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THE MINIMUM STANDARD  
OF INTERNATIONAL LAW  
APPLIED TO ALIENS

THÈSE  
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## VI. THE THEORY OF "NATIONAL TREATMENT"

### 1. *The Theory*

The doctrine of "national treatment" or equality doctrine sums up the rules of treatment of aliens by saying that the international obligations of the State are discharged from the moment that it has put the alien on a footing of complete equality in everything pertaining to civil or private rights. This theory starts from the major postulate that the alien must accept the legal conditions which he finds in the country of residence, and that neither he nor his government can justifiably complain if he is accorded, like nationals, the benefit or application of these conditions. Indeed any other system is considered by de Louter <sup>1)</sup> to constitute a

"...privilège exorbitant et funeste, essentiellement favorable aux Etats puissants, et nuisibles aux nations faibles, établir une inégalité injustifiable entre les nationaux et les étrangers, porter une profonde atteinte à la juridiction territoriale."

At first sight this opinion strikes one as being a reasonable expression of a certain state of affairs which is likely to exist in international relations. Many authorities of great learning and competence have adhered to and supported this opinion, which makes it necessary to devote great attention to it.

The problem of the treatment of aliens was strongly disputed, particularly in connection with the Rumanian Agrarian Reform. The details of this dispute between Rumania and Hungary are of no great interest to us in this connection, but the situation will nevertheless be worth briefly outlining.

By the treaty of Trianon, ratified on July 21, 1921, the province of Transylvania and other Hungarian territories were transferred to the Rumanian State. With respect to those Hungarians domiciled in these provinces, ceded to Rumania, the following arrangement was made: They were given the privilege to opt for Hungarian nationality or to remove their domicile within a year. But they were entitled to retain their immovable property. Those Hungarians, not domiciled in the provinces, but owners of real property therein, could notwithstanding the provisions for confiscation, retain their property as well.

<sup>1)</sup> De Louter, vol. I, pp. 296—298

The dispute arose when Rumania enacted on July 30, 1921, the so-called Agrarian Reform Law for Transylvania. The Hungarians in these provinces were deprived of their property and were remitted to the acceptance of Rumanian bonds in paper lei, estimated to have a value of approximately one per cent of the original gold value of the property. <sup>1)</sup>

In some points, the dispute presented rather knotty problems to the lawyer, and the parties tried to exploit this situation to their advantage. Almost every lawyer of international standing and who was an authority on international law was consulted by either government and their opinions represent a mine of information, especially as to the doctrinal approach of the treatment of aliens. <sup>2)</sup>

The theory of "national treatment" has been the Latin-American thesis for many years. We shall therefore start with the exposition of the theory by taking into consideration the writings of one of their eminent representatives, M. Alvarez. <sup>3)</sup>

Usually, as a starting point of any discussion of the equality doctrine, the conditions of civilization and also to a limited extent the geographical conditions of the different continents and the different regions of continents, are referred to as playing an important role in the formation of the policy towards foreigners.

For that reason the States of western civilization, in Europe as well as in America, insisted during the 19th century, with regard to the treatment of their nationals in countries of the orient (mainly in Turkey and in countries of Eastern Asia), that they should enjoy the same situation as they do in their own country, that is to say, that these States should recognize them as possessing rights which their own nationals could not dream of. Very often these demands were made the object of formal treaties, called "capitulations".

The countries of eastern civilization mostly objected to such a preferential treatment but were seldom in a position to satisfy the legitimate, though sometimes perhaps exaggerated, demands of the western powers otherwise than through this mode. The capitulations

<sup>1)</sup> Borchard, *Opinion on the Rumanian-Hungarian Dispute*, La Réforme Agraire, vol. I, p. 321—322

<sup>2)</sup> A collection of these opinions will be found in *La Réforme Agraire Roumaine en Transylvanie*, 2 vols. & *La Réforme Agraire en Roumanie 1927-28*, 2 vols.

<sup>3)</sup> *Le Droit International Américain* and in *La Réforme Agraire 1927*, pp. 35—48.

have mostly gone by now, but there remains the resentment which, during the period of the slow awakening of the national spirit which we now witness, brings along as a characteristic sign a violent hatred of everything which is foreign.

In the mutual relationship between the States of the western world the question of the treatment of aliens was left exclusively to the internal legislation of each State. In this respect, however, there was a difference (which perhaps even prevails today) between Europe and America. <sup>1)</sup>

Half a century ago, in most of the European States, even in the most advanced, the alien was in a condition much inferior to that of the national; for example, he was not allowed to possess real property.

It is claimed to have been, and still to be, different in America. Since these States, especially those of South America, have gained their freedom and independence, the alien is vested with the same rights as the national, which he can defend before the same courts and judicial agencies without any restriction. But, on the other hand, the South American States have never, under any pretext or motive, adhered to the opinion that the alien might have, under certain circumstances, more rights than the national himself. The alien has to submit himself to the conditions which prevail in the country as do the nationals, and his State of origin cannot intervene in his favour unless he is prevented from having recourse to the judicial authorities or if the latter treat him with gross injustice, notably because of the fact that he is a foreigner. <sup>2)</sup>

It is argued then that, if the alien in America cannot under any circumstances be in a better position than the national, there is no reason whatsoever that things should be different in Europe.

To admit that the alien may have more rights than the national of the State, where he enjoys hospitality, would be an insult to the nationals. If, for example, the State had to pay indemnities to the alien which it will deny to the nationals, the latter would be treated in an unjust manner and could legitimately demand to be indemnified themselves.

Or, to go further, if an alien could demand indemnities for damages created by a legislative disposition, then the State would

<sup>1)</sup> Alvarez, *La Réforme Agraire*, p. 41

<sup>2)</sup> Alvarez, *op. cit.*, p. 41

no longer be sovereign in its territory and its power and free will would in the end be subject to a foreign authority. <sup>1)</sup>

The "national treatment" seems therefore to be, in the eyes of many authors, the only principle which could guide the relations between the State and the alien in the spirit of positive international law. Not only can the alien have no more rights than the national, but even equality with the national is considered to be the maximum of treatment the alien can expect and to be likely to remain an idealistic postulate. <sup>2)</sup>

It would be easy to quote copious authorities in support of the equality doctrine. <sup>3)</sup> Most authors stress, however, the negative element of it by making it understood that it would mean that the treatment was to be not as good, but as bad as that of the national. Triepel, on the other hand, was of the opposite opinion and maintained:

"Nun herrscht weder in Theorie noch in Praxis darüber Zweifel, dass die Untertanen fremder Staaten, die sich mit unserem Willen bei uns aufhalten, auch ohne besonderen Staatsvertrag denselben Schutz gegenüber Verletzung und Gefährdung erhalten müssen, wie unsere Staatsgenossen."

## 2. *The Theory's Application in International Practice*

### a. *Jurisdiction*

The importance of any theory, however strongly it may be supported, can be measured only by the influence it has on State practice. Quantity must not be mistaken for quality.

It is evident that the equality doctrine can claim heavy support from official circles in many nations on account of its being very much in line with the traditional conception of sovereignty. It is consequently not too difficult to find numerous statements and judicial utterances in its support. A number of judicial statements will be enumerated forthwith. It is important to bear in mind that, without going into the merits of each case, a fragmentary quotation

<sup>1)</sup> Alvarez, *op. cit.*, p. 42

<sup>2)</sup> Pic, *Un grand conflit intern.*, *La Réforme Agraire* 1927, pp. 246-247

<sup>3)</sup> Berthélemy, *Consultation pour l'Etat Roumain*, *La Réforme* 1927, p. 107; Strupp, *Le litige Roumano-Hongrois*, *La Réforme* 1927, p. 450; *Das völkerrechtliche Delikt*, pp. 118-119; Sibert, *Remarques*, *La Réforme* 1928, pp. 350-351; Yepes, *El Panamericanismo*, p. 107; Nys, *Le droit intern.*, p. 266; Calvo, *vol. III*, par. 1278.

of the decision can be very misleading. Sometimes statements which seem to express a certain opinion when isolated may mean something quite different in their actual place. This gives cause for abuse, and sometimes such a procedure is resorted to by lawyers before tribunals, and sometimes even by doctrinal writers, to strengthen a weak case.

Nevertheless, we must refrain from giving full details about each case, because this certainly would lead us too far and obscure the line of the argument. It has been attempted, however, to be as fair as possible in order not to be accused of distortion.

The equality doctrine was often advocated in cases during the 19th century. So far example in the case of *Dr. Baldwin's Minatitlan Claims* before a United States-Mexican Claims Commission in 1839. <sup>1)</sup> The Mexican Commissioners contended as to the law of the case that where an American citizen voluntarily placed himself under the municipal laws of another country, he must take them as they were, and had no greater right to complain than the Mexicans themselves if the laws should be bad and imperfectly administered.

Another and very well-known case is that of the *British Claims against Tuscany and the Kingdom of Naples*. Some Englishmen suffered damages during the political troubles in Italy in 1849 and they made representations to their government with the view of being compensated for their loss. Great Britain thereafter approached the Austrian government through diplomatic channels, responsibility being thought to be involved because of its political and constitutional ties with Italy.

Prince Schwartzberg replied in a note to the British government of April 14, 1850, that he was very much astonished that there was a State which thought fit to claim for its subjects, established in a foreign country, rights and privileges which the nationals themselves did not possess. He continued that, however disposed the civilized nations of Europe might be to extend the limits of the right to protection, they would never come to the point of according to strangers privileges that the territorial laws did not guarantee to nationals. <sup>2)</sup>

It was intended thereafter to submit the dispute to the Russian Cabinet for arbitration. Count Nesselrode, however, adhered firmly to the view expressed by Prince Schwartzberg and declared that

<sup>1)</sup> Moore, Arbitrations, pp. 3238 et seq.

<sup>2)</sup> Calvo, vol. III, p. 144

to accept the role of arbiter would mean to admit doubts as to the validity of this principle, an act for which he could in no way take the responsibility. <sup>1)</sup>

These statements had their repercussions. Sir Henry Strong referred to them in the matter of the claim of *Rosa Gelbtrunk v. Salvador*. *Inter alia* he said:

“A citizen or subject of one nation, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own, is to be considered as having cast in his lot with the subjects or citizens of the State in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that State, so far as the police regulations and other advantages are concerned, on the other hand he becomes liable to the political vicissitudes of the country in which he thus has a commercial domicile in the same manner as the subjects or citizens of that State are liable to the same. The State to which he owes national allegiance has no right to claim for him as against the nation in which he is resident any other or different treatment. . . . that which the latter country metes out to its own subjects or citizens.” <sup>2)</sup>

A number of Secretaries of State of the United States of America adhered *grosso modo* to this conception, too. <sup>3)</sup> The most noteworthy expression of it was given by Mr. Webster, Secretary of State in the case of the claims of Spain against the United States following the disorders in New Orleans in 1851, during which damages were inflicted to the body and property of some Spaniards. Mr. Webster refuted the Spanish claim, arguing that aliens wishing to establish themselves in the country have to submit themselves *ipso facto* to its laws and tribunals and the Federal Government could not be held responsible for a mutiny. He, however, awarded compensation to the Spanish consul, who had also suffered damages, considering that, by reason of his official character, he was particularly placed under the protection of the United States. The Spanish government seems to have been fully satisfied with this settlement. <sup>4)</sup>

<sup>1)</sup> Calvo, vol. III, p. 145

<sup>2)</sup> Ralston, vol. I, p. 477

<sup>3)</sup> Secr. Bayard, Wharton's Digest, vol. II, p. 581; Secr. Marcy, Moore, Digest, vol. IV, p. 13

<sup>4)</sup> Calvo, vol. III, paragraph 1286

An essentially identical opinion was also held by another Secretary of State, although under quite different circumstances.

On February 26, 1923, the government of the United States paid the Norwegian government the amount of the award rendered on October 13, 1922, by the Tribunal of Arbitration, which was established for the purpose of adjusting by arbitration certain claims of Norwegian subjects against the United States arising out of requisitions by the United States Shipping Board Emergency Fleet Corporation. Although the United States government complied with the demands, it felt obliged to make certain reservations and to dissent from the reasons contained in the opinion of the majority of the Tribunal. In a significant passage which is of special interest to us, Secretary Hughes said:

“No such duty to discriminate in favour of neutral aliens is believed to be imposed upon a State by international law. . . . It is the view of this Government that private property having its situs within the territory of a State (and the property here concerned is wholly that of private individual claimants on whose behalf the Kingdom of Norway is merely the international representative), . . . is from the standpoint of international law subject to the belligerent needs of the territorial sovereign quite regardless of the nationality of the owners, provided that in the case of its requisition just compensation be made. Due process of law applied uniformly, and without discrimination to nationals and aliens alike and offering to all just terms of reparation of reimbursement suffices to meet the requirements of international law. . . .”<sup>1)</sup>

All the cases so far quoted are all evidence in support of the contention that this is “a generally recognized rule of international law that a foreigner within a State is subject to its public law, and has no greater rights than the nationals of that country.”<sup>2)</sup>

#### *b. International Legislation*

Besides the judicial expressions of the equality doctrine, the attempts of international legislation have also to be examined to see in how far they give support to it. Indeed, as will be shown, the

<sup>1)</sup> A. J., vol. 17 (1923), pp. 287–290

<sup>2)</sup> *Cadenhead Case*, Am. Br. Claims Arb., 1914, A. J. vol. 8 (1914), pp. 663–665.

equality doctrine has been advocated at international conferences and expressed in the ensuing multilateral conventions and also in the different proposals for the codification of the law of aliens.

Since we have started developing the theory by referring mainly to the opinion and writings of a South American authority, we may as well observe here the same order, because South America was and remains the centre of the propaganda which maintains that the alien can have no different nor greater rights than the national.

The topic of pecuniary claims has always proved to be the most controversial point regarding the treatment of aliens. It is necessary, however, before we start with its exposition, to appreciate that by the term “reclamaciones pecuniarias” the Latin American countries do not mean claims for money damages in the Anglo-American sense of the word, but claims arising out of unpaid bonds and other State contracts. Tort claims are excluded from the classification.<sup>1)</sup> Various forms of protecting the States against possible foreign intervention with the view of collecting debts have been devised and we shall devote our attention to them on a further occasion.

The provision for national treatment was recommended to the governments for adoption by the first Conference of American States, held at Washington in 1889. The United States and with her other countries, however, declined to approve this recommendation or to act upon it.<sup>2)</sup>

The second Conference of 1901 also dealing with the rights of aliens, reaffirmed anew equality of “all civil rights” and denied responsibility with respect to aliens except when there is denial of justice.

After the countries, represented at the Vth Pan-American Conference, held in Santiago in 1923, had agreed in principle to support actively and stimulate all attempts for codification within the framework of the Union, the Secretary of State of the United States, Mr. Hughes, proposed to the Pan-American Union to invite the American Institute of International Law<sup>3)</sup> to study the questions which were deemed to be fit for codification.

The American Institute submitted in 1927 a Project<sup>4)</sup> dealing

<sup>1)</sup> Borchard, A. J., vol. 33 (1939), pp. 272–273

<sup>2)</sup> Borchard, loc. cit., p. 275

<sup>3)</sup> Urrutia, R.G.D.I.P., vol. 35 (1928), pp. 135–136

<sup>4)</sup> A. J., spec. suppl., vol. 20 (1926), pp. 328–329

with the treatment of aliens to the International Commission of Jurists, in session at Rio de Janeiro.

In this Project, the responsibility of States was denied *grosso modo* for damages suffered by aliens for any reason whatsoever. <sup>1)</sup> This naturally is an acceptance of the equality doctrine in its extreme form.

The International Commission of Jurists itself submitted, after deliberation, a Project about the status of Aliens to the VIth International Conference of American States, held in Havana in 1928. The Commission proposed in article 2 of the Project the following rules to the Conference:

“The Nationals of one State who may be found in the territory of other States shall enjoy therein all the individual guarantees and all the civil rights which States grant to their own nationals, with due regard to the prescriptions of their political constitutions and the laws of the State.” <sup>2)</sup>

The Havana Conference finally showed itself also in favour of the doctrine of “national treatment”, as it was proposed to it, but the final formulation was somewhat watered down by amendments and is, as it stands, not half as explicit and uncompromising as before. This might be interpreted as meaning that not all American States indiscriminately belong to its firm supporters.

The Convention, elaborated by the Conference, provides that “aliens are subject, like nationals, to local jurisdiction and laws, due consideration being given to the limitations in conventions and treaties.” <sup>3)</sup> Article 5 establishes that the signatories are obliged to recognize in aliens all the individual guaranties which they admit in favour of nationals and the enjoyment of all essential civil rights, without prejudice, so far as it concerns aliens, to the legal provisions on the exercise of such rights and guaranties. <sup>4)</sup>

The VIIth Conference, held at Montevideo in 1933, adopted, under reservation of the United States and other countries, a treaty on the rights and duties of States which provides in article 9 that “the jurisdiction of the States within their territorial limits applies to all inhabitants, nationals and aliens are subject to the same protection

<sup>1)</sup> A. J., spec. suppl., vol. 23 (1929), p. 232

<sup>2)</sup> A. J., spec. suppl., vol. 23 (1929), p. 233

<sup>3)</sup> L. of N., Tr. Ser. vol. 132, p. 302

<sup>4)</sup> Borchard, loc. cit., p. 275

of the law and the national authorities, and aliens cannot claim rights different or more extensive than those claimed by nationals.” <sup>1)</sup>

A review of the results of the Pan-American Conference, as outlined, shows that the equality doctrine can claim tremendous support in the two Americas. It must also be said, however, that the practical effects of the enumerated decisions and proposals have remained rather small.

The second international event which is of interest to us with regard to the problem under discussion was the Paris Conference for the Treatment of Aliens in 1929. The position seems to have been the following:

In the attempt to fulfil the stipulations of Article 23 Paragraph c.) of the Covenant of the League of Nations, the Council invited the Economic Committee to study the question and to prepare a draft Convention which should institute common guarantees regarding the treatment of aliens.

The thoughts and ideas which were considered to be the correct principles and guiding elements for the preparation of the material to be submitted to a conference are quite significant.

The best and most effective guarantees the States, whose legislation is based on the principle of free activity of their nationals and free disposition of their property, may give the alien, were considered to be the national treatment, that is to say complete assimilation of the rights accorded to the alien with the rights the nationals enjoy according to their legislation. <sup>2)</sup>

Consequently, the framers of the draft convention have observed the equality of treatment as the basic rule, especially equality of treatment between foreigners and nationals in all matters of international trade, with a few expressly mentioned exceptions. It also was intended to secure most-favoured-nation treatment where this is more favourable than national treatment. But the text seems to be somewhat ambiguous in contenting itself with the statement that the former implies the latter: Article 17 said:

“Les dispositions du titre I ci-dessus, qui prévoit expressément l'octroi du traitement national aux Ressortissants des Hautes

<sup>1)</sup> Borchard, loc. cit., pp. 275–276

<sup>2)</sup> Doc. C. 36. M. 21. 1929. II, p. 7



Parties Contractantes impliquent l'octroi inconditionnel du traitement de la nation la plus favorisée." 1)

During the actual Conference various and different opinions were expressed about the ambiguity of the content of this article. The Hungarian Delegate, for example, seemed to be very unsatisfactorily impressed by the combination of national treatment with the most-favoured-nation treatment. 2) It was therefore thought necessary to submit this article to a sub-committee for detailed study and report. This sub-committee, however, found the only way to appease the obvious differences of opinion was to propose that this article be abolished. 3) The Conference followed its advice. 4)

This, however, in any case does not mean that the Conference had in mind to abandon the equality doctrine. It only found it difficult to conciliate the difference of opinion among the delegations when it was expressed in a statement of principle such as Article 17. The expression of the principle remained in quite an unconcealed manner in a number of other articles. 5)

At the Codification Conference of The Hague (1930) which touched on our question when dealing with the "Responsibility of States for Damage done in their Territories to the Persons and Property of Foreigners", the situation was similar at the beginning, but changed during the session.

This was first of all due to the fact that the Rapporteur was a South American, Mr. Guerrero, who naturally strongly defended the equality doctrine in his report to the Sub-Committee. He said therein about the treatment of aliens:

"Here also the will of the community of peoples is clearly defined. It accepts the above-mentioned rights as being the minimum which a State should accord to foreigners in its territory, but it does not thereby recognize the right to claim for the foreigner more favourable treatment than is accorded to nationals. The maximum that may be claimed for a foreigner is civil equality with nationals. This does not mean that a State is obliged to accord such treatment to foreigners unless that obligation has been embodied in a treaty. We thereby infer

1) Conference, p. 377

2) dto. p. 456

3) dto. p. 389

4) dto. p. 390

5) see e.g. arts. 2, 3, 4, 6, 7, 9, 10, 11

that a State goes beyond the dictates of its duty when it offers foreigners a treatment similar to that accorded to nationals. In any case, a State owes nothing more than that to foreigners, and any pretension to the contrary would be inadmissible and unjust both morally and juridically." 1)

Most of the governments to whom the report was submitted for study and observation did not commit themselves in their answers about their attitude towards the theory of national treatment. This is quite understandable because the Commission of Experts wanted to know first of all whether they considered the particular problems of international law ripe for codification. Only the Governments of Chile, San Salvador (the State of origin of Mr. Guerrero) and Roumania more or less openly declared themselves to be in complete agreement with the conclusions of the Guerrero Report.

On a later date, the governments of the States which were to take part in the Codification Conference were asked to express their views on each point of the Bases of Discussion which were destined to serve as foundations for the work of the Conference.

There was only one State left, Chile, which deemed it fit to stress once more the point that no system other than equality of treatment could be accepted. With regard to the answers of the other States, this problem seems to have become somehow lost in the complexity of the problem of State responsibility.

In a declaration the Chilean Government, however, submitted the following general observation to the Preparatory Committee:

"It is inadmissible and impossible to reach conclusions which would grant more favourable treatment to foreigners than to nationals. When the institutions of the State place foreigners on the same footing as nationals in respect of individual guarantees, the acquisition and enjoyment of civil rights, and the right to bring judicial actions before the courts of the country — as is the case in Chile — actions for damages which foreigners may desire to bring against the State, its officials or private individuals should be brought before the competent national authority and claims through the diplomatic channel are only allowable in the case of a denial of justice." 2)

1) L. of N., Doc C, 196.M.70.1927. V., p. 94

2) Bases, vol. III, p. 11

No explicit action was taken by the Conference itself at The Hague which might be considered as direct support of the equality doctrine. It really was not quite its task to do anything in this direction, but, as we shall see, it expressed various opinions touching our question without quite realizing where it stood.

As a last incident of the Conference, a statement made by the Chinese delegate, Dr. C. C. Wu, will be mentioned, which has become famous for its plausible argument. He said: <sup>1)</sup>

“Je voudrais proposer un seul principe bien défini, celui du traitement accordé par une nation à ses propres nationaux. Je ne crois pas, du point de vue de la logique, ni du point de vue de la justice, un pays puisse élever des objections contre l'adoption de ce principe. Lorsqu'un particulier se rend dans un pays étranger, c'est avec une parfaite connaissance des conditions qui y règnent, qu'elles soient meilleurs ou moins bonnes que dans son propre pays. Il les connaît d'avance, aussi bien qu'il connaît le climat du pays et sa situation au point de vue du paludisme, par exemple. Si le but de son voyage est de gagner de l'argent, il se renseigne sur les conditions économiques; si son but est de satisfaire sa curiosité, il se documente sur les caractéristiques du pays au point de vue pittoresque.”

“De même, il sait quelle est la situation en ce qui concerne le maintien de la paix et de l'ordre et l'administration de la justice. Il se rend dans ce pays les yeux ouverts et, d'ailleurs, sans y être invité, car je ne crois pas qu'un pays invite moralement ou légalement, des étrangers à pénétrer sur son territoire; les étrangers s'y rendent de leur propre gré. Pourquoi le gouvernement de ce pays se verrait-il donc imputer à leur égard une responsabilité plus étendue que celle qui lui incombe à l'égard de ses propres nationaux?”

Seventeen countries, mainly lesser States, supported this argument. Twenty-one countries, including all the Great Powers, opposed it as contrary to international law <sup>2)</sup> and on that issue the projected draft convention fell to pieces. <sup>3)</sup>

<sup>1)</sup> Cod. Conf., Actes, vol. 4, p. 187

<sup>2)</sup> loc. cit., p. 188

<sup>3)</sup> Borchard, A.S., Proceedings, 1939, p. 55

Judging from all the evidence collected here to support the equality doctrine, evidence which could easily be extended, the theory enjoys a widespread support. The resistance against any other system seems not so much to be due to a non-recognition of international law in these fields than to a legitimate fear by small nations of an exaggerated use by Great Powers of the right to diplomatic protection. By maintaining strictly that the national treatment is the maximum of good treatment any alien can ask for, they want to protect themselves against encroachments upon their sovereignty by powerful nations which possess the means to bring pressure to bear upon them. It is the unilateral action of one State which seems to frighten the South American States most, the demand of one State of extensive rights for its subjects, residing within their territories which would entail internal complications of a grave nature.

For the same reason, governments often insist on a clause of complete reciprocity in treaties and conventions of friendship and establishment as an additional guarantee to the clause of national treatment. A typical example of this is Article 9 of the Treaty between Austria and Turkey of 1924 <sup>1)</sup> which states that:

“Nationals of each Contracting Party shall enjoy in the territory of the other Party the same treatment as nationals of the country, as regards legal and judicial protection of their person and property.”

The clause of reciprocity may intervene in a positive or in a limiting manner, i.e. it either obliges the States to accord to aliens a certain favourable treatment, or, on the other hand, it allows them to undertake reciprocally restrictive practices. At any rate, it gives the governments a guarantee that nothing will happen which is beyond their control and against which they do not have, by law, the appropriate counter-measures.

<sup>1)</sup> L. of N. Tr. Ser., vol. XXXI, p. 166; see Convention resp. Residence, and Business and Jurisdiction between the British Empire, Italy, Japan, Greece, Roumania, Jougoslavia and Turkey, Lausanne 1923, art. 1: “Application subject to complete reciprocity...” L. of N., Tr. Ser., vol. XXXI, p. 304; dto. Turkey-Poland, 1923, op. cit., vol. XLIV, p. 345; dto. Italy-Jougoslavia 1924, op. cit., vol. LXXXII, p. 443

*c. Correlating Attempts to Restrict Diplomatic Protection*

In the light of these considerations it becomes apparent that national treatment is in the eyes of those States which support it, like the South American States, the last and ultimate concession they are prepared to make in the matter of treatment of aliens; even that concession from their viewpoint is a dangerous one. Not content only to admit national treatment, they go further and try to exclude all possible ways of interference by other States which might have an adverse effect on the upholding of the equality doctrine itself.

Thus various efforts seem to indicate a widespread American desire for a policy which would either greatly narrow or altogether abolish the institution of diplomatic protection.

The Argentine publicist Carlos Calvo is generally credited with being the originator of the idea of overturning the system of guarantees furnished by the institution of diplomatic protection, by proposing that a government's liability can be not greater towards aliens than that which it has towards its own subjects. It seems, however, that Calvo himself never intended to go so far as to maintain that equality with nationals under the laws was itself a bar to international inquiry. <sup>1)</sup>

The governments of a number of South American and Central American States and with them some publicists construed a conception which became known to the world as "Calvo Clause". This clause was frequently inserted in contracts with the nationals of a foreign State whereby the foreign national agreed that any claim or dispute arising under the contract shall be disposed of by the local tribunals and shall not be the subject of an "international reclamation", thereby purporting to renounce any claim upon his home State for its diplomatic protection. <sup>2)</sup>

International tribunals have consistently held the Calvo Clause to be invalid to bar claims upon a denial of justice or violation of

<sup>1)</sup> For an exposition of the attempts to restrict diplomatic protection see Freeman, A. J., vol. 40 (1946), pp. 121-147

<sup>2)</sup> Oppenheim, vol. I, p. 312; Lipstein, B.Y., vol. 22 (1945), p. 145, Freeman, op. cit., pp. 489-490

international law, <sup>1)</sup> consequently, it can safely be said that the Calvo Clause is ineffective from an international point of view.

In spite of that, it must be remembered that it is difficult to condemn a legal theory as being ineffective, which claims some support and which derives some justification from international experience, although that aspect was grossly exaggerated. We feel that the Mexican Claims Commission expressed a very reasonable and sound thought when it held that

"The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and an adequate balance between the sovereign rights of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other. No international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible within the general rules and principles of international law." <sup>2)</sup>

We therefore agree with the conclusions Freeman has arrived at:

"If a Calvo Clause in a given contract is susceptible of being interpreted as a promise to the local courts for the solution of differences which might arise between the parties in connection with the contract, and not as excluding international action in the event of a denial of justice, there is clearly no rule of the law of nations which deprives it of its validity. On the other hand, if the clause is so framed as to involve a complete waiver of the right of diplomatic protection, it must to that extent be held void ab initio." <sup>3)</sup>

<sup>1)</sup> "The Calvo Clause in neither upheld by all outstanding international authorities and by the soundest among international awards nor is it universally rejected. The Calvo Clause in a specific contract is neither a clause which must be sustained to its full length nor can it be discretionarily separated from the rest of the contract as if it were just an accidental postscript. The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business." *North American Dredging Co. Case*, Op. of Comm. 1926, p. 26; A. J. vol. 20 (1926), p. 801; see also *The United States of America on behalf of International Fisheries Company v. The United Mexican States*, Special Claims Comm., July 1931, A.D., 1931-1932, case 142.

<sup>2)</sup> *North American Dredging Co. Case*, loc. cit., pp. 801, 802; Feller, op. cit., pp. 199-200 submitted that "the question of the validity of the Clause should not be answered categorically for all cases," it is this a political solution which affords some justification.

<sup>3)</sup> Freeman, loc. cit., p. 190

The Calvo Clause, which interpreted in this manner seems to us to be the only possible way to interpret it at all, is a perfectly correct expression of a rule of general international law, namely the rule of exhaustion of local remedies. <sup>1)</sup> It can therefore under no circumstances be given the tendencial meaning that it abolishes the right of a State to protect its citizens abroad.

That the abolition of diplomatic protection is still an aim of certain South American lawyers was revealed at the IIIrd Conference of the Inter-American Bar Association, held in Mexico City in 1944. A sub-committee of the Committee of Post War Problems proposed a draft resolution to the Conference which contained startling ideas.

The resolution urged, first, that diplomatic protection of citizens abroad be abolished in favour of an international protection of the rights of man. Diplomatic protection was in the sub-committee's view rendered absolutely unnecessary, because the nations of the American continent have attained a similar reasonable standard of justice through "the similarity of their republican institutions, their unshaken will for peace, their profound sentiment of humanity and tolerance, and their absolute adherence to the principles of international law, of equal sovereignty of States and of individual liberty without religious or racial prejudices." <sup>2)</sup> This was said to derive from "the universally accepted principle, without a single discrepancy, that as between States fulfilling such conditions equality of rights with nationals is the utmost to which an alien can aspire."

Finally the resolution recommended that efforts be made to secure acceptance by the American States of two conventions, sanctioning the integral validity of the Calvo Clause and the irresponsibility of the States for damages to aliens arising out of civil war. <sup>3)</sup>

This striking and violent revival of the idea that States are responsible only to themselves, had two predecessors, the one in the ideas expressed by Dr. Churuchaga Ossa of Chile during the VIIIth International Conference of American States at Lima in 1938. He intervened so far as to demand the unrestricted recognition of the Calvo Clause (in the widest sense) and maintain that the conception of denial of justice had been abolished for the American countries by Article 9 of the Convention on the Rights and Duties of States,

<sup>1)</sup> Freeman, loc. cit., p. 121

<sup>2)</sup> Freeman, loc. cit., p. 121

<sup>3)</sup> Freeman, loc. cit., p. 121

adopted by the VIIth Conference at Montevideo. <sup>1)</sup> Thus if nationals cannot invoke that claim there is no use maintaining an institution such as diplomatic protection.

The other and second forerunner is a statement by Mr. Cardenas, then President of Mexico, in an address to the Congreso Internacional Por Paz in 1938. Cardenas was stified by the exchange of notes between the United States and Mexico relative to the expropriation of American-owned agrarian property. He protested strongly against the "exterritoriality of nationality" and held a conception which would divest nationality of any legal consequences, except within the national territory itself. <sup>2)</sup> Abolition of diplomatic protection would therewith be achieved and the whole law of responsibility repealed.

These are in brief the theories and attempts favouring a repression if not abolition of the institution of diplomatic protection as a measure strengthening the equality doctrine by evincing the only means a State has to interfere with it.

This is considered to be enough evidence as the basis, the content and the application of the doctrine of "national treatment". An evaluation of the theory as such in the light of positive law will be undertaken on a later occasion. A few general remarks, however, seem to be indicated at present.

In conclusion, on the basis of the evidence collected, the equality doctrine appears to correspond with the law's orientation which supposedly tends towards ultimate assimilation of the alien to the national. <sup>3)</sup> Here, however, we have to make some reservations:

First, the equality doctrine has not yet been subjected to a critical

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<sup>1)</sup> This article reads: "The jurisdiction of States within the limits of national territory applies to all inhabitants, nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of nationals." L. of N., Tr. Ser., vol. 165, p. 120. Dr. Churuchaga interpreted that in the following manner: "Such clear stipulations in force and already ratified by the greater part of the Am. Republics signify that there is no longer ground to speak of denial of justice if there do not exist rights which can be recognized." Quoted by Borchard, A. J. vol. 33 (1939) p. 277

<sup>2)</sup> Freeman, loc. cit., p. 122

<sup>3)</sup> „On peut poser comme règle générale le principe de l'assimilation des étrangers aux nationaux. C'est du moins l'orientation du droit ne reconnaissant au point de départ aucun droit à l'étranger, amélioré par la suite de plus en plus sa condition pour la rapprocher à celle des nationaux." Kelsen, Recueil, vol. 42 (1932, IV), p. 248.

analysis by such an authority as for example the Permanent Court of International Justice. Any conclusions as to its validity are therefore dangerous. Furthermore we have not so far taken into consideration that there are very sound counter-arguments, and above all, another theory which aims at different results.

The reasons why the equality doctrine is supported have been discussed at length. They can be summarized by describing them as the elements of conservatism, characteristic of the traditional doctrine of international law, which only in theory preaches the supremacy of the said law and in practice feels so often compelled to compromise with totalitarian demands of the State. Thus the equality doctrine fits perfectly into the widespread conception of the almost absolute sovereignty of the State. What the States, advocating the equality doctrine, want to achieve with it, is, in reality, a restriction of the sphere of validity of the law of nations by defining the sphere of jurisdiction which they possess themselves according to the same law of nations. In other words, they derive a right from international law to restrict that law as they wish. Whatever political justification might be construed in favour of it, legally such a procedure is hardly compatible with the general principles underlying a normative science.

The second reservation concerns the so-called trend towards assimilation. It has been repeatedly described as the ultimate aim and, moreover, as being in concord with the law's orientation. Such a statement cannot be subscribed to off-hand without knowing what assimilation really and truly means.

It is believed that assimilation, in the way it is understood by the majority of its supporters, means nothing else than giving the alien the doubtful privilege of being treated like a national and depriving him therewith of the protection of international law. Neither national nor alien would profit from that. The latter undoubtedly would lose. Furthermore the trend towards assimilation conflicts with the infinitely more important and fortunately also more pronounced trend in the modern law of nations, namely the noble task of protecting the individual as such.

## VII. THE MINIMUM STANDARD

### 1. *The Theory*

With the second theory, which is in opposition to the equality doctrine, we enter an altogether different realm. Thus far it always has been municipal law which in the end was the criterion for any conclusion. The equality doctrine therefore can be summed up as a mode of reconciling international law with the demands of the State, whereby it looks as if its supporters adhere to the opinion that municipal law takes precedence over international law. <sup>1)</sup> In this theory, which is to be exposed below, it is international law and international law alone which is the determining factor of the status of the alien.

It appears in the doctrinal writings under different, though related names: theory of the standard of civilized justice, <sup>2)</sup> or minimum standard of international law <sup>3)</sup> or civilization. <sup>4)</sup>

To be able to explain this theory requires that we re-examine briefly the whole structure of the international law of aliens.

The doctrine of equality asserts that only if a State denies equality of treatment to the alien may international responsibility be invoked. This contention carried to its logical conclusion would mean that the source of international responsibility would lie in municipal law. But this can hardly be true, because it contradicts the rule, often maintained on previous occasions, that a State's obligations are solely determined by international law. Whether or not the supporters of the equality doctrine are aware of this discrepancy is of minor importance. Regarded in the light of international law, however,

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<sup>1)</sup> As an example the views of the Roumanian Government on Point I of the Questionnaire of the Codification Committee may be quoted: L. of N., Doc. C. 75.M.69.1929. V., p. 18: "We cannot admit absolutely the principle... which presupposes the existence of an international law on a higher plane than the constitution and internal law of the various States.

In principle a sovereign State may enact any measures it thinks necessary to ensure its independence; it is understood, however, that the measures adopted must be general and must apply to all inhabitants of the territory, including nationals. Foreigners who have decided, of their own free will to take up residence in the territory of a State or enter into undertakings on the basis of any existing law cannot claim treatment which would be special and privileged, as compared with the treatment of nationals, simply because they are foreigners."

<sup>2)</sup> Borchard, A. S. Proceedings. 1939, p. 60

<sup>3)</sup> Oppenheim, vol. I, p. 283

<sup>4)</sup> Guggenheim, vol. I, p. 307

it confronts us with two questions, the answers to which will enable us to build up the theory of the minimum standard:

First of all we must try to prove the often repeated contention that the status of the alien is governed by international law.

This can only be done by inductive reasoning. The aim of the doctrine of equality is in its essence solely to delimit the local maximum treatment of the alien; if it also delimited the international minimum, municipal law would replace international law as the test of international responsibility. Now it is true as a general rule that an alien must abide by the local law. But it is equally true that no State may violate by domestic legislation the rules of international law and, what is more, a State cannot escape its responsibility under international law by invoking the provisions of its municipal laws. Such well-established principles <sup>1)</sup> support the view that a State is tied by international law to a certain behaviour as regards the alien, and it is therefore not municipal law which governs their situation in the first place.

Furthermore international tribunals seek their criteria of responsibility not merely in municipal law, but to a much greater extent in the approved practice of States in their diplomatic intercourse and from the decisions of other international tribunals. International law, in this respect, is largely composed of the uniform practice of civilized States. Long before article 38 of the Statute of the Permanent Court of International Justice made the "general principles of law recognized by civilized States" a source of common international law, international practice and arbitration tribunals had relied on such general principles, <sup>2)</sup> among which is the rule that the treatment of the alien is a matter of international law. <sup>3)</sup> This body of rules can be disregarded by the State only at the peril of international responsibility.

The responsibility of a State, however, is only involved if it has violated its international obligations. It is an established fact that the State of origin of the alien can successfully challenge legislative measures of the State of residence and force it to observe certain rules. Therefore it cannot be doubted anymore that there is a duty imposed by international law on the State of residence to assure

<sup>1)</sup> Cod. Conf., Bases, loc. cit., Point I, pp. 16-17

<sup>2)</sup> Borchard, loc. cit., pp. 53-54

<sup>3)</sup> Anzilotti, R.G.D.I.P., vol. 13 (1906), p. 6

the alien in its territory a certain juridical situation, <sup>1)</sup> regardless of the conceptions of its municipal law about the treatment, rights and duties of the individual.

The weight of this evidence justifies in our opinion regarding it as proved that the status of the alien is governed by international law.

Moreover, this statement is supported by the authority of the best-known writers and the jurisprudence of international tribunals. As the conclusive piece of evidence a passage will be quoted in addition which expresses the matter in a very clear manner:

"La condition de l'étranger se détermine en droit de gens, non d'après le droit interne applicable aux nationaux, mais directement, par application du droit international. Il se peut donc que l'étranger soit mieux traité que le national, qu'il trouve contre l'arbitraire des juges des garanties que le national ignore. . . . Dire que l'étranger ne saurait être mieux traité que le national, c'est une formule inexacte, car le traitement du national est déterminé par le droit interne, tandis que le traitement de l'étranger est déterminé par le droit international, et le contenu des règles du second, quoique généralement plus restreint, peut sur certains points, être exceptionnellement plus étendu que le contenu des règles du premier." <sup>2)</sup>

If it is the law of nations which obliges the States to accord the alien a certain treatment, then a second question arises as to whether this obligation consists in according equality of treatment with the nationals.

A negative, and in our opinion conclusive answer to this question was given by M. Anzilotti: <sup>3)</sup> In his opinion the principle of equality has not yet become a rule of positive international law, i.e., there is no obligation for a State to treat the aliens like the nationals. A discrimination of treatment between aliens and nationals alone does not yet constitute a violation of international law.

Evidence in support of this opinion can be obtained by logical deductions.

<sup>1)</sup> Anzilotti, loc. cit., p. 7

<sup>2)</sup> Lapradelle-Politis, Arbitrages, vol. II, doctrinal note to the Eliza Case, p. 278; For the same opinion see also Freeman, Denial of Justice, pp. 505-506, Basdevant, Répertoire, vol. 8 p. 15.

<sup>3)</sup> loc. cit., p. 19

If, as it is universally recognized, a State cannot invoke its municipal law to escape responsibility under international law, the latter cannot possibly prescribe national treatment as the rule governing the status of the foreigner, because one excludes the other. The doctrine of equality validates the plea of non-discrimination, a situation clearly in opposition to the actual State-practice and, on the other hand, the plea of non-discrimination being ineffective, invalidates the doctrine of national treatment, because if municipal law cannot be invoked, national treatment is impossible.

The same applies in the following case:

The Paris Conference for the Treatment of Aliens of 1929 was divided on one issue which for reasons inherent in the matter was unacceptable to most governments. In the draft Convention's Article 17 <sup>1)</sup> the Economic Committee combined unconditionally two principles which are as irreconcilable as the two mentioned above: namely the principle of national treatment and the most-favoured-nation treatment. Without repeating the essence of their debates about this article, <sup>2)</sup> it is apparent that if the national treatment is accepted in principle, the most-favoured-nation clause is superfluous. The two aims of the clause have become obsolete: the first, to prevent discrimination among aliens of different origin, because there can be no discrimination, each alien can demand lawfully the same treatment, namely equality of treatment, and the second, to assure the aliens the best treatment the State of residence is prepared to concede to anyone, is ineffective, because it is curtailed from the start by the provision that the national treatment is the most any alien can ask for.

Furthermore, and this is believed to be the strongest argument, international law cannot as a rule prescribe national treatment.

National treatment as it is understood by its supporters, means assimilation of the status of the alien to that of the national. But can the status of the national be a criterion for international law? In spite of the resemblance of the structure and the degree of civilization between the States nowadays, there is no uniformity as to the status of the individual in the different countries. The most obvious example of this is the difference in the attitude towards private property between the so-called capitalistic State on the one

<sup>1)</sup> see above p. 71

<sup>2)</sup> Doc. C. 36. M. 21. 1929, N. p. 7

side and the communist States on the other. Furthermore it is impossible to grant national treatment reciprocally, because these differences make it something else, quite apart from the fact that the now common most-favoured-nation clause has the same effect.

Apart from the lack of uniformity in the structure of the modern States, it has to be considered that so far the law of nations had no power to regulate or improve the status of the national, because this belongs almost exclusively to the sphere of the State's jurisdiction. It cannot be conceived therefore that international law would abandon the alien voluntarily to the mercy of the State by putting him on the same footing as the national.

For these cogent reasons, we must agree with M. Anzilotti and come to the conclusion that international law does not, when it regulates the status of the alien, provide for the national treatment. The doctrine of national treatment is in contradiction to the aims, the content and the actual practice of the modern law of nations.

As we concluded that the status of the alien is governed by international law and that international law does not provide for the national treatment, the question arises as to what it does provide for in reality.

It has to be noted to begin with that the legal status of the alien is regulated by general international law, therefore his situation is, to a certain extent, independent of that of the national. <sup>1)</sup> Logically it is doubtlessly possible that the alien may enjoy a worse or a better <sup>2)</sup> position than the national, without this necessarily amounting to a violation of international law. The comparison of the alien's status with that of the national is consequently meaningless for the *a priori* establishment of the principle. <sup>3)</sup> A comparison is only useful to determine in a concrete case the juridical situation of an alien, always presupposing, however, the recognition and application of the fundamental principle <sup>4)</sup>, whereby it has to be noted that a State only then meets the requirements of international law in granting equality to nationals and aliens when the treatment of nationals

<sup>1)</sup> Verdross, Recueil, vol. 37 (1931, III), p. 350

<sup>2)</sup> Steinbach, Untersuchungen, pp. 78-79, esp. notes 163 & 164

<sup>3)</sup> M. Kaufmann quoting M. Anzilotti, Chorzow Factory Case, P.C.I.J., Series C, No. 11, vol. I, p. 168; „Laissons donc de côté le principe d'égalité, qui en somme, ne dit rien. Ce qu'il y a de certain, c'est que les Etats se reconnaissent obligés à observer certains principes qui bornent leur omnipotence vis-à-vis des étrangers, et cela quel que soit le traitement qu'ils font à leurs propres sujets.”

<sup>4)</sup> Gidel, R.D.I. (Lapradelle), 1927, pp. 128-129

corresponds with the measures which international law requires for the aliens. <sup>1)</sup>

It is evident therefore, contrary to what the supporters of the equality doctrine maintain, that the final test lies in international law and not in municipal law.

It is thus apparent that international law has established an international minimum standard to which all civilized nations are required to conform under penalty of responsibility.

The historical and legal considerations which led to this state of affairs, afford its justification. "International law arose among States having a similar civilization based upon common ideas of right and justice, and if these be violated in the person of a foreigner, his State is not precluded from protesting merely because the natives received the same treatment. They as subjects of the territorial sovereignty whose acts are, so to speak, their own, have to submit, whereas the foreign State has a right to demand that its subjects should be treated in accordance with the standard of civilization on the faith of which he entered the country." <sup>2)</sup>

It may be true that, to take an example, the standard of civilization differs little in States of the western hemisphere and that in such a case, national treatment would be identical with the international standard. There is no guarantee, however, that this will remain so. A change in substantive national policy may violate common international law; although few countries would concede that their substantive law or administration falls below a civilized standard, <sup>3)</sup> a number of examples could be enumerated where this actually happened, such as the case of the often mentioned Roumanian Agrarian Reform, the agricultural expropriations in Mexico and, to mention an extreme, still vividly remembered case, some practices of Nazi-Germany such as compulsory sterilization and so forth.

Furthermore, in the opinion of many authors, <sup>4)</sup> a corrupt administration of justice is now more common than it was in the 19th century. Bad faith cannot be tested by national standards, especially if the judiciary does not enjoy the necessary freedom and in-

<sup>1)</sup> Steinbach, *op. cit.*, p. 80 who cites copious authorities in his support. See also Borchard, A. S. Proceedings, 1939, p. 60

<sup>2)</sup> Int. Law. Ass. Vienna Conference 1926. Report of the Protection of Private Property Committee, p. 9

<sup>3)</sup> Borchard, A. S. Proceedings, 1939, p. 58

<sup>4)</sup> e.g. Borchard, *loc. cit.*, p. 59

dependence from the executive of the State, as is increasingly the case in totalitarian States. So the international standard is a necessity which moreover is furnished by the law.

Through the fact that this standard has evolved on the legal conscience of civilized nations and is more or less identical with what is considered a normal situation in an organic community, its precise limits are necessary ill-defined. <sup>1)</sup> It appears to be useful therefore to interpret its fundamental idea in the light of the "general principles of law recognized by civilized nations." Consequently, in case of doubt, the content of the fundamental idea must be determined by the principles which the civilized nations recognize in general in their municipal organization. <sup>2)</sup>

The minimum standard is the expression of the common standard of conduct which civilized States have observed and still are willing to observe with regard to aliens, whereby it is of importance to note that for a given general principle to have weight as a source of law it is only necessary that the principle be found in general at the basis of national legal systems and it is not required that universal recognition be given to it by all civilized States. <sup>3)</sup>

The theory of the minimum standard finds great support in the writings of a number of international lawyers. Borchard already wrote in his classical work the following significant passage: <sup>4)</sup>

"In the absence of an international legislature and court of justice the standard of duty of the State towards aliens and its international responsibility for violation of its obligations may be considered the result of a gradual evolution in practice, States having in their mutual intercourse recognized certain duties incumbent upon them. In the absence of a central authority to enforce this standard of duty upon the State of residence, international law has granted the home State of the alien who has suffered by a delinquency the right to demand and enforce compensation for the injuries sustained."

Statements to the same effect could be quoted from the writings

<sup>1)</sup> Freeman, *Denial of Justice*, p. 522; Verdross, *Recueil*, vol. 37, p. 353; Borchard, A. S. Proceedings, 1939, p. 58

<sup>2)</sup> Verdross, *loc. cit.*, p. 353

<sup>3)</sup> Freeman, *op. cit.*, p. 522

<sup>4)</sup> *Diplomatic Protection of Citizens Abroad*, p. 177



of a great number of authors, who in principle advocate an international standard in the matter of the treatment of aliens. <sup>1)</sup>

But it is thought preferable to follow the same procedure as we did in the case of the equality doctrine and analyse national and international jurisdiction, diplomatic intercourse and the various other forms of State-practice for evidence in support of the theory.

## 2. *The Theory's Application in International Practice*

### a. *Jurisdiction*

When studying and analysing the jurisdiction of the last fifty years in matters touching our problem, one is compelled to make some general observations.

Firstly, it is easily ascertained that the material which can be exploited in support of the theory of the minimum standard is relatively small, compared with that available for the equality doctrine. This is due, in the first place, to the fact that the doctrine of the minimum standard was novelty 50 years ago for most States and has since only slowly gained ground in the international conscience. Furthermore, taking into consideration the fundamental difference in the conception of the two theories, the one favouring the preponderance of municipal law, the other definitely supporting the idea of international law as being the higher legal order, it is apparent that the use of the national jurisdiction as evidence for the theory under consideration demands some caution. In accordance with their function in a community of a State, national judges show a tendency to be rather in favour of the equality doctrine. This is

<sup>1)</sup> Borchard, *Bibl. Visseriana*, vol. III, p. 11; A. J., vol. 20 (1926), pp. 738-747; A. S. Proceeding, 1939, pp. 51-74; Opinion on the Roumanian-Hungarian Dispute, *La Réforme Agraire Roumaine*, vol. I, pp. 342-439; Oppenheim, vol. I, p. 316; Guggenheim, vol. I, p. 268, p. 307; Freeman, *Denial of Justice*, pp. 497-530; Verdross, *Recueil*, vol. 37 (1931 III), pp. 353-354; Steinbach, *Untersuchungen*, passim; Gibson, *Aliens and the Law*, pp. 1-18; Eagleton, *Responsibility*, pp. 82-87; Lapradelle, *Consultation concernant les affaires des ressortissants hongrois devant le TAM Roumano-Hongrois*, *La Réforme Agraire Roumaine*, vol. I, pp. 14-15; Note doctrinale, op. cit., vol. I, pp. 259-260; Note doctrinale, *Affaire Eliza*, *Recueil des Arbitrages Internationaux* (Lapradelle-Politis), vol. II, p. 278; Anzilotti, *R.G.D.I.P.*, vol. 13 (1906), pp. 18-19; Scelle, *R.G.D.I.P.*, vol. 34 (1927), pp. 464-465; Dunn, *The Protection of Nationals*, pp. 113-172; Feller, *Mexican Claims Commission*, passim; Basdevant, *Répertoire*, vol. 8, pp. 15-17; Beckett, *Grotius Society*, vol. 17, (1932), pp. 175-194; Cavaglieri, *Recueil*, vol. 26 (1929 I) p. 456; Fenwick *Intern. Law*, 3rd ed. pp. 277-279; Kaufmann, E., *Recueil*, vol. 54 (1935 IV) pp. 427-433; Kaekenbeck, *Recueil*, vol. 59 (1937 I), pp. 360 et seq.

very understandable, first of all, because their duty is to safeguard the State as it is and, secondly, in view of the fact that the minimum standard is still in the process of recognition. It is therefore up to international tribunals to do the pioneer-work and further this trend. National decisions which could be quoted in our support are consequently rare.

On the other hand, there are quite a number of decisions of international tribunals, which in our opinion defend our case more than adequately. The lack of national decisions is therefore not so much to be deplored, always remembering that the law of nations is primarily supported by its own judicial organs, which seems to confirm its unity and structural conformity. In our case, the decisions which will be cited, emanate from international agencies of the highest order and of greatest authority.

It is unfortunate, however, that the Permanent Court of International Justice was never called upon to give its opinion in this matter. The weight of such a decision would have easily counter-balanced any weakness of reasoning which perhaps remains. One Judgment and an Advisory Opinion are often quoted in matters concerning the treatment of aliens. <sup>1)</sup> But it would be incorrect if we quoted the sayings of the Court in support of the theory of the minimum standard. In those cases, the Court was mainly concerned with the interpretation of treaties of a quite particular character and was in no way expressing its views about the principles of common international law, to which alone these considerations are devoted. To disperse any doubts about the position of the Court, the most important passages of the two opinions will be quoted nevertheless. It may also serve as an example showing that it is sometimes difficult to find judicial utterances which support a general principle of the law of nations, if the decisions available are not forced into a framework of conceptions which is strange to them and probably not in accord with the intention of the judges who rendered them.

The relevant and complete passage of the Judgment No. 7 reads as follows: <sup>2)</sup>

<sup>1)</sup> Judgment No. 7, Case concerning Certain Polish Interests in Upper Silesia, Series A, No. 7; Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory, Series A/B, No. 44.

<sup>2)</sup> loc. cit., p. 33

“Expropriations without indemnity is certainly contrary to Head III of the Convention (Geneva Convention of May 15, 1922, between Poland and Germany) and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals.”

Hardly could any capital be made out of that passage, serving our purpose, although the principle is obvious and in complete accord with our theory. The plea of non-discrimination, introduced by Poland, cannot have any effect because Poland has to observe contractual international obligations. To interpret this decision, however, to mean that discrimination is prohibited in general would certainly be going too far.

In another passage of the same decision the Court held:

“Having regard to the context, it seems reasonable to suppose that the intention was, bearing in mind the régime of liquidation instituted by the peace treaties of 1919, to convey the meaning that, subject to the provisions authorizing expropriation, the treatment accorded to German private property, rights and interests in Polish Upper Silesia is to be the treatment recognized by the generally accepted principles of international law.”<sup>1)</sup>

Unfortunately the Court did not specify what those “generally accepted principles of international law” are in its opinion. It is consequently difficult to derive any conclusions from this statement.<sup>2)</sup>

In its Advisory Opinion regarding the Treatment of Polish Nationals in the Danzig Territory, the Court said:<sup>3)</sup>

“It is true that in the note of the Conference of Ambassadors annexed to its letter of October 20th, 1920, to the Secretary of the League of Nations, reference is made to ‘certain guarantees

<sup>1)</sup> loc. cit., p. 21

<sup>2)</sup> M. Vallotton d'Erlach, however, thought „..... il suffit de rappeler... l'arrêt No. 7 de la Cour Permanente de Justice Internationale, pour constater que selon la doctrine et la jurisprudence, le critère de la mesure des obligations de l'Etat à l'égard des étrangers n'est pas le traitement national, mais le droit international commun.” Institut de Droit International, Annuaire 1927, vol. III, p. 109. Compare also, Steinbach, Untersuchungen, pp. 78–81

<sup>3)</sup> loc. cit., p. 37

regarding treatment (equality of treatment)’, but the words ‘equality of treatment’ do not suggest any particular standard of comparison, so that no conclusion can be drawn that they mean national treatment....”

Thus far the statement is clearly pronouncing an opinion against the off-hand acceptance of the theory of national treatment. But any use it could have had in our argument for the international standard is destroyed by the phrase the Court pronounced shortly afterwards: <sup>1)</sup>

“The inference, if any, which can be drawn from the use of the expression ‘equality of treatment’ is that it means equality of treatment within the régime of the protection of minorities.”

There can be no doubt that there exists a certain relationship between the standard set up by the minority treaties and the international standard, but it would lead us too far to construe this connection here.

The absence of a conclusive pronouncement of the Court, however regrettable it might be, is certainly made good by a number of decisions of other international tribunals of the highest standing.

One of the first statements which clearly advocates an international standard was already made in the year 1824. This is a very noteworthy piece of evidence, because the circumstances under which it arose put it above the usual objection, so often made by the antagonists of the international standard that the standard is an arbitrary way of forcing weak States to observe a certain favourable behaviour towards a privileged class of aliens. The two parties in dispute, the United States and Mexico, were certainly at that time not very different as regards their power to bring pressure to bear upon one another. In *Dr. Baldwin's Minatitlan Claims* the American Commissioners maintained that “if Mexico wished to maintain rank and fellowship among civilized nations of the earth, she must place her laws on the footing with other nations so far as related to the intercourse with foreigners.”<sup>2)</sup>

In the second case, which was brought before the Central American Court of Justice, the judges adhered to a view which certainly

<sup>1)</sup> loc. cit., p. 37

<sup>2)</sup> Moore, Arbitrations, p. 3235

was revolutionary at that time, and perhaps even is today. The first question, of special interest to us, was put in the following manner:

“Whether the legal injuries complained of shall be classed by their nature in the group of matters which, in spite of the individual character of the injury, the law of nations places under its protection.”

The question was answered in the following manner:

“With respect to the first question, in as much as the Nicaraguan nationality of Mr. Fornos Diaz is proven, the court considers that the case comes under its jurisdiction if we look at it exclusively from the standpoint of the nature of the charges, for the fundamental rights and powers of the human individual in civil life are placed under the protection of the principles governing the commonwealth of nations, as international rights of man. . . .”<sup>1)</sup>

The Court based this thought on principles expressed in the two most important codes of international law, although they are unofficial. These codes played an enormous role in South American jurisdiction.

The Court referred to article 468 of Bluntschli's “Le Droit International codifié”:<sup>2)</sup>

“Il y a également violation du droit international lorsqu'un gouvernement ne respecte pas les principes internationaux en la personne d'un citoyen étranger, alors même qu'il ne porterait pas directement atteinte aux droits de l'Etat auquel appartient le lésé.”

In the second place, it quoted Fiore, “Il diritto internazionale codificato”, No. 522.<sup>3)</sup>

“Whatever his race, degree of culture and colour may be, man, so long as he lives in political association, even if he has a nomadic existence, does not lose the rights of human personality which are his according to international law. He may

<sup>1)</sup> Dr. Pedro Fornos Diaz v The Government of the Republic of Guatemala, March 6, 1909, A. J., vol. III (1909), pp. 737-747.

<sup>2)</sup> Translation by Lardy

<sup>3)</sup> Ed. of 1900. In Borchard's Translation (quoted), based on Ed. 1915, it is No. 619

everywhere request the respect, enjoyment and exercise of these rights, on condition of subjecting himself to the authority of territorial laws and of observing the local laws.”

It seems therefore that in reality the court expressed more than a mere minimum standard for the treatment of aliens; it was actually of the opinion that Diaz should enjoy protection not only because he was an alien, but because he was a human individual whose existence was safeguarded by the international rights of man.

A very interesting and unusual way of defining the international standard was chosen by Judge Huber in his report about the Spanish Zone of Morocco Claims: <sup>1)</sup>

“The vigilance which from the point of view of international law the State is bound to guarantee, may be characterized, in applying by analogy a term of Roman law, as a *diligentia quam in suis*. . . . As soon as the vigilance exercised falls obviously below this level in respect to the nationals of a particular foreign State the latter has the right to consider itself injured in its interests which must enjoy the protection of international law.”

He also clarified his position in respect to the problem of restriction of diplomatic protection, an aspect of the question dear to the promoters of the equality doctrine. This also gave him an opportunity to affirm the existence of an international standard:

“Mais les restrictions au droit des Etats d'intervenir pour protéger leurs ressortissants, présuppose que la sécurité générale dans les pays de résidence de ceux-ci ne touche pas au-dessus d'un certain niveau, et qu'au moins leur protection par la justice ne devienne pas purement illusoire”,<sup>2)</sup> and

“ . . . Le principe de la non-intervention dans les rapports entre un Etat et les étrangers établis sur son territoire, présuppose non seulement des conditions normales d'administration et de justice mais aussi la volonté de l'Etat de réaliser son but primordiale le maintien de la paix intérieure et de l'ordre social.”<sup>3)</sup>

<sup>1)</sup> Great Britain v. Spain, Aug. 27, 1925. Huber, Réclamations britanniques dans la zone espagnole du Maroc, Rapports (1925) pp. 56-57.

<sup>2)</sup> Huber, Rapports, p. 54

<sup>3)</sup> Huber, Rapports, p. 55

Though one is inclined to think that the international standard primarily protects aliens from the arbitrariness of States, international tribunals did not hesitate, in cases where they considered it justified, to declare the laws and procedure of a State to be in accord with international law and therewith to protect a State against exaggerated claims. Such was the case in the *Canadian Claims for Refund of Duties*. The British American (1910) Tribunal held in 1925: <sup>1)</sup>

“The remedies provided by the laws of the United States were not only fair and reasonable, but, in general, common to the custom laws of all civilized countries.”

On this ground the claim was disallowed.

Whereas at one time it was somewhat extraordinary to search for evidence in the jurisdiction of the New World, it is that jurisdiction which today furnishes us with the most powerful support. The two Americas certainly were, if not the breeding, at any rate the experimental ground of the two predominant theories. Being mostly countries of immigration and economic expansion, the problem of aliens had to be solved, either by assimilating them to the national by free or forced naturalization, or by applying the equality doctrine. There, however, the difficulty was, that in those communities law and order had to be enforced by other means and methods than in highly organized countries and often the alien was subjected to considerable hardship. Since international law is very much concerned about the protection of life and person of the alien and of his acquired rights, it is apparent that the circumstances in the Americas should give ample opportunities to test the behaviour of States towards the aliens with the measures furnished by the international standard.

It has turned out to be Mexico to which most international reclamations have been addressed during the last 30 years.

From 1910 onwards Mexico suffered a series of revolutions, a date from which began a decade of violence and turmoil. It is apparent that under such circumstances the lives and property of aliens were subjected to peril in a greater degree than in countries with a more stable political system. The claims arising out of this situation were imputed to the new Mexican government and various States began

<sup>1)</sup> Nielsen, Reports, p. 364

to press the necessity of adjusting them. <sup>1)</sup> It was then suggested that an arbitration tribunal or a mixed international commission should award damages as settlement of the claims. Time elapsed, however, until 1923, when on September 8, a General Claims Convention was signed in Washington between the United States and Mexico. <sup>2)</sup> Subsequently several claims conventions were also concluded between Mexico and some European Powers. Under the above-mentioned Convention, the Claims Commission decided five cases which in reality form the backbone of our evidence in support of the international standard.

The composition of the United States-Mexican General Claims Commission under the Convention of 1923 was the following: <sup>3)</sup> Presiding Commissioner, Mr. Cornelis Van Vollenhoven, Netherlands, appointed by agreement of the two governments; Mexican Commissioner, Mr. G. Fernandez Mac Gregor, American Commissioner, Edwin B. Parker, who resigned on July 17, 1926 and was replaced by Mr. Fred K. Nielsen.

In the *Neer Case*, one of the first which the Commission considered, the Commission stated:

“The propriety of governmental acts should be put to the test of international standards. The treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the country do not empower the authorities to measure up to international standards, is immaterial.” <sup>4)</sup>

With this decision the Commission set the rule which was to be the guiding principle of their jurisdiction. It is certainly in accord

<sup>1)</sup> Feller, Mexican Claims Commission, pp. 15–16

<sup>2)</sup> Feller, op. cit., pp. 23–24

<sup>3)</sup> Only those Commissioners are mentioned who took part in the decisions quoted. Feller, op. cit., p. 44

<sup>4)</sup> U.S.A. (L. F. Neer) v. United Mexican States, Op. of Comm., 1927; p. 71, A.D., 1925–1926, case No. 154



with our fundamental postulate and constitutes one of the strongest expressions of it to be found.

The Commission expanded thereafter this thought in the *Faulkner Case*:<sup>1)</sup>

“As the Commission expanded in its opinion in the case of L. F. Neer, it holds that the test lies in the application of international standards. That Mexico, just as all other civilized nations, is aware of these standards, is apparent from what the claimant states about the Allende prison. . . .”

The great interest and value of these decisions is not only restricted to these statements of general principles, but it is moreover important to know what the Commission had to say about the equality doctrine. The *Roberts Case*<sup>2)</sup> gave it an opportunity to deal with it:

“Equality of treatment of aliens and nationals did not constitute in the light of international law the ultimate test of the propriety of acts of authorities in regard to aliens. The test was whether aliens are treated in accordance with the ordinary standards of civilization.”

This solves also, in the eyes of the Commission, the problem whether the alien may be treated better, under certain circumstances, than the nationals themselves, as it held in the *Hopkins Case*.<sup>3)</sup>

“If it be urged that under the provisions of the treaty of 1923 as construed by this Commission the claimant Hopkins enjoys both rights and remedies against Mexico which it withholds from its own citizens under its municipal laws, the answer is that it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. The reports of decisions made by arbitral tribunals long prior to the treaty of 1923 contain many such instances. There

<sup>1)</sup> U.S.A. (*W. H. Faulker*) v. *United Mexican States*, Op. of Comm., 1927, p. 86, A. J., vol. 21 (1927), pp. 349-354.

<sup>2)</sup> U.S.A. (*Harry Roberts*) v. *United Mexican States*, Op. of Comm., 1927, p. 100, A. J., vol. 21 (1927) pp. 357 et seq.

<sup>3)</sup> U.S.A. (*George W. Hopkins*) v. *United Mexican States*, Op. of Comm., 1927, p. 42; A. J., vol. 21 (1927) pp. 161-167

is no ground to object that this amounts to a discrimination by a nation against its own citizens in favour of aliens. It is not a question of discrimination, but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens.”

With these decisions the Commission, in our opinion, gave conclusive affirmation that a minimum standard of treatment exists and has to be observed. All objections are definitely ruled out, the objection, as for example, that it is immaterial whether the municipal laws are good or bad, as was held in the *Neer Case*, or, as held in the *Hopkins Case*, it is also indifferent how the nationals are treated. Furthermore, no government can escape responsibility by pleading incompetence of its officials; the Commission came to this conclusion in the *Way Case*.<sup>1)</sup>

“It is believed to be a sound principle that, when misconduct on the part of persons concerned with the discharge of governmental functions, whatever their precise status may be under domestic law, results in a failure of a nation to live up to its obligations under international law, the delinquency on the part of such persons is a misfortune for which the nation must bear the responsibility.”

It may therefore be stated safely that the United States-Mexican Claims Commission has helped the theory of the minimum standard to gain a good foothold in the legal practice of modern States. Its consistent practice is a pure example of consequent and responsible jurisdiction along the lines of a well-founded and necessary postulate. The minimum standard has therewith become a reality which nobody may defy with impunity any more, and judging from its success, it certainly turned out that a demand of long standing had been fulfilled with it.

This consistent jurisdiction of the Commission was largely due to the stand Commissioner Nielsen took in respect of the standard. It is

<sup>1)</sup> U.S.A. (*William T. Way*) v. *United Mexican States*, Op. of Comm., 1929, (*Christian Sindballe*, Presiding Commissioner); A. J., vol. 23 (1929), pp. 466-476

therefore but just to close this enumeration of the cases, decided by the Commission, with an opinion which Mr. Nielsen rendered as dissenting arbitrator in the *Salem Case*:

“It may be said with reasonable degree of precision that the propriety of (governmental) acts . . . should be determined according to ordinary standards obtaining among members of the family of nations. Practical application may be given to this general rule if an international tribunal adheres to the principle that it can properly award damages only on the basis of convincing evidence of a pronounced degree of improper governmental action. Such a rule takes into account of the status of members of the family of nations, which, although their standards may differ, are equal under the law of nations.”<sup>1)</sup>

Other international tribunals have confidently followed this doctrine, underwritten by the United States-Mexican Claims Commission.<sup>2)</sup> It is, however, not thought to be necessary to devote much space to these decisions, because they do not bring anything new which could not be derived already from what is quoted.

To lead over to the next section of evidence, a last decision of an international tribunal may be cited.

We have already often referred to the great controversy arising out of the Roumanian Agrarian Reform. The individual disputes came in the end, in spite of the tremendous opposition furnished by Roumania, which relied on the well-considered opinion of a great number of international lawyers, before a Mixed Arbitral Tribunal.

In one case, *Kulin Emeric v. Roumanian State*,<sup>3)</sup> this tribunal pronounced a passage in its decision which shows a part of a very significant evolution:

“The preparatory work relating to article 250 of the Treaty of Trianon and article 267 of the Treaty of St. Germain showed that the intention of the Contracting Parties was fully to protect the rights of Hungarian nationals, situated within the territory of the former Austro-Hungarian Monarchy, and to place these rights under the régime of common international law.”

<sup>1)</sup> Quoted in Freeman, *Denial of Justice*, pp. 559–560

<sup>2)</sup> Of. e.g. *The Denham Claim*, Hunt's Report, p. 244, and the *De Sabla Claim*, *United States v. Panama*, June 29, 1933, A. J., vol. 28 (1934) pp. 602–614

<sup>3)</sup> *Recueil TAM*, vol. VII, p. 138

The interesting point in this passage is to know what the term “common international law” is to mean.

Correct reasoning leads us easily to an understanding. Common international law provides for a special régime for the alien, largely consisting in a certain standard of treatment, which we have called the minimum standard. It is apparent therefore that any reference to the principles of common international law with regard to the treatment of the alien implies the recognition of the minimum standard.

#### b. *The Law of Treaties*

The treatment of aliens has been, besides common international law, always and foremostly a matter of mutual agreement among nations. This is clearly evidenced by the enormous number of so-called treaties of establishment and commerce which have been concluded during the last century. Whereas the usual provisions consisted formerly in expressing certain principles, such as national treatment, subject to complete reciprocity,<sup>1)</sup> two new modes of regulating the status of the alien in those treaties have been evolved and applied during the last 30 years.

Often, instead of cataloguing the specific rights and duties of the alien in long articles, reference was made, as in the above mentioned case decided by the Mixed Arbitral Tribunal, to the principles of common international law. These principles obviously enjoy recognition and confidence in the legal conscience of modern civilized nations, otherwise nobody would consent to leave a matter of such importance to regulation by questionable postulates.

A few examples of treaties may be mentioned, wherein it was resorted to such a solution:

Convention respecting Conditions of Residence and Business and Jurisdiction between the British Empire, France, Italy, Japan, Greece, Roumania, Jougoslavia and Turkey, signed at Lausanne in the year 1923:<sup>2)</sup>

“In Turkey the nationals of the Contracting Parties will be received and treated, both as regards their person and property, in accordance with ordinary international law.”

<sup>1)</sup> See e.g. art. 9 of the Treaty between Austria and Turkey of 1924. L. of N., Tr. Ser., vol. 32, p. 304

<sup>2)</sup> L. of N., Tr., Ser., vol. 31, p. 166

Convention between Germany and Soviet Russia of 1925: <sup>1)</sup>

“Article 10: The Nationals of each Contracting Party shall, in accordance with international law, be entitled in the territory of the other Contracting Party to the same protection....”

Treaty of Friendship between Egypt and Persia of 1928: <sup>2)</sup>

“Article 4: They shall enjoy, on the same footing as nationals, the most constant protection and security for their persons, property, right and interests, in conformity with ordinary international law.”

Convention between Germany and Persia of 1929: <sup>3)</sup>

“...in accordance with the principles and practice of ordinary international law.”

Convention between Switzerland and Persia of 1934: <sup>4)</sup>

“...in accordance with the principles and practice of international common law.”

Since there can be no doubt about the content of common international law with regard to the treatment of aliens, these treaties evidence a growing recognition of the minimum standard of treatment.

It is apparent that the complete recognition, so far still jeopardized by the nations which obstinately cling to the equality doctrine, would simplify matters greatly and encourage the friendly intercourse between nations.

Besides this unmistakable adherence to the international standard, another, even more frequent way, which in its essence has the same effect, is in great use: the most-favoured-nation clause.

It is necessary to look into these matters from a general angle, in order to be able to appreciate the conclusive reasoning.

The Committee of Experts for the Progressive Codification of International Law of the League of Nations appointed in 1927 a sub-committee, composed of Mr. Wickersham, Rapporteur, Mr. Barbosa

<sup>1)</sup> L. of N., Tr., Ser., vol. 53, p. 95

<sup>2)</sup> L. of N., Tr., Ser., vol. 93, p. 381

<sup>3)</sup> L. of N., Tr., Ser., vol. 153, p. 241

<sup>4)</sup> L. of N., Tr., Ser., vol. 160, p. 175

de Magalhaes, to prepare a report about the effects of the most-favoured-nation clause. <sup>1)</sup>

Excerpts from this Report will form a useful basis for our contention.

Mr. Wickersham stated: <sup>2)</sup>

“Provisions relating to treatment of the nations of one party by those of the other occur in commercial treaties in a large variety of forms. Generally speaking, they may be divided into two forms: promises of national treatment and promises of most-favoured-nation treatment.

By national treatment is meant a promise that the inhabitants of one of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party, just as if they were natives of the second contracting party.... The effect of national treatment is to prevent discrimination against the nationals of the contracting parties, in any way, in regard to the points stipulated in the treaty.

Most-favoured-nation treatment, on the other hand, is a promise that the inhabitants of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party no more unfavourably than any other foreigner.... Under this clause, the nationals of one of the contracting parties may be discriminated against as compared with the nationals of the nation giving the promise, but must be given treatment at least as good as those of other countries.”

In this statement of Mr. Wickersham, emphasis certainly must be laid on the phrase “the nationals of one of the contracting parties may be discriminated against as compared with the nationals of the nation giving the promise.” Herein lies the importance of the clause. Mr. Wickersham, however, seems to be inclined to consider national treatment as the more favourable proposition, when he says:

“It will be seen, then, that national and most-favoured-nation treatment are the same in principle; but that national treatment, guaranteeing perfect equality, is much broader than most-favoured-nation treatment, which excepts from its promise of equality favours to its own nationals.” <sup>3)</sup>

<sup>1)</sup> L. of N. Publ., V. Legal. 1927. V. 10; A. J.; vol. 22 (1928), Spec. suppl., p. 133

<sup>2)</sup> Report of the Sub-Committee, A. J., loc. cit., pp. 134–135

<sup>3)</sup> Report, loc .cit., p. 135

In our opinion, however, the two principles are not and cannot be the same:

“Certains traités d'établissement, dont la plupart sont récents, se bornent à mettre les ressortissants de chaque Etat contractant établis sur le territoire de l'autre au bénéfice de la clause de la nation la plus favorisée. C'est à dire au bénéfice du meilleur traitement obtenu par un Etat tiers pour ses ressortissants établis dans cet Etat. Cette clause n'est donc pas fondée sur le principe de la réciprocité, ni sur celui du 'traitement national'.”<sup>1)</sup>

If there is no relation between the equality doctrine and our clause, there is no need to compare the treatment of the alien with that of the national either. It is a mistake, too often made, to rely always on this comparison and to let it influence the judgment.

But, if the comparison is made and results in realizing a discrimination, this discrimination is certainly not necessarily unfavourable to the alien, as Mr. Wickersham seems to think, and this for the following reason:

If most-favoured-nation treatment has nothing to do with national treatment, the question arises what it really is. Is it a treatment *sui generis* or does it coincide with the treatment according to common international law?

Logically analysed, it comes in the end to that. The treatment of the alien of one nation is measured with the treatment the most privileged alien enjoys in the country of residence. According to general international law, the best treatment an alien can enjoy is the treatment in accordance with the minimum standard. It is possible that, by means of conventions, a treatment may be accorded to aliens superior to the minimum standard, but, on the other hand, not one which is inferior. It is hardly conceivable that a State would conclude a treaty providing for a treatment inferior to the international standard, because treaties are concluded to get the best possible, and it is utterly inconceivable that other nations would recognize this treatment as the ultimate test for the rules applicable to their own nationals. The aim of the clause is, therefore, not to

<sup>1)</sup> Guggenheim, Fiches juridiques suisses, No. 662 (1943), VII. 5a; and see also Guggenheim, Lehrbuch, vol. I, p. 96

avoid discrimination between aliens and nationals, but to avoid discrimination between the aliens of different origin, resident in the same country. <sup>1)</sup> The clause means, therefore, in other words, recognition of the international standard.

To disperse the last doubts about this conclusion, the following considerations may be made:

If the best treatment, accorded to any alien, be the national treatment, the clause would be superfluous, because here again the test would be the treatment of the national and not that of the most-favoured alien.

The Paris Conference for the Treatment of Foreigners, which in general expressed itself favourably for the national treatment, <sup>2)</sup> considered the most-favoured-nation clause as a secondary guarantee, in cases where States were not disposed to confer upon aliens the benefits of national treatment. <sup>3)</sup>

The Economic Committee added, however, that the result of the clause is a status of the alien which is quite particular. <sup>4)</sup> This is in our opinion the important aspect of the whole problem. The status of the alien is governed by international law and has nothing to do with the national. It is therefore also immaterial whether the status of the alien compares favourably or not with that of the national.

It consequently seems to be by no means an exaggeration to stress the positive element in the most-favoured-nation clause and by doing so, its significance becomes quite clear.

As to the frequency of the clause in modern treaties, a survey of the conventions of establishment, concluded between the two wars, shows that in more than forty conventions the most-favoured-nation clause was found the most satisfactory way to regulate the respective treatment of the nationals of each of the contracting parties. <sup>5)</sup>

<sup>1)</sup> L. of N., Doc. C.36.M.21.1929, II, p. 18

<sup>2)</sup> see above p. 71

<sup>3)</sup> Doc. cit., p. 18

<sup>4)</sup> Doc. cit., p. 18

<sup>5)</sup> As a curiosity a unusual limitation of the clause may be mentioned; Convention between the United Kingdom, the United States of America and Iraq, 1930, L. of N., Tr. Ser., vol. 120, p. 473; con't. "The United States and its nationals shall have and enjoy all rights and benefits... secured... to members of the League of Nations and their nationals, notwithstanding the fact that the United States is not a member of the League of Nations."



The clause consequently is a substantially convincing and important part of the evidence proving the recognition of an international standard.

*c. International Legislation*

In our attempt to collect evidence in support of the theory of the minimum standard, the results of all the tentative efforts of international legislation and codification may not be neglected. They indeed give us perhaps the best picture about how far certain principles of international law have gained recognition in the legal conscience of civilized nations.

With regard to the minimum standard, the work of the great conferences between the two World Wars does not lend us great support. As we have had occasion to mention already, the Paris Conference of 1929 clearly and almost exclusively expressed itself in favour of the equality doctrine. We therefore need not devote any attention to it in this connection.

It was slightly different in the Hague Codification Conference of 1930. Here, on the other hand, we do not find a clear-cut statement in favour of either theory at all. This probably is due to the fact, which has already been the object of our criticism, that the Conference approached the subject of the treatment of aliens from an angle which is believed to be detrimental to its evolution, namely from the point of view of State responsibility only.

So when the Committee of State Responsibility began its work, on the ground of the Bases of Discussion prepared by the League of Nations, it lacked a starting point, which was designed to lay the legal foundations for international responsibility.

This lack evidently was strongly felt by the French delegation, which moved on the very first day the adoption of a proposal, independently of any Basis of Discussion, which was designed to form a *nucleus* of alle legal principles, with which everybody agreed and from which an evolution could start. The French delegation was of the opinion that there was one such principle, namely that there are international obligations. <sup>1)</sup>

After a lengthy discussion and a number of amendments the

<sup>1)</sup> Cod. Conf., Doc. C. 351 (c.) M. 145 (c.) 1930. V, p. 2 4

proposition of the French delegation was adopted unanimously and became article 1 of the proposed convention which reads:

“International responsibility is incurred by a State if there is any failure of the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.” <sup>1)</sup>

One expression of this article will prove to be of great interest to us because it gave rise to an exhaustive discussion among the different delegations, which in some points reveals much more than might be expected and turns out to lend support to our contention in a very convincing manner. It is the expression “international obligations”.

Apart from the above quoted Article 1, the same expression appears also in Bases No. 2 and No. 7.

Basis No. 2 reads:

“A State is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from treaty or otherwise, or of failure to enact the legislation necessary for carrying out these obligations.” <sup>2)</sup>

The Italian delegate, Mr. Cavaglieri, objected to the word “otherwise” as being too vague and proposed instead the wording that a State should be responsible for damages “resulting from treaty or from recognized principles of international law.” This amendment brought the discussion into full swing and stimulated considerable opposition. A clear and acceptable definition of “international obligations” was henceforth one of the major difficulties of the Committee.

Mr. Guerrero (San Salvador), supported by Mr. Sipsom (Roumania), were the main opponents to this amendment and were constantly demanding to know what the international obligations were to which they were asked to subscribe. <sup>3)</sup>

<sup>1)</sup> loc. cit., p. 31; see also Hackworth, A. J., vol. 24 (1930), pp. 500–502 and Borchard, A. J., vol. 24 (1930), pp. 517–520

<sup>2)</sup> loc. cit., p. 32

<sup>3)</sup> loc. cit., pp. 33, 34, 37, 38; Borchard, loc. cit., p. 520

It would, however, lead us too far to follow the debate into all its details; it shall therefore only be exposed in outline.

During the fourth meeting the delegates were invited to express their views about the following definition of "international obligations".<sup>1)</sup>

"The international obligations referred to in the present Convention are those obligations resulting from treaty or customary law which have for their object to ensure for the persons and property of foreigners treatment in conformity with the principles recognized to be essential by the community of nations."

The Rapporteur, Mr. de Visscher, in explaining the definition, stated:

"With regard to the custom, it (the definition) says that the law must in effect be that which accords a minimum guarantee in accordance with the principles governing the community of nations; but it would not be true to apply that observation to conventions, because a convention gives just as much as it states, and the object of a convention is not to insure this minimum."<sup>2)</sup>

He, however, said that it would be a simple matter to amend the definition and avoid this inconsistency. Its text read then this way:

"The international obligations referred to in the present Convention are obligations resulting from treaties and those obligations based upon custom which have for their object to ensure for the persons and property of foreigners treatment in conformity with the principles recognized to be essential by the community of nations."<sup>3)</sup>

It is evident that these explanations furnished by Mr. de Visscher would rouse a storm of opposition from quarters which adhered to the equality doctrine. On the other hand, it was acclaimed by certain delegations in a very warm manner, as for example by the German delegation, which declared itself satisfied with the interpretation that there is an obligation of the State to accord to aliens a certain minimum of rights.<sup>4)</sup>

<sup>1)</sup> loc. cit., p. 49

<sup>2)</sup> loc. cit., p. 50

<sup>3)</sup> loc. cit., p. 50

<sup>4)</sup> loc. cit., p. 53

None the less it was felt that only a majority vote could be expected, when this definition was to be accepted at all.<sup>1)</sup> Therefore the matter was referred to a sub-committee.<sup>2)</sup>

This sub-committee, which had a membership sufficiently large to give adequate representation to all the viewpoints expressed in the general committee, experienced the same difficulties in defining "international obligations". After several meetings, it, however, was able to propose the following text to the Committee:

"The expression 'international obligations' in the present Convention means obligations resulting from treaty, custom or the general principles of law which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations."<sup>3)</sup>

Finally the text passed all stages of the discussion once again and was adopted in the Committee by 28 votes to three.

It is certainly safe to state that the article, prepared by the sub-committee and accepted by the Committee, is a consecration of the minimum standard. This vote, although it was not unanimous, may therefore well be considered as a major victory of the standard, and means that almost all of the nations of the community of nations have at this moment given their approval to the principle.

The comment Mr. Borchard made on this definition, is, however, slightly critical:

"Inasmuch as the definition was an amalgam of several different proposals, it is perhaps inevitably open to criticism. The Italian delegate poked some fun at it and stated that he would vote for it only because he considered it meaningless. Possibly he is right. The purpose was to indicate that the several sources of international law which create international obligations have as their aim the assurance to a foreigner of a certain minimum of civilized treatment. That this adds but little if anything to our knowledge of international law and leaves as much vagueness in 'international obligations' as there is now, is probably not to be doubted...."<sup>4)</sup>

<sup>1)</sup> Hackworth, loc. cit., p. 504

<sup>2)</sup> loc. cit., p. 59

<sup>3)</sup> loc. cit., p. 235

<sup>4)</sup> loc. cit., p. 522

It is believed that Mr. Borchard, although his statement is certainly true, overlooks the fact that much is gained already by the mere acceptance of the principle of the minimum standard alone. It certainly is more than important that the States were brought to commit themselves so far.

At least, the most ardent opponent to the definition, Mexico, understood that quite clearly. In its Observation, submitted to the Committee, Mexico explained why she had voted against the definition. In the most noteworthy passage, it is said <sup>1)</sup> that in the opinion of Mexico, the formula maintains that the status of the alien is determined by international law, whereas according to the Mexican conception, the alien is primarily subjected to municipal law. Furthermore, the text implies that the States have to adopt certain identical standards which, in the Mexican opinion, is a wrong and dangerous thesis; this being physically impossible, because of the differences in conceptions and of the problems which each State has to face.

In conclusion, it may therefore be safely maintained that the Codification Conference, although in a foggy and complicated manner, has expressed itself in favour of international standards and accepted them as the legal foundation of their law of responsibility.

It is considered necessary to deal in this connection also with the work of two very representative, though unofficial bodies which can claim great credit for sustaining and preparing progressive codification of international law.

In the first place, it will be analysed as to what result the International Law Association has arrived at in this question.

A committee, which was appointed by the Executive Council of the Association in 1925, was to consider and report on the question "whether there exists any, and, if so, what, limitations upon the power of a sovereign State to expropriate private property within its jurisdiction belonging to its nationals or foreigners without adequate compensation." <sup>2)</sup>

This committee has considered, among other things, how far the principle of the inviolability of private property is recognized under international law.

The committee made the distinction between the acts of States

<sup>1)</sup> Cod. Conf., loc. cit., p. 229

<sup>2)</sup> International Law Association, Vienna Conference, 1926, Report of the Protection of Private Property Committee.

directed against nationals and those directed against foreigners. Whereas, in so far confiscatory legislation applies to the State's own subjects, it involved no breach of international law, because international law, properly so called, is not a rule concerned with the manner in which a State, in the exercise of its own internal sovereignty, treats its own subjects. If, on the other hand, expropriation is directed against the subjects of a foreign State, there can be no doubt that international law places a limit upon the rights exercisable by a State in regard to the subjects of another State. "The latter remain under the protection of their own sovereign who is entitled to demand that a certain standard of conduct shall be observed towards them by a State in whose territory they find themselves. The precise limits of the rule are difficult to define, but two general propositions can be laid down as representing the law of the subject:

1. A State is entitled to protect its subjects in another State from injury to their property resulting from measures in the application of which there is discrimination between them and the subjects of such other State.
2. A State is entitled to protect its subjects in another State from actual injustice at the hands of such other State even if the measure complained of is applied equally to the subjects of such other State." <sup>1)</sup>

It is certainly safe to jump from these considerations, made in connection with very special and highly technical problems, to the general conclusion that the International Law Association, too, is of the opinion that the situation of the foreigner is regulated by an international standard.

In the second instance, the Institute of International Law contributed its opinion to the discussion.

As we have already had occasion to mention, the Institute was one of the important contributors to the preparatory work of the Hague Codification Conference. It therefore followed the same procedure and method in working out the rules it considered regulated the status of the alien, that is to say, it approached the problem from the angle of State responsibility.

The Report, prepared by M. Strisower, Rapporteur, and submitted

<sup>1)</sup> Report, p. 9

for discussion to the session held in Lausanne 1927, was therefore entitled "La Responsabilité des Etats à Raison des Dommages Causés sur leur Territoire à la Personne ou aux Biens des Etrangers." <sup>1)</sup>

During the session of Lausanne, an interesting discussion about the general principles, governing the treatment of aliens, arose in connection with Article 6, which read:

"En tant que la nature des choses ne justifie pas un traitement différent, l'Etat est aussi obligé d'appliquer aux étrangers les mêmes mesures de protection contre les faits dommageable émanant de particuliers, et ce de la même façon que lorsqu'il s'agit des ses nationaux. Les étrangers doivent avoir en conséquence le même droit que ceux-ci à obtenir des indemnités." <sup>2)</sup>

The issue which was raised immediately was whether the alien should enjoy national treatment or treatment according to general international law. The delegates naturally were divided about the question.

A number of delegates expressed themselves strongly in favour of the equality doctrine, among whom M. Alvarez considered that Article 6 consecrated a capital principle of international law, namely:

"L'égalité des nationaux et des étrangers au point de vue de leur droits. Les législations européennes ont méconnu ce principe. Ce n'a jamais été le cas en Amérique, ou les mêmes droits civils et les mêmes prérogatives existent pour les étrangers et les nationaux. Ce principe commence à se faire jour, dans le droit universel." <sup>3)</sup>

These words were supported by the Rapporteur himself, <sup>4)</sup> and by Messrs. James Brown Scott, Sir Thomas Barclay, Urrutia, de la Barba and Hobza.

The argumentation of M. Alvarez, however, was ably opposed by M. de Lapradelle, who could claim the majority of the delegates as followers. He objected that the criterion for the treatment of aliens was not to be found in the "national treatment", but in the rules of

<sup>1)</sup> Annuaire, 1927, vol. I, pp. 455-515

<sup>2)</sup> Annuaire, 1927, vol. III, p. 108

<sup>3)</sup> Annuaire, 1927, vol. III, p. 111

<sup>4)</sup> Annuaire, 1927, vol. III, p. 109

general international law. <sup>1)</sup> He therefore proposed that Article 6 be amended in the following manner:

"En tant que le droit international n'exige pas un traitement de l'étranger supérieur à celui du national, l'Etat doit appliquer aux étrangers les mêmes mesures de protection contre les faits dommageables émanant de particuliers et ce de la même façon que lorsqu'il s'agit de ses nationaux. . . ." <sup>2)</sup>

This wording of the article guarantees a minimum of protection to the alien, because even if the State does not treat its own nationals in a manner which reaches the level of the international standard, it cannot escape responsibility when applying the same measures to aliens. On the other hand, there is no reason to stress the international standard if it coincides with national treatment. So, in both ways, the alien is protected in accordance with general international law.

This amendment was submitted to the Commission, after it had undergone a few minor alterations. Once again the conception of the minimum standard triumphed and the article was adopted by a majority of 46 votes to 9. <sup>3)</sup>

## VIII. EVALUATION OF THE TWO THEORIES

We have now come to the point where we must decide ourselves in favour of one or the other of the two theories in order to be able to outline the general rules regulating the status of the alien. The equality doctrine as well as the doctrine of international standards have been exposed and analysed so far from a purely objective point of view with few references to their interrelations. With the aid of the sections enumerating the support, these theories can claim in international life, it is difficult, if not impossible, to judge which of them should be given preference. Both are so heavily represented in present international practice that mere comparison of the weight of support they each can claim does not give us any conclusive results. Judging from the evidence we have quoted, they seem to be almost equal.

<sup>1)</sup> Annuaire, 1927, vol. III, p. 110

<sup>2)</sup> Annuaire, 1927, vol. III, p. 118

<sup>3)</sup> Annuaire, 1927, vol. III, p. 119

Other criteria of evaluation have to be sought. For a lawyer, the first question naturally is the validity. Jurisprudence, being a normative science, does not care so much whether a rule is good or bad, just or unjust, as whether it is valid or not. To ascertain the validity of a rule as a rule of law, legal science furnishes objective tests which we shall apply in due course.

In the second place, as a complementary aspect of validity, there is the question of the practicability of the rule, that is to say, whether it is applicable.

Thus an evaluation implies the dual task of ascertaining the compatibility or incompatibility of the two theories with the principles of international law, on the one hand, and the applicability or inapplicability in practice, on the other. This dualism roughly corresponds to the difference between the doctrinal approach and the practical approach; the latter is believed to be of greater value and importance when dealing with a primitive legal order such as international law.

### 1. *Doctrinal Evaluation*

We have found that the equality doctrine starts from the assumption that once an individual has entered the territory of a foreign State, the latter's duty consists in according him a treatment equal to that of the national and by doing so, it fulfils its international obligations.

The individual moves, when travelling, from the sphere of jurisdiction of his home State into the sphere of jurisdiction of a foreign State whereby his situation from the point of view of his rights remains practically the same, that is to say, he must abide by local law.

The equality doctrine follows the widespread opinion that the sphere of the State-power ends with its frontiers, i.e., where the sphere of power of another State begins. There is no room for anything between the two strictly defined legal orders, nor is there any room for anything above them. The law of the State, municipal law, is the sole element to be taken into consideration.

On the other hand, the doctrine of international standards starts from a different angle. It considers that the individual, when he

leaves his home State, abandons certain rights and privileges, which he possessed according to the municipal law of his State and which, to a certain limited extent, especially in a modern democracy, gave him control over the organization of the State with regard to the legislations and execution. In a foreign State, he is at the mercy of the State and its institutions, at the mercy of the inhabitants of the territory, who in the last resort accord him those rights and privileges which they deem desirable. This is a situation which hardly corresponds to modern standards of justice.

The law of nations provides, however, for a remedy. International law allows him the right to be protected by the diplomatic representatives of his home State. This is, however, connected with a certain danger, that powerful States exploit this institution to their advantage. That diplomatic protection does not become an arbitrary procedure of making undue and unjust claims, the treatment of the alien in the foreign State must be measured by certain international standards. Therewith it becomes possible to qualify claims arising out of maltreatment and it furnishes an effective basis for comparison.

The treatment of the national cannot be taken as a standard because of the variety of organization in the different communities of the world. It would signify that the continuity and the conformity, the main aims of any legal order, would be non-existent.

There exists, however, certain standards, recognized by civilized nations and consecrated by the general principles of law and order as expressed and applied in the State-practice. These standards furnish an objective criterion for the measurement of the treatment the alien enjoys. As to their kind, they belong to common international law, being international custom which has as source the "general principles of law recognized by civilized countries."

The difference between the two doctrines consists therefore in the fact that the equality doctrine gives precedence to municipal law, whereas the doctrine of international standards favours, on the other hand, international law as the higher legal order.

It naturally depends entirely on the personal attitude to the problem of the two concurring legal orders which of the two theories is given preference.

It is for obvious reasons impossible nowadays to deny the existence of international law. But in order to make it compatible with the dogma of absolute sovereignty, a fictitious construction is often

resorted to, namely that international law, to be valid, must be recognized by the State to which it should apply. In the case of the equality doctrine, a further fiction is resorted to. Except a few States (e.g., Rumania <sup>1)</sup>), the supporters of the equality doctrine accept international law, but maintain that it provides, in the case of the treatment of aliens, for national treatment. The reason for the validity of international law therewith becomes shifted into the municipal legal order; it depends in the end on the "will" of the particular State as the highest existing legal personality in the social sphere. <sup>2)</sup> Such a conception of international law makes it appear not as a higher legal order, nor even as an independent one, but as a freely accepted part of the legal order of the State.

Furthermore the assumption that international law provides for national treatment is wrong *per definitionem*. According to the structure of international law itself and to the position it takes in the hierarchy of norms, there are only two possible modes of regulating such matters: either international law leaves a particular field, in our case the treatment of aliens, to the exclusive jurisdiction of the State, as it does for example the treatment of the national, or, on the other hand, it regulates it itself, independently of any municipal law, in a normative manner. In the latter case, the rules are genuine international law, independent of any other legal order, and whether or not their content coincides with that of rules of municipal law is absolutely immaterial.

It is quite clear and sufficiently proved that the treatment of aliens does not fall under the exclusive domestic jurisdiction of the State, nor are the rules of international law absolutely identical with those of municipal law, because in such a case, considering the variety of governmental organizations in the world, we would be confronted with as many international laws as there are States. In the last resort, international law only prescribes the comprehensive essence of the legal conscience of the civilized world, as it finds its expression in international practice, to be the guiding principle, with the force of a rule of law, for the treatment of aliens. This is what in our opinion is legitimately called an international standard which represents the minimum of just and adequate treatment the alien should enjoy.

<sup>1)</sup> L. of N., Doc. C. 75.M.69. 1929. V. p. 18 and see above p. 81

<sup>2)</sup> Kelsen, *Reine Rechtslehre*, p. 140

It is evident that the consequences of the doctrine of national treatment have never been thought over to their full extent by its supporters. It has been realized, too, that political and not legal considerations were taken as its background. The theory is based on an overall ambition, which appears in a certain juridico-political doctrine as well as in an analogous way in the problem of the treatment of aliens, namely the attempt to maintain the conception of sovereignty, the conception that the State is the absolutely highest legal community. This sovereignty obviously can only be the sovereignty of the one State which is taken in an egocentric manner as the starting point of the whole construction. <sup>1)</sup> It is impossible, therefore, to qualify the equality doctrine other than as a mistake made on purpose, because it is incompatible with the logical structure of a normative legal order; it serves the needs of a selfish and narrow-minded conception of community life.

On the other hand, the doctrine of international standards fits perfectly into the framework of general international law, because it is consistent with its structure and, what is more, is an organic part of it. It would be difficult to destroy this conclusion by a logical argument in the spirit of a sound legal doctrine as that of positive international law. Therefore it may safely be said that a doctrinal analysis which touches the roots of the international legal order must be favourable to the theory of the minimum standard.

It is naturally impossible to speak of validity, the term understood in a legal sense, of a theory. If we speak of validity, it is to mean the specific existence of a norm: rules of law, if valid, are norms. <sup>2)</sup> To establish the specific norms, regulating the status of the alien, will be the object of the second part of this study.

But in order to find the norms, we must be guided by general principles. The doctrine of international standards seems to be fully in accord with the general principles of the law of nations, and, from the doctrinal point of view at least must be given preference to the doctrine of national treatment.

<sup>1)</sup> For a general discussion of these problems, see Kelsen, *Reine Rechtslehre*, pp. 134-154

<sup>2)</sup> Kelsen, *General Theory of Law and State*, pp. 30-31

## 2. *Practical Evaluation*

The further question which we have to answer is which of the two theories can be applied in practice. It is rather an important factor. Theories might logically and even legally be quite sound and correct and nevertheless lack practical value, because unsurmountable obstacles may be encountered in practice barring the realization of their aims. What is more, a legal theory has no value as long as it creates no definite results in the practical application or determination of the law.

It is often difficult, however, to express such things as the practical value of theories in an a priori manner. To construe their effects in the abstract is not only dangerous and misleading, but very unconvincing. We are exactly in such a position, because the infinite variety of their scope makes it impossible to choose one example of universal value which would give support to our reasoning.

In such a case, one can resort to another, disreputed method. It seems that we are compelled, instead of approaching the problem from a positive angle, to draw conclusions from the arguments against.

### a. *Arguments for and against the Equality Doctrine*

The first argument which must be made against this doctrine is that its name is already misleading.

Equality is the condition of being equal to somebody. The alien, however, is only in a very restricted sense equal to the national, nor is he treated like the national, as the term "national treatment" seems to suggest. The primary correction which must be made is that the term "national treatment" signifies placing the alien only on a footing of civil equality with the national.

This is the formula which is thought to have been introduced by Andres Bello, the famous Venezuelan who in 1855 drafted the Chilean Civil Code. <sup>1)</sup> National treatment amounts therefore to considerably less than the national actually gets. Even if civil equality is granted, this does not mean that the alien is to be envied, because most impositions and discriminations come from public law and its encroachments on which the alien cannot, by the nature of

<sup>1)</sup> Borchard, A. S., Proceedings, 1939, p. 55

his status, have, even in the most democratic country, any influence or control.

As an illustration of this, a remark of John Basset Moore in his brief in the *Constancia Sugar Case* before the Spanish Treaty Claims Commission, may be mentioned. He said that nationals are presumed to have a political remedy, whereas the alien's inability to exercise political rights deprives him of one of the principle safeguards against oppression. <sup>1)</sup>

With this falls also the contention that national treatment is a privilege bestowed upon the alien. It seems rather to be a burden for the alien, because, if he does not possess public rights, that is to say, if from the point of view of rights he is not equal to the national, he curiously enough is almost equal from the point of view of his duties.

This makes it clear that the equality doctrine is not a theory designed to protect the alien, but to protect the State from the alien, extraordinary though it may sound.

The best example in support of this contention was furnished by Mexico. In the exchange of notes between Mexico and the United States of America, which took place in the year 1938, Mexico frankly contended that the equality of treatment was not established "to protect the rights of foreigners against the State", but, on the contrary, to "defend weak States against the unjustified pretension of foreigners who, alleging supposed international laws, demand a privileged position." <sup>2)</sup> But a Note of the Secretary of State, Mr. Hull, gave this contention the appropriate answer: <sup>3)</sup>

"The doctrine of equality of treatment, like that of just compensation, is of ancient origin. It appears in many constitutions, bills of rights and documents of international validity. The word has invariably referred to equality in lawful rights of the person and to protection in exercising such lawful rights. There is now announced by your Government the astounding theory that this treasured and cherished principle of equality, designed to protect both human and property rights, is to be invoked, not in the protection of personal rights and liberties, but as a chief ground for depriving and stripping individuals of their con-

<sup>1)</sup> Borchard, loc. cit., p. 57

<sup>2)</sup> Note of Sept. 3, 1938, as quoted by Borchard, loc. cit., p. 55

<sup>3)</sup> Note of Aug. 22, 1938, Hackworth, vol. III, pp. 658-660

ceded rights. It is contended, in a word, that it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived, and if no victim is allowed to escape....”

“....The statement in your Government’s Note to the effect that foreigners who voluntarily move to a country not their own assume, along with the advantages which they may seek or enjoy, the risks to which they may be exposed and are not entitled to a better treatment than nationals of the country, presupposes the maintenance of law and order consistent with principles of international law; that is to say, when aliens are admitted into a country the country is obliged to accord a degree of protection of life and property consistent with the standard of justice recognized by the law of nations. Actually, the question at issue raises no possible problem of special privilege....”

The question which may be asked in this connection is whether the States need such a conception as the equality doctrine to protect themselves from unreasonable demands on behalf of aliens. This may have been the case on some occasions in the 19th century. The South American States almost exclusively put this reasoning at the basis of their theory. It may be true that sometimes they were harshly treated by European Nations <sup>1)</sup> which really is not so surprising considering the primitive and defective municipal organization from which at that time aliens could seek redress. Today the situation is quite different. As Prof. Borchard points out, contrary to the common view, the United States and other strong Nations probably pay more in damages for breach of international duty than do smaller States which are disposed to invoke their abstract sovereignty to escape international responsibility. <sup>2)</sup> A justification of the theory can not, in our opinion, be derived from it.

As a consequence that same argument cannot be used against our strongest criticism, namely that it is wrong and dangerous to try to withdraw the protection, furnished by international law, from a certain class of individuals. States derive some justification from the argument that any other treatment of the alien would be a bad

<sup>1)</sup> Eagleton, Responsibility, p. 218

<sup>2)</sup> loc. cit., p. 57

example to the national, who himself would begin to demand better treatment and therewith undermine the established social order. But since the international standard does not make any unreasonable demands, this argument means that in such a case the nationals must be very badly treated indeed and that the alien needs the protection of the law doubly. What is more, if it has as secondary effect the improvement of the treatment of the national, this is only to be welcomed.

There is, however, one argument which definitely is in favour of the equality doctrine, namely that it is easily applied. From the point of view of the municipal organization of the State it certainly is an advantage to be able to disregard to a fair extent that some of the “subjects” are aliens, and should therefore belong to a certain exceptional class. The equality doctrine considerably diminishes the aspect of the presence of the alien in the territory being a liability and favours the assimilation of the aliens into the organic structure of the economy of the State.

It is, however, not the aim of the doctrine of international standards to prevent such a development. Quite the contrary, it encourages it, because it may also be considered to be in conformity with international standards to enable an individual to live a normal community life. The equality doctrine fails, on the other hand, to protect the alien from the undue hardship of his life which he otherwise would have to suffer without having an adequate defense, because of the shortcomings of his position which have to remain, and are due to his being an alien.

#### *b. Arguments against the Standard*

Leaving apart now the question of sovereignty and that of priority of international law, aspects we have dealt with already, the common argument against the standard is that it does not exist.

It is conceded, however, that there might be local standards, such as an Anglo-Saxon common law standard, an European Roman Civil Law standard, a communist standard, fascist standard and so forth. <sup>1)</sup> The existence of such regional standards, hardly compatible with each other, is naturally of no value for international law as a test of international significance.

<sup>1)</sup> Freeman, Denial of Justice, p. 563



To a certain extent this argument certainly is justified. The degree of uniformity which we find in the world with respect to criminal and civil justice is not very high.

The question is often asked, therefore, and that quite legitimately, what we mean by asserting that there exists an international standard and what the contents of it are.

The answer most text-writers give, can hardly be esteemed satisfactory. Prof. Borchard was well aware of this difficulty when he said that the existence of the standard and its service as a criterion of international responsibility in specific instances by no means gives us a definition of its content. Frequent reference to it may easily give rise to erroneous inference that it is definite and definable, <sup>1)</sup> and he then went so far as to qualify it "vague, deceiving and confused properly calculated to produce error, for it pretends to express a conception which is reality seldom if ever exists." <sup>2)</sup>

Besides the unfortunate fact that the standard is not clearly stated there is furthermore no impartial authority either to determine or to enforce it. Prof. Eagleton is therefore of the opinion that the chief need of the principle of responsibility is a clearer statement of the rules of international law, a more precise definition of what obligations the State has under international law. The problem is not so much due to the fact that States refuse to respond to their obligations, as that they are unable, in many instances, to agree upon what those obligations are. <sup>3)</sup>

But is it really "hardly definable"? We think this is an exaggeration. At least it is felt, since it is compounded of general principles recognized by the domestic law of practically every civilized country, and has found its expression in innumerable arbitral decisions, there should be the possibility to define or state its fundamental norms, leaving the details to the appreciation of the judicial or arbitral authorities, handling a particular case.

Moreover, it is therefore only partly true that there is a series of international standards. It is as erroneous a contention as there could possibly be to maintain that there is a series of common laws.

Nobody would deny that a colonial territory, for example, and a

<sup>1)</sup> loc. cit., p. 61

<sup>2)</sup> In his Report to the Institute of International Law, Cambridge Session, Annuaire, 1931, vol. I, p. 265

<sup>3)</sup> Eagleton, Responsibility, p. 218

highly organized metropolitan territory, should not be put on the same footing. The standard is always the same, but it is for the judges to take the particular circumstances into consideration which may call for special leniency. An analogy to penal law may be useful in this connection. A murder is a murder, but the appreciation of the circumstances alone enable the judge to fix a penalty in conformity with civilized justice.

However, it is quite true that the apparent flexibility and variability of the standard is very likely an element which destroys the confidence of the States.

However it may be, the arguments against the standard do not shake the whole conception at its roots. Perfection seems to be unattainable and all the criticism addressed to it surely is well founded, but this is due to the fact that we are in the presence of an institution which is young and perhaps not yet reaching its target. Considering all the circumstances, its results are, however, more than merely encouraging. As to the practical question of whether or not it can be applied, the following considerations have to be made.

It must be confessed that it is more difficult for a State to apply a minimum of treatment to aliens along the lines of an international standard than to follow the equality doctrine. The fact that this minimum is hardly defined leaves no objective measure for the appreciation of the treatment. But since the demands of the standard are not exorbitant nor different from what a State is used to, the *diligentia quam in suis* will suffice under ordinary circumstances to fulfill its requirements.

### 3. Relations between the two Doctrines

The problem appears in a nutshell in a frequently used phrase. As a general rule, "national treatment" of a foreigner is sufficient, if the nationals themselves are treated according to international standards. <sup>1)</sup>

With this statement, the problem is moved to another plane.

<sup>1)</sup> "... Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection and the same redress for injury which it gives to its own citizens, and neither more nor less; provided the protection which the country gives to its citizens conforms to the established standard of civilization. . . ." Elihu Root, A.S., Proceedings, 1910, p. 20

No longer is the treatment of the alien under consideration but that of the national which itself again is taken as a standard for the treatment of the alien.

The analysis of the reasoning underlying this statement shows that it is fundamentally wrong.

International standards are not designed to be used as tests for the treatment of nationals and, what is more, they cannot apply to nationals, the latter being under the exclusive jurisdiction of the State. As a consequence the treatment of the national himself cannot be taken as a measure for international standards.

It would thus be reasoning which fundamentally mistakes the character of the international standard.

All that can be said is that the treatment of aliens according to international standards may coincide with the treatment of nationals. This, however, does not mean "national treatment" in the specific sense of the term. It only means that the norms of two different legal orders are identical in content in this particular field.

This identity of content may be assumed in most cases, although a discrimination between nationals and aliens appears to be very frequent and is, as we had occasion to mention, not in itself a violation of international standards.

For the sake of clarity and in order to maintain the uniformity of our argument, however, we must deny on scientific grounds a relation between the international standard and "national treatment". This, moreover, is as far as *a priori* reasoning can be carried. How the application of the doctrine works in practice will be discussed below.

#### 4. Conclusions

It is evident, in view of the preceding considerations, that from a scientific and practical point of view the doctrine of international standards must be given precedence over the equality doctrine.

We also venture to say that from a subjective point of view it is the only line for a progressive international lawyer to take.

In the course of the discussion, the doctrine of standards has been described with various expressions and with a number of fundamental conceptions. It might be expected that this variety would be

summarized and put together in this concluding section in a statement of principles. This, however, is impossible, because before we have tangible results, it is bound to be in some form of legal metaphysics which would leave as much vagueness in "international standards" as there is now. We therefore feel it to be necessary to try and establish once and for all the fundamental norms which form that international standard before anything definite can be said.

No better way of concluding this section of theoretical discussion could be found than by quoting Elihu Root. His words of great simplicity and power have become something of a classic in the controversy about the treatment of aliens, and they are admirably suited to support our case:

"There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment of aliens." <sup>1)</sup>

<sup>1)</sup> A.S., Proceedings, 1910, pp. 20-21

PART II

## APPLICATION

## I. INTRODUCTORY

The aim we have set ourselves in the second part of this study is to try to establish rules, if possible rules of law, as they appear in international practice and which we believe to be the skeleton of the international standard.

This is a bold undertaking when we remember that the greatest authorities in this field have expressed their scepticism as to the possibility of arriving at valid results in such an attempt. Indeed they have thought it unwise to try because, in their mind, the particular character of the standard does not lend itself easily to such an undertaking. What is more, they consider it fateful to do so because once the standard is established and fixed it necessarily loses something of its flexibility; its possibilities and scope are narrowed; and, possibly, it is also limited in its evolution.

To these grave arguments we have to oppose some considerations of a different nature, which in our opinion, justify our endeavour. If the international standard is neither definable nor to be defined, a question arises as to the principles by which a judge should be guided and inspired when rendering a decision in compliance with the demands of the standard. What are the principles underlying such a decision? Are they natural law of a universal and humanitarian character? Are they equity? Or are they norms?

As it may have been observed, we have consistently maintained that the international standard is nothing else than a set of rules, correlated to each other and deriving from one particular norm of general international law, namely that the treatment of aliens is regulated by the law of nations.

If this basic rule of international law can be expressed and defined, why should the rules which depend upon and acquire their validity from it not be susceptible of definition?

We do not believe that from a legal point of view the answer can be negative. It would be different, however, if our judgment were inspired by juridico-political and legislative considerations.

Vague terms like "minimum standard" or "international standard"

suggest nothing tangible; it almost can be said that they leave a wide field to our imagination. To pin them down and to state them in clear, legal terms may likely be disillusioning.

It may be argued that in the case where a legal order such as the law of nations is under consideration, a rather precarious legal order which is still in the midst of evolution and establishment, it is unwise to proceed to a disclosure which might reveal that behind an ambitious term like "international standards" minor and unimportant principles have found shelter.

Is it, however, wise to build confidence into something by labelling it with a practically meaningless name if the actual achievements themselves are something to be proud of?

Indeed, we think that the international standard is a contribution to a better world and is not to be underestimated. It is the first step towards the recognition of international human rights. For the first time the individual is the direct beneficiary of the protection of a legal order which formerly was considered to be a mere set of rules for the jealous, quarreling States. In our opinion it is of the utmost importance to know as far as possible the content and the field which the international standard covers. It is necessary to realise at what point of evolution it has arrived in order to appreciate its defects and shortcomings.

The only difficulty, in our view, is how it can be done. Can the minimum standard be expressed in short and conclusive rules?

We are confronted with a mass of court cases, national and international, some of them advocating "national treatment", others denouncing it and advocating the minimum standard. Most of them, however, contain clear decisions, to the point, with few statements about the principles involved and the conclusions to be made therefrom.

The importance of precedent as an expression of legal conscience has always been recognized. Such a thing as binding precedent, however, is hardly known in international law.

Nevertheless, precedents are a substantial source of legal perception and it is believed that, if it is possible to grasp the essence of decision on some particular points, we shall have arrived at the stage of being able to express recognized principles of international law.

This is the method we are going to apply.

In order to be able to arrive at practical results during the course of the analysis of the precedents to which we have access, we must base ourselves on general outlines of what we are looking for.

Since the treatment of aliens is under consideration, these outlines must cover, as far as possible, all stages and situations in which an individual may find himself in a modern society.

It appears that modern community life with all its implications can be divided into three spheres. The first and foremost is the individual's personality, either as a human or as a legal being. Second is the economic sphere, the individual's participation in the gainful activities by which he sustains himself and his family. Third is the mechanism of protection from infringement and violation of the two former spheres, namely his procedural rights. This may be an unorthodox division. It is, however, broad and nevertheless precise enough for our purpose.

Each of these spheres represents for lawyers a group of rights and duties, and it is exactly to these rights and duties that we shall devote our attention.

Our task consequently will be to analyse *an a prioristic* proposition in the light of the judicial and arbitral practice of the last 150 years, and upon discovery of a general trend or a certain consistency to state the essence of the decisions in a rule. This is not to mean, however, that these rules will be rules of law or norms; they may be, but our endeavour in the first place is to state the simple and concise expression of what the law usually is considered to be.

It is important to bear in mind that this is only an attempt to formulate the content of the minimum standard of rights the alien should be accorded. If it is not more, it surely is an illustration of what principles of general international law governing the treatment of the alien have been recognised by the community of civilized nations.

## II. THE RECOGNITION OF THE JURIDICAL PERSONALITY OF THE ALIEN

As a preliminary to all research regarding the minimum rights and duties of the alien under international law, it has to be determined whether international law imposes upon the receiving State

the duty to recognize the juristic personality of the alien either as an individual or as a corporation.

The juridical personality of an individual is the fundamental principle on which alone he can be incorporated as a member of a community and can take part from the point of view of law in all activities of modern social life.

Yet in spite of its apparent importance, it seems perhaps superfluous to discuss the question at all, the recognition of an individual as a juridical person, whether national or alien, being almost taken for granted. The following considerations, however, have nevertheless to be made.

In the case of a citizen of a State, municipal law determines when he acquires juridical personality and when and under what conditions he may lose it. Consequently not every individual is in the eyes of the law a juridical person through the fact alone that he is a human being who happens to come under its jurisdiction. There are certain conditions which must be fulfilled.

In the same way, the fact that an alien resides in a foreign territory and must therefore abide by local law does not suffice as such to make him a juridical person. He has to be recognized and the question is whether there is a duty of the receiving State according to international law to do so or not.

#### 1. *In the Case of an Individual*

Here the question is relatively easy to answer. There is considered to exist a general principle which expresses the real essence of the duties of States when they belong to the international community concerning the treatment of aliens. It may be stated in the following manner.

Each State is bound towards all other States to recognize their respective nationals as persons, subject to rights and duties, with all the consequences of public and private law which derive therefrom, and to afford them the legal protection which this recognition intends them to enjoy.<sup>1)</sup>

Even if no State is forced, besides the obligations it has to shoulder which derive from international conventions, to grant the alien all the rights, even the civil rights the nationals enjoy, it could not deny

<sup>1)</sup> Anzilotti, R.G.D.I.P., vol. 13 (1906), p. 19; Basdevant, Répertoire, vol. 8, p. 31; Verdross, Recueil, vol. 37, (1931, III), p. 353

them, without violating international law, the rights and privileges which are primarily and necessarily connected with juridical personality; nor could the State tolerate acts incompatible with the said personality; In the opinion of many authors there seems to be no possible doubt that such a rule of positive international law exists.<sup>1)</sup>

Indeed, the conscience of civilized nations could not admit that an individual could be treated differently than as a subject of rights and duties. Although there is no need to pretend in this connection that the personality of the individual is a natural gift, a conception which certainly is wrong, because the juridical personality is a law-created phenomenon and not to be confused with similar notions of the natural law doctrine.

In international relations the States are not inclined to consider it as within their power not to recognize the personality of the individual as such, not even if the individual happens only to be for a limited or unlimited period of time within the sphere of their jurisdiction. This was clearly evidenced by the principles the civilized nations adopted with the view of suppressing the slave trade.<sup>2)</sup>

It is moreover quite inconceivable that a State could consider all acts directed against the person and property of an alien as non-existent and without results, or that it could deprive the alien of the capacity to create or enter obligations and to be responsible for his acts. Quite apart from the fact that no other State would tolerate such a practice, it would certainly create difficulties and hardships where its own nationals are concerned.

#### 2. *In the Case of a Corporation*

If the recognition of the juridical personality of the alien individual does not give rise to great problems today, it is quite different when juristic persons or corporations are under consideration.

It is usually held by the traditional doctrine that the juridical personality of a corporation is based on a legal fiction. Consequently a corporation exists only by virtue of the avowed intention of the legislator who provides for the possibilities of its establishment.<sup>3)</sup>

<sup>1)</sup> The Institute of International Law has declared during its first session in 1874 that the juridical capacity of the alien „existe indépendamment, de toute stipulation des traités et de toute condition de réciprocité.” *Annuaire*, abridged edition, vol. I, p. 52

<sup>2)</sup> Anzilotti, loc. cit., p. 20, Basdevant, loc. cit., p. 32

<sup>3)</sup> Pillet-Niboyet, *Manuel de Droit International Privé*, p. 309

Since a corporation does not exist in reality, that is to say has no personality apart from the juridical personality, it is a question whether other States should recognize it as existing or not. The controversy therefore is whether, as regards the status and capacity of foreign corporations, a civil "recognition" of them is necessary to enable them to exercise their rights in the foreign country, or, as other authors hold, a new "recognition" is useless and even contrary to the principles of international law. <sup>1)</sup>

The first contention signifies that corporations do not exist outside the country where they were constituted, if they have not been the object of a real recognition in each other country. The juristic persons would consequently be purely territorial. <sup>2)</sup>

According to the second view, the starting point is the notion of reality of corporations. They are assimilated to natural persons living abroad. They therefore have a right to be recognized by law in international relations, because, as the argument goes, the activity of the human being is in its essence always the same, whether it is on an individual or on a social level. <sup>3)</sup>

It is, however, thought to be of no great importance to know the reasons for which the corporation should be recognized. The question is whether according to positive international law the juridical personality of a corporation has to be recognized at all.

The principle seems to be well established that a corporation, duly created in one country, should be recognized as a corporation by other countries. As Dicey said in Rule 139: <sup>4)</sup>

"The existence of a foreign corporation duly created under the law of a foreign country is recognized by the court."

Or as it was stated in Project No. 13 of the American Institute of International Law, a project dealing with "International Rights and Duties of Natural and Juridical Persons": <sup>5)</sup>

<sup>1)</sup> Note of the Italian Minister of Foreign Affairs to the American Embassy at Rome, July, 1899. Moore, Digest, vol. IV, pp. 19-20

<sup>2)</sup> Pillet-Niboyet, op. cit., p. 309

<sup>3)</sup> Pillet-Niboyet, op. cit., p. 310; Basdevant, op. cit., p. 32

<sup>4)</sup> Dicey, Conflict of Laws, p. 520; as to public corporations, see the Resolution of the Institute of International Law: "De la capacité des personnes morales publiques étrangères", *Annuaire*, abr. ed. vol. IV, 1928, p. 338

<sup>5)</sup> A. J., suppl. vol. 20 (1926), p. 326

"The juridical persons recognized by one of the American Republics... have a juridical character in all other American Republics....."

There seems to be a strong indication that this has become a positive rule of law and is not merely a matter of international comity as it was held to be:

„By the law of comity among nations, a corporation created by one sovereign is permitted to make contracts in another, and to sue and be sued in its courts; and this rule prevails in the United States and between the States thereof.” <sup>1)</sup>

One specification, however, has to be made with reference to the system of the European continental theories which know of a notion of "domicile" of the corporation:

"The generally recognized principle that entities of a foreign country, possessing legal capacity, are regularly accorded legal capacity within domestic territory, is limited when the State granting the legal personality is not at the same time the State of domicile (home State).” <sup>2)</sup>

The idea of assimilation of corporations to natural persons seems to break through. This would mean that in the end a distinction from this point of view between the two forms of juridical persons would become superfluous. The following statement hints in that direction:

"...corporations and individuals, aliens and citizens, are for most purposes in the same class. Ordinarily, they have the same civil rights; are entitled to the same remedies; are subject to the same police regulations...." <sup>3)</sup>

A great number of international conventions also follow the principle that corporations should be *ipso facto* recognized in foreign States. <sup>4)</sup> We therefore think it correct to formulate the first and

<sup>1)</sup> *Bank of Augusta v. Earle*, Moore, Digest, vol. IV, p. 19

<sup>2)</sup> Fontes, Ser. A sect. 2 tom. I. 1. No. 165

<sup>3)</sup> Dissenting opinion of Justice Brandeis in *Louis Liggett et al. v. Lee*, Comptroller et al., Hackworth, vol. III, p. 422

<sup>4)</sup> Basdevant, op. cit., p. 33

foremost rule of international law, which is the condition *sine qua non* of the treatment of aliens, in the following manner:

*An alien, whether natural person or corporation, is entitled by international law to have his juridical personality and legal capacity recognized by the receiving State.*

### III. RIGHTS AND DUTIES CONNECTED WITH THE PERSON OF THE ALIEN

#### 1. *Inviolability of the Person*

As a general rule the alien must be accorded certain rights which belong to him in his quality as a member of mankind. These rights come into existence and cease to exist with the birth and the death of the individual; they are therefore properly called rights connected with the person of the individual. They are not transferable, nor may they be withheld or prolonged beyond the actual existence of an individual.

Society, being the organized way of life and the expression of the interdependence of mankind, reposes on some fundamental moral and ethical commands which were made in order to safeguard its continuous existence and relative stability, the object of the protection of the law.

It is not the object of this study to deal with these commands as an outcome of morality, nor to indulge in speculations of the order of a natural law doctrine, but to ascertain these rules in the form of norms. It is, however, valuable to be reminded of their social roots from which they derive enormous respect, more perhaps than from the fact that their violation is heavily sanctioned.

It is generally recognized that each individual has a right to live, and during his life to be protected from hardship, bodily harm and deprivation of freedom. These are the fundamental rights of human existence. Through the fact that man lives in organized communities called States, it is the State *per definitionem* having a certain power over the individual, which has to guarantee and protect these rights. In the form they were expressed in the above statement, they belong to the common principles, recognized by civilized nations. This does not mean, however, that they are observed and applied in a uniform manner all over the world.

As we have concluded above, international law sets up a minimum

standard of rights and duties with regard to the alien. This raises the question whether the law of nations considers these rights to fall under this category of minimum rights and consequently protects them. The affirmative answer seems to be very probable, because the evident lack of uniformity in the world makes the protection of these rights a necessity. If the fundamental rights would not be protected it would be absolutely futile to try to establish a general standard of treatment.

Taking for granted, for the moment, that they exist, it is easily realized that they may be violated in different manners. For our purpose, it seems to be advantageous, to make the following distinction:

a. In the alien's State of residence a substantive law may be applicable which violates the obligations of that State towards other States in respect of the treatment of aliens.

b. The rights of an alien may be violated by acts of officials, administrative or judicial, in the exercise of their assigned functions. On this distinction the following analysis will be based.

#### *a. Illegal substantive law*

It is an established fact that a State may violate its international obligations by applying its laws to aliens, laws which do not fulfil the requirements of the international standard.

In the field of the inviolability of person this can happen in a variety of forms.

One form, however, was abolished in 1841, namely the Slave trade. <sup>1)</sup> The treaty of London of December 20, 1841, <sup>2)</sup> the General Act of Berlin of February 26, 1885, <sup>3)</sup> and the General Act of Brussels of July 2, 1890, <sup>4)</sup> have done more for the recognition of the minimum standard than is generally realized. <sup>5)</sup>

Modern "civilization", however, brought other dangers with it. Slavery is by no means abolished, but today it is not the black members of the human race which are held as property by an individual, but the white men themselves who are held as slaves by States in concentration camps.

<sup>1)</sup> Anzilotti, R.C.D.I.P., vol. 13 (1906), p. 20

<sup>2)</sup> Martens, N.R., 1. série, vol. II, p. 302 and p. 508

<sup>3)</sup> Martens, N.R.G., 2 série, vol. X, p. 414

<sup>4)</sup> Martens, N.R.G., 2 série, vol. XVII, p. 345

<sup>5)</sup> Guggenheim, vol. I, p. 309 and p. 438



Some modern political ideologies preach furthermore a conception of humanity and human dignity which is in flagrant opposition to those principles recognized by civilized nations. One only needs to be reminded of the antropologically untenable racial ideology of the former third Reich.

It is plain enough that a number of States did (and, incidentally, still do) violate the fundamental rights and principles of humanity which form the backbone of western civilization. We cannot devote much space to these horrors. They are too well-known and universally condemned. In order to show the implications a statute of national legislation may cause, one example only will be analysed dating from the Nazi-régime in Germany.

National socialist writers tried to set up a legal doctrine in accordance with the ideology preached by the Führer and his followers. The result was this:

They were of the opinion that the community (*Gemeinschaft*) expresses the will of nature; its law therefore is embedded in the blood and soul of the people (*Volk*). It is a natural law, peculiar to each people. <sup>1)</sup> Natural law is unwritten; it lies in the very blood of man; it is a biological natural law.

A law, whether natural or positive, is dependent on the racial composition of the „*Volk*” it governs. The purer the race, the clearer the legal perception of the „*Volk*”. <sup>2)</sup> The primary aim therefore was to purify the race and that not only from the elements of an allegedly inferior order, such as the Jews,<sup>3)</sup> but also from German elements which may not be considered as having reached, physically and mentally, the standard of the obsolet nordic race.

<sup>1)</sup> Gott, A. J., vol. 32 (1938), p. 705

<sup>2)</sup> Gott, loc. cit., p. 706

<sup>3)</sup> How far this conception impregnated practical life is illustrated by the following decision by the Appellate Court of Naumburg, January 5, 1935:

„Ne viole aucune obligation le débiteur allemand qui refuse d'exécuter un contrat lorsque la prestation expipé heurte l'intérêt national parce qu'elle facilite l'acquisition d'un immeuble allemand par un juif étranger.

Notamment c'est à bon droit qu'une société d'assurance sur la vie qui avait promis à un juif tchéoslovaque de consentir des prêts hypothécaires d'une importance déterminée à celui-ci ou à des personnes par lui proposées, oexipe du fait qu'elle administre, sous la surveillance de l'Etat des parties importantes du patrimoine allemand comme fiduciaire de la nation et que, ayant par conséquent l'obligation spéciale de se conformer aux idées directives du régime actuel, elle ne peut pas être tenue d'accorder des prêts aux personnes proposées par son co-contractant, si elles ne sont pas de nationalité allemande et de race aryenne.”

Bulletin de l'Institut Juridique International, 1936, p. 276

Among the bulk of social legislation, we therefore find a law for the Prevention of Hereditary Diseases (*Gesetz zur Verhütung Erbkranken Nachwuchses vom 14. Juli 1933*<sup>1)</sup>). This law provided that in cases of individuals suffering from hereditary diseases (especially mental diseases like schizophrenia etc.) a Court of Racial Health (paragraph 5 of the law) can order, on application by a doctor (paragraph 3), the compulsory sterilization of this individual (paragraph 12).

On several occasions, aliens were also subjected to this regulation. So, for example, the Court of Racial Health of Berlin<sup>2)</sup> ordered the sterilization of a Czechoslovak national, suffering from schizophrenia. It was objected on his behalf that he was a foreign national, and, in this matter, not subject to the jurisdiction of the Court.

It was nevertheless held that the Court was competent to order his sterilization because he was resident within the jurisdiction. The object of the law in question would not be attained if foreigners were not subjected to it. A foreigner could leave the country and so escape execution of the order. If he chose to remain, measures taken by the Government for the improvement of the health of the community must apply to him also.

In another case a domestic servant, employed in England, travelling through Germany to reach her home State in Eastern Europe, had attracted the attention of the authorities by her peculiar behaviour (schizophrenia) and a Court ordered sterilization. Upon appeal to the Supreme Court of Racial Health in Berlin the case was dismissed because she could not be considered as a resident alien. The argumentation of the Court about the principles involved is interesting enough to be noted:<sup>3)</sup>

“The appellant is an alien. The principle that aliens while sojourning in Germany are subject to the German laws applies also . . . to the Law for the Prevention of Hereditary Diseases. Even if the Law itself does not contain any provision regarding the sterilization of aliens, the purpose of the law which aims at maintaining the health of the German people, leads the Court to

<sup>1)</sup> Reichs-Gesetz-Blatt, vol. I, p. 529; Dokumente der Deutschen Politik, vol. I, p. 177

<sup>2)</sup> Sterilization (Germany) Case, April 19, 1934, A. D. 1933-34, case No. 128

<sup>3)</sup> Sterilization (Hereditary Diseases) Case, Jan. 20, 1938, A.D. 1938-40, case No. 121



the conclusion that aliens suffering from hereditary diseases must be sterilized if they are domiciled or permanently resident in Germany. For the purpose of the Law would be impeded if numerous persons who are permanently resident in Germany could, without restrictions, transmit to their descendants the hereditary diseases from which they are suffering.”<sup>1)</sup>

It seems almost superfluous to insist that such a law and, what is more, its application to aliens offends every standard of national as well as international justice. Acts, like those described in the above mentioned cases, even if they are so to say acts of States properly made applicable in the prescribed judicial way, are a violation of human rights by mutilating the body of an individual without his will nor his assent. International law cannot tolerate that.

Other instances of similar repulsiveness could easily be enumerated, especially with regard to the treatment of alien-Jews in Nazi countries. There are also other ideologies which could not escape the well-placed accusation that its domestic justice does not fully conform to the desired standard. But it is considered that no further proof is needed to discover the attitude of international law to such methods.

#### b. Violation by the Acts of Officials

In this second category, the acts of officials of the State, violating the fundamental rights of the alien, will be examined. No more is the content of laws under consideration, but the execution of the laws. It is, however, to be considered as an elementary rule of international law that, when the alien is submitted to a certain procedure during the process of the normal exercise of either the State's repressive or fiscal functions, neither he nor his home State has any ground for objection. Submission to its laws implies, as a general proposition, that the ordinary administration of the State's law-enforcement machinery can give no cause for international reaction.<sup>2)</sup> A contrary doctrine would fail to recognize that this administration is itself contemplated by international law and delegated to the members of the society of nations for the performance according to the manner

<sup>1)</sup> cf. also A.D. 1935-37 case, No. 149

<sup>2)</sup> Borchard, *Diplomatic Protection*, p. 22; Basdevant, *op. cit.*, p. 26

which they have chosen.<sup>1)</sup> There is no doubt that the receiving State enjoys the rights to judge and punish foreigners for all infractions committed upon its territory and to levy taxes, tolls and duties as it deems necessary and desirable.<sup>2)</sup>

The alien has no protest to make if all these laws are applied *bona fide* and with due diligence. But, since no governmental organization of any sort is perfect, there is a great possibility that he may be violated in his rights by officials in the exercise of their duties. International law draws certain limits with regard to the fundamental rights beyond which the State incurs responsibility for the acts of its officials.

To establish the laws of State responsibility it has naturally always to be ascertained by what officials the crime or wrong has been committed in order to be able to impute the act to the State.<sup>3)</sup> We, however, do not want to establish in the first place the exact degree of State responsibility. We want to know what diligence the alien is entitled to enjoy from any official of his country of residence. It is of no use to us to follow a division of the wrongful acts along the lines of the question by whom they have been committed, as e.g., acts by custom officials, acts by police officers and so forth to establish afterwards in how far the act can be imputed to the State.

It is really irrelevant to know the exact status of the official when a wrong ful act has been committed because the emphasis in this study must be laid on the act itself. We shall therefore only make the following subdivision: unlawful killing of an alien and cruel and inhuman treatment of the alien while detained by authority.

As regards the killing of aliens, many international tribunals and commissions had to state that human life seems not to be appraised in some State "as highly as international standards prescribe".<sup>4)</sup> The findings of the Mexican Claims Commission show irrefutably that there exists an international standard concerning the taking of human life.

There is the case of a Mexican girl, Concepcion Garcia, who was

<sup>1)</sup> Freeman, *Denial of Justice*, p. 196

<sup>2)</sup> Basdevant, *op. cit.*, p. 26

<sup>3)</sup> Cf. Eagleton, *Responsibility*, chapter II.

<sup>4)</sup> *US. (J. W. & N. L. Swinney) v. United Mexican States, Op. of Comm.*, 1927, p. 133

killed by a shot from the American side of the Rio Grande, when crossing the river on a raft in the company of other Mexicans. An American officer had discovered the raft in contravention of the laws, had fired the shot in order to make them halt and thereby killed the girl. The Commission held:<sup>1)</sup>

“The Commission makes its conception of international law in this respect dependent upon the answer to the question, whether there exists among civilized nations any international standard concerning the taking of human life. The Commission not only holds that there exists one, but also that it is necessary to state and acknowledge its existence because of the fact that there are parts of the world and specific circumstances in which human practice apparently is inclined to fall below this standard. . . . Nobody, moreover, will deny that in time of active war the value of human life even outside the battlefields is underrated. Authoritative writers in the field of domestic penal law in different countries and authoritative awards have emphasized that human life may not be taken either for prevention or for repression, unless in cases of extreme necessity. To give just two quotations on the subject: the famous Italian jurist Carrerra does not hesitate to qualify as an abuse of power excessive harshness employed by agents of the public force to realize an arrest, and adds that it is to such abuse that the sheriffs of Toscane owe their sad reputation. . . . An American court said: ‘The highest degree of care is exacted of a person handling firearms. They are extraordinarily dangerous, and in using them extraordinary care should be exercised to prevent injuries to others. . . . Officers, as well as other persons, should have a true appreciation of the value of human life. . . .’

The Commission was called upon in a number of other cases to judge cases of reckless<sup>2)</sup>, unlawful<sup>3)</sup> and wrongful<sup>4)</sup> killing of aliens and it developed thereby a very consistent practice:<sup>5)</sup>

<sup>1)</sup> United Mex. States (I. Garcia & M. A. Craza) v. U.S.A., Op. of Comm., 1927, p. 165

<sup>2)</sup> U.S. (J. W. & N. L. Swinney) v. U.M.St., Op. of Comm., 1927, p. 133; U.S. (C. S. Stephens & B. Stephens) v. U.M.St., Op. of Comm., 1927, p. 399

<sup>3)</sup> U.S. (M. Roper) v. U.M.St., Op. of Comm., 1927, p. 208

<sup>4)</sup> U.M. St. (D. Guerrero & de Falcon) v. U.S., Op. of Comm., 1927, p. 142

<sup>5)</sup> U.M. St. (F. Quintanilla et al.) v. U.S., Op. of Comm., 1927, p. 138

“It would go too far to hold that the Government is liable for everything which may befall him (the victim). But it has to account for him. The Government can be held liable if it is proved that it has treated him cruelly, harshly, unlawfully; so much more it is liable if it can say only that it took him into custody – and that it ignores what happened to him.”

The law in these matters appears to be the following:

In cases where the wrong is committed by a higher official of the government, acting within the scope or apparent scope of his authority, or by a person directed by such an official, the wrong is committed by the respondent government in the initial act,<sup>1)</sup> i.e. the killing or murder; there has been a wrongful act of the respondent State through its officials, a lack of the necessary diligence, in a word, a violation of the international standard.

An illustrating example is a case where an American citizen was arrested in the Dominican Republic on account of alleged remarks concerning the President of the Republic. While in jail, awaiting trial, he was secretly removed by one of the President's aide-de-camps and summarily executed.<sup>2)</sup>

A different question is, on the other hand, when the murderer is a private individual. If a State's organization assures a certain protection from crime, as is usual, the State will only have violated its international obligations, if it fails to prevent, apprehend or punish the murderer. This is, however, quite a different problem.

In the second place we have to deal with the question of cruel and inhuman treatment of aliens whilst they are detained in custody or prison on account of alleged wrongful acts or pending investigations. It seems to be in order to state at least some of the general principles which must be observed by the State in the exercise of its repressive functions.

As we have already had occasion to mention, an alien cannot escape the authority of local law. He is therefore subject to the same disagreeable procedure necessitated for the purpose of investigating crime as are the subjects of the State.<sup>3)</sup> If there is once given probable cause for arrest, followed by detention and conviction pursuant to

<sup>1)</sup> Whiteman, Damages, vol. I, p. 639

<sup>2)</sup> Hackworth, vol. V., p. 570

<sup>3)</sup> Freeman, Denial of Justice, p. 197

regular proceedings, the State has entirely fulfilled its international obligations in accordance with the soundest doctrine of establishing social order along the principles recognized by civilized nations.

The important issue in such a situation will normally be whether the action was taken in conformity with the due course of law as ordinarily administered in the legal system under which it was instituted.<sup>1)</sup> As a general rule, "international law requires that in the administration of penal laws an alien must be accorded certain rights. There must be some grounds for his arrest; he is entitled to be informed of the charges against him; he must be given opportunity to defend himself."<sup>2)</sup> A relatively frequent occurrence has been and still is in some countries that aliens, when subjected to official acts, like detention pending trial and so forth, are treated in a cruel and inhuman manner.

Here, too, international law knows tests which must be applied. As Judge Beichmann stated in the *Case of Mme. Chevreau*:

"The prisoner should be treated in a manner appropriate to his situation, and corresponding to the standard customarily accepted among civilized nations."<sup>3)</sup>

These rules are part of the procedural minima which international law requires of all States.

"No State shall subject an alien held for prosecution or punishment to other than humane treatment."<sup>4)</sup>

Unduly harsh or oppressive or unjust treatment during arrest, trial or imprisonment has frequently provided ground for international reclamation and award.

As an example of cruel and inhuman treatment, a few cases may be mentioned:

After an incident in Haiti, the Secretary of the United States, Mr. Root, stated in a note to the Minister of Haiti, February 1, 1907:<sup>5)</sup>

<sup>1)</sup> Freeman, *op. cit.*, p. 208

<sup>2)</sup> U.S. (B. E. Chatin) v. U.M. St., *Op. of Comm.*, 1927, p. 447; cf. also U.S. (Alter Levin) v. Turkey, Nielsen Report, 1937, p. 704; Hackworth, vol. III, p. 598

<sup>3)</sup> France (J. Chevreau) v. Great Britain, 1831, Hackworth, vol. III, p. 693

<sup>4)</sup> Harvard Draft Convention "Jurisdiction with respect to Crime", art. 12. A. J., spec. suppl. vol. 29 (1935) pp. 596-601; cf. also Basis No. 11, L. of N. Doc. C. 75.M.69.1929, V, p. 70

<sup>5)</sup> Hackworth, vol. III, p. 533

"Flogging of an American citizen by a Haitian officer can not be considered due process or due punishment for a violation of law, and . . . such conduct on the part of Haitian officials will not be tolerated."

In *Dr. Baldwin's Case*, claims were made for personal injuries suffered at the hands of the Mexican authorities. Baldwin was confined in stocks with a broken leg, and detained in prison without surgical assistance.<sup>1)</sup> Again it is the Mexican Claims Commission which made a statement which was destined to become classical:<sup>2)</sup>

"With respect to the charge of ill-treatment of Roberts, it appears from evidence submitted by the American Agency that the jail in which he (Roberts) was kept was a room thirty-five feet long and twenty feet wide with stone walls, earthen floor, a single window, a single door and no sanitary accommodations, all the prisoners depositing their excrement in a barrel kept in a corner of the room; that thirty or forty men were at times thrown together in this single room; that the prisoners were given no facilities to clean themselves; that the room contained no furniture except that which the prisoners were able to obtain by their own means; that they were afforded no opportunity to take physical exercise; and that the food given to them was scarce, unclean and of the coarsest kind. . . .

" . . . Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment."

The list of cases in which international tribunals dealt with

<sup>1)</sup> Moore, *Arbitrations*, pp. 3239-3240

<sup>2)</sup> U.S. (H. Roberts) v. U.M.St., *Op. of Comm.*, 1927, pp. 104-105

similar matters could be considerably extended.<sup>1)</sup> Alone from those quoted with regard to the treatment of aliens who happen to find themselves subjected to the repressive organization of a State the fundamental right to live of bodily integrity may in the light of these considerations safely be affirmed.

In view of this exposition of facts, touching the majority of the possibilities whereby an alien can suffer harm from the government of his State of residence, it is considered to be legitimate to affirm that international law has set a standard in this field, the non-observation of which constitutes an international wrong.<sup>2)</sup>

To specify the results of this investigation, we might formulate Rule No. 2 in the following manner:

*The alien can lawfully demand respect for his life and protection for his body.*

## 2. Personal Freedom

In addition to the inviolability of the person, the alien enjoys certain rights which are a necessary and immediate outcome of the recognition of juridical personality.<sup>3)</sup> The fact that they result from the juridical personality seems to imply their recognition as belonging to the international standard. In general this is not contested, but there is a considerable difference of opinion as to what the rights amount to. A detailed discussion is therefore necessary.

In the first place, one aspect of human personality has to be considered which is in close connection with the preceeding section, namely freedom of circulation, especially in the meaning of freedom from restraint. Arbitrary deprivation of liberty is an important and frequent form of violating the fundamental rights of the alien. Misconduct on the part of administrative and judicial authorities

<sup>1)</sup> cf. e.g. Cahagan Case, Moore, Arbitrations, pp. 3240—3241; Case of the „Emily Banning”, Moore, Arbitrations, p. 3251; Case of the Schooner „William Turner”, Lapradelle-Politis, vol. I, pp. 494—500; Case of the Frigate „Forte”, Lapradelle-Politis, vol. II, p. 244; White Case, Lapradelle-Politis, vol. II, pp. 313—318; Costa Rica Packet, Moore, Arbitrations, pp. 4940—4954; Levitt Case, Nielsen's Report, 1937, p. 704; Dillon Case, Mexican Claims Commission, Op. of Comm., 1929, p. 61; Franke Case, Mexican Claims Commission, Op. of Comm., 1930—31, p. 73; Case of Lawrence Simpson, Kuhn, A. J., vol. 31 (1937), p. 94; and cf. Whiteman, Damages, vol. I, pp. 517—527.

<sup>2)</sup> cf. also Kaufmann, Recueil, vol. 54 (1935, IV), p. 428

<sup>3)</sup> Cavaglieri, Recueil, vol. 26 (1929, I), p. 258.

may take the form of unduly long detention prior to trial<sup>1)</sup> or arbitrary arrest without sufficient cause or ground. Whereas the latter is a clear and obvious violation of the freedom of circulation, the former is rather difficult to establish. Unfortunately there is no definite standard prescribed by international law setting the time limits which an alien, charged, with a crime may be held in custody pending an investigation.<sup>2)</sup> The Mexican Claims Commission therefore thought it to be useful to examine the local laws, fixing a maximum length of time for determining whether detention has been unreasonable in a given case<sup>3)</sup> and established therewith a precedent.

“In other cases the Commission had expressed its opinion that there is no rule of international law fixing the period in which an alien accused of an offense may be detained in order to investigate the charges made against him, adding that it was deemed convenient to consider the local laws in order to decide this question.”<sup>4)</sup>

However, the fact that the maximum period of detention prescribed by the local law has not been exceeded does not mean that a State will thereby always be held to have acquitted its duties under international law. Compliance with the local law may be evidence that the international duty has been fulfilled, but is not conclusive on the point.<sup>5)</sup>

The Commission came to this conclusion in the *Koch Case*.<sup>6)</sup>

“With respect to the period of detention, the Commission is of opinion that a wrong had been inflicted upon the claimant for which Mexico was responsible. It was immaterial that the time limit fixed by Mexican law has not been exceeded. The object of provisions fixing a time limit for the duration of a detention is to establish a guarantee for the accused, but not to authorize detention up to the maximum period of time.”

Besides the excessive period of deprivation of liberty, it is obvious that groundless and unlawful arrest and deprivation of liberty as

<sup>1)</sup> Freeman, Denial of Justice, p. 203

<sup>2)</sup> U.S. (H. Roberts) v. U.M.St., Op. of Comm., 1927, p. 103

<sup>3)</sup> Roberts Case, loc. cit., p. 103

<sup>4)</sup> U.S. (C. Dyches) v. U.M.St., Op. of Comm., 1929, pp. 193—197; U. S. (L. Chazen) v. U.M.St., Op. of Comm., 1931, pp. 20—26

<sup>5)</sup> Freeman, op. cit., p. 104

<sup>6)</sup> U.S. (P. Koch) v. U.M.St., Op. of Comm., 1929, p. 118; A.D. 1927—1928, case No. 158

such constitute an international wrong.<sup>1)</sup> This need not be proved at length. It is considered to belong to the "Principal Rules" regulating such matters:

"Arbitrary arrest, detention and deportation of a foreigner may give raise to a claim under international law...<sup>2)</sup>

Freedom of circulation, however, implies not only protection from arbitrary deprivation of liberty. Some authors consider the alien to have a right, moreover, to circulate freely in the State of residence under the reservation that the police regulations are observed.<sup>3)</sup>

This was also the opinion of the Economic Committee of the League of Nations which expressed these rights in the following manner:<sup>4)</sup>

"Article 6: Les ressortissants de l'une quelconque des Hautes Parties contractantes, admis sur le territoire d'une autre Haute Partie contractante, y jouiront, en se conformant à ses lois et règlements, de la même liberté de circulation, de séjour, d'établissement, de choix de leur domicile et de déplacement, que les nationaux du pays en question, sans être soumis à des conditions ou prescriptions autres que celles auxquelles sont soumis les nationaux, sans préjudice toutefois, des prescriptions de police concernant les étrangers."

The Committee, however, was fully conscious of the advanced position it took by stating these principles in an article of a future

<sup>1)</sup> cf. Draft Convention prepared by the German Society for International Law in 1930, esp. art. 2 paragraphs 1 & 2 (a), Z.V., 1930, pp. 359-360

<sup>2)</sup> France (J. Chevrain) v. Great Britain, 1931, Hackworth, vol. III, p. 693; see also Powers Case, Moore, Arbitrations, pp. 3274-3275; and cases before the American and British Claims Commission, Moore, Arbitrations, pp. 3278-3311. Whiteman, Damages, vol. I, pp. 287-307

The same principle was also expressed in Basis No. 11 of the Codification Conference which reads:

"A State is responsible for damage suffered by a foreigner as the result of the executive power unwarrantably depriving a foreigner of his liberty. The following acts in particular are to be considered unwarrantable: Maintenance of illegal arrests; preventive detention if it is manifestly unnecessary or unduly prolonged; imprisonment without adequate reason or in conditions causing unnecessary suffering."

L. of N., Doc. 75.M.69.1929.V, p. 70.

<sup>3)</sup> Basdevant, Répertoire, vol. VIII, p. 34

<sup>4)</sup> L. of N., Doc. C.36.M.21.1929, II, p. 32

international convention. Several governments had drawn its attention to the restrictions nationals of Asiatic countries were subjected to in their territory, and we might add that there is hardly a country in the world where freedom of circulation is realized in such a manner. The Committee thought it necessary to exonerate itself from all responsibility in the following manner:

"Tout en se rendant pleinement compte des grandes difficultés que soulèvent dans certains pays les problèmes créés par la différence de races, le Comité économique n'a pas cru devoir les viser lui-même dans le statut libéral qu'il s'est proposé de codifier. La décision en cette matière appartiendra à la Conférence, si du moins elle en est saisie."<sup>1)</sup>

Though it is perfectly correct to affirm that the alien is protected by international law from arbitrary deprivation of his personal liberty, it would nevertheless be wrong to maintain that this implies the right to circulate and establish himself freely and unrestrictedly in his State of residence. International law does not oblige the State to accord aliens a right which the State not only denies to its own subjects, but which obviously would jeopardize its social and internal security. As long as the present system of social and economic order in the interior of the State and that of power politics and economic competition in their mutual relations continues to prevail, and, as it appears, to become even aggravated, the protection of the freedom of circulation by international law conceived in such a form is unthinkable. This particular part of personal freedom is consequently not included in the international standard of law.

From the wide angle of world peace and social progress, this is to be deplored, but from the practical point of view the problem is not very relevant. It was rarely, if ever, the object of diplomatic friction and, in general that limited freedom of circulation the alien enjoys in countries of western civilization seems to be sufficient for ordinary purposes. Where it is not, it is more than often regulated by bilateral conventions of establishment and so forth.

A further problem which enters the realm of personal freedom is that of freedom of conscience and worship.

This problem, too, has rarely been the object of international

<sup>1)</sup> L. of N., Doc. quot., p. 33

action with regard to foreigners. We must therefore base ourselves largely on the considered opinion of doctrinal writers.

A majority of them considers the freedom of conscience to be guaranteed by international law, <sup>1)</sup> since the peace of Westphalia. <sup>2)</sup>

In the 19th century, religious freedom was recognized by two important treaties, namely the treaty of Paris, March 30, 1856 and the treaty of Berlin, July 13, 1878. <sup>3)</sup>

It furthermore was postulated in 1926 by a project of the American Institute of International Law concerning the "International Rights and Duties of Natural and Juridical Persons" (art. 1). <sup>4)</sup>

The correlative aspect of freedom of conscience gets less support, that is to say, freedom of worship; although so widespread has become the habit of tolerance that any attempt to abridge completely the freedom of worship of a resident alien would now be regarded as contrary to general practice. <sup>5)</sup> It is, however generally agreed that the practice should not be contrary to public morals. <sup>6)</sup>

A good example of how these matters are generally treated is furnished by Articles I and V of the treaty of friendship, commerce and navigation between the United States and Liberia, signed on August 8, 1938. <sup>7)</sup>

Article I assures the right "to exercise liberty of conscience and freedom of worship". Article V provides further that the "nationals of each of the territories of the other, may without annoyance or

<sup>1)</sup> Supported by Rivier, vol. I, p. 310; Fauchille, vol. I (1), p. 959; Hyde, vol. I, p. 702; Cutler, A. J., vol. 27 (1933), p. 230; Kaufmann, E., Recueil, vol. 54 (1935 IV), p. 430; Opposed by Strupp, Delikt, p. 120; „Keinen besonderen Völkerrechtsschutz genießen religiöse und sittliche Anschauungen Staatsfremder“; Triepel, Völkerrecht und Landesrecht, p. 344.

<sup>2)</sup> Liszt, French, ed., p. 210

<sup>3)</sup> Busdevant, Répertoire, vol. VIII, p. 34

<sup>4)</sup> A. J., spec. suppl., vol. 20 (1926) p. 326; cf. also VIIIth Conference of American States, 1938; "The Republics represented at the Eighth Intern. Conference of American States declare:

(1) That, in accordance with the fundamental principle of equality before the law, any persecution on account of racial or religious motive which makes it impossible for a group of human beings to live decently, is contrary to the political and juridical system of America. (2) That the democratic conception of the State guarantees to all individuals the conditions essential for carrying on their legitimate activities with self-respect". A. J., vol. 34 (1940), suppl., pp. 168—169

<sup>5)</sup> Hyde, vol. I, p. 703; Liszt, op. cit., p. 210; Project, loc. cit., art. 1 (6)

<sup>6)</sup> With regard to Mormon missionaries and their doctrine of polygamy, see Hackworth, vol. II, p. 148 (expulsion from Prussia); vol. III, p. 697 (expulsion from Switzerland)

<sup>7)</sup> Hackworth, vol. III, p. 559

molestation of any kind, conduct religious services within their own houses or within appropriate buildings which they may be at liberty to erect and maintain in convenient situations, provided their teachings or practices are not contrary to public morals."

Essentially the same position was taken by Mr. Litvinow in a note of reply to the Government of the United States, dated November 16, 1933. <sup>1)</sup> He replied that

"the Government of the Union of Soviet Socialist Republics as a fixed policy accords the nationals of the United States within the territory of the Union of Soviet Socialist Republics the following rights referred to by You:

(1) The right to 'free exercise of liberty of conscience and religious worship' and protection 'from disability or persecution on account of their religious faith or worship'.

(2) The right to 'conduct without annoyance or molestation of any kind religious services and rights of a ceremonial nature'."

In the light of these facts it seems therefore that freedom of conscience and worship is essentially a part of the minimum standard.

One specification, however, seems to be necessary. The recognition of freedom of conscience does not include active forms of religious behaviour, namely the missionary activities. A State is legitimately allowed to forbid missionaries to proselytize in its territory, if it deems it desirable and necessary to do so.

There are still a number of freedoms which belong under the heading "Personal Freedom". They are of a vague and sometimes tendential character, such as freedom of association, freedom of action and freedom of speech. It is believed that international law does not extend protection to such matters. <sup>2)</sup>

These freedoms are certainly coloured by politics and therefore, as we shall see in the next section, beyond what an alien can aspire to enjoy. Often States may permit aliens to exercise such rights within specified limits. This, however, must be understood to be a voluntary concession of the State which can be withdrawn unilaterally at any moment without violating any rule of international law. <sup>3)</sup>

<sup>1)</sup> Hackworth, vol. III, p. 649

<sup>2)</sup> Supported by Pillet-Niboyet, pp. 189—190; opposed by Liszt, p. 210; Fauchille, op. cit., p. 930; Project, loc. cit., Art. 1 (4)

<sup>3)</sup> Verdross, Recueil, vol. 37 (1931, III), 379

Concerning free speech, a State may exercise censorship over what is spoken or published or pictured within its territory. Conversely, a State has little ground for complaint when its nationals within a foreign country are, pursuant to the local law, subjected to restraint through such action.<sup>1)</sup>

This opinion was given excellent expression to by an American Court:<sup>2)</sup>

"We do not mean to say that aliens have no right of free speech . . . We do, however, lay it down as a self evident proposition . . . that aliens have no constitutional rights to share in the privilege and responsibility of attempting to change our law or forms of government, and hence they have no right, under cover of being engaged in good faith to accomplish those ends, to engage in scurrilous or anarchistic propaganda which has been declared . . . to be dangerous to the public welfare."

In conclusion, only the protection from arbitrary deprivation of liberty and freedom of conscience and worship seems to be the right the alien enjoys according to the international standard.

It would perhaps be possible to subsume other problems under this heading as well as those discussed. Some of them will appear on a later occasion and some have been neglected. Since it is the object of this section to establish solely what rights the minimum standard embraces, those which obviously could never come within the realm have been omitted on purpose.

There is still another problem, not directly related with the present

<sup>1)</sup> Hyde, vol. I, p. 708; cf. also the Final Act of the Second Meeting of the Ministers of Foreign Affairs, Habana, 1940:

"Resolutions VII (4):

To recommend to the Governments of the American States that they adopt the following legislative or administrative norms, without prejudice to the respect due to their individual and sovereign right to regulate the juridical status of foreigners:

(a) Effective prohibition of every political activity by foreign individuals, groups or political parties, no matter what form they use to disguise such activity.

(b) Rigorous supervision of the entry of foreigners into the national territory, particularly in the case of nationals of non-American States;

(c) Effective police supervision of the activities of foreign non-American groups established in the American States;

(d) Creation of an emergency penal system for the offenses set forth in this article."

A. J., *supp.*, vol. 35 (1941), pp. 11-12

<sup>2)</sup> State v. Sínchuk et al., Hackworth, vol. III, p. 557

matter, but of importance and interest, which merits a brief exposition.

Rights, like those we have enumerated, are often recognized with reservation of the "ordre public national" of the State of residence. This is a misleading way of expressing an intention.

It means that the State would be in a position to abrogate unilaterally rules of international law under the pretext that the circumstances force it to take extraordinary measures under the cover of the maintenance of the "ordre public".

But it is firmly established as a rule that the minimum standard takes precedence over the "ordre public" of the State of residence except in cases when the so-called clause of "ordre public" has been stipulated in a treaty of establishment.<sup>1)</sup> This is to prove that these rights as enumerated are not dependent on the "ordre public", that it is still international law which either grants them to the alien or not.

In conclusion of this section, we may state Rule No. 3, formulated in the following manner:

*International law protects the alien's personal and spiritual liberty within socially bearable limits.*

### 3. Political Rights and Duties

Under political rights we understand rights which enable the individual to take part in the exercise of the State power,<sup>2)</sup> and to participate in any manner in the formation of the will of the State.<sup>3)</sup> It is unanimously agreed that according to common international law the alien may be excluded from the possession of the rights which normally belong solely to the nationals of the State.<sup>4)</sup>

This does, however, not mean that aliens may not be accorded political rights as a pure favour. Various efforts in this direction may be observed in recent State-practice which do not enjoy the

<sup>1)</sup> Guggenheim, vol. I, pp. 310-311

<sup>2)</sup> v. Frisch, *Fremdenrecht*, p. 352

<sup>3)</sup> Verdross, *Recueil*, vol. 37 (1931, III), p. 379

<sup>4)</sup> Guggenheim, vol. I, p. 311; Verdross, *loc. cit.*, p. 379; Frisch, *op. cit.*, p. 352; Basdevant, *Répertoire*, vol. VIII, p. 36, Cutler, A. J., vol. 27 (1931), pp. 227-228



protection and encouragement of international law, and efforts the value and sincerity of which are rather doubtful. <sup>1)</sup> Exclusion remains, however, the general principle.

Such was also the opinion of the Ministers of Foreign Affairs of the American Republics, when they met for the second time at Habana in 1940:

"The exclusion of foreigners from the enjoyment and exercise of strictly political rights is a general rule of international public law incorporated in the constitutions and laws of States." <sup>2)</sup>

In accordance with this general rule, it is furthermore universally recognized that the State of residence may exclude aliens from all public employment, civil or military and from all functions which include a delegation of a part of public power. <sup>3)</sup>

A different question is whether the State of residence is legitimated by common international law to impose upon aliens certain political obligations.

It is correlated to the absence of political rights that, in addition to the duty of obedience, aliens may be required to abstain from political agitation and in fact from all matters which may be said to concern citizens exclusively. <sup>4)</sup>

This provision is especially directed against the political conduct of aliens, who, though resident in a foreign country, were permitted and at times requested by their national government to take part in plebiscites and other activities in contravention of the sovereignty of their country of residence. It is evident that an alien can not exercise any political activities, whether in respect to the State of residence or his home State.

The VIIIth International Conference of American States, Lima, 1938, formulated in No. XXVIII of the Declaration of Lima: <sup>5)</sup>

"Aliens residing in an American State are subject to domestic jurisdiction and any official action, therefore, on the parts of the Governments of the countries of which such aliens are

<sup>1)</sup> Basdevant, op. cit., p. 37; cf. the Argentine and Soviet Policy.

<sup>2)</sup> Final Act, A. J., suppl., vol. 35 (1941), p. 10

<sup>3)</sup> Verdross, loc. cit., p. 379; cf. also L. of N., Doc. C.36.M.21.1929.II, p. 4 and below section IV (2)

<sup>4)</sup> Cutler, loc. cit., p. 227

<sup>5)</sup> A. J., suppl., vol. 34 (1940), p. 198 and Fenwick, A. J., vol. 33 (1939), p. 265

nationals, tending to interfere with the internal affairs of the country in order to regulate the status or activities of those aliens, is incompatible with the sovereignty of such States.

The Eighth International Conference of American States Resolves: To recommend to the Governments of the American Republics that they consider the desirability of adopting measures prohibiting the collective exercise within their territory, by resident aliens, of political rights invested in such aliens by the laws of their respective countries."

This principle also was held by the Ministers of Foreign Affairs of the American Republics at their second meeting:

"The aforesaid exclusion from the enjoyment of political rights implies the tacit prohibition for foreigners to engage in political activities within the territory of the States in which they reside." <sup>1)</sup>

In the field of political obligations, it is considered to be a principle of common international law that the alien cannot be submitted to compulsory military service. <sup>2)</sup>

It is, however, felt necessary to distinguish between the obligation to defend the State against external aggression and that of fighting internal dangers. Article 3 of the Convention on the Status of Aliens, signed at Habana in 1928 by the VIth International American Conference states: <sup>3)</sup>

"Foreigners may not be obliged to perform military service; but those foreigners who are domiciled, unless they prefer to leave the country, may be compelled, under the same conditions as nationals, to perform police, fire-protection, or militia duty for the protection of the place of their domicile against natural catastrophes or dangers not resulting from war."

The provisions of paragraph 2 of article 11 of the Draft Convention prepared for the Paris Conference of 1929 have to be understood in the same manner. It is declared therein that aliens are exempt in times of peace as well as during war from all obligatory military service in the army, navy, or air force or even in any form

<sup>1)</sup> A. J., suppl., vol. 35 (1941) p. 10

<sup>2)</sup> Verdross, Recueil, vol. 37 (1931 III), p. 379; Guggenheim, vol. I, p. 311; Basdevant, op. cit., p. 37

<sup>3)</sup> A. J., suppl., vol. 22 (1928), p. 137

of national guard or militia. Furthermore they are liberated from all personal duties replacing military service such as replacement tax. <sup>1)</sup>

These provisions, however, were not understood as barring the aliens from participating in acts of social solidarity like fighting fire, natural catastrophes and all danger which are not a result of war. Rules with contents such as described seem to be accepted by general State-practice. <sup>2)</sup>

They are a direct outcome of the fact that, on the one hand, the alien is not a member of his State of residence and consequently can not be asked to fulfill any political duties which by their nature presuppose a bond of allegiance, and, on the other, it seems only just that domiciled aliens participate in efforts to protect the country, the hospitality of which they enjoy, from dangers. In such a case it is not a question of politics. The distinction had already been made by Vattel who was of the opinion that, in recognition of the protection he enjoys, the alien must contribute to the defense of the country as far as his status of citizen of another country makes it permissible. <sup>3)</sup>

We need not devote any special attention to related questions, such as the duties of aliens who showed themselves to be willing to become citizens of their State of residence, <sup>4)</sup> and the status of neutral aliens <sup>5)</sup> and voluntary military service. <sup>6)</sup> The establishment of the general rule of positive international law suffices in our case. This exemption from political duties is not restricted to military obligations. It furthermore applies to all political functions of an administrative or judicial character. We shall come back to this problem on a later occasion.

In view of this brief exposition, general international law seems to cover the field of political rights and duties in the following manner:

Rule No. 4:

*According to general international law, aliens enjoy no political rights in their State of residence, but have to fulfill such public duties as are not incompatible with allegiance to their home State.*

<sup>1)</sup> L. of N. Doc. C. 36.M.21.1929.II, p. 5; Guggenheim, vol. I, p. 311

<sup>2)</sup> Borchard, Diplomatic Protection, p. 64

<sup>3)</sup> Vattel, Book II, chapter VIII, paragraph 105

<sup>4)</sup> Verdross, loc. cit., p. 381

<sup>5)</sup> Guggenheim, vol. I, p. 311

<sup>6)</sup> Basdevant, op. cit., p. 39

#### IV. RIGHTS AND DUTIES CONNECTED WITH THE ECONOMIC ACTIVITIES OF THE ALIEN

##### 1. Civil Rights

So far we have devoted our attention entirely to the rights which the alien enjoys in his capacity of being a member of humanity.

We have found that a good many of these fundamental rights are protected by general international law and form therefore a substantial part of the international standard.

With this section we enter a field which from a certain idealistic viewpoint may be considered as fundamental as the former, but has become, through the developments the basic conception of humanity has undergone by the fact that man lives in an organized society, to be of an inferior order, submitted to the needs and desires of society itself. In a modern democracy, personal rights take to a certain extent precedence over the will of the society or at least compete with it on a basis of equality, whereas the economic rights are considered to be inferior to the same will of society. This is, however, not to be understood as passing a judgment on either group of rights; they are both as important as the other.

To begin with we have to consider some rights which take an intermediate position between the two sections, which after all are based on an arbitrary division of reality, justified by experience. On the one side, they are inalienable rights of mankind, and, on the other, closely linked up with man's economic activities.

The recognition of the alien's juridical personality makes him a subject of civil rights and obligations. The faculties which the alien must be held to enjoy correspond therefore largely with the capacities conferred upon nationals by the local law. <sup>1)</sup> Indeed international law governing the rights of aliens cannot be given a content completely independent of the legal faculties which a given system of municipal law recognizes in its own citizens. On the other hand it need not go so far as to recognize all of them.

It is often held that there are some fundamental elements — "fundamental in the sense that they are considered essential to the alien's existence in modern society" <sup>2)</sup> — almost everywhere accepted as

<sup>1)</sup> Freeman, Dental of Justice, p. 511; Verdross, Recueil, vol. 37 (1931, III), p. 357

<sup>2)</sup> Freeman, op. cit., p. 511

to belong to the minimum standard. <sup>1)</sup> It will, however, only at the end be possible to judge whether international law admits aliens to as many rights as modern life requires.

To speak about civil rights in general is rather difficult. There seem to be different theories as to what their content is. <sup>2)</sup> These rights which really are of international importance will be analysed in the following sections. The others, to which we cannot devote any space, are either of secondary importance and rarely, if ever, the object of international reclamations, or are implicitly recognized with the juridical personality of the alien.

## 2. *The Alien's Right to Work and Exercise a Profession*

With the present section we enter an altogether different realm. We are to study the implications caused by the natural and necessary desire of the alien to partake in the economic activities of his State of residence. Our task amounts therefore to the analysis of the problem created by the alien's participation in economic life either independently as businessman, industrialist or craftsman, or as employee or worker. As in the previous sections, we are only interested to discover the rules of general international law. We therefore shall not devote much attention to the innumerable arrangements and provisions in commercial treaties and other bilateral agreements, progressive and valuable though they may be, because it is not believed that the norms regulating the economic domain are inspired by other principles than those of general international law. <sup>3)</sup>

With regard to general international law the position seems to be the following:

A State may exercise a large control over the pursuits, occupations and modes of living of the inhabitants of its domain. In so doing, it may doubtless subject resident aliens to discrimination without necessarily violating any principle of international law.

According to general international law, the States, members of the international community, are not obliged to base their economic legislation on the principle of free activity and intercourse. They

<sup>1)</sup> Basdevant, Répertoire, vol. VIII, pp. 40–41

<sup>2)</sup> cf. Basdevant, op. cit., p. 40 and authors cited.

<sup>3)</sup> Verdross, loc. cit., p. 395

may, consequently, reserve the exercise of economically gainful occupations to their own nationals and exclude aliens completely. <sup>1)</sup>

Numerous statutory provisions have been enacted in the various States excluding aliens from engaging in certain professions.

In the first place, it is understandable that, since aliens do not possess any political rights or duties, they are legitimately excluded from all occupations which demand an allegiance to the State, such as it the case in public and governmental services, courts and so forth. These exceptions usually are maintained even in the most liberal treaties of commerce and establishment. <sup>2)</sup>

In view of the structure of the modern State which only tolerates nationalism favourable to itself, these restrictions seem perfectly justified.

Municipal legislation, however, does not stop at this point. Often it discriminates against aliens and enactments to that effect are defended on the ground that they are a justifiable and necessary exercise of police power. <sup>3)</sup> How far such a justification can be held valid, is difficult to say because international law apparently does not furnish a standard which we could accept as a guiding principle.

This absence is fortunately somewhat counterbalanced by constitutional guarantees from which the alien benefits in many countries. The most noteworthy piece of municipal legislation which protects the alien from abuse of police power doubtlessly is the Fourteenth Amendment of the Constitution of the United States. What this Amendment aims at can be illustrated by quoting the words of an American Judge on it: <sup>4)</sup>

“These provisions (Fourteenth Amendment) are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, colour, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws.”

The absence of such beneficial provisions easily may lead to considerable hardship, to which the national State of the suffering alien

<sup>1)</sup> Guggenheim, vol. I, p. 313; Verdross, loc. cit. p. 389; Hyde, vol. I, p. 656  
<sup>2)</sup> of, e.g. L. of N. Draft Convention, art. 7 (2), Doc. C.36.M.21.1030, II, p. 4, and A.D. 1938–40, case No. 127, Admission as Attorney (South Africa)

<sup>3)</sup> cf. for examples Hackworth, vol. III, pp. 617–619

<sup>4)</sup> *Yick Wo v. Hopkins* (1886) 118 U.S. 356, quoted in Gibson, *Aliens and the Law*, p. 127, cf. for general discussion, the same, op. cit., p. 119–144

is very likely to react by discrimination against aliens within its own jurisdiction. A better example of the fallacy of the so-often advocated principle of reciprocity could hardly be found.

A further aspect which has to be considered is discrimination to protect national labour. This enters already too much into the political and economic sphere of world problems as it could properly be discussed in a legal study. Sometimes States have arrived at a point of regulating the problem of foreign labour by bilateral treaties, but in general it is quite safe to state that there is hardly a field in the complex of international problems which suffers more from the lack of co-operation and of regulations so utterly lacking in ultimate design.

As it is, protection of national labour is perhaps the most prominent feature of discrimination in the economic sphere. Its roots can be traced far back and even the most liberal States could not escape its grip on the internal social relations. The findings of an expert describing the situation of alien labour in the United States in 1932 may serve as an example. <sup>1)</sup>

“In the United States a condition exists wherein three out of every five jobs are closed to aliens, where four out of every five memberships in labour unions are open to citizens only, and where innumerable laws in each State deter an alien from entering many occupations. Such a condition, when imposed on an alien, results in a tendency to emigrate back home. Hence any analysis of the general topic of the attitude of States to employable aliens should involve an inquiry into the attitude of industrialists of any country toward their employment, a statement as to the position taken by labour unions towards admitting such foreigners to their ranks and a view of the statutes of the Governments themselves as they pertain to the employment of aliens.”

The analysis of the situation in most of the European States would reveal even more drastic features. <sup>2)</sup>

A convenient and effective method of imposing extensive limitations upon the participation of aliens in economic life has proved to be a system of registration to which many countries have resorted.

<sup>1)</sup> Fields, A. J. vol. 26 (1932), pp. 674—675

<sup>2)</sup> Fields, loc. cit., pp. 675—699

Each alien is furnished with a certificate or a work permit. The issuance of these certificates or permits is dependent on a number of factors, including the extent of employment in a given profession or occupation, the number of aliens present, the character of the work, the granting of reciprocity by the alien's country, etc. The various aspects we cannot dwell on any longer.

Turning back to the question of treatment of aliens in commerce, one principle of general international law at least seems to have gained universal recognition, namely that there is a right of international common law imposing the governments the obligation to grant equality of treatment, and that a government has a right to ask for equality of treatment. <sup>1)</sup>

Equality of treatment in this connection does not signify national treatment. It means prohibition of discrimination among aliens of different nationalities.

Equality of treatment must be considered as an essential requirement of international freedom of commerce. <sup>2)</sup> as it was defined in an authoritative manner by the Paris Conference of 1929:

“Article I, paragraph 1; Les ressortissants des Hautes Parties Contractantes pourront, même sans résider sur le territoire des autres Hautes Parties contractantes, y procéder à toutes transactions commerciales, notamment vendre des marchandises, faire des achats, recueillir des commandes, livrer des marchandises sur commande et exécuter des travaux sur commande, pour autant que ces transactions ou l'exécution de ces travaux ne soient pas soumises, d'après les prescriptions légales dudit territoire, même pour ses ressortissants, à l'octroi d'une concession. <sup>3)</sup>”

The Paris Conference in general devoted much time and erudition to the questions arising out of commerce and occupation by aliens. <sup>4)</sup> The Draft Convention, however, had been rejected by the Conference and has lain dormant ever since. Neither advanced nor backward countries have shown a disposition to reopen a general

<sup>1)</sup> Culbertson, A. S., Proceedings, 1937, p. 74; Guggenheim, vol. I, pp. 313—314

<sup>2)</sup> Guggenheim, vol. I, p. 314

<sup>3)</sup> Doc. C. 36.M.21.1929, II, p. 3

<sup>4)</sup> Doc., loc. cit., pp. 122—152

consideration of the problems with which it deals nor did it have any practical effect as it stands. <sup>1)</sup>

We cannot linger any longer over these questions, since it has become apparent that they do not involve questions of general international law. The economic structure of a country demands such delicate handling nowadays that States are as opposed as ever to any interference which possibly might restrict their freedom of action, even if it is only with regard to aliens. The problem of foreign labour and of commercial competition can only be solved on a truly international level and before that will have been achieved in some form, the economic situation of the alien is inevitably to remain precarious and lacking the protection of the law of nations.

Though it is a common enough postulate that a government which lays any claim to being civilized must extend to all residents within its jurisdiction, alien or national, freedom of opportunity to engage in employment of some kind for the sustenance of the individual. <sup>2)</sup> It is not our task to express an opinion with regard to the national, but it is only too obvious that the alien today enjoys no such thing as freedom of opportunity.

In the light of these considerations we think that Rule No. 5 should be formulated in the following manner:

*General International Law gives aliens no right to be economically active in foreign States. In cases where the national policies of foreign States allow aliens to undertake economic activities, however, general international law assures aliens of equality of commercial treatment among themselves. <sup>3)</sup>*

### 3. Property Rights

Private property is an institution of the utmost importance in democratic-capitalistic States. With the rise of Bolshevism, it has become a subject of eternal and fruitless controversies. The attitude

<sup>1)</sup> Cutler, A. J., vol. 27 (1933), p. 235

<sup>2)</sup> Gibson, Aliens and the Law, p. 119

<sup>3)</sup> Verdross gives an explanation for this not very encouraging situation, Recueil, vol. 37 (1931, III), pp. 395—396:

„Cette différence entre les règles générales et le droit spécial du domaine économique s'explique cependant facilement par le fait que le droit général contient des règles reconnues par la conscience juridique universelle, de manière que nul Etat ne peut éluder leur application à l'égard des étrangers, tandis que dans le domaine économique proprement dit une opinion juridique mondiale n'existe pas.”

of international law towards private property, even if we deal with it in this connection only with regard to aliens is, by the fact that the law of nations is a universal legal order of a superior level, of great practical and scientific interest.

It is considered to be a convenient method of dealing with the problem by discussing the two separate aspects of the institution, namely the acquisition of property on the one hand, and the protection of acquired property (acquired or vested rights) on the other.

#### a. Acquisition of private property

Strange as it may seem, a coherent theory of acquisition of property as a separate institution has not been developed in the literature of international law. Although partial aspects of the subject have been treated under widely differing categories, it has not been the object of great attention in general. To anybody who is not familiar with the intricacies of the international legal order, this may come as a surprise.

The explanation lies, however, in the fact that international law has not developed a conception of property of its own, but has solely established the principle of protection of property. <sup>1)</sup>

As a direct result of this, it can be affirmed that a State enjoys an exclusive right to regulate matters pertaining to ownership of property of every kind within its territory. <sup>2)</sup> Thus it may determine not only the processes by which title may be acquired, retained or transferred, but also what individuals are to be permitted to enjoy the privilege of ownership. The alien has therefore, according to general international law, no right to demand to be able to participate in that privilege, either with respect to movables nor to realty; and any international intervention which would have such a demand to its object would fail. <sup>3)</sup> No rule of international law is believed to prescribe a different course.

In actual practice this principle is less strictly applied in the case of movable property. Usually movables may be held and inherited by aliens, subject to various limitations in the public interest. Some

<sup>1)</sup> Guggenheim, vol. I, p. 300

<sup>2)</sup> Hyde, vol. I, p. 650

<sup>3)</sup> Cavagliari, Recueil, vol. 26 (1929 I), p. 458

authors consider such property as one of the essentials of life and therefore accessible also to the alien. <sup>1)</sup>

It would, however, be difficult to draw the line between movable property as an essential of life and movable property which belongs to another class. A frequent reservation is that movable property and transferrable securities are barred from acquisition by foreigners, if their acquisition by aliens is likely to result in "undue command" of vital economic resources or to endanger these in exceptional cases, such as currency crises. <sup>2)</sup> Furthermore, it is not believed that this somewhat vague expression of "essentials of life" has any influence in international law at all. It can be easily conceived that in a society which has abolished or does not know private property, essentials of life in such a form are non-existent. It seems therefore difficult to maintain that the above-mentioned rule suffers exceptions with regard to movable property.

On the other hand, there seems to be universal agreement that a State may be unwilling to permit acquisition, succession and retention to title to immovable property within its domain by persons other than its own nationals. <sup>3)</sup>

Municipal law of the various States has made application of this right in various forms and it can safely be stated that there seem to be no general rules at all. It naturally cannot be our task to enter into details with regard to any State, because, by so doing, we would leave the realm of international law. This problem has, however, often been the object of research in the different States and we refer to that literature.

The variety of regulations, however, will be illustrated only by two judicial decisions of two different countries.

In one case, *Terrace et al. v. Thompson, Attorney General of the State of Washington* (1923), the United States Supreme Court held: <sup>4)</sup>

"The regulation of the Statute (which disqualified aliens who had not declared their intention to become citizens from taking any interest in land for farming or certain other purposes) was

<sup>1)</sup> Fauchille, vol. I (1), p. 949; Rivier, vol. I, p. 810; Basdevant, op. cit., p. 45

<sup>2)</sup> Cutler, loc. cit., p. 243; cf. also Draft Convention, art. 10

<sup>3)</sup> Hyde, vol. I, p. 651; Rivier, vol. I, p. 290; Cavaglieri, loc. cit., p. 258; Moore, Digest, vol. IV, pp. 32-50; Cutler, loc. cit., p. 239; Freeman, Denial, p. 513

<sup>4)</sup> A.D. 1923-24, case No. 140

within the police power of the State. Except as treaties provide otherwise, the State may prohibit entirely the alien ownership of land." <sup>1)</sup>

With regard to the acquisition of real property by aliens in Germany the Reichsgericht held (1922):

"Aliens must obtain the consent of the State authorities for the validity of acquisition of land." <sup>2)</sup>

Besides and beyond these two modes, almost any other rule may be provided for by municipal law. To realize this possibility, however, suffices for our purpose.

International law may therefore in the light of this brief exposition not be relied upon to give the alien a right to acquire any form of property. To maintain the opposite opinion would indeed mean to fail to realize the nature of positive international law. Whether this principle is just is not questioned at all, because it is of no concern to us. Natural law, on the other hand, holds a different view:

Among the so-called natural, inborne, sacred rights of man, private property plays an important, if not the most important, role. Nearly all the leading writers of the natural law doctrine affirm that the institution of private property corresponds to the very nature of man. <sup>3)</sup> In accordance with this conception, John Adams wrote the following sentences, expressing thereby the conviction generally accepted in his time:

"The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If 'Thou shalt not covet' and 'Thou shalt not steal' (rules presupposing the institution of private property) were

<sup>1)</sup> cf. for the regulation in the U.S., Gibson, op. cit., pp. 45-86; cf. also *Applegate v. Luke*, A.D. 1927-28, case No. 222; *Takiguchi v. State of Arizona*, A.D. 1935-37, case No. 147

<sup>2)</sup> *Immovables (Aliens in Germany) Case*, A.D. 1919-1922, case No. 169

<sup>3)</sup> Kelsen, *General Theories of Law and State*, p. 10

not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free.”<sup>1)</sup>

Any form of society which reserves property exclusively or even only partly to the community itself is consequently not only unjust but even not maintainable.

This doctrine, however, overlooks fundamental facts:

As Prof. Kelsen explains, history shows besides legal orders instituting private property others that recognize private property, if at all, only to a very restricted extent. We know of relatively primitive agricultural societies where the most important thing, the land is not only owned by private persons, but by the community; and the experience of the last decades shows that a communistic organization is quite possible even within a powerful and highly industrialized State. Private property is historically not the only principle on which a legal order can be based.<sup>2)</sup>

There is clearly no rule in international law which forbids a State from throwing aside the characteristics of an individualistic society and passing over to a régime founded upon socialistic or communistic principles. A State possessing a socialistic or communistic organization cannot be compelled to grant to the subjects of a foreign State a legal condition which is only possible in a State with a capitalistic economic organization.<sup>3)</sup>

On the other hand, it has been maintained that whenever the ownership of private property is permitted, the alien's right to participate in the privilege must be admitted.<sup>4)</sup> We hesitate to state, however, this as a rule. International law, as a universal system, cannot make exceptions. At the most it may be considered as a matter of international comity. We therefore think that the attitude of

<sup>1)</sup> Works of John Adams, 1851, vol. VI, p. 9, as quoted by Kelsen, op. cit., p. 10

<sup>2)</sup> op. cit., p. 11

<sup>3)</sup> Kelsen, *Recueil*, vol. 42 (1932, IV), p. 250; cf. also *Harvard Draft Convention on Responsibility*, A. J., spec. suppl., vol. 23 (1929), p. 146, comment to art. 5: "International law should not be deemed to prohibit social experiments, if undertaken in good faith and not for the purpose of spoliation."

<sup>4)</sup> Freeman, *Denial of Justice*, p. 512

international law towards the acquisition of property by aliens has to be formulated in the following manner:<sup>1)</sup>

Rule No. 6:

*According to general international law, the alien's privilege of participation in the economic life of his State of residence does not go so far as to allow him to acquire private property. The State of residence is free to bar him from ownership of all or certain property, whether movables or realty.*

#### b. *Protection of Acquired Property Rights*

In the absence of an explicit rule of general international law allowing foreigners to acquire property, we have found a factor seriously limiting the alien's sphere of activities in a foreign State.

In actual practice the absence of such a rule is not felt as much as it might be feared. Almost all States exercise their right to exclude aliens from ownership only in few particular instances, such as in cases of certain kinds of movables likely to be vital importance for the economic military security of the State and of land carrying mineral wealth. The States may and do confer rights to the alien beyond the minimum rights required of them.<sup>2)</sup>

The reason for the absence of a rule to that effect is quite understandable. It would be impossible to affirm a right of ownership in an absolute manner because this could have implications menacing the State. It would have to provide therefore for legitimate exceptions which, in turn, considering the complexity of the problem and the variety of the needs of the different communities, cannot possibly be generalized. A customary rule of international law, containing a catalogue of exceptions, on the other hand, is unthinkable.

The principle of protection of private property should consequently be interpreted as meaning that, if aliens are permitted to acquire

<sup>1)</sup> The Paris Draft Convention declared with regard to property: Art. 10: „(1) Les ressortissants de chacune des Hautes Parties contractantes seront placés sur un pied de complète égalité avec les nationaux en ce qui concerne les droits patrimoniaux, le droit d'acquies, de posséder ou d'affermier des biens mobiliers, ainsi qu'en disposer conformément au régime national. . . . aux mêmes conditions que les nationaux, sans qu'une modification ou restriction d'aucune sorte puisse être apportée à ce régime d'égalité. . . ." Doc. C. 36.M.21.1929, II, p. 5. These clauses met, however, with considerable opposition, cf. Doc. C.97. M.23.1930, pp. 433—437; cf. also Cutler, loc. cit., p. 243 and Verdross, loc. cit., pp. 402—403

<sup>2)</sup> Kelsen, *Recueil*, vol. 42 (1932, IV), p. 256

property, they may not be deprived of it arbitrarily without compensation.<sup>1)</sup> Once ownership is permitted, the States fall into an international obligation to provide the same or as effective legal protection for it as is required for those rights which are guaranteed by the law of nations.<sup>2)</sup>

We here enter one of the most hotly disputed problems of the principles governing the treatment of aliens and it will be impossible to deal with every aspect of it. Some necessary limitations will therefore be made and the question will be approached in a rather unorthodox angle.<sup>3)</sup>

One of the causes of confusion is certainly the term "vested" or "acquired rights" itself. Duguit obviously was correct when he said: "Jamais personne n'a su ce que s'était qu'un droit non acquis."<sup>4)</sup> The term alone does not show any difference between "existing rights" and "vested rights". A vested right, in our opinion, is a right which is presumed to survive the change of the *status quo* in which it came into existence.

A right is acquired by virtue of a rule of law which provides for its acquisition. As we had already occasion to mention, no legal order is immutable. On the contrary, it is subject to a constant evolution and change which sometimes even takes the form of abrogation and replacement by a new order. In such case, rights are normally destroyed by the new law. Vested rights, however, are presumed to survive the legal order according to which they came into existence, and, what is more, to be protected by the new law.

A collision of laws in respect of time takes place when two successive rules of law contend for authority over the same legal relation.<sup>5)</sup> The new laws leave the vested rights unaffected, whereas the other rights lose their validity and protection.

It is furthermore of great importance to know what a "collision of laws in respect of time" means. The usual example given as an illustration is that of State succession. This, as a rule, means that the

<sup>1)</sup> Cavaglieri, R.G.D.I.P., vol. 38 (1931), p. 294

<sup>2)</sup> Freeman, Denial of Justice, p. 513

<sup>3)</sup> cf. for a general and exhaustive discussion of the problem of acquired rights Kaeckenbeek, Recueil, vol. 59 (1937, I), pp. 321-419 and B.Y. 1936, pp. 1-19; Cavaglieri, loc. cit., pp. 257-296

<sup>4)</sup> as quoted by Kaeckenbeek, B.Y., 1936, p. 2

<sup>5)</sup> Kaeckenbeek, loc. cit., pp. 2-3

political organization, the public law and the public policy of the new State supersede those of the former one.<sup>1)</sup> We feel, however, that it covers also such a state of affairs in which rights are suppressed by statute,<sup>2)</sup> if the continuation of which has become inconsistent with the prevailing legal consciousness (e.g. slavery), or if they are inconsistent with the social needs and conscience, (agrarian reforms, nationalization) or even if public utility requires it (requisitions and expropriations). In all these cases, a rule of law, providing for the acquisition of a right to ownership, has been superseded by another rule of law which provides for the contrary and takes precedence over the former. The question is, therefore, whether there are rights which can survive such a change.

If we accept the notion of vested rights, we also must deal with the limitations of and exceptions to such a principle.

Thus, with regard to interpretative laws, or with regard to laws abolishing or changing legal institutions as such, which are closely connected with moral, political and economic motives and purposes, the preservation of vested rights cannot be conceived as a ruling principle because it would rob these laws of all meaning.<sup>3)</sup>

Furthermore, it is evident, a frequent case connected especially with State succession, that public rights, especially those with a political character, cannot fall under the principle of protection of vested rights.<sup>4)</sup> Court decisions to that effect are quite frequent.<sup>5)</sup> but we need not enter into details, since we are mainly concerned with private property rights.

For a right to be considered as "vested", it must have become a person's own right. Abstract faculties or qualities of all men or of whole classes of men, as well as expectations, founded on the law, are not vested rights.<sup>6)</sup> Kaeckenbeek cites as examples the liberty

<sup>1)</sup> Kaeckenbeek, loc. cit., p. 8 and Recueil, loc. cit., p. 339; cf. Guggenheim, Staatenwechsel, pp. 122-135; cf. also P.C.I.J., Series B, No. 6, p. 36: "Private rights acquired under existing law do not cease on a change of sovereignty."

<sup>2)</sup> Gierke, Deutsches Privatrecht.

<sup>3)</sup> Kaeckenbeek, B.Y., 1936, p. 4

<sup>4)</sup> Kaeckenbeek, Recueil, loc. cit., p. 345 et seq.

<sup>5)</sup> cf. e.g. the Decision of Mr. Root, Secretary of War, in the matter of the application of the Countess of Buena Vista, Dec. 24, 1900; "I cannot assent to the proposition that the right to perform any part of the duties or receive any compensation attached to the office of sheriff of Habana under Spanish sovereignty constituted a perpetual franchise which could survive that sovereignty." Moore, Digest, vol. I, p. 428

<sup>6)</sup> Kaeckenbeek, B.Y., 1936, p. 3



to embark upon industrial or commercial activity, the expectation of A. to be heir to B. according to existing law and so forth.

In this connection, we also may quote an important opinion which the Permanent Court of International Justice expressed in the *Oscar Chinn Case*:<sup>1)</sup>

"The Court, though not failing to recognize the change that had come over Mr. Chinn's financial position . . . . . is unable to see in his original position — which was characterized by the possession of customers and the possibility of making a profit — anything in the nature of a genuine vested right. Favourable business conditions and good-will are transient circumstances subject to inevitable changes; the interests of transport undertakings may well have suffered as a result of the general trade depression and the measure taken to combat them."

Thus it is evident that not all property rights are likely to be vested rights too.<sup>2)</sup>

Vested rights may be infringed by acts of legislation or by acts of administrative practice.

The legislative power and the administrative power of the State remain complete and unrestricted as long as a customary (or a conventional) rule of international law does not limit them.

With regard to the legislative power, no general customary rule limiting the legislative power of State to legislation not interfering with vested rights, or making internationally illegal, legislation infringing vested rights and therefore rendering a State internationally liable for it, has ever been shown to exist,<sup>3)</sup> nor is there a rule forbidding the State, acting according to its laws and through its organs or authorities to expropriate foreign owned property.<sup>4)</sup> That there is no generally accepted rule of international law was strikingly confirmed by the answers given by the governments to Point III, No. 3 of the Bases of Discussion prepared for the Hague Codification Conference.

The question was formulated in the following manner:

<sup>1)</sup> P.C.I.J., Series A/B, No. 63, p. 86

<sup>2)</sup> Herz. A. J., vol. 35 (1941), pp. 245-246

<sup>3)</sup> Kaeckenbeeck, B.Y., 1936, p. 14

<sup>4)</sup> Herz. loc. cit., p. 247

"Does the State become responsible in the following circumstances: Enactment of legislation infringing vested right of foreigners?"<sup>1)</sup>

After having taken into consideration the answers of the governments to this query as well as the observations thereon, the Preparatory Committee concluded:

"The replies on this question reveal fairly substantial differences of opinion. Doubts are felt as to what precisely is to be understood by vested rights. Some replies admit that the State is responsible. Others say that the rights in question, having been acquired under the law of the State, are liable to be terminated by that law. Some consider a general answer impossible. In these circumstances, it has not been felt desirable to make the question the subject of a separate basis of discussion . . ." <sup>2)</sup>

Indeed it may safely be stated that a rule forbidding any interference with vested rights would jeopardize social progress, because there is hardly any social change and progress which does not prejudice some acquired rights.<sup>3)</sup>

Thus we may conclude that, in the first place, vested rights are not protected by international law to the extent that they are immutable and everlasting.

Quite another problem, however, is whether vested rights may only be suppressed when their owner is duly compensated for loss. This, in our opinion, most important idea, was originated by Kaeckenbeeck, the former President of the Arbitral Tribunal for Upper Silesia. He said:

"Many see one single issue in these two questions and speak in one breath of a duty not to suppress vested rights without compensation. I believe this to be erroneous, or at least misleading. Expediency from the point of view of public interest, and the equitableness of granting an indemnity are in my opinion two absolutely distinct questions, the solution of which depends on different facts and considerations." <sup>4)</sup>

<sup>1)</sup> L. of N. Doc. C.73.M.09.1929, V. p. 33

<sup>2)</sup> Doc. cit., p. 37

<sup>3)</sup> Kaeckenbeeck, Recueil, loc. cit., p. 359

<sup>4)</sup> B.Y. 1936, p. 15 and Recueil, loc. cit., pp. 359-360

Hence the whole question of vested rights boils down to a question of compensation.

There has been rarely a question of international law about which more doctrinal writers have more violently and consistently disagreed. We can, however, not discuss all the innumerable opinions in detail,<sup>1)</sup> and shall devote our attention only to the controversy carried on the pages of the British Yearbook of International Law between Mr. Fachiri and Sir John Fischer Williams.

After having considered the question from the point of view of authority, Mr. Fachiri, in a first article,<sup>2)</sup> came to the following conclusions: After the practice of the 17th and 18th century to stipulate in treaties that the respective subjects of the European Powers had the right of acquiring, enjoying and disposing of various kinds of property in each other's dominions had fallen into desuetude, it must be assumed that such express stipulations have become unnecessary by reason of the universal recognition and adoption in these countries of certain legal principles. "Among these principles", he continues, "is the right of aliens to possess and deal with property, including land, and inviolability of such property in the sense that expropriation is only permissible for public purposes and then only on payment of full compensation by the State."<sup>3)</sup>

This principle, however, has to be reconciled with another, equally important one, namely that international law allows full scope to the internal organization of the State for the purpose of securing its progress and well-being and that foreign States are not in general entitled to intervene. Mr. Fachiri thought, absolutely correctly in our opinion, that the solution may be found in applying this test:<sup>4)</sup>

"Does the measure in dispute violate a legal principle accepted by the society of civilized States as a whole, so that the detriment caused to the individuals concerned can be regarded as a breach of a binding obligation, as breach of international law?"

He then arrived at the conclusion that the plaintiff State would

<sup>1)</sup> cf. the literature cited by Basdevant, Répertoire, vol. 8, pp. 49-50

<sup>2)</sup> B.Y. 1925, pp. 159-171

<sup>3)</sup> loc. cit., pp. 169-170

<sup>4)</sup> p. 170

have a reasonable prospect of success for pressing its claim if one of the two conditions were fulfilled and proved:<sup>1)</sup>

(1) that there had been discrimination against its subject as compared with the natives in the applications of the legislation,<sup>2)</sup> or

(2) that no compensation was given in respect of the expropriation, or if there was compensation, that it was so inadequate as to involve a substantial degree of confiscation.<sup>3)</sup>

Sir John, on the other hand, disagrees with this conclusion. First of all he dismisses the precedents as inconclusive.<sup>4)</sup>

He then advances an argument, based on considerations of fact, wherein he points out that there has been no written international engagement limiting the authority of the legislative or executive power of the State to the effect that international law could override the measure expropriating property.<sup>5)</sup> Mr. Fachiri answered to this contention, there can be no question and never was that anything could prevent the measure being carried into operation. The only result could be that the government would be bound, upon a claim being duly made by a State of the disposed alien, to pay compensation.<sup>6)</sup>

The second and third arguments by Sir John, based upon the doctrine of "eminent domain"<sup>7)</sup> and "police power",<sup>8)</sup> were equally refuted by Mr. Fachiri as not really touching the point under discussion.<sup>9)</sup> Mr. Fachiri again came to the conclusion, a conclusion which is supported by a majority of authors, that it is a general rule of international law that if a State expropriates the physical property of an alien without the payment of full compensation it commits a wrong of which the State of the alien is entitled to complain.<sup>10)</sup>

It is evident that expropriation cannot be considered as an international wrong without some definite qualifications. According to

<sup>1)</sup> p. 171

<sup>2)</sup> cf. also Guggenheim, vol. I, p. 302

<sup>3)</sup> Herz., loc. cit., p. 248

<sup>4)</sup> B.Y. 1928, p. 15

<sup>5)</sup> loc. cit., pp. 15-24

<sup>6)</sup> B.Y. 1929, p. 49

<sup>7)</sup> B.Y. 1928, p. 24 et seq.; also Herz, loc. cit., p. 251

<sup>8)</sup> B.Y. 1928, pp. 27-28

<sup>9)</sup> B.Y. 1929, p. 52

<sup>10)</sup> B.Y. 1929, pp. 54-55

the practice of the Permanent Court of International Justice, such a measure clearly is lawful, apart from the case where a special treaty stipulation forbids expropriation, and leads to an international obligation to pay compensation for the value taken. The Court said:

"The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation — to render which lawful only the payment of fair compensation would have been wanting. . . ." <sup>1)</sup>

In the case of the Chorzow Factory, however, the Court found a breach of an express treaty obligation forbidding expropriation (Geneva Convention) which made the act wrongful — "a seizure of property" <sup>2)</sup> — for which restitution in kind (or, if impossible, full payment of value plus losses sustained) was due. <sup>3)</sup>

We therefore can state as a general rule of international law that infringement of vested rights obliges the State to indemnify the foreign owner. This rule can be verified by State practice and jurisprudence as one of customary international law.

Most of these cases are so well-known that we only need to quote the statements of the judicial or arbitral authorities, immediately touching the matter.

Since we shall not enter into the merits of each case, only the chronological order will be observed.

In the case of the United States' vessels, taken at sea by the Spaniards in the war between Spain and Great Britain (1796), the Commissioner's Final Report stated:

"Wheresoever any sale, or other improper disposition of prizes, has been proved to be made within Spanish territory, to the injury of the right owner, being a citizen of the United States and within the knowledge of any proper officer of the Spanish Government, the Commission has held Spain liable, and therefore allowed the claim." <sup>4)</sup>

<sup>1)</sup> P.C.I.J., Judgment No. 13 (Chorzow Factory, Merits), Series A, No. 17, p. 46

<sup>2)</sup> loc. cit., p. 46

<sup>3)</sup> Herz., loc. cit., p. 253

<sup>4)</sup> Moore, Arbitrations, p. 4516

In the second case, the *Sicilian Sulphur Monopoly*, <sup>1)</sup> it was suggested that this case is not relevant because the British claim was based upon a treaty. <sup>2)</sup>

It is believed, on the other hand, that a dual violation had taken place, namely by the fact that the measure was discriminatory against aliens and a violation of a treaty. <sup>3)</sup>

The value of the case as a precedent is not quite clear <sup>4)</sup> and we can therefore only state that the result of the diplomatic intervention of Great Britain was the abolition of the monopoly and the payment of compensation by the Kingdom of the Two Sicilies.

In the case of *Henry Savage (U.S. v. San Salvador, 1851)*, an American citizen, whose stock of gun-powder was confiscated by the authorities in San Salvador, the United States maintained that "property of individuals should not be taken for public purposes without previous payment of its value." <sup>5)</sup> A commission of three, acting as arbitrator, awarded therefore Mr. Savage compensation.

In the next two cases, an American and a British subject were deprived of property by the Greek Government.

In the case of *the Rev. Jonas King*, whose land was seized as a result of an isolated administrative act, the American Government intervened and obtained compensation. <sup>6)</sup>

The similar case of *George Finlay*, a British subject, was referred to arbitration. Finlay's land was taken for the garden of the King of Greece and the arbitral tribunal had to determine the value of the land at the time of its seizure. The compensation was awarded and paid in satisfaction of Mr. Finlay's claim.

A very important case, that of the *Delagoa Bay Railway*, was the subject of arbitrary proceedings in 1900 between the United States and Great Britain on the one hand and Portugal on the other. <sup>7)</sup> The arbitral tribunal had to fix the compensation for the cancelling of the concession. The tribunal was of opinion that, if there are no legal dispositions to the contrary, the cancellation of a concession

<sup>1)</sup> La Fontaine, *Pasicrisie Internationale*, p. 97 et seq.

<sup>2)</sup> Fischer Williams, B.Y. 1923, p. 16

<sup>3)</sup> Borchard, *Harvard Draft on Responsibility*, A. J., spec. suppl., vol. 23 (1939), p. 160

<sup>4)</sup> Steinbach, *Untersuchungen*, p. 44

<sup>5)</sup> Moore, *Arbitrations*, pp. 1855-1857

<sup>6)</sup> Moore, *Digest*, vol. VI, pp. 262-264

<sup>7)</sup> Moore, *Arbitrations*, p. 1805 et seq.; La Fontaine, *Pasicrisie int.*, p. 397 et seq.

without compensation is unlawful and that therefore the entire loss should be compensated. <sup>1)</sup> Another case of the introduction of a State monopoly was that of the *Italian Life Insurance* question. By a Bill of 1911 the whole life insurance business was to be entrusted to a National Institute. Protests were made immediately by several States, <sup>2)</sup> based on the considered opinions of several authorities in international law. The Bill was consequently amended to the effect that foreign companies could continue business for another ten years, time enough to dispose of their assets and especially of their real property. We can therefore not speak of a violation of acquired rights in this case, because merely the good-will of the companies was destroyed which in itself is not a vested right.

The Case of the *Expropriation of Religious Property in Portugal* was decided by the Hague Court of Arbitration in 1920. The Court held: <sup>3)</sup>

"In view of the circumstances under which the claimants possessed the property claimed in Portugal, as well as the burdens resulting therefrom, and especially the fact that they had introduced capital into that country:

Whereas, it was not the intention of the Government of the Portuguese Republic to seek in the seizure of the said property a source of pecuniary gain, any more than it had been the intention of the claimants to violate the respect due to the laws and institutions of Portugal;

Whereas, under these circumstances, the following settlement of the claims, the subject of the present arbitration, appears as just and equitable and of a nature to satisfy the respective legitimate expectations of the parties; . . ."

The Tribunal therefore awarded compensation to the claimants.

In the Case of the *Norwegian Claims against the United States*, also decided by the Hague Court of Arbitration in 1922, it was held: <sup>4)</sup>

"Whether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under international law, based upon the respect of private property."

<sup>1)</sup> cf. also Guggenheim, vol. I, p. 305

<sup>2)</sup> cf. Basdevant, op. cit., p. 51 and literature cited.

<sup>3)</sup> Scott, Hague Court Reports, 2nd series, pp. 3-4

<sup>4)</sup> Scott, op. cit., p. 69

The Rapporteur, M. Huber, also held in the *Spanish Zone of Morocco Claims*, 1924, that: <sup>1)</sup>

"Under international law an alien cannot be deprived of his property without just compensation, subject of course, to the conventional law in force."

We come now to the *Chorzow Factory Case*, decided by the Permanent Court of International Justice. This decision constitutes, in our opinion, not a real precedent, because the issue depended upon a treaty, the Geneva Convention between Poland and Germany. All the utterances with respect to our question are therefore only incidental, which should not be interpreted, however, as meaning that it deprives them of their great authority. We have already quoted the most significant statement of the Court in these questions, <sup>2)</sup> and there is still another passage where the Court maintains this view:

"Furthermore, there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rule generally applied in regard to the treatment of foreigners and the principle of vested rights." <sup>3)</sup>

We agree therefore with Mr. Fachiri that "even if be not a precedent in point, it undoubtably shows how the Permanent Court would approach the question if it arose directly before them." <sup>4)</sup>

As the last of the judicial or arbitral decisions in support of this view the case of *Kulin, Emeric v. Roumanian State* before the Rumanian-Hungarian Arbitral Tribunal, must be quoted.

This is the case which arose in connection with the Rumanian Agrarian Reform to which we have already referred. In view of the fact that this dispute has been discussed by almost all international lawyers, we will add nothing but the important statement of the Tribunal itself: <sup>5)</sup>

<sup>1)</sup> Rappports, p. 60

<sup>2)</sup> See above Judgment No. 13, *Chorzow Factory (Merits)*, Series A, No. 17, p. 46.

<sup>3)</sup> Judgment No. 7, Series A, No. 7, p. 21

<sup>4)</sup> B.Y. 1929, p. 45

<sup>5)</sup> The Rumanian Judge refused to sign the decision. Reported in A. D. 1927-28, case No. 59

"The preparatory work relating to Article 250 of the Treaty of Trianon and Article 267 of the Treaty of St. Germain showed that the intention of the contracting parties was fully to protect the rights of the Hungarian nationals situated within the territory of the former Austro-Hungarian Monarchy, and to place these rights under the régime of common international law. A measure as the result of which the property of an ex-enemy is taken away in its entirety from the owner constitutes, prima facie, a violation of the general principle of respect of acquired rights and oversteps the limits of common international law."

To this list of judicial and arbitral precedents, two diplomatic interventions conveniently may be added which show that the greater part of the community of nations believes that the claim to protection of vested rights has a legal basis.

The Bolshevik Revolution in Russia led the Soviet government to promulgate confiscatory decrees which hardly could be more general. The U. S. Ambassador and doyen of the diplomatic corps in Petrograd presented therefore in 1918 a Note on behalf of the United States and all other States, allied and neutral, diplomatically represented in Russia, to the Russian Minister of Foreign Affairs, the important passage of which reads: <sup>1)</sup>

"In order to avoid misunderstanding in the future, the representatives at Petrograd of all foreign Powers declare that they consider the decrees relating to the repudiation of the Russian State loans, the confiscation of property of all sorts and the analogous measures as without effect in so far as their nationals are concerned, and the said representatives reserve the right to claim at the desired moment from the Russian Government damages for all losses which these decrees may entail for their nationals." <sup>2)</sup>

In the second place the Mexican Agrarian Legislation (1917) as a social reform involved large expropriations. Whereas throughout the first stage of the ensuing discussion between Mexico and the

<sup>1)</sup> Fachiri, B.Y. 1929, p. 45 and Basdevant, op. cit., p. 55  
<sup>2)</sup> as quoted by Fachiri, loc. cit., p. 45

United States the issue was the adequacy of compensation, <sup>1)</sup> the two contradictory principles of "minimum standard" and "national treatment" became, after the new reform measures, introduced by President Cardenas, the fundamental question. <sup>2)</sup>

These measures were followed by an exchange of notes in 1938, the result of which was a compromise in which both parties maintained their respective legal standpoints in principle, while, in practice, Mexico largely complied with American demands. <sup>3)</sup>

In view of these precedents, it seems justified to maintain that the principle of equitable compensation for deprivation of property rights is rooted in the legal conviction of the world. Or, as Mr. Kaeckenbeeck put it:

"What is therefore needed to ensure a minimum of justice in international practice is not an alleged principle of immunity of vested rights against legislation... but an international minimum standard for equitable compensation. <sup>4)</sup>

Rule Number 7 should therefore be formulated in the following manner:

*Wherever the alien enjoys the privilege of ownership of property international law protects his rights in so far as his property may not be expropriated under any pretext, except for moral or penal reasons, without adequate compensation. Property rights are to be understood as rights to tangible property which have come into concrete existence according to the municipal law of the alien's State of residence. <sup>5)</sup>*

<sup>1)</sup> Herz, loc. cit., p. 258; cf. in general Bullington, A. J., vol. 21 (1927), pp. 655-705 and Vol. 22 (1928), pp. 50-69  
<sup>2)</sup> cf. Exchange of Notes between U.S. and Mexico, A. J., suppl., vol. 32 (1938) pp. 181-207

<sup>3)</sup> Herz, loc. cit., p. 258

<sup>4)</sup> B.Y. 1936, p. 16

<sup>5)</sup> Some authors (cf. Verdross, Recueil, vol. 37 (1931, III), pp. 360-364), hold the view that a principle of private international law, namely that rights acquired abroad shall be recognized and protected, is comprised in the minimum standard. According to Dicey, Conflict of Laws, General Principle I, this includes all legal positions that would be enforceable by the law under which they were created. The object of this notion is not indeed to select rights specially entitled to preservation, but to give validity outside the territorial limits to all rights duly created, cf. Kaeckenbeeck, B.Y. 1936, p. 6 and Recueil, vol. 59 (1937, I), pp. 332-336. This is the condition sine qua non of private international law, but not a principle of general international law.

## V. PROCEDURAL RIGHTS

We have discovered that international law exercises a control over the State's legal order with regard to aliens. We furthermore stated that the violation of these substantive rights by the State organs entails the State's responsibility.

It is a well known fact that no governmental organization of any sort is beyond reproach. Misapplication of laws and regulations by officials, acting in good or bad faith, is a danger any form of administration runs. It is therefore proper for a civilized community to create agencies destined to give wronged citizens reparations for the wrongs inflicted on them. In our form of society this task is fulfilled by the judicial authorities. Judicial processes are thus an obvious way of providing for a system of redress, because judicial authorities are instituted also to repair wrongs inflicted by individuals in their private capacity on their fellow citizens.

In the event that an alien is wronged in his rights by an official, a State organ, etc., an international delict has been committed by the act of the violation itself. As we know, such a violation entitles the home State of the alien to intervene through normal diplomatic channels on behalf of its nationals at the government of his State of residence. But although the international delict has come into existence by the act itself, it would be unjust to prevent the State of residence to repair the wrong done to the alien independently and by its own means through its proper municipal organization. It has to be maintained as a general rule that a diplomatic intervention is justified as long as the agencies of the municipal organization did not have an opportunity to repair the invasion of rights. Any other rule would fail to recognize that the law of nations itself contemplated that the State would have its own agencies for the repair of damage done. Since the State is permitted this power, it must be given a chance to use it. Hence international law instituted the local remedy rule.

International intervention of the State on behalf of its citizens is not legitimate until the citizen has exhausted local remedies without adequate success. It is a general rule that no international claim may be presented on behalf of an aggrieved national as long as there remains at the disposal of the individual in question effective means for obtaining reparation in the State in which the wrong was com-

mitted. Prof. Borchard stated that "this principle is so strongly established that the detailed citation of authorities seems hardly necessary." <sup>1)</sup>

Under particular circumstances, however, there are exceptions to this principle. Otherwise it would be possible for any State to hide behind its municipal codes and, asserting that its own laws had been properly enforced, to refuse to allow any intervention on behalf of aliens by their home state. <sup>2)</sup>

The most frequent case where the exception is in order, is, as was well expressed by Mr. Fish, Secretary of State of the United States, that "a claimant in a foreign State is not required to exhaust local justice in such States when there is no justice to exhaust." <sup>3)</sup>

We cannot, however, enter into a detailed discussion of the local remedy rule and its exceptions. Suffice it is to say that it exists. <sup>4)</sup> In the second instance, an alien, living and carrying on business in his State of residence may be wronged by individuals. So he would need to go to court to enforce contractual claims, or, to protect himself from libel and so forth, to use the legal machinery in the same way as the national.

The alien should therefore possess some procedural rights and this for a double reason: in the first place, because he is under obligation to exhaust the available local remedies before he may claim the diplomatic protection of his home State; and secondly, because his life in a modern community necessitates the capacity of being able to appeal to agencies for the protection of rights.

It is logical that since the alien is granted substantive rights by general international law, the same law of nations provides also for his procedural rights for protection of the former. It is unquestionable that these procedural rights, too, must conform with an international standard.

<sup>1)</sup> Diplomatic Protection, p. 818; Freeman, Denial of Justice, pp. 403-455; Eagleton, Responsibility, pp. 95-124; Harvard Draft on Responsibility, A.J., spec. suppl., vol. 23 (1929), pp. 149-157; Dunn, Protection of Nationals, p. 156-159.

<sup>2)</sup> Eagleton, op. cit., p. 103

<sup>3)</sup> Moore, Digest, vol. VI, p. 677

<sup>4)</sup> cf. e.g., *The Panevezys-Soldutiskis Railway Case*, P.C.I.J., Series A/B, No. 76; The Court considered the Lithuanian objection on the non-observation by the Estonian Government of the "rule of international law requiring exhaustion of remedies afforded by municipal law" (p. 18). The Court then examined all grounds on which Estonia's contention was founded and found that they "cannot be regarded as excusing that company from seeking redress in the Lithuanian courts" (p. 21).

In this connection the question arises whether the law of nations binds States to set up judicial systems and procedures so organized and operated as to conform to certain fundamental principles generally recognized by civilized nations. We think it is evident that the State is at liberty to choose the means for the accomplishment of the desired state of stability and security. It is also clear that the judicial remedies available to the alien should be the normal, proper courts and not any form of special and exceptional board or tribunal created for the particular purpose, perhaps with doubtful intentions. <sup>1)</sup>

But "the subjection of the alien to the local law and remedies is necessarily based upon the assumption that the local law and remedies measure up to the standard required by international law." <sup>2)</sup>

A normally constituted State will possess regular courts and laws <sup>3)</sup> and the requisite standard will be easily met by it in every case where local justice is permitted to operate in a normal manner. <sup>4)</sup>

On the other hand, as the draftsmen of the Harvard Draft admit, the charge against a country that its local laws or remedies do not meet this standard is not a light one to make.

When approaching this field from the viewpoint of State-responsibility we enter the sphere of denial of justice in the narrow meaning of the term, which signifies "some misconduct or inaction of the judicial branch of the government by which an alien is denied the benefit of due process of law." <sup>5)</sup>

In our terminology the question is what kinds of action of courts, when dealing with cases involving aliens, are to be considered as improper, which consequently means by what standards the action of the local judicial system has to be judged. <sup>6)</sup>

In normal court procedure, three aspects have to be considered:

1. Free access to court
2. Obstacles in the proceedings
3. Undue delay during the trial <sup>7)</sup>

<sup>1)</sup> Basdevant, Répertoire, p. 60; Freeman, op. cit., p. 547; cf., e.g., U.S. (Idler) v. Venezuela, Moore, Arbitrations, p. 3508

<sup>2)</sup> Harvard Draft, comment to art. 5, loc. cit., p. 148

<sup>3)</sup> Borchard, op. cit., p. 101

<sup>4)</sup> Freeman, op. cit., pp. 537-538

<sup>5)</sup> Dunn, op. cit., quoting Borchard, p. 147

<sup>6)</sup> Dunn, op. cit., p. 149

<sup>7)</sup> cf. Mr. de Visscher's explanations at the Hague Cod., Conf., Doc. C. 351 (c). M.145 (c.). 1930. V.p. 153

### 1. Free Access to Court

One of the fundamental international obligations incumbent upon the State is to grant the alien free access to court for the protection and enforcement of his rights. <sup>1)</sup>

This principle is universally recognized and its violation has always been considered as the most elementary form of denial of justice. A very elucidating passage has been written by Freeman on this point:

"The reason for this universality is clear. Resort to the machinery of domestic justice is but a means to an end; and that end is the vindication and enforcement of rights under which a determinate substantive capacity is guaranteed in aliens. Without the faculty of invoking domestic justice, an individual would be totally bereft of the technique necessary to ensure an application of the law governing his material rights." <sup>2)</sup>

Refusal of free access to courts is encountered in modern practice with increasingly less frequency than it used to be in the time when the alien's situation was still indefinite. We therefore need not undertake lengthy proof of the validity of this rule.

One of the famous examples, however, should be mentioned.

In the *Fabiani Case* (France v. Venezuela) the President of the Swiss Confederation held: <sup>3)</sup>

"En permettant aux adversaires de Fabiani d'entraver sans droit l'exécution des sentences françaises, les autorités judiciaires du Vénézuéla ont commis à l'encontre de ce dernier des dénégations de justice, consacrées essentiellement par l'admission de l'appel des Roncayolo avec effet suspensif; il y a eu refus déguisé de statuer."

The replies to the questionnaire drawn up by the preparatory Committee of the Hague Codification Conference, too, leave no doubt that there is a complete agreement among the governments as to the validity of this rule. <sup>4)</sup> It furthermore was recognized in the

<sup>1)</sup> Freeman, op. cit., 215; Basdevant, op. cit., pp. 57-58

<sup>2)</sup> Freeman, op. cit., p. 216

<sup>3)</sup> Moore, Arbitrations, p. 4900; cf. also cases cited by Freeman, op. cit., pp. 230-239

<sup>4)</sup> Basis of Discussion No. 5

Draft Convention for the Paris Conference under the heading "civil and judicial guarantees." <sup>1)</sup> One specification, however, seems necessary with regard to *cautio judicatum solvi*.

The obligation to give security for costs has no direct connection with the question of free access to courts. <sup>2)</sup> Under normal circumstances it cannot be interpreted as barring the alien from his lawful procedural right. Continental courts have consistently held this view in their practice, <sup>3)</sup> and it was incorporated as a principle in paragraph 3 of article 9 of the above quoted Draft Convention.

This question, however, is not so important anymore since the Hague Convention on Procedure in Civil Cases of 1905 has abolished the *cautio* among many states. <sup>4)</sup>

## 2. Obstacles in the Procedure

As Mr. Freeman pointed out it would be a staggering task to enumerate the infinite varieties of judicial misconduct which might be produced during the course of a trial.

In the search for a test of a proper trial, he considered that the international obligations of a State have been disregarded whenever judicial action is taken without observing the following rules: <sup>5)</sup>

The alien must be given the opportunity of a fair hearing:

"Still, a plain violation of the substance of natural justice, as, for example, refusing to hear the party interested. . . . amounts to the same thing as an absolute denial of justice." <sup>6)</sup>

The alien should be informed of the charges against him, be able to prepare a defense, be allowed to produce proofs, <sup>7)</sup> and no documents should be withheld, hidden or destroyed by authorities to the prejudice of the foreigner's case, and he should be allowed to produce all evidence and summon witnesses in court: <sup>8)</sup>

<sup>1)</sup> Doc. C. 31.M.21.1929.II p. 5

<sup>2)</sup> Freeman, op. cit., p. 224

<sup>3)</sup> cf. the decisions of the Swiss Federal Court, *Instant Index Corporation v. Tribunal of the Canton of Vaud.*, BGE, vol. 60, I, p. 220 and *Richter and Sons v. Court of Appeal of Berne*, BGE, vol. 62, I, p. 246; cf. also *Reichsgericht, Security for Costs (Germany) Case*, A.D. 1919-22, case No. 170

<sup>4)</sup> Basdevant, op. cit., p. 58

<sup>5)</sup> *Denial of Justice*, pp. 266-267

<sup>6)</sup> *Cotesworth and Powell Case*, Moore, *Arbitrations*, p. 2083

<sup>7)</sup> *Cotesworth and Powell Case*, loc. cit., p. 2083

<sup>8)</sup> Freeman, op. cit., pp. 267-268

"Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceeding, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the court." <sup>1)</sup>

The judicial action should neither be influenced by the government or any other political authority, nor should it show a partiality for one of the parties. <sup>2)</sup> Equally the decision of a court should not be arrived at by an obviously fraudulent or erroneous interpretation or application of the local law, especially the law of procedure. <sup>3)</sup>

## 3. Undue Delay during the Procedure

On the other hand, the opinion about the consequences of delays in the procedure is divided. In his Report, Mr. Guerrero denied responsibility for abnormal delay in the administration of justice:

"No State can claim to possess courts so efficient that they ever exceed the time-limit laid down in the laws of procedure. The larger the State, the greater the number of cases brought before its judges and consequently the greater the difficulty of avoiding delays, sometimes quite considerable delays." <sup>4)</sup>

It seems, however, to be generally accepted that undue delay in the procedure is a violation of the alien's procedural rights. Excessive delay is as effective as any other method for preventing an alien from getting redress for a wrong inflicted upon him.

Such has been the opinion of many arbitral tribunals.

The Claims Commission between Great Britain and Mexico held, for example, in the *Interoceanic Railway of Mexico Case*:

". . . There could be no doubt as to the claimants having exhausted all the local means of redress open to them. These local

<sup>1)</sup> *U.S. (B. E. Chattin) v. United Mexican Sts.*, op of Comm., 1927, p. 440

<sup>2)</sup> Freeman, op. cit., p. 268

<sup>3)</sup> *Diss. Op. of Mr. Nielsen, in the Garcia Case*, Op. of Comm., 1927, p. 173

<sup>4)</sup> A. J., spec. suppl., vol. 20 (1926), p. 192



means of redress had, however, proved insufficient. By taking the course indicated by the Mexican laws, the claimants had not been able to pursue their right. For this reason a denial of justice or undue delay of justice must be assumed to exist, in other words that international delinquency which... entitled the claimant to apply to his own government...<sup>1)</sup>

In the *Salem Case* also "inexcusable delay of proceedings"<sup>2)</sup> was mentioned; and the Mexican Claims Commission held in the *Dyches Case* that:

"the fact remains that the procedure was delayed longer than what it should reasonably have been, in view of the simple nature of the case."<sup>3)</sup>

It derives from the few decisions quoted that here, too, the existence of an international standard may be affirmed. But in view of the fact that the literature about denial of justice is very abundant, the discussion of the procedural rights of the alien has been kept short. Before we state the rule of general international law touching these matters, however, some general considerations have to be expressed.

It is, of course, an admitted principle that the alien is subject to at least as effective means of redress for injuries as nationals have. The first test to be applied is, therefore, whether, according to national justice, the alien's judicial treatment was correct and lawful. Then, in the second place, it must be ascertained whether the State's judicial organization measures up to the standard instituted by international law.

In the end it is immaterial whether the deficiency in judicial action be due to inadequate laws under which the local system operates, or whether it proceeds from the fact that the action taken in a given case is itself short of that required of an average modern State.<sup>4)</sup> In both cases the State can be held responsible.

Where a faithful application of the local law has been established, responsibility can only be incurred when it is evident that the

<sup>1)</sup> A. J., vol. 28 (1934), pp. 173—174

<sup>2)</sup> A. D. 1931—32, case No. 188

<sup>3)</sup> U.S. (C. Dyches) v. United Mexican Sts., Op. of Comm., 1929, p. 196

<sup>4)</sup> Freeman, op. cit., p. 539

minimum requirements of international law have been left unsatisfied, that the very law itself fails to provide those sanctions of justice which the law of nations prescribes in the treatment of aliens.<sup>1)</sup>

These minimum requirements we venture to formulate in the following manner:

#### Rule No. 8.

*International Law grants the alien procedural rights in his State of residence as a primary protection against the violation of his substantive rights. These procedural rights amount to freedom of access to court, the right to fair, non-discriminatory and unbiased hearing, the right to a just decision rendered in full compliance with the laws of the State within a reasonable time.*

## VI. RECAPITULATION OF THE RESULTS

### 1. The Rules

It may be of advantage to state at the end of our investigation once again the results at which we have arrived; this time freed from all the obscuring, though eminently necessary, considerations which we had to make in order to find and establish them in rule form.

The *a prioristic* concept in the form of an arbitrary division of the social form of human existence into three spheres, namely the sphere of human and juridical personality, the economic sphere and the judicial sphere, seems to have become justified by the fact that in each case we were considering an aspect of one particular sphere our endeavour produced results which appear to be logical and which can be proved. In a way, therefore, the eight following rules are, in the light of practical experience, the minimum requirements, imposed by general international law upon the States with regard to the treatment of aliens.

(1) An alien, whether natural person or corporation, is entitled by international law to have his juridical personality and legal capacity recognized by the receiving State.

(2) The alien can lawfully demand respect for his life and protection for his body.

<sup>1)</sup> Freeman, op. cit., p. 299