derogations to general rules have to be proportionate to the danger those events represent. Thus, an individual alien, who lives in a certain country for some time without causing any concrete problem and has family ties in this same country, should not be expelled on grounds of national security because he adopts theoretically the Marxist doctrine, for instance. This individual, who has lived and worked in a country without ever having been a threat to the national security, should not be considered as such solely because he expresses a specific political opinion. Such a decision can be considered arbitrary, disproportionate and therefore contrary to international law.

Along the same lines, the principle of consistency, or reciprocity, in international relations should be taken into account as well. The behavior of a State when dealing with other States should be consistent with all the obligations this State has assumed under international law and one State cannot demand more from another State than that which it offers others. This principle has applicability both as regards the treatment of aliens and state responsibility for injuries to aliens.

Finally, as aliens are understood as beneficiaries of human rights instruments, these provisions and guarantees have to be applied in full or else they risk being understood as innocuous rules. They have to have efficacy, which is the goal of any rule. Moreover, these instruments have to be applied in accordance with the principles that led to their adoption, that all human beings are worth some basic rights, independently of their status, sex, religion or nationality. International courts and agencies have to take that into account when applying these instruments, and admit these limitation clauses only when absolutely necessary, or these instruments will be considered of little importance and efficacy.

Additionally, States, in their daily activities, should base their legislation, administrative and judiciary decisions on the rules and principles adopted by human rights instruments, or they may be deemed to be acting in disrespect of international law. Finally, all States of the international community, besides acting in accordance with these rules, should also demand the same attitude from other States. International organizations should also observe their compliance.

In brief, in very objective terms, the following conclusions were reached:

In the first chapter, the importance of the concept of nationality as regards the definition of an alien is stressed. It was pointed out that nationality, despite being a subject matter regulated by domestic legislation, is also subject to several international law rules, established mainly by international conventions. These international rules which govern the subject are of impressive number and very objective content. They are listed in the final section of this chapter, together with their corresponding sources.

In Chapter II, the treatment granted to aliens is analyzed throughout history from ancient Rome and Greece until the French Revolution, and it was concluded that

treating aliens with humanity and comity was an idea common both to religions and ancient customs. As a conclusion to this chapter, it was observed that all these distinctions towards aliens in the sphere of political rights were created by the French Revolution, which at the same time, was also the starting point of the struggle for respect of human rights.

Chapter III focuses on the development of the legal treatment of aliens, from the concept of state responsibility, where only the State of the nationality of the individual has legitimacy to represent him or her at international level, to the concept of human rights, where the individual is protected, not because he or she is a national of a particular State, but because he (or she) is a human being.

It was concluded that state responsibility, due to its specific nature, still exists and in fact coexists with the doctrine of human rights, instead of the notion that the latter encompasses the first.

Also, it was established that the standard to define the rights of aliens under international law, which may give rise to international claims, is the standard minimum of rights. This standard minimum is comprised of the rights contained in human rights instruments of widespread acceptance. Therefore, if a State does not comply with this standard and proceeds illegally against a resident alien, this may give rise to a claim at international level, based on state responsibility.

Chapter IV focuses on fundamental rights, that is the right to life, the right to personal freedom and the right not to be discriminated against and not to be incriminated under *ex post facto laws*. In this chapter, the concept of non-derogable rights is adopted to select the rights to comprise this category, and it is concluded that these rights are of universal acceptance and cannot be disregarded, under any circumstances. As a consequence of this concept, aliens should be entirely assimilated to nationals, as regards the enjoyment of these rights.

Concerning the right not to be discriminated against, which is part of this category, aliens are undoubtedly included in this provision and cannot be discriminated against, simply because of their alienage. Discrimination based on alienage, if not justified, is obviously a prohibited motive, despite it not being expressly included as a ground which forbids differential treatment, due to the fact that the terms employed in all the conventions allow for other grounds. Therefore, the only differential treatment towards aliens which international law admits *prima facie* are those expressly admitted under human rights instruments.

Chapter V deals with private rights according to the concept of the civil law system, namely, the right to be considered as a person, the right to have family life and the right to private property. As regards the right to be considered a person before the law, despite its inclusion in this category of private rights, it is concluded that this right tends more to be part of the former category, of fundamental rights. All international conventions and all domestic legislation examined consider this right a basic one and even two conventions of widespread acceptance- the C.P.R. Covenant and the American Convention- qualify this right as non-derogable. Hence, aliens cannot be disregarded as persons for reasons of alienage, that is, they cannot be denied legal personality, i.e. the generic capacity to acquire rights and obligations.

The right to family life has also been understood as a basic right. Despite the vagueness of its contents in international law, under some circumstances, international tribunals have decided that, out of respect for this right, the faculty of the

States to control immigration can be regarded as of lesser importance than the right to family life. This tendency has also been followed by the domestic legislation of most States, since the great majority of countries do take into account, although to different degrees, the existence of a national family when considering issues of entry and expulsion.

As regards the right to own property, it was observed that there is no such right at international level, for the great majority of instruments either expressly admit limitations to the enjoyment of this right, or only guarantee the enjoyment of property rather than the right to acquire property. Therefore, as there is no definite rule in international law regarding this subject, aliens can be excluded from the faculty to acquire property and dispose of it, under international law. As a matter of fact, the great majority of States, in their legislation, impose limitations with regard to both the acquisition and the enjoyment of this right.

Chapter VI focuses on the social rights, specifically, the right to education, the right to social assistance and the right to work, when the State, as a rule, has to take a positive stance (take action), in order to guarantee compliance of the individuals' rights. As these rights depend on the State taking an active role, and as their implementation is costly, the States do not follow a very definite pattern regarding their compliance. The rights comprised in this category aim at State involvement, obliging the State to provide services to the population and their goal is essentially to improve living conditions and to promote better distribution of wealth among individuals. Additionally, the definition of the contents of these rights is also somewhat vague under international law.

The right to work for a living, guaranteed in all human rights instruments, is not thoroughly respected in the domestic legislation of the States. The great majority of the States, including developed countries, impose several limitations on the enjoyment of this right in the domestic arena. For example, aliens cannot be lawyers, accountants, pharmacists or journalists in several countries. These limitations, as they cannot be explained on the ground of national security or public policy, are entirely contrary to international law patterns.

The right to social assistance, also guaranteed in all human rights instruments, is difficult to define. Therefore it was concluded that there is such a right under international law, but we are unable to identify specifically which benefits it comprises. It was also observed that the great majority of countries do not entirely exclude aliens from social assistance. The imposition of some limitations to the enjoyment of certain benefits cannot be considered as contrary to international law patterns.

The right to education, established in all human rights instruments, can also be said to be an international law rule. However, the right to primary education is more guaranteed than the right to secondary education, for economic reasons. In general, the great majority of States grant this right to all resident aliens.

Chapter VII deals with economic rights, namely the right to take part in profitable activities, as well as participating in specific economic activities. International law expressly admits the possibility of developing countries excluding aliens from this category. It was observed though, that not only developing countries but also developed countries tend to exclude aliens from the exercise of these rights. Additionally, as the right to own private property is not entirely granted to aliens, this has also influence over this category. Notwithstanding, it was also noted that recently the leg-

isolation of various foreign countries has been changed to admit the participation of aliens in economic activities. Additionally, as regards the enjoyment of these rights resident aliens are treated more favorably than non-resident aliens.

Chapter VIII discusses the political rights, that is, the right to vote and be elected, the right to access to public jobs and the right to exercise certain functions. These rights have been traditionally denied to aliens in accordance with international law patterns. International conventions clearly exclude aliens from benefiting from these rights. Along these lines, the great majority of countries grant these rights only to nationals, despite the existence of a rising number of exceptions also regarding resident aliens, mainly at local level.

Chapter IX is dedicated to the analysis of public rights, the right to freedom of movement, the right to freedom of expression and the right to freedom of religion. The right to associate, the right to meet and the right to strike are also included in this category. These rights demand an attitude of non-action, a neutral stance, from the State in order to guarantee their implementation and are declared, as a rule, in the public legislation of the States. These rights also have been traditionally limited in relation to aliens. The right to freedom of movement across national boundaries is not granted to them, neither by international instruments nor by domestic legislation of the States as only nationals have the right to enter their country of nationality. The right to leave is guaranteed to nationals and aliens alike.

As regards the right to freedom of expression, it was observed that international law clearly grants this right to everyone, except for reasons of public policy, public health, morals and national security. However, at domestic level, this right is generally denied to aliens and sometimes they may even be subject to expulsion for having exercised their right to freedom of expression. These restrictions imposed by the legislation of several countries are entirely contrary to international law patterns, for this right can only be limited under exceptional and justifiable circumstances.

The right to freedom of religion is granted to everyone under international law and should suffer no limitations, save for exceptional reasons. Domestic legislation also does not differentiate between nationals and aliens with regard to the enjoyment of this right.

The right to associate is also granted to everyone under international law instruments, specifically if the goal of the association is to obtain social benefits. Domestic legislation, however, does not assure this right broadly to both nationals and aliens alike, which can be deemed as contrary to international law patterns, if these prohibitions are not specific and justified.

As regards the right to assemble, international law also grants it to everyone. Similarly to what happens to the right to associate, it is also not entirely respected under the domestic legislation of the great majority of countries.

The right to strike is not widely protected as such under international instruments. It was observed that the domestic legislation of many States allows for expulsion of aliens because of participation in strikes. As there is no clear rule in international law concerning the existence and contents of this right, legislation of those States which allows for expulsion cannot be understood *prima facie* as contrary to international law patterns.

Chapter X deals with procedural rights, the right to due process of law, the right to access to courts, the right to a lawyer and the right to judicial review, in the scope of

immigration cases as well as in other situations. Some of these rights are granted to everyone, such as the right to due process of law, but only in the sphere of criminal actions under international law. With regard to civil and administrative cases, international law establishes a clear rule which grants to everyone, aliens included, the right to a public hearing and access to competent courts (not necessarily judicial).

It was observed that the great majority of countries do not differentiate between nationals and aliens in relation to some of these rights but do differentiate as regards others. For instance, as regards the right to a lawyer, not all countries grant to aliens the right to free legal assistance; as regards *causio judicatum solvi*, many countries demand aliens to present this security deposit, and in relation to the right to know the allegations against oneself, as many countries do not grant to aliens the right to an interpreter, the right to due process and access to courts remain somewhat futile or at least difficult to be put into practice.

Finally, it can be concluded that there are three major categories of rights, as regards the rights of aliens, as follows:

- 1) Rights which cannot be denied to aliens under any circumstances: fundamental rights (as a category) and the right to be treated as a person before the law. As regards this category there should also be no difference of treatment between resident and non-resident aliens.
- 2) Rights which should be granted to aliens as a rule, but as they admit limitations to their enjoyment, States may deny these rights, if this denial can be justified. It should be observed that some rights included in this category receive a higher degree of compliance both under international and domestic law than others: procedural rights (as a category); religious freedom; freedom of expression; right to family life; social rights (as a category); right to enjoy private property; right to assemble; right to meet; right to leave a country; right to freedom of movement within national boundaries and the right to strike. Within this category it should also be observed that resident aliens are treated differently than non-resident aliens, receiving more guarantees as regards most of these rights.
- 3) Rights which are not granted to aliens under international law: political rights (as a category); right to free movement across national boundaries- i.e.- right to enter a country; right to own property and economic rights (as a category). As such, States may deny these rights to aliens without the need to justify their denial. It should be observed though, that the domestic law of some States is already granting some of these rights to resident aliens, such as some political rights at local level, the right to enter the country of residence, as well as economic rights, in accordance with local legislation and bilateral treaties. Some years from now, if this favorable trend towards aliens shows widespread acceptance, it may become customary international law.

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## Treaties Cited

STATUS – 1999

Name	Place	Date of Approval	Countries
African Charter on Human and People's Rights [African Charter]	Banjul	June 26, 1981	<i>Parties:</i> Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Congo Dem. Rep., Djibouti, Egypt, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharan Arab Democratic Republic, Sao Tome, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe
American Convention on Human Rights [American Convention]	San Jose	Nov.22, 1969	Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad e Tobago, Uruguay, Venezuela.
UNESCO Convention Against Discrimination in Education	Paris	Dec.14, 1960	Albania, Algeria, Argentina, Armenia, Australia, Barbados, Belarus, Belize, Benin, Brazil, Bulgaria, Bosnia, Brunei, Central African Rep., Chile, China, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, Finland, France, Georgia, Germany, Guatemala, Guinea, Hungary, Indonesia, Iran, Iraq, Israel, Italy, Jordan, Kuwait, Kyrgyzstan, Lebanon, Liberia, Libya, Luxembourg, Macedonia, Madagascar, Malta, Mauritius, Moldova, Mongolia, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Romania, Russia, St. Vincent, Saudi Arabia, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Spain, Sri Lanka, Swaziland, Sweden, Tajikistan, Tanzania, Tunisia, Uganda, Ukraine, United Kingdom, Uzbekistan, Venezuela, Vietnam (South), Yugoslavia.

<i>Name</i>	<i>Place</i>	<i>Date of Approval</i>	<i>Countries</i>
Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment	New York	Dec. 10, 1984	Afghanistan, Albania, Algeria, Antigua & Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belize, Benin, Bolivia, Bosnia-Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Congo Dem. Rep., Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Indonesia, Israel, Italy, Ivory Coast, Jordan, Kazakhstan, Kenya, Korea Rep., Kuwait, Kyrgyzstan, Latvia, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malawi, Mali, Malta, Mauritius, Mexico, Moldova, Monaco, Morocco, Namibia, Nepal, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Saudi Arabia, Senegal, Seychelles, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Togo, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, USA, Uruguay, Uzbekistan, Venezuela, Yemen, Yugoslavia.
Convention for the Protection of Human Rights and Fundamental Freedoms	Rome	Nov. 4, 1950	Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.
Convention on the Elimination of All Forms of Discrimination against Women [The UN Convention on the Elimination of Discrimination against Women]	New York	Dec. 18, 1979	Albania, Algeria, Andorra, Angola, Antigua & Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belarus, Belize, Belgium, Benin, Bhutan, Bolivia, Bosnia, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Rep., Chad, Chile, China, Colombia, Comoros, Congo, Congo Dem. Rep., Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Erythrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Korea (South), Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi,

Name	Place	Date of Approval	Countries
			Malaysia, Maldives, Mali, Malta, Mauritius, Mexico, Moldova, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Papua New-Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Rwanda, Saint Kitts, Saint Lucia, Saint Vincent, Samoa, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Tajikistan, Tanzania, Thailand, Togo, Trinidad e Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Yugoslavia, Zambia, Zimbabwe.
Convention on the Nationality of Women (OAS)	Montevideo	Dec. 26, 1933	Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, USA, Uruguay, Venezuela.
Convention on the Reduction of Statelessness	New York	Aug. 30, 1961	Armenia, Australia, Austria, Azerbaijan, Bolivia, Bosnia, Canada, Costa Rica, Denmark, Germany, Ireland, Kiribati, Latvia, Libya, Netherlands, Niger, Norway, Sweden, UK
Convention on the Rights of the Child	New York	Nov. 20, 1989	Afghanistan, Albania, Algeria, Andorra, Angola, Antigua & Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Rep., Chad, Chile, China, Colombia, Comoros, Congo, Congo Dem. Rep., Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Erythrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Korea (North), Korea (South), Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Moldova, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Niue, Norway, Oman, Palau, Pakistan, Panama, Papua New Guinea, Paraguay, Peru,

Name	Place	Date of Approval	Countries
			Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, St. Christopher, Saint Lucia, Saint Vincent, Samoa, San Marino, Sao Tome, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, Togo, Tonga, Trinidad & Tobago, Tunisia, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, UK, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Yugoslavia, Zambia.
Convention relating to the Status of Refugees	Geneva	July 28, 1957	Albania, Algeria, Angola, Antigua & Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Belgium, Belize, Benin, Bolivia, Bosnia, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Cambodia, Canada, Central African Rep., Chad, Chile, China, Colombia, Congo, Congo Dem. Rep., Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea Bissau, Haiti, Holy See, Honduras, Hungary, Iceland, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kazakhstan, Kenya, Korea (South), Kyrgyzstan, Lesotho, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Mali, Malta, Mauritania, Monaco, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Romania, Russian Federation, Rwanda, Saint Vincent, Samoa, Sao Tome, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sudan, Suriname, Sweden, Switzerland, Tajikistan, Tanzania, Togo, Tunisia, Turkey, Tuvalu, Uganda, United Kingdom, Uruguay, Yemen, Yugoslavia, Zambia, Zimbabwe.
Convention relating to the Status of Stateless Persons [The 1954 Convention of Stateless]	New York	Sept. 28, 1956	<p><i>Parties:</i> Algeria, Antigua &amp; Barbuda, Argentina, Armenia, Australia, Azerbaijan, Barbados, Belgium, Bolivia, Bosnia, Botswana, Brazil, Costa Rica, Croatia, Denmark, Ecuador, Fiji, Finland, France, Germany, Greece, Guinea, Ireland, Israel, Italy, Kiribati, Lesotho, Liberia, Libya, Luxembourg, Macedonia, Netherlands, Norway, Korea (South), Slovenia, Spain, Sweden, Switzerland, Trinidad &amp; Tobago, Tunisia, Uganda, UK, Yugoslavia, Zambia, Zimbabwe.</p> <p><i>Signatories:</i> Brazil, Colombia, El Salvador, Guatemala, Holy See, Honduras, Liechtenstein, Philippines.</p>

Name	Place	Date of Approval	Countries
Discrimination in Employment and Occupation Convention (ILO111)	Geneva	June 25, 1958	Afghanistan, Albania, Algeria, Angola, Antigua & Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Rep., Chad, Chile, Colombia, Congo Dem. Rep., Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Guinea Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Jordan, Korea (South), Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libya, Lithuania, Madagascar, Malawi, Mali, Malta, Mauritania, Mexico, Moldova, Mongolia, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, Rwanda, St. Lucia, San Marino, Sao Tome, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Togo, Trinidad & Tobago, Tunisia, Turkey, Turkmenistan, Ukraine, UK, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Yugoslavia, Zambia, Zimbabwe.
European Convention on Social Security	Strasbourg	April 16, 1968	Belgium, Cyprus, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, UK, Turkey.
Fourth Protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms [Fourth Protocol to the European Convention]	Strasbourg	Sept. 16, 1963	Albania, Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Sweden, Ukraine. Signatories: Bulgaria, Estonia, Lithuania, Poland, Romania, Slovenia, Spain, Turkey, UK.
Freedom of Association and Protection of the right to Organize Convention (ILO87)	Geneva	July 9, 1948	Albania, Algeria, Antigua & Barbuda, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia, Botswana, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Rep., Chad, Chile, Colombia, Comoros, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador,

<i>Name</i>	<i>Place</i>	<i>Date of Approval</i>	<i>Countries</i>
			Egypt, Estonia, Ethiopia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kuwait, Kyrgyzstan, Latvia, Lesotho, Liberia, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Mali, Malta, Mauritania, Mexico, Moldova, Mongolia, Mozambique, Myanmar, Namibia, Netherlands, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Rwanda, San Marino, Sao Tome, St. Lucia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Togo, Trinidad & Tobago, Tunisia, Turkey, Turkmenistan, Ukraine, UK, Uruguay, Venezuela, Yemen, Yugoslavia, Zambia.
Charter of the United Nations [UN Charter]	San Francisco, CA	June 26, 1945	<p><i>Original members:</i> Argentina, Australia, Belarus, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Rep., Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Russia, Saudi Arabia, South Africa, Syria, Turkey, Ukraine, United Kingdom, USA, Uruguay, Venezuela, Yugoslavia.</p> <p><i>Non-signatories admitted under art. 4:</i></p> <p>Afghanistan, Albania, Algeria, Andorra, Angola, Antigua &amp; Barbuda, Armenia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Benin, Bhutan, Bosnia, Botswana, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Rep., Chad, Comoros, Congo, Congo Dem. Rep., Croatia, Cyprus, Czech Republic, Djibouti, Dominica, Equatorial Guinea, Erythrea, Estonia, Fiji, Finland, Gabon, Gambia, Georgia, Germany, Ghana, Grenada, Guinea, Guinea Bissau, Guyana, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Korea (North), Korea (South), Kuwait, Kyrgyzstan, Laos, Latvia, Lesotho, Libya, Liechtenstein, Lithuania, Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Micronesia, Moldova, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Niger, Nigeria, Oman, Pakistan, Palau, Papua New Guinea, Portugal, Qatar, Romania, Rwanda, St. Kitts &amp; Nevis, St. Lucia, St. Vincent &amp; Grenadines, Samoa,</p>

Name	Place	Date of Approval	Countries
			San Marino, Sao Tome, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Tajikistan, Tanzania, Thailand, Togo, Trinidad & Tobago, Turkmenistan, Tunisia, Uganda, United Arab Emirates, Uzbekistan, Vanuatu, Vietnam, Yemen, Zambia, Zimbabwe.
Convention on the Nationality of Married Women	New York	Feb. 20, 1957	Albania, Antigua & Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Barbados, Belarus, Bosnia, Brazil, Bulgaria, Canada, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Rep., Ecuador, Fiji, Finland, Germany, Ghana, Guatemala, Hungary, Iceland, Ireland, Israel, Jamaica, Jordan, Kyrgyzstan, Latvia, Lesotho, Libya, Luxembourg, Macedonia, Malawi, Malaysia, Mali, Malta, Mauritius, Mexico, New Zealand, Nicaragua, Norway, Poland, Romania, Russia, Saint Lucia, St. Vincent & Grenadines, Sierra Leone, Singapore, Slovakia, Slovenia, Sri Lanka, Swaziland, Sweden, Tanzania, Trinidad & Tobago, Tunisia, Uganda, Ukraine, Venezuela, Yugoslavia, Zambia, Zimbabwe.
ILO Convention #97 on Migrant Workers of 1949		July 1, 1949	Algeria, Bahamas, Barbados, Belgium, Belize, Bosnia, Brazil, Burkina Faso, Cameroon, Cuba, Cyprus, Dominica, Ecuador, France, Germany, Grenada, Guatemala, Guyana, Israel, Italy, Jamaica, Kenya, Macedonia, Malawi, Malaysia, Mauritius, Netherlands, New Zealand, Nigeria, Norway, Portugal, St. Lucia, Slovenia, Spain, Tanzania, Trinidad & Tobago, UK, Uruguay, Venezuela, Yugoslavia, Zambia.
International Convention on the Elimination of All forms of Racial Discrimination [The UN Convention Against Racial Discrimination]	New York	March 7, 1966	Afghanistan, Algeria, Antigua&Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Bolivia, Bosnia, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Rep., Chad, Chile, China, Colombia, Congo, Congo Dem. Rep., Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Holy See, Hungary, Iceland, India, Iran, Iraq, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Korea (South), Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger,

Name	Place	Date of Approval	Countries
			Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, Rwanda, St. Lucia, St. Vincent & Grenadines, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Togo, Tonga, Trinidad & Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, UK, USA, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Yugoslavia, Zambia, Zimbabwe.
Cartagena Agreement – Agreement for Sub-regional Integration (Andean Common Market)	Cartagena	May 26, 1969	Bolivia, Colombia, Ecuador, Peru AD: Venezuela (AD means adhesion)
Charter of the Organization of American States	Bogota	April 30, 1948	Antigua, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Rep., Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines, Suriname, Trinidad & Tobago, USA, Uruguay, Venezuela.
Code of Private International Law (Bustamante Code)	Havana	Feb.13, 1928	Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Rep., Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Venezuela.
Convention on Certain Questions Relating to the Conflict of Nationality Laws [Hague Convention on Nationality]	The Hague	April12, 1930	Australia, Belgium, Brazil, China, Cyprus, Fiji, India, Kiribati, Lesotho, Malta, Mauritius, Monaco, Netherlands, Norway, Pakistan, Poland, Swaziland, Sweden, UK, Zimbabwe.
Convention on the Status of Aliens	Havana	Feb.20, 1928	Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Rep.,Ecuador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Peru, USA, Uruguay.
Equality of Treatment (Social Security) Convention ILO118	Geneva	June28, 1962	Bangladesh, Barbados, Bolivia, Brazil, Cape Verde, Central African Rep., Congo Dem. Rep., Denmark, Ecuador, Egypt, Finland, France, Germany, Guatemala, Guinea, India, Iraq, Ireland, Israel, Italy, Jordan, Kenya, Libya, Madagascar, Mauritania, Mexico, Netherlands, Norway, Pakistan, Philippines, Rwanda, Suriname, Sweden, Syria, Tunisia, Turkey, Uruguay, Venezuela.

Name	Place	Date of Approval	Countries
European Convention on Nationality (ETS 166)		Nov. 6, 1997	Austria, Moldova, Slovakia.
European Convention on the Legal Status of Migrant Workers	Strasbourg	Nov. 24, 1977	France, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Turkey.
European Convention on the Social protection of Farmers	Strasbourg	May 6, 1974	Austria, Belgium, Italy, Liechtenstein, Luxembourg, Netherlands, Spain, Switzerland, UK.
European Social Charter	Turin	Oct. 18, 1961	Austria, Belgium, Cyprus, Czech Rep., Denmark, France, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Turkey, UK.
Hague Convention on Civil Procedure	Hague	March 1, 1954	Argentina, Armenia, Austria, Belarus, Belgium, Bosnia, Croatia, Czech Republic, Denmark, Egypt, Finland, France, Germany, Holy See, Hungary, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Luxembourg, Macedonia, Moldova, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, Turkey, Uzbekistan.
Hague Convention on Access to Courts	Hague	Oct. 25, 1980	Croatia, Spain, Estonia, Erydn, Finland, France, Netherlands, Poland, Slovenia, Sweden, Switzerland, Belarus, Bosnia.
International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families [The UN Convention on Migrant Workers]	New York	Dec. 18, 1990	Azerbaijan, Bosnia, Colombia, Egypt, Mexico, Morocco, Philippines, Seychelles, Sri Lanka, Uganda.
International Convention on the Suppression and Punishment of the crime of Apartheid	New York	Nov. 30, 1973	Afghanistan, Algeria, Antigua & Barbuda, Argentina, Armenia, Azerbaijan, Bahamas Bahrain, Bangladesh, Barbados, Belarus, Benin, Bolivia, Bosnia, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Rep., Chad, China, Colombia, Congo Dem. Rep., Costa Rica, Croatia, Cuba, Czech Rep., Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guyana, Haiti, Hungary, India, Iran, Iraq, Jamaica, Jordan, Kuwait, Kyrgyzstan, Laos, Latvia, Lesotho, Liberia, Libya,

Name	Place	Date of Approval	Countries
			Macedonia, Madagascar, Maldives, Mali, Mauritania, Mexico, Mongolia, Mozambique, Namibia, Nepal, Nicaragua, Niger, Nigeria, Oman, Panama, Pakistan, Peru, Philippines, Poland, Qatar, Romania, Russia, Rwanda, St. Vincent & Grenadines, S. Tome & Principe, Senegal, Seychelles, Slovakia, Slovenia, Somalia, Sri Lanka, Sudan, Suriname, Syria, Tanzania, Togo, Trinidad & Tobago, Tunisia, Uganda, Ukraine, United Arab Emirates, Venezuela, Vietnam, Yemen, Yugoslavia, Zambia, Zimbabwe.
International Covenant on Civil and Political Rights [CPR Covenant]	New York	Dec. 16, 1966	Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Barbados, Belarus, Belize, Belgium, Benin, Bolivia, Bosnia, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Rep., Chad, Chile, Colombia, Congo, Congo Dem. Rep., Costa Rica, Croatia, Cyprus, Czech Rep., Denmark, Dominica, Dominican Rep., Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Greece, Grenada, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Korea (North), Korea (South), Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Mali, Malta, Mauritius, Mexico, Moldova, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Rwanda, San Marino, St. Vincent & Grenadines, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, Togo, Trinidad & Tobago, Tunisia, Turkmenistan, Ukraine, UK, USA, Uganda, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Yugoslavia, Zaire, Zambia, Zimbabwe.
International Covenant on Economic, Social and Cultural Rights [ESCR Covenant]	New York	Dec. 19, 1966	Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Rep., Chad, Chile, Colombia, Congo, Congo Dem. Rep., Costa Rica, Croatia, Cyprus, Czech Rep., Denmark, Dominica, Dominican Rep., Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Greece,

Name	Place	Date of Approval	Countries
			Grenada, Guatemala, Guinea Bissau, Guinea, Guyana, Honduras, Hungary, Iceland, India, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Korea (North), Korea (South), Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Malta, Mali, Malta, Mauritius, Mexico, Moldova, Monaco, Mongolia, Morocco, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Rwanda, St. Vincent & Grenadines, San Marino, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, Solomon Islands, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Togo, Trinidad & Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, UK, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Yugoslavia, Zambia, Zimbabwe.
Maintenance of Social Security Rights Convention (ILO157)	Geneva	June 21, 1982	Philippines, Spain, Sweden.
Migrant Workers Convention (ILO143)	Geneva	June 24, 1975	Benin, Bosnia, Burkina Faso, Cameroon, Cyprus, Guinea, Italy, Kenya, Macedonia, Norway, Portugal, San Marino, Slovenia, Sweden, Togo, Uganda, Venezuela, Yugoslavia.
Montevideo Treaty on the Rights and Duties of the States	Montevideo	Dec. 26, 1933	Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Rep., Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, USA, Venezuela.
Ninth Protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	Rome	Nov. 6, 1990	Austria, Belgium, Cyprus, Czech Rep., Denmark, Estonia, Finland, Germany, Hungary, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Sweden, Switzerland.
Protocol Relating to a Certain Case of Statelessness [Protocol on Statelessness]	The Hague	April 12, 1930	Australia, Brazil, Chile, China, Cyprus, El Salvador, Fiji, India, Jamaica, Kiribati, Lesotho, Macedonia, Malawi, Malta, Mauritius, Netherlands, Niger, Pakistan, Poland, South Africa, UK, Yugoslavia, Zimbabwe.
Protocol Relating to Military Obligations in Certain Cases of Double Nationality	The Hague	April 12, 1930	Australia, Austria, Belgium, Brazil, Colombia, Cuba, Cyprus, El Salvador, Fiji, India, Kiribati, Lesotho, Malawi, Malta, Mauritania, Mauritius, Netherlands, Niger, Nigeria, South Africa, Swaziland, Sweden, UK, USA, Zimbabwe.

<i>Name</i>	<i>Place</i>	<i>Date of Approval</i>	<i>Countries</i>
Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms	Paris	March 20, 1952	Albania, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Rep., Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, UK.
Second Protocol to the 1950 European Convention for the Protection of human Rights and Fundamental Freedoms	Strasbourg	May 6, 1963	Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Rep., Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, San Marino, Spain, Sweden, Switzerland, Turkey, Ukraine.
Seventh Protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	Strasbourg	Nov.22, 1984	Albania, Austria, Croatia, Czech Rep., Denmark, Estonia, Finland, France, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Moldova, Norway, Romania, Russia, San Marino, Slovakia, Slovenia, Sweden, Switzerland, Ukraine.
Sixth Protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms	Strasbourg	April28, 1983	Andorra, Austria, Belgium, Bulgaria, Croatia, Czech Rep., Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Netherlands, Norway, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, UK.
Special Protocol Concerning Statelessness	The Hague	April12, 1930	Australia, Belgium, Brazil, China, El Salvador, Fiji, India, Pakistan, South Africa, UK.
The European Convention on Establishment [ETS 019]	Paris	Dec.13, 1955	Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey, UK.
Vienna Convention on the Law of Treaties [Vienna Convention]	Vienna	May23, 1969	Algeria, Argentina, Australia, Austria, Barbados, Belarus, Belgium, Bosnia, Bulgaria, Cameroon, Canada, Central African Rep., Chile, China, Colombia, Congo, Congo Dem. Rep., Costa Rica, Croatia, Cuba, Cyprus, Czech Rep., Denmark, Estonia, Egypt, Finland, Georgia, Germany, Greece, Guatemala, Haiti, Holy See, Honduras, Hungary, Italy, Ivory Coast, Jamaica, Japan, Kazakhstan, Kenya, Korea (South), Kuwait, Kyrgyzstan, Laos, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Malawi, Malaysia, Mali, Mauritius, Mexico,

Name	Place	Date of Approval	Countries
			Moldova, Mongolia, Morocco, Myanmar, Nauru, Netherlands, New Zealand, Niger, Nigeria, Oman, Panama, Paraguay, Philippines, Poland, Russia, Rwanda, St. Vincent & Grenadines, Senegal, Slovakia, Slovenia, Solomon Islands, Spain, Sudan, Suriname, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Togo, Tunisia, Turkmenistan, Ukraine, UK, Uruguay, Uzbekistan, Yugoslavia.

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