THE ENTRY, ESTABLISHMENT AND REMOVAL
OF ALIENS IN NATIONAL AND INTERNATIONAL LAW

by

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The provisions of local immigration laws are notoriously liable to sudden change. I have, therefore, attempted to state the law as it stood on the 21st September 1973.

GSGG
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SELECTED ABBREVIATIONS


BVerfGE. Entscheidungen des Bundesverfassungsgericht (BVerfGe) (Decisions of the Federal Constitutional Court of the Federal Republic of Germany)

BVerwGE. Entscheidungen des Bundesverwaltungsgericht (BVerwGe) (Decisions of the Federal Administrative Court of the Federal Republic of Germany)

DAG. Deutsches Auslieferungsgesetz 1925 (German Extradition Law)

GG. Grundgesetz 1949 (Constitution of the Federal Republic of Germany)

OVG. Oberverwaltungsgericht (Higher Administrative Court)

VerwRspr. Verwaltungsrechtsprechung in Deutschland (administrative law reports)


INTRODUCTION

The movement of persons across frontiers represents an area of particular problems for international law. Both emigration and immigration touch the self-interest of states and it is common to find expressed the view that these are matters pre-eminently within the reserved domain of domestic jurisdiction. By this characterisation it is understood that the state enjoys an absolute and uncontrolled discretion, or sovereign power, to determine whether it will permit its subjects to travel abroad and whether, and on what conditions, it will permit the entry and establishment of aliens. This first reference to "discretion" requires immediate qualification, for the term is loosely employed and it suffers from a corresponding ambiguity. In practice, it is frequently understood to signify the incidence of uncontrolled freedom of choice between courses of action or inaction. Often it is equated with arbitrary power and opposed to the ideal of the rule of law. It is true that in many of the areas examined below such a meaning may seem justified by first impressions. However, it is essential to bear in mind an alternative interpretation, or characterisation, of those powers which are loosely termed "discretionary powers". The premise upon which much of what follows is based, is that discretion
operates whenever the **legal limits** on a particular power permit freedom of choice between alternative courses of action. Occasionally, this freedom may be otherwise described as a "margin of appreciation", but here too the emphasis is upon a power which exists within limits. The present thesis is principally concerned with discretionary state powers in so far as they are, or may be, subject to and controlled by the rules and standards of international law. Wherever reference is made to discretion, it is made with the idea of control in mind, although often this control may seem to operate only at the outermost edges of an apparently absolute power.

The early chapters are intended to give an indication of the context in which problems arise concerning the movement of aliens, and they do not purport to be definitive. First, consideration is given to the concepts of nationality and alienage, for it is by reason of the "fundamental" difference between the national and the alien that exclusions and restrictions on the latter are most frequently justified. The alien, it is said, stands outside the political community and he has, therefore, only a qualified right, if any, to participate in the life of that community. In practice, however, it will be seen that such hard and fast distinctions are rarely drawn, and municipal systems will often look favourably upon the reception of some classes of aliens, while tending at the same time impose restrictions on classes of their own nationals. The inquiry into the rôle of nationality in international law also provides a useful introduction to the concept of the controlled discretionary power, of freedom of decision within permitted limits. The manner in which this discretion is
exercised is examined briefly with reference to the provisions of four municipal systems and certain preliminary conclusions are drawn in regard to the relation between nationality and the right to enter a state.

Municipal law is of particular importance in the review of the rôle of passports which follows. However, despite the close connections between the travel document and domestic jurisdiction, it will be seen that the passport plays a significant part in an international context and that it may have international consequences not only in regard to the nationality and identity of the holder, but also upon the question of the right of a state to exercise diplomatic protection, the right of the holder to travel and the latter's returnability to the issuing state.

The following section looks briefly at the general issue of the standard of treatment which is due to aliens. The dichotomy between the international minimum standard and the doctrine of equal treatment is considered, and recent developments are examined with a view to indicating possible sources of new, more elaborate standards of treatment. These sources are brought forward for more detailed investigation in the contexts of entry and expulsion. Particular attention is also paid to the development of a norm or principle of non-discrimination, its meaning and the limits of its applicability to the movement of aliens across frontiers. Alienage is in many cases still considered to be a relevant distinction sufficient to justify a variety of exclusions, restrictions and preferences. Nevertheless, developments in the general standards of treatment, and particularly in the
prohibition of discrimination on racial grounds are shown to indicate further limits on the discretion to deal with aliens at will. The notion of absolute territorial sovereignty must, in given areas, yield to the precepts of general international law. This theme is carried over within a broader examination of the continuing doctrine of the reserved domain of domestic jurisdiction. While the concept may still operate to perpetuate areas of uncontrolled discretion, or at least to maintain a presumption in favour of local competence, developments in contemporary human rights standards call for constant scrutiny of its extent.

With these points in mind, attention is next focussed on the substance of state powers over the entry and expulsion of aliens. The traditional theory of an "unfettered right" to exclude any alien is noted, and due recognition is given to the wide margin of appreciation which states still enjoy in their assessment of the desirability or otherwise of prospective entrants. The position is reserved, however, in regard to the limits within which even this discretion is confined.

There then follows a detailed examination of two selected municipal systems, that of the United States of America and that of the United Kingdom. These are presented, first, for their own sake and as examples of the approach to problems of entry and exclusion in the light of the preponderant influence of the reserved domain. Secondly, it is suggested that certain practices and principles found in these systems embody or crystallize the standards of international law. Thus, the provisions of municipal law, together with evidence of
other state practice, may constitute an *opinio juris*. In particular, it is thought that the principle of non-discrimination on racial grounds is operative even in the matter of entry and exclusion. More specific international obligations, in the sense of those resulting from treaties generally and from treaties of commerce and establishment in particular, are then considered, while the special problems of refugees are left for later examination.

It may be that the discretionary power to expel is more closely confined than the power to exclude. Certainly, this view is shared by many writers on international law, but, traditionally, they have stopped short of indicating restraints upon the power other than that it must not be "abused". Far greater precision is possible, and a detailed examination of expulsion, its purpose and function, reveals a body of rules of general international law which confine, directly and indirectly, this exercise of "sovereign power". It is shown, for example, that the power must not be exercised so as to cause intentional harm, to deprive the alien of his property, or in such a way as to violate fundamental human rights. An examination of selected municipal systems in turn provides evidence of states' recognition and acceptance of international obligations which restrain their freedom. While local laws may vary greatly in the details of their application, nevertheless they show remarkable coherence and consistency with the standards of international law proposed earlier. The elaboration of these general standards by way of international obligations specifically undertaken in bi- and multilateral treaties is next brought forward to illustrate the nature and
extent of the rules which may limit the freedom of states.

In the final part, attention is turned to exceptional categories of aliens who may be directly protected against exclusion and expulsion by international law. The most significant of these categories includes the broad class of refugees and those who may take the benefit of the practice of asylum and the principle of non-extradition of political offenders. In the light of multilateral treaties, municipal law and state practice generally, it is proposed that there is now a rule of customary international law which forbids the return of refugees to a state in which they will face persecution. This view is in turn linked to a developing concept of international responsibility and to the idea of international obligations which may be owed either to the community of states as a whole, or to some regional organisation. In addition, it is suggested that developments in the customary law concerning asylum and refugees may benefit the general class of aliens. Finally, the position of minor exceptional categories, including diplomats and consuls, special missions, international officials and crew members is briefly investigated in an Appendix.

As already noted, it is a major premise of the thesis that discretionary powers are powers which are subject to control. Freedom of decision is confined within limits, and the intention is to show where those limits are to be found. Moreover, the manner of exercise of discretion is itself structured within those limits, and the intention again is to show the rules or standards which, by international law, govern the process of decision. The fact that states retain a "margin
of appreciation" is not thought to represent a significant stumbling-block to a more detailed description of international obligations in matters concerning the entry, establishment and removal of aliens.
PART I

PRELIMINARY TOPICS
INTRODUCTION

The object of the two Chapters which follow is to explain the context in which the movement of aliens takes place and its relation to international law. Chapter I is concerned with nationality, for it is the quality of not belonging to a state which is the basis of many of the distinctions drawn against aliens. The competence which states possess in nationality matters is important also as an illustration of a power which is essentially discretionary in the sense already considered. Thus, the freedom of decision may not be exercised in violation of, or to avoid compliance with, a state's international obligations. The institution of diplomatic protection, which itself is closely related to the claim of the alien to be treated according to the standards of international law, provides further evidence of the limits which are attached to the competence of states.

The nationality laws of four municipal systems are briefly discussed in order, first, to call attention to the bases of local distinctions between nationals and aliens. Secondly, reference is made to the practice adopted by some states, which is to differentiate between various classes of their own nationals, particularly where the right of entry into a state is in issue. Finally, the nature and possible sources of this right are discussed by way of introduction to the substantive problems of entry and exclusion which are dealt with in Part III.

Chapter II explains the importance of the passport régime in international travel, and its relation to nationality,
diplomatic protection and returnability. The passport is an essential factor in any assessment of the right to travel and for this reason reference is made not only to the provisions of municipal law, but also to those international agreements which have facilitated travel, either by abolishing the passport requirement in favour of some lesser document of identity, or by making provision for the issue of travel documents to refugees and stateless persons. In principle, the passport and the conditions of its issue appear to be matters essentially within the reserved domain and subject to the absolute discretion of the state. The space which is devoted to this instrument of municipal law may therefore appear somewhat excessive. However, the continuing international significance of the travel document justifies such treatment, and Chapter II concludes with a discussion of the variety of ways in which the passport may affect the relations between states and thereby come to the attention of international law.
CHAPTER I

Nationality, Alienage
and the Right to Enter a State

(I) Introduction

The general issue of nationality is inextricably bound up with the phenomenon of persons crossing frontiers. Whether an individual is a citizen, an alien or a treaty national may determine the extent of his rights, if any, to enter a state, to remain and work there, to leave that state and not to be expelled. The precise status of the individual may similarly determine the rights of other states, and the question whether any of them has a sufficient interest to exercise diplomatic protection in regard to the treatment afforded to that individual. The "allocation" of people to one rather than another subject of international law is manifestly an issue upon which both municipal law and international law may pronounce. It is trite knowledge that, by international law, states enjoy a considerable discretion, or freedom of decision, in the choice of that class of persons who will be known as nationals. Similarly, states are generally free to decide for themselves whether there shall be different categories of nationals, and whether such categories shall be subject to

1. In some cases an international body may also be involved, as where that body has a recognised interest in the protection of the individual's human rights; see below, pp. 377-380

varying rights and obligations. It will be seen that a class of persons which occupies an intermediate status between the citizen and the alien is frequently of major significance in matters of immigration. Again, the consequences of such a status are generally a matter for internal law alone or, occasionally, in conjunction with specific treaty stipulations.

The decisions of international tribunals have often emphasised the necessity of a continuing distinction between the internal and international aspects of nationality. Oppenheim also observes: ¹

"Nationality of an individual is his quality of being a subject of a certain State, and therefore its citizen. It is not for international law but for municipal law to determine who is, and who is not, to be considered a subject."

This general statement is then qualified by reference to the principle of customary international law that such nationality is required to be recognised by other states only in so far as it conforms with international law. Schwarzenberger is more precise: ²

"If the individual is an object of international law, international law must ultimately determine the criteria for allocating any such object to one rather than another subject of international law. The primary test is that of nationality."

Weis chooses to underline the twin aspects of the institution: ³

"As a concept of municipal law [nationality] is defined by municipal law; as a concept of international law, it is defined by international law."

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³ Weis, Nationality and Statelessness in International Law, (1956), p. 239.
"law. From the aspect of municipal law there is, therefore, no one concept of nationality but as many concepts as there are municipal laws."

The freedom which states possess in this field leads inevitably to the anomalies of dual and multiple nationality and statelessness. Municipal law does show some conformity, however, particularly in regard to accepted methods for the acquisition of nationality, and the final result may not be so chaotic.

The development of the concepts of nationality, citizenship and alienage has been thoroughly explored elsewhere, and requires no additional elaboration. For present purposes, the concern is with (1) nationality as the basis for the exercise of protection on the international plane; and (2) the incidents of nationality, in so far as these may affect the right of an individual to move from one territory to another, and which are principally a matter for municipal law. A distinction is sometimes drawn between the terms 'nationality' and 'citizenship', and the relevant differences have been

2. Cf. 5 B.D.I.L., 7.
"Conceptually and linguistically, the terms 'nationality' and 'citizenship' emphasise two different aspects of the same notion: State Membership. 'Nationality' stresses the international, 'citizenship' the national, municipal, aspect. Under the laws of most states citizenship connotes full membership, including the possession of political rights; some states distinguish between different classes of members (subjects and nationals) ... It follows ... that the terms 'national' and 'citizen' overlap. Every citizen is a national, but not every national is necessarily a citizen of the state concerned; whether this is the case depends on municipal law; the question is not relevant for international law."

In fact, current usage shows little consistency, and 'national', 'citizen' and 'subject' may be employed indifferently.

Disregarding the terminology, however, it remains essential to preserve the distinction, which is readily drawn, between the municipal law of nationality and its consequences, and the international law of nationality, particularly as regards the question of opposability.

(II) Nationality and International Law

It is still the accepted view that, in principle, matters of nationality fall within the domestic jurisdiction of each state. Parry notes: 3.

"The concern of international law with municipal rules as to who is and who is not a national of

1. Whiteman, Digest, vol. 6, p. 4.
3. 5 B.D.I.L., 7.
"a particular state arises from the circumstance that a state is conceded, in relation to its nationals, rights which it does not enjoy in relation to other persons."

International law does not, therefore, ignore the precepts of municipal law in determining the status of an individual. Indeed, Weis goes so far as to conclude:¹

"Since nationality is determined by the law of the country whose nationality is claimed, evidence - usually of a documentary nature - that the de cujus was considered as a national by an authority qualified under municipal law to determine or to certify nationality will, as a rule, be the best evidence."

However, the determinations of municipal authorities are not conclusive and if the question of nationality is in issue, then it is for the international tribunal seised of the matter to determine its validity or invalidity.² A man may, within the territory of a state, be denied all the normal incidents of citizenship and yet be a national for the purposes of international law.³ The reverse is equally true, and one commentator has referred to the 'novelty' inherent in the judgement of the International Court of Justice in the Nottebohm case by which, in the eyes of international law an individual may be a national for the purposes of being taxed or hanged for treason, but not for the purpose of having his

3. In Kahane v. Parisi and Austria (1929), Ann. Dig. 1929-30, Case No. 131, p. 213, the Rumanian Mixed Arbitral Tribunal concluded that although Rumanian Jews had been deprived of all political rights, nevertheless they remained liable to military service and were issued with Rumanian passports when travelling abroad. Although not "full citizens", they did come within the category of "ressortissants" comprehended by Article 249 of the Peace Treaty of St. Germain 1919.
claim pressed internationally.\textsuperscript{1}

The essential quality of a state's power or competence in the matter of nationality is its discretionary nature. It will be argued subsequently that this same characteristic pertains to the powers which a state enjoys generally in regard to the entry and expulsion of aliens. Moreover, it is by way of the concept of discretion, confined and structured by law,\textsuperscript{2} that one may progress towards a more comfortable theory of "sovereign rights". The limitations which international law places upon states in the area at present under consideration are revealed by three situations in particular: (1) the imposition of nationality upon immigrants or residents; (2) denationalisation; and (3) the issue of nationality in relation to the exercise of diplomatic protection.

\textbf{(1) The Imposition of Nationality upon Immigrants or Residents}

As Brownlie observes, the automatic imposition of nationality upon all residents entering a state's territory would, if accepted, avoid that state's duties to aliens resident or passing through.\textsuperscript{3} Today the general view is that recognition need not be accorded to such measures if imposed without request or consent, unless the individual has a genuine connection with the state by both parentage and

\textsuperscript{1} O'Connell, \textit{International Law}, p. 680. Taxation and treason, however, are also areas in which aliens present within state territory are commonly accorded equal treatment with nationals, by way either of the doctrine of local allegiance or of the notion of submission to the jurisdiction. They are not exclusively incidental to national status.

\textsuperscript{2} Admittedly with varying degrees of certainty.

permanent domicile. At an earlier time, however, there was a tendency to discover an element of implied consent, or at least of tacit acquiescence, in the acquisition of local nationality, especially in the case of long-term or permanent residents. For example, in 1862 the Law Officers of the Crown could find no objection to a Colombian decree which provided that foreigners or immigrants should be naturalised from the moment of entry into the state. But in 1865, on the issue of a Mexican decree which, inter alia, imposed nationality on foreigners acquiring land, a protest was advised on the ground primarily of its retrospective effect. It was suggested that some time should be allowed to such aliens to determine whether they would retain their property, and to enable them to dispose of it.

The criterion of consent, or of acquiescence, of the individuals affected is again of importance today in cases involving a change of territorial sovereignty. Formerly, it may have been that the nationality of resident or domiciled inhabitants automatically followed the change of sovereign, although they would not always lose their former status. It was commonly accepted, however, that there must be a "sufficient

2. 5 B.D.I.L., 26-27.
3. Ibid., p. 28; see also Brazilian Law of 1889: ibid., pp. 28-30; 250-251.
link", whether described in terms of domicile or habitual residence, between the successor state and those whom it claimed as nationals.¹ Thus, in Peinitsch v. German State the German-Yugoslav Mixed Arbitral Tribunal concluded that international law would not permit a successor state to extend its nationality to persons other than those domiciled in the territory.²

Modern treaties of cession and for the regulation of nationality tend to apply the criteria of permanent or habitual residence, in conjunction with recognition of the right of option. For example, in the 1956 Treaty between Belgium and the Federal Republic of Germany on Frontier and other Matters,³ Article 3 provides that German nationals (ressortissants/Staatsangehörigen) domiciled within the areas ceded to Belgium shall have the right, within two years, to opt for Belgian nationality. Those who exercised this right automatically lost their German nationality, while those who did not so choose had the right to retain their domicile and their immovable property.⁴ In the Treaty with the Netherlands of 1960 the similar right of option is related to the criterion of continued residence in the agreed areas and domicile in the

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3. BGBl. 1958, II, S.263. See also France, loi no. 73-42 du 9 janvier 1973, articles 12 and 13, as amended by article 1.

4. Alternatively they might, within two years, remove themselves, their movables, and the proceeds from the sale of immovable property.
The emphasis is reversed in the 1969 Treaty between the German Democratic Republic and the U.S.S.R. to regulate questions of dual nationality. A right of option is provided for those having dual nationality, to be exercised within one year from the entry into force of the treaty. Those domiciled in one state who wish to opt for the nationality of the other party must make a declaration to that effect before diplomatic or consular representatives. Those domiciled in a third state must make a similar declaration, and both classes will then become citizens of their chosen state. However, those who do not make the required declaration within one year automatically become citizens of that state party in whose territory they are domiciled or, if domiciled in a third state, of the state party in whose territory they were domiciled prior to exit.

Despite its frequent occurrence, it is doubtful whether there is any rule of customary international law which insists upon a right of option. Indeed, its recognition by treaty may only be evidence of a limited exception to the general rule which relates nationality to the criterion of genuine or substantial connection with the territory in question.


3. Articles 1, 2(1). The Treaty came into force on 13th February 1970.

4. Article 2(2),(3),(4). Article 12 provides that those domiciled in the territory of the state party other than that for whose nationality they opt become aliens.

"Denationalisation"

National legal systems commonly provide for deprivation of nationality in certain circumstances, and indeed Brownlie concludes:

"Existing practice and jurisprudence does not support a general rule that deprivation of nationality is illegal."

Once again this is an area of discretion in which states' powers are only indistinctly confined by international law. Thus, Lauterpacht points out the contradiction inherent in Articles 15 and 16 of the Universal Declaration of Human Rights. The former declares that everyone has the right to a nationality, the latter that no one shall be arbitrarily deprived of his nationality. The natural implication of the principle that everyone is entitled to a nationality would be the prohibition of any deprivation, whether arbitrary or otherwise, which resulted in statelessness.

Despite international action in this field, statelessness is a continuing phenomenon. However, an indication of the circumstances in which denationalisation would be unlawful can be gathered from a consideration of some of the incidents


of nationality. From among them Oppenheim selects one particular right and one particular duty: 1.

"The right is that of protection over its citizens abroad which every state holds ... The duty is that of receiving on its territory such of its citizens as are not allowed to remain on the territory of other states."

In the same way that a state cannot avoid its international obligations towards aliens by the imposition of nationality, so too it is barred from avoidance of the duty to admit nationals by a measure of "ad hoc denationalisation". Every case would need to be considered in the light of its facts and of the reasons behind such a decision, but as Brownlie notes: 2.

"In appropriate circumstances responsibility would be created for the breach of duty if it were shown that the withdrawal of nationality was itself a part of the delictual conduct facilitating the result."

Whether such issues would ever be settled on an international judicial level is, of course, another matter. 3.

At the present time the competence of states to introduce denationalisation measures cannot be doubted. On occasion they may have effect only internally, for example, in the case of a suspension of political rights. But the issues are less straightforward in regard to other states. Whereas every state is generally free to refuse admission to any individuals who have been rendered stateless, in practice this freedom is often restricted by treaty and other obligations towards


refugees and persons similarly placed. 1.

(3) **Nationality and Diplomatic Protection**

In many cases it is impossible to separate the right to exercise diplomatic protection from the fact of nationality. 2. In its opinion in the Panevezys-Saldutiskis Railways Case, the Permanent Court observed: 3.

"in the absence of a special agreement, it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection."

Taken out of context, this statement itself is not very helpful. It is of still less assistance when accompanied by references to the well-known dictum of the same Court in the **Nationality Decrees** case, to the effect that questions of nationality are in principle within the reserved domain of domestic jurisdiction. 4.

Be that as it may, Schwarzenberger remarks that the reasons why any state is not entitled to intervene on behalf of any individual lies in the fact that, 5.

"in so far as the relations between any subject of international law and its own nationals are concerned, at least under customary international law, these are matters within the exclusive jurisdiction of that particular subject of international law."

1. See further below, pp. 586ff.. In some states, for example, the United Kingdom, the power to revoke citizenship is limited to the case of naturalised persons; British Nationality Act 1948, section 20. This suggests that such persons owe a higher duty of allegiance than their "natural-born" comrades. Cf. **Case of Mr. and Mrs. Andreae** (1912), naturalised British subjects, whose passports were impounded on account of their residence abroad; 5 B.D.I.L., 295–296, 335–337; see also at pp. 327–331.

2. Cf. 5 B.D.I.L., 3 and passim.


It may be that today this conclusion is open to re-examination in the light of a distinction recently drawn by the International Court of Justice between international obligations *erga omnes* and international obligations the performance of which is the subject of diplomatic protection. It is in the latter case, said the Court, that a state must first establish its right or interest in order to bring a claim.¹

In most cases the claimant state will prove its right or interest by showing that the individual concerned is its national. There may be problems, however, if the local law has little or nothing to say about the nationality of the *de cujus*. In the *Cayuga Indians* case ², the decision of the Tribunal that those Indians resident in Canada were British nationals under the protection of the Crown rested principally on the fact of residence and attachment, as also upon the fact that the Crown was in lawful administration of the territory wherein they resided.³. As O'Connell observes, with considerable

3. *Ibid.*, p. 177. Cf. Brownlie, *op. cit.*, at pp. 388-389: "... if a right of protection arises by virtue of lawful administration of territory, then it would seem that nationality may be said to arise from the fact of the right of protection." Note also the category of "British protected persons"; in 1897 the Legal Adviser to the Foreign Office declared, "There is no law to prevent Her Majesty from extending her protection to any body she pleases, and therefore, technically, I can hardly say that there is any 'legal objection': *Illegitimate Anglo-Chinese*: 5 B.D.I.L., 465-467. This statement must, of course, be read in relation to the competing rights of other states; in the case in point the Chinese authorities did not wish to claim the individuals in question as Chinese subjects. See also 5 B.D.I.L., 439-448; O'Connell, *International Law*, pp. 677-678; Parry, *Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland*, I, pp. 11-15; Jones, *British Nationality Law*, (1956), pp. 84, 185ff.
justification, it is impossible to disengage nationality in its international sense from the social fact of attachment to a given legal society.¹ It is this practical point which is the most striking in the judgement of the International Court of Justice in the Nottebohm case:²

"... the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States ... [Nationality] is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."

Earlier the Court affirmed that it is international law which determines whether a state is entitled to exercise protection and to seise the court.³ This it may generally do by showing


the "internationally required prerequisite of genuine connection between itself and the individual". 1 A simple assertion, or the formal appearance of nationality may not be enough.

The competence of states to regulate nationality has been compared with their competence in matters of territory and jurisdiction. 2 In respect of the former Parry notes: 3

"The rules as to who are a State's nationals are of the same order as the rules as to what is a State's territory. Their application is of both internal and external significance. They do not operate at all unless the State concerned performs an act of will. If a State disclaims the exercise of its discretion to acquire a new national, the position is similar to that in which a State disclaims the acquisition of further territory ... Similarly, if a State declines to assimilate all those who possess its nationality in an international sense to the same domestic category - as where it treats the inhabitants of a colonial protectorate as aliens for domestic purposes - this is normally a matter within its exclusive discretion just as is its decision whether or not to annex colonial protectorates themselves."

A closer analogy is perhaps to be found in the issue of delimitation of the territorial sea. As Brownlie observes in regard to the Fisheries case, 4 it is the coastal state which would seem to be in the best position to appraise the local conditions dictating the selection of baselines. Nevertheless,

1. Schwarzenberger, op. cit., p. 359. See also ibid., pp. 361-362, where the writer goes on to argue that "if the necessary distinction between nationality for the purposes of international and municipal law is made ... for the purposes of international law, nationality is regulated by rules of international law and, thus, neither exclusively nor essentially within the domestic jurisdiction of states."


the international aspect of delimitation requires its conformity with international law. Very similar principles apply to nationality and the question of its opposability to third states. The issue is on an international plane, and an international tribunal will not hesitate to examine the validity of a claim to nationality. Thus, in the Flegenheimer case the Italo-American Conciliation Commission found that the de cujus did not possess the asserted nationality of the United States and that he could not, therefore, be considered a United Nations national for the purposes of Article 78 of the Treaty of Peace with Italy. The Italian Government argued that every international tribunal is free to assess the validity of any claim to nationality with which it is presented. It followed that a nationality might exist for the purposes of internal law, while remaining inoperative on the international plane. However, it was not the function of the tribunal either to pronounce on the matter of internal validity or to declare such nationality to be void. The United States Government argued that the issue to Flegenheimer of a certificate of nationality was itself sufficient proof of status. The Tribunal disagreed and after an independent examination of the form and the basis of the acquisition of nationality it concluded that the claimant had not fulfilled the conditions required by the Treaty for the purpose of being considered a United Nations national.

3. Ibid., p. 102.
In the circumstances the Commission did not favour, and refused to apply, the notion of effective nationality as it had been formulated by the Court in the Nottebohm case. In the Mercé claim, however, the same Commission, constituted under a different president, did resort to the principles of that case. In particular it observed:

"The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two states must ... be considered."

Indeed, where nationality is in issue, no one connecting factor is ever likely to be decisive. Brownlie concludes:

"The internal legislation of states makes general use of residence, domicile, immigration animo manendi ..., and membership of ethnic groups associated with the state territory. International law has rested on the same principles in dealing with the situations where a state has no nationality legislation and when certain parts of the population are outside nationality legislation ... The principle of effective link is considered to underlie much of the state practice on state succession and to support the concept of "ressortissant" found frequently in treaties."

The general thesis of this conclusion is supported by the evidence considered above. While a presumption remains in favour of the local law, this is clearly limited by controlling precepts of international law. Nevertheless, the effect of international law upon such normal incidents of nationality as the "right" to enter one's own country is far from clear.

1. Mercé Claim, U.N. Rep., vol. XIV, p. 236 at pp. 238-239 (1955). See also Schmeichler-Pagh, decision of the Danish Supreme Court, Clunet, vol. 92, (1965), p. 689, in which it was held that even between the two states from which the de cujus originates, the decisive factor is the dominant nationality.


Adopting the words of Schwarzenberger, the question is:

"whether a genuine connection, which establishes the right of diplomatic protection, creates also an international duty on the part of a State to accept international obligations which result from this relationship."

(III) Nationality and Municipal Law

The words just cited preface a consideration of the state's duty to receive back any of its nationals who are expelled from the territory of another state. This duty is traditionally seen as the corollary of the right which other states enjoy to order the removal of foreigners. It is a duty owed to other states, rather than to nationals themselves. In practice, states do tend to accord the right of entry to nationals, but this general statement must be qualified by a cautious approach to the definition of "national" in this context. States commonly create classes of nationals, whose rights and duties vary according to their differentiation. Frequently, too, states will agree among themselves to accord a right of entry to the nationals of each party which is more substantial than that enjoyed by certain classes of their own citizens. It is in this particular area that the local law is of greatest importance, in so far as it regulates the "normal" incidents of citizenship. The refusal of entry to a particular class of citizens or nationals may only infrequently touch upon international law, as where the refusal is a breach of the

2. Cf. Oppenheim, op. cit., pp. 645-646. The "right" is, however, neither absolute nor uncontrolled: see below, pp. 345ff.
duty owed to a state which has lawfully exercised its right of expulsion or, possibly, where exclusion infringes the inchoate, human right of entry. 1 A few examples from national legal systems will illustrate the manner in which distinctions are made between nationals.

(1) British Nationality and Citizenship of the United Kingdom and Colonies

The concept of British nationality developed through adherence to the feudal concept of allegiance. The application of this doctrine can be seen in Calvin's case in 1608, the case of the Postnati. 2 At the time of the decision the Crowns of Scotland and England were united in a personal union, of which King James was the embodiment. The question to be resolved was whether one born in Scotland after this union was to be considered an alien in England. It was held that he was not, on the ground characterised by Lord Ellesmere, "One King, one obedience". This was explained by Coke to mean that the allegiance to the King was one, and that his sovereignty could not be divided. In his view, "ligiance" as a general conception of the law,

"is a true and faithful obedience of the subject to his sovereign. This ligiance is an incident inseparable to every subject, for, as soon as he is born, he oweth, by birthright, ligiance and obedience to his sovereign ... It is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him, and he is called their liege lord because he should maintain and defend them."

Coke considered allegiance to be a duplex et reciprocum ligamen,

1. See further below, pp. 292-299.
and "they that are born under the obedience, power, faith, ligealty or ligeance of the King are natural subjects and not aliens". In his view, there were normally three incidents to a subject born: (1) his parents must be under the actual obedience of the King; (2) the place of his birth must be within the King's dominions;¹ and (3) "the time of his birth is chiefly to be considered, for he cannot be a subject born of one kingdom, that was born under the ligeance of a King of another kingdom, albeit afterwards one kingdom descend to the King of the other". As Calvin was born under one ligeance to one king he could not be an alien, that is, "a subject that is born out of the ligeance of the King and under the ligeance of another”.²

Also in his report Coke makes reference to four different types or forms of allegiance: (1) ligeantia naturalis; (2) ligeantia acquisita; (3) ligeantia localis; and (4) legal obedience. Up until 1949 the first two forms applied to the bulk of British subjects, and Jones notes:

"The definition of a natural-born British subject (originally corresponding roughly to the jus soli, subject to the doctrine of allegiance) was

1. "Ligeance or obedience, without any place within the King's dominions, may make a subject born, but any place within the King's dominions without obedience can never produce a natural-born subject ... [The] King's ambassadors abroad, having children, these are natural-born subjects at common law, yet born out of His Majesty's dominions." As has been observed, "the true rule of the common law was not that birth within the dominions of the Crown made a subject, but that birth within the allegiance did so. But, subject to minor exceptions, the allegiance comprehended the dominions of the Crown": 5 B.D.I.L., 54.

2. Statelessness, the man without a lord, was at this time inconceivable to the law; cf. Parry, op. cit., p. 23.

"gradually extended by the adoption of the _jus sanguinis_ principle, that is to say, the principle that British nationality might be acquired by descent from a British ancestor."

The _jus sanguinis_ doctrine was brought in to modify the rule that the position of children of natural-born subjects born abroad was, at common law, that of aliens. There were certain recognised exceptions, including the children of ambassadors and the heir to the throne, but for other cases legislative action was thought to be necessary. The statute _De Natis ultra Mare_ of 1351 operated in favour of children born abroad of parents who, at the time of birth, owed allegiance to the King.¹

For some time there was doubt as to the scope of this statute, although it was liberally interpreted over the years. For example, in the cases of _Rex v. Eaton²_ and _Bacon v. Bacon³_ it was held sufficient for the father alone to be a natural-born subject, the woman being _sub potestate viri_, so that both were deemed to owe allegiance to the King. Further uncertainty arose over the question of how many generations of children born abroad might benefit from the Act. A statute of 1708 simply affirmed that the children of natural-born subjects who were born abroad should be deemed to be natural-born subjects themselves, "to all intents, constructions and purposes whatsoever".⁴ A law passed in 1772 expressly extended the

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1. 25 Ed. III Stat. I; see also 42 Ed. III c.10 (1368).
4. 7 Ann. c.5; see also 4 Geo. II c.21 (1730). Jones concludes that the use of the word 'deemed', "did not mean that they were natural-born subjects but merely that they had a status which was personal to themselves": _British Nationality Law and Practice_, (1947), p. 69.
privilege of 1351 to the second generation,¹ but in the case of De Geer v. Stone the court rejected the proposition that British nationality became inheritable from persons whose title to be British subjects was based on the statutes.² It held, further, that there was no foundation for the doctrine that, under the common law, the posterity of a natural-born British subject, though born abroad, were British subjects for ever. On the contrary, the eighteenth century legislation extended the law only so far as to allow the status of a natural-born subject to the first and second generation born abroad, but no farther.

The characteristics of British nationality and of alienage were summarised in the British Nationality and Status of Aliens Act 1914, section 1 of which declared that natural-born British subjects comprised (a) any person born within His Majesty's dominions and allegiance; and (b) any person born out of His Majesty's dominions if, inter alia, his father was born within His Majesty's allegiance. This was an Imperial enactment, intended to provide the basis for a common status. However, it was never applied uniformly and did not preclude discrimination in the policies followed by Commonwealth countries in their inter se relations, even during the period prior to the Statute of Westminster 1931. Thus, in Canada, South Africa, Australia and New Zealand, the immigration of orientals in particular was at the least severely restricted, notwithstanding the

¹. 13 Geo. III c.21.
². (1882) 22 Ch.D. 243; 5 B.D.I.L., 44.
common status of British subjects. 1. The Canadian case Re Munshi Singh illustrates attitudes prevailing in 1914, and on the subject of immigration to Canada the Chief Justice declared: 2. "in my opinion the British subject has no higher right than an alien in coming to the shores of Canada."

The common status continued to be respected in the law of the United Kingdom, however, and restrictions on entry imposed during the First World War were directed solely at the alien, that is, "any person who is not a British subject." 3.

The movement towards greater autonomy among Commonwealth nations after the Second World War was reflected in the radical changes introduced by the British Nationality Act 1948. Allegiance as the basis of nationality was abandoned, although it continued as an incident to that status. The idea of the "natural-born British subject" was also jettisoned, and replaced by notions of "citizenship by birth" and "citizenship by descent". In one commentator's words, it was "of the essence of


2. 6 Western Weekly Rep. 1347 (1914). See also Re 32 Hindus 15 D.L.R. 189 (1913).

3. British Nationality and Status of Aliens Act 1914, section 27; this definition is expressly preserved by British Nationality Act 1948, section 32. A British subject might nevertheless be treated as an alien by virtue of the Aliens Restrictions Acts 1914 and 1919 and Article 15, Aliens Order 1920, unless he could prove his status by producing a passport or other document establishing his identity. See now Immigration Act 1971, section 3(8); Sch. 2 paras. 2, 4 and below, pp. 254-255.
the new scheme that each [Commonwealth] country decides who
are its citizens", and a feature "that each country acknowledges
the citizens of the others not to be aliens."¹ In pursuit of
this aim the Act makes a distinction between citizens of the
United Kingdom and Colonies (treated with the Channel Islands
and the Isle of Man as one unit) and those of Commonwealth
countries specified in section 1(3), as amended.² The Act
speaks of having the status of a British subject and "being
known" as a British subject, but it does not define that status.
Indeed, from the point of United Kingdom law, no satisfactory
definition is possible without taking account of the combined
effect of all Commonwealth legislation in the matter. The
terms "British subject" and "Commonwealth citizen" are also
declared to have the same meaning,³ but again their meaning
is only comprehensible in the light of internal law provisions
governing citizenship of the United Kingdom and Colonies and of
independent Commonwealth countries respectively. Additional
difficulties are created by the anomalous position of the
Republic of Ireland, which is neither a Commonwealth country,
nor a part of Her Majesty's dominions. However, under the law
of the United Kingdom it is not a foreign country either, and
its citizens, although not Commonwealth citizens, are not
treated as aliens.⁴

¹ Parry, op. cit., p. 112.
² British Nationality Acts 1948-1965; see also Bangladesh Act
³ British Nationality Act 1948, section 1(2).
⁴ Ibid., section 32(1); Ireland Act 1949, sections 2(1), 3(1).
The category of persons known as "British subjects without citizenship" occupy a temporary position introduced in order to keep alive the British nationality of persons who were British subjects at the entry into force of the Act until such time as they should acquire Commonwealth citizenship or become aliens or citizens of the Republic of Ireland. "British protected persons" are another intermediate category who derive their status by reason of connection with any protectorate, protected state, mandated territory or trust territory. They shared with aliens some of the disadvantages resulting from the non-possession of British nationality, but at the same time they were granted certain privileges not enjoyed by aliens.¹ One result of the 1948 legislation was to create, for the purposes of internal law, some seven categories of persons who were not aliens. These included: (1) citizens of the United Kingdom and Colonies; (2) citizens of independent Commonwealth countries; (3) citizens of the Republic of Ireland who were British subjects before 1949; (4) British subjects without citizenship; (5) citizens of Southern Rhodesia; (6) British protected persons; and (7) other citizens of the Republic of Ireland. In international law, and for the purposes of exercising diplomatic protection, the first, fifth and sixth classes would be regarded as United Kingdom nationals, while the others would probably be considered as aliens enjoying certain privileges.

¹ For example, they were exempted from application of the Aliens Restrictions Acts 1914 and 1919: British Nationality Act 1948, sections 3(3), 32(1). See also Jones, British Nationality Law, (1956), p. 84, n.3; Introductory Note to the Statement of Immigration Rules for Control on Entry (Commonwealth Citizens), 1973 H.C. No. 79.
A leading feature of the British Nationality Act, although one which is of less and less practical importance, is the common or multiple status which it creates within the term British subject/Commonwealth citizen. Even at the time of its affirmation, however, it was admitted that such status would not preclude discrimination in the policies followed by Commonwealth countries in their inter se relations. In debate in the House of Lords at the time the Lord Chancellor stated:  

"Let it be plainly understood that common nationality does not necessarily confer rights in other member states ... The mere fact that one possesses British nationality does not, and cannot ... confer any rights in regard to any particular territory."  

The Act recognised the wish of independent Commonwealth states to enact their own citizenship laws. The United Kingdom version is described as citizenship of the United Kingdom and Colonies, and the Act prescribes the manner of its acquisition and loss. From 1949-1962 an unconditional right of entry and residence extended both to citizens of the United Kingdom and Colonies and to the citizens of independent Commonwealth countries. This has been progressively cut back, and entry into the United Kingdom now depends not upon citizenship nor upon subjecthood, but

3. It is no exaggeration to say that there is no such creature as a "United Kingdom citizen", pure and simple: see Lester, Citizenship and the Immigrants, The Observer, 3rd June 1973; Citizenship, Immigration and Integration, (Labour Party Green Paper, 1972), pp. 31-34.  
5. See below, pp. 243-254.
on the concept of patriality, the quality of "belonging" to the United Kingdom. The class of patrials is in many ways anomalous, and, for example, it not only includes certain citizens of independent Commonwealth countries, but also excludes certain classes of United Kingdom citizens.

Under the Immigration Act 1971, those who enjoy the right of abode are comprised within the following categories:

(a) citizens of the United Kingdom and Colonies who acquired that status by birth, adoption, naturalisation or registration in the United Kingdom;¹ (b) citizens of the United Kingdom and Colonies born to or adopted by such citizens as are within (a) above, or whose parent had obtained citizenship in the manner prescribed by (a) above;² (c) citizens of the United Kingdom and Colonies at any time settled in the United Kingdom and ordinarily resident there for five years or more.³ A person is settled in the United Kingdom if he is ordinarily resident there without being subject to any restriction on the period for which he may remain.⁴ A form of de facto patriality is

1. Immigration Act 1971, section 2(1)(a). The reference to registration applies also to registration in an independent Commonwealth country by the United Kingdom High Commissioner (under section 8(2), British Nationality Act 1948), except that in the case of registration of a minor under section 7 of that Act, such registration must have been effected prior to the passing of the Immigration Act 1971 (28th October 1971): section 2(4).

2. Ibid., section 2(1)(b)(i) and (ii). As there was no United Kingdom citizenship before 1949, references to citizenship before that date are to be construed as references to British nationality: ibid., section 2(3)(c).

3. Ibid., section 2(1)(c). The Act provides that a person is not to be treated as ordinarily resident in the United Kingdom at a time when he is there in breach of the immigration laws: section 33(2). The Act in effect follows the Court of Appeal ruling in Re Abdul Manan [1971] 1 W.L.R. 859.

4. Ibid., sections 2(3)(d); 33(1).
conferred on Commonwealth citizens "settled" in the United Kingdom at the entry into force of the Act, that is, on 1st January 1973.\(^1\) In addition, the effect of section 1(2) is that an alien settled in the United Kingdom at the passing of the Act is better off than a non-patrial United Kingdom citizen who still awaits admission. Such aliens are to be treated as having received indefinite leave to enter and remain in the United Kingdom, although they continue liable to deportation.\(^2\).

Two further categories of patrials are created by the Act: (d) Commonwealth citizens born to or adopted by a citizen of the United Kingdom and Colonies who acquired such citizenship by birth in the United Kingdom.\(^3\) It was originally intended that Commonwealth citizens should benefit from the connection of their grandparents with the United Kingdom, but this was thrown out at the Committee Stage and not reintroduced by the Government.\(^4\). As it stands, this condition of patriality

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1. Immigration Act 1971, section 1(5).

2. For the meaning of "ordinarily resident" under section 2(6), Commonwealth Immigrants Act 1962, see Cheng v. Secretary of State [1972] Imm. A.R. 5; Shahbaz Khan v. Secretary of State, ibid., p. 172. In the latter case the Immigration Appeals Tribunal held that it was implicit in section 2(6) that a person admitted without any condition limiting the period of his stay was deemed to be ordinarily resident after his admission. The status of ordinary residence may, of course, be lost by a period of absence abroad: R v. Hussain, The Times, 13th November 1971 (C.A.).


4. The Guardian, 7th April 1971; The new Immigration Rules, however, have secured considerable privileges in matters of employment and residence for non-patrial Commonwealth citizens who would otherwise have qualified under the grandparents provision: 1973 H.C. No. 79, paras. 27-28. See criticisms at 851 H.C. Deb., cols. 600-601. The privileges were defended by the Home Secretary on the ground that, although extensive, they did not amount to the grant of a right of abode; the beneficiaries remained liable to deportation and there was now no automatic right to register as a United Kingdom citizen after five years residence: 851 H.C. Deb., cols. 596-597. See below, p. 268
benefits those Commonwealth citizens whose mothers had acquired United Kingdom citizenship by birth and who retained that citizenship at the time of birth of their child, whether the father be an alien or a Commonwealth citizen. Those who qualify by virtue of the citizenship of their mother are thus given a right of entry for the first time since it was taken away by the Commonwealth Immigrants Act 1962. Once again this is a provision which will benefit citizens of the "old" Commonwealth, to the exclusion of the non-patrial citizens of the United Kingdom.

The last class of patrials comprises (e) women who are Commonwealth citizens and married to patrials within any of the above categories (a) - (d), that is, whether those patrials be United Kingdom citizens or Commonwealth citizens. The benefit of this provision in favour of married women is subject to certain exceptions. Thus, a woman who is entitled, whatever her nationality, to register as a United Kingdom citizen (by virtue of her marriage to such citizen), does not acquire the right of abode under section 2(1)(a) or (b) unless her marriage took place prior to the passing of the 1971 Act. These rules

1. Note that a Commonwealth citizen whose father had United Kingdom citizenship by birth and who still had that citizenship at the time of his child's birth, would also be a citizen of the United Kingdom and Colonies by descent under the British Nationality Act 1948, section 5, and patrial by virtue of the Immigration Act 1971, section 2(1)(b).


3. Immigration Act 1971, section 2(2)(a); this provision applies also in respect of women who are non-patrial United Kingdom citizens. Section 2(2)(b) extends the right of abode to the former wives of United Kingdom or Commonwealth citizens within the same categories.

may still give rise to anomalous situations. For example, a woman who married a United Kingdom citizen in, say, Uganda after independence was entitled to register as a United Kingdom citizen under section 8(2) of the British Nationality Act 1948. Assuming that the marriage took place prior to the passing of the Immigration Act 1971, such a woman has the right of abode in the United Kingdom by virtue of section 2, subsections (1)(a) and (4) of that Act. At the same time it is quite possible that her husband, although himself also a United Kingdom citizen, would not be patrial; his wife would be allowed into the country, while he would be excluded. A similar situation existed under the Commonwealth Immigrants Acts 1962 and 1968,¹ and the hardship resulting from the working of this provision was the basis of a number of applications before the European Commission on Human Rights, complaining that the United Kingdom Government was in breach of Article 8 of the European Convention, which prohibits interference with family life.²

The concept of patriality is but one example of the way in which states may, for the purposes of controlling immigration, distinguish between various classes of nationals. Under present United Kingdom law, the class of those who have the right of abode does not necessarily correspond with that class of nationals on whose behalf the United Kingdom may exercise diplomatic protection. The class of non-patrial citizens

1. Section 1(2A).

2. Applications 4478/70 and 4486/70 from Group I; Application 4501/70 from Group II; see further below, pp. 296-299.
continue to benefit from protection even though they do not satisfy the requirement of substantial connection. The principle of effective nationality must be applied in relation to other principles also, such as estoppel. In the matter of United Kingdom responsibility for, and right of protection over, non-patrial citizens, effective nationality must be understood in the light of the citizenship laws and other agreements decided upon at the time of independence of, for example, East African states.  

(2) Other Examples from Municipal Law

(i) The United States of America

The principal Act of United States legislation concerned with aliens and citizens is the Immigration and Nationality Act 1952, as amended. This provides that the term "alien" means any person who is not a citizen or national of the United States. It declares in turn that "national of the United States" means either a citizen of the United States or a person who, though not a citizen, owes permanent allegiance to the United States.

Thus, while every citizen is necessarily a national also, not every national is a citizen; the former includes persons born in the United States and subject to the jurisdiction thereof, and the later those born, inter alia, in outlying possessions.

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1. See below, pp.125-126. Reference must also be made to that class of "United Kingdom nationals" who may benefit from freedom of movement within the EEC; see Treaty of Accession, U.K.T.S., Misc. No.3 (1972), Pt.I, p. 118; Cmdn. 4862-I; see below.  
3. 8 U.S.C. s.1101(a)(3).  
4. Ibid., s.1101(a)(22). See also subsection 31, which defines "permanent" to mean a relationship of continuing or lasting nature, even though that relationship may be dissolved eventually either by the individual or by the United States, according to law.  
5. 8 U.S.C. ss.1401(a), 1408.
As was the case with the early law of the United Kingdom, the concept of allegiance plays an important part as a criterion of nationality, applicable alike to citizens as to the intermediate category of non-citizen nationals. The doctrine was applied in order to establish the alienage or otherwise of the applicant in the case of United States v. Ushi Shiroma. 1. In determining whether the defendant, a native of Okinawa and a permanent resident of Hawaii, was an alien or national, the court looked to the question whether permanent allegiance was owed to the United States in accordance with the statutory definition of a national. The court took the view that "permanent allegiance is a correlative of the concept of sovereignty" and affirmed that "permanent allegiance is owed only to a de jure sovereign". 2. It concluded that since the United States, although a de facto sovereign, was not the de jure sovereign of Okinawa (following the treaty of peace with Japan), the defendant was properly regarded as an alien.

(ii) France

In an earlier period French law drew a distinction between "citoyens français" and "sujets français", the latter deriving their status from connection with the overseas colonies. The essence of this distinction was abolished by virtue of the 1946 Constitution which introduced the single status of "citoyen de l'union française". This status was enjoyed by all those

2. Ibid., pp. 147, 148.
who had the necessary associations either with France and the non-metropolitan territories, or with colonies, protectorates and mandated territories. The 1945 Code de la Nationalité prescribed the relevant connections in a comprehensive piece of legislation notable, in one commentator's view, "pour sa préoccupation ... de faire le plus de français possible."2.

The idea of a single citizenship was affirmed by Article 77 of the 1958 Constitution,3 but in practice special provisions continued to apply to the category of persons known solely as "ressortissants". However, the 1945 law has been reenacted with substantial amendments by the law of the 9th January 1973,4 which now contains no reference to the colonies as such. The area of application of the new law, "s'étend du territoire métropolitain, des départements et des territoires d'outre-mer".5 Where such départements and overseas territories achieve independence, the general rule is that the local population acquires the nationality of the new state.6 Although provision

1. Articles 6 and 7 of the ordonnance du 19 octobre 1945 previously described the areas covered by the terms "en France" and "aux Colonies"; Boulbès observed, in relation to these articles that they have "un caractère exclusif. Tout territoire qui ne se situe ni 'en France' ni 'aux Colonies' est nécessairement l'étranger: pour l'application du Code de la Nationalité et, en général, des lois sur la nationalité .... L'extranéité pure et simple est la situation de l'individu qui n'est pas un Français": Droit Français de la Nationalité, (1956), pp. 27, 469.


5. Ibid., article 6, as amended by article I.

6. Ibid., articles 12 and 13, as amended by article I; articles 152-157, as amended by article 20.
is made for the retention of nationality by those domiciled in such territories who derive their status through a connection with metropolitan France,\(^1\) there is no provision for a further status comparable to that of British subject or Commonwealth citizen.

Reference was made above to the class of "ressortissants", and these have been characterised as follows:\(^2\).

> "Les ressortissants d'un État sont toutes les personnes qui relèvent à un titre quelconque de son autorité. En particulier, ont été considérés comme ressortissants de l'État: ses nationaux, les sujets de ses colonies, ceux des mandats qu'il administrait; ceux de ses protectorats; ... il a été affirmé que le terme "Français" figurant dans les traités conclus par la France au 19ème siècle était l'équivalent du terme "ressortissant français" en comprenant l'ensemble des individus ressortissants à un titre quelconque du Gouvernement de la République française."

Essentially this description reproduces that class of persons on whose behalf France might justifiably exercise the right of diplomatic protection.\(^2\) Within metropolitan France, however, many ressortissants were treated as aliens. The decision of the Conseil d'État in the case of Hamar ben Brahim ben Mohamed, dit Paci illustrates this point.\(^4\). The question to be decided was whether a Moroccan subject could legally be made the subject of a deportation order. The court took the view that a Moroccan

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1. Articles 152-157, as amended.


3. "Au point de vue international, les sujets ou les protégés français doivent être considérés comme des ressortissants français": Rapport au Président de la République Française, 1913: Clunet, 1914, p. 311; Kiss, op. cit., s. 437.

subject was clearly not a French national within the meaning of the Code de la Nationalité and that, moreover, he was not entitled to the privileges granted to the "ressortissants de l'Union française" by Article 81 of the 1946 Constitution. The court concluded that his quality as a subject of a French protected state was no defence to the order expelling him from French territory.1. Here again the class of nationals described by international law for the purposes of protection is divided up for the purpose of an application of the immigration laws by the protecting power.

(iii) The Federal Republic of Germany

Article 1(2) of the 1965 Ausländergesetz (AuslG.) declares simply:2.

"Ausländer ist jeder, der nicht Deutscher im Sinne des Artikels 116 Absatz 1 des Grundgesetzes ist."

The article of the Constitution to which this provision refers in turn declares:3.


1. See also the Samné case, Conseil d'État, arrêt du 5 février 1931: Recueil Dalloz Sirey, 1931, p. 136, in which a Libyan subject, also a "protégé français", was found to be an alien - "tout individu qui n'a pas la qualité de Français".

2. BGBl. 1965, I, 353.

3. Article 116(1), Bonner Grundgesetz 1949. See also the Bundesvertriebenengesetz, BGBl. 1953, I, 201, Article I; BGBl. 1961, I, 1883.
This means that, unless otherwise ordered by law, a "German" is either one who possesses German nationality or one who, as a refugee or exile of the German race, has been accepted within the territory of the German Reich as it stood on the 31st December 1937. It is apparent that the concept of "Deutscher" is not so easy of comprehension as the affirmative declaration of Article 1 of the AuslG. might lead one to believe. The inclusion of non-national, ethnic Germans can give rise to problems, particularly where they retain the nationality of another state. Nevertheless, the basic premise of the law is that "Germans", however described, are to be set over and against all others:

"Die deutschen Staatsangehörigen und die aufgenommenen Volkszugehörigen werden durch Art. 116 Abs. 1 GG unter dem Begriff "Deutsche" zusammengefasst. Es besteht daher Veranlassung, diesen Begriff auch bei der Bestimmung des Begriffs "Ausländer" heranzuziehen. Dieser ergibt sich daraus, dass den Deutschen allen anderen Personen gegenübergestellt werden."

The class of persons comprised within the category, "deutscher Volkszugehöriger" is itself divided. Only those ethnic Germans who qualify as "Flüchtlinge" or "Vertriebenen" come within the constitutional definition of "Deutscher". Makarov observes:

"Beide der soeben genannten Kategorien von 'Deutschen' können neben ihrer Eigenschaft als 'Deutscher' im Sinne des Artikels 116 Abs. I GG eine fremde Staatsangehörigkeit besitzen ...

1. In some cases this description has only notional application, for example, in regard to those portions of the German Reich now under Polish sovereignty.


"Die Deutschen ohne deutsche Staatsangehörigkeit können auch staatenlos sein."

Putting aside the problems of dual nationality, it is clear that, from the point of view of international law, the category of Germans without German nationality is less likely to satisfy the requirement of substantial connection in such a way as to permit the exercise of diplomatic protection in their favour.

The law, however, gives them a qualified right to be naturalised on demand, provided that they do not endanger the internal or external security of the Federal Republic or of the individual Länder. This right is further limited by the constitutional requirement that the individuals concerned should have been received within the territory of the former German Reich. On the assumption that this anticipates the establishment of permanent residence, and that this in turn takes place within the area presently subject to the jurisdiction of the Federal Republic, then the criterion of genuine link would appear to be satisfied.

The application of Article 116(1) of the Constitution was recently the subject of a decision by the Bundesverwaltungsgericht. The applicant had been born in 1909 as a German national and had lived in X all her life until 1963. She was first married to a German who was killed in 1944, and in 1946 she married a Polish national, the second applicant. At the end

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1. Staatsangehörigkeitsregelungsgesetz 1955, Article 6(1). Paragraph (2) provides that on it becoming clear that the individual has declined to exercise his right, he loses his legal status as a German ("verliert ... die Rechtsstellung eines Deutschen").

2. Note that Article 8(1) of the above law, which grants a similar right to other ethnic Germans, requires both permanent residence and the impossibility of returning home.

of the war X came under Polish sovereignty and, in 1959, after
an exchange of territories, under Czechoslovakian sovereignty.
In 1963 the applicant and her family emigrated to the Federal
Republic. The Court found that although on her second marriage
she had lost her German nationality, she qualified as a German
without German nationality:

"In vorliegenden Fall hat die Klägerin ... den Status einer Deutschen ohne deutsche
Staatsangehörigkeit erst im Jahre 1963 durch die Aufnahme im Bundesgebiet erlangt. Durch
die Eheschließung im Jahre 1946 hat sie nach damaligen Recht die deutsche Staatsangehörigkeit
verloren, nicht aber zugleich die Eigenschaft der deutschen Volkszugehörigkeit."

The applicant thus came within the constitutional provision, and
her husband and children also partook of this status.

The category of "Personen deutscher Volkszugehörigkeit"
has been further elaborated in the Bundesvertriebenengesetz 1957,
Article 6 of which provides:

"Deutscher Volkszugehöriger im Sinne dieses Gesetzes ist, wer sich in seiner heimat zum deutschen Volksstum bekannt hat, sofern dieses
Bekenntnis durch bestimmte Merkmale wie Abstammung, Sprache, Erziehung, Kultur
bestätigt wird."

This concentration upon objective signs of belonging to the
German race illustrates the point that this intermediate class
of non-citizens is of relevance principally for the purpose of
privileged treatment in naturalisation. These provisions of

2. Ibid., p. 288. See also BVerwGE. Bd. 23, S. 272 (1966), in
which a refugee from Czechoslovakia was recognised as a German
without German nationality, although born of an Italian father and
an Austrian mother, thereby being an Italian national. He had been
expelled as a "Volksdeutscher" and had then taken up residence in
the Federal Republic.
3. BGBl. 1953, I, 201; BGBl. 1963, I, 1883; Makarov, op. cit.,
p. 246.
German law are in many ways comparable to the different criteria applicable, under United Kingdom law, to the registration of Commonwealth citizens as citizens of the United Kingdom and Colonies, and to the naturalisation of aliens. Strictly speaking, the application and effect of such laws is of little concern to international law.

An issue which has been a steady source of controversy is that concerning the status of citizens of the German Democratic Republic, and at present there is some division of academic opinion on the point. In 1968 Schiedermair expressed the following view: ¹

"Nach hM gibt es trotz der Teilung Deutschlands nur eine einheitliche deutsche Staatsangehörigkeit. ... Die Angehörigen der DDR sind somit für die BRD deutsche Staatsangehörige und unterliegen daher nicht den für Ausländer geltenden Bestimmungen. An dieser Auffassung ist festzuhalten, obwohl die DDR in jüngster Zeit eine eigene Staatsangehörigkeit eingeführt hat."

This expresses the traditional view, but fails to reflect political realities. In 1967 the German Democratic Republic (DDR) enacted its own citizenship law, which is the only one recognised throughout East Germany. ² This provides that citizens of the DDR shall comprise all those who, at the time of its founding, ³ were German nationals domiciled or ordinarily resident in the state, and who have not since lost their citizenship. ⁴ It also includes all those domiciled or resident


³ 7th October 1949.

⁴ Article I(a).
outside the state, with no other nationality, who registered their status, and those who have been naturalised. In 1968 the DDR adopted a new constitution and, in effect, completed a process of secession from legal sources previously shared in common with the Federal Republic. In the latest edition of his work, Makarov notes that earlier the Federal Republic had not recognised the DDR as a state; it could not, therefore, logically recognise a nationality deriving from a non-entity. Refugees from the East have never been treated as aliens, but Makarov suggests that some re-examination of previous theories is necessary in the light of recent developments.

(3) Conclusions

This examination of the provisions of a number of municipal systems has illustrated the variety of local concepts of nationality. It has been seen, in particular, how states will quite frequently establish intermediate classes of "non-citizen nationals". The reasons which underlie such provisions are legion and are perhaps best exemplified by the development and demise of the so-called "common status" of Commonwealth citizens. While such categories will often bear little or no relation to the class of persons who are allocated to a state under general international law, they nevertheless remain important for the purposes of immigration and the right of entry

1. Article I(b),(c).
2. E.g. Reichs- und Staatsangehörigkeitsrecht 1913.
into a state. In such cases the continuing concept of the reserved domain of domestic jurisdiction is of singular significance. While international law is concerned with nationality for the purposes of diplomatic protection, and also in the matter of the reception of those expelled from the territory of other states, it leaves to states a much wider discretion in the regulation of the incidents of nationality, and in the creation of privileged classes, either of aliens or citizens.¹.

(IV) The Right to enter a State

The problems which are raised by the national or alien who seeks to enter a state are considered more fully below, and for present purposes it will suffice to call attention briefly to the nature and sources of the right in question, if thus it may be described. In an earlier period it was common to find general support for the principle of freedom of movement and Vitoria, for example, sought to justify Spanish incursions into the Americas upon the basis of natural law:².

"The Spaniards have a right to travel into the lands in question, provided they do no harm to the natives, and the natives may not prevent them. Proof of this may in the first place be derived from the law of nations ... which either is natural law or is derived from natural law.... It was permissible from the beginning of the world (when everything was held in common) for anyone to set forth and travel wheresoever he would."

¹ Cf. Schiedermaier, op. cit., p. 95.

² De Indis, III, 2. See also Grotius, De Jure Praedae, p. 218; cf. Wolff, Jus Gentium Methodo Scientifica Pertractatum, ss. 147, 148, 293; Grotius, De Jure Belli ac Pacis, II, II, XIII.
At one time freedom of movement was certainly the rule, rather than the exception, but with the growth of nation states and the opening up of countries ripe for immigration there came also the development of permanent controls over the entry and exit of peoples.¹

More recently, the right to freedom of movement, both within state territory and for the purpose of quitting such territory, has come to figure prominently among the human rights declared fundamental to all men.² It may be that this right is inextricably bound up with other human rights, but if so then its development has been hampered by a corresponding reluctance on the part of states to accord full recognition within the general field. Wherever such a right of entry can be said to exist today, then it may usually be traced to one of three sources: (a) to municipal law, as an incident of citizenship; or (b) to treaties, which may create specific rights in favour of certain classes of aliens, including refugees and stateless persons; or (c) to general international law, in so far as this affirms the duty of a state to receive back its nationals expelled from other states or, possibly, in so far as it recognises the human rights aspect and the right of entry as belonging to the individual citizen.

(i) Municipal Law

In a study completed in 1963, José Inglés, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, observed that the right of a national to return to his country was formally recognised by twenty-four countries in constitutional texts or laws and in twelve countries by judicial legislation, while forty-nine countries did not expressly recognise the right. However, it is necessary to adopt a cautious approach both to the mere fact of a formal recognition, and to the definition of "national". It has already been seen that states will frequently distinguish between various classes of nationals, particularly with a view to restricting entry to the metropolitan territory. But it remains true to say that the principal distinction which states draw is that between aliens and citizens; the right of entry of the latter tends to be assumed, while that of the former requires to be established.

(ii) Treaties

Bilateral treaties of commerce and establishment have long recognised the need to affirm a right of entry on behalf of the nationals of each contracting party. Again, the provisions of such treaties will commonly stipulate precisely for those who are to be recognised as "treaty-aliens". For

2. See below, pp. 78-82 , on United Kingdom legislation and the use of passports as evidence of a right of entry.
3. See below, pp. 327ff.
example, in the 1962 Treaty between the United Kingdom and Japan, Article 2(a) defines the nationals of the former so as to include: 1.

"all citizens of the United Kingdom and Colonies, all citizens of any territory for the international relations of which the United Kingdom is responsible and all British protected persons, except in each case those who belong to any territory to which the present Treaty may be extended under the provisions of Article 32 but has not been so extended."

Other treaties proceed similarly. Thus, the European Convention on Establishment 1955 declares that no contracting party shall be obliged to grant the benefits of the Convention to nationals of another contracting party, "ordinarily resident in a non-metropolitan territory of the latter party to which the Convention does not apply". 2. The European Agreement on the Movement of Persons 1957 is principally directed in favour of the nationals of contracting parties, 3. but it expressly provides that such parties shall re-admit the holders of documents specified by them as travel documents, without formality and even if the issue of nationality is in dispute. 4.

In addition to the limited régimes of bilateral and regional treaties, due consideration must also be given to international conventions in favour of refugees and stateless persons. It will be seen that these treaties, together with consistent state practice over a long period, support the conclusion that

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1. 478 U.N.T.S., 86; see further below, pp. 340-341
2. E.T.S. No. 19, Article 30.
3. E.T.S. No. 25, Article I.
4. Ibid., Article 5. Note also the distinct class of "nationals of a Member State of the EEC", who alone are entitled to freedom of movement, etc., within the Community; see below, pp. 310ff.
states have a general obligation not to return refugees to persecution, which is subject only to limited and clearly defined exceptions.¹

(iii) General International Law

The traditional view of the "right of entry" of nationals expresses itself as a duty of admission which is corollary to another state's right to expel.² From this it would seem to follow that a state is not bound by international law to admit even its own citizen until another state has taken steps to expel him, or if it is shown that no other state will admit him.³ The duty as owed to other states is clearly established,⁴ but the idea of the duty as owed to the individual is still developing. In practice admission is generally granted to nationals, but the difficulty of protecting such a right as a human right lies in the problem of finding a subject of international law with a sufficient interest in the matter. The notion of international obligations erga omnes is comparatively new,⁵ but it may be that the principal developments will occur within the context of a regional régime, such as that established by the European Convention on Human Rights.⁶

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¹ See below, pp. 585-587.
³ Plender, op. cit., p. 72.
⁶ See below, pp. 295-299, on the applications before the European Commission by United Kingdom citizens from East Africa.
At the same time it is necessary to accord due recognition to the principle of effective nationality, especially in so far as it may operate in favour of resident aliens. In the Nottebohm Case the International Court of Justice found that Nottebohm's effective nationality was that of Guatemala.\(^1\) This finding at once begs the question, whether Guatemala was thereafter under a duty not to expel Nottebohm and under a duty also to permit his re-entry. The substance of this issue is discussed below, together with the related notion of an acquired right of residence.\(^2\).

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2. See below, pp. 396-402.
Passports and other travel documents are well established in the international practice which governs the movement of persons across frontiers. However, while there is more or less universal compliance with the recommendations of the 1920 League of Nations Conference as to the format of the international style passport,¹ there is very little consensus as to the rôle which passports are intended to play, both in the international and the municipal sphere. The purpose of this chapter is to examine the function of the passport in both those spheres. Because so much of passport practice is dependent upon the provisions of municipal law, there will be times when this aspect appears to dominate. But attention will also be drawn to those areas in which the passport touches upon the relations between states and these include, particularly, the issues of nationality and its proof, diplomatic protection, and the returnability of the holder to the state of issue. On the controversial question of the right to travel as a human right, it will be seen that municipal systems vary considerably. Thus, it is not always clear whether possession of a passport is a legal prerequisite to travel abroad, whether the individual has an enforceable right to be issued with a passport, and whether due process or alternative guarantees are applicable

¹. Turack, The Passport in International Law, (1972), ch. 22 and passim.
in such matters. These problems in turn raise the question of the precise nature of the passport and the place it occupies in the local administration of states, whether or not the issue of a passport is a matter of foreign policy, as has often been argued in the United States, and therefore open to executive and arbitrary control. In what follows, it will be seen that passport practice, although in many details purely dependent on local jurisdiction, does involve principles which affect the international relationships existing between the passport's rôle as an identity document, nationality, and the diplomatic protection of citizens abroad. While passports continue to be of paramount importance to the individual who seeks to travel abroad, yet the "rights" of that individual in respect of this particular freedom are still largely unrecognised. There is still much truth in the comment made in 1934, that, 1.

"... le passeport n'est pas seulement un titre de voyage et une pièce d'identité. Il n'est pas seulement nécessaire pour se déplacer d'un pays à un autre. Il l'est pour obtenir du travail, pour participer au bénéfice des lois sociales, pour obtenir un permis de séjour. En de nombreux pays, l'étranger dépourvu de passeport n'est pas admis à séjourner. Il ne peut être reçu dans un hôtel, ni dans un hôpital. S'il a déjà une autorisation de séjour, celle-ci ne peut être renouvelée si le passeport n'est pas renouvelé."

(1) A Brief History of Passports.

The word "passport" today is generally understood to signify a document indicating the identity and status or

nationality of the bearer, for his use in international travel.\(^1\) This meaning is of comparative recent origin. For a long time international law was primarily concerned with that form of passport issued by a belligerent to the diplomatic representatives of an enemy state after the outbreak of hostilities, to enable them to return safely to their own country. The entitlement to such a passport is a matter of international law, flowing from the general and customary right of diplomats to immunity.\(^2\). But the term "passport" has in fact long been applied to documents generically similar to today's version, and the idea of documents as aids to travel has grown up with travel itself. Indeed, Vattel writes of passports and "saeuf-conduits" as applied not only to persons, but also to ships and to merchandise.\(^3\). In an English statute of Edward VI's reign, the word passport is used in the sense of a "leave-pass" for soldiers, and in the treaty of England with Denmark of 1670, "letters of passport" were made applicable to men by analogy with their applicability to ships.

It has been argued that under medieval law in England, passports or licences were required of every one who wished to leave the Realm, for this would deprive the king of the subject's military or other feudal services. No doubt such a requirement was also of profit to the sovereign, and it may be that this licensing system was an abuse of the common law

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2. On diplomats generally, see Appendix.
which Chapter 42 of the Magna Carta of 1215 sought to remedy in its declaration of the rights of subjects. The right of free egress in English law is the result of a probably unintended development of Chapters 41 and 42, and of the extension of the special privileges granted to merchants so as to cover subjects as will. The effect of the freedoms safeguarded in Magna Carta was amplified by other statutes, such as that of 1328, which provided that "all merchant strangers and privies may come and go into England after the tenour of the Great Charter". However, an element of prerogative control over foreign travel did remain, and the subject's duty to defend the Realm might be enforced by writ, ultimately the writ ne exeat regno. This writ was given a statutory basis by Richard II in 1381, but in 1606 it was expressly enacted that:

"one act made in the fifth year of King Richard the Second, concerning the restraint of passage of His Majesty's subjects out of this Realm, and every ordinance, provision, article or clause therein contained, shall be from henceforth utterly repealed."

What remained of the writ degenerated into an equitable restraint on absconding debtors, the common law right of British subjects to enter and leave the Realm was recognised, and nothing remained of the "licence to leave the Realm ...

1. 2 Edw. VII c.9.

2. 5 Rich. II c.2. In Parsons v. Burk [1971] N.Z.L.R. 244 the applicant sought to prevent the New Zealand rugby football team from travelling on tour to South Africa by way of the writ ne exeat regno. It was argued that such a tour was greatly to the prejudice of the state, but it was held that the writ would not issue for these reasons on the application of a private individual. See Bridges, The Case of the Rugby Football Team and the High Prerogative Writ, 88 L.Q.R. (1972), 83-92.

3. 4 Jac. I c. 1/XXII.

... licences are called passports.¹.

In France in the seventeenth century there existed a fairly sophisticated, widespread and rigorous system of passports. Ordinances of the 12th June and the 2nd November 1677 introduced the general obligation to have a passport, applicable to all travellers, native or alien, who wished to enter or leave France. This requirement was abolished in 1686 and reintroduced in 1745. The idea of "Passpflicht" was also well-known in the German states at the beginning of the eighteenth century, and many types of internal passports were in use, including the "Militärpass", the "Pestpass" or "Gesundheitspass", and the "Judenpass".² With the French Revolution there came a general condemnation of the passport system as an infringement of personal liberty, and this was marked in words and, for a short time, in deeds. Reale quotes the revolutionary Peuchet, writing in the "Moniteur" of 29th July 1790:³.

"Le passeport est un désordre de police d'autant plus odieux qu'il tient à tous les arts de la tyrannie et prive l'homme du premier, du plus juste de ses droits, celui de respirer l'air qui lui plaît, sans demander la permission d'un maître qui peut la lui refuser ... Il n'y a point de convenances qui puissent autoriser un abus de cette espèce; il n'y a point d'avantage qui puisse en effacer l'odieux et l'injustice; établir des droits avec cette inégalité, cette irrégularité de jouissance, ce n'est pas en établir, c'est fatiguer inutilement la société ... Les passeports

¹. I Fitzherbert, The New Natura Brevium, para. 85. For a recent attempt to use the writ ne exeat regno, see Fenton v. Callis [1969] 1 Q.B. 200; the court maintained its jurisdiction but held that the writ would not issue in the particular case.


"sont contraires à tous les principes de justice et de raison, il n'y a que l'oubli des droits et l'inconséquence politique qui puisse les consacrer...."

The same writer set down again these ideals in the "Moniteur" of 10th August of the same year:

"Permettre à un homme de voyager, c'est lui permettre ce qu'on n'a pas le droit de lui défendre; c'est un injustice sociale; il n'y a que l'accent de la force qui puisse faire taire la voix de la conscience à cet égard."

These principles were embodied in the Constitution of 3rd - 14th September 1791, but less than a year later they had been rescinded - "les raisons qui conseillaient le retour au régime des passeports étaient surtout des raisons de police".¹ The result was the law of 1792, followed in turn by a series of other laws and decrees, restoring and maintaining a rigorous passport régime. The example was followed throughout much of Europe, and only a handful of countries, including England, Sweden and Norway, retained at this time a considerable liberty regarding the movement of persons.

Even in England, fear of the imminent spread of revolutionary ideas and the immediate prospect of war, led to the enactment of a few control laws. An Act of 1798² provided that no alien should leave "without a passport for that purpose first obtained from one of His Majesty's principal Secretaries of State or from some other person authorised by His Majesty to grant such passport". This use of a passport recalls the custom of giving safe-conducts to the diplomatic representatives of an enemy state.³ It is

¹ Reale, loc. cit., p. 102.
² 38 Geo. III c.50; see also 6 B.D.I.L., 106-108.
not until 1826, however, that there is the first statutory reference to a passport as a document which an alien may, but not necessarily will, have in his possession on arrival in England.¹ The statute anticipated that such document would have been issued by a foreign authority, that it would be surrendered on entering the country and recovered on leaving. The British legislation of the time was either declared to be of limited duration, or in practice soon came to occupy an insignificant and nominal rôle. Indeed, towards the end of the nineteenth century freedom of travel throughout Europe was the general rule, the passport requirement but a rare exception. Even in 1906, reference could be made to "the desuetude into which the passport system is falling".² But exceptions there were, and passports were still required for travel to Turkey, Russia, Bulgaria, the Austrian provinces of Bosnia Herzegovinia and, outside Europe, to Colombia, Haiti, Guatamala, Uruguay, Persia and several other countries.

In the second half of the nineteenth century, it was the practice of governments to issue passports both to aliens and to their own subjects in order to facilitate their travel abroad. Passports were also issued to aliens through consular agents abroad, for the purpose of assisting their entry into the territory of the issuing government, and it was this latter practice which later developed into what is known today as the visa system. At that time there was no

1. 7 Geo. IV c.54; see also 6 B.D.I.L., 11.
international usage to the effect that governments might not issue passports to aliens within their territory, either for internal or external use. There was, similarly, no general rule that passports constituted even prima facie evidence of the bearer's nationality or of his implied right to the protection of the issuing state.¹

The First World War was witness to the introduction of the passport system in its modern form, and a passport in its current sense came to mean a document of identity which a state will generally require alien travellers to have in their possession. Except where the matter is governed by treaty provisions, for example, those relating to the issue and validity of documents for refugees and stateless persons and to the acceptance of alternative documents, it is for the municipal law of the state which the traveller visits to determine the form of the passport or visa which it requires. In many countries, and especially in those which had avoided participation in the war, there manifested itself a strong desire to keep away the human detritus which that conflict had produced. Even in the United States, limits were placed on immigration by the Literacy Act and the Immigration Act 1917. This trend was soon followed by the British Dominions, which imposed stronger controls on certain racial groups of British subjects, particularly orientals.² Migration ceased

¹. See R v. Burke, Casey and Mullady 11 Cox C.C. (1868): "the mere production of a passport found on a prisoner, which is proved to be granted by the authorities of a foreign state to natural-born subjects only, is not evidence of his being an alien.
to be free and individual, and became a collective movement controlled and directed by states governments. The visa system enabled immigration countries to operate quality and quantity controls over prospective migrants, and the passport system enabled the state similarly to regulate the departure of its nationals in its own interest. Contemporary opinion concluded:

"Le passeport est devenu non seulement une arme de défense entre les mains des gouvernements, mais une arme offensive contre leurs propres ressortissants, permettant d'en suivre et régler l'activité, même à l'étranger .... Les raisons qui conseillent le maintien du régime des passeports et le rendent plus rigoureux sont surtout des raisons de police ...."

(2) The Passport in Municipal Law.

(a) Passports for Aliens seeking to enter a Foreign State

The foundations of the present passport system were laid in the First World War and during the years which followed. In the United Kingdom regulations imposing the passport requirement were first authorised by the Aliens Restriction Act 1914, which authorised restrictions on aliens in time of war or other emergency, including restrictions or conditions on aliens landing or arriving at any port in the United Kingdom. The Aliens Orders 1920 and 1953 gave detail to these restrictions, and obliged the alien in each case to produce a passport containing a photograph of himself, or some other document which established his identity and

2. Section 1(1)(a).
nationality to the satisfaction of the Immigration Officer.\(^1\) These regulations also encouraged the possession of a passport by British subjects, for they imposed on every person seeking to enter or leave the United Kingdom the duty to provide an Immigration Officer with such information as he might require. It has on occasion been argued that these conditions were never meant to apply to British subjects and that they were imposed, as it were, by a sideward. Although the 1914 Act states that in any question whether a person is an alien or not, the onus lies on that person to prove otherwise,\(^2\) it is still not the law that a British subject and citizen of the United Kingdom must be in possession of a passport for the purposes of entry and departure.

However, the rules concerning the passport requirement for aliens are quite specific. The government insists upon passports for a number of different reasons, the first and most obvious being the need to establish the identity of those who are admitted, and the second, which reflects the desire for an assurance that the alien will be returnable to some other country should his continued presence become undesirable. Immigration Rules made under the Immigration Act 1971 require all passengers, whether Commonwealth citizens, EEC or other nationals, to produce to the Immigration Officer on request either a valid passport or other document which indicates the holder's nationality and identity. Every one arriving

\(^1\) Aliens Order 1920, Article 15(1); Aliens Order 1953, Article 7(1)(a). The powers under the 1914 Act were continued in force for one year by the Aliens Restriction (Amendment) Act 1919 and re-enacted each year until the Immigration Act 1971.

in the United Kingdom is liable to be examined and is obliged
to furnish the Immigration Officer with such information as
he may require for the purpose of determining whether the
passenger requires leave to land and, if so, what conditions
should be imposed. It is a sufficient ground for refusal
of entry that the passport produced is issued by an
unrecognised government, or by one which does not accept
United Kingdom passports, or if the passport itself does
not comply with international practice. Other travel
documents which may be tendered in lieu include national
identity cards in conjunction with British visitors' cards
for nationals of those countries with which the relevant
agreement exists and, for EEC nationals, identity cards
alone.

The purpose of the passport requirement is emphasised
by specific provisions concerning restricted returnability.
Any passenger who cannot satisfy the Immigration Officer that
he will be admitted to another country after his stay in
the United Kingdom may be excluded on that ground. In
addition, if the passenger is required to enter that country
before a given date, or if his passport or travel document is

1. 1973 H.C. No. 79 (Commonwealth Citizens), para. 3; 1973 H.C.
No. 81 (EEC and other Non-Commonwealth Nationals), para. 3.
See also Immigration Act 1971, Sch. 2, para. 4; The Immigration

2. 1973 H.C. No. 81, para. 4.

3. For details of the system of visitors' cards, see Turack, The
Passport in International Law, pp. 60-63.


conditional on returning within a specified date, then his period of entry is to be so limited as to coincide with those periods. The passport is of relevance also as indicating one possible destination to which the alien may be removed on his exclusion or subsequent deportation. In addition to passports, certain categories of passengers also require "entry clearances", which term includes entry certificates, visas, work permits and Home Office "letters of consent". Special provision is made for travellers from those states which are not recognised by the United Kingdom. The passports of such passengers are not accepted, lest this might be interpreted as implying recognition of the state concerned. The procedure in such cases was recently explained in the House of Commons, in regard to those coming from East Germany:

"It is normal international practice not to visa passports issued by the authorities of states which are not recognised. Passports issued by the East German authorities are therefore not acceptable for United Kingdom visa and immigration purposes. Holders of such passports are granted visas on declarations of identity in lieu of passports issued by British consular officers. Visas are granted and travellers from East Germany are admitted to the United Kingdom in accordance with the published immigration rules."

1. On applications for extension of stay by the holders of restricted travel documents, see 1973 H.C. No. 80, para. 27; 1973 H.C. No. 82, para. 25.


Where an agreement exists, the United Kingdom is also prepared to accept "collective passports" as legitimate identity and travel documents, subject to the observance of certain conditions, such as the production of individual photographs for identity purposes. Collective passport agreements exist with most states, other than those of the "Eastern bloc". Seamen and aircrew members are covered by their own particular régime, and provision has been made on an international level for the reciprocal recognition of their own particular travel documents. The United Kingdom is party to these agreements, as also to the international conventions governing the status of refugees and stateless persons. Here again provision has been made for the issue and acceptance of what are loosely termed, "non-national" travel documents.

In the Federal Republic of Germany, the passport requirement is imposed on aliens by the Ausländergesetz 1965. This law deals with entry into and residence in the Federal Republic, and makes both these issues dependent upon the common condition that the alien's presence should not injure or prejudice the interests of the state as whole, or of the individual Länder. Article 3 declares the "Ausweispflicht", which, interpreted literally, means the "duty to identify oneself":

"Ausländer, die in den Geltungsbereich dieses

1. ECOSOC Doc. E/3438/Add. 1, p. 9, note 5.
2. See below, Appendix.
4. BGBI. I, 353.
"Gesetzes einreisen, sich aufhalten order aus ihm ausreisen wollen, müssen sich durch einen Pass ausweisen."

In fact this requirement is not as strict as may seem. The Minister of the Interior is empowered to authorise exceptions and in particular may free from the obligation those aliens whose return is guaranteed, or who produce other acceptable documents of identity. However, possession of a current passport or substitute is of importance also as regards the continuation of a residence permit. This will automatically extinguish on the expiration of the validity of the passport, and it is an offence punishable with up to one year's imprisonment, with or without fine, for an alien to remain in the Republic thereafter.

The provisions of Article 3 have been elaborated and explained in an administrative order. This declares that, in order to be recognised by the German authorities, foreign passports must contain, inter alia, the name of the holder, his nationality and date and place of birth, a photograph which is a faultless likeness of the holder, the official stamp and signature of the issuing authority, and details of the length and area of validity. The Federal Republic must be included within this general area, and this provision implies recognition of the practice of some other states in imposing "area restrictions". If the alien's

1. AuslG. Article 3(2). Aliens who cannot establish their identity by a passport or other document may be issued with a "Fremdenpass": ibid., Article 4.

2. Ibid., Articles 9(1), 47. Special provision is made for those who have been granted political asylum (Asylberechtigten).


passport lacks any of these characteristics, then it is not a passport within the meaning of the Ausländergesetz, and the bearer may be refused entry. Additionally, the recognition of a foreign passport by the German authorities presupposes that the issuing state is itself recognised by the Federal Republic.

The official attitude towards foreign passports is that they are not so much travel permits as identity documents (Legitimationsurkunde). This approach is apparent not only in their terminology employed, but is also evidenced by an official statement put forward at the drafting stage of the Ausländergesetz: 1.

"Die Personenidentität ist viel mehr als früher zu einem unentbehrlichen Hilfsmittel der öffentlichen Verwaltung in allen ihren Zweigen geworden. Dieser Entwicklung hat die BRD gegenüber Deutschen durch die Einführung der Pflicht, 'einen Personalausweis zu besitzen und ihn auf Verlangen einer zu Prüfung der Personalien ermächtigten Behörde vorzulegen', Rechnung getragen."

While the greatest emphasis is on the proof of identity, this does not mean that the simple possession of a passport or other travel document guarantees a right of entry. There are still other conditions to be met. 2.

As noted above, the Ausländergesetz authorises the Minister to excuse certain categories of aliens from the rigours of the passport law as enacted. This power has been exercised in a number of "Rechtverordnungen" 3, which permit the authorities to accept suitable substitutes and these include, amongst


others, collective passports, seamen's books, crew members' certificates, the "laissez-passer" of officials of the United Nations, and travel documents issued by states to refugees and stateless persons. Germany is also a party to a number of bilateral treaties with other European states, under which national identity cards are accepted on a reciprocal basis in lieu of full national passports. These agreements are usually limited to those visitors who are coming for a period of three months or less, and for purposes other than employment. On this last point, however, due regard must now be paid to the provisions of EEC law which guarantee the freedom of movement.¹

Some of the most detailed provisions of municipal law in respect of passports are to be found in the statutes and regulations of the United States. The Immigration and Nationality Act 1952 is a comprehensive piece of legislation which makes a first distinction between immigrant aliens and non-immigrant aliens. The passport requirement is imposed on both these classes, although with certain exceptions limited primarily in favour of the nationals of contiguous territories. The statute defines a passport as,²

"... any travel document issued by the competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the entry of the bearer into a foreign country."

In practice, this definition is not limited to a national passport and special provision is made for those who are

1. See below, pp. 304ff.
unable to obtain such passport but who nevertheless manage to satisfy the documentary requirements in other acceptable ways. Immigrant aliens will only be admitted if they are in possession of a valid unexpired immigrant visa, together with a valid unexpired passport "or other suitable travel document, or document of identity and nationality". Similar provisions apply to non-immigrants, who require their own visa and a passport which is valid for a minimum of six months from the date of expiration of the initial period of admission and which authorises the holder to return whence he came or to proceed to another country.

There are many exceptions to these requirements and, for example, as regards immigrants, no passport is required if the alien is the spouse, parent, unmarried son or daughter of a United States citizen, or is stateless or is an anti-Communist who for that reason is unable or unwilling to obtain a passport from the country of his nationality.

Certain non-immigrants are also exempt, including uniformed or documented members of the armed forces and American Indians born in Canada. In all other circumstances the passport obligation is strictly enforced and in one case, for example, it was held that an expired British passport, with no assurance of renewal, was not acceptable.

1. 22 C.F.R. 41.1.
2. 8 U.S.C. s.1182(a)(20); s.1181(b) provides for certain exceptions in favour of returning resident aliens. Possession of a visa does not itself guarantee entry: s.1201(h); below, p.234.
3. Ibid., s. 1182(a)(26)(A).
4. 8 C.F.R. 211.2; 22 C.F.R. 42.6; 42.112.
The Immigration and Nationality Act 1952 imposes a strict visa system and it is by way of this system that the most comprehensive control is exercised over persons desirous of entering the United States. Indeed, the United States has only considered abolishing the visa requirement for the nationals of contiguous states, and a similar attitude has been expressed in regard to agreements for the reciprocal acceptance of any form of travel document less than a full national passport. The reason for this may be found in the statutory definition of a passport, which requires that an alien have evidence of his right to enter another country. That this quality of "returnability" continues to play an important part in United States law and practice, as also of many other states, is evidenced by official pronouncements. Thus, in answer to the recommendation of the Committee of Experts in 1947 that bi- and multilateral agreements to waive the passport requirement on a basis of reciprocity should be encouraged, the United States limited its agreement to the case of states with common frontiers:

"Under such circumstances, the exclusion or deportation of an alien to his country of nationality, whenever ... necessary ..., is relatively easy to accomplish.... The current United States practice of requiring passports for aliens ... from non-contiguous territories provides this country with a reasonable assurance that some foreign country will receive the alien whenever he becomes deportable. Any bilateral or multilateral agreement abolishing the passport requirements would have to provide the same assurance to the United States government."

In the light of this policy it can be understood why the

United States has not ratified the General Convention on the Privileges and Immunities of the United Nations, and why in consequence it does not recognise the validity of the United Nations laissez-passer as an international travel document. American policy is to accept such documents only if presented with any other document which, when considered together, show the origin of the official, his nationality if any, and his ability to enter some country other than the United States. The laissez-passer is "not considered to be a passport within the meaning of the [Act] and no visa should be placed therein". The United States has taken a similar view of the travel documents proposed to be issued to officials of the Organisation of American States, and it observed that if such documents were to be issued to United States nationals, this would constitute an infringement of national sovereignty.1.

(b) Passports for Nationals: Travel Abroad and Re-entry.

Given the near universal acceptance of the passport requirement for aliens, it is clear that a refusal by the national state to issue such a document may seriously hamper the "right to travel".2. Although this right finds expression in a number of international instruments, state practice in the municipal sphere does not suggest that it has yet been accepted


2. This right may, of course, be hampered in other ways, witness the indirect effect of Exchange Control restrictions and the current controversy over the Soviet "education" or "emigration tax", imposed on Russian Jews desiring to emigrate to Israel: The Guardian, 24th August, 4th, 16th September, 30th November 1972; 22nd, 24th January, 19th April 1973; The Times, 4th, 5th September 1972.
as a rule of general international law. It is also not possible to state with certainty that the provisions concerned are even potentially of a norm creating character, in the sense employed by the International Court in the North Sea Continental Shelf Cases. Despite these disadvantages, it will be seen that municipal systems are tending to limit any absolute discretion which the executive may claim in regard to the issue of passports and in the control of citizens travelling abroad. It may be, however, that these developments owe more to local constitutionalism than to the impact of a burgeoning rule of international law.

In the United Kingdom there is no law which declares the right to a passport or regulates its issue. In the nineteenth century, the absence of any real need for the individual to carry such a document with him may account for the fact that the question of issue was kept within the discretion of the executive. The general policy seems to have been that passports should be refused simply and only to persons of "bad character". Thus, in Snelling's case in 1871 the Queen's Advocate advised:

"... that Mr. Snelling having renounced his allegiance to the Queen, as far as in him lies, by deserting from Her Majesty's forces abroad, has ... forfeited all title to Her Majesty's protection...,"

and might be properly refused a passport. A similar policy

1. Universal Declaration of Human Rights, Article 13(2); International Covenant on Civil and Political Rights, Article 12 (2); International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d); European Convention on Human Rights, Fourth Protocol, Article 2(2), and note (3).


3. 5 B.D.I.L., 308.

4. Ibid.
was pursued in respect of known criminals and rogues, and it was these somewhat uncertain beginnings which laid the groundwork for the current discretionary, or prerogative, practice.

It remains the law that a British subject and citizen of the United Kingdom is not obliged to carry a passport for the purposes of international travel and return to the United Kingdom. Section 1 of the Immigration Act 1971 declares that those with the right of abode in the United Kingdom "shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance." But the appearance of an absolute right is substantially qualified by reference to those restrictions which may be required in order to enable this right to be established. The plain intention appears to be, that a United Kingdom passport, suitably endorsed, is the best evidence available in the matter. For the purposes of travel abroad there will also be considerable practical difficulties, both in entering foreign countries and in finding a transport company which is willing to take the passenger without a passport. However, it is not illegal for a British subject and United Kingdom citizen to visit a state for which his passport is not valid. On the occasion of questions in the House of Commons concerning the visit of Mrs. Felton to North Korea during the currency of the

1. 5 B.D.I.L., 308.
2. Williams, Without Let or Hindrance, 123 New L.J. 605-607 (1973)
3. It is common immigration practice to make transportation companies liable for the expenses of removal of those refused entry.
Korean War, the Minister of State replied: ¹.

"The passport is a request to foreign governments to give certain facilities to the holder. If the passport is not valid for a particular country, then the Foreign Secretary cannot be said to have made that request in respect of that individual; but that does not stop the person going."

The official view of the passport was explained further in the following month by the Under-Secretary of State for Foreign Affairs: ².

"A passport is simply a facility, and if a person is not in possession of a passport he will experience considerable difficulty in leaving the country... [but it] is not a document which entitles people to travel or which puts any impediment in their way..."

There are no published rules and regulations which set out the reasons which may justify the withdrawal or refusal of a passport, but these occasions also have been the subject of statements in Parliament. In 1958, they were listed as follows: ³.

"First, in the case of minors suspected of being taken illegally out of the jurisdiction; secondly, persons believed on good evidence to be fleeing the country to avoid prosecution for a criminal offence; thirdly, persons whose activities are so notoriously undesirable or dangerous that Parliament would be expected to support the action of the Foreign Secretary in refusing them a passport or withdrawing a passport already issued in order to prevent them leaving the United Kingdom; and fourthly, persons who have been repatriated to the United Kingdom at public expense and have not repaid the expenditure incurred on their behalf."

Such declarations by the Government of the day are almost the only evidence of the "law" of passports in the

1. 489 H.C. Deb., cols. 3-4 (18th June 1951).
2. 491 H.C. Deb., cols. 451-453 (25th July 1951)
United Kingdom. The few cases which there have been tend to support the view that this is an area of prerogative and discretionary control. Occasionally, the courts have had to consider the "effect" of the possession of a passport, and in *R v. Brailsford* in 1905 the Lord Chief Justice stated:¹

"... a passport is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named."

Although some doubts might be expressed today on the latter half of this statement, it was expressly approved by the House of Lords in the case of *Joyce v. D.P.P.* in 1946.²

The Court here held that an alien abroad who holds a British passport enjoys the protection of the Crown and, so long as he has not renounced that protection, he is guilty of treason if he adheres to the King's enemies. The majority of the House of Lords, Lord Porter dissenting, considered that the renewal of the passport in 1939 was proof that the duty of allegiance continued until the passport ceased to be valid, or until some action on the part of the Crown or of the bearer put an end to the Crown's duty of protection. Counsel argued on behalf of the appellant that a passport is only a request to a foreign potentate and a command to a British representative abroad to afford the holder assistance; that no right to protection is derived from a British passport as such, and that

¹. [1905] 2 K.B. 730, at p. 745.

a passport gives protection only in the colloquial sense and not that protection which is the counterpart of allegiance. These views were not shared by the Court, which gave little weight to the general rule that the local allegiance of the alien is coterminous with his residence within the Realm, or to the fact that the "duty" of protection is not such as may be enforced at law. The Lord Chancellor, Lord Jowitt, declared:

"... possession of a passport by a British subject does not increase the Sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification. But the possession of a passport by one who is not a British subject gives him rights and imposes upon the Sovereign obligations which would not otherwise be given or imposed. It is immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects ..., the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial privileges ... the holder may demand from the state's representatives abroad and from the officials of foreign governments that he be treated as a British subject."

Once one has cut through the confused terminology and has observed the failure to differentiate between rights and duties and liberties or privileges, then one finds the decision to be based on those benefits which may ensue, in actual practice, to the holder of a British passport.

5. Lord Porter dissented, inter alia, on the ground that the renewal of the passport was at best some evidence that allegiance continued. This was a question of fact for the jury to decide in view of the purpose for which the passport may have been retained: ibid., p. 381.
The most relevant of the dicta in this case simply affirms that the passport "serves as a voucher and means of identification",¹ and that abroad it may be *prima facie* evidence of status and entitlement to the inchoate right of protection. From the point of view of the subject, however, neither the right to protection nor the correlative duty of allegiance flow from the possession of a passport. In 1972, the Foreign Secretary, Sir Alec Douglas-Home, stated the position:²

"The grant of a United Kingdom passport does not in itself confer a citizenship or other status on the holder. It recognises the status which he already has and is accepted internationally for travel purposes."

It is from the personal status of the individual that his rights and duties are derived. From that status also there flows the right of the state in international law to exercise protection, and the obligation, which it owes to other states, to admit its nationals who may be expelled and who have nowhere else to go.³

Whereas in practice the possession of a United Kingdom passport may be accepted as *prima facie* evidence for the purpose of exercising protection and making representations, in other cases the legal significance of the passport will vary according to the context.⁴ In 1962, the Commonwealth

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2. 843 H.C. Deb., (Written Answers), col. 172.
3. See further, pp. 117-121.
4. See 837 H.C. Deb., (Written Answers), col. 521.
Immigrants Act imposed controls on Commonwealth citizens and on some classes of citizens of the United Kingdom and Colonies. The latter were identified as the holders of United Kingdom passports, whose passports were issued by the Government "on behalf of the Government of any part of the Commonwealth outside the United Kingdom".¹ This section was applied in a decision of the Court of Appeal in 1967, which held that the appellants did not hold United Kingdom passports as defined in the Act because their passports, which were issued under the Royal prerogative, were issued in Mauritius by the Governor of Mauritius in the name of the Queen of Mauritius. They were not, therefore, issued by the Government of the United Kingdom.²

The immigration controls were further extended in 1968 so as to include even the holders of "full" United Kingdom passports, if they did not possess certain family connections with the United Kingdom.³ This relation of the right of abode to the fact of "belonging" to the United Kingdom is maintained by the patriality provisions of the Immigration Act 1971. Thus, the individual who holds a United Kingdom passport but who is not also patrial is subject to immigration control if he attempts to enter the country. The passport gives him no right. There is, however, another set of rights and duties which is involved, and this situation was described

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¹ Commonwealth Immigrants Act 1962, section 1(3). Holders of United Kingdom passports "issued to the holder by the Government of the United Kingdom" were otherwise exempt.
in 1972 by the Foreign Secretary, in relation to the expulsion of United Kingdom citizens from Uganda:

"At the time of independence of the former British East African Territories, no specific undertakings were made either about the entry of East African Asians as such to the United Kingdom or about retention of citizenship. But this does not affect the obligation to admit nationals in certain circumstances if they are expelled and have nowhere else to go."

The obligation which is here referred to is that obligation owed by the state of nationality to another state which has admitted its nationals, in circumstances where the latter desires to exercise its powers of expulsion. In such cases, the possession of a passport is an incident to, and some evidence of, the status which is conferred by municipal law. It is not constituent of that status, but may indicate to the receiving state the destination to which an alien once admitted can later be removed. Any question of the individual's rights is another matter entirely.

United Kingdom passports are issued under prerogative powers of the Crown, and there is no law which prescribes either entitlement or conditions of issue. In practice, it is necessary for the applicant to provide the usual personal details and to show evidence of his status as a British subject and citizen of the United Kingdom, which he will usually do by producing a birth certificate or certificate of naturalisation or registration. This, together with the provision of two photographs of the applicant and the payment

1. 843 H.C. Deb., (Written Answers), col. 172. See further below, pp. 365-369.

of the necessary fee,\(^1\) is the sum of formality involved. Personal appearance at the Passport Office is not required, nor need any oath of allegiance be sworn. There is even less formality involved in an application for a British Visitor's passport. This travel document is valid for only one year, and it may be used only for travel to those states with which the necessary agreements have been concluded.\(^2\) Its format corresponds to that of the national identity cards issued by many of the states of continental Europe and it may be obtained by personal application at any Employment Exchange. The application may be supported by a range of documents, including not only a birth certificate, but also a National Health Service Medical Card and an expired, unc cancelled full passport.

The law and practice of the passport régime of the United Kingdom is all that which remains after distilling various statements by Ministers in Parliament, various admissions to international conferences, the content of bilateral and multilateral treaties and a few decisions of the courts. The aura of an absolute and arbitrary discretion hangs over the system and, although there is little evidence of manifest abuse, there may be a case for putting the issue

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1. As from February 1968 passports were issued for a period of ten years, except in regard to children under 16 who are granted passports for five years, renewable for a further five. The fee for a full passport was raised to £5 in November 1970. As from 1st January 1973, passports will indicate whether the holder has the right of abode in the United Kingdom, which depends upon his satisfying the patriality provisions of the Immigration Act 1971. Holders of passports issued before that date who wish to take advantage of the freedom of movement provisions of the EEC may apply for the necessary endorsement.

2. The states for which British Visitor's passports are valid are recited on Application Forms VP and VPC; see also Turack, op. cit., pp. 63-65.
of passports on a statutory basis, with due recognition given to procedural rights and with limits placed upon the discretion of the authorities.\(^1\). Many of the contradictions of the present system flow from an inadequate law of nationality, and these have been accentuated by the divisive influence of patriality upon the quality of the United Kingdom passport.

If a passport is refused, the individual has no remedy.\(^2\). Injustice which results from maladministration may be made the subject of complaint to the Parliamentary Commissioner of Administration, but this officer has no jurisdiction to enquire into the reasons which may have led to the refusal or withdrawal of a passport, and he has no power to alter any decision.\(^3\).

The retention of passport jurisdiction within the discretion of the executive is found also in the law and practice of France. In a case concerning the refusal of a passport in 1948, the Conseil d'État stated:

"Il appartient à l'autorité administrative..., saisie par un ressortissant français d'une demande de passeport à l'étranger, d'apprécier..."

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1. In March 1973 a committee, of which the present writer is a member, was set up by JUSTICE to look into the question of passports, with a view to reform. A report is expected in early 1974.

2. "If Parliament decided that the Foreign Secretary had overstepped his prerogative, I imagine, though I will not commit the Foreign Secretary in any way, the Foreign Secretary would re-exercise his prerogative on the ground that he had made a personal misjudgement": 209 H.L. Deb., col. 860f. (Earl of Gosford, Joint Parliamentary Under-Secretary of State, 1958). See also the case of Sir Frederick Crawford, whose passport was withdrawn after he entered the United Kingdom from Southern Rhodesia, where he had connections with the Smith régime: The Times, 9th May, 8th, 19th June 1968; 764 H.C. Deb., (Written Answers), cols. 232-233, 270; id., cols. 1041-1116; The Southern Rhodesia (Property in Passports) Order 1965 (S.I. 1965 No. 1955). On police powers in respect of passports, see Ghani v. Jones [1970] 1 Q.B. 693; and note Criminal Justice Act 1967, section 21.

3. Parliamentary Commissioner Act 1967, section 4; Sch. 2; art. 4, Secretary of State for Foreign and Commonwealth Affairs Order 1968
The Court did claim, however, that it might exercise its jurisdiction in respect of the materiality of the facts and the legitimacy of the reasons upon which the decision was based. This would suggest that there are limits to the discretion of the authorities, but in practice the extent of that control remains doubtful. In a commentary upon this decision, the following observations are made:

This approach has been upheld in a later decision, in which the Conseil d'État also held that the authorities were under no duty to reveal the reasons for their decision.

This ruling would effectively hamper the individual in proceedings even for "excès ou détournement de pouvoir".

2. On the limits to discretion in expulsion proceedings, see below, Ch. XI.
By contrast, the issue of passports in the Federal Republic of Germany is the subject of express provisions which recite the necessary qualifications and lay down precise grounds upon which passports may be refused or withdrawn. Article 6 of the Passport Law 1952 declares that "Deutsche Pässe werden nur Deutschen im Sinne des Artikels 116 Abs. 1 des Grundgesetzes ausgestellt." It is for the applicant to prove his status as a German national, and he must also appear personally before the passport authorities. Article 7 prescribes the occasions on which passports may be refused, which include the case of those seeking to avoid prosecution or the payment of taxes, unmarried minors whose applications are not approved, and those who intend to join unauthorised military service. This article also contains a general "security clause", which permits the denial of passports to those who are likely, having regard to all the facts, to endanger the internal or external security or other important interests of the Federal Republic or of any of the Länder. In no case, however, is a passport to be refused to a German national who seeks to return to the Federal Republic. Any of the circumstances mentioned in Article 7 also justify the withdrawal of a passport and it is an offence for a


2. Article 6(2).


3. Article 7(1)(a).

4. Article 7(3). Cf. United Kingdom practice, 475 H.C. Deb., cols. 28-29: "In no circumstances may a British subject, citizen of the United Kingdom and Colonies be denied a travel document to enable him to return to the United Kingdom." This must now, presumably, be read in the light of the Immigration Act.

5. Article 8.
German national to cross the frontier at other than approved points and at other than approved times, or to avoid showing his passport or other travel document. ¹

The decision to refuse or to withdraw a passport is an administrative act (Verwaltungsakt), and may therefore be challenged in the administrative courts. The order which contains the decision to refuse or withdraw a passport must be shown to the person concerned, together with a statement of the reasons and details of the right of appeal. ² Although the passport authorities enjoy a certain amount of discretion, particularly in their appreciation of the relevant facts, this is subject to the controlling jurisdiction of the courts, and any unlawful or arbitrary exercise of their powers can be annulled. ³ The decisions of the administrative courts are binding upon the authorities.

¹ Article 12. Article 3 of the Gesetz über das Passwesen, as amended in 1956 BGBl. I, 435, empowers the Minister to authorise the use of substitute documents (Passersatz), such as national identity cards. In the context of continental Europe, the reciprocal recognition of national identity cards as sufficient travel documents is of particular importance. In those states where they are required, identity cards are issued as of right, and this right may be enforced, generally, by proceedings in the administrative courts (France, loi du 27 oct. 1940; Germany, 1950 BGBl. I). In consequence of the many bilateral and multilateral treaties which European states have concluded among themselves, the possession of a national identity card becomes of great significance to the individual and to the exercise of his right to travel. See, for example, the European Agreement on the Movement of Persons between the Member States of the Council of Europe 1957, Article 5.

² Before resorting to the courts, the individual may appeal "internally" to the next highest administrative authority.

³ See Article 114, Verwaltungsgerichtsordnung 1960 BGBl. I, 17.
Whereas the Federal Republic of Germany deals with passports on a straightforward statutory basis, the courts of other states have on occasion discovered the right to travel, and hence the right to a passport, as a necessary consequence of constitutional liberties. In Sawhney v. Assistant Passport Officer, the Supreme Court of India held that the individual has a right to travel abroad, and that the refusal by the Government to issue him with a passport is a denial of the rights to personal liberty and equality before the law which are guaranteed by the Constitution of India. In the Court's view, a passport was a prerequisite condition for free travel, and the question to be decided was, whether the right to personal liberty could include the right to travel. The Court referred to decisions of the United States courts which had accepted this right, and it observed that the right was also recognised by Magna Carta and under the Common Law of England. The power claimed by the Government to issue passports at its discretion patently violated the doctrine of equality, for the differentia in the treatment of persons rested solely on the arbitrary selection of the executive, and such arbitrary power violated Article 14 of the Constitution.

The effect of this decision was not extensive, for within three months the Government had enacted the Passport Act 1967 by which no citizen or alien may depart from, or attempt to


2. Printed in 7 Indian Journal of International Law (1967), 569-583; see also, Nambiar, Right to a Passport, ibid., p. 526.
depart from India unless he holds a valid passport or travel document.\textsuperscript{1} The right of an Indian citizen to be issued with a passport now stems from this statute, which also lays down fairly wide grounds for refusal and withdrawal.\textsuperscript{2} A right of appeal is granted to persons aggrieved by such refusal or revocation,\textsuperscript{4} but no such appeal will lie against any order made by the Central Government, for example, that the issue of a passport is "not in the public interest".\textsuperscript{5}

In the United States, the issue of passports is governed by statute and by extensive published regulations. The present content of the latter owes much to decisions of the courts, and to their interpretations of fundamental constitutional liberties. Authority to issue passports derives from the Passport Act 1926,\textsuperscript{6} section 1 of which declares:

\begin{quote}
...the Secretary of State may grant and issue passports, and cause passports to be granted, issued and verified in foreign countries by diplomatic representatives of the United States, ... under such rules as the President shall designate and prescribe on behalf of the United States, and no other person shall grant, issue or verify such passports."
\end{quote}

\textsuperscript{1} For entry regulations, see inter alia, Passport (Entry into India) Act 1920; Passport (Entry into India) Rules 1950.

\textsuperscript{2} Section 5.

\textsuperscript{3} Sections 6, 10.

\textsuperscript{4} Section 11.

\textsuperscript{5} E.g. section 6(2)(i).

\textsuperscript{6} 44 Stat. 887.
For a long time the statute's use of the words "may grant and issue" were held by the executive to denote a discretionary power which was not subject to review by the courts. However, in a series of cases between 1952 and 1967, there was a reaction against the Department of State's policy of refusing passports, withdrawing those already issued, and of imposing so-called "area restrictions". The courts declared that the right to travel, and hence the right to a passport, was a right guaranteed by the Constitution. Consequently, it could only be restricted in accordance with the fundamental principle of due process of law laid down in the Fifth Amendment.

Under current regulations, passports are issued only to nationals, that is, to persons who owe permanent allegiance to the United States, and the onus is on the applicant to prove his status. Denial of passports is covered by regulations which provide, inter alia, that a passport "may be refused" where the applicant has not paid a repatriation loan, and where the Secretary of State determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or to the foreign policy of the United States. A passport may also be revoked, restricted or limited where the applicant would not be entitled to a new passport, where the passport has been obtained by fraud, or fraudulently altered, or fraudulently misused, and where the national's activities abroad are in violation of the laws of the United States. There is also power to

1. 22 C.F.R. 51.40-41.
2. 22 C.F.R. 51.70.
3. 22 C.F.R. 51.71.
Upon determination by the Secretary of State that a country or area is, (a) a country with which the United States is at war; or (b) a country or area where armed hostilities are in progress; or (c) a country or area to which travel must be restricted in the national interest, because such travel would seriously impair the conduct of foreign affairs, then United States passports shall cease to be valid for travel thereto, unless specifically validated. Any such restrictions must be published in the Federal Register and automatically expire at the end of one year, unless limited to a shorter period.

The special validation of passports is only considered where this is in the national interest of the United States, for example, where the applicant is an accredited journalist who intends to publish information about the restricted area. In cases where an individual is affected by an adverse decision regarding the issue, revocation or restriction of a passport, then it is open to him to use the system of administrative appeals provided. Proceedings are heard first by a single officer, from whom a further appeal may be made to the Board of Appellate Review. The decision of the Board is final, unless the matter is referred to the Secretary of State for decision. It is expressly provided that neither the hearing officer nor the Board may take into consideration any confidential security information which is

1. 22 C.F.R. 51.72.
2. 22 C.F.R. 51.73.
not part of the record. The individual is entitled to be informed of all the evidence before the hearing officer and of the source of such evidence, and he is entitled to confront and cross-examine any adverse witness. It is these procedural and substantive safeguards which are the direct result of judicial decisions in the period 1952 to 1967.

Further regulations deal with the travel control of United States citizens in time of war or national emergency. These in turn refer to the 1952 Act which makes it unlawful, once the President has declared a state of emergency by Proclamation, for any citizen to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport. This use of passports as a method of controlling the movement of nationals is significant, and is one not found explicitly, for example, in the law of the United Kingdom. As might be expected, it is thought to be an unwarranted restriction on individual liberty, and many of the legal battles were fought over such restrictions.

Although it is radically different today, the origins the United States passport régime bear a strong resemblance to those of the United Kingdom régime. Originally, the

1. 22 C.F.R. 51.83; 51.95.
2. 22 C.F.R. 51.85.
3. 22 C.F.R. 53.

4. A state of emergency was declared in 1953 and is still in force: Proclamation No. 3004, 67 Stat., c. 31. There are certain exceptions to the general rule requiring passports, principally that governing travel by citizens to and from the countries of the Western Hemisphere, excluding Cuba.
American passport was not a document legally required for travel, but a safe-conduct given to a citizen, and advising foreign nations and American diplomatic representatives that the bearer was under the protection of the United States.¹

There is nothing in the legislative history to show that in passing the various passport Acts Congress ever intended to authorise the executive to formulate substantive conditions in the issue of passports. The intention appears to have been to enable the executive to lay down the necessary procedural rules. The discretionary and political nature of the passport was recognised as long ago as 1835 in the case of Urtetiqui v. D'Arbel,² and this character was presumed to continue into the very different circumstances of the twentieth century.

In 1936, the official view was that,³ 

"... the issuance of a passport is considered a part of the conduct of the foreign relations of the United States, plenary control of which, under the direction of the President, is exercised by the Department [of State]..."

Whereas a simple discretionary power was all that was needed in the early and middle nineteenth century, it may be that with modern developments in, and facilitation of, travel states have felt the need to maintain ultimate control over the movement of their subjects.

No statute prescribes a right in the individual to be issued with a passport, but already by 1939 the discretionary authority of the Secretary of State was shown to be subject

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². 34 U.S. (9 Pet.), 692, 698 (1835).
³. July 16th, 1936, MS Dept of State, file 823. 111/79.
to the scrutiny of the courts. In the case of Perkins v. Elg, the Secretary of State had refused a passport to Miss Elg solely on the ground that she had lost her native-born American citizenship. In finding that she had not, in fact, done so, the Court granted a decree which, it was said, would not interfere at all with the Secretary's discretion in the issue of passports, but would simply bar him from denying a passport on the ground of loss of citizenship.

Most of the controversial cases, however, occurred after the enactment of three statutes, the Internal Security Act 1950, the Subversive Activities Control Act 1950, and the Immigration and Nationality Act 1952. With these Acts, and with the Proclamation of a state of emergency, passports became legal prerequisites to travel abroad. Much of the legislation was directly and intentionally anti-Communist and the official attitude was expressed in a press release in May, 1952:

"Possession of a passport indicates the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad. The right to receive the protection of this government is correlative with the obligation to give undivided allegiance to the United States. A person whose activities, either at home or abroad, promote the interests of a foreign country or a political faction therein to the detriment of the United States or of friendly foreign countries should not be the bearer of an American passport."

The first challenge to the effects of this legislation occurred in the same year in the case of Bauer v. Acheson.

The District Court of Columbia held, inter alia, that the denial of an American passport has a direct bearing on the applicant's personal liberty to travel outside the United States. It followed, therefore, that the discretion of the executive branch in such matters, although political, must be exercised with due regard to the constitutional rights of the citizen. The freedom to travel abroad, like other liberties guaranteed by the Constitution, is subject to reasonable regulation and control in the interests of public welfare, but the Constitution demands due process and equal protection of the laws in the exercise of that control. Due process does not require a judicial hearing, but merely a procedure in which elements of "fair play" are accorded, the essentials of which are notice and an opportunity to be heard before a judgement is reached. Consequently, in the present case, the Secretary of State was without authority summarily to revoke a passport during the period for which it was valid, without prior notice or opportunity for a hearing, and on the bald statement that the citizen's activities were contrary to the best interests of the United States. There was, similarly, no authority to refuse to renew a passport under the same circumstances.

This decision was followed by a string of like cases. In Nathan v. Dulles it was held that the applicant, whose request for a passport had been denied after several months

2. Compare the control of discretion in expulsion cases, see below, pp. 432-436.
of informal interrogation and correspondence, had not been given the hearing to which he was entitled. The applicant continued to pursue his remedies, and in Dulles v. Nathan, the court ordered the Department of State to give a hearing within a certain time and, if the passport were still refused, to state the reasons "with particularity". After "reconsideration", a passport was promptly issued. This was also the course chosen by the Department after Boudin v. Dulles, in preference to revealing its sources of information. In the case of Schactmann v. Dulles, the court stated as a matter of principle that a passport is not simply a political document, and that its issue is not a purely political matter within the rule that purely political matters are non-justiciable.

Perhaps the most important of all the passport cases is Kent v. Dulles, decided by the Supreme Court in 1958. The Court held that the pertinent statutes did not authorise the Secretary of State to withhold a passport for the reason stated, namely, that the plaintiffs had refused to file an affidavit concerning their membership in the Communist Party. The majority of the Court (the division was five to four) felt

2. See now 22 C.F.R. 51.75 and 51.103.
that Congress had not intended to give the Secretary of State unbridled discretion to grant or withhold a passport for any substantive reason which he might choose. They were also of opinion that, while the issue of a passport carried some implication of an intention to extend diplomatic protection to the bearer, this was one subordinate function. The primary purpose of the passport today was control over exit, and the right of exit is a personal right which is included within the word "liberty" in the Fifth Amendment.

The Supreme Court reaffirmed its view of the right to travel in 1964 in *Aptheker v. Secretary of State*. Here it held that section 6 of the Subversive Activities Control Act 1950, which made it unlawful for members of any "Communist organisation" to apply for or attempt to use a passport, was unconstitutional in that it restricted the right to travel too broadly and indiscriminately. This recognition by the courts of the individual's right to contest the denial of a passport lead directly to the establishment of an administrative review system. There appears also to be recognition of the fact that, while passport policy in general may involve foreign affairs judgements, a refusal in an individual case has very little to do with foreign policy.

The success of individual petitioners in asserting their right to be issued with a passport has not been matched by a similar success in regard to the legality of area restrictions. It has long been the policy of the United States

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2. 22 C.F.R. 51.80-51.105.
not to issue passports for travel to countries which are not recognised or with which diplomatic relations are not maintained. Restrictions have also been placed on travel to areas of armed conflict and other areas where United States citizens might be in danger. The official attitude was explained in 1957, in regard to the denial of passports for travel to Communist China:

"The United States does not recognise the Communist China régime and does not maintain diplomatic relations with it. The United States could not, therefore, extend normal diplomatic and consular protection to its citizens who travel in the area under Communist control. The fact that Communist China has engaged in the practice of taking, and are now holding, political hostages is clear evidence of the special need for such protection. As a matter of principle, the Government must extend such protection to every citizen to the limit of its capabilities whether or not the citizen would waive his right to protection."

Express judicial recognition of the power to restrict the travel of American citizens to certain countries or areas is to be found in the cases of Worthy v. Herter and Frank v. Herter, both dismissed by the Supreme Court in 1959.

Although the ruling in these cases may seem to be contrary to the view of the Court in Kent v. Dulles that the President possesses no inherent constitutional power to limit individual


2. 270 F. 2d 905 (1959).

3. 269 F. 2d 245 (1959).

4. 361 U.S. 918 (1959), cert. den.

freedom to leave the country, it is apparent that the concept of area restrictions is more of a political and foreign affairs matter than is the denial of a passport in an individual case.¹ Should the United States citizen decide to violate the area restrictions, then he will not generally make himself liable to criminal penalties, either under existing statutes or under the law of conspiracy.² Such activities may be sufficient ground, however, for the revocation or refusal of a passport.³ In Worthy v. United States in 1964 the court declared unconstitutional section 215 of the 1952 Act in so far as it purported to make it unlawful for a citizen to return to the United States without a valid passport. The court said:⁴

"... it is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil ... The Government cannot say to its citizens, standing beyond its border, that he re-entry into the land of his allegiance is a criminal offence."

¹. The decisions on area restrictions were upheld by the Supreme Court in Zemel v. Rusk 381 U.S. 1 (1965), in which the petitioner sought to challenge the refusal to issue passports valid for travel to Cuba. For further discussion of the rôle of the passport in United States and practice, see 3 Stan. L.R. 312 (1951); 61 Yale L.J. (1952); Parker, The Right to go Abroad, 40 Virginia L.R. (1954); Ehrlich, Passports, 19 Stan. L.R. 129, (1966-67); Sinderson, Executive Restrictions on Travel, 5 Houston L.R. 499 (1967-68).


⁴. 328 F. 2d 386 (1964).
(c) Conclusions.

Although they may vary in the details of their application, the provisions of municipal law form the basis of a settled and general practice. For a state which admits an alien, the passport remains the first and basic document by which the alien will establish his identity. Secondly, the alien's passport will be accepted by that state as evidence of the alien's "returnability" to the state of issue. If the travel document should not guarantee such return, then this will commonly form a sufficient ground for exclusion. In many cases, "returnability" will be co-extensive with nationality, and thus the passport may be taken as **prima facie** evidence of such status. Thirdly, the passport, in its internationally accepted format, is recognised as a document upon which other states may impress their visas or official stamps. As a general rule, states enjoy a fairly wide discretion in regard to additional authorisations which they may require. ¹ This aspect of the passport may raise problems, particularly in respect of travel documents issued by states or governments which are not recognised by the receiving state. In such cases, ad hoc procedures may be adopted so as to permit entry in such a way that the passport itself is not "recognised" as a valid travel document.

In the matter of passports for their own nationals, the provisions of municipal law also reflect certain common factors. The general rule is that the issue of passports

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¹ It has been suggested that exclusion which does violence to the well established systems of control and supervision may be regarded as arbitrary and discriminatory, and that diplomatic protest might be in order: O'Connell, *International Law*, p. 696. N.b. the controversy over the unilateral insistence by Libya that passports be written in Arabic: *The Times*, 14th June 1973. See also 857 H.C. Deb. (Written Answers), cols. 244-246.
remains a matter within the reserved domain of domestic jurisdiction, and as an aspect of executive control over foreign affairs. States feel themselves free, therefore, to impose those conditions and restrictions which they deem fit. It is apparent that the majority of states accept that the passport may be used to control the movement of their nationals. The question of the right to travel as a fundamental freedom remains essentially a matter for local jurisdiction, as also the question whether any form of appeal is to be allowed against an adverse decision. If state discretion in this field is to be confined and structured, this will generally result from local developments, rather than from any direct impression by international law.

Assuming that there are no other restrictions, such as exit visas, the citizen holder of a national passport is thereby entitled to travel abroad. But the question of his admission into another state is a different matter, and the simple possession of a passport entails rights only if the bearer can benefit from specific treaty provisions. Once admitted, however, the citizen may usually rely on his passport as prima facie evidence of status when seeking diplomatic or consular assistance. In the final analysis, protection flows from status itself, not from the document, and it is commonly accepted that there is no right, in the strict sense, to such


2. In replies submitted to the 1961 Conference on the Development of Travel and Tourism, it turned out that the United Kingdom was the only state among those participating which did not require its nationals to have a passport for travel abroad: ECOSOC Doc. E/3438/Add. I, p. 3 (27th February 1961).

3. See below, pp. 290ff.
protection. Finally, it should be observed that the possession of a passport will not necessarily guarantee to the individual that he has free and unimpeded access to the state of issue, for while state practice accepts returnability as part of customary international law, the obligation imposed is owed between states alone.

(3) Passports and Treaties.

While the passport remains the universally acceptable travel document, municipal systems make frequent provision for the use of substitute documents. These exceptions reflect particularly the agreements entered into by contiguous and neighbouring states. In 1963 the United Nations Conference on International Travel and Tourism recommended in its final act that states should pursue the abolition of the passport through the conclusion of bilateral and multilateral treaties, although it noted that, while much had already been achieved on a regional basis, a valid passport was still the most suitable international travel document.\(^1\) Where agreements do exist, they demonstrate the influence of what are probably the two most important functions of a full passport: the proof of identity and the guarantee of returnability.\(^2\) If these two matters are satisfactorily covered, then the recognised alternative is not necessarily confined to a national identity card, but will frequently include other forms of travel documents, such as collective passports, children's passports,

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alien's cards, and nationality certificates. Existing agreements, however, are usually restricted in their application to tourists and others entering for short periods. The term "tourist" is defined in the 1954 United Nations Convention concerning Customs Facilities for Touring to mean any person,¹

"without distinction as to race, sex, language or religion, who enters the territory of a Contracting State other than that in which that person normally resides and remains there for not less than twenty-four hours and not more than six months in the course of any twelve month period, for legitimate non-immigrant purposes, such as touring, recreation, sports, health, family reasons, study, religious pilgrimages or business."

In practice, individual treaties usually specify those who may benefit from the provisions as persons coming for a period not exceeding three or six months, who are not coming to work.

Belgium was long a leading proponent of reciprocal arrangements designed to facilitate inter-state travel. In 1945, freedom of movement of persons was re-established with the Grand Duchy of Luxembourg by an exchange of notes constituting an agreement. This provided that Belgian nationals proceeding to Luxembourg, and Luxembourg nationals proceeding to Belgium, might be admitted to the two countries respectively on production of an identity card issued by the competent local authorities.² A similar reciprocal arrangement

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¹ Article 1(b); Turack, The Passport in International Law, pp. 39-40, 53-57.

² 41 U.N.T.S., 265. This agreement was cancelled and superseded by 65 U.N.T.S., 147, defining and extending the possible range of adequate identity documents, and this was in turn supplemented by 79 U.N.T.S., 329. See also 23 U.N.T.S., 215, Franco-Belgian Agreement respecting Minor Frontier Traffic, which provided for the use of the "carte frontalière" for frontier workers (21st May 1945).
was made with the Principality of Monaco for trips of not more than three months to the Principality, or two months to Belgium. Both parties expressly reserved the right to refuse access in individual cases.\(^1\) The Belgian agreement with Switzerland gave additional recognition to the use of "collective lists", provided that each member of the party should possess an official or recognised identity document, complete with photograph of the bearer. It was expressly declared that the agreement was subject to the existing laws and regulations applicable to aliens in respect to temporary or permanent residence, and to the exercise of a gainful occupation.\(^2\). The agreement with the Netherlands of the same year is noticeable for the fact that Belgium agreed to recognise a "certificate of Netherlands nationality" as a valid travel document.\(^3\). Dutch nationals are not required to carry identity cards, and this solution enabled the two states to abolish the obligation to carry a passport for nationals travelling between them.

Freedom of movement was further encouraged by the Benelux Agreement in 1960.\(^4\). The Convention on the Transfer of Control of Persons to the External Frontiers of Benelux Territory eliminated passport control at the internal frontiers, and provision was made expressly for the issue of a visa valid for Benelux territory.\(^5\). Sweden, Denmark, Finland and Norway

1. 51 U.N.T.S., 93.
2. 71 U.N.T.S., 91.
5. Article 4; note also Article 5, which describes national security and 'ordre public' in terms of the whole territory.
have also established a "common travel area" by similar agreements, and likewise a common policy regarding the entry and residence of aliens. Such an area is established as well in United Kingdom immigration control. The United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland form a common travel area and passengers examined at any one point are thereafter free to travel to any other party without further examination. A common policy of control applies, and a passenger is to be excluded if there is reason to believe that he will attempt to enter a part of the travel area where he is not acceptable. The United Kingdom also recognises national identity cards in conjunction with visitor's cards in return for recognition being extended to the British Visitor's passport. In such cases entry is only permitted for visits of six months or less, and the privilege does not extend to those who are coming for employment. Collective passports are recognised, subject to the observance of certain conditions, such as the production of individual photographs for identification purposes, and the United Kingdom government supports the practice of "no passport" excursions of one or two days duration.

2. Immigration Act 1971, section 9; Immigration Rules for control on Entry, 1973 H.C. No. 79, para. 8; 1973 H.C. No. 81, para. 6; The Immigration (Control of Entry through Republic of Ireland) Order 1972 (S.I. 1972 No. 1610); Turack, op. cit., p. 118
3. 1973 H.C. No. 81, para. 3 and note. EEC nationals require only national identity cards, ibid.
The successful conclusion on a regional basis of many bilateral agreements of the nature of those considered above has resulted in localised travel régimes of remarkable freedom. Despite the variety of national systems, the number of alternative documents which states are prepared to recognise on a reciprocal basis is encouraging. As already noted, the acceptance of national identity cards can be of singular importance to the individual and to his "right" to travel, for in many cases he will have a legal entitlement to such a card, where he has no enforceable right to a passport. The right to travel will be limited spatially to a right to remove himself to those states which have agreed to recognise his identity card, but the area of administrative discretion and control is, to some extent, confined. Existing agreements concentrate on securing recognition of informal travel documents and they bear, therefore, only indirectly on the question of the right to travel as a right of the individual. The latter is of marginal interest only to the state, whose primary concern is with establishing the identity of the alien at the frontier, and with effecting his removal should that become necessary. These opposing aspects of travel and passport control are brought somewhat closer together by the provisions of the Treaty of Rome.

The participation of nine European states in a common market implies the consequent suppression of all obstacles which frustrate the free circulation of merchandise, people, services and capital. Articles 48 to 57 of the Treaty of Rome

1. For other examples, see Turack, The Passport in International Law, pp. 35-45, 49-50, 53-59, 67-77, 81-87.
propose the freedom of movement of workers and the right of establishment in the territory of a Member State, for the purposes of employment, or involvement in the production or distribution of goods, or the provision of services. None of these rights is absolute, and states may deny their exercise in certain circumstances, limited by reference to reasons of public health and security, and of 'ordre public'. The Treaty provisions have been given substantive effect by various Regulations and Directives of the European Commission. The Regulations are immediately binding on Member States, giving enforceable rights to individuals, while Directives are "binding as to the end to be achieved", leaving the means by which that end is achieved to the choice of the national authorities. Regulation 1612/68 declares the right of every national of a Member State to take up and carry on a wage-paid occupation in the territory of another Member State. The right for a national to leave his own state is necessarily implicit in this statement, but it is also laid down expressly in Directive 68/360:

"Member States recognise that [nationals] have the right to leave their territory with a view to taking up a wage-paid occupation and to carrying it on in the territory of another Member State. This right is exerciseable on simple production of a valid identity card or passport. Members of his family shall enjoy the same right as the national on whom they are dependent."

2. For the definition of national, see below, pp. 311-313.
3. Article 1(1); cf. European Social Charter 1961, Article 18(d).
4. Article 2(1).
In order that this right should have some practical meaning, the same Article provides that Member States "shall, in accordance with their own legislation, issue to their nationals" passports or identity cards showing, in particular, the nationality of the bearer. Where passports are the only documents valid for leaving the state, then they are to be valid for at least five years, and no exit visa or equivalent obligation may be imposed on nationals. In theory, the simple production of an identity card or a national passport is sufficient formality for the nationals of one Member State who seek to exercise their treaty rights in the territory of another Member State. Derogation from these provisions is permitted only for reasons of 'ordre public', public security or public health. None of the rights conferred is absolute, in the sense that it may not be made subject to reasonable restrictions, but 'ordre public' is a concept of Community law and to that extent it restricts and confines the discretion of Member States.

1. Article 2(2). Note also Directive 64/220, Articles 6, 7; cf. United Kingdom law, Secretary of State v. Lakdawalla [1972] Imm. A.R. 26.


3. Article 2(4).


6. Note Directive 64/221. For criticism of these reservations as "une sorte de survivrance de la souveraineté nationale", see Lyon-Caen, op. cit., para. 183. For discussion of the alternative, that 'ordre public' is an area of controlled discretion, see below, pp. 492-495.
In determining the individual's right to travel, if any, consideration must also be given to the provisions of the European Convention on Human Rights. The main body of the Convention will only protect such right indirectly, for example, by reference to the right to respect for family and private life (Article 8), or the right to security of the person (Article 5). In a number of decisions the European Commission on Human Rights has held that the Convention does not in fact guarantee a right to leave the territory of a Contracting State. Similarly, the Commission has rejected complaints concerning the refusal by state authorities to issue a passport.

Article 2(2) of the Fourth Protocol goes some way towards confining state discretion in these matters, and it provides:

"Every one shall be free to leave any country, including his own."

Once again, however, this right is not absolute and express provision is made for its restriction according to law and in the interests of national security, 'ordre public', etc.

Although the permitted grounds of derogation are widely drawn, they are not without their limits. It remains open to the Commission and to the European Court of Human Rights to determine in a given case whether measures taken to restrict travel are compatible with the obligations assumed by States under the Convention. The possibility that the individual's

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3. Article 2(3).
4. See further on this general issue, below, pp. 486-487.
right to travel might be indirectly protected by his right to be issued with an identity card has also received support. An unlawful refusal to issue such a document might well be construed as an interference with the security of the individual, such as is forbidden by Article 5 of the Convention.

In one decision of the Swiss Federal Court, it was held that,

"Freedom of residence as guaranteed by Article 45 of the Federal Constitution also includes the obligation of the canton of origin and the canton of previous residence not to impede or prevent a Swiss citizen from moving his place of residence by refusing to provide the necessary identification papers."

Even if this principle is applied to the general issue of identity cards, it will still only amount to an indirect protection of the individual's right to travel abroad. Neither current state practice, nor the provisions of contemporary treaties, lend support to such an affirmative right. If such a right is to be established, it is to developments in municipal law that one must look.

In effect, it is with respect to refugees and stateless persons that states have agreed, within limits, to issue travel and identity documents. The years following the First World War and the Russian Revolution found Europe inundated with refugees and other displaced persons whose resettlement was hampered by the rigours of the new passport régimes. The League of Nations faced this problem and in 1922 secured states' agreement to the Arrangement with Regard to the Issue

2. On the question of a right of entry, either for aliens or nationals, see below, pp. 290ff.
of Certificates of Identity to Russian Refugees. 1. By this agreement it was provided that certificates would be issued subject to the following conditions: (1) they would not infringe the laws and regulations in force in any state concerning the control of aliens; (2) they would in no way affect special regulations concerning those who had Russian nationality, or who had lost it without acquiring another; (3) the grant of the certificate did not in any way imply the right for the refugee to return to the state in which it had been issued without the special authorisation of that state; (4) the state of issue was alone qualified to renew it so long as the refugee continued to reside within the territory of that state; (5) on presentation of the certificate, the refugee might, in certain circumstances, be admitted into the state which he wished to enter, if the government of that state affixed its visa directly on the certificate, or if the state in question regarded it as a document containing proof of identity.

This document, hedged about as it was with restrictions and limitations, was the first of the "Nansen" passports, introduced at the suggestion of Dr. Nansen, the High Commissioner for Refugees. 2. The most obvious limitation to the certificate was that which gave no right of return to the state of issue. This deficiency was made good in part by an agreement in 1926 which recommended the affixing of return visas on identity

1. 13 L.N.T.S., 238; Reale, loc. cit., 141-163.
certificates. Subsequently, Article 2 of the Convention of 28th October 1933\(^1\) and Article 15 of the London Agreement of 15th October 1946 made the "return clause" an integral part of the refugee's travel document.\(^2\).

In the meantime, the benefit of the "Nansen" agreements was extended to cover other categories of refugees, including all those generally who had ceased to enjoy the protection of their government.\(^3\). Attempts were also made in the League of Nations to secure certain guarantees for those who were not refugees, but who were without nationality or whose nationality was in doubt. In 1927 the Conference of the League of Nations proposed an identity document similar to that issued to refugees under the 1926 Arrangement. Once again, this was hedged with limitations and, for example, the issue of such a document was not to give the holder any right to protection of the diplomatic or consular authorities of the issuing state, nor was it to give to that state any right to exercise such protection. In the end, very few states adopted the recommendations on stateless persons.\(^4\).

Both refugees and stateless persons are today covered by multilateral conventions: the International Convention relating to the Status of Refugees 1951, and the International Convention relating to the Status of Stateless Persons 1954.\(^5\).

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5. 189 U.N.T.S., 137 and 360 U.N.T.S., 117, respectively.
Articles 27 and 28 are common to both conventions, and they provide (1) for the issue of identity papers to any refugee or stateless person in their territory who does not possess a valid travel document; and (2) for the issue to resident refugees or stateless persons of travel documents for the purpose of foreign travel.\(^1\) Contracting States may derogate from this obligation only where compelling reasons of national security or "ordre public" otherwise require, and to that extent the refugee or stateless person may find that he is better off than the local citizen. Travel documents may also be issued to other refugees and stateless persons, and sympathetic consideration is to be given to those who are unable to obtain such documents from the country of their lawful residence.\(^2\).

A specimen travel document is set out in the Schedule to each convention, and in many ways it resembles the international-type passport.\(^3\) However, the document itself recites that it is issued,

"solely with a view to providing the holder with a travel document which can serve in lieu of a national passport. It is without prejudice to and in no way affects the holder's nationality."

The document also includes a "return clause", which may be limited in respect of time by the issuing authority. In one

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1. In 1963 it was stated that "Travel documents are issued to stateless persons without discrimination as to race, religion or country of origin, if they are lawfully staying in the United Kingdom and cannot obtain a document from any other government": 681 H.C. Deb., (Written Answers), col. 221.

2. For additional guarantees on expulsion and refoulement, see below, pp. 583-584.

3. Turack, op. cit., pp. 128-134.
case it was decided that the obligation to readmit terminated with the validity of the travel document. Both refugees and stateless persons commonly require visas for travel abroad, in addition to their travel documents. This burden has been removed under the European Convention on the Abolition of Visas for Refugees 1959 for those refugees resident in the territory of one Contracting Party who desire to enter or leave the territory of another Contracting Party. This privilege is conditional on possession of a travel document issued either under the 1951 Convention or under the 1946 London Agreement, and it is limited to those whose visit is of not more than three months duration. The European Agreement also provides in express terms for the return of the refugees concerned, who "shall be readmitted at any time to the territory of the Contracting Party by whom the travel document was issued, at the simple request" of the Party whose territory they have entered.

The essential function of travel documents for refugees and stateless persons is to provide evidence of identity and status. To this end it is also necessary to secure the

1. Re Spitzer 24 I.L.R. 486 (1957, Austria); see also United Kingdom Immigration Rules for Control on Entry, 1973 H.C. No. 79, para. 14; 1973 H.C. No. 81, para. 12.

2. For example, 1973 H.C. No. 81, para. 8.

3. Article 1. On exclusion and the applicability of 'ordre public', see Articles 4(2) and 7.

4. Article 5. Compare European Agreement on the Movement of Persons between Member States of the Council of Europe 1957; this agreement provides for the reciprocal recognition of a range of identity documents and travel documents for those visiting for less than three months. Article 5 of the Agreement declares, however, that each Party shall allow the holder of any of the documents specified in the attached list to re-enter its territory without formality even if his nationality is under dispute.
agreement of as many states as possible in the matter of recognition of such documents, but otherwise and in practice they will not differ so very much from full national passports. There remains one significant distinction: travel documents issued to non-nationals are not designed for the purposes of exercising protection. As a general rule, protection is bound up with and flows from nationality. Paragraph 16 of the Schedule to the 1954 Convention, for example, declares that the issue of a travel document does not entitle the holder to the protection of the issuing state, and that it does not confer ipso facto a right to exercise protection on that state. However, it still remains possible that such state may acquire the right of protection by reason of other circumstances, as where the refugee or stateless person has acquired the effective nationality of the issuing state by a period of residence.


Hitherto consideration has been given principally to the place of the passport in municipal law. Borella notes:

"Le passeport est resté très largement un acte du droit interne, régi par le principe de la compétence exclusive des États ... Quelque soit le système utilisé, la caractéristique générale

1. By 1971, for example, the 1951 Convention was in force between some fifty-six states.

2. Consideration might also be given to the status of the conventions as evidence of customary international law, and to the notion of those obligations which states owe to the international community as a whole: Barcelona Traction Case I.C.J. Rep., 1970, p. 32.

Writing some thirty years earlier, Reale had expressed a similar view:

"Étant un acte administratif qui ressortit au domaine réservé et à la souveraineté nationale, elle est soustraite à tout contrôle et à tout appréciation."

This character of the passport and the discretionary aspect of its issue is still favoured by state practice, although there is some tendency today to allow the procedural guarantees of due process in the case of refusal or withdrawal. The human rights aspect, the idea of the right to travel and hence to a passport as a right inherent in the individual, remains still within the area of lex ferenda. In so far as it figures in recent international conventions, it is as a right which may be made subject to restrictions in accordance with law, for the protection of national security and 'ordre public'. The right to leave one's own country does not, as yet, find a place within those basic human rights which states must guarantee in fulfilment of obligations owed erga omnes. Those conventions which propose the right have attracted few ratifications, and there is little evidence to suggest that it has established itself independently in customary international law. If the criteria employed by the International Court of


2. This does not rule out the possibility that the denial of a right to leave may, in certain circumstances, amount to the breach of another international obligation. Thus, a state might, through such denial, seek to pursue some other unlawful purpose, such as genocide or the execution of policies of racial or religious persecution. See below, pp. 370-372.
Justice in the *North Sea Continental Shelf Cases* be applied by analogy,\(^1\). It is apparent that (1) the rule as expressed in international conventions is not such as may be described as "of a fundamentally norm creating character"; (2) that the conventions do not, generally, enjoy widespread and representative participation;\(^2\) and (3) that, with 1966 as the critical date at which the right found expression in a treaty, there is not yet sufficient and uniform activity over a period of time, such as to show a general recognition that a rule of law or legal obligation is involved. Municipal law does, however, show some awareness of the human rights aspect of travel, and this may be taken as evidence of the direction in which states now feel the law should develop.

(a) **Passports and Returnability**

The fact that an alien is or is not returnable to some other state is frequently a crucial matter in the determination of whether he is to be permitted to enter a foreign country. If it is subsequently found that the alien is "undesirable", then states will try to deport him elsewhere and considerable difficulties may arise if he has no passport or if no other state is willing to issue him with one. So in one case, the Supreme Court of Brazil found that the expulsion of a Rumanian national could not be implemented because of the Rumanian Government's refusal to issue him with a passport.\(^3\) However,

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2. This is not necessarily the case in regard to the participation of states in regional arrangements, such as the European Convention.
there is a strong body of authority for the proposition that the actual possession of a passport does indicate the existence of a duty, binding on the issuing state, to re-admit the holder if he is expelled from another state and has nowhere else to go.

In many cases this duty is recognised in treaties, and even extended to cover those whose passports have expired, or who possess alternative documentary evidence of nationality. For example, by an agreement concluded in 1961, Austria and the Federal Republic of Germany agreed to accept each other's nationals if a presumption were established as to the individual's nationality.¹ Such presumption might be based on a passport, even if expired or wrongly issued, or on some other travel document or identity card.² Expired passports also figure prominently in the 1957 European Agreement on the Movement of Persons as a sufficient guarantee of returnability, even if the nationality of the holder is under dispute.³

The issue of returnability bears also on the question of the passport as evidence of nationality. There is in fact no rule of customary international law which prohibits the issue of passports to non-nationals. On the contrary, there are many precedents in favour of the practice. For example, in the years 1876-1905 a recurring problem was whether British passports

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¹ 414 U.N.T.S., 211.
³ Article 5: E.T.S. No. 25.
might be issued to illegitimate children born Switzerland.
Under the law of the day, the fact that the mother was a British
subject conferred no right to that status upon the child while,
at the same time, the effect of Swiss law was also to deny
nationality. In one case the Law Officers advised in favour
of including such child in the British passport issued to the
mother.¹ In another similar case in 1898 a passport was itself
issued, in which the holder was described as "daughter of a
British subject". In the view of the Law Officers, this was
not to be taken as a precedent, "or as involving the recognition
of the claim to British protection."² The denial of the
right of the holder to claim protection might be though also
to amount to a denial of the duty to admit the holder if she
were subsequently to be deported. In fact this problem does
not seem to have arisen. The passports were issued principally
to meet the local requirement of an identity document. The
Swiss authorities accepted them as such and raised no objection
to the denial of nationality. It is apparent that they would
have been estopped from insisting, at a later date, that Great
Britain was bound to admit the individuals concerned.

Since the Second World War political and humanitarian
considerations have led many states to issue passports to non-
nationals. Turack cites the example of Spain, France and Italy
after the Arab-Israeli war of 1967, whose flexible interpretation
of nationality laws permitted the issue of passports to certain
Jews in the United Arab Republic.³ In other cases passports

2. Ellen Louise Flamant 1898: ibid., pp. 99-100; see also the
case of Hans Curt E. 1900: ibid., p. 101; case of Mrs. J. H-S 1900:
ibid., pp. 277-278
may be issued to individuals who have been granted asylum or who, for political reasons, are unable to obtain one from their own government.\(^1\) Clearly, such documents cannot state the nationality of the holder with authority, but if they are to be recognised by other states as valid travel documents, then the guarantee of returnability is essential.

The importance of this latter requirement in customary international law is again illustrated by recent United Nations action in the matter of passports for Namibians. The Council for South West Africa decided in 1968 to arrange for the issue of travel documents in its own name.\(^2\) However, it was accepted that a return clause was essential if such documents were to be recognised by other states. For this reason the Council attempted to secure the agreement of neighbouring countries to guarantee the returnability of passport holders to their respective territories. Such agreement was reached with Zambia in February 1970, under which the right of Namibians to return to Zambia was to be granted initially for a period of two years.\(^3\)

State practice, particularly in the form of the provisions of municipal law, insists upon returnability as essential to the validity of a travel document. It is accepted that the passport is itself sufficient evidence of this

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1. See the case of Dr. Ramon Villeda Morales, former president of Honduras, who found asylum in Costa Rica and was granted a diplomatic passport: Turack, *op. cit.*, p. 225, n. 5.


guarantee, even though it may be equivocal on the issue of nationality. Although the passport is primarily an instrument which emanates from municipal law, in this one respect at least its effect is dictated by a rule of customary international law.

(b) The Passport as Evidence of Nationality

The statement above to the effect that the passport may be equivocal on the question of nationality requires some qualification. For in day to day practice states commonly look to the passport not only to ascertain returnability, but also as an indication of the holder’s identity, nationality and status. In the Nottebohm Case Liechtenstein argued that the "acceptance" by Guatemala of Nottebohm’s passport and its issue to him of a visa amounted, with other related administrative acts, to recognition of his status as a national of Liechtenstein. This argument was denied by Guatemala:

"... il faudrait assurément que ces actes constituent de manière claire et non équivoque une reconnaissance définitive de la parfaite régularité et sincérité du changement de nationalité survenu."

In effect, this view was accepted in the judgement of the Court:

"When Nottebohm ... presented himself before the Guatemalan authorities, the latter had before

1. Note that travel documents for refugees and stateless persons now expressly include a return clause, although they neither give the issuing state a right of protection, nor affect the nationality if any, of the holder; see above, pp. 112-115.


4. Ibid., p. 196.

"them a private individual; there did not thus come into being any relationship between governments. There was nothing in all this to show that Guatemala then recognised that the naturalisation conferred upon Nottebohm gave Liechtenstein any title to the exercise of protection."

The judgement thus appears to support the separation in law of passports and the right to exercise protection. This also is the view accepted in state practice, which relates protection to status, not to the possession of a passport.1. In the absence of special agreement, only the relation of nationality gives the state a right of protection.2. On the question whether this relation exists in international law, the passport and acts affecting the passport are not conclusive.3. In practice, states tend to insist that their passports be accepted as at least prima facie evidence of citizenship. The position of the United States has been described as follows:4.

"While admitting the right of foreign authorities traversing the conclusively evidentiary character of the passport ... by showing fraud or illegality, the United States ... has reserved to itself the exclusive right to determine the ultimate validity


3. While passports frequently include a request for protection, this is purely formal and entails no legal consequences. Note that municipal courts have also taken the view that the passport is not conclusive proof of nationality: R v. Burke, Casey and Mullady, 11 Cox C.C. (1868); Urtetiquil v. D'Arbel 34 U.S. (9 Pet.) 692 (1835); In Re Gee Hop 71 F. 274 (1895); Scott v. McGrath 104 F. Supp. 267 (1952); Hackworth, Digest, vol. III, pp. 347, 435-436, 468; Moore, Digest, vol. IV, p. 492.

These views are reflected in the Department of State opinion in 1937 that the Portuguese authorities should accept United States passports as prima facie evidence of the naturalisation of persons previously known to have been Portuguese citizens.¹

Be that as it may, the weight which an international tribunal gives to a passport will vary from case to case. In the Méregé claim, for example, the Commission relied to some extent on the use of a passport by a dual national in its determination that one rather than another nationality was dominant. But in this case there was, additionally, little evidence that the de cuibus had otherwise established effective links with the other state.² In conjunction with other criteria, the possession and use of a passport may provide corroborative evidence of the status of the bearer. At other times it will be but one factor


2. U.N. Rep. vol. XIV, pp. 236, 238-239 (1955). See also Schmeichler-Pedch, Clunet, vol. 92 (1965), p. 689 (Danish Supreme Court). Cf. In Re Bulla, Ann. Dig., 1933-34, Case No. 111: #the application for a passport for the purposes of enabling the applicant to obtain work cannot in the present case and having regard to the conditions of employment at the time, be regarded as prejudicing the question of nationality.¶ see also Wildermann v. Stinnes, Ann. Dig., 1923-24, Case No. 120

Cf. Spaulding claim 24 I.L.R. 452; Zangrilli claim 24 I.L.R. 459.
in a given case which may, or may not, support the existence of an effective link. International tribunals retain jurisdiction to go behind the document in order to ascertain the true status. This general point was affirmed by the Italian-United States Claims Commission in the Flegenheimer case, where it was held that the tribunal might look beyond a certificate of nationality in order to determine whether the certificate was correct according to national and international law.

Although the possession of a passport is equivocal on the question of nationality, its acceptance by a foreign state raises other questions not fully explored by the Court in its judgement in the Nottebohm case. The points at issue were stated succinctly in Read's dissenting opinion. He noted that when an alien presents himself at the frontier, the state has an unfettered right to refuse admission. If, however, it permits the alien to enter then, by its voluntary act, it brings into being a series of legal relationships with the state of which he is a national. This relative relationship of rights and duties is the source of the receiving state's obligation to accord reasonable treatment and of its right to terminate the state of affairs by deporting the alien to his state of nationality. It is the source also of the right

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3. Ibid., p. 46.
of the state of nationality to exercise protection, and of
that state's obligation to admit its nationals expelled from
other states.\(^1\) In Read's view, the original relationship
which existed between Guatemala and Germany, Nottebohm's
former state of nationality, came to an end with Nottebohm's
naturalisation in Liechtenstein:\(^2\).

"From that time on Guatemala had the right to
deport Mr. Nottebohm to Liechtenstein, and
Liechtenstein was under the correlative
obligation to receive him on deportation."

The Court's judgement, however, does not deal with the question
of how far Guatemala might have relied upon the Liechtenstein
passport as a guarantee of returnability.\(^3\) Little significance
was attached to the "routine administrative acts" which
characterised Guatemala's reaction to Nottebohm's purported
change of nationality.\(^4\) Guatemala was not estopped from
subsequently denying the validity of that change, but at the
same time it is not inconceivable that Liechtenstein would have
been barred from avoiding its obligation to admit Nottebohm
as the holder of one of its passports.

A somewhat similar problem might have arisen at the
time of the expulsions from Uganda in 1972.\(^5\) While in many
cases the United Kingdom citizens involved might not have
satisfied the requirements of effective nationality, this would

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1. See further below, pp. 345ff.
3. On the principle of effective nationality and the expulsion of
   long resident aliens, see below, pp. 396ff.
4. For another view of such routine acts in another context, see
5. On which see further below, pp. 365ff.
in no way have justified a refusal on the part of the United Kingdom Government to admit them. The principle of effective nationality does not operate in isolation, and there will be occasions when it must be applied in relation to other principles, such as estoppel, and in the light of international agreements. In the case under consideration, passports played a crucial rôle. From the point of view of United Kingdom law, the passports indicated that the holders were subject to immigration control. From the point of international law, the same passports symbolized the substance of agreements entered into at the time of Ugandan independence which expressly recognised the continuing status as United Kingdom citizens of those who did not exercise the right of option in favour of the local citizenship. In the circumstances it would seem that the continuing guarantee of returnability was to be implied as a consequence of those agreements and of the issue to individuals concerned of United Kingdom passports.

In conclusion, it is apparent that the legal significance of the issue or possession of a passport will vary from case to case. Thus, a state may issue passports and travel documents to its nationals, or it may not. It may also issue them to non-nationals, to aliens generally and to refugees and stateless persons. The passport may be some evidence of nationality, or it may not. By itself, the passport may not even be sufficient for travel, and other states may require the addition of visas; on the other hand, the passport is not necessary at all. In practice, the holder of a passport will frequently rely on it as the outward title of his right to diplomatic protection, 1.

although protection may be denied even to a national and holder of a passport, in the discretion of the state. For a receiving state the passport will guarantee that the alien is returnable to another state, but for the bearer it will not necessarily guarantee his free and unimpeded entry into the state of issue.

Ideally, no more can be asked of the passport than that establish the identity and status of the bearer, and that it guarantee his return to the issuing state. The passport is not strictly relevant to the question of protection, which depends precisely on status; nor should it, theoretically, affect the individual’s right to enter the state of issue, which also flows primarily from status. In practice, states employ their passport laws as a measure of control over their nationals in matters of both entry and exit. States' discretion in such matters remains largely beyond the control of international law, although future developments in the notion of the right to travel as a human right may, some day, produce restrictions. At present, international law is concerned with the passport partly as an item of some evidence of nationality, but principally as a guarantee that the holder will be admitted to the issuing state at the request of any other state.
PART II

THE AVAILABILITY OF INTERNATIONAL STANDARDS
IN THE CONTEXT OF THE MOVEMENT OF PERSONS
ACROSS FRONTIERS
INTRODUCTION

The object of the first three Chapters in this part is to examine briefly the sources and nature of the standards which govern the treatment of aliens. Chapter III discusses the relationship between the international minimum standard and the doctrine of equal treatment of aliens and nationals. But its aim is strictly limited and it does not purport to present a definitive account of the doctrines. Chapter IV next seeks to illustrate the great number of new "sources" and developments which may be employed today as the basis for a fuller recognition of the rights of the alien. Although in many cases the covenants and treaties involved cannot be said to have acquired the status of rules of international law, nevertheless it is thought that they may be relied upon to indicate with more precision the content of contemporary standards. Reliance is also placed upon recent statements by the International Court of Justice which tend to place certain international obligations within a concept of duties owed to the community of states at large. However, it is accepted that major problems remain to be solved in regard to a cogent theory of international responsibility in such matters.

From a consideration of general sources, which themselves recur in the context of entry and expulsion, Chapter V moves to discuss one issue of major significance, namely, the principle or norm of non-discrimination. This, too, will be seen to be relevant to the more particular concerns of later Chapters. The present discussion aims to explain the meaning of non-discrimination and its relevance to aliens, and the limits of its applicability. Finally, Chapter VI places the foregoing Chapters in the context of the reserved domain of domestic jurisdiction, and briefly indicates the ways in which this remaining area of absolute, or uncontrolled, discretion may be limited by international duties.
International Standards
and the Treatment of Aliens

The treatment due to aliens has long been a fruitful source of conflict and controversy. Much has been made in the past of the difference between what was commonly described as the international minimum standard on the one hand, and the standard of national, or equal, treatment, on the other hand. The "international minimum standard" was known by a variety of names, including the "standards of the more advanced states," the "ordinary standards of justice," the "standard of civilized justice," and so forth. The variety of the terminology was matched with as little agreement regarding the content of this standard. Indeed, Borchard castigated it as "vague, deceiving and confused, properly calculated to produce error, for it pretends to express a conception which in reality seldom if ever exists".\(^1\) The descriptions cited above, to the effect that the international minimum standard represented the standards of the "more advanced states", is particularly illuminating as to the origins of the standard. For it was the economically more powerful nations of Western Europe, together with the United States, who were especially active in the international sphere, and who were most interested in seeing the establishment of a certain standard of treatment for their

nationals abroad. Not only did these states apply this standard between themselves, but they also sought to impose it upon other nations, particularly those with less well developed or inefficient judicial and administrative systems. This led in time to a reaction, expressed by the doctrine of the equality of treatment of nationals and aliens, and to the contention that aliens could not acquire, through any principle of international law, a position more privileged than that of nationals.

Both "standards" enjoyed their own measure of support. Thus, it was accepted that the individual who removed himself to a foreign state must generally take the local law and local conditions as he found them. His entry was an entry within the jurisdiction, and Phillimore noted:

"Every individual who enters a foreign country, binds himself, by a tacit contract, to obey the laws enacted in it for the maintenance of the good order and tranquillity of the realm."

However, the leading proponents took this argument still farther, and maintained that the alien had no right to expect anything more than equal treatment. Such a view falls very much in line with traditional conceptions of sovereignty and with the assumption that, presumptively, the ordering of persons within the limits of its territory is an aspect of the domestic jurisdiction of a state. The theory of national treatment


does have a certain plausibility, especially if an alien has long been resident in a foreign state, enjoying its advantages and the protection of its government. In many cases there will be some basis for maintaining that he should in corresponding degree become assimilated to a national of that state.¹

There was, however, concerted opposition against taking the doctrine of equality to extremes. In a reply to Mexico in 1938, United States Secretary of State Hull declared:²

"... the Mexican doctrine of risk ... presupposes the maintenance of law and order consistent with the principles of international law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognised by the law of nations." ³

It was denied that this was a claim of special privilege, and the Secretary of State maintained that confiscation of property could not be excused by the inapplicable doctrine of equality. It has been pointed out that one of the disadvantages of the doctrine of equal treatment is that it tends to restrict the freedom of aliens to the same degree as that of nationals, and to an extent which many states have frequently found unacceptable. ⁴

In argument against the adoption of such a doctrine in all cases, one may refer to the established principle that a state may not invoke its municipal law as a reason for avoiding its international obligations. ⁴ On the other hand, equality in

¹ Thus, in the Nottebohm Case (Second Phase) the Court found that the effective nationality was that of Guatemala: I.C.J. Rep. 1955, p. ⁴ at pp. 25-26.
³ O'Connell, International Law, p. 700.
its widest sense would seem to offer more than an alien or
his government can reasonably request. In the absence of
treaty, international law expressly permits certain inequalities
in regard to aliens, for example, in the matters of ownership
of property or the holding of certain jobs. In 1949, Roth
wrote: 2.

"... it cannot be doubted any more that there is
a duty imposed by international law on the State,
of residence to assure the alien in its territory
a certain juridical situation, regardless of the
conceptions of its municipal law about the
treatment, rights and duties of the individual."

The difficulty in any given case is to assess the quality of
this required juridical situation. The local law is not
necessarily irrelevant to consideration of the question, whether
a state has or has not neglected its international obligations
in regard to aliens admitted to its territory. For example,
in the Roberts Case in 1925, the U.S.A.- Mexico Claims Commission
held, inter alia, that there was no definite standard prescribed
by international law for fixing the time limit for detaining
in custody an alien pending the investigation of a charge
against him. In such a case the local law fixing a maximum
length within which a person charged may be held in custody
without being brought to trial may well be useful in determining
whether the detention has been unreasonable. 3. In the instant

1. Borchard, The Minimum Standard of the Treatment of Aliens,
below, pp. 165ff.

2. Roth, Minimum Standard of International Law applied to
Aliens, (1949), pp. 82-83.

case it was also stated that 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 the authorities in regard to aliens.

More recently, however, the Inter-American Juridical Committee, in the Contribution of the American Continent to the Principles of International Law that govern the Responsibility of the State, proposed the following Article: 1

"The State is not responsible for acts or omissions with respect to foreigners except in those same cases and conditions where, according to its own laws, it has such responsibility toward its own nationals."

The United States voted against this proposal, and in a separate opinion included the following as its position on the proper standard of treatment due to aliens: 2

"When a State admits foreigners to its territory, it has an international duty to protect their life and property according to a minimum standard of rights determined by international law. Neither the receiving State nor the foreigner's State can, by its own law, determine this international standard. It is determined by international law. A State which fails to comply with the applicable international law, as regards the person or property of foreigners in its territory, incurs international responsibility and must make reparation in such form as may be appropriate."

The alien's position remains anomalous. While he binds himself to obey the local law, he still continues to enjoy the protection of his own state. That there is a presumption in favour of the local jurisdiction is apparent from the reluctance of governments to pursue diplomatic claims on behalf

2. See also Whiteman, Digest, vol. 8, pp. 885-886.
of nationals long settled abroad. Phillimore noted further:

"The foreign domicil does not ... take away [the power to enforce the claims of its subjects in a foreign state], but it renders the invocation of it less reasonable and the execution of it more difficult."

This reluctance to intervene is especially apparent in regard to matters affecting the administration of justice. In one case in 1881, the Law Officers advised:

"It is impossible for a Government, on behalf of its subjects, to interfere with propriety in relation to the administration of justice in other countries unless corruption or unequal application of the laws, or clear perversion of justice can be shown."

The corollary of the alien's duty to submit to the local law is his right to the protection of that law. It was on the quality of this protection that states sought to impose the international minimum standard, both in regard to the administration of justice and to matters of general treatment. A number of attempts were made by jurists to establish and to list the minimum rights which must be recognised, and the general standard of treatment which was due to the alien in the exercise of those rights. Thus, in 1906, Anzilotti stated the view:

"Tout État est tenu envers les autres États de reconnaître à leurs nationaux respectifs la

"qualité de personnes, de sujets de droit, avec les conséquences de droit public et de droit privé qui en découlent, et de leur octroyer la protection juridique voulue par la reconnaissance de cette qualité."

In 1915, Borchard had written of, 1

"the premise that the local civil and criminal law and its administration do not fall below the standard of civilised justice established in international law ... [and that] ... the impossibility of a state existing in rigid isolation, and the necessity of entering into relations with other states in the international community, has compelled on the part of each state certain restrictions on its freedom of action and a modification of any theoretical claim it may have had to absolute authority over its subjects abroad or over all the inhabitants of its territory."

In his view, the violation by a state of a somewhat indefinite standard of treatment would nevertheless result in that state incurring international responsibility.

Writing in 1929, Cavaglieri attempted to endow with more particularity this otherwise vague standard: 2

"Il s'agit de règles un peu vagues, qui assurent aux étrangers la jouissance au moins de certains droits fondamentaux de sécurité personnelle, de liberté individuelle et de propriété privée, auxquels la doctrine donnait déjà le nom de droits naturels ou de droits de l'homme. Il s'agit en effet de facultés qui appartiennent à un individu en tant qu'homme vivant dans un certain milieu de civilisation, indépendamment du lieu de nationalité ... [L'État] obtient du droit international une grande latitude en ce qui concerne les détails de l'application des principes généraux qu'il doit respecter, parce que le contenu de ces principes est assez vague, mais sa responsabilité internationale est engagée s'il les renie dans leur signification essentielle."


However, although the content of the international standard was never categorically determined in these years, even in the treaties which established general claims conventions,\(^1\) publicists continued their attempts to list the rights of aliens said to be recognised by international law. Thus, Kaufmann proposed as a minimum the right to life, to liberty and to reputation, the right to property, including acquired rights, the right to the free exercise of religion subject only to the demands of public order, and the right to the equal and non-discriminatory application of a local law in conformity with international law.\(^2\).

Despite its vagueness, the general notion of a minimum standard found some support in various decisions of the U.S.A.-Mexico General Claims Commission.\(^3\) In the **Neer** case in 1926 Commissioner Nielsen observed:\(^4\)

> "... it is ... clear that the domestic law and the measures employed to execute it must conform to the requirements of the supreme law of members of the family of nations, which is international law, and that any failure to meet these requirements is a failure to perform a legal duty, and as such an international delinquency. ... 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 recognise its insufficiency. Whether this insufficiency proceeds


\(^2\) 54 Hague Recueil (1935 - iv), p. 427. See also Roth, op. cit., p. 182f.

\(^3\) By Article I of the General Claims Convention 1923, claims were to be decided in accordance with principles of international law, justice and equity: U.N. Rep., vol. IV, p. 11.

"from the deficient execution of a reasonable law or from the fact that the laws of a country do not empower the authorities to measure up to international standards, is immaterial."

In Janes' case, the Commission similarly found the Mexican Government liable for having transgressed a provision of international law as to state duties, in that it had not measured up to its duty of diligently prosecuting and properly punishing an offender.¹

While the standard might be indefinite when considered in the abstract, both customary law and treaty had for long set out specific exceptions to the absoluteness of territorial competence.² Customary law prescribed rights and privileges for diplomatic agents, and treaties were the instruments by which states agreed to guarantee to each other's nationals particular standards of treatment, for example, in respect of access to the courts and freedom and security in the enjoyment of property and trade.³ From the seventeenth century onwards there was a progressive development in the standards of most-favoured-nation and national treatment,⁴ which standards themselves operated to limit territorial jurisdiction over foreigners. While the standards prescribed were restricted in scope and were primarily those of equal or non-discriminatory treatment, it is apparent that they served as the basis for the later development of a broader, objective standard.⁵

Neither the international minimum standard nor the doctrine of equal treatment presents an adequate solution to the problems raised by the presence of foreigners on state territory. The international minimum standard is unconscionably vague, and its proponents have generally been too ambitious. In the struggle to prescribe detailed rules the central issue has frequently been lost. Essentially, the standard is like any other standard, for example, the standard of reasonable care in the law of negligence, and it can only be defined or quantified in a set of concrete circumstances. It was always admitted that the applicable standard might vary from case to case and that, for example, the protection due to the alien in time of war or civil disturbance was less than that due in time of peace. Thus, in 1882 on the occasion of the Alexandria Riots, the Law Officers advised:

"The measure of protection to be afforded is ... that which a Government, using all reasonable means and exercising all reasonable diligence for the prevention and repression of outrage to persons or property, is capable of affording."

Brownlie draws a distinction between, on the one hand, the question as to the content of the standard and the mode of its application and, on the other hand, the core principle, which is that the territorial sovereign cannot in all circumstances avoid responsibility by pleading that aliens and nationals have received equal treatment. This distinction points up the

3. 6 B.D.I.L., 322-323; Brownlie, op. cit., p. 512.
4. Brownlie, op. cit., p. 511. See also this writer's suggestion of a variable standard, such as diligentia quam in suis: ibid., p. 512. Cf. O'Connell, op. cit., pp. 944, 945.
fact that international law expressly permits certain
discriminations against aliens, for example, in the matter of
political rights,\(^1\) while it also now prohibits even certain
actions against nationals alone.\(^2\) Developments in this latter
respect raise particularly pertinent issues concerning the
reserved domain of domestic jurisdiction, and the extent to
which confinement of this area by the precepts of international
law will affect the entry and expulsion of aliens. Immigration
is still viewed as essentially a domestic matter,\(^3\) but it will
be seen that in many cases this "simple" issue will impinge
also upon, for example, established and fundamental human
rights.

1. See further below, pp.165ff.
32, in which the International Court of Justice related
fundamental human rights to a concept of state duties which are
owed \textit{erga omnes}. See below, pp.377-379.
3. Cf. Verdross, citing President Wilson, in \textit{Les règles
internationales concernant le traitement des étrangers}, (1932),
p. 24. See also the response of the Australian Government to
the suggestion that its assisted passage scheme for immigrants
violated anti-discrimination provisions in United Kingdom law:
CHAPTER IV

Developments in Human Rights Standards and the Movement of Aliens across Frontiers

(I) Introduction

The object of the present chapter is to examine the most recent developments in human rights standards with a view to indicating the present sources of rules which may limit the competence of states in their dealings with aliens. It was suggested above that neither the international minimum standard nor the doctrine of equal treatment is today an adequate basis upon which to judge the treatment of aliens. It will be argued below that concurrent developments in regard to the reserved domain of domestic jurisdiction also demand a re-appraisal of the scope of matters over which states may legitimately claim exclusive authority.\(^1\) Undoubtedly, one of the most remarkable developments since 1945 has been the progressive interpretation given to the human rights provisions of the United Nations Charter by the Organisation and its agencies.

It was with reference to these provisions that a solution to the conflict between the international minimum standard and the doctrine of equal treatment was proposed by García-Amador,

formerly Special Rapporteur to the International Law Commission on the subject of state responsibility. In his view, this solution was to be found in a synthesis of the two principles, founded upon the development of the international recognition of the essential rights of man. With the Charter of the United Nations as a basis for a standard of humanity, García-Amador suggested that whether an individual was a citizen or an alien was henceforth immaterial. The human being, as such, would now come under the direct protection of international law.

In his Third Report, the Special Rapporteur expressed the view that,

"the conflict and antagonism formerly existing between the 'international standard' and the principle of equality of nationals and aliens have become obsolete in consequence of the political and juridical phenomenon in the post-war world of the recognition of fundamental human rights, and hence it would be useless to continue to hope that either the 'international standard' or the principle of equality will prevail."

These submissions met with two principal objections. The first was that an individual, whether an alien or a national, could not be regarded as a direct subject of international law. The second was that fundamental human rights had not yet been recognised by positive international law. Both these objections are related, in that any recognition of human rights by general international law would necessarily entail as a consequence


the recognition of the individual as a direct subject of international law. The Special Rapporteur answered his critics as follows: 1.

"The only question is whether international law, in its present state of development, recognises certain interests and rights of the human person regardless of his nationality. . . . [There] may be some confusion between legal rules which merely recognise a right (or impose an obligation) and those which by establishing procedures and guarantees of various kinds, ensure its effective exercise (or guarantee compliance with an obligation). The distinction may be of little consequence in an internal legal system which has been fully developed and refined, but it still has very great significance in the international legal order. Hence, even when speaking in terms of positive international law, nobody draws the distinction between two categories of rules and nobody contends that only those in the second category have validity or binding force. In brief, therefore, one should not confuse in international law the validity or intrinsically obligatory nature of a rule with its efficacy."

This is scarcely a satisfactory answer, although it does hint at the difficulties which may be encountered in establishing human rights provisions within a coherent theory of international obligation.

In his Sixth Report in 1961, the Special Rapporteur submitted a revised draft on state responsibility, Article I of which sought to define the new standard, now to be based on the international recognition of human rights and fundamental freedoms. In paragraph (1) it declared: 2.

"For the purpose of the application of the provisions of this draft, aliens shall enjoy the same rights and legal guarantees as nationals, but these rights and guarantees shall in no case be less than 'the human rights and fundamental freedoms' recognised and defined in contemporary international instruments."

2. Ibid., 1961-II, p. 1 et seq.
The second paragraph to this Article attempts to enumerate the "human rights and fundamental freedoms", and includes the right to life, liberty and security of the person and the right to own property.\(^1\) Other provisions refer to the right to a remedy and redress for any violation of the said rights, and prescribe certain procedural and other guarantees for those accused of crime. Paragraph (3), however, opens the way to derogation by declaring that the first four of the rights mentioned above, "are subject to such limitations and restrictions as the law expressly prescribes, for reasons of internal security, the economic well-being of the nation, public order, health and morality, or to secure respect for the rights and freedoms of others."

The effect of such a provision would be practically to annul any use of the word "right". Its substance is in marked contrast to, for example, the limited provision of Article 15 of the European Convention on Human Rights.\(^2\) If exceptional measures are taken under this term of the treaty, and if they should subsequently be the subject of litigation before the European Court of Human Rights, then it is a question for the court whether those measures were warranted by the circumstances.\(^3\)

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1. This last "right" may be justly criticised as an attempt to raise a practice of economic life into a principle of human rights; it must remain controversial. Cf. Brownlie, op. cit., pp. 513-514.

2. Article 15(1) permits derogation "... in time of war or other public emergency threatening the life of the nation." However, no derogation is permitted from Article 2 (right to life), save in regard to deaths resulting from lawful acts of war; Article 3 (which prohibits torture, inhuman or degrading treatment); Article 4 (which prohibits slavery or servitude); or Article 7 (which prohibits punishment under retroactive laws). Furthermore, any state which avails itself of this right of derogation is obliged to inform, and to keep informed, the Secretary-General of the Council of Europe as regards the measures taken.

Although the remainder of this revised draft followed fairly uncontroversial lines, it was not well received. Insofar as it attempted a synthesis of the international minimum standard and the doctrine of equal treatment in the light of human rights developments, it nevertheless continued to reflect overmuch the principles enunciated in arbitral decisions of the past. At the time of its formulation there was but little recognition of the field of obligations which may be owed by states to the international community at large. There still remains much to be achieved in this area, but since the publication of García-Amador's Sixth Report, international obligations in the general field of human rights have begun to crystallize.

(II) Human Rights and the United Nations

As García-Amador observed in the course of his work as Special Rapporteur on State Responsibility, the post-war world has been characterised by the phenomenon of the recognition of fundamental human rights. The process was not, however, entirely new. The nineteenth century witnessed a number of occasions of forcible intervention in foreign states justified, at least by the participants, on humanitarian grounds.¹ In the years following the First World War the League of Nations was particularly concerned with securing the rights of refugees and stateless persons,² and many contemporary treaties sought also

¹ For examples and comment see Brownlie, International Law and the Use of Force by States, (1963), pp. 338-342.
² See further below, pp. 580ff and above pp. 110-115.
to ensure the protection of national minorities. Following the Second World War, the Charter of the United Nations became the primary document extending recognition of human rights. It was concluded as a consequence of the United Nations Conference on International Organisation held at San Francisco, and was brought into force on 26th June 1945. The Preamble to the Charter declares the peoples of the United Nations determined,

"to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."

Article I expands this basis and declares among the purposes of the United Nations,

"[the achievement of] international co-operation in solving problems of an economic, social, cultural or humanitarian character, and [the promotion and encouragement of] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

These aims were elaborated still more by Chapter IX on International Economic and Social Co-operation, and by Chapter X which deals with the functions and powers of the Economic and Social Council. These references to human rights in the Charter provided the basis for elaboration of the content of the proposed standards, and for the eventual introduction of machinery

1. See, for example, Lausanne Peace Treaty 1923 (28 L.N.T.S., 11), Articles 29, 37-44; Treaty of Versailles, Article 104(5). See also the approach of the P.C.I.J. in Minority Schools in Albania, (1935) Ser. A/B, No. 64; Polish Nationals in Danzig, (1932) Ser. A/B, No. 44.

2. Cf. Article 62(2). The International Trusteeship System, introduced by Chapter XII, is based on similar considerations; cf. Article 76(c),(d).
designed to implement protection of human rights.

Articles 55 and 56 of the Charter have proved to be perhaps the most important of the human rights provisions. An indication will be given subsequently of the extent to which the organs of the United Nations have relied upon these Articles in order to justify inquiry into matters which might otherwise have been held to be within the reserved domain of domestic jurisdiction. Article 55 is the less potent of the two, and requires the United Nations to "promote", inter alia, "universal respect for, and observance of, human rights and fundamental freedoms ..." Article 56, however, calls upon Member States themselves:

"All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."

There is considerable debate on the question whether this Article imposes any legal obligation upon Member States, but the interpretations of the political and judicial organs have tended to accept this premise. A point of greater significance is that the "obligation" is expressed in general terms, and gives no indication of its intended content.

(a) Crimes under International Law

The same year that witnessed the birth of the United Nations also saw the first important step towards endowing the


conception of human rights with some definite content. On 8th August 1945 the Allies, the United States, France, Great Britain and the U.S.S.R., signed the agreement for the prosecution and punishment of the major war criminals of the European Axis. Under this agreement the Allies declared the Charter of the International Military Tribunal and in Article 6 it was stated that the following acts were crimes coming within the jurisdiction of the Tribunal, and for which there should be individual responsibility: (a) crimes against peace; (b) war crimes; and (c) crimes against humanity. This latter category is particularly important, and its criteria are equally valid in time of peace; it included:

"murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated."

Although the Nuremberg Charter was drawn up to meet the exigencies of the particular situation, the principles enunciated therein have acquired general validity. Many states have aligned themselves with the Charter, and state practice indicates an acceptance of that Charter as a source of general international law. Three years later in 1948 the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of


2. Brownlie, International Law and the Use of Force by States, (1969), at pp. 175f, 185f, 191-194. By Resolution No. 95, adopted unanimously on 11th December 1946, the General Assembly affirmed "the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal".
Genocide. Article I of the Convention declares:

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

The nature of the crime itself, and the extent to which it has been recognised, lead to the conclusion that the prohibition of genocide is today a part of jus cogens, from which no derogation is permitted under international law.\(^1\)

(b) The Universal Declaration of Human Rights

The day following its acceptance of the Genocide Convention, the General Assembly adopted the Universal Declaration of Human Rights,\(^2\) which proclaimed itself as a "common standard of achievement for all peoples and all nations". As these words suggest, the Declaration sought to enumerate and to specify the rights and freedoms held common to all men but it is not, as such, a legally binding instrument. Certainly, some of the principles enshrined in it may be said to constitute general principles of law, or to represent "elementary considerations of humanity,"\(^3\) but as Waldock has noted:\(^4\)

"to treat the Declaration itself as a legal instrument directly binding upon Member States would be to run counter to the clear intention of the Assembly when it was drawn up and go near to attributing a power of legislation to the majority in the Assembly."

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While the Declaration was drawn up to serve as a common standard, to be achieved by all Members, Waldock justly observes that it:

"has received such wide recognition both on the international plane and in national systems that it can fairly be regarded as an embodiment of generally accepted concepts of human rights, and we may accordingly refer to it for indications of the content of the human rights envisaged in the Charter."

While those Charter provisions, being treaty provisions, undoubtedly make the treatment by Member States of individuals, whether nationals or aliens within their jurisdiction, a matter of United Nations concern, nevertheless they do so only to the extent of the very general obligations which they contain and of the controversial powers which they confer upon that body.

Looking beyond the Declaration itself, it is perhaps best to consider it as a preliminary step on the road to legally binding conventions or covenants. These will give express legal recognition to human rights and fundamental freedoms, and at the same time provide some sort of positive legal guarantee.

(c) The International Labour Organisation

With a view to establishing applicable standards, consideration must also be given to the constitutions of various

1. 106 Hague Recueil (1962 - ii), p. 199. As long ago as 1958, the Secretary-General was able to declare that the Universal Declaration has "acquired an authority of growing importance. A living document, it has had a considerable impact and its influence is reflected not only in the work of the United Nations itself but in international treaties and national legislation": Introduction to the Annual Report of the Secretary-General on the Work of the Organisation, August 1958, A/3844, Add. 1, p. 5. See also the examples from municipal law in Brownlie, Basic Documents on Human Rights, (1971), pp. 3-89

2. Articles 55 and 56 in particular.

3. See below, pp. 201-203.
international organisations, such as UNESCO and the International Labour Organisation. The constitution of the latter, in particular, emphasises the need for "social justice" in the Preamble, and in Article 41, the Organisation is authorised to suspend any Member "found by the United Nations to be flagrantly and persistently pursuing by its legislation a declared policy of racial discrimination such as apartheid". The Annex to the Constitution prescribes the aims and purposes of the Organisation and affirms that,

"all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and of equal opportunity."

(d) International Action on behalf of Refugees and Stateless Persons

The action taken by states on behalf of refugees and stateless persons has done much to establish a minimum standard of treatment applicable also to aliens as a class. These, and related matters are dealt with more fully elsewhere.

(e) Recent Covenants and Conventions

It was not until the mid-sixties that any substantial success was achieved in securing a more elaborated international

1. Instrument of Amendment (No. 2), 1964, adopted on 9th July 1964. This new Article is not yet in force: Brownlie, Basic Documents in International Law, (2nd. ed., 1972), p. 64.


recognition of basic rights and freedoms. On 21st December 1965 the General Assembly adopted the International Convention on the Elimination of all Forms of Racial Discrimination. 1 Its singular importance is its enunciation of a principle of non-discrimination which had been developing over the years. 2 Article 1 of the Convention defines "racial discrimination" to mean,

"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

It is unfortunate that this statement of principle is immediately followed by a wide exception clause to the effect that the Convention is not to apply to distinctions, exclusions, etc., which a State Party may make between citizens and non-citizens. 3 However, even this liberty of the state to differentiate between nationals and aliens is not without important limitations. While not all the rights enumerated will be guaranteed to aliens, for example, the political rights, Article 6 affirms the fundamental rule that States Parties are to assure to everyone within their jurisdiction effective protection and remedies against acts of racial discrimination.

A year after the adoption of the Convention against Racial Discrimination the General Assembly adopted, on 16th

1. U.K.T.S. Misc. No. 77 (1969), Cmnd. 4108. The Convention has been signed by seventy-one states and over twenty-nine states have become parties.

2. Cf. Schwelb, 15 I.C.L.Q. (1966), 996-1059; Vierdag, The Concept of Discrimination in International Law, (1973); see below, Ch. V

3. Article 1(2).
December 1966, three important international instruments: (a) the International Covenant on Economic, Social and Cultural Rights; (b) the International Covenant on Civil and Political Rights; (c) the Optional Protocol to the International Covenant on Civil and Political Rights. As Dr. Brownlie has observed: "The nature of the subject-matter is such that even for non-parties the content of the Covenants represents authoritative evidence of the content of the concept of human rights as it appears in the Charter of the United Nations."

When, or if, these Covenants enter into force, then they will, as embodying treaty stipulations, override the more exhortatory provisions of the Universal Declaration. In the meantime, it is a matter for debate to what extent they may be said to reflect, or even to crystallize, existing rules of general international law. It is possible that they continue to represent only desirable standards. Both Covenants will be examined briefly, with particular regard to their relevance to the standard of treatment to be accorded to aliens.

The Preamble to the Covenant on Economic, Social and Cultural Rights follows the general lines laid down in the Charter of the United Nations. Article 1 commences with an affirmation of the right of all peoples to self-determination and to dispose freely of their natural wealth and resources.

1. Signed by thirty-nine states, with so far only one ratification.
2. Signed by thirty-eight states, again with only one ratification.
3. Signed by fourteen states, but with only one ratification.
Article 2(2) declares that States Parties undertake to guarantee that the rights set out will be exercised without discrimination of any kind, and it includes "birth or other status" within the list of grounds upon which distinctions must not be based. This would appear to be wide enough to prohibit discrimination against aliens. However, the following paragraph states: 1.

"Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals."

This provision was the object of certain hostility from the United States, which put forward the view that it was contrary to many existing treaties and inconsistent with generally recognised principles of international law. 2. It is vague in its wording and especially unclear as to the meaning to be attached, for example, to the phrase "developing countries. There is, however, some suggestion that an objective test might be applied in order to assess the validity of a state's actions in the light of its international obligations.

Article 4 permits states to apply certain restrictions to the exercise of rights, but these may be made subject only to "such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". 3. Other Articles of the Covenant do not limit themselves

1. Article 2(3).
specifically to the rights of nationals, but recognise, for example, the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and the right of everyone to the enjoyment of just and favourable conditions of work. The wording of these provisions suggests that, although there may be no obligation on states to permit aliens to work within their jurisdiction, if such privilege is granted, then they must be treated according to the same standard as is applicable to nationals.

It is the International Covenant on Civil and Political Rights, however, which is more relevant to the status of aliens. Thus, 3.

"Each State Party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This is clearly wider and more explicit than the provision contained in Article 2(2) of the first-mentioned Covenant. Article 4(1) continues the prohibition against any form of discrimination, with particular reference to permitted measures of derogation:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties ... may take measures derogating from their obligations under the present Covenant to

1. Article 6.
2. Article 7.
"the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin."

The anti-discrimination provision here is not so widely drawn as that in Article 2(1) above, and exceptional measures might therefore legitimately distinguish between citizens and non-citizens. However, such distinctions are not unlimited and they would not justify, for example, discrimination against a particular class of aliens which was determinable solely by reference to race or colour.\(^1\) In addition, any such measures must be consistent with a state's other obligations under international law. Article 4(2) expressly forbids any derogation from those provisions which guarantee the right to life,\(^2\) which forbid torture or inhuman treatment,\(^3\) slavery, servitude,\(^4\) and conviction or punishment under retroactive laws,\(^5\) as also those Articles which guarantee the right to recognition as a person before the law\(^6\) and the right to freedom of thought, conscience and religion.\(^7\)

The content of the following articles elaborates many of the rights and freedoms first set out in the Universal Declaration, and to a certain extent reflects the principles already incorporated in the European Convention. Thus, Article 9

1. See expulsions from Uganda 1972, below, pp.
3. Article 7.
4. Article 8(1),(2).
5. Article 15; also Article 11, which bars imprisonment merely for inability to fulfil a contractual obligation.
6. Article 16.
7. Article 18.
declares the right of everyone to liberty and security of the person, and to freedom from arbitrary arrest and detention. Article 10 prescribes that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 12 calls for freedom of movement for everyone lawfully within the territory of a state, and for the right to leave any country. It emphasises, too, that while these rights may be restricted, state power in such matters is essentially discretionary and confined by reference to its purpose and to the requirement that decisions be taken according to law.¹

Subsequent Articles continue to list a variety of rights, including the right of aliens not to be arbitrarily expelled,² the right to equality before courts and tribunals,³ the right to recognition as a person before the law,⁴ the right to privacy, to honour and to reputation,⁵ and the right of the family to protection by the state.⁶ The content of Article 26 is becoming increasingly familiar:

"All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection

¹. See further below, pp. 409-410. Article 12(4) declares that one shall be arbitrarily deprived of the right to enter his own country.


3. Article 14(1).

4. Article 16.

5. Article 17(1).

6. Article 23(1).
"against any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The Covenant on Civil and Political Rights is accompanied by an optional enforcement Protocol which gives the individual the right to petition the Human Rights Committee established by the Covenant. Neither of these two Covenants is yet in force, and it remains to be seen how effective they will be in setting up direct protection for the enumerated rights and freedoms. However, their content is not without present significance and both Covenants may serve to indicate the scope of standards already extant in general international law.

(III) Human Rights Standards Today

In the course of his dissenting opinion in the South West Africa Cases (Second Phase), Judge Tanaka made the following remarks:

"A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The rôle of the State is no more than declaratory ... Human rights have always existed with the human being. They existed independently of, and before, the State. Alien and even stateless persons must not be deprived of them."

It is not necessary, however, to adopt a natural law posture in order to conclude that basic human rights are established within the realm of positive international law. In its recent decision

in the Barcelona Traction case,\textsuperscript{1} the International Court of Justice referred to a category of international obligations which are owed towards the international community as a whole:\textsuperscript{2}

"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."

The Court observed that some of these obligations derive from general international law, while others are conferred by international instruments of a universal or quasi-universal character.\textsuperscript{3}

The prohibition on genocide is clearly today within that area of law sometimes referred to as \textit{jus cogens},\textsuperscript{4} from which no derogation is permitted. Where such is the case, then acts against an individual or a class could not be justified on the ground of a distinction drawn between nationals and aliens. Implicit in the concept is the idea of universality. The status of other fundamental human rights is not so clear. The Court itself referred to protection against slavery\textsuperscript{5} and racial

\begin{enumerate}
\item Ibid., p. 32.
\item Note also the impact of regional instruments such as the European and American Conventions on Human Rights.
\end{enumerate}
discrimination, and it is to be remarked that both these rights figure in recent conventions among those from which no derogation is permitted, even in exceptional circumstances.

If one applies this criterion of "no derogation" to the rights enumerated generally in international conventions, three other rights in particular stand out as future candidates for inclusion within a category of jus cogens. These are the right to life, in so far as the individual is protected against "arbitrary" deprivation of life; the right to be protected against torture, cruel or inhuman treatment or punishment; and the right not to be subject to retroactive criminal penalties. One may propose additionally the right of everyone to be recognised as a person before the law, although this right may sometimes be indirectly expressed in terms of the right of everyone to an effective remedy, together with the rule of non-discrimination.

Whether any of these rules may be said to have found a place in general international law remains open to debate. They are included within the provisions of many international instruments and are reflected also in national legal systems. This latter fact is by no means conclusive evidence of a sufficient opinio juris, but it does provide some indication of

1. On which see further below, Ch. V.
2. E.g. European Convention, Article 15(2); Covenant on Civil and Political Rights, Article 4; American Convention, Article 27.
3. European Convention, Articles 15(2), 2, 3, and 7; Covenant on Civil and Political Rights, Articles 4, 6, 7, and 15; American Convention, Articles 27, 4, 5, and 9.
4. Covenant on Civil and Political Rights, Article 16; American Convention, Article 3.
the direction in which states think that the law is developing. Similarly, the simple inclusion of rights in international covenants is itself insufficient evidence of the status of those rights as rules of international law. In the North Sea Continental Shelf cases\(^1\) the applicants argued, *inter alia*, that delimitation of the continental shelf on the basis of the "equidistance/special circumstances" principle was, or ought now to be regarded as, a part of general international law, and as such to be automatically binding on the Federal Republic of Germany. The Court noted that there was both a positive law and a fundamentalist aspect to this contention.\(^2\) The former was supported by reference to the work already done in this field by international legal bodies, to state practice and to the influence of the Geneva Convention on the Continental Shelf. The fundamentalist aspect related to the so-called "natural law" of the continental shelf, and looked to equidistance as having the *a priori* character of a legal norm. It is clear that very similar arguments might be mustered in support of human rights standards, and for the view that international covenants merely reflected or crystallized existing norms of customary international law.

In order to establish the precise effect of Article 6 of the Geneva Convention, the Court found it necessary to examine the status of the principle of delimitation at the time when the Convention was drawn up, the effect of the Convention itself, and of the Convention in the light of subsequent state practice.\(^3\)

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2. Ibid., p. 28.
3. Ibid., p. 37.
Two main objections to the principle as a part of general international law were apparent. Firstly, it had been proposed by the International Law Commission somewhat hesitantly, "at most de lege ferenda, and not at all de lege lata or as an emerging rule of customary international law." Secondly, Article 6 was one of those provisions open to reservation, and the Court commented:

"this cannot be so in the case of general or customary rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of unilateral exclusion exercisable at will by any one of them in its own favour."

It is tempting to draw an analogy at this point between the privilege of a state to make reservations to certain terms of a treaty, and its privilege to derogate from certain obligations in human rights conventions. Where reservation or derogation is barred, then this may support a finding that a treaty stipulation embodies or crystallizes a pre-existing or emergent rule of customary international law. In the case before it, the Court found otherwise.

The applicants also argued that the rule on delimitation of the continental shelf had, in any case, come into existence since the convention, partly by reason of subsequent state practice and partly by reason of its own impact - the treaty rule had emerged as a rule of customary international law, binding on all.

3. Ibid., p. 41.
4. Id.
The Court recognised that this was an accepted method by which new rules of customary international law might be formed. Its judgement, however, advises caution and against the making of any assumptions in the matter. In the circumstances the rule in question failed to meet the three criteria which were held essential to the process. First, it is necessary that the relevant provision should be of "a fundamentally norm-creating character". Secondly, very widespread and representative participation in the convention might be sufficient to establish the rule, without any significant passage of time, provided that it included that of states whose interests were affected. Thirdly, as regards state practice and the time factor, the Court observed:

"Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question ... state practice ... should have been both extensive and uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

In the case before it the Court found that Article 6 was not essentially norm-creating, that the number of states participating in the Convention, although respectable, was hardly sufficient, and finally, that subsequent state practice did not provide conclusive evidence of an opinio juris sive necessitatis.

2. Article 6 refers in the first place to delimitation by agreement.
It is no straightforward matter to apply these criteria to the human rights and fundamental freedoms now set out, for example, in the Covenant on Civil and Political Rights. It has been seen that some sort of recognition has been extended to human rights over very many years. Their rôle in raising the individual to the level of subject of international law is, however, comparatively new, as is their reduction to a set of finite rules. The low level of ratifications of the most recent conventions nevertheless suggests that states continue to find this process unacceptable, and to adhere to the _prima facie_ exclusive authority over territory and inhabitants which seems to follow from the doctrine of the reserved domain.

The International Court of Justice has now given limited recognition to the concept of obligations which are owed by a state to the international community as such, and there can be little doubt that, for example, acts of genocide or the implementation of a policy of racial discrimination, are matters of international concern, affecting both the interests of the United Nations and those of other states. At present it is perhaps more useful to turn to the detailed provisions of international instruments as indicative of certain standards. The importance of such standards must not be underestimated, for it is to them that international tribunals may turn for support in the interpretation and application of other treaties and agreements. In many ways, Jessup's dissenting judgement in the _South West Africa Cases_ (Second Phase) may be taken as presenting a minimum programme for the application of human rights standards. In his view the judicial task of the Court in interpreting the Mandate for South West Africa was to be
performed by applying the appropriate objective standards: 1.

"... the standard to be applied by the Court must be one which takes account of the views and attitudes of the contemporary international community. This is not the same problem as proving the establishment of a rule of customary international law and ... I do not accept the Applicants' alternative plea which would test the apartheid policy against an assumed rule of international law ... also. ... my conclusion does not rest upon the thesis that resolutions of the General Assembly have a general legislative character and by themselves create new rules of law ... [But as regards] proof of the pertinent contemporary international community standard ... obtaining the disagreement, the condemnation of the United Nations is of decisive practical - and juridical - value in determining the applicable standard. The Court is bound to take account of such a consensus as providing the standard to be used in the interpretation of Article 2 of the Mandate."

Where there is doubt as to whether a given principle of human rights is within the corpus of general international law, then recourse may usefully be had to the approach suggested by Jessup. Standards may still operate effectively to confine and to structure a state's exercise of discretion, and their effect in particular contexts will become apparent below. Basic human rights, such as the right to life, liberty and security of the person, the right to equality before, and equal protection of the law, permit no distinction between nationals and aliens. The effect of the human rights standard generally has been to raise up the standard of treatment of all individuals. Some distinctions continue to be permitted, and the scope of these will be examined more thoroughly in the context of the rule against discrimination.

CHAPTER V

The Principle of Non-Discrimination in the Context of Movements across Frontiers

The principle or norm of non-discrimination has figured prominently in all recent attempts to secure the better protection of fundamental human rights. It is clearly a principle which may operate to the advantage of the alien, for it is inherent in the universal standard of respect for human rights which itself involves the state in obligations *erga omnes*. However, some caution is necessary and it is apparent that both general international law and various of the recent conventions anticipate continued distinctions between the national and the alien. While the "basic rights" of the latter may be assured, it remains open to what extent his other rights and interests can be restricted. It may be that non-discrimination as a general principle or rule is itself confined to those distinctions which are drawn on the basis of race.


but there is now substantial evidence for the view that non-discrimination as a standard of international law is drawn on a wider scale.1

It has been seen that international instruments most frequently define discrimination in terms of some exclusion or restriction, or alternatively as some privilege or preference, which operates to nullify the particular rights in a given context. Aristotle observed,2

"Injustice arises when equals are treated unequally, and also when unequals are treated equally."

This statement of the formal requirements of equality has been adopted and elaborated by subsequent writers as indicative of the bases of justice itself:3

"The general principle governing rights and duties is that of equality. This asserts that like cases should be treated in like manner and that differential treatment requires justification by reference to differences in the persons concerned or in their circumstances."

The same writer has noted that the principle of equality,4

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4. Ibid., p. 42.
"challenges those who wish to treat individuals differently to show cause for differential treatment, and the growth of justice has consisted very largely in the realisation that certain differences such as those of sex, race, religion are no adequate ground for discrimination."

Valuable as it is, this description of the formal character of justice offers little guidance to the necessary content of justice, and in practice suggests little restriction on those grounds which may be raised to support inequalities. Justice itself may not be equality alone, and the distinction must be maintained between what has been described as,

"the concept of justice as meaning a proper balance between competing claims (and) a conception of justice as a set of related principles for identifying the relevant considerations which determine the balance."

It is to the content of these principles that one must look in order to obtain the substantive assurance of equality.

In practice international tribunals have stepped determinedly beyond simple appearances of equality, and the Permanent Court has observed that equality in fact may well demand different treatment in order to attain a result which establishes an equilibrium between different situations. In the Minority Schools in Albania Case, the Court had to


2. Rawls, op. cit., p. 10, emphasis supplied. Ginsberg similarly refutes discrimination based on "irrelevant differences" (op. cit., pp. 57, 58), and Lucas also on "irrelevant distinctions" (op. cit., pp. 238-239).


interpret the provision in the Albanian Declaration 1921, Article 5(1), that "minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals". In rejecting Albania's plea that the abolition of private schools constituted a general measure applicable to the majority as well as to the minority, the Court adopted its earlier ruling in the German Settlers in Poland Case:

"There must be equality in fact ... as well as ostensible legal equality ... in the sense of absence of discrimination in the words of the law."

In a joint dissenting opinion, Judges Hurst, Rostworowski and Negulesco attempted to be more specific:

"The word "equal" implies that the right so enjoyed must be equal in measure to the right enjoyed by somebody else ... A right which is unconditional and independent of that enjoyed by other people cannot with accuracy be described as an "equal right". "Equality" necessarily implies the existence of some extraneous criterion by reference to which the content is to be determined."

That extraneous criterion may be the treatment which is accorded to other groups similarly situated, so that discrimination and equality are essentially relational terms. Alternatively, it may be possible to review the validity of distinctions in terms of more general propositions. The dissenting opinion of Judge Tanaka in the South West Africa Cases (Second Phase) is of particular assistance in this

1. Compare Article 38, Lausanne Peace Treaty 1923, 28 L.N.T.S., 11: "The Turkish Government undertakes to assure full and complete protection of life and liberty to all inhabitants of Turkey without distinction of birth, nationality, language, race or religion."


latter respect.¹ That this was a minority judgement does
not detract from its value, for the Court did not deal with
the merits of the case and its own judgement neither supports nor
challenges the reasoning upon which Tanaka bases his dissenting
opinion.² Referring to the idea of equality, Tanaka states
that it³.

"... does not exclude the different treatment
of persons from the consideration of the
differences of factual circumstances such as
sex, age, language, religion, economic condition,
education, etc. To treat different matters
equally in a mechanical way would be as unjust
as to treat equal matters differently .... If
individuals differ one from another and societies
also, their needs will be different, and
accordingly, the content of law may not be
identical. Hence is derived the relativity
of law to individual circumstances .... A
different treatment comes into question only when
and to the extent that it corresponds to the
nature of the difference. To treat unequal
matters differently according to their inequality
is not only permitted but required. The issue
is whether the difference exists."

From his restatement of the principle of relevant differences,
Tanaka goes on to affirm that different treatment must be
assessed according to the criterion of justice or
reasonableness.⁴

"Different treatment must not be given
arbitrarily; it requires reasonableness, or
must be in conformity with justice, as in the
treatment of minorities, different treatment
of the sexes regarding public conveniences, etc...
Discrimination according to the criterion of
'race, colour, national or tribal origin' in

1. I.C.J. Rep., 1966, p. 6 at pp. 284-316; also printed in

2. Tanaka's judgement has been described as "probably the
best exposition of the concept of equality in the existing
literature," Brownlie, op. cit., p. 455.


4. Ibid., p. 313.
"establishing the rights and duties of the inhabitants of the territory is not considered reasonable and just. Race, colour etc., do not constitute in themselves factors which can influence the rights and duties of the inhabitants as in the case of sex, age, language, religion, etc. If differentiation be required, it would be derived from the difference of language, custom, etc., not from the racial difference itself."

In developing his conclusion that the norm of non-discrimination had become a rule of customary international law, Judge Tanaka noted that the concept of equality before the law and equal protection of the law is a feature common to many constitutions. This fact alone is some evidence of the acceptance of equality as a general principle of law, and it is additionally remarkable that many states guarantee fundamental rights without distinction between citizens and non-citizens. The Constitution of the Federal Republic of Germany declares that "all persons" shall be equal before the law, and that "no one" shall be prejudiced by reason of his sex, parentage, etc.

1. I.C.J. Rep., 1966, p. 300. Peaslee, Constitutions of the Nations, (1965), vol. I, p. 7, estimates that some 75 per cent. of the world's constitutions include this basic principle. Its existence as a norm of general international law was also accepted by Judges Wellington Koo (ibid., p. 234), and Padilla Nervo (ibid., pp. 455, 464-468).


3. Article 3. Relevant provisions of the Constitution are printed in Brownlie, Basic Documents on Human Rights, at p. 18.
of the Republic of India declares equality for "any person within the territory of India", although the express anti-discriminatory provision of Article 15 is limited to "any citizen".¹ Many of the former dependent territories of the British Commonwealth have constitutions which reflect the particular influence of the European Convention on Human Rights,² and a discussion of the Convention itself is essential to any examination of the general issue of equality. Article I declares:³

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

Thereafter the rights and freedoms laid down are all expressed in terms of "everyone" or "no one" and apply equally to both aliens and nationals, unless that interpretation is expressly excepted. In addition, the enjoyment of the rights and freedoms is to be secured without discrimination, and for every violation there is to be an effective remedy before a national tribunal, notwithstanding that the violation may have been committed by persons acting in an official capacity.

Article 16 provides the only exception to the otherwise general application of the rights and freedoms to aliens and nationals alike, and it permits restrictions to be imposed on the political activities of the former.⁴ Besides the limitations permitted within


3. E.T.S. Nos. 5, 9, 44, 45, 46.

society, Article 15 makes provision for wider powers of derogation in time of war or other public emergency which threatens the life of the nation. But in no case is derogation permitted from Article 2, which guarantees the right to life, except in respect of deaths resulting from lawful acts of war, and a similar prohibition applies in favour of Article 3 (which prohibits torture), Article 4(1) (which prohibits slavery or servitude), and Article 7 (which prohibits retroactive criminal legislation). Furthermore, any State Party which resorts to this right of derogation is obliged to keep the Secretary-General of the Council of Europe informed of the measures which it has taken and the reasons therefor. It is thus a right which is limited by reference to the criterion of war or serious threat to the nation. It is a controlled discretion which has been characterised by the European Court of Human Rights as an "exceptional right" in a case in which it was also held that it was for the Court to decide whether the derogation was warranted by the extent of the alleged emergency. 1.

The overriding principle of non-discrimination is set out in Article 14:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

But it is a principle which does not stand absolute, for it is confined to the "rights and freedoms set forth in the

Convention*. Although this limitation finds some support in decisions of the Commission,\(^1\) in other cases Article 14 has been accorded an independent rôle to the extent that there may be a violation of the principle of non-discrimination in a field which is dealt with by another Article of the Convention, although there is otherwise no violation of that particular Article.

The Commission's decision in Application 238/56\(^2\) deals with the point of general applicability. In so far as the Applicant sought to invoke Article 14, the Commission considered that she was attempting to secure the right of her husband to reside in the territory of a state other than his state of nationality. The Commission observed:

"que seule la violation alléguée d'un de ces droits et libertés peut faire l'objet d'une requête recevable devant la Commission; que le droit susmentionné ne figure pas, quant à son principe, parmi lesdits droits et libertés; ..., que le principe de non-discrimination consacré à l'article 14 ..., ne vaut que dans la jouissance des droits et libertés reconnus dans la Convention."

In Application 1465/62\(^3\), the Commission affirmed its previous decisions to the effect that the right of a person to reside in a country of which he is not a citizen is not, as such, included among the rights and freedoms guaranteed by the Convention. At the same time, however, the Commission admitted that the deportation of a foreigner to a particular

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2. 1 Yearbook 205.
3. 5 Yearbook 256.
country might, in exceptional circumstances, give rise to the possibility of inhuman treatment within the meaning of Article 3. The general principle, adopted and affirmed by the Commission, is that a State Party to the European Convention, 1.

"... must be understood as agreeing to restrict the free exercise of its rights under general international law, including its right to control the entry and exit of foreigners, to the extent and within the limits of the obligations which it has accepted under that Convention."

Clearly, these restrictions on "sovereign rights" spring from the nature of the particular treaty régime. But implicit in this statement of principle there lies the notion of the state's powers over aliens as essentially discretionary and, therefore, subject to control in the light of their intended function. 2.

In addition to considering the scope of Article 14 the Commission has dealt also with the problems of defining unlawful discrimination. In one case the applicant had been convicted and sentenced in the Federal Republic of Germany for homosexual activities. 3. He contended, inter alia, that repression of the crimes in question was a violation of the Convention not only in principle, in that it infringed the right to respect for family life guaranteed by Article 8,

1. Application 434/58: 2 Yearbook 354. See also Alam and Khan v. United Kingdom, Applications 2991/66, 2992/66: 10 Yearbook 478. For recent cases involving United Kingdom citizens from East Africa, see below pp. 295-299
2. See further on expulsion, below Ch. XI
3. Application 104/55: 1 Yearbook 228.
but also in its application, in that it was confined to
offences by men, thus contravening the principle of non-
discrimination as to sex which was protected by Article 8
in conjunction with Article 14. However, the Commission
found that,

"la Convention permet à une Haute Partie
Contractante d'ériger, dans sa législation,
l'homosexualité en infraction punissable,
le droit au respect de la vie privée et
familiale pouvant faire l'objet, dans une
société démocratique, d'une ingérence prévue
par la loi de cette Partie pour la protection
de la santé ou de la morale."

Although this finding is not elaborated, it is clear that
the "margin of appreciation" left to states was not exceeded
in this case.\footnote{On the "margin of appreciation" in expulsion cases, see
Application 3170/67 v. Belgium and United Kingdom; Application
3898/68 v. United Kingdom, below pp. 294-295}

In their consideration of states' discretion
to impose the restrictions anticipated by Article 8(2), the
Commission in effect balanced the interests of the individual
against the interests of public health and morality and
concluded that the discrimination was not unreasonable.

Different treatment was also upheld in the case of
Gudmundsson v. The Republic of Iceland in 1960.\footnote{Application 511/59: 3 Yearbook 394.}
The applicant complained of the differential treatment accorded
to co-operative societies and joint stock companies in the
matter of taxation. The Commission took the view that
different treatment was a common factor in taxation laws and
that there was, therefore, no sufficient basis for calling
in question the character of those laws as a legitimate
means of taxation. Additionally, the right to equal application
of the tax laws was not such a right as was guaranteed either by the Convention or the First Protocol.\(^1\)

Progress in the development of the concept of discrimination was made in the case of Grundrath v. The Federal Republic of Germany,\(^2\) which involved a possible violation of Article 14 in conjunction with either Article 4 or Article 9. The Commission adopted, by a majority of 8-5, the following significant interpretation of Article 14:\(^3\)

"The application of Article 14 does not depend upon a previous finding of the Commission that a violation of another Article ... already exists.... Consequently, if a restriction which is in itself permissible [under the Convention] is imposed in a discriminatory manner, there would be a violation of Article 14 in conjunction with the other Article concerned."

This progressive elaboration of the independent rôle of Article 14 and the principle of non-discrimination is of importance also to the general issue. In the context of movements across frontiers, for example, it suggests itself as an inherent qualification upon the right of states to exclude aliens. Thus it may be that the prospective entrant, while still retaining a precarious position, may nevertheless demand not to be excluded on any of the prohibited grounds alone, such as race or sex.

To date, the leading case to involve Article 14 is that relating to certain aspects of the laws on the use of

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1. 3 Yearbook 394, 424. The Applicant had relied in part on Article 1 of the First Protocol which declares that every natural and legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of them save in the public interest and subject to the conditions provided by law and by the general principles of international law. The Commission held that this latter requirement could not be invoked by an Applicant against the Contracting State of which he was a national.

2. Application 2299/64: 10 Yearbook 626.

3. Ibid., p. 678; see also at p. 680 for a description of discrimination which is unlawful.
languages in education in Belgium. The applicants in this case alleged violations of Articles 8 and 14 of the Convention and of Article 2 of the First Protocol. On the question of admissibility, the Commission described in detail its views on the application of Article 14 in relation to the rights and freedoms guaranteed by the Convention.

"... de l'avis de la Commission, l'applicabilité de l'article 14 ne se limite pas aux hypothèses où il y aurait violation concomitante d'un autre article. Une application aussi restreinte retirerait à l'article 14 toute utilité pratique. La discrimination aurait pour unique effet d'aggraver la violation d'une autre disposition de la Convention. Semblable interprétation serait d'ailleurs peu compatible avec le libellé de l'article 14: il y est dit que la jouissance des droits et libertés reconnus doit être assurée sans distinction aucune. Le texte impose donc aux États une obligation qui n'est pas simplement négative........ L'article 14 revêt une importance particulière par rapport aux clauses de la Convention qui, tout en consacrant un droit ou une liberté, laissent aux États un pouvoir discrétionnaire quant aux mesures à adopter en vue d'en assurer la jouissance...... Il se peut que des mesures différentes prises par un État envers différentes parties de son territoire ou de sa population n'entraînent aucun manquement à l'article de la Convention qui définit le droit considéré, mais que semblable différenciation comporte une violation si l'on apprécie la conduite de l'État sous l'angle de l'article 14. Il s'agirait alors de la violation non du seul article 14 mais du droit en question, tel qu'il est énoncé par l'article pertinent en combinaison avec l'article 14; l'individu au détriment duquel un État enfreint l'article 14 ne jouit pas, en fait, de pareil droit ou liberté selon les modalités ou le degré que prescrit la Convention, envisagée dans son ensemble."

1. On admissibility and the question of the reserved domain of domestic jurisdiction, see above, pp. 205-206

On the particular linguistic régime in issue, the Commission noted that distinctions might well be justifiable for administrative, financial or other reasons. It was not enough for the applicants merely to establish that discriminations were inherent in the scheme, or that inequalities and disadvantages might incidentally result. The principal question to be answered was whether such distinctions were imposed deliberately, in order to weaken or undermine the position of a particular community.

The Belgian Government had argued before the Commission that there could be no violation of Article 14 in the absence of a simultaneous violation of one or more of the rights protected. Before the Court, however, and in the light of the Commission's espousal of an independent rôle for Article 14, the Government's arguments were directed principally to the question of the scope of that Article. The Court in fact adopted the views of the Commission and, while accepting that the guarantee in Article 14 is not capable of a separate existence in so far as it relates solely to the rights and freedoms set forth in the Convention, concluded that a measure itself in conformity with a particular article might nevertheless infringe that article when read in conjunction with Article 14. In the present case, the applicants could not claim the right, under Article 2 of the Protocol, to obtain from the public authorities the creation of a special kind of educational establishment. Nevertheless,

2. Ibid., para. 425.
a State which had set up such an establishment could not, in laying down entrance requirements, introduce discriminatory measures within the meaning of Article 14.

In spite of the very general wording of the French version of Article 14 (sans distinction aucune), in the Court's view that Article did not forbid every difference in treatment in the exercise of the rights and freedoms guaranteed. Those words had to be read in the light of the more restrictive text of the English version. A wide interpretation would lead to absurd results and in order to avoid such a situation the Court set out and followed a number of principles. It held,¹.

"... that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference in treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim; Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."

In answer to the first question put to it, the Court further observed,².

"... Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on a fair balance between the protection of the interests

1. Judgement of the European Court of Human Rights, 23rd July 1968, p. 34.

2. Ibid., p. 44. Compare the principles suggested by Tanaka, above p. 169f.
"of the community and respect for the rights and freedoms safeguarded by the Convention."

On this point the Court found that the relevant legislation did not violate the rights of the individual, and that the measures taken were not so disproportionate to the requirements of the public interest which was being pursued. On the fifth point before it, however, the Court did find a violation of Article 14. The issue was whether legislation violated the Convention in so far as it prevented certain children, solely on the basis of their parent's residence, from attending French language schools at Louvain and various of the other communes enjoying a special status. As the residence condition affected only one of the two linguistic groups, the Court had to consider whether this amounted to unlawful discrimination contrary to Article 14, read in conjunction with either Article 2 of the Protocol or Article 8. It held that it was not justified in that in involved differential treatment founded even more on language than on residence. The measure was not applied uniformly to families speaking one or other of the national languages. Dutch speaking children resident in the French unilingual region, which was very near, had access to Dutch language schools in the communes, whereas French speaking children living in the Dutch unilingual region were refused access to the French language schools in those same communes.

Consequently, it appeared to the Court that the residence condition was not imposed in the interests of the schools, nor for administrative or financial reasons. In the case of the applicants, it proceeded solely from considerations relating to language. The enjoyment of the
right to education and of the right of access to existing schools was not secured to everyone without discrimination on the ground of language, and the measure did not fully respect, in the case of the majority of the applicants and their children, the relationship of proportionality between the means employed and the aim sought to be realised. It was thus incompatible with the first sentence of Article 2 of the Protocol, read in conjunction with Article 14.

The sixth question put to the Court was whether there was any violation in so far as certain legislation resulted in the absolute refusal to homologate certificates relating to secondary schooling not in conformity with the language requirements in education. The Court noted that in adopting the particular system, the legislature had pursued an objective concerned with the public interest. This interest favoured linguistic unity within the unilingual regions and the promotion among pupils of a knowledge in depth of the usual language of the region. This objective did not itself involve any element of discrimination, but as regards the relationship of proportionality, greater difficulties were encountered. The Court observed that the State treated unequally situations which were unequal, and that the exercise of the right to education was not thereby fettered in a discriminatory manner. However, the Court noted the possibility that the application of the legal provisions in issue might lead, in individual cases, to results which would put in question the existence of a reasonable relationship of proportionality to such an extent as to constitute discrimination.
It should now be apparent that discrimination is not synonymous with differential treatment, but that, as employed in international law, its meaning implies distinctions which are unfair, unjustifiable or arbitrary. From Tanaka's judgement in the South West Africa Cases and that of the European Court of Human Rights in the Belgian Linguistics case certain propositions emerge. Differential treatment is not unlawful if (1) the distinction is made in pursuit of a legitimate aim; (2) if the distinction does not lack an "objective justification"; and (3) providing that a reasonable relationship of proportionality exists between the means employed and the aims sought to be realised. Whether or not there is discrimination will thus depend upon a consideration of all the relevant circumstances, and these propositions will amplify and complement the definitions of discrimination most usually found in international instruments and local laws.

An example from municipal law may be usefully cited at this point. In the case of *Akar v. Attorney-General of Sierra Leone*, the Judicial Committee of the Privy Council


was faced with a constitutional amendment which purported to restrict citizenship to persons "of negro African descent."\textsuperscript{1} It was conceded in argument that the adoption of the word "negro" involved a description by race, and the question in issue was whether the amendment offended against the constitutional guarantees of fundamental rights and non-discrimination.\textsuperscript{2} The Constitution permitted exceptions to and restrictions on these rights which were reasonably justifiable in a democratic society. The Court, however, doubted whether the imposition of a disability on the ground that someone's father or paternal grandfather were not "negroes of African descent" was something which, having regard to its nature, was reasonably justifiable.\textsuperscript{3} The majority of the Court noted,\textsuperscript{4}

"to justify ... making discriminatory legislation not only must the disability be of itself of a nature that makes it reasonably justifiable but there must also be "special circumstances pertaining" to the persons subjected to the disability which make the legislation reasonably justifiable in a democratic society. .... If (the Constitution) provides that no law shall make any provision which treats some people differently from others merely because of differences in race it cannot be that such differences in race would alone constitute "special circumstances" pertaining to those being treated differently. The special circumstances would have to be additional to the differences of race (or of tribe or of place of origin or political opinions or colour or creed as the case may be) ..... The only circumstance which was to exclude those

\textsuperscript{1} [1970] A.C. 853.

\textsuperscript{2} Sections 11, 23(3), Constitution of Sierra Leone.


\textsuperscript{4} Ibid., pp. 865-866. Lord Guest dissented on the ground that an Act dealing with citizenship was, by that fact alone, reasonably justifiable in a democratic society: \textit{ibid.}, pp. 871-872.
"who ... had already become citizens was that they could not satisfy a description which was essentially a description by race."

The Court held that this new condition of citizenship, being an essentially racial one, offended against the letter and flouted the spirit of the Constitution. Although not precisely on all fours, comparison of this case with the earlier Privy Council decision in Pillai v. Mudanayake in 1953 shows the developments which have taken place in the concept of non-discrimination. In that case the Court had to consider the effect of the Citizenship Acts of Ceylon which barred a large number of Indian Tamils from becoming citizens because neither their fathers nor grandfathers were born there. These laws had to be interpreted in the light of the constitutional provision that no law should make persons of any community liable to disadvantages or restrictions to which persons of other communities are not made liable. The Court declared that,

"Standards of literacy, of property, of birth or of residence are ... standards which a legislature may think it right to adopt in legislation on citizenship, and it is clear that such standards, though they may operate to exclude the illiterate, the poor and the immigrant to a greater degree than they exclude other people, do not create disabilities in a community as such, since the community is not bound together by its illiteracy, its poverty or its migratory character, but by its race or religion .... The migratory habits of the Indian Tamils ... are facts which ... are directly relevant to the question of their suitability


"as citizens of Ceylon and have nothing to do with them as a community."

Considered by the standards of today, it is clear that this judgement ignores what may be called the "pith and substance" of the legislation in question. The distinctions which were invoked and justified by the Court are, without doubt, included within the contemporary meaning of unlawful discrimination.¹

Modern covenants and conventions tend to propose three distinct elements as incidents of such discrimination. There must be (1) a distinction, exclusion, restriction or preference, which is (2) based on one or more of the specified grounds, such as race, colour or religion, and which (3) has the purpose or effect of nullifying or impairing the enjoyment or exercise on an equal footing of the rights and freedoms which are guaranteed.² Despite the general wording of recent conventions, it may be that discrimination on the basis of nationality alone is still permissible, at least within certain limits.³ For example, the state's duty to admit is most usually confined to nationals and it is widely accepted that aliens may be barred from

¹. For eventual agreement between India and Ceylon regarding the status of the Indian Tamils, see ⁴ Indian Journal of International Law (1964), pp. 522-526, 637-640.

². See Draft Convention on the Elimination of All Forms of Religious Intolerance 1967, Article I(b); International Convention on the Elimination of All Forms of Racial Discrimination 1966, Article I(1); I.L.O. Discrimination (Employment and Occupation) Convention 1958, Article I(1)(a); Fawcett, op. cit., pp. 238-244.

the exercise of political rights, the ownership of certain property and the holding of public office. State practice recognises such discriminations in the local law as permissible, although there is a marked tendency for states to accord each other's nationals greater equality through the medium of treaty stipulations. The disadvantages of alienage were significantly reduced through the development of most-favoured-nation and national treatment in the commercial treaties of the seventeenth century onwards, and it is in the notion of equality inherent in these standards that one finds some of the beginnings of the norm of non-discrimination. But even in the absence of treaty it was considered that certain measures which discriminated against foreigners alone were unacceptable. In matters of taxation, for example, the view generally held was that the alien was liable "in the manner and to the same extent as the native subjects".


2. For example, no alien may own a British ship: Status of Aliens Act 1914, section 17; nor may he generally take Crown employment: Aliens Employment Act 1955.

3. See Mrs. Stevenson's case (landholding), 6 B.D.I.L., 327-328; Grant's case (exercise of certain trades), ibid., pp. 328-329; Mrs. Thompson's case (establishment of schools), ibid., p. 329.


5. 6 B.D.I.L., 405, 406, 408; case involving the Treaty with Colombia of 1825, ibid., p. 333.
Clearly, this rule follows from the general principle that the alien is subject to the laws of the state in whose territory he is resident, but exception was taken in one case involving the Colombian transit tax on mail which, it was said, was "framed in a spirit of direct hostility to British interests" and exempted other foreign states.¹

Equality of treatment could, of course, be disadvantageous and it tended on occasion to prejudice the alien to the same degree as the national.² Thus equality came to be tempered by the further requirement of treatment in accord with a minimum standard, at least in respect of the most basic rights. To be sure, the foreigner who ventured abroad submitted himself to the local law³ but, as Phillimore observed,⁴:

"Foreigners, whom a State has once admitted unconditionally into its territories, are entitled not only to freedom from injury, but to the execution of justice in respect of their transactions with the subjects of that State. No State has a right to set, as it were, a snare for foreigners..."


³. 6 B.D.IL., 278ff.

Access to the courts was most frequently accorded by treaty, but there was an underlying assumption that the justice dispensed would itself meet certain standards, that "all law ... must be administered towards foreigners with reasonable justice". The rights to life, to liberty, to security of the person and property, exist independently of the status of the individual, be he alien or national. There could be no objective justification for the denial of such rights to the alien qua alien. This view is further supported by the provisions of the International Covenant on Civil and Political Rights, 1966. The rights are guaranteed without distinction to all individuals within the territory of a Contracting State and subject to its jurisdiction. Article 4 provides for a right of derogation in time of public emergency which itself would probably justify distinctions


3. Cf. Barcelona Traction Case, I.C.J. Rep., 1970, at p. 32. Some reservation may today be entered on the point of property - see for example, the International Covenant on Economic, Social and Cultural Rights 1966, Article 2(3); Jennings, 121 Hague Recueil (1967 - I), at p. 505. If alien property is included within nationalisation measures while national property is excluded, then this may be a discrimination which is prohibited by international law; see White, The Nationalisation of Foreign Property (1961), ch. 6; Anglo-Iranian Oil Case, I.C.J., Pleadings, pp. 93-97. See also per Altamira, dissenting, Oscar Chinn Case, P.C.I.J. (1934) Ser. A/B, No. 63, at pp. 101-102; and note in particular the findings of the Commission in Gudmundsson v. Iceland: 3 Yearbook 394 and above, pp. 175-176.

4. Article 2(1). The exercise of political rights is expressly confined to citizens by Article 25.
between nationals and aliens; it is to be noted that the
anti-discrimination provision in the first paragraph is narrower
than the general provision in Article 2(1), and that it does not
include "property, birth or other status" within the prohibited
grounds. However, it is expressly stated that there must be
no derogation from those rights and freedoms which guarantee
life, which prohibit torture and slavery, which secure
the recognition of everyone as a person before the law, which
forbid retroactive legislation, etc.¹. In addition, the
exercise of the exceptional right of derogation is subject to
the overriding principle which requires that it should not
be used to effect discrimination solely on the ground of race,
colour, sex, religion, language or social origin.².

States' liberties in their dealings with aliens are thus
subject to distinct limitations by virtue of the principle of
non-discrimination, and these will be seen to be incorporated, at
least in part, in the provisions of municipal law. In racial
matters non-discrimination has a normative character and may be
adjudged a part of jus cogens. In the Barcelona Traction case
the International Court of Justice included the prohibition on
racial discrimination, as also the principles and rules concerning
the basic rights of the human person, within that class of
obligations which a state owes to the international community as
a whole.³. In other matters involving distinctions against

¹. Article 4(2); Oppenheim, International Law, (8th. ed., 1955),

². Article 4(1).

an approach to the problem of whether a conventional rule has
established itself as a rule of customary or general international
law, see North Sea Continental Shelf Cases, I.C.J. Rep. 1969, p. 3
at pp. 28-43, and above, pp. 160-162.
aliens in regard to property, to access to the courts, to entry, exclusion and expulsion, the question is whether there is now a sufficient body of standards by which to determine whether the state's exercise of discretion is justifiable, or whether it amounts to unlawful discrimination. Distinctions in these areas purportedly based on alienage or on the competence to deal with aliens at will, but which are in reality founded on racial grounds, are clearly barred. But even in other matters, alienage as the sole basis for distinctions must remain questionable, and it has been the object of both treaties and international practice to prevent injurious discriminations against aliens. In a recent American case, the District Court of Arizona struck down a fifteen year residency requirement for aliens as a condition of eligibility for general welfare assistance. Such a condition was held to amount to a denial of equal protection and, in the court's view, alienage was an inherently suspect basis of classification.

Such a view, however, finds only minimal acceptance in either municipal law or state practice. Further amelioration of the position of the alien will, most probably, be accomplished through the medium of bi- and multilateral treaties.

Over and above the basic human rights, such treaties seek to assure, for example, national treatment or equality of opportunity or treatment in employment,\(^1\) equal rights to trade union membership,\(^2\) and to the benefits of social security.\(^3\) Article 7 of the EEC Treaty declares that within the scope of application of the Treaty, and without prejudice to special provisions, "any discrimination on the grounds of nationality shall be prohibited". Advocate General Lagrange submitted before the European Court of Justice that "non-discrimination ... reaches beyond the limits of the establishment of a Common Market",\(^4\) but, as will be seen, even within the particular régime the EEC national may still find himself distinguishable by reason of his personal citizenship. Member States continue to retain certain powers of exclusion and deportation, although their discretion is further limited by the provisions of Community law.

On the general issue of equality in international law, it is necessary in each case to discover whether alienage is, in the circumstances, a "relevant difference" which justifies differential treatment. The principle of non-discrimination expressly rules out certain distinctions and

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requires a presumption of equality. The burden of proof lies on the party seeking to invoke exceptions to show objective justification and proportionality.¹ Basic human rights are established in favour of the individual qua individual,² and in later chapters it will be seen how the principle of non-discrimination and the standards which flow from it operate to control the discretion which states may have generally in their treatment of aliens.

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1. See above, pp. 180-181; Brownlie, op. cit., p. 579

CHAPTER VI

The Reserved Domain of Domestic Jurisdiction

Questions of immigration, of the entry and expulsion of aliens fall easily within traditional conceptions of domestic jurisdiction. It is still largely accepted that the decision on whether an alien shall be permitted to remain within a state is a matter for that state alone to decide, "in the plenitude of its sovereignty".¹ In the same way, it was for long argued that the only rule of international law concerning nationality was that the determination of nationality had nothing to do with international law. Nevertheless, in that statement itself there is an implied reference to international law, and today it is accepted that there are certain restrictions upon states' exercise of discretion, or freedom of decision,² in the field of nationality. Thus, in the Advisory Opinion in the Tunis and Morocco Nationality Decrees case, the Permanent Court of International Justice observed:³

"... it may well happen that, in a matter which, like that of nationality, is not, in principle,  


"regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law."

The Court also described the delimitation of jurisdiction as "an essentially relative question, dependent upon the development of international relations". Perhaps the most important point to emerge here, however, is the reference to states' powers which are discretionary. It will be argued later that this notion is particularly significant, as indicating both the nature of a given power, and the limits within which it may be confined by international law.

Clearly, where seemingly unilateral acts are opposed to other states, and to the rights of other states, then the matter comes once again within the realm of international law. In a comment upon the Norwegian Fisheries case, Brownlie notes that,

"though it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the delimitation with regard to other States is dependent upon international law."

Similarly, in asserting that the principle of effective nationality is a general principle of international law, and as such is a limitation upon the discretion of states, the International Court of Justice has declared that:

"a State cannot claim that the rules it has ..."

1. Brownlie calls attention to the tautology which describes matters within the competence of states under general international law as being with the reserved domain of domestic jurisdiction; Principles of Public International Law, (2nd ed., 1973), pp. 284–5
"laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."

The limitations on the local competence in both nationality and delimitation of the territorial sea derive essentially from the fact that both institutions are opposable to third states. The question is whether there can now be said to exist any matters within the scope of the present inquiry which, although not obviously involving international obligations, nevertheless are not solely within the reserved domain of domestic jurisdiction. It will be seen later that, like the examples of state competence already considered, the refusal of entry to, or expulsion of, an alien may touch upon the rights of other states. Actions within these areas take place in what may loosely be described as the international sphere. In order to avoid international responsibility, therefore, exclusion and expulsion must be validly opposable either to the alien's national state or, on occasion, to another body or subject of international law having a recognised interest in the protection of the alien's rights.¹

A distinction may usefully be maintained between, on the one hand, internal competence and the "domestic" exercise of state power and, on the other hand, the question of enforcement on the international plane, with the possible consequence of liability for an ultra vires exercise of power.² The "list"

¹. The latter case provides for liability in respect of a state's actions against refugees, stateless persons, and even its own nationals. See below, pp. 376-380

approach to topics within the reserved domain is not very satisfactory.\(^1\). It may be that the entry and expulsion of aliens is *prima facie* within that area,\(^2\) but it will be argued subsequently that international law frequently limits states' discretion in such matters by way of international obligations generally and treaty stipulations in particular. Under general international law states retain, on the whole, a wide discretion in immigration matters, and they enjoy a significant margin of appreciation. However, because these matters cannot be entirely separated from a wealth of other issues including, for example, nationality and fundamental human rights, it is necessary to consider briefly the present status of the doctrine of the reserved domain.

The reservation in regard to matters within domestic jurisdiction is of importance principally in two spheres, the political and the legal. In the political sphere, it operates as a bar to "intervention" by the organs of international organisations, such as the United Nations. In the legal sphere its effect is similarly to prevent adjudication of certain disputes by international tribunals.

The Charter of the United Nations declares that the Organisation is based upon the principle of the "sovereign equality" of its Members,\(^3\) and that nothing in the Charter

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2. Brownlie notes that if a matter is *prima facie* within the reserved domain because of its nature, then certain presumptions against any restrictions on that domain may be created: *op. cit.*, p. 286.

3. Article 2(1).
shall authorise,¹

"the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

Reference in Article 2(1) to the sovereign equality of states is of a more exhortatory than definitive nature, an affirmative description of statehood and of the independence of Member States. Alternatively, it may simply reaffirm the competence and "discretionary power of States within areas delimited by law".² Sovereignty is frequently used to describe a relationship between rulers and ruled, and it is a little curious to find the word linked with "equality". However, it has been well argued that sovereignty, as so described, is not to be taken,³

"to imply that there is something inherent in the nature of states that makes it impossible for them to be subject to law ... But to the extent that it reminds us that the subjection of states to law is an aim as yet only very imperfectly realised, and one which presents the most formidable difficulties, it is a doctrine which we cannot afford to ignore."


It is practically impossible to define sovereignty in isolation from any particular context, and in Article 2(1) it serves to emphasise the political aspect of the independence and equal status of Members of the United Nations. When linked with the principle of the reserved domain of domestic jurisdiction, however, it tends to become a barrier against the assumption of international obligations.  

It is Article 2(7) which is the more active source of controversy. One apparent reason for its formulation was that as a result of the enlargement of the functions of the United Nations through the Economic and Social Council and in other ways, it was thought necessary to safeguard the independence of Members by prohibiting, as a general principle, any intervention by United Nations organs in the internal affairs of states.  

On its face the provision goes to the constitutional competence of United Nations organs and makes no specific reference to the criterion of international law. Lauterpacht argues, however, that the result of Article 2(7) is not to nullify the legal purpose of the Charter provisions in the matter, particularly, of human rights and fundamental freedoms. He supports this view with an elaborate interpretation of the word "intervention", and of the intended use of the various actions and measures which fall short of intervention.  

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jurisdiction of a state do not comprise matters which have
become a subject of international obligations or which have
become matters of "international concern" by virtue of
constituting an actual or potential threat to international
peace or security. Inasmuch as the observance of fundamental
human rights and freedoms is a basic legal obligation imposed
on members of the United Nations, they are, therefore,
outside the reservation of Article 2(7). Consequently, this
Article does not preclude, on the part of the organs of the
United Nations, acts of implementation, such as investigation,
study, report and recommendation, which do not amount to
"intervention in the accepted legal connotation". Lauterpacht
further affirms that in regard to the determination of matters
essentially within the domestic jurisdiction of a state, the
position is the same as in the case of any other disputed
interpretation of the Charter, namely, that the power of
interpretation belongs to the organ concerned, that is, to the
General Assembly or the Economic and Social Council.

Although Article 2(7) refers neither to any criterion
of international law, nor to the competence of the International
Court of Justice, this does not mean that the issue is entirely
divorced from legal criteria. As Waldock has noted:

"... jurisdiction, whether it be of a political
organ or a legal tribunal, is a legal concept and
must by its very nature be a matter of law."

1. Cf. Higgins, The Development of International Law through the
Political Organs of the United Nations, (1963), pp. 77-81;
Brownlie, op. cit., p. 288.
2. On an interpretation of Articles 55 and 56; see below, 201-203
This writer does not, however, agree entirely with Lauterpacht, especially as regards the latter's elaboration of measures falling short of intervention. In Waldock's opinion, it is not possible to regard any recommendation addressed by an organ of the United Nations to an individual state with respect to its conduct in a specific matter as anything other than an intervention in that state's affairs. In his view, 1.

"the fundamental question logically is not so much the meaning of the word 'intervention' as the extent to which, having regard to the Nationality Decrees case, the Charter still leaves economic and social matters within the domestic jurisdiction of Member States. To the extent that economic and social matters are made matters of United Nations concern by Articles 55 and 56, the various powers of discussion, study and recommendation conferred upon the designated organs of the United Nations by the Charter are automatically exercisable with respect to these matters."

He does agree that Lauterpacht was most likely correct in thinking that the key to Article 2(7) is the attempt by states to limit the actions of the Organisation.

On the practical side, the General Assembly, while refraining from committing itself to any formal interpretation of Article 2(7) as a limit to its own jurisdiction, has nevertheless dealt with specific matters concerned with economic, social or colonial affairs, and it does not appear to admit the Article to be any obstacle to its doing so. 2. Waldock concludes that the essential effect of Article 2(7) is twofold: 3.

"first, to preclude any intervention by the United Nations in a State's affairs except

with reference to the State's international obligations either under the Charter or otherwise; and, secondly, even where international obligations of the State are involved, to preclude the United Nations from penetrating, without the State's consent, behind its authority over its own territory, nationals, ships and aircraft, except only in cases of enforcement action for the maintenance or restoration of peace."

It is not at all clear how far the qualified limitation on United Nations competence contained in the second limb of this conclusion should be taken. There is room today for the view that there are certain obligations which states owe towards the international community as a whole. While an adequate theory of international responsibility in these areas remains to be defined, the International Court of Justice has cited particularly the obligations which derive from the outlawing of acts of aggression, of genocide, as also the principles and rules concerning fundamental human rights. However they are rationalised, it is apparent that such matters may go well beyond a state's prima facie exclusive authority over its territory, nationals, ships and aircraft. It may be that the quality of permissible United Nations action is nevertheless diluted by the continuing reservation in Article 2(7).

Waldock does emphasise the idea of human rights as "matters of international concern". At one point he states,

4. Cf. Higgins, op. cit., pp. 77-81. This writer also points out that certain issues, principally those concerning the right of self-determination and the principle of non-discrimination, are regarded by the General Assembly as of "international concern": ibid., pp. 90-104; see also Brownlie, op. cit., p. 288.
for example, that,¹

"the Charter provisions [on human rights], being treaty provisions, undoubtedly make the treatment by Member States of individuals, whether nationals or aliens, within their jurisdiction a matter of United Nations concern; but they do so only to the extent of the obligations which they contain and the jurisdiction which they confer upon the United Nations."

If this is so, then, within the limits which Waldock proposes, discussion, vote and the adoption of resolutions, etc., must be considered as legitimate outlets for the expression of United Nations concern.²

An example of the way in which the General Assembly works in matters which may appear to be strictly within the domestic jurisdiction of states is provided by its dealing with the question of the observance of human rights in the U.S.S.R. A charge was brought by Chile that the U.S.S.R. had taken administrative measures to prevent the Soviet wives of foreign nationals from leaving the U.S.S.R. It was contended, inter alia, that when these measures affected the wives of members of foreign diplomatic missions, they violated diplomatic practices which were a part of general international law. Hence, the U.S.S.R. could not claim that the measures fell essentially within its domestic jurisdiction. The General Assembly invoked Articles 13 and 16 of the Universal Declaration of Human Rights and in the resolution adopted, it overrode the objections of the U.S.S.R. which were based on Article 2(7) of the Charter.³ It confirmed that the measures relating to the wives of foreign

2. This view is supported in part by Higgins, op. cit., pp. 61, 62
diplomats were contrary to diplomatic practices, that they were not in conformity with the Charter and that they were likely to impair friendly relations among nations.

The notion of issues which are of "international concern", together with the burgeoning concept of international obligation, must lead to some rethinking on the scope and content of domestic jurisdiction, particularly as regards the general issue of human rights. Indeed, Higgins goes so far as to assert:

"the claim ... that human rights questions cannot be essentially within the domestic jurisdiction ... seems justified, for Articles 55 and 56 impose specific obligations by which all states are bound, Article 2(7) notwithstanding."

However, she is careful to point out that the majority of Member States do not hold the view that Article 2(7) is entirely meaningless. In her view, any limitation of that provision must be within the bounds of a reasonable interpretation, although she argues that the specific clauses on human rights do fall within such reasonable interpretation.

2. Op. cit., p. 128, emphasis supplied. But note the objections raised by the United Kingdom before the Commission on Human Rights to the proposed draft of the International Convention on the Elimination of All Forms of Racial Discrimination. The first paragraph of the Preamble would have referred to the obligations imposed on all Members by the U.N. Charter in respect of human rights. The United Kingdom objected that the Charter did not, in fact, impose any such obligations: U.N. Docs. /ECN.4/SR. 775, 779. The first paragraph to the Preamble now paraphrases Articles 55 and 56 and makes no reference to obligations.
3. O'Connell takes the view that the prohibition on intervention in Article 2(7) has been emasculated as a result of the administrative measures taken by the organisation, which have had the effect of inducing Member States to conform to U.N. policies to which they are not, in strict law, required to conform: International Law, p. 308 et seq.
The idea that the reserved domain of domestic jurisdiction is open to constant scrutiny and restriction is inherent in its nature as a concept, principally, of international law. In the Covenant of the League of Nations one finds that the claim based on domestic jurisdiction was to be tested by the criterion of international law, and not by political criteria.\(^1\) The proviso in the Covenant did not, unlike that of the Charter of the United Nations, expressly exempt Members from the obligation to submit to the League disputes arising from matters which a party considered to be within its domestic jurisdiction.\(^2\) But whether or not the present scope of Article 2(?) is identical with the rule established in general international law, it is clear that it may be restricted in practice, not only as a consequence of treaty obligations, but also as a result of the interpretations given to it by the organs of the United Nations, and by the progressive development of customary international law.\(^3\)

\(^1\) Article 15(8): "If a dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which, by international law, is solely within the jurisdiction of that party, the Council shall so report and shall make no recommendations as to its settlement."


An example of the practical restriction of the sphere of domestic jurisdiction is to be found in a case which arose under the European Convention on Human Rights.\(^1\). In its Second Memorial in preliminary proceedings to the [Belgian Linguistics](https://example.com) case, the Commission argued that the domain reserved to national jurisdiction depends upon each state's international commitments. It is neither absolute nor invariable, but is a relative notion which varies with the development of international law and the extent of obligations imposed and undertaken.\(^2\). In support of its argument the Commission referred both to the [Nationality Decrees](https://example.com) case\(^3\) and to Resolutions adopted in 1954 by the Institute of International Law.\(^4\). It concluded its argument as follows:\(^5\).

"If States are ... authorised by the Convention and Protocol to restrict the exercise of the rights and freedoms guaranteed where national security, the maintenance of order and the economic and fiscal spheres are affected, it seems

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4. Annuaire de l'Inst. de droit inter., vol. 45, II, pp. 292, 293: "Article I: The reserved domain is the domain of state activities where the jurisdiction of the state is not bound by international law. The extent of this domain depends on international law and varies according to its development. Article 3: The contracting of an international obligation in a matter within the reserved domain debars a party to that obligation from invoking the objection of the reserved domain with regard to any problem of interpretation or application of the obligation in question."

"reasonable to conclude that no field of governmental activity lies a priori outside the scope of the Convention, thus constituting a domain reserved to States."

The Commission also pointed out that the Belgian Government had not exercised the option open to it of making express reservations under Article 64 of the Convention.

For its part, the Belgian Government argued that the complaints referred to the Court were not covered by the Convention and the Protocol, but formed part of the reserved domain of the Belgian legal order. However, in its judgement on this preliminary objection in 1967, the European Court of Human Rights unanimously rejected any possibility of resort to the notion of the reserved domain. It declared:

"... the Convention and Protocol which relate to matters normally falling within the domestic legal order of the Contracting States, are international instruments whose main purpose is to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction ... the jurisdiction of the Court extends to all cases concerning the interpretation and application of those instruments ... [and]... the Court cannot in the circumstances regard the plea based upon the notion of reserved domain as possessing the character of a preliminary objection of incompetence."

Apart from cases of interstate treaties, where nations agree to surrender "sovereign rights" in terms, it will always be difficult to establish legal principles applicable to the reserved domain. The example of the European Convention shows

1. Acts of the Court, No. 5, Summary at p. 16.
that the most significant developments are likely to result from regional arrangements, where states can be persuaded to limit the exercise of their rights in detail, by reference to the aims and purposes of a given treaty, and to submit themselves to the jurisdiction of an international tribunal. On the other hand, it will be seen that, in the context of the movement of aliens, the notion of absolute territorial sovereignty has been transformed as a result of the recent elaboration of general standards of treatment.
INTRODUCTION

This section presents a discussion of some of the most fundamental issues arising from the movement of persons across frontiers. Chapter VII examines briefly the claim by states to absolute power over the entry and exclusion of aliens, but it concludes with the suggestion that there may yet be areas in which the exercise of discretion is controlled. However, because of the continuing insistence by states that matters of immigration remain essentially within the reserved domain of domestic jurisdiction, Chapters VIII and IX present a detailed examination of the practices and procedures of two selected municipal systems. The treatment may seem at times to be weighted overmuch in favour of local laws, but nevertheless it is felt that such an examination is justified on the ground that, in their internal affairs, states will frequently reflect and develop the standards of international law. In such circumstances, the provisions of municipal law may be employed to support an opinio juris. In regard to the particular systems under discussion, it is shown that there is a noticeable compliance with certain procedural requirements, such as the right to a hearing, the right to be excluded only after a decision taken in accordance with law, and also with the substantive requirement of non-discrimination. On the latter point, some reservations are entered in respect of aspects of United Kingdom law.

Finally, Chapter X considers the nature of international obligations to admit both aliens and nationals. These are seen to derive principally from treaty, and examples are employed to demonstrate the positive effect which treaty stipulations have in confining the discretion of states parties, both directly, in the form of agreements to permit entry, and indirectly, by protecting human rights.
PART III

THE ENTRY AND EXCLUSION OF ALIENS
CHAPTER VII

The Foundations of Control over the Entry of Aliens

It is in policies of admission and exclusion that one sees clearly the discriminations practised by states in the choice of those whom it will admit. Where those who seek entry desire to settle permanently, then it is not uncommon for the host state to weight the balance more favourably for those who, as near as can be, reflect the ethnic and cultural origins of the indigenous population. Until 1965, for example, the United States pursued what was known as the "national origins" quota system. An overall numerical maximum of immigrants was set and that figure was broken down into percentages corresponding to the racial geography of the country. It naturally operated to secure the position of the principally North European majority and to preserve the minority status of many South European and Asian groups.

Homogeneity can be maintained in other ways as well. For many years Australia adhered to the so-called "white Australia" policy. When colour alone as a bar to eligibility for permanent immigration was abandoned, the policy was continued in practice by confining the benefits of assisted passage to those of European origin. The Race Relations Board challenged the validity of this policy under United Kingdom anti-discrimination laws in 1970. The Government of Australia replied
that the question of who was to receive assisted passage was a matter for that Government alone to determine, and that it would be "an infringement of Australia's rights as a sovereign State if its immigration authorities overseas were subject to the application of the laws of other countries".¹

States are commonly unable or unwilling to treat permanent immigration in other than a racial context. Stringent controls will often be justified in the name of national identity and self-preservation. In defence of the national origins system, Senator McCarran declared in 1952:²

"Assimilation is the key to a sound immigration system."

But the practice of racial discrimination in matters of immigration is not always overt. The provisions of the law of the United Kingdom do not specify colour as a ground of exclusion, but, in effect, sanction discrimination in reverse by granting special privileges to those "connected" with the United Kingdom. This benefits the citizens of the "white Commonwealth" countries to the detriment of large numbers of the coloured citizens of the United Kingdom. The general tendency in recent years, however, has been to abandon racial grounds as the principal bases for immigration control. In 1965 the United States replaced the former system of population-related quotas with overall numerical limits.³


3. 170,000 immigrant visas for the natives of independent countries of the Eastern Hemisphere; 120,000 for natives of Western Hemisphere countries: 8 U.S.C. s.1152, in force in 1968.
However, prospective immigrants from Eastern Hemisphere countries must still qualify under certain preferences in order to gain admission to the United States. Each of these preferences is restricted to a certain percentage of the maximum and, for example, while ten per cent. is reserved for skilled or unskilled workers, seventy-four per cent. of available preferences is reserved in favour of relatives either of citizens or of aliens admitted for permanent settlement. In this way the existing balance of population is maintained, although not so blatantly as before.

The new Australian immigration policy has officially dropped colour as a relevant factor. Under the new scheme first preference is given to applicants with close relatives in Australia; second preference to those with sponsors; and third preference to persons with desired skills. The Australian system has borrowed and adapted that of individual assessment first elaborated in Canada. Prospective immigrants are graded according to such matters as family unity, personal hygiene, speech, initiative, self-reliance and independence. The special privileges previously applicable to United Kingdom citizens have been removed and the one scheme applies to all. The Canadian system is based on points. Out of a maximum of one hundred, the applicant may be awarded up to ten for fluency in the English and French languages, up to fifteen for adaptability, motivation, resourcefulness, etc. An

1. 8 U.S.C. s.1153.

independent applicant must obtain at least fifty points in order to qualify for entry, and to be assessed as likely to establish himself successfully in Canada.¹

The immigration laws of the United States, Canada, Australia and the United Kingdom all contain discriminatory provisions. The question in each case is whether that discrimination can be justified on any reasonable grounds. The first three of these states are still primarily countries of immigration; the United Kingdom is not. Some attempt to rationalise the immigration policy of the United Kingdom was made recently by the Home Secretary, Mr. Carr, who based the Government's policy on three declared principles:²

"The first principle is the recognition that Britain is an overcrowded island with a labour force which, for the moment at least, appears ample for her needs, and, therefore, that there must be restriction of all permanent immigration to ... the "inescapable minimum" ... The second principle is to recognise, within this overall need, a continuing responsibility to those in various parts of the world who remain entitled to United Kingdom citizenship. Hence the decision to reserve for these people as large a proportion as possible of the limited numbers we are able to admit year by year, and to do so in a controlled and orderly way. The third principle is the recognition that it is both right and natural to give easy access to Britain to all those with close and recent ties with this country, provided they create no significant pressure for permanent settlement."

It is out of the conflict of the second and third principles that there have arisen the racially objectionable provisions of the current law. The state's obligations to its own

¹ Entry privileges attach to those with relatives already in Canada, and to those who are sponsored by people in Canada. In addition, the applicant may readily obtain a credit of twenty-five points if he intends to establish a business and has sufficient financial resources.

² 851 H.C. Deb., col. 598.
citizens have been compromised in the dubious concept of patriality. Non-patrial citizens are clearly second-class, and this is reflected in fact and in law. The distinction drawn operates in fact as a racial one, and may be contrary not only to the particular provisions of the European Convention on Human Rights but also to the compelling principle of non-discrimination examined above.¹.

The discriminations practised in immigration control by Australia, Canada and the United States are a different kind. First, each of those states gives substantial preferences to those related to or sponsored by people already established within national boundaries. Secondly, and this is especially apparent in the Canadian and Australian systems, significant advantages are granted to those who speak the local language and who, culturally, are most likely to settle down. Thirdly, each state looks most favourably upon those immigrants who will be of most value to itself, either in terms of special skill or other achievement.². Although not openly based on race, in its way each of these preferred categories is discriminatory. The first classification ensures that a high proportion of future immigrants will reflect the established population. The second classification likewise ensures the reception of those most easily assimilable; and the third indirectly encourages immigration from those more highly developed countries where applicants will have had an opportunity to acquire the necessary skills.

¹. At pp. 165-192. See further below, pp. 296-299

For the moment these discriminations will be justified on the ground that they are broadly based and that a man is not excluded by reason of his colour alone. It may be just and reasonable also to treat relatives differently to independent applicants, and it might be argued with some force that this amounts merely to the effective recognition of legitimate interests. To such an extent, discriminatory provisions may escape characterisation as unfair, improper or arbitrary, while those present in the law of the United Kingdom would not.

It is apparent that the encouragement of immigration is not a purely altruistic activity: the state is looking to its own interests, and to that end will find more acceptable the economically, socially and culturally tractable. For these reasons, and by additional reference to its "inalienable rights", the state will continue to claim a very wide margin of discretion in regard to control over entry. It will seek to leave itself free to decide upon the grounds of exclusion, both for immigrants and non-immigrants, to decide whether these shall relate to personal qualities such as criminal record or physical or mental disability, or to more general grounds such as race, religion and colour. In 1932, Verdross observed: 1.

"Les questions d'immigration ne sont pas du tout laissées à la compétence arbitraire d'un État seul, car le droit international limite sa compétence en la matière, en vue du bien commun de l'humanité."

1. Verdross, Les règles internationales concernant le traitement des étrangers, (1932), p. 25. Cf. President Roosevelt (1906): "Whether they are Catholic or Protestant, Jew or Gentile; whether they come from England or Germany, Russia, Japan or Italy, matters nothing. All we have a right to question is a man's conduct." Cited in Konvitz, op. cit., p. 20.
However, except in those areas in which treaties or peremptory norms, such as that on non-discrimination, operate, it is not easy to bring matters of entry and exclusion within the bounds of international law. The preponderant view remains that these are matters essentially within the reserved domain of domestic jurisdiction, although in the past there was some consensus as to the existence of a general duty to admit aliens. Thus, Vittoria noted:

"[It] was permissible, from the beginnings of the world (where everything was in common) for anyone to set forth and travel wheresoever he would."

In his view, therefore, the Spaniards might lawfully carry on trade with foreign nations, provided that they did no harm. Grotius accepted that the right to engage in commerce pertains equally to all peoples, and that temporary sojourn should be accorded to all those who pass through a country, and permanent sojourn to the exile. Wolff, however, proposed certain limits to the freedom of movement. Thus, while the exile might request admittance, he had no right in the matter and entry could be refused for good reasons, where,

"there is fear lest the morals of the subjects may be corrupted, or lest prejudice may be aroused against religion, or even lest criminals be admitted because of whom injury threatens the state, and other things which are detrimental to public welfare .... [Moreover], since nations are free, the decision in these matters must be left to the nations themselves and that decision must be respected."

1. De Indis, III, 1.
3. De jure belli ac pacis, II, 2, XV, XVI.
Vattel was of the same view, that entry could be denied in the case of danger to the nation: 1.

"it belongs to the nation to judge whether her circumstances will or will not justify the admission of [the] foreigner."

The sovereign was free to forbid the entrance of foreigners in general or in particular cases, 2. and to impose conditions upon the grant of permission to enter. 3. Despite these concessions to practical reality, the presumption was in favour of admission which might be restricted only by reference to particular and important reasons. 4.

It was Vattel who proved to be the inspiration behind the decisions in two important exclusion cases in the late nineteenth century. In Musgrove v. Chun Teeong Toy the Privy Council upheld the validity of a statute designed to exclude the Chinese from the state of Victoria. 5. On the question, whether an alien had any right to enter British territory, it was noted: 6.

"No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native, but it is quite another thing to assert that an alien excluded from any part of Her

2. Ibid., II. 7. 94.
3. Ibid., II. 8. 100; the right to impose conditions ought to be exercised "with regard to the duties of humanity".
4. Ibid., II. 10. 135; "A difference in religion is not a sufficient reason to exclude him, provided he does not engage in controversial disputes with a view to disseminate his tenets." See also, Blackstone, I Comm., 261.
6. Ibid., at p. 282.
"Majesty's dominions by the executive government there, can maintain an action in a British court."

In a United States decision on similar facts, it was stated: 1.

"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

The twentieth century has been witness to substantial developments in immigration law and control. States have pressed on, assuming the right of exclusion to be "inherent in their sovereign powers", although the exercise of this right is necessarily tempered by the exigencies of modern intercourse.

An alien on the threshold of initial entry has, effectively, no definable right: he awaits the discretionary grant of the privilege of entry and an arbitrary or unjust exclusion would give rise rather to a political, than to a legal, pecuniary claim, unless in violation of local law.

In the Nottebohm Case Judge Read stated as part of his dissenting opinion: 2.

"When an alien comes to the frontier, seeking admission ... the state has an unfettered right to refuse admission....."


"A general right of entry is too abstract to permit a tribunal to say that a specific individual has been wrongfully excluded. The appreciation of him as a security or racial or moral contamination risk is essentially subjective, and it is difficult to conceive of an occasion when one could with confidence say

1. Nishimura Ekiu v. United States 142 U.S. 651, 659 (1892), per Gray J. See also, Hackworth, Digest, III, 549-552, 690-707, 717ff.
2. I.C.J. Rep. 1955, p. 4, at p. 46. See further below, pp. 353ff
"that the faculty of appreciation has been misused."

However, for present purposes, the reference to the "faculty of appreciation" may perhaps be taken out of context, elaborated and used to show the existence of boundaries to the discretionary power. It will be seen that municipal law already recognises the obligatory nature of the rule prohibiting discrimination on racial grounds and that it has gone some way towards providing substantive protection in regard to other fundamental rights, including the right to a hearing. Moreover, treaties of commerce and establishment, which necessarily require the entry of aliens, and other treaties which prescribe more general standards of treatment, are of particular importance in structuring the exercise of discretionary power.
CHAPTER VIII

The Entry and Exclusion of Aliens under the Law of the United States of America

(1) Introduction

Although for many years immigration into the United States was restricted laws directed to the exclusion of certain racial groups,¹ a most significant and recent amendment now declares that no person shall receive any preference or priority or be discriminated against in the issue of an immigrant's visa because of his race, sex, nationality, place of birth or place of residence.² Admittedly, there are certain exceptions to this general rule in favour of "special immigrants" and immediate relatives, but these in no way detract from the strong recognition which is here given to the mandatory rule of non-discrimination.

As amended, the Immigration and Nationality Act 1952 is the principal statute governing the entry of aliens, both immigrants and non-immigrants. Numerical control and the issue of visas, etc., are dealt with by the Department of State through consular officers abroad, while practical control at the borders of the United States is exercised by officers of the Immigration and Nationality Service. Deportation and exclusion proceedings are conducted locally through "special inquiry officers", and the Attorney General has

¹. See Konvitz, Civil Rights in Immigration, (1953), pp. 3-20.
². 8 U.S.C. s.1152(a), enacted in 1965.
delegated his authority to hear appeals from the findings and orders of such officers to the Board of Immigration Appeals, which is established as part of the Attorney General's office.

Whether an individual has the right to enter the United States must always be determined at the border, and every one seeking to enter the country is presumptively deemed to be an alien until he produces evidence to remove himself from this category. United States law makes a first distinction between immigrants and non-immigrants. The latter are further reduced into distinct categories, such as aliens in transit, treaty aliens, alien students, international organisation aliens, representatives of foreign information media, exchange workers, and so forth. The 1952 Act also elaborates the classes of aliens which are to be excluded from the United States and, although it has removed the racial barrier which precluded the entry of Asians, it has maintained the tradition of growth in the grounds of exclusion. These statutory grounds are equally applicable to immigrants and to non-immigrants, but they are exclusive and cannot be enlarged by executive fiat. Although the grounds for exclusion are

2. 8 U.S.C. s. 1101 (a) (15).
3. An Act of 7th April 1971, 84 Stat. 116, introduced additional categories, including fiancées, fiancés and "business executives". Classification determines the class of visa which will be granted.
4. Gegiow v. Uhl 239 U.S. 3 (1915). The grounds for exclusion may not be disregarded either by executive officers or the courts, although the Act does empower the Attorney General, in certain circumstances, to waive an applicant's inadmissibility: Immigration and Nationality Act 1952, section 211(b); section 212(d)(3),(4),(5),(6); 8 U.S.C. s.1181(b); s.1182(d)(3),(4),(5),(6).
numerous, the number of aliens actually excluded is small; in 1960, for example, less than one per cent. of all applicants for entry were barred.\(^1\).

In regard to the formalities to be complied with in applications for entry, the Act forbids the entry of those previously deported, excluded or removed. Thus, an alien against whom a final order of exclusion has been executed is barred from re-entry for one year, and an alien against whom an expulsion order has been executed or who has been removed from the United States at government expense is perpetually barred, unless in each case the Attorney General has consented to their re-applying for admission.\(^2\). Stowaways always were excluded, but since 1952 the Attorney General's discretion to admit has been eliminated and alien stowaways are now excluded absolutely.\(^3\). The Act also bars those who arrive without documents or with improper documents, and those who have made wilful misrepresentations in seeking entry.\(^4\).

The next category of grounds for exclusion is that dealing with personal qualifications, and first among these grounds are those concerning physical and mental defectives. Exclusion is frequently mandatory when a specific disease or affliction is found, and this may occur either at the border

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1. This figure does not include the number of aliens refused visas by consular officers. See generally, Gordon and Rosenfield, *Immigration Law and Procedure*, (rev. ed., 1972), ch. 2.

2. 8 U.S.C. s.1182(a)(16),(17).

3. Ibid., s.1182(a)(18).

4. E.g. s.1182(a)(19) bars from entry "any alien who seeks to procure, or has sought to procure a visa or other documentation, or seeks to enter the United States by fraud, or by wilfully misrepresenting a material fact."
or at the time of visa application.¹ As regards mental defects or disabilities, the Act requires exclusion of those who are insane, who have had one or more attacks of insanity, or who are afflicted with psychopathic personality or sexual deviation.² The vagueness of these terms has often been criticised, but they are generally justified on the ground that they reflect the incompleteness of medical knowledge in such matters, although the immigration law does anticipate medical judgements in such matters. The particular category of "mental defect" appears to refer to some inherent, rather than acquired, condition; it would include Mongolism, but not mere ignorance.³ Chronic alcoholism and narcotic drug addiction are further grounds for exclusion, but the latter disability does not include a person who uses drugs solely for the relief of pain or for some other medical reason.⁴ A ground which has also attracted criticism is that which excludes those aliens, other than non-immigrants, who are ineligible for citizenship.⁵ This class includes many aliens who have claimed exemption from military service under the provisions of treaties between their own countries and the United States.⁶

¹. In the latter case the consul's determination is not appealable and the frustrations which result from medical rejection at this stage seldom come to public view.

². Epilepsy as a mandatory bar was abolished by section 15(b), Act of 1965, 79 Stat. 911. See generally, 8 U.S.C. s.1182(a)(1), (2), (3), (4).

³. Formerly there were no grounds for waiver of excludability in such cases; see now 8 U.S.C. s.1182(g).

⁴. 8 U.S.C. s.1182(a)(5).

⁵. Ibid., s.1182(a)(22).

Where physical defects or disabilities are in issue, the exclusion is ordered in the case of any dangerous contagious disease, and a list of such diseases is kept up to date by the Public Health Service.\(^1\). Other physical conditions may also bar an alien if they are such as to impair his earning capacity and unless he can satisfy the consul or immigration officer that he will not have to earn a living. Paupers, professional beggars and vagrants are specifically barred, as are those who, in the opinion of the consular officer of immigration officer, are likely to become public charges.\(^2\). The statutory use of the word "opinion" appears to limit the possibilities of judicial review. However, it has been held that the exercise of this discretion, by an immigration officer, must be based on some tangible evidence which produces a reasonable probability that the alien will become a public charge after entry.\(^3\). In the case of Gegiow v. Uhl the Supreme Court overruled the determination of an immigration officer that an alien was excludable as a prospective public charge simply because he was destined to Portland, Oregon, where the labour market at the time was overcrowded. The court held that a person is likely to become a public charge if he is one whose anticipated dependence on public aid is due to poverty and to physical or mental afflictions.\(^4\). The Act of 1952 also

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1. 8 U.S.C. s.1182(a)(6).
2. Ibid., s.1182(a)(8),(15).
3. 22 C.F.R. 42.91(a)(15)(i).
4. 239 U.S. 3 (1915). See also Gabriel v. Johnson 29 F.2d 347 (1928); Berman v. Curran 13 F.2d 96 (1926). As yet there is no right of judicial review by which to challenge comparable determinations by consular officers.
bars illiterates,¹ and aliens accompanying excluded aliens.²

The next important list of grounds for exclusion deals with cases of misconduct by the applicant. For example, the Act bars aliens who have been convicted, or who admit the commission, of a crime involving moral turpitude, or who admit committing acts which constitute the essential elements of such a crime.³ Other convicted aliens are also excluded, although there are certain exceptions in favour of those convicted of purely political offences, for juvenile offenders, and in respect of petty offences.⁴ The law is particularly strict, however, in its attitude to so-called "immoral aliens", such as prostitutes, polygamists, those convicted of drugs offences, and the smugglers of aliens.⁵

¹. 8 U.S.C. s.1182(a)(25) bars aliens "over sixteen years of age physically capable of reading who cannot read or understand some language or dialect". There are certain exceptions.

². Ibid., s.1182(a)(30).

³. Ibid., s.1182(a)(9). "Moral turpitude" is an extremely vague categorisation usually defended for its flexibility and adaptability to changing mores. It would appear to exist independently of the penalty imposed for the crime and to be found in the nature of the offence itself. Some idea of the uncertainty which bedevils this concept can be gathered from the following: "A crime involving moral turpitude ... is an act or omission which is malum in se and not merely malum prohibitum; ... which is so far contrary to moral law ... that the offender is brought to public disgrace, ... but which is not the outcome merely of natural passion, of animal spirits, of infirmity of temper, of weakness of character, of mistaken principles, unaccompanied by a vicious motive or corrupt mind." 2 I.N. 134, 141 (1944).

⁴. Ibid., s.1182(a)(10) applies to offenders who have been convicted of two or more offences and actually sentenced to imprisonment for five years or more.

⁵. Ibid., s.1182(a)(9), as amended.

⁶. Ibid., s.1182(a)(11),(12),(23),(31).
One category of aliens of particular interest is that of "subversives". The history of the exclusion of this class is by no means recent and, after the assassination in 1901 of President McKinley by Leon Czolgosz, an "anarchist terrorist", an Act was passed to bar from the United States aliens who advocated or who belonged to organisations which advocated the violent overthrow of the Government. In 1904, the Supreme Court declared that this exclusion law was not open to constitutional objection. Even if "anarchist" were interpreted to cover mere philosophers with no evil intentions, the law was still valid. The court based its decision, in part, on the "accepted principle" of international law that every sovereign nation had the inherent power to forbid the entrance of foreigners.

The prohibition on past as well as present members of subversive organisations has been a dominant feature of contemporary legislation and the Internal Security Act 1950, which specifically named the Communist Party as such an organisation, banned aliens who at any time had been members of the party, its affiliates or sections. The Immigration and Nationality Act 1952 makes three separate provisions in respect of subversives: (1) it bars aliens who, in the judgement of consular officers or of the Attorney General, are coming to the United States to engage in activities prejudicial to

1. 32 Stat. 1213 (1903).
3. Ibid., at p. 290. See also per Fuller C.J., at p. 294. For later developments, see 39 Stat. 889 (1917); 40 Stat. 1012 (1908); 41 Stat. 1008 (1920); 54 Stat. 673 (1940); Kesler v. Strecker 307 U.S. 22 (1939).
the public interest or safety;¹ (2) alternatively, the Act excludes those who would probably engage in such activities after entry;² and (3) additional restrictions are imposed on aliens who advocate or have advocated "proscribed" doctrines. These are aimed primarily at the Communist Party, but also apply, for example, to adherents of the Nazi Party or any of the other non-Communist totalitarian régimes of Latin America, Europe, the Middle East or Asia.³ In 1971, a new attempt was made to challenge the validity of these provisions. Mandel v. Mitchell ⁴ involved a refusal to grant waiver of inadmissibility to the plaintiff, a prominent Marxist. The latter, together with a number of American scholars who had invited him to speak in the United States, sought judgement declaring that section 212(a)(28) of the Act of 1952 was

1. 8 U.S.C. s.1182(a)(27). One who was entering temporarily to advocate and lecture on pacifism and legal opposition to conscription was held not to be coming to engage in prejudicial activity within the meaning of this restriction: Matter of M., 5 I.N. 248 (1953).

2. 8 U.S.C. s.1182(a)(29). It is apparent that this provision contains a wide and largely undefined power which, when exercised, may result in exclusion without a hearing. Those excludable on this ground cannot be granted a waiver of inadmissibility for the purpose of temporary entry.

3. 8 U.S.C. s.1182(a)(28). These provisions were originally enacted in the Internal Security Act 1950. In order to clarify their purpose, Congress declared in 1951 that the exclusion of subversives related only to those whose membership or affiliation was voluntary; see now, s.1182(a)(28)(I). Section 8 of an Act of 1949 (63 Stat. 212) authorises the Director of the Central Intelligence Agency, the Attorney General and the Commissioner of Immigration to determine that the admission of a particular alien for permanent residence is in the interests of national security or essential to furtherance of the national intelligence mission. Entry is permitted without regard to the general requirements of immigration and other laws, up to a maximum of 100 persons each year. There are no published regulations or procedures.

invalid. The problem of standing was dismissed by the court as unreal, and it expressed the view that the plaintiff's status as a party did not rest on any individual right to enter the country, but on the American citizens' "right to hear" and the constitutional guarantees of the First Amendment. 1. It was noted that the statutory provision was aimed directly at the belief and advocacy of proscribed doctrines. Such a law would certainly have been unconstitutional as regards citizens of the United States, but the question in this case was, whether the same test could apply to the alien. The majority of the court found that certain earlier decisions and dicta were no longer binding. 2. The proper test to be applied where restrictions on freedom of speech were in issue was that of "clear and present danger", 3. and this was equally applicable to aliens as well as citizens. 4. On appeal to the Supreme Court, however, this judgement was reversed. 5. The


2. E.g. Turner v. Williams 194 U.S. 279, 292: "Those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens"; Bridges v. Wixon 326 U.S. 135, 161: "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores".


4. 325 F. Supp. 620 at p. 628. The dissenting judge based his reasoning on the fact of the alien's presence in the country, at which point only he becomes vested with the rights which the Constitution guarantees to all people within the borders. Reference was also made to essential matters of national security and foreign policy, the so-called "political question doctrine", on which see Konvitz, Civil Rights in Immigration, (1953), p. 44.

Court reasserted the traditional doctrine of plenary and unqualified power which Congress has been held to enjoy in the regulation of entry into the United States.\(^1\) It held that the alien could not challenge the statute which required his exclusion, and that the First Amendment rights of United States citizens could not overcome the paramount authority of Congress vis-à-vis the alien.

\((2)\) Pre-Entry Procedures

With the exception of the inhabitants of certain countries in the Western Hemisphere, all aliens who seek to enter the United States are required to be in possession of a valid visa, either as an immigrant or as a non-immigrant.

The prospective immigrant passes through what has now become a fairly standardised procedure and he is not generally required to appear personally before the consular officer until he is ready to receive his visa, his necessary documents have been assembled, and a preliminary determination as to his eligibility has been made. Formal application may also be preceded by registration on a waiting list, by obtaining a labour certificate, and by the approval of a preliminary visa petition if the applicant is claiming preferential status.\(^2\)

The 1952 Act confers upon consular officers exclusive authority to pass on applications for immigrant visas, and

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\(^2\) For example, in cases where the applicant is the parent or wife of an alien already admitted to the United States, or of a United States citizen: 8 U.S.C. ss.1151(b), 1153.
these determinations are not subject to direct control by the Secretary of State.\textsuperscript{1} The latter has, however, issued regulations to which consular officers must adhere,\textsuperscript{2} and he is expressly empowered to instruct such officers to discontinue issuing visas to nationals or residents of states which refuse to accept deportees.\textsuperscript{3} The consul's consideration of visa applications is informal, since no formal hearing or proceeding is authorised either by statute or regulation. The grant to consuls of an unreviewable authority to deny visa applications has been much criticised,\textsuperscript{4} and this has led to the adoption by the Department of State of procedures to supervise refusals and to limit the possibility of error.\textsuperscript{5} Each refusal must now be reviewed by the principal consular officer and his decision must be recorded in writing. He in turn may alter the preliminary decision or refer the case to the State Department for an advisory opinion. The Department may also request such reports and submit its own advisory opinion which the consul is not to disregard without first submitting the case again, with an explanation of his proposed action.\textsuperscript{6} Otherwise, the consul's authority to deny visas is not altered, and there is no formal review procedure by which either the applicant or his sponsor can question the consular ruling, nor any possibility of judicial aid. In practice,

\begin{itemize}
  \item \textsuperscript{1} 8 U.S.C. s.1201(a).
  \item \textsuperscript{2} 22 C.F.R. 42; see also 22 C.F.R. 42.1; 8 U.S.C. s.1101(a)(9).
  \item \textsuperscript{3} 8 U.S.C. s.1253(g). This often occurs in respect of "Iron Curtain" countries, although exceptions may be granted in individual cases or specified classes of cases.
  \item \textsuperscript{4} Cf. United Kingdom law, which permits an appeal against the refusal to issue an "entry clearance": Immigration Act 1971, section 13(2).
  \item \textsuperscript{5} 22 C.F.R. 42.130.
  \item \textsuperscript{6} 22 C.F.R. 42.130(b),(c).
\end{itemize}
upon a request made by members of Congress, lawyers or other interested parties, the Visa Office of the State Department will often review consular action and, if it is found to be erroneous, they will submit an advisory opinion which the consular officer will generally follow.¹.

Assuming that an immigrant visa is issued, then it is ordinarily valid for a maximum period of four months. In effect, it is a *prima facie* determination of eligibility to enter the United States, but it does not ensure the holder's entry. The question of admissibility can be raised again by an immigration officer, and exclusion ordered if it is then found that the holder does not qualify.².

The non-immigrant who seeks to enter the United States must be in possession of a valid non-immigrant visa or, for some purposes, a valid border-crossing card. As is the case with prospective immigrants, alien visitors must show that they do not fall into any of the proscribed and excludable classes described above. They are not, however, subject to numerical limitations and they may enjoy additional benefits under treaty.³. The procedure for application is less detailed and shorter, although the consul may request any supplementary information wherever he deems this to be

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¹. A court could not compel the issue of a visa even if it were possible to obtain jurisdiction over the consul abroad: United States, ex rel. Ulrich v. Kellogg 30 F. 2d 984; United States, ex rel. London v. Phelps 22 F. 2d 288.

². 8 U.S.C. s.1201(h). A visa may also be revoked by a consular officer or by the Secretary of State: Ibid., s.1201(i).

³. See below, pp. 336-339
necessary. Usually an application will be made to the consular office in the district of the applicant's residence, and in person, although this requirement may be waived. The prospective non-immigrant may be required to produce a police certificate and to supply a bond guaranteeing that he will leave at the end of his trip and will not change his status. Photographs are required but, unlike the case of immigrants, where it is mandatory, fingerprinting is not always demanded. Similarly, a medical examination is only required of non-immigrants where the consul demands it, whereas it is obligatory for all immigrants. Finally, if the application is in order, it can usually be dealt with at once.

Again the consul has exclusive authority either to grant or to refuse a visa application, with only a very limited measure of control remaining to the Secretary of State. In each case the applicant's good faith is vital, and the consul may demand proof to substantiate his intentions. Particular attention will be paid to the following factors: the adequacy of the evidence of an intention to return; whether the applicant has any close family ties in the United States; the permanency of domicile, employment, and so forth, in the home country; financial ability to return; whether previous attempts have been made to obtain an immigrant visa. In the case of a refusal to issue a visa there is once more no established review procedure, although in practice reconsideration may be secured along the same lines as for immigrants.

Non-immigrant visas are normally valid according to reciprocal arrangements with the state where they are issued.
In some cases, visas may be issued which are valid indefinitely and for an indefinite number of entries, while others may be restricted to a limited number of admissions. Unlike immigrant visas, the non-immigrant visa is not a document but a stamp in the applicant's passport in which dates, validity, restrictions and the like are inscribed. Non-immigrant visas may be extended or revalidated either by the issuing office or by any other consular office, but only if the applicant has been maintaining *bona fide* non-immigrant status and is otherwise still eligible.

(3) Procedure at the Border

The issue of a visa of either class is no guarantee that the holder will be admitted into the United States, and the alien at the border will be thoroughly checked again by officials of the Immigration and Nationality Service. The latter are not the only persons with responsibility for the enforcement of the immigration laws, and other obligations devolve on transportation lines generally. For example, the owners, masters, agents and officers of such lines are under a duty to prevent landings at other than designated ports of entry, and heavy penalties are imposed for breach of this regulation.¹ They are also obliged to prevent the embarkation of obviously inadmissible passengers and must, therefore, ensure that their passengers are in possession of valid visas.²

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1. 8 U.S.C. s. 1229.
2. Ibid., ss.1223, 1227.
If so ordered, they must additionally detain and deport any alien stowaways, and they must not in any case knowingly bring in any aliens previously excluded or deported.

The final authority and responsibility for administering the immigration laws, manning the borders and preventing the illegal entry of aliens is vested in the Attorney General, and this he has mostly delegated to immigration officers and other officials of the Immigration and Nationality Service.¹ The Service has the power to scrutinise the qualifications of each applicant for entry at the frontier,² and with this there goes an extensive power to conduct interrogations and to take evidence, where necessary, under oath and in writing.³

The first examination which a person arriving at the borders of the United States may be required to undergo is the medical inspection. This will establish the general question of whether there is any need for a period of quarantine, and it may settle the particular question of the admissibility of the individual. The inspection is carried out by medical officers of the United States Public Health Service and, while they have no direct authority to exclude any individual, it is for them to issue the medical certificates upon which the immigration officers will normally base their decisions. In certain circumstances, such as cases of mental affliction, the individual has the right of appeal to a board of medical officers, at which he may introduce an alternative

1. 8 U.S.C. s.1101(a)(18).
2. Any alien who enters without inspection is liable to be deported: ibid., s.1251(a)(2).
3. Immigration officers also have the power to issue sub poenas, to board, search and arrest: ibid., s.1225(a).
The immigration inspection which follows is concerned directly with the admissibility of the applicant. Not only are visas no guarantee that the holder will be admitted, but even the bearer of a United States passport may be subjected to inquiry and rejection by the immigration officer if he finds that the citizenship claim is not substantiated. ¹ A prior administrative declaration of status is not res judicata and does not preclude a subsequent reappraisal at the time of entry. ² Although the immigration officer's jurisdiction may depend on alienage, he has the right to question and to detain anyone claiming citizenship, and to determine whether that claim is justified. ³ This power of inquiry and of passing on the admissibility of all applicants is emphasised by the Act itself. ⁴ Any person coming into the United States may be required to declare under oath the purpose for which he comes, how long he intends to remain, and, if an alien, whether he intends to become a citizen. ⁵

2. The same principle applies in respect of returning resident aliens, holders of re-entry permits.
4. 8 U.S.C. s.1225(a). Inspection takes place at the time and place designated, although in certain circumstances the practice of "pre-inspection" may be employed. In such cases, the applicant is inspected once and for all in a foreign country, and this procedure was much used for those entering under the Displaced Persons and Refugee Relief Acts.
5. The applicant may also be called on to supply any other information which will aid the immigration officer in determining whether he is admissible: 8 U.S.C. s.1225(a). At the same time immigration officers will scrutinise the applicant's identity and documents, and check that his name is not noted in the so-called "look-out" books.
The immigration inspector, the first and usually the last official whom the applicant will meet if he is admitted, has the authority to pass entrants and to admit them to the United States, although at the time of entry any favourable ruling may be challenged by any other immigration officer who may require that the case be considered by a special inquiry officer. Approval of entry is itself not conclusive, and the alien may be expelled if it is subsequently revealed that he has entered in violation of law. If the alien immigrant is admitted, then his visa and passport are stamped and the visa surrendered; thus endorsed, it is retained as a permanent record of admission. The non-immigrant who is admitted also has his passport stamped, together with a note of the period for which admission is authorised and of his non-immigrant classification. Most applicants are admitted directly, but in cases of doubt and where there is a need for further inquiries the law permits temporary detention of the applicant pending final determination of admissibility. This detention may be ordered by an immigration officer, but it is not such as to constitute a "landing" and, in the eyes of the law, the alien is regarded as stopped at the frontier. In practice, only those who are considered likely to abscond or those whose freedom of movement might compromise national security or public safety will be detained in custody. The others are usually released on conditional parole, with reasonable restrictions to ensure their availability. Again, this is

1. 8 U.S.C. s.1225(b).
2. Ibid., s.1230(a).
not to be regarded as an "entry" and any subsequent proceedings relate to entry and exclusion, not to expulsion.\(^1\).

While an immigration inspector has the authority to admit an alien, he has no power acting alone finally to bar the applicant or to waive the statutory grounds for exclusion. In such situations he must refer the matter to other officers: (a) in the case of waiver, to the district director; (b) in the case of temporary exclusion in security cases, to the regional commissioner as to whether a hearing shall be accorded; (c) in other cases, and generally where the inspector is not fully satisfied, to a special inquiry officer for a hearing. In cases of the last class the alien is detained or released on parole, and he is informed of the proceedings and of his right to be represented by counsel.

\((4)\) Hearing, Decision and Appeal

There is a marked conceptual difference between an exclusion and an expulsion proceeding. Once an alien is actually admitted to the United States, even if his stay is quite brief, he can be dealt with only in expulsion proceedings, and this applies, too, even if he has entered the country illegally. An applicant for entry has the burden of proving his admissibility; in deportation proceedings, on the other hand, it is the government which must satisfy the burden of proof. Furthermore, the constitutional requirements of "due process"\(^2\).

\(^1\) See below, pp. 527-528

\(^2\) Due Process of Law in Proceedings to Exclude or Deport Aliens, 94 L. ed. 329; 96 L. ed. 576.
give greater protection to the alien who is already in the United States. Nevertheless, it is established that the conduct of exclusion proceedings is subject to the general control of the courts. The Supreme Court has held that an alien who is excluded from the United States must be given a fair hearing, with an opportunity to establish his right to enter. The Court has further held that there is a manifest lack of due process where the proceedings are blatantly unfair or such as to prevent a proper investigation or which reveal a manifest abuse of the discretion committed by statute to the administrative officer in charge of the proceedings, or where it appears that the authority of such officer was not fairly exercised.

The special inquiry officer who is charged with the conduct of proceedings is himself an immigration officer considered by the Attorney General to be specially qualified for such purposes. The hearing before him is a more informal affair than a trial in court, but still the basic ingredients of fair play must be followed. The alien is seeking a privilege and he must establish his claim. On the other hand, he must be given a chance to bring forward his proof, and a reasonable opportunity to examine, cross-examine and to present evidence. In addition, the decision of the special inquiry officer must

2. Kwock Jan Fat v. White 253 U.S. 454 (1920). Cf. Ekiu v. United States 142 U.S. 651 (1892), in which it was held that the fair hearing requirement was satisfied by an administrative hearing, and that immigration statutes which make administrative findings in such cases final and not subject to judicial review are valid. See now, 8 U.S.C. s.1105(a).
3. 8 U.S.C. s.1101(b)(4).
be based on evidence in the record of the hearing. Any departure from this basic procedure may lead to challenge in the courts and, for example, hearings have been ruled unfair where there was a refusal to hear competent evidence, where there was a denial of an opportunity of appeal afforded by the statute and by regulations, and where there was no adequate support in the record for the order of exclusion.

The impartiality of the hearings is aided by statutory provisions which declare that an officer may not conduct a case in which he has participated in an investigating or prosecuting capacity, that there shall be an administrative appeal from the finding of a special inquiry officer, and that such findings may be brought before the courts on application for habeas corpus.

The applicant has the privilege of representation by counsel or by other representative of his choice who is entitled to practice in such proceedings. The statute declares


2. Kwok v. White 253 U.S. 454 (1920). Curtailment of the right to a fair hearing has been vigorously opposed (for example, in dissenting opinions in Knauff v. Shaughnessy 338 U.S. 537 (1950); Konvitz, Civil Rights in Immigration, (1953), pp. 48-51), but limitations were upheld by a bare majority in Shaughnessy v. Mezei 345 U.S. 212 (1953). Some alien entrants may be better off than others, for example, lawful residents returning after a brief absence abroad; see below, pp. 424-425

3. See also Tod v. Waldman 266 U.S. 113 (1924).

4. 8 U.S.C. s.1105a(b); s.1226(a),(b),(c). The special inquiry officer has the power to conduct exclusion proceedings, to administer oaths, to present and receive evidence, to interrogate, examine and cross-examine the alien and witnesses, and to determine whether the applicant for entry shall be admitted or excluded. He may also issue sub poenas and order the taking of depositions in cases pending before him; ibid., s.1225(a); 8 C.F.R. 287.4; 236.2d.

5. 8 U.S.C. s.1362. The work of voluntary agencies is of particular importance in matters of representation; see Lovenstein The Alien and the Immigration Law, (1957).
that it is the applicant who has the burden of proving his admissibility, and this applies whether he is a returning resident or an original entrant, and even if he asserts a right to American citizenship. The informality of the proceedings is emphasised by the general inapplicability of the judicial rules of evidence, although the officer's decision must rest entirely on that evidence which is incorporated in the record of the hearing. The decision itself must be reasoned and include discussion of the evidence and the findings, together with notice of the applicant's right of appeal. The Board of Immigration Appeals hears appeals from the decisions of special inquiry officers, and in so doing it exercises the authority and discretion of the Attorney General.

It has already been observed that the alien at the frontier does not enjoy the full benefits of the constitutional right to a hearing. There are certain situations in which the right is absolutely excluded, for example, in the case of alien stowaways. Special rules apply also to alien crewmembers

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1. 8 U.S.C. s. 1361. In Jelic v. District Director 106 F.2d 14 (1939) it was held that the rule as to burden of proof cannot justify a disregard of the fair import of the evidence.

2. 8 U.S.C. s. 1226(a); Chun v. Proctor 84 F. 2d 763 (1936).

3. 8 C.F.R. 263.3. Where the decision is to admit the alien, the District Director has a similar right of appeal. The alien's right is not absolute, and it does not apply if he is excluded for security reasons on confidential information or if he is mandatorily excludable for physical or mental infirmity: 8 U.S.C. s. 1226(b),(d). An exclusion order will not be enforced where an appeal is pending.

4. 8 C.F.R. 3.1(d)(1),(2). Decisions of the Board are final except in very unusual cases which may be reviewed by the Attorney General himself.

5. This does not apply in the case of a resident of the United States, if the alien claims American citizenship, or if he manages to get into the country.

6. See below, Appendix.
and to security cases. If it appears to the immigrant inspector or to the special inquiry officer that the alien is inadmissible on security grounds, then he is temporarily excluded and no further hearing may be held except as expressly authorised.¹

Any alien who is ordered to be excluded is usually immediately conveyed back to the country whence he came, in accommodation of the same class and in the same vessel or aircraft, unless the Attorney General, in his discretion, orders otherwise.² Unlike expulsion proceedings, there are no alternatives possible in fixing the place of removal, and the excluded alien is given no say in regard to the country to which he would like to go.³ An alien cannot apply for suspension of deportation, as this relief is available only to those who are within the United States. He may seek a stay of execution, but this is wholly within the discretion of the District Director.⁴

¹ 8 U.S.C. s.1225(c); 8 C.F.R. 235.6. Security cases may be further considered by the District Director and the Regional Commissioner, in which case the alien must be given the opportunity to submit written representations, otherwise the proceedings may be defective. There is, however, no right to counsel and if the Regional Commissioner orders exclusion on security grounds without a hearing, then there is no appeal. For the non-applicability of the "anticipated persecution" provisions in such cases, see below, pp. 526-528.

² 8 C.F.R. 236.6.

³ Wah v. Shaughnessy 190 F. 2d 488 (1951). Consent of the country of destination is not a pre-requisite to execution of the order of removal. Cf. Stacher v. Rosenberg 216 F. Supp. 511 (1963), where the court ruled that in the case of a long-term resident of the United States returning after a temporary absence abroad, the United States was the only country which qualified as the country whence he came, and that he could not be removed under an exclusion order to any other state.

⁴ See 8 U.S.C. s.1227(a),(c) on the obligations of transportation lines. Carriers are liable for the expenses of detention and removal in exclusion proceedings, and this obligation is enforceable by civil suit.
The system of immigration control in the United States appears to work fairly well, despite the elaborate and complex nature of its provisions. In many ways it is remarkable for the extent to which it permits appeal against and review of the exercise of executive discretion. The statute and the regulations made thereunder are highly detailed and, although this is not always satisfactory, such definition does serve as an aid to the confinement and structuring of powers. Two areas stand out, however, as beyond effective control: (1) the authority of consular officers to deny visas; and (2) the procedure in "security" cases. The former raises, essentially, problems of jurisdiction which should not be insuperable. The latter represents retention by the state of its powers of appreciation in matters deemed by it to touch the national interest. But even here the powers remain discretionary and, providing that the evidentiary burden could be satisfied, cases of manifest abuse could undoubtedly be brought to the attention of the courts. Whether the provisions on appeal can be said to reflect the requirements of international law is doubtful, despite contemporary developments in the field of civil rights. In this respect, municipal law is probably in advance of international law, although at the same time there is clear and abundant evidence to support the view that, generally, a certain standard of treatment is due even to the

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alien on the point of initial entry. The statutory prohibition on discrimination, however, and its local effect of confining the limits of executive discretion, clearly embodies the rule of international law.
CHAPTER IX

The Entry and Exclusion of Aliens under the Law of the United Kingdom

(1) Historical Introduction

From shortly after the end of the Napoleonic Wars until 1905 no foreigners were excluded or expelled from Great Britain. While various Aliens Acts were passed during this period, they dealt principally with registration and were not in fact applied with any vigour. It was never very clear whether the Crown enjoyed any prerogative powers in matters of entry and exclusion of aliens, and in 1890 it was argued that such powers existed only with reference to foreign sovereigns, their ambassadors and forces. In the following year, however, the Privy Council decided in the case of Musgrove v. Chun Teeong Toy that the Crown did have the power to prevent any alien from entering British territory. Since 1905 Aliens Acts of one sort or another have been continually in force, and it is doubtful whether the prerogative powers are still relevant in time of peace. Nevertheless, the most recent legislation proclaims that the statutory powers shall not be taken to


supersede or impair Her Majesty's prerogative powers in respect of aliens.¹

The first of the modern generation of aliens statutes was the Aliens Act 1905, which was passed in order to restrict Jewish immigration from East Europe.² The Act did not apply to all passengers entering the country, but made subject to inspection only "alien steerage passengers" carried on "immigrant ships".³ Provision was made for such passengers to disembark only at specified immigration ports,⁴ and for the making of returns in respect of all such passengers.⁵

On landing, alien steerage passengers were inspected by an immigration officer and a medical inspector.⁶ Pending consideration of their case, and providing suitable arrangements had been made, applicants for entry might be conditionally disembarked, although securities and bonds were required from those responsible for transportation.


³. Aliens Act 1905, section 8. An "immigrant ship" was defined as any ship carrying more than 20 (reduced to 12 by the Conservatives, then raised again to 20 by the Liberals) alien steerage passengers. This class was in turn defined to include all passengers other than those travelling first class; there were some exemptions in favour of second class passengers, but where there was only one class, they were all reckoned as alien steerage passengers.

⁴. Ibid., section 6.

⁵. Ibid., section 5.

⁶. A less detailed inspection procedure was applied to alien seamen and "transmigrants": ibid., section 8(1).
The exclusion provisions of the 1905 Act were aimed at the generic class, "undesirable immigrants". The major purpose of the Act was to reduce the social cost of immigration, and thus the class was identifiable principally by a lack of funds or an inability to support oneself. An immigrant was deemed to be undesirable (a) if he did not have, or was not in a position to obtain, the means of decently supporting himself and any dependants; (b) if he was insane or was likely to become a public charge owing to disease or infirmity; (c) if he had been sentenced in a foreign country for an extradition crime not being an offence of a political character; (d) if an expulsion order under the Act had been made against him. In the last three cases exclusion was mandatory, irrespective of means. As regards means themselves, there was some room for appreciation, but the burden was on the applicant to satisfy the immigration officer either of his present position or of his future prospects.

Where granted, leave to land was given verbally to the immigrant by the immigration officer - there was no question of landing conditions and the immigrant was free to go. In the case of a refusal, then notice was given to the alien in writing, setting out the grounds of his undesirability and informing him of the right of appeal to the Immigration Board.

1. Aliens Act 1905, section 1(3).

2. It was expressly provided that leave to land should not be refused, on the ground of want of means or the probability of the alien becoming a charge on the rates, to any immigrant who proved that he was seeking to enter the country solely to avoid persecution or punishment on religious or political grounds; see above, pp. 543-546
established by the Act. ¹ This statute remained in force until 1919, although it was in practice superseded by the emergency legislation of the First World War. It is debatable how effective the Act was, for any alien who could raise enough money to travel first class escaped inspection, and the statutory guarantees of asylum were generous by any modern standard. However, the very existence of the Act and its somewhat cumbersome machinery seem to have achieved some overall numerical control over those admitted, and to that extent to have reduced the costs of immigration. ²

Additional powers of control were rushed through Parliament in one day at the outbreak of the First World War. These provisions were contained in the Aliens Restriction Act 1914, and were introduced as a temporary measure for time of war or "other occasion of imminent national danger". At the conclusion of hostilities they were continued in force from year to year under the authority of the Aliens Restriction (Amendment) Act 1919 and the annual Expiring Laws Continuance Acts. ³ The Aliens Restriction Acts 1914 and 1919, and the Aliens Orders made thereunder, regulated the entry and expulsion of aliens until the entry into force of the Immigration Act 1971 on 1st January 1973. For most of this period the only class of entrants subject to control were aliens, defined by the [British Nationality and] Status of Aliens Act 1914 as

¹. Aliens Act 1905, section 1(2).
³. The 1905 Act was repealed by the Act of 1919.
persons who were not British subjects. 1. At this time there existed throughout the Empire one common nationality, derived from the common allegiance to the Crown. British subjects, wherever they came from, enjoyed an unrestricted right of entry to the United Kingdom until 1962. 2. Aliens, on the other hand, were not permitted to land or embark in the United Kingdom except with the leave of an immigration officer and at an approved port or place. 3. Certain exceptions were again made in favour of alien passengers in transit and alien crewmembers. Otherwise, leave to land would be granted on condition that the alien was in a position to maintain himself and any dependants in the United Kingdom, 5 or, if he entered to work, on condition that he was in possession of a work permit issued for engagement to a particular employer and by the appropriate authority. 6. It was further provided that leave


2. This was not the case throughout the Commonwealth. For example, the Australian Immigration Restriction Act 1901 (No. 17) effectively reduced all immigration from South East Asia by way of a dictation test (section 3). See also Re Munshi Singh 6 W.W.R. 1347 (1914); Thornton v. The Police 1962 A.C. 339 (P.C.).

3. Aliens Order 1953, Article 1(1); Cmnd. 4296, para. 3.


5. Aliens Order 1953, Article 4(1)(a); Cmnd. 4296, paras. 11-14.

6. Aliens Order 1953, Article 4(1)(b); Cmnd. 4296, paras. 22-24. The "appropriate authority" in employment matters was formerly the Ministry of Labour, and is now the Department of Employment. See Hepple, Race, Jobs and the Law in Britain, 2nd. ed., (1970), pp. 50-52 and passim. Work permits were generally valid for one year, but might be extended on an annual basis; after four years the restrictions were usually removed; Cmnd. 4296, para. 34. Certain permit-free categories were also admitted, e.g., doctors and dentists: Cmnd. 4296, para. 25; and there were special provisions for businessmen (ibid., paras. 28-30), and persons of independent means (ibid., paras. 31-33).
to land might be granted subject to any conditions of which notice was given to the alien by the immigration officer.¹

Like the 1905 Act, the Aliens Orders also prescribed the grounds for exclusion, and included an additional ground for exclusion in the case of an alien arriving for the purposes of controlled employment, but without a work permit.² Over and above the specific grounds, a wide discretionary power was granted to immigration officers to refuse admission wherever it appeared that the alien's presence in the United Kingdom was undesirable, for example, on account of his character, conduct or associations, or if he was a danger to the national security, or if he would not be returnable to another country.³ This final, reserve power of decision on the question of the alien's desirability is common to the immigration laws of most states. It is still extant in the law of the United Kingdom, an area of discretion for which it is difficult to establish, with any precision, the boundaries of control.⁴

1. Aliens Order 1953, Article 5; Cmd. 4296, para. 5. Such conditions might limit the length of stay, for example, or require the alien to register with the police.

2. Ibid., Article 4; Cmd. 4296, para. 58.


It was not until 1962 that any control over the entry of British subjects/Commonwealth citizens into the United Kingdom was introduced. For many reasons, including the practical inconveniences of a labour shortage in the 1950's, the United Kingdom had stood alone among Commonwealth countries in not imposing any such restrictions. The ideal of the common status of British subjecthood was maintained, and in order to qualify for that status one might possess either citizenship of the United Kingdom and Colonies or citizenship of any independent state of the Commonwealth.¹ The right of entry into the British Isles was incidental to the status of British subject, but in the wake of a campaign against coloured immigration and declared fears about unresolved social problems, this right was abolished by the Commonwealth Immigrants Act 1962.

This statute purported to distinguish between citizens of the United Kingdom and Colonies and citizens of independent Commonwealth countries. But a further distinction was also drawn, this time among United Kingdom citizens themselves, which depended upon whether their passports were issued by the United Kingdom Government or "on behalf of the Government of any part of the Commonwealth outside the United Kingdom". The holders of passports in the latter class were made subject to control.²

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¹. British Nationality Act 1948, section 1.
². Commonwealth Immigrants Act 1962, section 1(2),(3); R v. Secretary of State, ex parte Bhurosoh [1967] 3 All E.R. 831. See also Secretary of State v. Lakdawalla [1972] Imm. A.R. 26; Mamacos v. Secretary of State, ibid., p. 11; Cheng v. Secretary of State, ibid., p. 5; and above, pp. 80-82.
Although there was nothing openly discriminatory in this statute, its aim, and eventually its effect, was to cut back coloured immigration into the United Kingdom. Those subject to control who wished to enter the country for the purpose of employment were required to obtain Ministry of Labour vouchers, unless they qualified under some other head. There was, however, an absolute right of entry in favour of the wife and any child under sixteen of a Commonwealth citizen who accompanied them to the United Kingdom, or who was already resident there. From 1962 until 1st August 1965 there were three categories of employment vouchers which might be issued: Category A vouchers for Commonwealth citizens with a specific job to come to; Category B vouchers for applicants who had certain skills or qualifications, for example, doctors and teachers; Category C vouchers for applicants not covered by A and B, that is, unskilled labour. In August 1965 the annual quota of employment vouchers was fixed at 8,500, and the issue of Category C vouchers was discontinued altogether.

1. Immigration Rules repeat consistently the requirement that Immigration Officers shall carry out their duties without regard to the race, colour or religion of applicants for entry; e.g. Cmd. 3064, para. 1; Cmd. 4296, para. 1; Cmd. 4298, para. 1. Such provisions clearly do not solve any of the problems raised by an immigration law which is itself discriminatory. See further, below, pp. 296-300.


3. Ibid., section 2(2)(b). Certain other classes of dependants were also admitted as a matter of discretionary practice; see, for example, Cmd. 3064, paras. 24-34.

4. For a general survey of the system, and details of the numbers of vouchers issued, see Bottomley and Sinclair: Control of Commonwealth Immigration, (Runnymede Trust, 1970).

In March 1968 further restrictions were announced in an attempt to relate immigration more specifically to labour and social requirements.\(^1\) That same month saw the enactment of the Commonwealth Immigrants Act 1968, which was introduced primarily to bring under control large numbers of United Kingdom citizens resident in East and Central Africa.\(^2\).

Hitherto such citizens had continued to enjoy the unrestricted right of entry into the United Kingdom by virtue of their citizenship and of the fact that, after the independence of their countries of residence, their passports were issued by the United Kingdom authorities. In most cases the resident Asian population had failed to acquire local citizenship by operation of law.\(^3\). A statutory right of option was provided, and local citizenship could be obtained by registration; but if this right were not exercised, then the laws of the United Kingdom ensured that the former national status was retained, as it were, by default.\(^4\). Many of the Asian population failed

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2. Entry was to be restricted to 1,500 heads of families per annum, plus dependants. This was later raised to 3000 "special vouchers" per annum with effect from June 1971, with a once for all allocation of a further 1500 vouchers: 818 H.C. Deb., col. 380. A number of British protected persons are also among the United Kingdom passport holders in East Africa, but section 1(4) of the Commonwealth Immigrants Act 1962 provided that they were to be treated as Commonwealth citizens. There is no similar provision in the Immigration Act 1971, but see Statement of Immigration Rules for Control on Entry, 1973 H.C. No. 79, Introductory note and para. 5.


to take out local citizenship and preferred to opt for what at the time appeared to be the more preferable status of United Kingdom citizen.\(^1\) In the late sixties, however, local policies of "Africanisation" were accelerated, and many non-citizens found themselves unable to obtain the requisite trade licences and, in consequence, a living.\(^2\) In anticipation of mass immigration from East Africa, the Government of the United Kingdom decided to act.

Citizens of the United Kingdom and Colonies who held United Kingdom passports, but who had no substantial connection with the United Kingdom, were immediately brought under control. "Substantial connection" was established if the applicant for entry could show that he or she, or at least one parent or grandparent, (a) was born in the United Kingdom; or (b) was naturalised in the United Kingdom; or (c) became a citizen of the United Kingdom and Colonies by virtue of adoption in the United Kingdom; or (d) became such citizen by registration under the British Nationality Act 1948 or the British Nationality Act 1964.\(^3\) In cases of no substantial connection the

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2. Ibid., pp. 18-22.
3. Commonwealth Immigrants Act 1968, section 1. The wording of condition (d) above excludes, for example, persons who became citizens by such registration in Kenya, Tanganyika or Uganda before those countries became independent. The 1968 Act also removed the right of a child to join a single parent (other than a sole surviving parent), although such child would be admitted where family or other considerations made exclusion undesirable; section 2 of the Act of 1962, as amended by section 2 of the Act of 1968; Cmdd. 3566, paras. 1-4. In addition, the minimum age for admission of dependent fathers was raised to 65; Cmdd. 3566, para. 5; and it was made a criminal offence to land in the United Kingdom without examination by an immigration officer; section 4A(1),(2),(4), Commonwealth Immigrants Acts 1962 and 1968. The period within which an entrant must be examined was extended from 24 hours to 28 days; see *R v. Governor of Brixton Prison, ex parte Ahsan* [1969] 2 Q.B. 222; *Azam v. Secretary of State* [1973] 2 W.L.R. 949 (C.A.); [1973] 2 All E.R. 765 (H.L.).
admission of United Kingdom citizens was dependent upon possession of a "special quota voucher". Once again, there was nothing overtly discriminatory in the statute itself. However, the fact that exemption from control was granted to those whose parents or whose grandparents were born in the United Kingdom underscored the contemporary view that the entry of United Kingdom citizens from East Africa was a racial problem, not an immigration problem. Very few white settlers would be caught by these provisions, which impliedly admitted that their admission posed no problems. The analogous patriality provisions of the Immigration Act 1971 repeat the racial bias of earlier laws, and in a recent debate on Immigration Rules it was estimated that a "grandparents provision" would give a right of entry to somebody, one of whose grandparents left the United Kingdom in about the year 1800 as a babe in arms. It was suggested that people in this category could not honestly be described as having close family ties with this country.

1. See above, p.451; Cmnd. 4298, para. 27. See also the rights conferred on holders of entry certificates under section 20, Immigration Appeals Act 1969, amending section 2 of the Commonwealth Immigrants Acts 1962 and 1968.

2. 851 H.C. Deb., col. 600 (David Steel, M.P.). Under the Fifteenth Amendment to the Constitution of the United States there is a prohibition on the passing of laws which discriminate in the franchise and, in particular, which seek to bar Negro voters. A number of states attempted to circumvent this provision by employing a "grandfather clause" in laws which imposed a literacy test as a condition of the right to vote. The effect of these laws was that an illiterate white was entitled to vote, because his grandfather could vote, while an illiterate Negro was barred because his grandfather would have been a slave. In Guinn and Beal v. United States 238 U.S. 347 (1915) the Supreme Court held that such clauses were contrary to the Fifteenth Amendment, which guaranteed the right to vote without distinction as to race, colour or previous condition of servitude. On proceedings before the European Commission on Human Rights and the application of the 1968 Act, see below, pp. 296-300
This examination of the earlier legislation, and of the context in which the Immigration Act 1971 was enacted, is not without relevance. The new law, which was intended to bring together the separate régimes governing entry and residence for aliens and Commonwealth citizens, manages to combine the worst of both systems. In fact, no significant reforms were introduced and the immigration law of the United Kingdom is still without one essential foundation—a comprehensive, and comprehensible, law of citizenship. The new Act maintains the discriminatory provisions of the Act of 1968 and the questionable distinctions which that legislation drew between United Kingdom citizens. The appeals system, which was established in 1969 after the recommendations of the Wilson Committee, is retained, but the permitted grounds of appeal have been significantly reduced.

(2) **The Immigration Act 1971: Entry and Exclusion**

The Immigration Act 1971 replaces both the earlier legislation affecting Commonwealth citizens and that dealing with aliens. It places all immigration law on a permanent footing and there are no provisions which are subject to annual renewal. The Act introduces the concept of "patriality" to

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1. For an extremely critical analysis of the purposes behind the new law, and of its likely effects, see Macdonald, *The New Immigration Law*, (1972), pp. 12-21.


3. For example, there is now no appeal against the refusal of entry or of an entry clearance if the Home Secretary personally directs that the individual's exclusion is "conducive to the public good": section 13(5), Immigration Act 1971. The relevant terminology is nowhere defined. See below, pp. 281-282.
describe the status of those who possess the "right of abode"
in the United Kingdom and who thereby "shall be free to come
and go into and from the United Kingdom without let or hindrance
except such as may be required ... to enable their right to
be established".\(^1\). All those who are not patrial, and who
therefore do not have the right of abode, are subject to
control and to the rules which may regulate the conditions
of their entry and stay.\(^2\).

Section 2 of the Act lays down the conditions for the
acquisition of patriality.\(^3\). This new status was intended
to represent the fact of attachment to or substantial connection
with the United Kingdom and, in view of this premise, it is
perhaps not surprising to find that it excludes that same class
of United Kingdom citizens which was distinguished by the
1968 Act. But patriality does not only divide and exclude

\(^1\) Immigration Act 1971, section 1(1); a patrial may therefore
be questioned or detained in order to establish his status. See
United States law, above, p. 234; see also, Williams,
Without Let or Hindrance, 123 New L.J., 605-607. Certain
provisions of the Aliens Restriction (Amendment) Act 1919 are
still in force; for example, it is an offence for an alien to
promote or attempt to promote industrial unrest in any industry
in which he has not been \textit{bona fide} engaged for at least two years:
section 3(2).

\(^2\) Immigration Act 1971, section 1(4). Four sets of immigration
rules were laid before Parliament on 25th January 1973 under
section 3(2) of the Act; these had been revised in the light of
Parliament's rejection of the first set of rules on 22nd
November 1972. The new rules revert to the primary distinction
between Commonwealth citizens on the one hand, and EEC and other
non-Commonwealth nationals on the other hand. See Statement of
Immigration Rules for Control on Entry (Commonwealth Citizens)
1973 H.C. No. 79; (EEC and other Non-Commonwealth Nationals)
1973 H.C. No. 81; Statement of Immigration Rules for Control
after Entry (Commonwealth Citizens) 1973 H.C. No. 80; (EEC and
other Non-Commonwealth Nationals) 1973 H.C. No. 82. A motion
to diapprove the Rules as laid was negatived on 21st February
1973 by 283 votes to 240: 851 H.C. Deb., cols. 577-646.

\(^3\) See generally, above, pp. 36-39
among United Kingdom citizens; it goes much farther and extends the right of abode to great numbers of the citizens of independent Commonwealth countries who, previously, were caught by the 1962 and 1968 provisions. For the most part these newly qualified entrants are to be found in the independent countries of the "old", or white Commonwealth, such as Canada, Australia, New Zealand, and even South Africa. A necessary consequence of patriality in its application to the citizens of these countries is that distinctions must be drawn among them also. For example, a New Zealander of "British stock" might qualify as a patrial, whereas it is most unlikely that a New Zealander of Maori extraction would so qualify.

For those who do not benefit from the status of patrial, the Immigration Act makes it unlawful to enter the United Kingdom without leave. It is further provided that such leave to enter or remain may be either for a limited or for an


2. It is ironic that the arguments in favour of exceptional treatment for "kith and kin" found more vociferous expression in the United Kingdom than in those Commonwealth countries which stood most to be affected by the proposed restrictions; see leading articles in *The Sunday Times* and *The Observer*, 26 November 1972, 24th December 1972. At the same time the new government in Australia announced that it was dropping the seventy year old "white Australia" immigration policy (*The Times*, 5th January 1973; *The Guardian*, 1st February 1973), and the New Zealand Prime Minister made it clear that the patrial provision was not acceptable because it drew a distinction between various groups of New Zealanders (*The Evening Standard*, London, 31st January 1973). See also dissatisfaction expressed by Lord Porritt, former Governor-General of New Zealand in debate in the House of Lords: 339 H.L. Deb., cols. 548-551; see also 851 H.C. Deb., cols. 580-581, 591-593, 604-605, 618-619, 626-627, 630-632.
an indefinite period. If such leave to enter is limited, then it may also be made subject to conditions, for example, restricting employment or requiring registration with the police. The power to give or refuse leave to enter the United Kingdom is to be exercised by immigration officers, and the power to give leave to remain or vary the duration of stay or the conditions of entry, by the Secretary of State. The Immigration Appeals Tribunal and the adjudicators provided for by the Immigration Appeals Act 1969 are continued under the new Act, and members of the Tribunal are appointed by the Lord Chancellor, adjudicators by the Secretary of State.

Although it is the Immigration Act which lays down the basic principles of control, it is to the immigration rules that one must turn in order to understand the working of these principles in any given context. The Act provides that the

1. Immigration Act 1971, section 3(1). To enter without leave is punishable on summary conviction with a fine of not more than £200 or with imprisonment for six months or with both such fine and imprisonment: section 24(1)(a). There is an extended time limit for prosecutions, which may be tried if an information is laid within six months of the commission of the offence, or if it is laid within three years of the commission of the offence and not more than two months after the date certified by a chief officer of police to be the date on which evidence sufficient to justify proceedings came to the notice of an officer of his police force: sections 24(3)(1), 28(1). Police constables or immigration officers are empowered to arrest without warrant any one who has, or whom he, with reasonable cause, suspects to have committed such an offence: section 24(2).

2. Ibid., section 3(1)(c). Under the current rules registration with the police may only be required of non-Commonwealth nationals, although this could be changed in the future: 1973 H.C. No. 81, paras. 56-57. See also, section 4(3) and The Immigration (Registration with Police) Regulations 1972 (S.I. 1972 No. 1758); and section 4(4) and The Immigration (Hotel Records) Order 1972 (S.I. 1972 No. 1689).

3. Ibid., section 4(1); Sch. 2, para. 1. The Secretary of State is also empowered to provide for the regulation of a variety of other topics by statutory instrument.

4. Ibid., section 12; Sch. 5.
Secretary of State shall from time to time lay before Parliament statements of the rules made regarding the administration of the Act and regulating the entry into and residence in the United Kingdom of non-patrials. The rules are subject to the negative resolution procedure and may be disapproved by resolution within forty days of their being laid. If they are rejected, as the first sets of rules were, then the Secretary of State has a further forty days in which to introduce the necessary changes. The statute anticipates that the rules made will regulate the admission and stay of persons coming for employment, for study, as visitors or as dependants. It is expressly provided, however, that the Secretary of State is not obliged to make uniform provision regarding admission policies and that for these, as well as for other purposes, account may be taken of citizenship or nationality. This latter power has enabled the rules to be framed in the light of the United Kingdom's obligations as a member of the EEC.

1. Immigration Act 1971, section 3(2).
2. See 849 H.C. Deb., col. 653 et seq.

4. Ibid., section 3(2). N.B. section 3(7) which empowers the Secretary of State by Order in Council to prohibit or restrict the embarkation of non-patrial foreign nationals as a measure of retaliation for restrictions imposed on United Kingdom citizens seeking to leave the countries of which those non-patrials are nationals.

5. Cf. Simmonds, Immigration Control and Free Movement of Labour - A Problem of Harmonisation, 21 I.C.L.Q., (1972), 307. See further below, pp. 284-285. There is considerable flexibility in the manner and form in which immigration rules may be made. Many rights which were embodied in earlier statutes are now reduced to the status of rules and a change in policy could simply and quickly cut back or abolish these rights with little chance of redress.
(3) Pre-Entry Procedures

A partial may enter the United Kingdom without leave and to that extent he is not bound to undergo any form of examination abroad, although in some circumstances he may need a "certificate of patriality" as proof of his right of abode. For non-patrials, however, the documentary requirements have been tightened up. Any non-partial who now comes to settle in the United Kingdom must possess an "entry clearance" in the form of a visa, or an entry certificate, or a Home Office "letter of consent", the precise document depending on his national status. Under the earlier law, the entry certificate was compulsory only for Commonwealth wives and children under sixteen, and this reversion to a stricter régime is contrary to current international trends.

For some time visas have been, and still are, required by the nationals of most East European countries, some Asian and African countries, and now Cuba. They are also needed by stateless persons and other holders of non-national travel

1. Immigration Act 1971, section 3(9); 1973 H.C. No. 79, para. 4. Such certificates may be issued by a British Government representative abroad or directly, on application to the Home Office. See further below, p.264.

2. Ibid., section 33(1). Nationals of Member States of the EEC are exempt from this requirement: 1973 H.C. No. 81, paras. 49-54; see below, pp. 284f.


4. It is also contrary to the recommendations of the Wilson Committee: Cmd. 3387, para. 70.

5. For the full list, see Appendix to 1973 H.C. No. 81. Cuba is a recent addition: The Guardian, 24th October 1972.
documents, for example, refugees. The Home Office "letter of consent" is an innovation; it is not compulsory except for those coming for settlement, but otherwise it is available to any non-visa national who wishes to ascertain in advance whether he is admissible to the United Kingdom. It is further required that a passenger must have such clearance if he is seeking admission as the wife, child or other dependant of a person settled in the United Kingdom, or as the husband or fiancé of such a person.

Like the alien, the Commonwealth citizen who comes for settlement must also be in possession of an entry clearance, in his case known as an "entry certificate". A non-patrial citizen of the United Kingdom who holds a United Kingdom passport must produce either a special voucher or an entry certificate in lieu. If he arrives without such a document,

1. 1973 H.C. No. 81, para. 8. Refugees who hold such travel documents issued by countries which have signed the 1959 European Convention on the Abolition of Visas for Refugees (European Treaty Series, No. 31) do not require visas if coming for visits of three months or less: ibid., footnote to para. 8. See above, pp. 114-115.

2. Ibid. As the immigration rules note, this procedure is of particular value when the claim to admission depends upon proof of facts entailing inquiries in this country or overseas. A non-visa national (but not a non-patrial United Kingdom citizen; see below, p. 261) may, it seems, be admitted for a period without such letter in order to put his case to the authorities.

3. Ibid., para. 9. Note paras. 34-41 for further detailed rules on the admission of dependants. In all cases the person concerned must be able and willing to support and accommodate his dependants without recourse to public funds. Cf. Francis v. Secretary of State [1972] Imm. A.R. 162.


5. Entry certificates and special vouchers are obtainable from the appropriate British representative in the country of residence. On special vouchers, see above, pp. 253.
then his exclusion is mandatory, and it is this provision in particular which has accounted for the practice of "shuttlecocking", that is, continually deporting those without proper documents to their point of embarkation. A rule similar to that noted above applies in respect of dependants, for whom possession of an entry certificate is also mandatory, and the general requirement is that the person concerned must be able and willing to support his dependants without recourse to public funds. This does not apply, however, in the case of admission of a wife or child under eighteen of a Commonwealth citizen who is patrial or who was settled in the United Kingdom at the coming into force of the Act.

So far consideration has been given only to those documents which are required by passengers coming for settlement in the United Kingdom, and by the dependants of such passengers or of persons already settled. This does not include what is perhaps the most important category of entrants, namely, those coming to work. Under the earlier legislation, work permits were issued to aliens, employment vouchers to Commonwealth immigrants. Work permits were subject to a number of restrictions, and were usually tied to a specific job with a specific employer and for a specified time. The numbers issued were entirely a matter for the Ministry of Labour or the

1. 1973 H.C. No. 79, para. 38: "... such a passenger is to be refused leave to enter."
2. Ibid., para. 40.
3. Ibid., para. 39.
4. Aliens Order 1953, Article 4(1)(b); see above, p. 2472. The maximum time was twelve months, but this could be extended.
Department of Employment. Employment vouchers for Commonwealth citizens, on the other hand, although restricted to a maximum of 8,500 in 1965, did not carry the same restrictions as work permits. A Commonwealth citizen who entered with an employment voucher had an automatic right to settle, while the alien was obliged to seek renewal of his permit from year to year and enjoyed no such right.

The Immigration Act now imposes on all non-patrials subject to the requirement of a work permit the same uniform restrictions as previously applied only to aliens. Any passenger subject to control who comes to the United Kingdom to take employment is to be mandatorily excluded if he does not have a work permit, unless he comes within one of the exempted

1. See above, p.250. In 1971 when the government announced the doubling of the rate of issue of special vouchers for United Kingdom citizens, it also reduced the maximum rate of issue of employment vouchers from 8,500 to 2,700. This entered into effect on 1st June 1971: 818 H.C. Deb., (Written Answers), cols. 179-181. In Shah v. Secretary of State [1972] Imm. A.R. 56 the Immigration Appeals Tribunal held that the method of issue of special vouchers in East Africa was outside the appeals system, and was under the control of the Foreign and Commonwealth Office. The definition of "entry certificate" under the Immigration Appeals Act 1969, section 24(1), was fairly narrow, and under the 1971 Act an appeal may be brought against the refusal to issue an "entry clearance", which includes a visa, entry certificate or other document which is evidence of a person's eligibility for entry into the United Kingdom: sections 13(2), 33(1). For details of restrictions on the numbers of work permits for aliens made in the same year, see 825 H.C. Deb., (Written Answers), cols. 200-202.

2. But an employment voucher was mandatory for a Commonwealth citizen wishing to enter the United Kingdom "for the purpose of taking up or looking for employment": Cmdn. 4298, para. 28. In Baldacchino v. Secretary of State [1972] Imm. A.R. 76 the appellant held an entry certificate endorsed "visitor". The Tribunal held that he was rightly excluded on the basis of evidence that his secondary purpose in coming was to look for employment. A work permit is not included in the statutory definition of "entry clearance" (above, note 1) and there is no appeal against refusal of issue: Latiff v. Secretary of State [1972] Imm. A.R. 76.

3. Commonwealth Immigrants Act 1962, section 2(3)(a). He might be deported only during the first five years, after conviction.
categories.\textsuperscript{1} It is further provided that the holder of a current work permit should normally be admitted for the period specified in such permit, subject to conditions permitting him to change his employment only with the permission of the Department of Employment.\textsuperscript{2} Work permits are issued by that Department in respect of a specific post with a specific employer,\textsuperscript{3} and considerable governmental control is thus retained over the movements of the migrant work force.

Only non-patrials require leave to land in the United Kingdom, but the Immigration Act expressly declares that it shall lie on the person who claims patriality to prove his entitlement.\textsuperscript{4} Immigration officers are empowered to examine

\begin{itemize}
\item \textsuperscript{1} 1973 H.C. No. 79, para. 25; 1973 H.C. No. 81, para. 23. A work permit does not exempt the holder from complying with visa requirements. On the permit free categories, see below, p. The wife and children under eighteen of a work permit holder who also seek admission must possess the relevant entry clearance, and no other dependants may be admitted before the time limit on the worker's stay has been removed, i.e. before he has become "settled" within the meaning of section 2(3)(d). 1973 H.C. No. 79, paras. 37, 39-46; 1973 H.C. No. 81, paras. 33, 34-41.
\item \textsuperscript{2} 1973 H.C. No. 79, para. 26; 1973 H.C. No. 81, para. 24.
\item \textsuperscript{3} 1973 H.C. No. 79, para. 25; 1973 H.C. No. 81, para. 23. A worker may apply for an extension of stay beyond the first maximum of twelve months. Such extension "may" be granted if the worker is still engaged in the employment specified in the permit or in other employment approved by the Department of Employment, and the employer confirms that he wishes to continue to employ him: 1973 H.C. No. 80, para. 19; 1973 H.C. No. 82, para. 17. Cf. the provisions in favour of EEC nationals, paras. 32-39. Where an extension is granted it should be for a further three years unless there is any special reason to the contrary. After four years in approved employment the time limit on the person's stay can be removed and he then requires no further permission from the Home Office or the Department of Employment to engage in any kind of business or employment: 1973 H.C. No. 80, para. 28; 1973 H.C. No. 82, para. 26. Restrictions on taking employment, etc., imposed under the Aliens Order 1953 and still in force on 1st January 1973 have been revoked by statutory instrument in respect of those aliens who are nationals of Member States of the EEC: The Immigration (Revocation of Employment Restrictions) Order 1972 (S.I. 1972 No. 1647).
\item \textsuperscript{4} Immigration Act 1971, section 3(8).
\end{itemize}
any person arriving in the United Kingdom in order to determine whether he is patrial, and every person is obliged to furnish the immigration officer with whatever information may be required to establish his identity, nationality, etc. For many patrials there will be no particular problems, and a certificate of patriality will only generally be required in the case of someone who claims the right of abode other than under section 2(1)(a) or (b) of the Act or by virtue of marriage to a man to whom section 2(1)(a) or (b) applies.

This provision, however, entails further consequences for the holders of United Kingdom passports. The Immigration Rules provide that a passenger holding a passport issued in the United Kingdom or Ireland is to be admitted freely without proof of patriality, unless the passport carries an endorsement to the effect that the bearer is subject to immigration control.

1. Immigration Act 1971, section 4; Sch. 2, para. 2; see also para. 3 for similar powers in respect of departing passengers.

2. Ibid., Sch. 2, para. 4.

3. Ibid., section 3(9); 1973 H.C. No. 79, para. 4. Section 2(1)(a), (b) declares to be patrial those who have acquired United Kingdom citizenship through birth, adoption, naturalisation or registration in the United Kingdom, either in their own right or through a parent. In October 1971 it was stated that both entry certificates and certificates of patriality would probably take the form of a stamp in the passport: 324 H.L. Deb., col. 430.

4. 1973 H.C. No. 79, para. 5. United Kingdom passports issued after 1st January 1973 will indicate whether or not the holder has the right of abode in the United Kingdom. Holders of passports issued before that date are entitled to readmission unless the passports are endorsed in any of the following ways: (a) Issued on behalf of the Government of ... (b) This passport does not fall within the category of passports referred to in section 1(2) of the Commonwealth Immigrants Act 1962; (c) with reference to "Circular 0 252/68" or to "Circular 0 79/71. Such endorsements show that the holder is subject to immigration control. The bearer of an unendorsed passport who intends to take advantage of the free movement provisions of the EEC Treaty may apply for the endorsement "Holder has the right of abode in the United Kingdom": see Passport Office Leaflet P1.
Passports issued to United Kingdom citizens in the United Kingdom will now distinguish between patrials and non-patrials, although it is provided that a citizen of the United Kingdom and Colonies who holds a United Kingdom passport, wherever issued, and who satisfies the immigration officer that he has previously been settled in the United Kingdom should be freely admitted.\(^1\)

(4) **Procedure on Arrival**

Immigration officers may examine any passengers who arrive in the United Kingdom in order to determine their status, whether leave to land is required, whether it should be granted and, if so, upon what conditions.\(^2\) In considering an applicant's case for admission immigration officers are under a duty to act fairly and honestly, letting the applicant know the impressions he has made and giving him a fair opportunity to rebut any unfavourable impression. To this limited extent only do the rules of natural justice apply, and prior to the introduction of a statutory appeals system it was very difficult successfully to challenge the actions of immigration officers in the courts. In one case\(^3\), Lord Denning drew a distinction between two decisions involving actions by Commonwealth immigrants.\(^4\) In his Lordship's view, the restricted rules of

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1. 1973 H.C. No. 79, para. 5; Immigration Act 1971, section 1(2)
2. Immigration Act 1971, section 4; Sch. 2, para. 2. Detention pending examination may also be ordered: ibid., Sch. 2, para. 16.
natural justice applied only in the one case where the immigrant had a right to enter if he satisfied certain conditions. In the second case there was no such right, but admission might be granted in the complete discretion of the immigration officer. Natural justice did not apply at all and the authorities were under no duty either to give reasons for exclusion or to permit an opportunity to make representations. The immigrant was in the same position as the alien, seeking the privilege of entry which was within the "licence of the Crown".1

If the applicant is in possession of an entry clearance then his admission may be facilitated, but the entry clearance itself is no guarantee of admission and is only to be taken as evidence of the holder's eligibility for entry.2 Admission is not to be refused unless the immigration officer is satisfied that (a) false representations were made or material facts concealed for the purpose of obtaining the clearance, whether or not to the holder's knowledge; or (b) if a change of circumstances since issue has removed the basis of the holder's claim to be admitted.3 The holder of an entry clearance is also liable to be excluded on the general grounds of inadmissibility, such as medical reasons, restricted returnability, criminal record, the existence of a deportation order against him, or if exclusion would be conducive to the


public good. In examining the holder of an entry clearance the immigration officer is entitled to act on reasonable inferences and any other information available to him, although there continues to be a limited presumption in favour of eligibility.¹

Similar provisions apply to the examination of the holders of work permits. Again, the presumption is in favour of eligibility for admission, but the immigration officer may nevertheless order exclusion if his examination reveals good reason for doing so, for example, in the case of false representations made to obtain the permit, or if the holder's true age puts him outside the limits for employment, or if the holder does not intend to do, or is incapable of doing, the employment specified.² A passenger who comes for employment without a work permit is mandatorily excluded, unless he comes within one of the permit-free categories, or benefits from the privileges granted to those with "United Kingdom ancestry" and to those who come on "working holidays".

1. 1973 H.C. No. 79, para. 13; 1973 H.C. No. 81, para. 11. The holder of an entry clearance who is refused admission can generally appeal against that decision without first having to leave the country. For appeals decided under the earlier, but analogous legislation, see: Padmore v. Secretary of State [1972] Imm. A.R. 1 (entry certificate obtained by misrepresentation); Mustun v. Secretary of State, ibid., p. 97 (entry certificate obtained by concealment of material facts); Secretary of State v. Georgiou, ibid., p. 179 (reconsideration and appreciation of the question, whether applicant a "genuine visitor"); Perween Khan v. Secretary of State, ibid., p. 245 (untrue statement invalidating entry certificate); Secretary of State v. Idowu, ibid., p. 197 (presumption in favour of eligibility displaced by agent's failure to disclose that he was applying on holder's behalf).

2. 1973 H.C. No. 79, para. 26; 1973 H.C. No. 81, para. 24. The immigration officer has a discretion to admit a passenger whose work permit is out of date if satisfied that circumstances beyond his control prevented his timely arrival and that the job is still open: ibid.
The permit-free categories are set out at length in the Immigration Rules, and include ministers of religion, doctors, dentists, private servants of members of diplomatic missions, teachers and others on approved schemes, seamen under contract to join a ship in British waters, and various others. Privileges in employment are granted to those with United Kingdom ancestry, and an entry clearance is granted expressly for this purpose. No work permit is required in addition and those who qualify under this head are given indefinite leave to enter. Commonwealth citizens on working holidays are permitted to take employment "incidental to their holiday", and they may be admitted for a period of twelve months, extendable within a maximum of five years.

Passengers may also be admitted as businessmen, as persons of independent means, or as self-employed. Businessmen who have secured an entry clearance are to be admitted for a period not exceeding twelve months, while those without an entry clearance are to be admitted first for two months, but with the prospect of extension. In both cases leave to enter should be granted subject to a condition restricting their freedom to take employment. In order that this category should not be used by those seeking to circumvent the controls, it is

2. See the Immigration (Exemption from Control) Order 1972 (S.I. 1972 No. 1613); on the right of diplomats themselves to enter, see below, Appendix
3. On entry by crewmembers, see below, Appendix
4. 1973 H.C. No. 79, para. 27.
5. Ibid., para. 28; see also 851 H.C. Deb., cols. 596-597.
provided that the applicant for an entry clearance shall show, if he is joining an established business, that he will be investing his money in it, that he will receive an adequate share of the profits, and that he will be able to bear his share of the liabilities. If he intends to start his own business, then he must present evidence of sufficient funds. In neither case is it permitted for the applicant to supplement his income by additional employment for which a work permit would otherwise be required.

A passenger of independent means is to be admitted if he is in a position to maintain himself and his dependants indefinitely in the United Kingdom without working, and he may satisfy the immigration officer on this count by producing evidence of funds available. Where an entry clearance has been obtained in advance, leave to land may be for twelve months, and for two months in other cases. In Randhawa v. Secretary of State the Immigration Appeals Tribunal held that it was not permissible to consider the appellant's own means in conjunction with the support which he received from partial dependence on his family, in this case the provision of free board and lodging. In the circumstances, the claim to remain permanently in the United Kingdom was rejected. Similar


2. 1973 H.C. No. 79, para. 34; 1973 H.C. No. 81, para. 30. The Immigration Rules make no express reference to a class of "treaty aliens" or "treaty investors"; see below, pp. 336ff


provisions apply in respect of self-employed persons, such as artists and writers, who may also be admitted if the immigration officer is satisfied that they can maintain themselves and their dependants without engaging in controlled employment. ¹

Wives and children under eighteen of any of the above categories may also enter and be admitted for the same period as the passenger in whose behalf they claim admission. If the latter is prohibited from taking employment, then a similar condition is to be imposed on the dependants. No further dependants may be admitted until that passenger is "settled" in the United Kingdom within the meaning of the Act, but it is expressly provided that no dependants at all shall be admitted in behalf of seasonal workers or of those admitted for resident domestic employment.² Wives and children must also fulfil the requirements of further rules applicable to the dependants of those admitted for settlement.³ In every case apart from that of a Commonwealth citizen who is patriotic or who was settled in the United Kingdom on 1st January 1973, the person concerned must be able and willing to support his dependants without recourse to public funds. The Immigration Rules do not expressly recognise the problems which may arise in the case of polygamous marriages, and the word "wife" is

¹ 1973 H.C. No. 79, para. 36; 1973 H.C. No. 81, para. 32. The way is again made easier for those who have obtained entry clearances in advance.


³ 1973 H.C. No. 79, paras. 39-46; 1973 H.C. No. 81, paras. 34-41. In all cases dependants seeking admission must come provided with an entry clearance: ibid.
not qualified in any way. It is declared, however, that a woman who has been living in permanent association with a man has no claim to enter, but that she may be admitted after due consideration has been given to local customs and traditions tending to establish the permanency of the association. This might suggest that executive discretion was just as wide in regard to polygamous marriages. The significance of such marriages in other contexts tends to vary with the circumstances. For example, there is no title to benefit in matters of national insurance, industrial injuries and family allowances in the case of a marriage which is actually polygamous. On the other hand, in the case of a claim for supplementary benefits, provision for a man's requirements takes account of and includes any wife living with him and of any of their children in the household. Since 1972 English law has extended recognition to foreign marriages valid in form under the *lex loci celebrationis* and, in respect of capacity, under the law of domicil. For the purposes of entry into the United Kingdom, it is apparent that the word "wife" must include a party to a polygamous marriage which is thus recognised. In one case no doubt was raised on this point, the only question being whether the husband had acquired a domicil of choice in England so as to render him incapable of contracting a valid polygamous marriage.

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2. As opposed to a marriage which is only potentially polygamous at the time of a claim.
3. 845 H.C. Deb., (Written Answers), cols. 277-278 (November, 1972
As a general rule, children under eighteen are entitled to settle in the United Kingdom with their parents, but interpretation of the rules in the past has produced inconsistency and hardship.\(^1\). Difficulties have arisen over the proof of age, and this problem is particularly pertinent in the case of children arriving from countries with insufficiently developed systems of registration. In *Aftab Miah v. Secretary of State* the Immigration Appeals Tribunal came face to face with the problems of assessment of age on the basis of X-Ray photographs.\(^2\). It was presented with different determinations from four equally highly qualified doctors and, in the end, concluded that the appellant must be accepted, "on the balance of probabilities", as the son of the sponsor.

Further problems arise in cases where a child seeks admission to join one parent only. Consideration must then be given to the question of who has had the "sole responsibility" for bringing up the child, and whether there are family or other circumstances which make exclusion undesirable. Appeals on the first point show little consistency, and it is not clear how the criterion of "sole responsibility" is to be satisfied. Sometimes the determination will be based on evidence of money sent for the support of the child abroad, and sometimes on evidence of the absence of the other parent. None of these factors, however, is conclusive, and a decision may well go against a child who is being satisfactorily cared for by a

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1. The new rules do not differ appreciably or materially from those previously applicable: see now 1973 H.C. No. 79, paras. 43-44; 1973 H.C. No. 81, paras. 38-39.

grandparent or other relative. As regards the second point, it has been held by the Tribunal that the conditions under which the child is living in the home country are not to be weighed against the conditions available for the child in the United Kingdom. The situation in this country is only to be taken into account if the conditions overseas show that exclusion is undesirable.

By contrast, the position of the children, wives and other dependants of nationals of EEC states is considerably better. For example, the family of the EEC entrant, which is entitled to enter with him as of right, is to be regarded as consisting not only of his wife, but also his children under twenty-one, other children if still dependent, and dependent parents and grandparents. The general rule in non-EEC cases is that children over eighteen must qualify for admission in their own right. Thus, while in certain circumstances an unmarried and fully dependent son under twenty-one or an unmarried daughter under twenty-one may be admitted if the whole family are settled in the United Kingdom or are being admitted for settlement, there is no right in


2. Howard v. Secretary of State [1972] Imm. A.R. 93, as applied in Secretary of State v. Campbell, ibid., p. 115. In Campbell the adjudicator's decision in favour of two Jamaican children against the refusal of entry certificates to join their mother was upheld on the facts.

3. See below, p. 314

4. 1973 H.C. No. 81, paras. 53-54.
the matter. 1.

Certain other dependants of persons settled in the United Kingdom may also be admitted and the rules make provision in respect of parents, grandparents and distressed relatives. 2. Admission may also be granted to those who wish to enter the country in order to get married, although the rules look more favourably upon women who seek to enter, than upon men. 3. The latter will only be granted permission to enter for settlement in view of the degree of hardship which would be caused to the woman in having to live outside the United Kingdom in order to be with her husband. 4. It is at this point that the law strikes at the woman who is herself a patrial or settled in the United Kingdom. The Government maintains the view that "international custom" in immigration matters places responsibility with the head of the household, that is, with the husband. The hardship which results from the application of this rule was made the basis of a number of complaints to the European Commission on Human Rights, alleging that the United Kingdom Government was in breach of Article 8 of the Convention which prohibits interference with family life. 5.


2. 1973 H.C. No. 79, paras. 45-46; 1973 H.C. No. 81, paras. 40-41 Relatives may qualify if they are isolated, i.e. living alone with no relatives to turn to, and distressed, i.e. living at a standard substantially below that of their own country; entry is only exceptionally granted to those under sixty-five. See further, 851 H.C. Deb., col. 594.

3. 1973 H.C. No. 79, paras. 48-50; 1973 H.C. No. 81, paras. 43-45. The male fiance with a grandparent born in the United Kingdom is in a privileged position once again. See also Bottomley and Sinclair, op. cit., p. 25.


5. See below, pp. 298-299
To a certain extent, the Immigration Act protects the rights of those already settled in the United Kingdom on 1st January 1973.\(^1\) The privileges of returning residents are elaborated in the Immigration Rules, which declare that such passengers are to be admitted for settlement if the immigration officer is satisfied that they were previously settled in the United Kingdom and that they have not been away for longer than two years.\(^2\) If this latter condition is not satisfied, leave to enter may still be granted if, for example, the applicant has lived most of his life in the United Kingdom.\(^3\)

However, residents who were not "settled" within the meaning of the Act are not so well off. Under section 3(4) of the Act a person's leave to enter and remain in the country lapses on his going to any state or territory outside the common travel area, whether or not he lands there. The Immigration Rules further provide that a person whose stay in the United Kingdom was subject to a time limit and who returns after a temporary absence abroad has no claim to be admitted as a returning resident.\(^4\) For example, if a non-patrial student, admitted for twelve months to study in England, decides to spend his Christmas vacation in Paris, he may find that he is

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1. Section 1(2),(5). Cf. Re Di Cesare, Ann. Dig., 1938-40, Case No. 119. See also below, pp. 396ff


3. Secretary of State v. Bashir Sheikh [1972] Imm. A.R. 143; Francis v. Secretary of State, ibid., p. 162. The new rule appears to be a little more flexible than Cmd. 4298, para. 49, under which Francis and Bashir Sheikh were decided.

refused admission when he attempts to return for the new term.¹

Besides those who are coming for permanent or semi-permanent residence, prospective entrants may fall within one or other of the temporary categories. Passengers coming as visitors are to be admitted with their dependants if the immigration officer is satisfied with the genuineness of the visit. Factors to consider will be the ability of the entrant to support himself and his dependants and to pay for his outward journey. An initial period of six months will normally be allowed, although this may be extended or curtailed in the light of special circumstances; for example, the period may be shorter where the passenger is due to leave on a particular charter service or is in transit.²

Students will also be admitted if they are in possession of an entry clearance. Such clearances will be issued if the applicant satisfies the issuing officer that he has been accepted for a course of study at a university, a college of education, an independent school or any bona fide private educational institution.³ He must show that the course will

¹ This actually happened to three students from Cameroun in January 1973, even though they had taken with them to Paris their original entry clearances valid until August 1973 and a letter from the college saying that they were due back in class on 8th January. Re-entry was only permitted after new entry clearances had been obtained from the British authorities in France: The Sunday Times, 21st January 1973. There are a few exceptions to this rule: section 3(4) provides that leave to enter or remain shall not lapse if the person concerned returns to the United Kingdom in circumstances in which he is not required to obtain leave to enter; see the examples in The Immigration (Exemption from Control) Order 1972 (S.I. 1972 No. 1613) Article 5.

² 1973 H.C. No. 79, paras. 15-17; 1973 H.C. No. 81, paras. 13-15
See also 849 H.C; Deb., col. 655.

³ 1973 H.C. No. 79, paras. 16-20; 1973 H.C. No. 81, paras. 18-22
Cf. Schmidt v. Secretary of State [1969] 2 Ch. 149.
occupy the whole or a substantial part of his time,\(^1\) that he has the means to meet the cost of the course and of the maintenance of himself and any dependants,\(^2\) and that he intends to pursue the course and to leave the United Kingdom on completion. If the student is thinking of remaining behind or of seeking permission to settle, then account may be taken of this and admission accordingly refused.\(^3\) The holder of an entry clearance must also satisfy the immigration officer of the above matters, and that officer may himself assess the applicant's qualifications and intentions.\(^4\).

Finally the rules recognise the so-called "au pair" arrangement, under which a girl of seventeen or more may come

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1. Fifteen hours per week is reckoned to be the minimum, and entry clearances are not to be issued for the purpose of taking a correspondence course. Special provision is made for student nurses and midwives accepted for training at a hospital, and for doctors and dentists doing post-graduate work, even though they may also intend to seek employment in posts related to their studies.


3. In Perveen Khan v. Secretary of State [1972] Imm. A.R. 245 the applicant's admission as a student was refused on the basis of evidence that her primary purpose in coming to the United Kingdom was not study, but work and settlement: see Cmd. 4298, para. 19. The applicant applied to the Queen's Bench Division for orders of certiorari and mandamus, but her applications were dismissed: [1972] Imm. A.R. 268; [1972] 3 All E.R. 297. Widgery L.C.J. noted: "... that which is in the immigrant's mind in regard to conduct after the expiration of the course must be a factor in the determination of the purpose or purposes with which she enters the country, and ... an argument which completely eliminates any consideration of that aspect of the matter seems to me to be wrong."

4. One who cannot satisfy the requirements mentioned above, but who can satisfy the immigration officer that he has realistic and genuine intentions of studying in the United Kingdom may be admitted for a short period. This is to be limited according to his means, with a prohibition on employment, and the applicant is to be informed that he may seek further consideration of his case from the Home Office. Cf. Secretary of State v. Virdoe [1972] Imm. A.R. 215; Sharma v. Secretary of State, ibid., p. 219 (note).
to live with a family in the United Kingdom to learn English. In return she may do domestic work and receive pocket-money, but it is not expected, nor allowed, that she be engaged in full-time employment. Where the immigration officer is satisfied that a bona fide au pair arrangement has been made, then leave to enter for up to twelve months may be granted, subject to a prohibition on the taking of employment. A girl admitted "au pair" may be admitted for a second period, but a total of two years is the maximum permitted under this concession.

(5) General Grounds of Exclusion and Rights of Appeal

A passenger who does not fall within any of the admissible categories above is to be refused entry, but even if he does so qualify, leave to enter may still be denied on any of a number of additional grounds set out in the Immigration Rules. In each case the authority of a Chief Immigration Officer is required.

1. 1973 H.C. No. 79, paras. 23-24; 1973 H.C. No. 81, paras. 21-22. The United Kingdom provisions are in accordance with the European Agreement on Au Pair Placement 1969. See Articles 2, 3, 4; also Explanatory Report, (Council of Europe, 1972).

2. For recent criticisms of the present state of au pair arrangements, see 851 H.C. Deb., cols. 620-621.

3. Limited recognition is given to the "right" of asylum and a passenger should not be excluded if the only country to which he can be removed is one in which he has a well-founded fear of persecution: 1973 H.C. No. 79, para. 54; 1973 H.C. No. 81, para. 55. See generally, below, Chs. XIV-XVI. The criminal provisions of the Immigration Act 1971 make no express concessions in favour of refugees who enter illegally: section 24(1)(a). Cf. Article 31, 1951 Convention relating to the Status of Refugees.

4. 1973 H.C. No. 79, paras. 55-66; 1973 H.C. No. 81, paras. 58-68. Admission may also be refused to a passenger who produces an unacceptable passport or travel document: see above, pp. 66ff.
Officer must always be obtained before a final decision to exclude is taken. Any passenger, whether he holds an entry clearance or not, may be refused admission for medical reasons, on the basis of criminal record, because he is subject to a deportation order, or because his exclusion is conducive to the public good. The general rule is that no appeal may be entered against exclusion while the passenger remains in the United Kingdom, unless he is the holder of an entry clearance or is named in a current work permit. ¹.

Immigration officers are required to act in accordance with the law and with instructions given to them by the Secretary of State which are not inconsistent with the Immigration Rules. ². These instructions are not published but would, presumably, include the so-called "look-out" books which give details of undesirable aliens, fugitive offenders and the like. Medical examinations may be required, and medical inspectors are also appointed by the Secretary of State. ³. Normally any passenger who intends to remain in the United Kingdom longer than six months should be examined, as also any passenger who appears to be mentally or physically abnormal, or who mentions medical treatment as a reason for his visit. ⁴. The medical inspector may advise that admission is undesirable.

¹. Immigration Act 1971, section 13(3). See below, pp. 283-284
². Ibid., Sch. 2, para. 1(3).
³. Ibid., Sch. 2, para. 1(2). It is provided that medical inspectors shall be fully qualified medical practitioners. For further details of examination and detention procedures, see Macdonald, op. cit., pp. 72-75, 77-80.
for medical reasons, in which case the immigration officer should refuse leave to enter, unless there are strong compassionate circumstances. ¹ The immigration officer is also required to take account of specified diseases or conditions brought to his attention by the medical inspector which might interfere with the passenger's ability to support himself and any dependants. There is no published list of undesirable diseases or conditions, although presumably guidance is given in the unpublished instructions from the Secretary of State.² Returning residents and the wives and children under eighteen of persons settled in the United Kingdom are not to be refused admission on medical grounds, but the immigration officer is empowered to require further examination or necessary treatment after admission.³

Exclusion on the ground of criminal record may be ordered in the case of any passenger other than the wife or child under eighteen of a person settled in the United Kingdom, where that passenger has been convicted in any country, including the United Kingdom of an extradition crime. The immigration officer has a discretion to grant leave to enter where this is justified by strong compassionate reasons.⁴

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¹ Admission may also be refused where the passenger declines to undergo a medical examination.

² See the similar provisions of the Aliens Act 1905, above, p. 244. See also the diseases and conditions specified by United States law, above, pp. 221-223, and in EEC Directives, below, p. 323.


A passenger currently subject to a deportation order is mandatorily excluded and if he wishes to make representations in the matter, he must first return to his own country from where he may apply for revocation of the order. If the revocation is refused, then he will generally have a right of appeal.\textsuperscript{1}

Finally, there is a general discretionary power to order exclusion on the ground that this is conducive to the public good. Any passenger, other than the wife or child under eighteen of a person settled in the United Kingdom, may be so excluded where (a) the Secretary of State has personally directed exclusion; or (b) from information available to the immigration officer it seems right to refuse leave to enter, for example, in the light of the passenger's character, conduct or associations.\textsuperscript{2} Where exclusion or the refusal of an entry clearance is ordered personally by the Secretary of State, "and not by a person acting under his authority", then the individual affected is barred from any appeal within the statutory system, whether he is in the United Kingdom or abroad.\textsuperscript{3} It is clearly intended that this power of the


\textsuperscript{2} 1973 H.C. No. 79, para. 63; 1973 H.C. No. 81, para. 65. Note also the very wide powers of inquiry and examination granted to the immigration officer, including the power to search for and detain documentary evidence, and the duty incumbent on the passenger to provide information: Immigration Act 1971, Sch. 2, para. 4. \textit{Cf.} Rice \textit{v. Connolly} [1966] 3 W.L.R. 17. A passenger who is detained under Sch. 2, paras. 16 and 18 pending a decision on his admissibility may apply for bail after seven days: 1973 H.C. No. 79, para. 66; 1973 H.C. No. 81, para. 68; Immigration Act 1971, Sch. 2, paras. 21-25.

Secretary of State will be exercised primarily in "security" and political cases, and it is apparent that appeals against exclusion simply on the basis of a man's character or associations were more acceptable to the government of the day. Nevertheless, it may be that recourse to the courts is still open. Unlike the law of the United States, no express mention is made of the alternative remedies, but in other contexts, including deportation and the removal of illegal immigrants, the courts have declared their competence to go behind the orders in question to see whether the statutory powers have been abused. The practical difficulties, however, are considerable; a very heavy burden of proof will lie on the individual affected, and in many cases he will have been removed from the jurisdiction and beyond the writ of habeas corpus. But if manifest abuse could be shown, then without doubt the courts would be free to intervene.

Where a passenger is excluded, steps may be taken to secure his removal and, as a general rule, he will be returned to that state in which he embarked for the United Kingdom. Directions for this purpose may be given to the captain of the ship or aircraft in which the passenger arrived, or to the owners or agents of such ship or aircraft.


3. See further, Immigration Act 1971, Sch. 2, para. 8. For directions regarding seamen and aircrews, ibid., paras. 12,13; on payment of the costs of removal, ibid., paras. 19,20; on additional duties of those connected with ships or aircraft or with ports, ibid., paras. 26,27.
The passenger refused admission is to be handed a written notice of the decision, informing of the reasons for the decision and indicating his rights of appeal, if any.¹

As noted above, there is no statutory right of appeal in "security" cases, and in many other cases the passenger will only be able to exercise his right after he has left the United Kingdom. While in the country a passenger may appeal against a decision that he requires leave to enter only where the claim to patriality is based upon section 2(1)(a) or (b) of the Act. Such right may also be exercised while in the United Kingdom by a woman who is a citizen of the United Kingdom and who claims patriality by virtue of marriage to a person to whom section 2(1)(a) or (b) applies, or where the passenger holds a certificate of patriality.² Again, however, it is likely that alternative proceedings are available to the passenger who claims the right of abode. On an application for a writ of habeas corpus he may challenge the legality of his examination or detention by immigration officers, whose powers, for most purposes, are jurisdictionally limited to non-patrials.³ The burden would be on the passenger to prove his right, but the procedure is more attractive than enforced

¹. See The Immigration Appeals (Notices) Regulations 1972 (S.I. 1972 No. 1683). Such notice may also be handed to someone authorised by the passenger to receive it, e.g. a solicitor or adviser: R v. Chief Immigration Officer, Manchester Airport, ex parte Insah Begum [1973] 1 W.L.R. 141 (C.A.).

². Immigration Act 1971, section 13(1),(3). 1973 H.C. No. 79, para. 68; 1973 H.C. No. 81, para. 70. Section 13(2) gives a right of appeal against the refusal of a certificate of patriality, which can clearly be exercised either in the United Kingdom or abroad.

³. Macdonald, op. cit., p. 88. In R v. Secretary of State, ex parte Azam [1973] 2 W.L.R. 949 (C.A.); [1973] 2 All E.R. 765 (H.L.) the applicants employed the habeas corpus procedure to challenge the legality of their detention and of directions for their removal as illegal immigrants. There is only a very limited right of appeal under the Immigration Act: section 16.
removal abroad.

A person who appeals against his being refused leave to enter may also appeal against directions for his removal to a particular country.\(^1\). Again this right is limited, and applies only to the case of one who is also appealing against a decision that he requires leave to enter, that is, one who is claiming to be patrial, and to the case of one who was refused admission while he held a current entry clearance or was named in a current work permit.\(^2\). There is thus no right of appeal against "refoulement", the immediate return of a refugee who arrives without an entry clearance.\(^3\).

Apart from the holders of entry clearances and work permits, in all other cases, and irrespective of the passenger's national status, the right of appeal against exclusion is exercisable only after he has left the United Kingdom.\(^4\). This latter provision, and other parts of the Immigration Rules, does not appear to reflect the full extent of the United Kingdom's obligations within the EEC in regard to free movement. The Home Secretary recently stated in the House of Commons:\(^5\).

"An EEC national cannot enter this country without leave. He must have a passport or visa and we have the right to refuse entry on a number of grounds ..."

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1. Immigration Act 1971, section 17(1).
2. Ibid., section 17(5).
3. See below, pp. 549-550
4. Immigration Act 1971, section 13(3); 1973 H.C. No. 79, paras. 68-69; 1973 H.C. No. 81, paras. 70-71. A passenger who is aggrieved by the terms of a condition attached to his permission to land may apply for variation subsequent to entry, and there is a right of appeal if such variation is refused: sections 3(3), 14.
5. 851 H.C. Deb., col. 588.
"... on medical grounds, on a criminal record, on grounds of personal undesirability and on conducive grounds."

This statement, and the Immigration Rules to which it refers, fails to take fully into account the Regulations and Directives which are already in force within the EEC. In particular, detailed provision has been made concerning those diseases and afflictions which justify exclusion. It has also been declared that conviction for a criminal offence is not itself a sufficient ground for exclusion, and the so-called "conducive grounds" do not coincide at all with the concept of 'ordre public' which has been elaborated and defined in Directive 64/221. Article 5 of this Directive creates a presumption in favour of the EEC national and makes provision for "conditional entry". This may in certain circumstances be allowed under the Immigration Act, but detention as the general rule pending the decision on admission appears to be ruled out by the Directive. The same applies to any provision requiring the EEC national to leave the country before exercising his right of appeal.

The new Immigration Act contains stringent provisions applicable to illegal entrants and to all intents and purposes such persons are considered as stopped at the port of entry. If they are apprehended, they may be dealt with in exclusion proceedings and their removal ordered without the additional requirement of a deportation order. Prior to 1968, it was no

1. See below, pp. 304ff.
2. See below, p 322f.
4. Immigration Act 1971, section 4(2); section 16(1),(2); Sch. 2, para. 9.
offence to enter the United Kingdom without being examined by an immigration officer, and any Commonwealth citizen who entered and remained free for more than twenty-four hours became, in effect, a lawful immigrant.\(^1\) In the leading case of D.P.P. v. Bhagwan\(^2\), it was held that evasion of the Commonwealth Immigrants Act 1962 in this way was not a criminal offence, and it was not until 1968 that entry without examination was made criminal. Thereafter any person who entered without examination entered in breach of the immigration laws; he was an illegal entrant and could never become ordinarily resident or settled in the United Kingdom.\(^3\).

However, it was only the clandestine landing which was made an offence,\(^4\) and the illegal entrant had to be prosecuted within six months of that landing.\(^5\) As Lord Denning pointed out in the recent case of R v. Secretary of State, \textit{ex parte Azam},\(^6\) after six months the illegal entrant was virtually untouchable, but that did not mean that he was here as of right. His presence continued to be unlawful, although he could not be

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1. R v. Governor of Brixton Prison, \textit{ex parte Ahsan} [1969] 2 Q.B. 222. The same rule did not apply to aliens, who were only permitted to land with the leave of an immigration officer: Aliens Order 1953, Article 1(1); for removal of aliens who landed unlawfully, see Article 9.

2. \textit{[1972]} A.C. 60. The "Bhagwan Gap", as it was known, only benefited those who came in clandestinely, without examination, and not those who had previously been refused admission.


prosecuted for it. With the entry into force of the Immigration Act 1971, new provision is made for the removal of all those in the United Kingdom in breach of the immigration laws. In effect the Act imposes a retrospective penalty on such entrants and renders them liable to removal for an offence which was not previously punishable in this way. In Azam's case the Court of Appeal upheld the retrospective effect of the law in three applications for habeas corpus, and this decision has now been affirmed by the House of Lords.1

Within the statutory system, adjudicators will generally meet two types of exclusion appeal. Section 13(1) of the Act provides for appeals against the decision that a passenger requires leave to land, or against the refusal of leave to enter itself.2 Section 13(2) provides for appeals against the refusal of a certificate of patriality or an entry clearance.3 The statute declares that the adjudicator shall allow the appeal if he considers (1) that the decision or action was not in accordance with law or any applicable immigration rules;4 or (2) where the decision or action involves the


2. Such appeal may be made in conjunction with an appeal against removal to a particular country; see above, p 284

3. There is no appeal against the decision by the Department of Employment not to issue a work permit. Cf. Latiff v. Secretary of State [1972] Imm. A.R. 76.

4. Immigration Act 1971, section 19(1)(a)(i). For this purpose the adjudicator may review any determination of a question of fact on which the decision or action was based: section 19(2). The adjudicator is required to dismiss an appeal against refusal of leave to enter if satisfied that at the time of the refusal the appellant was an illegal entrant; and to dismiss any appeal against the refusal of an entry clearance if satisfied that a deportation order was in force in respect of the appellant at the relevant time: section 13(4), and note section 16(4).
exercise of discretion by the Secretary of State or by an immigration officer and that discretion should have been exercised differently. In every other case the appeal is to be dismissed.

If the appeal is allowed, then the adjudicator may give such directions as he thinks necessary for giving effect to his decision. For example, he may order release from detention and he may also make recommendations in respect of any other relevant matters, including conditions of admission. The decision and directions are binding on the Secretary of State and immigration officers, although their implementation may be suspended so long as an appeal can be brought against the adjudicator's determination, and so long as that appeal is pending.

Conclusions

Much of the preceding discussion of the law and practice of the United Kingdom and the United States has demonstrated the extent to which questions of entry and exclusion are still


2. Immigration Act 1971, section 19(3).

3. Ibid., section 20(2). Appeals from the decisions of adjudicators to the Immigration Appeals Tribunal are governed by section 20(1) and the rules of procedure regulating the grant of leave to appeal: The Immigration Appeals (Procedure) Rules 1972 (S.I. 1972 No. 1684), Part III. The Secretary of State also benefits from section 21 of the Act, under which he may at any time refer any matter to an adjudicator or to the Tribunal which relates to an appeal already heard and which was not dealt with at the original hearing.
retained within the reserved domain of domestic jurisdiction. However, certain factors common to both systems suggest that the states concerned recognise a number of obligations imposed on them by international law. The United States has expressly recognised and implemented the rule of non-discrimination, although in the case of the United Kingdom, this recognition is qualified to some extent by the distinctions actually drawn among certain of its own citizens.

Beyond that, there is a marked consistency in the practice of according some legal standing to the alien on the point of initial entry. This is especially apparent in cases where he may have presented himself at the border in reliance upon the issue to him of a visa or other entry clearance by the authorities of the state concerned. In these circumstances it is recognised that a decision to refuse entry should be a decision "in accordance with law". The consequence is that a right of appeal exists, and executive discretion may be controlled by independent adjudication. In other circumstances due recognition is also given to the special position of the alien who, already settled in the receiving state, may be said to have acquired a vested right of residence. These, and related matters, are discussed more fully below, in the context of expulsion.

CHAPTER X

International Obligations to Grant Admission

The preceding examination of entry and exclusion in municipal law illustrates the thesis that states retain a wide margin of appreciation in matters of immigration. No state today adheres to the "free movement" school, but there is, nevertheless, a marked degree of conformity between local régimes. In principle, the entry of aliens is within the reserved domain of domestic jurisdiction, but it has already been noted that there are certain limits to the state's competence in this area. The major difficulty in any case will be to characterise the refusal of entry as the breach of an international obligation, such as to involve the putative state in international responsibility. Obligations do exist in respect of those fleeing from persecution, and these obligations, it is argued, derive both from treaty and from customary international law. However, it will often be unclear to whom those obligations are owed. In his dissenting opinion in the Nottebohm Case, Judge Read expressed the general rule that an exercise of the "unfettered right" to refuse admission prevents any legal relationship from coming into existence between the "receiving state" and the state of the alien's nationality.° This general rule is particularly relevant to

the fulfilment of conditions for the exercise of diplomatic protection, but today it is apparent that there are other obligations, beyond the confines of diplomatic protection, which a state may owe to the international community or to a regional institution.\(^1\) Treaties, whether bilateral or multilateral, are a primary source of obligations and, by their terms, may indicate more precisely the limits to state discretion in matters of entry and exclusion.

The number of agreements and instruments which directly or indirectly bear upon the status of foreigners is legion,\(^2\) and their rôle is firmly established in history. Early treaties of great significance were the "capitulations", under which complete and separate legal régimes were set up for the benefit of foreigners. During the seventeenth, eighteenth and nineteenth centuries bilateral treaties of friendship and commerce were concluded to regulate the status of the individual merchant in particular, to recognise his legal personality, and to secure certain minimum rights.\(^3\) Modern treaties have tended to accord even greater protection to the alien and to approximate his rights to those of the national.


2. See too the indirect effect of municipal legislation, for example, the Ghana Capital Investments Act 1963; Algerian Investment Code 1963, Article 2 Int. Leg. Mat., 666, 1111.

Since the Second World War it has been common to find, for example, that treaties make provision for a hearing in the case of refusal of a residence permit, for the right to counsel, to an interpreter, and to communicate with one's consul, and for restrictions on the power to expel, particularly in favour of the long-term resident.¹ Other treaties have confirmed the status of particular groups; for example, by a treaty of May 1945 Belgium agreed with France on the regulation of minor frontier traffic and on the issue and recognition of frontier permits.² In the same year Belgium and Luxembourg furthered the re-establishment of freedom of movement by suspending the passport requirement and accepting national identity cards as sufficient evidence of status for their nationals passing between the two countries.³ In addition to the limited régimes set up by treaties of this nature, due consideration must also be given, particularly in the European context, to broader based, multilateral agreements which look to the rights of the individual.

¹ See, for example, the Treaty of Establishment between the Federal Republic of Germany and Italy, 1957, considered in Re Expulsion of an Italian Worker [1965] C.M.L.R. 53.
³ 41 U.N.T.S., 13, 265. See above, pp. 102-106

(1) The European Convention on Human Rights

Although its effect is only indirect and as a sort of negative guarantee, the European Convention still remains one of the most important treaties concluded under the auspices of the Council of Europe. The Convention does not, as such,
protect a right of entry\textsuperscript{1}, and this point was emphasised in an early decision of the European Commission on Human Rights where it noted, in regard to the particular case,\textsuperscript{2}.

"... que la requérante semble revendiquer pour son mari le droit de se fixer sa résidence sur le territoire d'un État autre que son État national; ... qu'aux termes de ses articles 1 et 25(1), la Convention garantit les seuls droits et libertés définis en son titre premier; que seule la violation alléguée d'un de ces droits et libertés peut faire l'objet d'une requête recevable devant la Commission; que le droit susmentionné ne figure pas, quant à son principe, parmi lesdits droits et libertés; que le principe de non-discrimination consacré à l'article 14 de la Convention ne vaut que dans la jouissance des droits et libertés reconnus dans la Convention..."

Consequently, unless another right or freedom guaranteed by the Convention is in issue, a complaint by a foreigner that entry to a Contracting State has been refused him is inadmissible. Nevertheless, there are a number of provisions under which the foreigner denied admission may be able to bring himself before the European Commission. For example, Article 3 of the Convention forbids degrading treatment; Article 5 defines the right to security of the person; Article 8 provides for respect for family life; and Article 14 protects individuals from discrimination.

A number of decisions of the Commission have brought these rights into play in matters of entry and exclusion. Thus, where an alien was refused entry to Sweden to take part in custody proceedings, the Commission decided that there existed the possibility of a violation of Article 6 of the

\textsuperscript{1} But note Article 3, Fourth Protocol; see below, pp. 481ff.

\textsuperscript{2} Application 238/56: 1 Yearbook 205.

\textsuperscript{3} N.b. the progressive approach of the Commission to the interpretation of Article 5 in the East African Asians Case (Group I), Decision on Admissibility, October 1970, p.38.
Convention, which guarantees a fair hearing in the determination of civil rights and obligations. This reasoning was supported by reference to the fact that in the case in hand the personal character and manner of life of the applicant appeared to be a matter directly relevant to the formation of the Swedish court's opinion on the merits of the claim. In addition, the applicant's ex-wife was in a position to attend the hearings and to impugn in court the applicant's personal qualities.

The Commission noted further:

"... a state which signs and ratifies the [Convention] must be understood as agreeing to restrict the free exercise of its rights under general international law, including its right to control the entry and exit of foreigners to the extent and within the limits of the obligations which it has accepted under that Convention."

In another case, brought this time under the provisions of Article 8, the Commission held that although the Austrian Government had refused to re-admit a deported German national, they had in no way prevented his wife, who had remained behind, from crossing into Germany to see or live with the applicant. On the facts, there had been no such interference with family life as was prohibited by Article 8. In other applications which have involved the question of admission of those convicted of crimes, the Commission, while noting the


principle that domestic authorities had a "considerable measure of discretion in taking into account factors in the case which might appear to them to be critical for the prevention of disorder or crime", has nevertheless affirmed that it is the Commission itself which is the final judge of whether the measures taken are in breach of the Convention.¹

Recently the Commission retained for further examination the case of Mohamed Khan v. United Kingdom, which concerned a refusal of admission by immigration authorities acting under the Commonwealth Immigrants Act 1962.² The applicants alleged violation of the right to respect for family life and of the right to receive a fair and impartial hearing before an independent tribunal in a determination of their civil rights under Article 6(1). The United Kingdom Government argued, inter alia, that the rights concerned were not "civil rights" within the meaning of the Convention, but this was rejected by the Commission. In its view it was necessary to examine the merits of the applicant's case as regards a possible breach of the provisions of Article 8, and a Sub-Commission set up for this purpose achieved a friendly settlement at the end of 1968. The United Kingdom agreed to issue the requisite entry certificate and to make an ex gratia payment to cover the airfare from Pakistan, although it continued to maintain that the Convention had not been breached.

1. In Application 3170/67 v. United Kingdom the Commission held that, in considering the background, character and unfavourable criminal record of the applicant, the decision of the United Kingdom authorities to refuse admission was "reasonable and in no way exceeded the 'margin of appreciation'."

2. Application 2991/66: 10 Yearbook 478. Cf. Application 2992/66 Harbhajan Singh v. United Kingdom, where the complaint was rejected when the applicant failed to show such a family link to exist as would establish family life within Article 8.
Although those provisions of the European Convention which have been ratified by the United Kingdom do not include the right of a national to enter his own state, it has been argued that the 1968 legislation in fact infringed other related provisions. Between February 1970 and July 1972 a total of two hundred and fifty-five applications by East African Asians against the United Kingdom Government were registered by the European Commission on Human Rights. These were originally placed in thirteen groups and in October and December 1970 the Commission declared admissible respectively Groups I (25 applications) and II (6 applications), in so far as they raised issues under Articles 3, 5, and 14, whose determination should depend upon an examination of the merits of the cases. In respect of three of the applications, the complaints were also declared to be admissible under Articles 8 and 14. Notice of the other groups has been given at intervals to the United Kingdom Government, but further proceedings have been suspended pending the outcome of the proceedings in groups I and II.¹

1. Applications 4478/70 and 4486/70 of Group I, and Application 4501/70 of Group II. See below, pp. 298-299. All other complaints under Articles 8 and 14 were declared inadmissible, as being manifestly ill-founded.

2. Of the 255 cases considered, by August 1972 at least 201 applicants had been admitted to the United Kingdom: Press Release Council of Europe, C (72) 24, 25th August 1972. The Commission considered the cases further in its sessions in September and December 1972, and on the latter occasion communicated to the Government details of additional applications (Group XV). In its session in April 1973 the Commission continued the drafting of its Report under Article 31 of the Convention, which it had begun in February of that year, and this was examined at the session commencing on 9th July 1973: Letter to the writer from A.H. McNulty, Secretary to the European Commission. Publication of the Report was anticipated in October 1973, in the event of a failure to reach a friendly settlement.
In argument before the Commission on the applications in Group I the United Kingdom Government found it difficult to deny the discriminatory effect of the 1968 legislation. As regards the rights protected under Article 3, the Government alleged that there was no discrimination and that the applicants had at all times enjoyed the same rights as every other person seeking to reside in the United Kingdom. At the same time, however, the Government accepted that had the United Kingdom been bound by the Fourth Protocol to the Convention, then the 1968 Act was discriminatory, and that if this issue ever became relevant the Government would have to justify that discrimination. In the meantime, and without prejudice to its alternative submissions, the Government admitted that the legislation was discriminatory in so far as its object was to exclude more than a limited number of East African Asians from entering the United Kingdom at any one period. The basis of the Government's case was that this still did not amount to discrimination in the enjoyment of those rights and freedoms guaranteed by the Convention. This argument was rejected by the Commission, which concluded:

"quite apart from any consideration of Article 14, discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 ... it is generally recognised that a special importance should be attached to discrimination based on race and that publicly to single out a group of persons for differential treatment on the basis of race might ... constitute a special form of affront to human dignity."

1. Decision of the Commission as to the admissibility of 25 applications by S.M.L. Patel (Application 4403/70) and others against the United Kingdom, October 1970, p. 36.
In respect of those applications which were based on an alleged breach of Article 8 of the Convention, the United Kingdom Government argued that where a person has no right to enter or remain in a particular country, he cannot obtain such a right by having his wife change her residence to that country and then invoking Article 8.\(^1\) It was further submitted that the place of residence of a family is normally the place of residence of the husband,\(^2\) and that in so far as Article 8 safeguards a right for husband and wife to live together permanently in any particular place, it does not safeguard such right at a place other than the place of residence of the husband. In the opinion of the United Kingdom Government, the separation of husband and wife was not attributable to the Government, but to the voluntary actions of the applicants. However, the Commission noted that it was unlikely that, in the circumstances, the applicants would have been able effectively to establish their family life in Uganda, and the substance of the Government's submissions was rejected.

Applications 4478/70, 4486/70 and 4501/70 were declared admissible in that the actions of the United Kingdom Government might be capable of constituting an interference with the right to respect for family life within Article 8, or of raising an issue under Article 14 in conjunction with

\(^{1}\) Cf. Application 238/56: 1 Yearbook 205.

\(^{2}\) 846 H.C. Deb., cols. 37, 40-41; 849 H.C. Deb., col. 663; see also The Observer, 18th February 1973.
Article 8.1.

In addition to the racial bias of the 1968 legislation, the law was also criticised as being in breach of the duty in international law which a state has to admit its nationals. Before the European Commission the United Kingdom Government maintained that they did not intend nor do they intend that United Kingdom citizens resident in East Africa should be permanently prevented from entering the United Kingdom. In the view of the Government, the purpose of the Act was to regulate the flow of entrants at a level which the United Kingdom is capable of absorbing at any one time. The allocation of special vouchers was designed to implement this regulatory purpose and, while no voucher was ever refused to an eligible applicant, the system of priorities which was based on the individual's immediate needs might delay the issue of a voucher to a particular person.

1. On the precarious position of a woman settled in the United Kingdom who marries a non-patrial, see now: 1973 H.C. No. 79, para. 47; 1973 H.C. No. 81, para. 42. Cf. Secretary of State v. Dumont [1972] Imm. A.R. 119, which turned on the similar provision of Cmnd. 4295, para. 24. Allowing the Secretary of State's appeal the Immigration Appeals Tribunal held that while there might be some hardship in the wife having to settle with her husband in Canada, there was insufficient evidence "to justify the view that serious harm will be likely to result". In Hector v. Secretary of State [1972] Imm.A.R. 41 the Tribunal concluded that para. 24 had in mind "difficulties of a more serious nature such as, for example, might face a woman settling in a strange country on account of differences in race, language, customs or religion or on account of political intolerance". The new rules are a little wider, and decisions are now to be taken in the light of "special considerations, whether of a family nature or otherwise, which render exclusion undesirable." Nevertheless, it still remains possible that a woman may be obliged to quit her own country in order to be with her husband, and this is inconsistent with developments in other fields affecting women's rights; see, for example, Guardianship of Minors Acts 1971 and 1973, section 1(1).

2. See above, pp. 250-253

The Government's view of its final obligation to United Kingdom citizens in East Africa and elsewhere has, to a certain extent, been vindicated by subsequent events. At the time of the mass expulsion of such citizens from Uganda in late 1972, the United Kingdom Government affirmed that it was under a duty to take in its nationals. More recently, the official attitude has become somewhat equivocal. In a statement made on the introduction of revised Immigration Rules in January 1973, the Home Secretary, Mr. Carr, explained to the House of Commons that the Uganda expulsions had created a new situation. He said:

"The Government consider that to have a similar burden thrust on us again would impose unacceptable strains and stresses in our society and, not least, endanger our ability to carry out our duty to those immigrants already resident here. The Government therefore think it is right at this time... when there is no threat to United Kingdom passport holders elsewhere, to make it clear that while we shall continue to accept our responsibility to United Kingdom passport holders by admitting them in a controlled and orderly manner through the special voucher scheme, this...

1. The duty of reception is most frequently described in terms of a duty to receive nationals expelled from other states, which duty is owed to the expelling state; see Schwarzenberger, International Law, (3rd. ed., 1957), pp. 360-361; Oppenheim, International Law, (8th. ed., 1955), pp. 645-646. However, the extent of such duty remains unclear in cases where the expelling state has acted unlawfully.

2. See statement by the Foreign Secretary, Sir Alec Douglas-Home, in a television broadcast reported in The Times, 1st September 1972: "... successive British governments have made clear that in the last resort if these people were ever expelled we accepted an obligation to take them in ... Under international law a State has a duty to accept those of its nationals who have nowhere else to go". See also The Times, 21st September 1972, letter from the Prime Minister, Mr. Heath, to the Monday Club.

"is as much as it is reasonable and realistic for us to do if good community relations are to be maintained in Britain."

It may be that this was only a political statement for local digestion, and it is probably unwise to speculate on the basis of some future and hypothetical mass expulsion. There remains, at base, the acceptance of responsibility towards United Kingdom citizens, but the regulatory controls over these citizens are to remain.

This policy reflects the traditional view of many governments, that the entry of aliens and some classes of nationals is not a right which may be enforced by the individual. However, discretion in such matters is clearly limited for those states which are parties to the European Convention. In the protection which it extends to individual rights, the Convention sets the boundaries of state competence. It indicates with some precision the circumstances in which an exercise of lawful powers may nevertheless constitute an abuse. This effect has the additional consequence of raising the individual from the confines of his nationality and, by impinging on the traditional areas of state competence, the Convention places obligations in respect of fundamental rights and freedoms in an area of regional control. A similar process

1. The Nairobi Sunday Post commented that the Home Secretary's statement was a "wholly unwarranted interference in Kenya's sovereign discretion"; cited at 851 H.C. Deb., col. 635.

also occurs in respect of other treaties of more limited application and intention. In such cases, state powers are confined by reference to the terms of the treaty and, in particular, by reference to its object and purpose. It will only be occasionally that these deal with human rights in the manner of the European Convention.

(2) The European Convention on Establishment 1955 and the Treaty of Rome 1957

Article 1 of the European Convention on Establishment provides:

"Each Contracting State shall facilitate the entry into its territory by nationals of the other Parties for the purpose of temporary visits and shall permit them to travel freely within its territory except when this would be contrary to 'ordre public', national security, public health or morality."

Prolonged or permanent residence is also to be facilitated, but this may be further limited to the extent permitted by the economic and social conditions of the States Parties. The Protocol expressly provides that each Contracting State shall have the right to judge by national criteria the reasons of 'ordre public', national security and so forth, which may justify exclusion, and it is apparent that this concession may

1. European Treaty Series No. 19. See also Article 1, European Agreement on the Movement of Persons 1957, which makes provision for the reciprocal acceptance of informal documents of identity for those entering for periods of less than three months. The Agreement also allows derogation on grounds relating to 'ordre public': Articles 6, 7 (E.T.S. No. 25).

2. Article 2.

3. Section I; see also Section III.
amount to a very wide power of derogation. Of the Convention as a whole, it has been said: 1.

"En l'absence de dispositions spécifiques imposant l'abolition d'une législation nationale discriminatoire, et considérant les larges clauses échappatoires contenus dans le traité, aussi bien que son objectif limité, on peut dire que la Convention n'a qu'un intérêt pratique réduit."

However, this conclusion is not entirely justified in the light of other provisions of the treaty and of the principles of general international law which apply to its interpretation. For example, the treaty expressly states that a Contracting Party may only restrict the rights of nationals of other Parties for the reasons set forth in the Convention, and to the extent compatible with the obligations assumed. 2. The object and purpose of the treaty is the facilitation of establishment. The obligations assumed by states may not be very extensive, but an exercise of powers of derogation which frustrated the declared object and purpose would clearly be in breach of those obligations. The reservation of 'ordre public' certainly represents a reservation of discretionary power, but that is not the same as a reservation of arbitrary power. Again, it must be understood, in the context of the specific treaty obligations, as an exceptional right which, in the final analysis, is subject to impartial adjudication. 3.

1. Droit des Communautés Européennes, para. 1861.
2. Protocol, Section I(c).
In its terms the Convention on Establishment is in many ways wider even than the Treaty of Rome, but because it tends to espouse generalities rather than details, it must be considered of less effect. As the first multilateral treaty in an area traditionally governed by bilateral agreements, it purports to be a complete charter of the rights and duties of states in their relationship with the nationals of other Contracting Parties. But the particular problems of entry and residence are, admittedly, approached with caution — the obligation assumed is merely to "facilitate" these ends. It is useful to contrast the convention with the analogous provisions of the Treaty of Rome. There can be little doubt that the agreements most effective in achieving freedom of movement between states are those which concern themselves with detail, and which envisage a local plan to be fulfilled by the co-ordination of national régimes. It has been observed that,

"entre les États européens le problème que pose la présence d'étrangers est moins l'octroi du standard minimum de civilisation que celui des conditions de participation à la vie économique."

This conclusion is particularly pertinent in regard to the

1. It is doubtful whether non-signatory states could obtain the advantages of the European Convention on Establishment through the operation of the most-favoured-nation clause in existing or future bilateral treaties. The Convention is not an ordinary treaty, but was promoted by a regional institution to achieve certain regional objectives. See further, Kiss, La Convention européenne et la Clause de la Nation la plus favorisée, Ann. Fr., (1957), 478-489.

2. Within the EEC, for example, 'ordre public' relates to non-economic grounds of national importance; Directive 64/221, Article 2(2); Re Expulsion of an Italian National [1965] C.M.L.R. 285; City of Wiesbaden v. Farulli [1968] C.M.L.R. 239. See also OEEC/OECD Treaty 1948, Articles 8, 13; Western European Union Guestworker Convention 1950; EFTA Treaty 1960, Article 16; Benelux Treaty 1958, Article 2(2). For a brief and general summary of the European background, see Macdonald, op. cit., 122-5

fundamental economic basis of the Treaty of Rome, and in relation to its provisions as to the right of establishment. Furthermore, if one is seeking to establish a community in which there is to be free circulation of people and workers, then it become apparent that it is not possible to leave the interpretation of the relevant provisions to individual governments, for these are matters which will have important repercussions on the "sovereignty" of each Member State. Consequently, although both Article 48 and Article 56 of the Treaty of Rome anticipate "limitations justifiées des raisons d'ordre public, de sécurité publique et de santé publique", nevertheless Article 52 foresees that restrictions on the freedom of establishment will be progressively abolished during the transition period, and Article 53 prohibits Member States from introducing new restrictions in respect of EEC nationals.

Article 48 requires free movement of labour to be achieved by the end of the transition period and emphasises that this entails the abolition of all discrimination based on nationality, in respect of employment, pay and conditions of work. This article applies to wage-earners, whether skilled or unskilled, but it does not, on its face, include

1. Articles 48-56.
2. Article 48(1),(2).
3. Cf. Article 69, European Coal and Steel Community Treaty, in which Member States undertook to remove nationality restrictions on employment in the coal and steel industries in favour of workers nationals of Member States who have recognised qualifications. Article 96, Euratom Treaty, anticipated similar steps to liberalise access to skilled employment in the field of nuclear energy.
refugees or stateless persons, unless they belong to the 1. family of a Community worker. The notion of "Community worker" is itself a concept of Community law and it does not arise from, and is not governed by, national law. It embraces not only manual workers, but all employees; not only a present worker, but also one who, having left his job, is capable of taking another. 2.

Articles 48 and 49 prescribe in some detail what is involved in free movement of labour and the action which is to be taken to achieve the end by the organs of the Community and by Member States themselves. Free movement is to be implemented at the latest by the end of the transitional period and, in fact the régime was established in November 1968. 4. It is further provided that the inception of free movement shall entail the abolition of all discrimination based on nationality vis-à-vis Community workers, 5. and the Article goes on to

1. See Council Declaration 64/305, 25th March 1964, JOCE 22nd May 1964, No. 78: the entry of refugees established in the territory of another Member State "doit être examinée avec une faveur particulière".


4. Article 48(1). The free movement provisions became directly binding on the United Kingdom at the date of entry, 1st January 1973, except in respect of Northern Ireland for which a five year transitional period was negotiated: The United Kingdom and the European Communities, Cmd. 4715, para. 144.

5. Article 48(2). See also Articles 3, 7.
elaborate the rights which shall accrue to such workers and the permitted restrictions which may be justified by reference to the concepts of 'ordre public', public security and public health.\(^1\). The rights declared in Article 48(3) embrace (i) the right to accept offers of employment actually made;\(^2\); (ii) the right to move freely for this purpose within the territory of Member States;\(^3\); (iii) the right to remain in a Member State in order to work in accordance with the law governing the employment of nationals of that State; (iv) the right to remain in another Member State after having been employed there.\(^4\). The provisions of this Article do not extend to employment in the civil service, or to the policy and decision making levels of nationalised industries.

While Article 48 sets out the objectives, Article 49 declares the means to be employed in order to achieve these ends. It set out the groundwork for a step by step plan for the realisation of free movement of labour, which was effected in three stages. (1) The first stage in the years 1961-1964 involved the retention of national priorities in the labour market, with certain exceptions in favour of EEC nationals.\(^5\).

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1. Article 48(3). See Directive 64/221, below, pp. 322ff.
2. Regulation 1612/68, Articles 1, 5, 7.
4. Regulation 1251/70. It is not clear whether this right to remain includes a "right to return" to a state where a worker has at some time been employed, or whether it is limited to the state where he is last employed. Article 8(2) of this Regulation only provides that states shall look favourably on workers in this position: Mégret, *op. cit.*, vol. III, p. 5.
5. Regulation 15/61.
(2) In the years 1964-1968 priority for Community workers was introduced, with certain exceptions retained in favour of national workers.  
(3) The régime of free movement was finally established in 1968 with the entry into force of Regulation 1612/68 and Directive 68/360, which provided for de jure free movement of labour in the six countries, together with equality and the principle of non-discrimination.

Article 49 also anticipates the institution of appropriate machinery to bring offers of employment into contact with applications for employment - a sort of central vacancy clearance system. Regulation 15/61 created the Bureau européen de co-ordination de la compensation des offres et demandes d'emploi, and this office has been continued in later regulations.

Article 50 provides that Member States shall, within an overall plan, encourage the exchange of young workers and Article 51 makes substantial provision in respect of social security. In effect, the Community worker has established

1. Regulation 38/64.

2. By Article 189 of the Treaty, Regulations issued by the Council have general application and are directly binding and applicable in their entirety in all Member States. Directives are binding as to the result to be achieved, but it is left to national authorities to chose the means of their implementation. As regards the free movement of labour and the right of establishment the Council has tended to use the Regulation for the purpose of laying down conditions of employment and the rights of workers, and the Directive for the purpose of covering technical matters and questions of police control.

3. E.g. Regulation 1612/68, Articles 21-23, 15-20.

4. See First Programme, 64/307, JOCE, 22nd May 1964, No. 78.

5. See now Regulation 1408/71, which came into force on the 1st April 1973.
rights in Community law to social security benefits in respect of the periods spent by him working in another Member State. The migrant worker is not placed at a disadvantage and wherever he goes within the Community he takes with him his social security entitlements. ¹

These are the basic provisions governing freedom of movement of labour within the EEC, and matters of detail are dealt with specifically in Regulation 1612/68 and Directives 64/221 and 68/360. ² In practice it is debatable to what extent they are relevant to the European worker. In the years 1958-1970 the European Community suffered from a distinct lack of manpower and this led to the importation of labour from states outside the Community. For example, it has been estimated that of the 3.7 million migrant workers in the Community, between 2.3 and 2.7 million came from third states such as Greece, Turkey, Yugoslavia, Spain, etc. Indeed, the Community has concluded Agreements with such states, particularly in respect of the importation of labour. ³ Articles 12-14 of the 1964 Agreement with Turkey anticipate the gradual removal of restrictions on the movement of labour, establishment and

1. Regulations 3/62, 4/62; see now Regulation 1408/71.
2. See below, pp. 314ff. See also in respect of Articles 52-58, the right of establishment, below, pp. 321ff.
3. This is in addition to the association agreements permitted by Articles 131-136 with those non-European countries and territories which have special relations with the Member States. Article 135 permits the establishment of free movement with these territories, subject to the provisions of 'ordre public', public security and public health, and to the unanimous approval of Member States. Cf. Decision of the Council, 15th October 1968, extending application of Articles 48-49 to the French Overseas Departments, JOCE, 19th October 1968, No. L257. Member States have also entered into bilateral arrangements with third states, for example, France with Spain, Portugal and Yugoslavia; Germany with Greece and Turkey.
the supply of services.². It is not clear how far workers from third states may enjoy the benefits which accrue to the migrant worker. It is possible that Article 48(1) is wider than Article 48(2) and that the general objectives of the EEC Treaty would be best advanced by permitting free movement of labour regardless of nationality.². In a case in Belgium in 1968 it was held that Treaty references to workers or their dependants were limited to workers who are ressortissants of Member States, or who are stateless persons or refugees resident in Member States and their dependants.³. But whether a worker must always be within these categories in order to come within the Treaty is by no means clear. However, the present tendency is to maintain such restrictions. The fact that Community law obliges a Member State to keep its labour market open to workers from other Member States was used as the basis for a German decision that nationals from other states, in this case an Egyptian student, have no right to find employment in the Federal Republic.⁴. Such a conclusion is not a necessary consequence of the Community provisions. Regulation 1612/68 merely prohibits discrimination as between nationals of Member States⁵ and simply reaffirms the provision originally laid down in Regulation 38/64, namely, that the nationals of other

1. See also Additional Protocol, 23rd November 1970 and Regulations 1232-5/71. Free movement is to be progressively introduced between the 12th and the 22nd year of the transitional period. A similar agreement with Greece has been suspended.

2. Cf. Articles 3(c), 7.


5. Articles 1, 2, 4, 5, 6.
Member States shall enjoy priority over others as regards access to employment.¹

The notion of "worker" as employed in the terms of the Treaty is a concept of Community law.² Although Article 48(1) refers merely to "workers", this appears to be limited in subsection (2) to "workers of the Member States", that is, to workers who are nationals ("ressortissants") of Member States.³

As a general rule, nationals are defined by reference to the local law of the state concerned, and that status will be evidenced by a passport or other national identity card. However, certain difficulties are presented by the respective nationality laws of France, Holland, Germany and the United Kingdom. According to German law and to a declaration made by the Federal Republic at the time of accession to Euratom and the EEC, German nationals include citizens of the German Democratic Republic.⁴ The status of French national embraces citizens of the French overseas territories from the date at which they establish their permanent residence in France.⁵

Furthermore, the status of Dutch national includes those who enjoy that status solely by birth in or relation or connection with Surinam or the Antilles. The latter, and French nationals not permanently resident in France, are not EEC nationals for

1. Article 1(2).
2. See above, p 306
3. Regulation 1612/68, Article 1(1): "Any national of a Member State, irrespective of his place of permanent residence, shall be entitled to take up and carry on a wage-paid occupation in the territory of another Member State".
the purposes of Articles 48 and 49, even though they may enjoy unrestricted immigration into Holland or France.¹

These somewhat anomalous classifications have much in common with the situation and circumstances of Commonwealth citizens and non-patrial United Kingdom citizens. When the United Kingdom signed the Treaty of Accession it made a declaration on the meaning to be given to the phrase "United Kingdom national" for the purposes of the Treaty.² Basically, this definition includes citizens of the United Kingdom and Colonies and British subjects without that citizenship or the citizenship of any other Commonwealth country, who have the right of abode in the United Kingdom.³ In addition, United Kingdom citizens from Gibraltar, even though not "patrial", also enjoy the benefits of Articles 48 and 49.

At a time when the Community still needs to import labour it may seem a little ludicrous for Member States to insist upon such a restrictive definition of each state's nationals, and such a course of action does not seem entirely compatible with the expressed objectives of the Community.⁴

An indication of the grounds which lie behind these forced distinctions, whether or not they be rigidly enforced, is to be found in the Joint Declaration on free movement attached by the "Six" to the Final Act of the Treaty of Accession. By


2. Cmnd. 4862-1, p. 118.

3. I.e., they are "patrial" and not subject to control under the Immigration Act 1971. But United Kingdom nationals and patrials are not co-extensive, and the former does not include Commonwealth citizens born to or legally adopted by a parent, citizen by birth of the United Kingdom: Immigration Act 1971, section 2(1)(d)

4. Articles 2, 3(c), (i), (k), 5, 7; Regulation 1612/68, Preamble.
this Declaration it was noted that "the enlargement of the 
Community could give rise to certain difficulties for the 
social situation in one or more Member States", and the Member 
States therefore reserved the right to bring such matters for 
settlement before the institutions of the Community. 1. It is 
manifest that this Declaration was made expressly in order to 
permit later restrictions upon the movement of black citizens, 
particularly from the United Kingdom. 2. However, it would still 
not be possible for any single Member State to impose such 
restrictions unilaterally. 3. Bearing in mind the Treaty's 
objectives, it is open to question whether sufficient unanimity 
could be obtained either to cut back the fundamental tenet of 
free movement, or to run counter to the general norm of non-
discrimination. 4. Nationality is by no means a satisfactory 
basis for the free movement provisions and it is unlikely that 
it could ever be successfully reduced to an absolute concept 
for the purposes of the Treaty of Rome. Although it is the 
基本 criterion or qualification for participation in the 
benefits, it is continually nibbled at by the inclusion of

1. Cmnd. 4862-1, p. 117.
1972; The Times, 15th January 1972.
3. See above, p. 308
4. Cf. Article 49(d). Under Regulation 38/64, Article 2, Member 
States enjoyed a safeguard clause under which they might give 
priority to their own nationals in areas where there was a 
serious threat to the standard of living or to employment. 
Holland took advantage of this provision for all occupations in 
the province of Overijssel from April 1967-April 1968, and Belgium 
in respect of mineworkers in the provinces of Hainault/Liège and 
Limburg from 1st July 1967. Now, however, under Regulation 
1612/68, Article 20, Member States are no longer free to take 
unilateral action, but must use the Community procedure prescribed 
in the Regulation. This procedure merely involves suspending the 
operation of Articles 15-17 of the Regulation and not sending 
workers to the affected regions; it does not become illegal for 
a worker to go there on his own initiative: Mégrèt, op. cit., p.26.
refugees, and of the families and dependants of nationals.

Thus, the right of the members of the worker's family to settle with him applies "quelle que soit leur nationalité".¹

In addition to the generality of rights described above, the migrant worker also enjoys specific rights which bear particularly on his entry into the territory of another Member State. The Regulations made under Article 48 confer enforceable rights on the individual, and in one case in 1962 the court declared:

"the legal position ... by which the grant of a residence permit is in the discretion of the authorities has been altered in favour of those workers who are nationals of the EEC Member States to the effect ... that there exists a legal right to the grant of a residence permit, unless reasons of safety or public order or public health stand against it."

Directive 68/360 provides for the suppression of the remaining

1. Regulation 1612/68, Article 10(1); Directive 68/360, Article 4(4).

2. Re Residence Permits [1964] C.M.L.R. 5, (decision of the Berlin Verwaltungsgericht, 1962); this decision was based upon Regulation 15, and the right to be issued with a residence permit today is no longer tied to a labour permit. See also Re Expulsion of an Italian National [1965] C.M.L.R. 285.

Regulation 1612/68 also lays down specific rights on non-discrimination in access to employment (Articles 2, 3, 4, 5, 6.); equality of treatment concerning conditions of employment (Article 7); equality of treatment as regards membership of trade unions and the exercise of trade union rights (Article 8); and nondiscrimination in housing (Article 9). Article 10 declares the right of the worker's family to join him, and family is defined to include the spouse, children under twenty-one or, if older, dependent children; dependent relatives of the worker and his spouse in the ascending line. States are also required to look favourably on the admission of other dependent relatives. The exercise of the right of settlement is made conditional upon provision by the worker of adequate housing (Article 10(3)); Mégret, op. cit., p. 24. Once admitted for settlement, spouse and children under twenty-one are entitled to take up employment (Article 11; Ministère Public v. Scarabel [1968] C.M.L.R. 264), and children are to be admitted to schools, etc., on the same terms as nationals (Article 12).
restrictions on the movement and residence of the EEC nationals referred to in Regulation 1612/68. One of the most important provisions is contained in Article 2, by which States Members recognise the right of their nationals to leave the country "en vue d'accéder à une activité salariée et de l'exercer sur le territoire d'un autre État membre". This right is exercisable on simple presentation of a valid passport or identity card, which states are in turn obliged to issue. Similarly, entry to other Member States is to be permitted on production of the relevant travel document, and visas may only be demanded of family members who are not EEC nationals. Once admitted, the EEC national is entitled to a residence permit and again the only formality required is that he show the travel document with which he entered the territory, together with a declaration of engagement from his employer. Members of his family must also show their travel documents, and a certificate from the competent authority of the state of origin showing their relationship to the worker and, where necessary, their dependence on that worker. Residence permits will generally

2. Ibid., Article 2(1),(2). Where a passport is the only valid exit document, then it must be valid for at least five years; Article 2(3). No exit permit or visa may be required: Article 2(4). See above, pp. 76-84, for United Kingdom practice, which continues to be governed by the royal prerogative: Secretary of State v. Lakdawalla [1972] Imm. A.R. 26.
4. Ibid., Article 4(3)(a),(b). This article creates the "carte de séjour de ressortissant d'un État membre de la CEE". Cf. France, décret du 5 janv. 1970, articles 3,4,10; article 4 of this law also requires the EEC national to produce a medical certificate. See Directive 64/221, Annex, list of diseases which justify exclusion.
5. Ibid., Article 4(3)(c),(d),(e).
be valid for five years and are automatically renewable and valid for the whole territory.\(^1\)

The holder of a residence permit enjoys the right to take up and carry on wage-paid occupations in the territory concerned under the same conditions as local nationals. Such a permit is not tied to a specific job,\(^2\) and the EEC national is free to move around at will. Moreover, the permit may not be withdrawn merely because the holder is out of work, either because of temporary incapacity from illness or accident, or because he is "involuntarily unemployed".\(^3\) However, the permit's duration may be reduced to a period of not less than one year if the holder is involuntarily unemployed for more than twelve consecutive months.\(^4\) Otherwise, States Members may only derogate from the provisions of this Directive on grounds of 'ordre public', public security or public health.\(^5\)


\(^2\) Compare United Kingdom practice, Böhning and Stephen, The EEC and the Migration of Workers, Supp., (1972), p. 1; and see above, pp. 261-263. Cf. Federal Republic of Germany, Arbeitsverordnung, 1971, BGBI. I, p. 152, which makes provision for the issue of work permits to foreign workers either for a particular job, or without restriction: Article 1. Such unrestricted permits are also available, for example, where the individual has spent five years working in the Federal Republic, or is married to a German national, or has been accorded refugee status: ibid., Article 2.

\(^3\) City of Wiesbaden v. Barulli [1968] C.M.L.R. 239, 246. The court held, inter alia, that the Treaty and Regulation 38/64, in referring to freedom of residence of EEC nationals in EEC states, only confer such freedom in furtherance of the movement of workers in the Community labour market. An idle alien layabout not intending to take work may not rely on these provisions to avoid expulsion from an EEC country of which he is not a national. See also, Campbell, op. cit., Supp., ch. 10.


\(^5\) Ibid., Article 10. See below, pp. 322ff.
More recently, Regulation 1251/70 has emphasised that the right of residence which accrues to active workers,\(^1\).

"a pour corollaire le droit reconnu par le traité de demeurer sur le territoire d'un État membre après y avoir occupé un emploi."

In effect, this Regulation recognises, and gives practical meaning to, acquired rights of residence in favour of the migrant worker. Certain conditions are laid down, but the privilege of continued residence is granted not only to the worker, but also to his family.\(^2\). Where a worker qualifies, then his family may remain even if the worker has died,\(^3\), and those who come within the Regulation have the right to a residence permit valid for five years and automatically renewable.\(^4\).

In addition to the special rules applicable to the wage-earner, treaty provisions and subordinate legislation also deal with the individual who wishes to set up in business on his own account, or to engage in some other non-salaried activity.\(^5\). These provisions fall under the general rubric of

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2. The term "worker" includes (a) the worker who has reached pensionable age, has been employed for at least twelve months in the state concerned and has resided there for more than three years; (b) the worker with two years' residence in the state of his employment, who becomes incapacitated; (c) the worker who lives and works in one state, and then works in another state while continuing to reside in the first state: Article 2(1)(a), (b), (c). In certain circumstances the residence qualification is inapplicable, for example, if the worker's spouse is a national of the state of residence or lost that nationality on marriage: Article 2(2).

3. Regulation 1251/70, Article 3(1). In some circumstances, for example, death from industrial disease, the family may remain even though the worker dies before qualifying: Article 3(2).

4. Ibid., Article 6.

5. See, for example, the thirty-seven Directives contained in European Communities, Secondary Legislation, Part 2, Right of Establishment, H.M.S.O., 1972.
the "Right of Establishment", and are covered by Articles 52-58 of the Treaty. The general principle is that, 1.

"Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected..."

This concept of establishment is by no means new, and already it figures in a multitude of bilateral and multilateral treaties, so much so that it can be looked upon as a term of art.

Generally, the provisions of such treaties aim to equate the alien with the national in respect of professional and commercial activities, although none so far concluded goes quite so far towards creating the effective and practical régime anticipated within the European Community. The potential scope of the EEC provisions is vast, and Directives already issued cover activities ranging from agriculture to the film industry, from the wholesale trade to forestry and logging.2. In other areas, such as banking and the mutual recognition of diplomas and qualifications, progress has not been quite so fast.3.

Article 53 of the Treaty prohibits Member States from introducing any new restrictions on establishment in their territory by nationals from other Member States. In a case in 1964,4 the Court of Justice of the European Community held

1. Treaty of Rome, Article 52.

2. See above, p. 317, note 5.


that the obligation of abstention under Article 53 is complete in itself and legally perfect. Compliance with Article 53 requires that no new rule should subject the establishment of EEC nationals to a more severe regulation than that which is prescribed for local nationals. Article 53 is "consequently capable of producing immediate effect as regards the relations between Member States and their subjects".¹

Two exceptions to the general principle of a right of establishment may be noted: (1) a reservation is made in favour of the local state in respect of those occupations which involve the exercise of official, public authority, which would include, for example, employment in some capacity on behalf of the central or local government.² (2) Provision is made for special treatment of aliens who are EEC nationals for reasons of 'ordre public', public security and public health.³

The Court of Justice, in the case above mentioned, held that the right of establishment referred to in Articles 52 and 53 is the right to "national" treatment only,⁴ and does not confer an absolute right to engage in any occupation. Essentially, the Treaty is here dealing not so much with the right of entry and residence, as with the right to settle and carry on a specific activity. It is in this area that the

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¹. [1964] C.M.L.R. 425 at p. 458. The Court also noted that the EEC Treaty "created its own legal order which is directly applicable both to the Member States and to their nationals as a result of the partial transfer of sovereignty from the Member States to the Community."


³. Treaty of Rome, Article 56; Directive 64/221.

⁴. See above, p. 318
issue of "national treatment" is of importance, and starting from this point one can understand the intensity of the movement to achieve greater harmonisation of procedures and regulations, and wider recognition of diplomas and qualifications. It is remarkable that states which from the outset apply discriminatory measures against foreigners are, more often than not, those which have the greatest number of foreigners working as traders within their territory. Other states effectively exclude the alien by insisting that he comply with local regulations, that he submit to "national treatment". For example, the man who wishes to open a supermarket in Holland must pass an examination in the Dutch language. One commentator has noted that, "the disparity in the systems applicable to nationals in the matter of the exercise of professions makes the clause of national treatment totally ineffective for the setting up of an equitable régime of the right of establishment on the international plane."

For this reason, Article 57 of the Treaty of Rome is of major importance, in that it forecasts co-ordination of requirements based, internationally, on the Community. Only when a sophisticated background of harmonisation is achieved will the right of establishment and the right to national treatment become relevant to the EEC national.

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1. Cf. Article 10, European Convention on Establishment, which requires non-discrimination in employment between nationals of the Contracting Parties. For details of local efforts in this field, and for an indication of the limited benefits accruing from "national treatment", see First Periodical Report by the Standing Committee on Establishment (Individuals), (Strasbourg, 1971), pp. 31-43.


4. Note Articles 59-66 of the Treaty for corresponding provisions in respect of the freedom to provide services within the EEC.
Two Directives were first issued which were crucial in their application to the right of establishment: Directive 64/220, which concerned the suppression of restrictions on the movement and residence of EEC nationals in respect of establishment and the provision of services;¹ and Directive 64/221, which requires co-ordination in local jurisdictions of the special régime applicable to foreigners in matters affecting 'ordre public', public security and public health.²

Directive 64/220 is very similar in form to Directive 68/360 examined above. In this case the beneficiaries are those EEC nationals who wish to provide services or participate in some non-salaried activity on the territory of another Member State, and the families of such persons.³ Member States agree to permit the entry of EEC nationals upon simple production of a passport or a national identity card,⁴ and they recognise also the right of their nationals to leave their own state.⁵ For a temporary stay of less than three months no residence permit is required, but in other cases permits will generally be issued for five years and they must be renewed automatically.⁶ The only documents required to be

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2. JOCE, 4th March 1964, p. 850/64. This latter Directive is equally applicable to measures taken under Article 47 of the Treaty as to those taken under Article 52.
5. Directive 64/220, Article 6; Directive 73/148, Article 2(1). On the duty to issue passports or other travel documents, see above, pp. 107-108.
6. Directive 64/220, Article 3(1),(2); Directive 73/148, Article 4(1),(2). The same rights extend to family members: ibid.
produced are (a) the travel document under which the entrant gained admittance to the country;\(^1\) and (b) proof that the entrant has the right to engage in the specified activity, that is, that it has been 'freed'.\(^2\) Derogation is again permitted only for reasons of 'ordre public', etc.\(^3\).

Both Article 48 and Article 56 anticipate the possibility of such limitations on the freedom of entry and residence as are justified by reasons of 'ordre public', public security and public health. It has been argued that Directive 64/221 was issued in order to co-ordinate these concepts, which represent a retention of "sovereign rights".\(^4\) In fact, it will be seen that 'ordre public' is itself a concept of Community law which simply leaves to states members a certain margin of appreciation in matters held to affect the national interest.\(^5\) The power of derogation is exceptional, and the validity of its exercise stands to be assessed in the light of the fundamental obligations undertaken by states parties to the Treaty of Rome and to the express limitations on the area of discretion which are required by Directive 64/221. This applies to questions of entry, to the issue of residence permits or their renewal, and to expulsion. In no case, however, may restrictions be imposed to serve economic ends.\(^6\).

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5. See below, pp.493-496.
6. Directive 64/221, Article 2(2).
Health matters are dealt with quite simply. Article 4(1) of the Directive, together with the annexed list of diseases and disabilities, declares the circumstances in which entry may be refused, or the first residence permit denied.\(^1\)

However, where such diseases or disabilities arise after a residence permit has already been issued, then this provision does not justify either refusal to renew the permit or an order of expulsion.\(^2\). The conditions for the imposition of restrictions on grounds of 'ordre public' or public security are less clearly defined, but certain guidelines are laid down. First, any action taken or proposed must be related solely to the personal conduct of the individual concerned.\(^3\). Neither a criminal conviction by itself, nor the mere expiry of an identity card may justify the refusal to renew a permit or the making of an order of expulsion.\(^4\). While a criminal conviction will naturally be relevant to any consideration of the alien's personal behaviour, in a decision in 1968 a German court emphasised that other factors were also to be taken into account before the discretion to expel was exercised. A criminal conviction may be the lawful condition for the exercise of discretion, but alone it was not a sufficient ground for an adverse decision.\(^5\).

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3. Ibid., Article 3(1).

4. Ibid., Article 3(2),(3).

5. VerwRSpr. Bd. 19 S. 964 (decision of the Bundesverwaltungsgericht, 1968). The case involved a conviction for manslaughter on the grounds of diminished responsibility, and the court considered that there was a possibility of repetition and therefore a danger to 'ordre public' and public safety.
In a later decision, a different court affirmed that expulsion should be founded on the character of the individual alien, but it also noted that the authorities have a wide margin of appreciation in the matter and that, in effect, the interests of the state are of greater concern than those of the alien.  

More recently the formative influence of Community law concepts has become more noticeable. The courts of the Federal Republic of Germany have become particularly critical of the actions of state authorities, and have been keen to set the limits of discretion with some precision. In one case, for example, the court declared that it would be a misuse of discretion for the authorities to limit the exercise of their judgement to establishing simply the existence of one of the conditions for expulsion. In all cases the exercise of power must be based on the principle of proportionality. Elsewhere it has been held that 'ordre public' as used in Article 48(3) of the Treaty, and in Regulations and Directives made thereunder, is a concept of Community law and not necessarily to be identified with any similar concept in any of the national legal systems of the Member States.

1. VerwRspr. Bd. 20 S. 844 (decision of the Oberverwaltungsgericht, Rheinland-Pfalz, 1969). The court considered Directive 64/221 and also the similar provisions of Article 2(2) of the Treaty of Establishment with Italy.

2. BVerwGE. 35, 291, 292-293, 296 (1970). This decision involved interpretation of the 1927 Treaty of Establishment with Turkey, but the principles stated are of general application. See also, Re Residence Permits [1964] C.M.L.R. 5; Re Expulsion of an Italian National [1965] C.M.L.R. 285, which both affirm that the court may determine for itself whether the alleged reasons relating to 'ordre public', etc., exist.

In addition to the substantive guarantees, Directive 64/221 also anticipates a number of procedural guarantees. For example, Article 5 creates a presumption in favour of the EEC national and, while insisting that decisions on individual applications must be taken with all due dispatch, it also provides for "conditional entry" in the meantime. The reasons for any refusal to renew or to issue a residence permit and for any order of expulsion must be given to the person affected, unless this would be contrary to the interests of national security. Notice of the decision must also be given and at least fifteen days allowed for departure to those still awaiting the first residence permit, or one month to others. Articles 8 and 9 require that there should be available some form of appeal or review against adverse decisions, and the individual concerned is to enjoy the same possibility of challenging administrative action as is enjoyed by nationals. Where no recourse to a court of law is available, or where such remedy can only be against the legality of the decision, or where it has no suspensory effect, then review must be permitted by some body independent of that which took the original decision.

1. Directive 64/221, Article 5(1). Decisions must be taken within six months at the latest.

2. Detention pending decision is not, therefore, permitted. Cf. United Kingdom Immigration Act 1971, section 4(2); Sch. 2, para. 1.

3. Directive 64/221, Article 6. Article 5(2) authorises the receiving state to seek details of a person's past record from the state of origin, but this is to be done on an informal, rather than regular or systematic basis.

4. Ibid., Article 7. Less time may be allowed in cases of urgency.

The EEC Treaty and subordinate legislation have introduced a special régime for the benefit of the nationals of Member States. These advantages accrue primarily to those who desire to contribute economically to the Community, but in practice this cannot be considered to be a restricted category. While international law protects the minimum rights of the alien abroad, the EEC national is also protected against future changes in the law which may adversely affect both citizens and foreigners. At the same time he enjoys the protection of Community law and Community law concepts, which override the provisions of local jurisdictions. In this way significant restrictions are placed upon areas of state discretion which are commonly characterised in terms of "sovereign rights". The entry of the nationals of Member States to the territory of other Members is in practice dependent upon the simple proof of identity and status. Once within the frontiers, the migrant must comply with the established system of residence permits, but here he enjoys substantive rights as regards their issue, together with important procedural rights of appeal and review. Despite suggestions to the contrary, the discretionary state powers retained in the 'ordre public' clause cannot be used to frustrate the fundamental principle of free movement. The competence which is affirmed stands to be interpreted in the light of the treaty obligations assumed and the provisions


2. Cf. the notion of "Community worker", above, p. 306 and 'ordre public' as a Community law concept, below, pp. 500ff.

of the particular legal order which that treaty has created. The reduction of free movement and establishment provisions to so many details emphasises the failure of many earlier bilateral treaties which have been content to abide by generalities.

If the alien abroad is to be given substantive protection, then it seems that this may most effectively be achieved by way of a regional and centralised plan which is geared to the co-ordination and subordination of national régimes. The provisions of the EEC are unique, but treaties and agreements dealing with the right of establishment are by no means new. One may now turn to consider whether the word "establishment" as used in such treaties is a term of art, and whether it can be seen to entail any well-defined rights and benefits.

(3) Bilateral Treaties of Establishment

Historically, treaties of commerce and friendship have employed a variety of stock phrases purporting to express norms of international law applicable between the parties. Treaties have guaranteed that nationals of each party shall "enjoy the full protection and security required by international law", or that they shall benefit from the most-favoured-nation standard, that is, from treatment on a footing not inferior

1. See further, below, pp. 500ff.


to the most favoured third state, or that they shall be accorded "national treatment". At first glance there might appear to be a sufficient body of customary international law in this field to lend weight and content to the standards provisions of bilateral treaties. However, in many respects these standards were not only uncertain, but were also inadequate to the main purpose, which was to secure non-discrimination with respect to treaty nationals or commercial enterprises. For example, the most-favoured-nation clause never in fact prohibited a state from discriminating or raising barriers against aliens as a class. The development of the "national treatment" clause as the norm was intended to overcome these drawbacks, but it too was accompanied by substantial disadvantages. In many cases it could be argued that the standard of national

1. Schwarzenberger, The Most-Favoured-Nation Standard in British State Practice, 22 B.Y.I.L. (1945), 96. The benefits of the Treaty of Rome are limited, for the most part, to the "ressortissants" of states signatory thereto, especially in the case of Articles 52-59. It has been observed that, where individual states members have concluded treaties with third states, then "... les ressortissants de l'État tiers qui ne participer pas à cette communauté et qui, dès lors, n'a pas souscrit aux obligations inhérentes à cette participation, ne peuvent pas se prévaloir, en vertu d'une clause de la nation la plus favorisée, des avantages résultant de cette communauté": Droit des Communautés Européennes, para. 1859. See also, Le Statut de l'étranger et le Marché Commun, 57ème Congrès des Notaires de France, (1959), E.S. de la Marnière, Introduction, pp. 16-20. Note Article 234 of the Treaty of Rome, which obliges Member States to take all necessary steps to eliminate any incompatibilities resulting from agreements with third states, and which emphasises that Treaty advantages are inseparably linked to the creation of common institutions.

treatment did not even meet the minimum requirements of international law, while in other cases disparity between national systems in regard to, for example, the establishment of enterprises, made it impossible to set up an equitable and reciprocal régime. Together with these doubts and uncertainties, most treaties of commerce and establishment included a reservation to the effect that while nationals of each contracting party enjoyed the right of entry, such "right" was subject to compliance with local immigration and police laws. When problems arose over particular exclusions, States Governments were never quite sure of their footing. Diplomatic protests did not usually follow upon individual exclusions, but there are a number of examples of remonstrance when exclusion took the form of discrimination against certain classes or groups of citizens. Occasionally, such discriminations were considered justifiable in the light of the terms of the treaty. For example, the Law Officers of the Crown in 1886 came to the conclusion that the treaty right of British subjects to "free" admission to the United States, which was based on Article I of the Convention of Commerce between Great Britain and the United States of 1815, was confined to the inhabitants of the territories of Her Majesty in Europe and was subject


2. See, for example, the controversy over the interpretation of Articles I and XI of the Anglo-Russian Treaty of Commerce and Navigation 1859: 6 B.D.I.L., 29-32. See also, Memorandum of Grievances of British Subjects of the Jewish Faith, (1912); 6 B.D.I.L., 32-42.
always to the laws and statutes of the United States. It could not, therefore, be properly invoked by Her Majesty's Government in support of the claim of British subjects of Chinese origin to exemption from the Chinese Exclusion Act and to free admission to the United States. 1.

This Convention was again in point in the matter of the admission of British nationals, free persons of colour, which was impeded by the laws of South Carolina. The Foreign Office enquired whether it could not fairly be contended that a condition attached to the enjoyment of a right granted by treaty must be construed as only regulating the exercise of that right, but cannot justly be construed as authorising its entire extinction. With reference to the proviso in the Treaty that the liberty of free admission was to be subject always to the laws and statutes of the two countries respectively, the Foreign Office contended that these very words implied that the liberty was to exist and to be enjoyed and exercised and that it was therefore impossible to maintain that the proviso could sanction a law, the effect of which must be utterly to prevent that liberty from being exercised and enjoyed, or from existing at all. However, the Queen's Advocate then advised: 2.

"The condition attached to the enjoyment of a right granted by Treaty should certainly be construed as regulating, and not as authorising its entire extinction; but the condition in this case does not operate as an extinction of the right to the general body of Her Majesty's subjects, but to a particular class only, and if known to

1. 6 B.D.I.L., 20.
2. Ibid., p. 22.
Another instance of discrimination arose in relation to the Anglo-Russian Treaty of Commerce and Navigation of 1859, and Russian policy regarding the admission of Jews. The Treaty followed the usual form and it was provided that the stipulations as to freedom of commerce, etc., "in no way affect the laws, decrees and special regulations regarding commerce, industry and police, in vigour in each of the two countries, and generally applicable to all foreigners." The question for determination was whether British Jews were thereby subject to the considerable number of laws in Russia which discriminated against persons of that particular creed. Her Majesty's Government somewhat reluctantly concluded that it was unable to object to such discriminations, which had been tacitly accepted since 1859, and expressly in 1862 and 1881. It was admitted, however, that:

"the claim of the Russian Government to be entitled to define for itself classes of undesirables is capable in practice of very wide extension, and might lead to results entirely inconsistent with the Treaty ... The

2. Article I.
3. 6 B.D.I.L., 37. In a Memorandum submitted by British Jews on the Government's interpretation and its view that British Jews in Russia were not suffering the same disadvantages as Russian Jews, it was alleged that the Russian Government was claiming to apply to British Jews certain special laws and regulations in the Passport Statute and the commercial code entirely different from the special administrative system which governed native Jews. The opinion was put forward that these restrictions were not justified by the Treaty because they did not apply to foreigners generally, but only to a single class defined by reference to a difference of religious opinion.
"Russian claim must be reduced within limits, but it is not easy to see where the limits are to be placed, while reserving the right to exclude persons who may properly be considered undesirables."

The Assistant Legal Adviser, Mr. Hurst, while accepting that the general right of entry must be read subject to the implied right of the contracting parties to exclude individuals whose presence will be harmful to the territory, nevertheless felt that the onus of showing that such individuals were harmful ought to rest on the excluding power. He added:

"I do not think that logically it is possible for the excluding Power to claim a higher right than that; in fact it might well be argued that from the strict point of logic the implied exception only extends to cases where the parties are agreed as to the harmful effect of the individual ... to be excluded, but on the whole I think that the sounder rule would be that a party is entitled to exclude where it can demonstrate to the satisfaction of a reasonable person that the individuals ... would have a harmful effect ..... In practice, however, it does seem to me that there has been a tendency on the part of foreign nations to accept exclusion laws without demur - at any rate, so far as individuals are concerned - without calling upon the excluding State to justify its act ... My own conclusion is that unless Russia can demonstrate that the presence of a Jew in Russia is harmful in its effects she is not entitled under her Treaty with Great Britain to exclude them altogether when they are of British nationality."

However, it was not this opinion which prevailed and the Lord Chancellor concluded that the Treaty's objects and scope were prima facie restricted to what reciprocal privileges in commerce and navigation imply, and that police regulations and the power to make them do not fall within the range of those restrictions on sovereignty which the Treaty contemplated. Furthermore, it could not be asserted that the wording of the Treaty was such

as to have effected a surrender of the inherent sovereign right of restricting the entry of individuals on grounds unconnected with their nationality. 1. In consequence, no protest was made to the Russian Government, a policy decision which was motivated also by the fear that any complaint to that Government would encourage it to terminate the Treaty by formal notice, to the detriment of all concerned. 2.

These cases may be contrasted with another instance of class discrimination against British subjects, apparently in violation of treaty rights. In 1896 the question arose whether a new law of the South African Republic constituted a violation of Article XIV of the London Convention of 1884. 3. This law provided that persons should not be at liberty to enter or reside in the Republic unless they could show affirmatively that they had the means or ability to support themselves, whereas the only condition imposed by the Convention was that they should conform themselves to the laws of the Republic.


2. Cf. Dudley Mann's case (1852): Whiteman, I Damages in International Law, 464. This case concerned the refusal by the Russian legation to visa Mr. Mann's passport, which was alleged to be in violation of Article I of the Treaty of Commerce and Navigation of 1832 between the United States and Russia. In reply to a request to the United States Government that a demand for damages of not less than $100,000 be submitted to the Russian Emperor, Secretary of State Everett noted that while the power reserved to Russia to exclude those deemed dangerous probably had some limits, "... it would not be safe to deny to ... governments the right of judging for themselves ... which course of policy in this respect is required by the great law of self-preservation. What we deny to other powers we must disclaim for ourselves; and this government could never give up the right of excluding foreigners whose presence they might deem a source of danger to the United States."

Her Majesty's Government considered that this new law was more than an ordinary police law, and that it was discriminatory in the sense that it imposed an additional burden which it might be difficult for many of the poorer, though perfectly respectable, immigrants to satisfy. A protest to the Government of the South African Republic was made along these lines.¹

In many cases, certainly, the rule against exclusion in violation of treaty seems to have been honoured more in the breach than in the observance. In the Chinese Exclusion Case in 1889, the United States Supreme Court held that although the exclusionary Act of 1888 was in contravention of the treaties made with China in 1868 and 1880, it was not on that account to be restricted in its enforcement. In the opinion of the Court, treaties were of no greater legal force than an Act of Congress and were subject to such Acts as Congress might pass for their enforcement, modification or repeal.² In 1893

1. 6 B.D.I.L., 26-29.

2. Chae Chan Ping v. United States 130 U.S. 581 (1889). The Court also declared that the power to exclude foreigners is an incident of sovereignty and that the right to its exercise cannot be granted away or restrained on behalf of anyone. See also Hackworth, Digest, vol. III, p. 717 et seq. Whiteman, I Damages in International Law, 418; Shizuko Kumanomido v. Nagle 40 F. 2d 42, 44 (1930); In Re Pezzi 29 F. 2d 999, 1002 (1928). In McCandless v. United States, ex parte Diabo 25 F. 2d 71 (1928) the court held that Article III of the Jay Treaty, which gave to Indians dwelling on either side of the United States-Canada boundary the right "freely to pass and repass ... into the respective territories and countries of the two parties" was not abrogated by the War of 1812 and that the applicant could not therefore be deported for entering the United States under the provisions of the Treaty. Article IX of the Jay Treaty was considered in a decision of the Supreme Court in 1830, in which it was noted that the Article related to the rights of nationals of both countries to hold and dispose of land as if they were natives and not aliens, and that it was therefore within those terms of the Treaty which were intended to be permanent, which operated in time of war as of peace, and which dealt with permanent territorial arrangements: Society for the Propagation of the Gospel in Foreign Parts v. New Haven & Wheat, 464. In 1928 the Supreme Court itself also dealt with Article III, but
in a Report to the President on a proposed Bill to suspend immigration for one year, Secretary of State Foster declared: 1.

"I am not aware of any treaty which specifically purports to limit or restrict the right of this Government to control immigration into the United States ... Treaty provisions granting the right of entry, travel or residence in this country generally contain in some form the conditions of subjection to the laws of the land ... It is doubtful whether any of these treaty provisions guaranteeing rights of travel, residence, etc., were intended or can be construed to be restrictive of the right of the contracting governments to control immigration into their respective territories."

During the late nineteenth and early twentieth centuries assertions continued to be made to the effect that immigration was a matter of purely domestic concern. 2. Nevertheless,

it distinguished the nature of that Article from that of Article IX. The latter might be implemented in war as in peace whereas Article III, which dealt with passage across the border, could not; in addition, Article IX could be said to have given a vested right intended to be perpetual, while Article III could not be so described. In effect the rights recognised in McCandless' case were limited to Indians who had been accepted and enfranchised as citizens of Canada: Karnuth v. United States, ex parte Albrow 279 U.S. 231 (1928). See further Francis v. R [1955] 4 D.L.R. 760, where a Canadian court followed the Supreme Court and held that Article III of the Treaty had expired with the War of 1812, even if Article IX had not. Cf. United States Treaties in Force, 1st January 1962, which declares that only Articles IX and X of the Treaty continue in force.


2. E.g. Sixth International Conference of American States 1928: "The delegation of the United States desires ... to state that the control of immigration is a matter of purely domestic concern, representing the exercise of a sovereign right and that, as far as the United States of America is concerned, the authority of its Congress in immigration matters is exclusive." Cited in Wilson, United States Commercial Treaties and International Law, (1960), pp. 28-29. As already noted, this attitude is reflected in municipal law by the courts' adoption of the "political question doctrine" - the notion that questions which are in their nature political can only be answered by Congress or the President and are beyond the scope of judicial review: Fong Yue Ting v. United States 149 U.S. 698 (1892); Nishimura Ekiu v. United States 142 U.S. 651 (1892); Konvitz, Civil Rights in Immigration, (1955), pp. 3-6.
developments were in hand which were to give important practical weight to the hitherto vague concept of a right of establishment, and to secure its more effective recognition both in municipal law and in the provisions of contemporary treaties.

The United States Immigration Act of 1924 brought the classification of "treaty-merchant" into the general category of non-immigrants. It was considered desirable, in the words of one commentator,

"that there be created a status which would be consistent with the spirit of existing commercial treaties, by permitting natural persons to enter the country on a basis somewhat less permanent than that accorded full immigrants, but more favourable than that enjoyed by temporary visitors having visas valid for a relatively short time."

Such treaty-merchants were described by the statute, as amended in 1932, as "aliens entitled to enter the United States solely to carry on trade between the United States and the foreign State of which [they are nationals] under and in pursuance of a treaty of commerce and navigation". The 1932 amendment emphasised that the trade be reciprocal and not merely local, and it extended the statutory provision in respect of treaties subsequently concluded. The emphasis upon trade and the status of "merchant" has been underlined in a number of court decisions.

1. 43 Stat. 153, section 3(6). See also complaints by the Japanese Government that this statute otherwise contravened the "Gentleman's Agreement" of 1907 by providing, in section 13, that "no alien ineligible to citizenship shall be admitted to the United States": Konvitz, op. cit.

2. Wilson, op. cit., p. 32 et seq.

3. The right of entry extended also to the alien's wife and unmarried children under twenty-one, if accompanying or following to join him.
decisions. Thus, for example, a Chinese teacher was held not to be a person engaged in "trade" within the meaning of the Treaty of 1880 between China and the United States. ¹. In an earlier case, the Supreme Court made the following observations in regard to the status of a treaty merchant: ².

"The confounding of occupations - that of salesman or manager with that of merchant - cannot be accepted. A merchant is the owner of a business; a salesman or manager, a servant of it, and especially so under the immigration law. The policy of the law must be kept in mind. It is careful to distinguish between the status of merchant and those below that status."

The category of treaty trader has been maintained in the Immigration and Nationality Act 1952, ³, and non-immigrant status continues to be accorded to those who qualify under treaty. ⁴. However, the trade in question must now be "substantial and it must also be carried on "principally" between the United States and the foreign state of which the treaty trader is a national. The 1952 Act introduces a further category of treaty alien, the "treaty investor", who is characterised as one who comes solely to develop and to direct operations of an enterprise in which he has made or is about to make a


2. Dharandas Tulsidas v. Insular Collector of Customs 262 U.S. 258, 264 (1923). Cj Shizuko Kumanomodo v. Nagle 40 F. 2d 42, 44 (1930), where it was held that a Japanese subject, the editor but not the proprietor, of a Japanese newspaper published in San Francisco, was engaged in trade within the meaning of Article 1 of the Treaty with Japan of 1911. The Treaty expressly provided that Japanese subjects shall have the right to "employ agents of their choice ... incident to or necessary for trade".


4. The nationality of the spouse and children is irrelevant, for their rights and their classification are dependent upon the status of the treaty alien: 22 C.F.R. 41.40(c); 41.41(b).
substantial investment. The treaty investor innovation has figured frequently in commercial treaties concluded after 1952. In most other cases, however, the treaty trader will either be self-employed or, if in the service of another, then his employer will be a person or organisation of the same nationality as the non-immigrant. But if the latter is to benefit from the statute and the treaty, it is necessary that he be engaged in supervisory or executive duties, or that he have some special qualifications.

The conditions which generally apply to non-immigrants apply also to treaty aliens, and the right of entry or the right to most-favoured-nation treatment will be qualified by reference to the usual reservations permitting measures of exclusion or restriction necessary to maintain public order, and to protect public health, morals or safety.


2. In the Treaty of Friendship, Commerce and Navigation concluded with the Republic of Ireland in 1950 (206 U.N.T.S., 269) reference was made simply to entry for the purposes of "carrying on trade between the territories of the two parties and for the purpose of engaging in related commercial activities": Article I(1). Compare Article I(1) of the similar treaty concluded with Japan in 1953 (206 U.N.T.S., 143), which added, "(b) ... the purpose of developing and directing the operations of an enterprise in which they have invested or in which they actively in the process of investing, a substantial amount of capital."


5. Ibid., Article I(1)(b);(3). See also Minutes of Interpretation for the clarification of Article I(3). Cf. Treaty with Japan 1953, loc. cit., Article I(3).
from either Contracting Party cannot bring themselves within
the category of trader or investor, then, as a general rule,
they do not enjoy any advantages over aliens from third
states. At most, the treaty will ensure that the alien
benefits from certain minimum civil rights in the matter of
liberty of the person, that he will receive national
treatment in respect of social security matters, that he
will enjoy national treatment and most-favoured-nation
treatment as regards access to the courts and in respect of
compensation for the expropriation of property.

However, both the national treatment clause and the
most-favoured-nation clause are of little practical application.
In the Treaty of Establishment between France and the United
States of 1959, the most-favoured-nation standard appears in
only two areas, tax and exchange. The emphasis is once again

1. Treaty with Ireland 1950, Article I(1)(b); Article 20(5); Treaty with Japan 1953, Article I(1)(c); Article 21(4). Cf. BVerwGE 36, 45 (1970), a decision which concerned the interpretation of the treaty of establishment between Germany and Turkey. The appellant, a Turk, objected to the fact that his residence permit was so restricted as to prevent him setting up his own business. The court held, inter alia, that he could not rely on the treaty which permitted entry and establishment only in accordance with the laws (at p. 49). See also VerwSpr. Bd. 21, S. 335, 347.

2. Treaty with Ireland 1950, Article 2(1); Treaty with Japan 1953, Article 2(1): "... the most constant protection and security, in no case less than that required by international law"


5. Ibid., Article 6(3),(4).

on the particular economic aims of the treaty, represented in the form of the treaty trader and investor.\textsuperscript{1} Although reservation is made in respect of current laws and regulations on admission and residence, the two Contracting Parties, in the Protocol and Joint Declarations, state that such measures are not to be applied so as to curb, at base, engagement in the economic activities envisaged. The Joint Declaration is founded on reciprocity, and both Governments undertake to apply in the most liberal manner possible the powers conferred by their respective legislatures in matters of entry, residence and establishment.\textsuperscript{2} But this statement of policy applies only to Article II of the Treaty, and the Joint Declaration is much vaguer about liberalising and facilitating the entry and establishment of those not involved in the favoured occupations of investment and bilateral trade.\textsuperscript{3}

It is useful to contrast the treaties concluded by the United States with the Treaty of Commerce, Navigation and Establishment of 1963, between the United Kingdom and Japan.\textsuperscript{4} This Treaty is remarkable for the way in which it maintains, purely and simply, the stock clauses of the most-favoured-nation, national treatment and the international standard. The right

\begin{itemize}
\item \textsuperscript{1} Article II(1)(a),(b).
\item \textsuperscript{2} Protocol, Section 2(b).
\item \textsuperscript{3} Cf. Article 1, décret-loi du 17 juin 1938: industrial and commercial activities by aliens in France are geared in their extent to what is permitted to the Frenchman in the aliens' home states, and the extent to which reciprocity exists is a question of appreciation for the authorities: Piot, loc. cit., p. 962.
\end{itemize}
of entry, residence, engagement in business and departure is expressed in terms of the most-favoured-nation, and other civil rights are founded upon one or other standard, or a combination of standards. It is true that the Preamble calls for fair and equitable treatment and a liberal interpretation of the provisions, but the terms themselves are couched in generalities. Frequent references to most-favoured-nation and national treatment are no substitute for positive rights and remedies directly effective in municipal law. By contrast, the United States treaty with Japan comes far closer to the realisation of commercial ends, with its declaration of specific benefits for traders and investors. While customary international law fails to declare any right in the alien to enter a foreign state, "the treaty method of providing a reasonable basis for entry has been much used".

Early treaties did little more than guarantee recognition of the alien's legal personality. The twentieth century, however, has witnessed a movement towards giving him greater protection by ensuring basic human rights and approximating him to the national, for example, in matters of social security. This movement was first away from most-favoured-nation treatment towards national treatment. More recently, progress has been made to the point of special guarantees, written into

1. Article 3(1),(4).
2. Articles 7,14,28.
a treaty and reinforced by provisions of municipal law. The high point at the present time is the special régime within the EEC, where passage across frontiers has been reduced to the level of a check on identity, and the issue of residence permits turned into a mere automatic control function. In addition, social security rights have been assured on a Community-wide basis, the grounds for exclusion and expulsion have been limited and certain procedural rights ensured. Regional plans such as this, which entail the overall co-ordination of national régimes, are clearly the most effective in creating substantive rights in favour of the alien. For the time being, however, considerable attention must continue to be paid to the less complete, but often quite effective, provisions of bilateral treaties. These have served not only to raise the level of the general standard of treatment, but also to implement the principle of non-discrimination, in the first instance, in regard to the reception of treaty aliens. Today it is possible to view the bilateral treaty as an important adjunct to the principles and standards of general international law, and as a major source of the detailed content of those standards.
PART IV

THE POWER TO EXPEL
INTRODUCTION

The power of expulsion is traditionally described as the inherent and sovereign right of every state. Chapter XI shows that it is a power like any other, in this case subject to and controlled by international law. The limits of discretion are illustrated by reference to the function and purpose of the power, and consideration is given to its relationship with the practice of disguised extradition and with the doctrines of respect for acquired rights and abuse of rights. Examples are taken both from the decisions of arbitral tribunals and from the most recent excesses of states governments to show the circumstances in which this exercise of competence may become unlawful. Recourse is also had to the standards examined in Part II, although a cautious approach is made to the question whether any of them have acquired the status of rules of general international law. On the other hand, it is accepted that the somewhat vague principle of respect for fundamental human rights and the more precise, normative rule of non-discrimination may form a part of jus cogens. An exercise of the power of expulsion which did violence to either of these principles would, therefore, fall within the broader delictual conduct.

On the practical side, due recognition is given to the "margin of appreciation" which states have in determining whether to permit the continued residence of an alien. The concept of 'ordre public', as representing the fundamental national interests of the state, is examined, but the conclusion proposed is that this is a "general legal conception", existing under and controlled by law.

From the limits of expulsion in general international law, attention is turned to the practice of expulsion in
municipal law. The example of selected systems is again used to show the areas in which state practice reflects the requirements of international law. Of particular significance is the tendency of states to accord a privileged position to the long resident. In many ways this practice suggests recognition of the effective nationality of the alien as that of the host state. In addition, municipal law commonly provides for a system of appeals and makes available remedies by which the alien may challenge either the legality or the merits of his deportation. It is noted, however, that states continue to reserve to themselves decisions on political or security matters. Nevertheless, the overall impression is one of a discretion which is to be exercised only in accordance with the law. Finally, Chapter XIII buttresses the municipal law with a discussion of the impact of treaty obligations on the power of expulsion, with particular reference to the European Convention on Human Rights and the provisions of EEC law.
CHAPTER XI

The Limits of the Power of Expulsion in General International Law

(1) Introduction

The word "expulsion" is commonly used to describe that exercise of state power which secures the removal, either voluntarily or forcibly, of an alien from the territory of a state. Municipal laws show little consistency in usage, but a distinction is sometimes drawn between expulsion and deportation, which confines the latter to proceedings initiated at the port of entry and designed to effect departure following an original refusal of admission. In the United States, "deportation statutes" were first passed to facilitate the removal of illegal immigrants, but over the years deportation has developed its own peculiar régime.¹ By its very nature, the power of expulsion is confined to the body of aliens. The duty of a state to receive its nationals expelled from another state who have nowhere else to go has been described as the corollary of the "right" of expulsion. Schwarzenberger observes:²

"To make the right of expulsion effective, the practice of states has insisted on the duty of the home state to receive back any national expelled from a foreign state."

¹ Konvitz, Civil Rights in Immigration, (1953), pp. 93-96. The status of the illegal entrant varies from state to state; sometimes he remains susceptible to summary removal, while in other cases he benefits to the full from due process provisions and the right of appeal. See R v. Governor of Pentonville Prison, ex parte Azam [1973] 2 W.L.R. 949 (C.A.); [1973] 2 All E.R. 765 (H.L.).

Oppenheim describes the function of nationality as involving one particular right and one particular duty: 1.

"The right is that of protection over its citizens abroad which every state holds ... The duty is that of receiving on its territory such of its citizens as are not allowed to remain on the territory of other states."

Statements of this kind do little more than beg the question. They proceed on the assumption that both the "right" and the "duty" are absolutes, whereas in fact they are subject to many limitations. Thus, it is a matter of debate to what extent a state may expel an alien long established on its territory, and who may be considered to have acquired the effective nationality of that state. 2. Nor is it clear whether a state is under any duty to receive those of its nationals who have been unlawfully expelled from another state, at least in so far as the duty to admit is one owed between states alone. Furthermore, the unqualified use of the word "national" is also open to objection, and it may be noted, for example, that the common nationality of the British Empire prior to 1946 guaranteed neither freedom of movement nor a right of residence throughout the Dominions. 3.


3. Note now the "patriality"provisions of United Kingdom law, above, pp. 36ff, which cut right across the normal incidents of citizenship. Cf. Franklyn v. McFaul 32 I.L.R., 247; De Marigny v. Lancais, Criminal Reports (Canada), vol. 5, (1946), 256.
Recently, and with due regard to deficiencies in the terminology, the view has been canvassed that the state's duty to admit its nationals may be owed not only to a second state which may wish to repatriate them, but to any legal person with a recognised interest in the preservation of the individual's human right to enter his own state.\(^1\) The right of entry as a human right must not pass unconsidered. It features in many recent international instruments,\(^2\) and it has been at the base of the controversy over the admission of United Kingdom citizens from East Africa. It can, however, be severed quite effectively from whatever rights a state may have to secure the removal of an alien from its own territory. At the present time one must also express serious doubts about the duty of admission as an obligation owed at large, to the international community as a whole.\(^3\) But this does not, of course, mean that states may not agree among themselves to recognise such a right as incidental to obligations assumed within some regional organisation.\(^4\)


The first and general condition of a valid exercise of the power of expulsion is that it should be directed against the body of an alien. In one case, however, the Judicial Committee of the Privy Council ruled that whether or not the word "deportation" is, in its application, to be confined to aliens remains open as a matter of construction of the particular statute in which it is found. Nationality per se is not a relevant consideration. International law clearly permits the revocation of nationality in certain circumstances, but the governing principle is that a state may not manipulate international law in order to avoid its international obligations. While, for example, fraud and misrepresentation commonly figure as grounds for revocation of citizenship acceptable to international law, where denationalisation takes place solely to give an air of legality to arbitrary expulsion, then it is but one aspect of the general delictual character of that exercise of state power. Fischer Williams has proposed that, whereas positive international law does not forbid a state unilaterally to sever the relationship of nationality so far as the individual is concerned, "... still a state cannot sever the tie of nationality in such a way as to release itself from the international duty, owed to other states of receiving back a person denationalised who has acquired no other nationality, should he be expelled as an alien by the state where he happens to be."

Although this characterisation may be technically correct, it is not likely that the issues of expatriation would ever be settled on the international judicial level in any contentious case.\(^1\). Humanitarian considerations, as well as the express obligations which many states have assumed towards refugees, would also operate to keep such problems away from strictly legal determinations. In 1960, for example, Her Majesty's Government admitted the reality that no other state could be required to accept a stateless deportee, and that the power of deportation was not, therefore, available in a case in which a person's citizenship had been revoked following conviction for espionage offences.\(^2\).

States will sometimes resort to the sanction of exile in order to secure the removal of politically undesirable nationals. For example, a French national can be banished, and this measure has been characterised as a "temporary political sanction judicially imposed".\(^3\). It is admitted, however, that the practice is one which may give rise to objections from the point of view of international law.\(^4\).

In the nineteenth century, the British Government took great exception to the practice of the French authorities in


\(^3\) H. Donnedieu de Vabres, *Traité élémentaire de droit criminel*, n. 613. Note also the recent example of the journalist Peter Niesewand, a Rhodesian citizen, who was released from detention by the Smith régime on condition that he left the country: *The Times*, 4th May 1973.

securing the removal of French criminals and other undesirables to England. In the view of Her Majesty's Government, this practice amounted to a "very serious breach of international comity".¹

In normal circumstances the competence to expel is accepted by states, by international tribunals and by writers as the necessary concomitant of the state's powers in regard to the admission and exclusion of aliens.² It is frequently justified by reference to the public interests of the state and as an incident of sovereignty. In 1869, United States Secretary of State Mr. Fish stated:³

"The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the state are too clearly within the essential attributes of sovereignty to be seriously contested..."

A successor to this office described the powers of exclusion and expulsion as "incidents of sovereignty based on the fundamental right of self-preservation", and he inclined to the view that such rights could not be impliedly surrendered.⁴ Most writers also accept that the power at


2. It should be noted also that an alien may not generally object to expulsion on the ground that he or she is married to a national: C. v. E. (1946) T.L.R. 326; R v. Hannah Fine (1912) 29 T.L.R. 61 (C.C.A.); Aliens Order 1953, article 20(5). See now Immigration Act 1971, section 5(2); also, Cons. d'État, 8 mars 1939, Nouv. Rev. de dr. int. privé, (1939), 456. Nor may an alien woman complain that she is the mother of a child who is a national by birth: Louie Yuet Sun v. The Queen 32 I.L.R., p. 252 (Supreme Court of Canada).


least exists. Thus, Oda states the common view:

"The right of a state to expel, at will, aliens, whose presence is regarded as undesirable, is, like the right to refuse admission of aliens, considered as an attribute of sovereignty of the state ... The grounds for expulsion of an alien may be determined by each state by its own criteria. Yet the right of expulsion must not be abused."

The present edition of Oppenheim also accepts the general principle, but introduces significant limitations:

"Although a state may exercise its right of expulsion according to discretion, it must not abuse its right by proceeding in an arbitrary manner."

The idea of discretion, of freedom of decision within limits, is the subject of pertinent discussion by Schwarzenberger.

However, he concludes somewhat cautiously:

"It is arguable whether sovereign states have absolute discretion regarding the expulsion of foreigners or whether, in this respect, the minimum standard of civilisation imposes limitations on the exercise of untrammelled domestic jurisdiction. However this may be, within the limits in which international law permits the expulsion of foreigners, this right involves the duty of the home state to receive its nationals."

Thus, in the view of some writers at least, the power or competence to expel is to be seen not so much in terms of an absolute right, but rather as an exercise of controlled


4. Ibid., p. 360, emphasis supplied. See also at p. 207 for a view of the international minimum standard transforming unlimited into limited territorial jurisdiction over aliens.
discretion. Expulsion requires justification, but although an expelling state will hardly admit to not having just cause, 1.

"... the borderline between discretion and arbitrariness, although elastic, is a real one, and in a case of doubt it is for an impartial organ to determine whether it has been overstepped."

O'Connell also notes that the right arbitrarily to expel an alien is not so well established as the right to exclude him, 2 and it will be seen that there is now a substantial body of authority in support of "confining and structuring" the power to order expulsion. 3

In 1927, de Boeck examined the problems raised by expulsion and concluded: 4

"L'expulsion sera legitime, lorsqu'elle aura pour objet d'assurer la conservation de l'état; elle sera illegitime, si elle n'est pas dictée par l'intérêt supérieur de l'association politique ... La liberté d'expulsion n'est pas illimitée: pour être licite en droit international et pour exclure toute reclamation diplomatique, l'expulsion doit reposer sur de sérieux motifs, répondre à une véritable nécessité, et être exempte de toute rigueur inutile."

These words highlight three particular areas in which international law defines and limits the discretionary power of expulsion. Thus, the power is directly related to (1) its


3. Davis, op. cit., p. 97: "The purpose of confining is to keep discretionary power within designated boundaries ... The purpose of structuring is to control the manner of the exercise of discretionary power within the boundaries." Although Davis is concerned with the rôle of discretion in a municipal system, his approach holds general validity and relevance for the present discussion.

4. 18 Hague Recueil (1927 - iii), 447-647.
essential function, which is the protection of the state; (2) the requirement of reasonable cause, of sufficient justification; and (3) an acceptable manner of execution. None of these limits is exclusive, but international law and state practice both recognise their existence and indicate the circumstances in which an expulsion which is arbitrary or unjustified will invoke state responsibility.

When a state admits foreign nationals it is bound to extend to them the protection of the law and it assumes clear obligations concerning the treatment to be afforded them. Those obligations are owed, in the first instance, to the alien's state of nationality, and it has been argued that they derive from the consent of the states concerned. In his dissenting opinion in the Nottebohm case, Judge Read noted:

"by admitting the alien, the State, by its voluntary act, brings into being a series of legal relationships with the State of which he is a national..... The receiving State becomes subject to a series of legal duties vis-à-vis the protecting State, particularly the duty of reasonable and fair treatment. It acquires rights vis-à-vis the protecting State, particularly the rights incident to local allegiance and the right of deportation to the protecting State. At the same time the protecting State acquires correlative rights and obligations vis-à-vis the receiving State, particularly a diminution of its rights as against the individual resulting from the local allegiance, the right to assert diplomatic protection and the obligation to receive the individual on deportation.... The scope and content of the rights are ... largely defined by positive international law."

In the case before him, Read concluded that just such a

relationship came into being between Guatemala and Liechtenstein on Nottebohm's admission to the former country after his naturalisation in the latter. This relationship could not be brought to an end by the unilateral action of one of the states;¹.

"It was open to Guatemala to terminate the position by deportation [of Nottebohm to Liechtenstein], but not to extinguish the right of Liechtenstein to protect its own national without the consent of that country."

For present purposes we are concerned only with the fact that the admission of aliens sets up a bilateral legal relationship,². and with the extent to which the resulting rights and obligations may bear upon the power of expulsion. Breach of any of these obligations, such as the duty to receive nationals expelled or to accord fair and reasonable treatment to aliens admitted, will involve the guilty state in international responsibility. Put another way, that state will be placed in a situation where another state, or even some other subject of international law, enjoys either the right to claim reparation or the competence to impose a sanction.³. In a recent report on state responsibility, the Special Rapporteur to the International Law Commission has observed:⁴.

"the different conceptions of responsibility nevertheless coincide in agreeing that every


². Note the idea of exceptional obligations which are owed *erga omnes*: Barcelona Traction Case, I.C.J. Rep. 1970, at p. 32.


⁴. Ibid., pp. 184, 191.
internationally wrongful act creates new legal obligations between the state committing the act and the injured state... The wrongful act is above all a breach of a legal duty, a violation of an obligation, and it is precisely this kind of act which the legal order considers... for the purpose of attaching responsibility."

In order to establish, as precisely as possible, the circumstances in which expulsion amounts to such breach of an "international obligation", it is necessary to examine in detail the function and nature of the state's power, the matters which justify its exercise and the manner in which it is to be executed. Some attempts have been made to break down obligations in this field to a series of finite rules, but these have resulted in little agreement between states.¹

The 1965 Restatement of the Law by the American Law Institute proposed that state conduct causing injury to an alien is wrongful if it (a) departs from the "international standard of justice", or (b) constitutes a violation of an international agreement.² This international standard is defined by reference to principles established by international custom, judicial or arbitral decisions or by analogous principles of justice derived from municipal law. There may be some value

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² U.N. Doc. A/CN.4/217, Add. 2, para. 165. See also para. 166 on discrimination against aliens; para. 171 on who is an alien for the purposes of state responsibility; and para. 197, which declares that state conduct does not depart from the international standard of justice if reasonably necessary for the maintenance of public order, safety or health, or the enforcement of any law which does not itself depart from the international standard.
in standards generalised to this degree but, without more, they are of little assistance in defining the boundaries of the discretionary power of expulsion.

(2) The Function of Expulsion.

The essential function of expulsion is clearly the protection of the state and the preservation of that which in continental jurisprudence is described as 'ordre public', public morality and public health. It follows that an exercise of the power to expel must be related to these purposes and that an expulsion which is not executed in good faith may be in breach of the obligations of the receiving state. It will not always be easy to establish mala fides on the part of the expelling state and, indeed, it should be noted that state practice admits of a considerable margin of appreciation in such matters. Between themselves states accept that expulsion is justified for activities in breach of the local law and, in addition, that the content of that local law is a matter for that state alone. A distinction is usually

1. This requirement of bona fides is reflected in municipal law. In R v. Governor of Brixton Prison, ex parte Soblen [1963] 2 Q.B. 243, the court emphasised that a deportation order made on the ground that the alien's presence was not conducive to the public good would be struck down if it were shown that the Home Secretary did not honestly hold such an opinion. This ruling shows that the Home Secretary's power is one of controlled discretion, although in practice the evidentiary burden may be very difficult to satisfy. For similar judicial insistence on the relation of statutory discretion to the "aim and purpose" of the statute in question, see Padfield v. Minister of Agriculture [1968] A.C. 997.

2. Dr. Hoby's case 1843: 6 B.D.I.L., 113 (preaching contrary to local laws in favour of the established church).

3. N.b. present issues are directly related to the general principles which govern questions of local competence on the one hand, and international opposability on the other hand; see Anglo-Norwegian Fisheries Case, I.C.J. Rep., 1951, p. 116
drawn between expulsion following judicial sentence and expulsion which is ordered by the executive on general political grounds. Here, too, it is accepted that the "policy" of each nation must determine whether it will permit the continued residence of the alien, and in 1894 it was stated that,

"in the opinion of Her Majesty's Government if the law ... permits the expulsion ... of persons whose presence is dangerous to public order, an expulsion on such ground lawfully carried out according to the municipal law could not be taken exception to, on any ground of international law, by a power whose subjects had been so expelled."

Statements of this nature do tend to perpetuate the notion of an uncontrolled and uncontrollable sovereign power. On closer examination, however, significant qualifications are apparent, especially in the case of expulsions allegedly based on "political" reasons. Thus, in 1883 the Law Officers advised:

"where ... the expulsion does not result from a judicial sentence, but from the act of the Executive, Her Majesty's Government is entitled to scrutinise the facts; and if the action of the Executive has been arbitrary and unfriendly, or the mode of its enforcement unnecessarily harsh or oppressive, may properly make the matter the subject of protest or representation..."

Judicial inquiry, with its basis in formal investigation and the proof of facts, is a surer guard against abuse than the free exercise by governments of a power of expulsion based on vague and indefinite allegations.

These issues are exemplified by the case of Mr. Raphael, who was expelled from Italy in 1907. The Italian Government defended its action on two specific grounds: (1) the provisions of the local law, namely, Article 90 of the Law of Public Security; and (2) the inherent right of every state to expel undesirable aliens. On the second point the Law Officers advised:

"This right exists in the abstract ... but its exercise is subject to at any rate two important qualifications: (1) that it is not restrained by the provisions of municipal law - as it probably is in the present case; and (2) that it is not exercised towards the subject of a friendly power without any apparent justification."

Throughout their advice the Law Officers manifest a desire to keep the Italian Government to their original defence and not to permit recourse to vague and general principles. At the same time they accepted that if the Italian Government did admit that the law had been erroneously applied, they would maintain that the mistake was made in the bona fide exercise of his discretion by the official at fault, and that therefore no compensation was due as of right. But in the view of the Law Officers this prospect alone was no reason not to ask both for compensation and for the revocation of the order of expulsion.

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1. 6 B.D.I.L., 151.

2. Ibid., p. 152. See also the arguments of the Italian Government in favour of an uncontrolled discretion: ibid., p. 153.

3. Compare Mr. Luxenburg's case (1908), in which it was accepted that compensation as of right could not be demanded for a false arrest which was based on a bona fide mistake: ibid., p. 297.
Certain preliminary conclusions can be drawn from the above examples. First, states have the "right", or "power" or "competence" to expel aliens. Secondly, this competence may be exercised in the discretion of the state, and on the grounds which it deems fit. Thirdly, that discretion is, however, confined by reference to its function and purpose. Fourthly, its exercise is subject to the requirement of justification, although a margin of appreciation is left to the expelling state. The third and fourth points are usually summarised by writers and by governments in a description of the right of expulsion as a right which must not be abused by proceeding in an arbitrary manner. In 1966 Her Majesty's Government set out the principles which govern the decision whether or not to make representations regarding the expulsion of United Kingdom citizens from Commonwealth countries:

"We ... reserve the right to make representations to any Commonwealth Government in any individual case if the manner in which the power ... is exercised causes hardship, or seems to be arbitrary or unjust ... This is different from representations, which we cannot make, concerning the operation of the laws of a country perfectly correctly according to their concept of their laws."

(a) Expulsion and the Doctrine of Abuse of Rights

Reference to function and purpose and to the good faith of the expelling state invites consideration of the

2. 733 H.C. Deb., cols. 1223-1225, quoted in British Practice, 1967, pp. 112-114.
doctrine of abuse of rights. This doctrine in fact raises, from another standpoint, the general issue, whether the right of expulsion is uncontrolled or whether, if the intention behind it is to do harm, it ceases to be an exercise of discretion and becomes unlawful. For example, the "right" of expulsion may be exercised with the intention of effecting a de facto extradition, or in order to expropriate the alien's property, or even for the purposes of genocide, as by mass expulsions over desert frontiers. In such cases it cannot be that the exercise of the power remains untainted by the ulterior and illegal purpose.

It is a matter of some controversy whether a doctrine of abuse of rights even exists in international law. Where states' freedom of action is already limited by customary or conventional law, then the doctrine can be of little significance, but it is to be admitted that rules of this nature are often difficult to impose upon the general area of entry and removal of aliens. Abuse of rights has been described as occurring when a state avails itself of its rights in an arbitrary manner in such a way as to inflict an injury on another state which cannot be justified by a legitimate consideration of its own advantage; that is to say, when its actions, although strictly speaking "legal", are

1. Consider also the principle established in the law of tort by the decision in Wilkinson v. Downton [1897] 2 Q.B. 57, to the effect that an act done which is calculated or intended to do harm, and which actually results in harm, is actionable, even though it is not strictly a trespass. See also, Hollywood Silver Fox Farm Ltd. v. Emmett [1936] 2 K.B. 468, and cf. Rattray v. Daniels (1959) 17 D.L.R. (2d) 134; Bradford Corporation v. Pickles [1895] A.C. 587.
coloured by bad faith. The doctrine would therefore seem to involve two elements in particular: the recognition of certain rights in favour of the state, and an exercise of those rights in some way contrary to fundamental rules.

After examining a number of expulsion cases, Politis concluded that the requirement of "abuse" was satisfied where the expulsion was arbitrary, was effected with insufficient motive, was in excess of power, or was otherwise affected by some fault on the part of the state authorities. It was his view that the admission and expulsion of aliens generally was an area almost unregulated by international law, and that if the power of expulsion, for example, was the logical consequence of the sovereignty of the state, then the doctrine of abuse of rights was necessary in order to relate its exercise more precisely to considerations of humanity.


Further elaboration of the doctrine was undertaken by Kiss, who concluded in favour of it as a general principle of international law: \(^1\).

"dans les domaines où une autre règle du droit international ne limite pas le pouvoir discrétionnaire des Gouvernements Étatiques, le principe interdisant l'abus de droit est appliqué."

In Kiss's view, decisions and actions on matters affecting expulsion do not reflect sufficient repetition of conformity to a norm, together with conviction that the norm is a rule of law, to warrant the finding of any rules. \(^2\). Abuse of rights must therefore be called in aid to regulate those perhaps less significant matters upon which international law has nothing in particular to say.

The doctrine has received but little recognition in international tribunals, and it has not been used explicitly to ground liability. \(^3\). In the case concerning German Interests in Polish Upper Silesia, for example, the Permanent Court made only a passing reference to the theory, excluded it in the instant case, and noted that abuse of rights or bad faith could not be presumed. \(^4\). In the Nottebohm Case,


2. Ibid., pp. 139-141: "la distinction entre l'existence du droit et les modalités dont ce droit est exercé - chose tout à fait indépendante de l'existence du droit" - est caractéristique: elle paraît une affirmation très nette de la conception de l'abus de droit." These remarks were, however, confined to the legality of conditions such as a time limit for departure, imposed on the person expelled. Questions involving the treatment of that person were, in Kiss's view, already adequately covered by the rules and standards of international law.


Liechtenstein relied to some extent upon the doctrine as indicating the illegality of Nottebohm's expulsion and Guatemala's refusal to re-admit him:

"While in principle a State is entitled to expel aliens from its territory, this right is subject to the qualifications common to the exercise of any right in international law and especially compelling in this instance, that it may not be exercised unjustifiably, arbitrarily, or in such a way as to constitute an abuse of rights .... If an alien acquires by long residence in a State a right to continue to reside there, a right which international law protects by prohibiting his arbitrary expulsion, it follows that that right continues to exist even if the alien temporarily departs ... In such cases the refusal to re-admit ... amounts to an abuse of the right to regulate the admission of aliens."

Liechtenstein sought damages for the unlawful arrest, detention and expulsion of Nottebohm, and the refusal to re-admit him, together with more general damages for unlawful interference with and deprivation of property. Had the Court been prepared to deal with the merits of the case, it would have had to consider whether Nottebohm's expulsion and the refusal to re-admit might not have been effected in order to expropriate his property. The fact that more than one hundred different proceedings were subsequently initiated in order to deprive Nottebohm of his proprietary interests might then have moved the Court to consider the expelling state's underlying intentions. On behalf of Guatemala, it would then have had to consider the arguments to the effect

that the decision on re-admission had been taken "dans l'exercice de sa compétence essentiellement nationale dont il ne doit rendre compte à personne". In further support of this point, Guatemala also alleged that,\(^1\):

"... dans l'état actuel du droit l'admission ou le refus d'admission d'étrangers échappe à toute limitation ou réglementation internationale et par suite à tout contrôle extérieur."

Moreover, the doctrine of abuse of rights could not be applied to security matters in particular, and to the exercise of an assumed absolute, discretionary competence in general.

In his Second Report on State Responsibility, Roberto Ago characterises international responsibility primarily in terms of the breach of an international obligation.\(^2\). On the rôle of "abuse of rights" he notes:\(^3\):

"the question is one of substance involving the existence or non-existence of a "primary" rule of international law - the rule whose effect is apparently to limit exercise by the State of its rights, or, as others would maintain, its capacities, and to prohibit their abusive exercise ... If it was recognised that existing international law should accept such a limitation and prohibition, the abusive exercise of a right by a State would inevitably constitute a violation of the obligation not to exceed certain limits in exercising that right, and not to exercise it with the sole intention of harming others ... If the existence of an internationally wrongful act was recognised in such circumstances, the constituent element would still be represented by the violation

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1. I.C.J. Pleadings, Nottebohm Case, Duplique of the Guatemalan Government, p. 505 at p. 542. It was also suggested that the conferment of nationality on Nottebohm by Liechtenstein itself constituted an abuse of rights vis-à-vis Guatemala.


3. Ibid., p. 193.
"of an obligation and not by the exercise of a right."

This approach is infinitely preferable to that of Politis, for example, who takes the sovereign power of the state as his first premise and then seeks to confine it by imposing upon it the doctrine of abuse of rights. If the power of expulsion is seen in its proper context, that is, as but one right in the complex legal relationship between receiving state and protecting state, then the limitations which international law demands in its exercise become apparent. Although it cannot be affirmed that the doctrine exists as a general principle of positive law, nevertheless the concept of abuse of rights may still be helpful in focussing attention on the intentions which motivate expulsion and on the manner of its execution.¹

Awareness of the general notion also invites an appreciation of the fact that, in certain circumstances, expulsion may well be but one aspect of something else, such as expropriation. In August 1972 President Amin of Uganda announced that he was asking Britain to take responsibility for all United Kingdom citizens of Asian origin resident in Uganda, "because they are sabotaging the economy".² A time limit of three months was set for their departure and stringent controls were introduced to restrict the transfer of funds abroad. The expulsion order was implemented by two presidential decrees. These in effect made continued residence illegal, and actual departure was encouraged by

¹. Note the related concept of "incomplete privilege", Brownlie, op. cit., pp. 452-453, 506.

². The Times and The Guardian, 5th August 1972. See also The Guardian, 6th July 1972, for deportation measures against other foreigners, particularly Senegalese, for alleged criminality.
the threat that Asians who remained would be herded into concentration camps. The Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree 1972, made on the 9th August 1972,\(^1\) cancelled the documents specified and previously issued to any person of Asian origin, extraction or descent who was a citizen of the United Kingdom, India, Pakistan or Bangladesh. An absolute discretion was retained to re-instate any such permit holder. The Declaration of Assets (Non-Citizen Asians) Decree 1972, signed on the 4th October but made retroactive to the 9th August,\(^2\) provided that no person leaving Uganda by reason of the earlier decree was to transfer "any immovable property, bus company, farm, including livestock, or business to any other person".\(^3\)

Further provisions was made for every "departing Asian" to declare his assets and to effect transfer of his property or business to an agent.\(^4\). In return, every such Asian was to be given a receipt and the Minister was directed to keep

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2. 11 Int. Leg. Mat., pp. 1389-1391.

3. Section 1(a),(2). Subsections (b) and (c) prohibited mortgages of such properties and, in the case of companies, the issue of new shares, any change in the salaries of staff, or the appointment of new directors or any variation in their terms of service or remuneration.

4. Section 2(1),(2). Such agent was responsible for looking after the property until transferred by sale to a Uganda citizen; section 2(3). Section 6 anticipated the possibility of an agent leaving Uganda for good or otherwise becoming incapable of acting, in which case the Minister was to appoint a trustee.
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a register of properties so declared. A penalty of fifty thousand shillings or two years imprisonment or both was imposed for non-compliance.

Originally the expulsion order was destined to affect Asian citizens of Uganda as well, but after pressure from other African governments and the description of this facet of his policy as racialist, President Amin changed his mind. In fact large numbers of Ugandan citizens were deprived of their status by reason of "defects" said to have been found in their original registration. Many of those affected became stateless and they were issued with emergency travel documents under the auspices of the United Nations High Commissioner for Refugees. In the General Assembly the United Kingdom at first pressed for a debate on the expulsions as an important and urgent matter. While affirming the United Kingdom's duty to admit its nationals, the Foreign Secretary stressed the humanitarian aspects. The Uganda authorities argued that the matter was entirely within the reserved domain of domestic jurisdiction. They denied that

1. Sections 2(5); 3.

2. Section 5. Section 4 made provision for the sale of the properties declared, but none in respect of the purchase money.

3. The Guardian, 22nd August 1972 (President Nyerere).


5. The Guardian, 23rd October 1972. Co-operation was also arranged with the Intergovernmental Committee for European Migration and the Red Cross. Clearly, no state was absolutely bound to receive the stateless Asians and India and African countries bordering on Uganda declared that they would not admit them. However, the Uganda authorities were able to rely on both the good offices of the United Nations High Commissioner and the adherence of most European states to international conventions on refugees and stateless persons. Cf. Schwarzenberger International Law, vol. I, p. 377.
there was any danger to the lives of United Kingdom citizens, or that assets were being confiscated. The British representative replied that the issues involved went far wider than domestic jurisdiction and that the hardships caused by the collective expulsion of members of an ethnic group raised humanitarian issues germane to the wide purposes of the Charter of the United Nations. Eventually, the United Kingdom agreed not to press for a debate in the General Assembly after an indication that Uganda was willing to discuss an extension of the deadline and an offer of mediation from President Mobutu of Zaire. At the same time, attempts to secure positive action from the United Nations Sub-Committee on Human Rights were also defeated. Although there must be doubts regarding the extent of any duty which might have been owed to Uganda, the British Government for the most part fulfilled the obligations owed to its citizens with nowhere else to go. There was, however, some controversy over stateless Asians split up from their families who still retained United Kingdom citizenship.

There can be little doubt that the Uganda expulsions contravened the principles and rules of international law. The expulsions were unprovoked and allegations of "sabotaging the economy" and the transfer of funds abroad were never established. If such charges had been proved, then they


2. The Times and The Guardian, 30th September 1972. In fact no extension was granted, although the Ugandan authorities gave certain assurances to the Secretary-General that there would be no maltreatment or oppression, that no property was being confiscated, and that departing Asians were being allowed to take with them their personal effects and up to £50 in cash; The Guardian, 5th October 1972. President Mobutu, on the other hand, informed the Secretary-General that Amin had agreed to a further three months; The Guardian, 6th October 1972.
might have warranted repressive measures against the responsible individuals, but not against the whole of one racially distinct minority. Expulsion purportedly based on nationality but in fact selective by reference to racial or ethnic criteria clearly offends against the principle of non-discrimination. In addition, there was considerable evidence of harassment and a general failure on the part of the Uganda authorities, particularly the army, to respect the life and dignity of those affected. Although a period of three months might be considered reasonable, it was a period of widespread confiscation of personal and other property and so far little or no indication has been given of any intention or willingness to pay compensation. This fact alone suggests that the expulsions were effected, in part at least, for the purposes of an unlawful expropriation. The value of the property left behind has been variously estimated at between £100m. and £500m. and the United Kingdom Government has informed Uganda that it reserves all rights in respect of these matters. A similar right to claim compensation in regard to the property of United Kingdom citizens was reserved following the expulsions from Egypt in 1956, and in retaliation the Government imposed exchange control restrictions

1. See, for example, reports in The Guardian, 22nd December 1972; The Times, 26th September 1972; the London Evening Standard, 18th September 1972.

2. The Foreign and Commonwealth Office set up the Uganda Property Records Section to compile data about the assets left behind by citizens of the United Kingdom: The Guardian, 21st December 1972.

3. 200 H.L. Deb., col. 633. In a letter to the Secretary-General of the United Nations the Foreign Secretary condemned the expulsions for their "brutal haste" and "indiscriminate" nature: 561 H.C. Deb., col. 589.
on Egyptian banks in London. The issues between the parties were finally settled by agreement and, in return for the lifting of exchange control, the United Arab Republic agreed 

(1) to lift sequestration measures; (2) to return British property, with certain exceptions; and (3) to pay £27,500,000 in full and final settlement for the property retained and for injury or damage to property incurred prior to 1959.1 It is clear that the intention to expropriate without compensation, because it denies the essential function of expulsion, may also deny to that act the character of a bona fide exercise of discretion.2 A useful analogy is to be found in the principles applicable to confiscatory taxation.3 The limitations on the "sovereign power" of taxation have been succinctly stated by Albrecht and they may be extended, mutatis mutandis, to the case of 'confiscatory expulsion'.4

"According to the doctrine of the sovereign right of taxation, and in the absence of special treaty

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2. Note the analogous approach adopted by municipal courts in relation to the exercise of statutory powers. In Brownehaven Properties Ltd. v. Poole Corporation [1957] 3 W.L.R. 669, [1958] 2 W.L.R. 137 (C.A.), the court condemned the corporation's introduction of a one-way street system through the use of a general police power to control traffic temporarily in times of processions and the like. The corporation had earlier failed in its application for such a system under the proper legislation. Cf. Backhouse v. Lambeth L.B.C., The Times, 14th October 1972.


provisions, there would seem to be no basis in international law for objections to the exercise by a state of its right to tax where there is no discrimination against aliens...
Nevertheless, an exception must be made in the case of confiscatory taxation, for it is a rule of international law that confiscation, or expropriation without compensation, is illegal. There is little difference in the practical effects of confiscation and confiscatory taxation. Surely, then, confiscation in the guise of taxation cannot be permitted when confiscation itself is prohibited. A state may tax aliens without unfair discrimination under international law only so long as the taxation is not confiscatory. When taxation becomes confiscatory, it becomes illegal."

In the same way, it is reasonable to conclude that where expulsion becomes confiscatory, it also becomes illegal. Similarly, where expulsion is the instrument of genocide or mass murder, then it is but one aspect of the greater illegality. Two recent incidents contained elements which suggested that the action taken was intended or calculated to do harm. In retaliation for Iran's policy over navigation on the Shatt-al-Arab river Iraq expelled large numbers of Iranians from that country in April and May 1969. The expulsions were carried out at a moment's notice and in circumstances of great brutality, with bus-loads of refugees being deposited in the border towns. The Iranian Government complained to the Security Council on 12th May, protesting against the "arrests, expulsions and tortures" inflicted by the Iraqi authorities on the deported Iranians.1. Later the same year the Ghanaian Government tightened up controls over the resident alien population both for economic reasons and because, it was said, some 90 per cent. of those known to

have criminal records or to be serving prison sentences were aliens. The result of the Government's directive was that a mass exodus took place in conditions of great panic and by the end of January 1970 it was estimated that some 200,000 African aliens had quit the country. The Government of Togo closed its border after receiving 40,000 refugees, and some 100,000 Nigerian nationals were accommodated in camps in their own country. Following representations from neighbouring states, Ghana took steps to allay the panic and set up its own camps in an effort to deal with all those who wished to regularise their status. The Government denied that it was at any time contemplating a mass expulsion of aliens, but by then the frantic flight along the roads leading to the frontiers had already begun.¹ In practice, there may be little difference between forcible expulsion in brutal circumstances, and "voluntary removal" promoted by laws which declare continued residence illegal and encouraged by threats as to the consequences of continued residence.² The introduction of a new régime of permits can quite effectively secure the de facto expulsion of aliens. In order to establish or negative good faith, consideration must therefore be given to all the circumstances, including the reasons underlying the measures taken and their actual consequences.


². On General Amin's threat to set up "concentration camps" for those who remained in Uganda after the deadline, see The Times, 14th, 15th September 1972; The Guardian, 14th September 1972.
(b) Expulsion and "Disguised Extradition"

Both the manner in which expulsion is accomplished and the consequences to which it may lead bear upon the character of the exercise of state power. Expulsion which in fact secures the delivery up of the individual to death or to persecution is ruled out by general principles and reference may here be made to the practice generally known as "disguised extradition". The refusal of admission on request and the deportation of individuals whom other states wish to prosecute or punish override the usual provisions of municipal law. These commonly permit the legality of the extradition proceedings to be contested and allow for the submission of evidence to show that the individual is being pursued for political reasons.

Resort to immigration laws for such purposes has long been controversial. A case in the United Kingdom involved the expulsion of one Strongford on the recommendation of the court in 1906. He claimed United States nationality, but the American authorities could find no evidence of his citizenship. It appeared that he might be German, and it was known that the German authorities wanted him, although they were not willing to use extradition proceedings. On the question whether his expulsion would constitute irregular extradition, the Home Office unofficially advised:

"Here at worst a German would be sent home

1. See also below, Ch. XV.
"and his fate when he got there is nothing to us provided we are pretty sure he is a German and nothing else. If he belonged to any other country as well as to Germany the former might have a grievance..."

In fact because of continuing doubts about Strongford's nationality the Home Office proposed making the expulsion order and then telling him to go wherever he chose. Under the Aliens Act 1905 the effect of expulsion was merely to "require the alien's departure". Only where the Government had to purchase a ticket did the question of a choice of destination arise, and the policy was generally to choose a place to which there was good reason to believe the alien belonged. The current view was that the Government's duty was done, "when the departure of the alien has been secured; and it is open to the alien to go to whatever part of the world he wishes or finds possible." ¹

By contrast, it may be argued that the immigration laws have a supporting rôle to play in the international control of criminals, and that therefore de facto extraditions made under those laws are justified. ² It may indeed be a little spurious to demand the use of extradition proceedings in a state which has already decided, as a matter of immigration policy, that the alien will not be allowed to remain. However, the established and primary purpose

¹. Glen's case 1910: 6 B.D.I.L., 239-240. This view was opposed to the contention of the Danish Government that each state should have the right to determine whether a person possesses its nationality and that that question should be settled in diplomatic negotiations before deportation takes place. Today the possession of a passport is taken as prima facie evidence of returnability; see above, pp. 117ff.

of deportation is to rid the state of an undesirable alien, and that purpose is achieved with the alien's departure. His destination, in theory, should be of little concern to the expelling state, although in difficult cases it may bring in issue the duty of another state to receive its national who has nowhere else to go. Unlike extradition, which is based on treaty, expulsion gives no rights to any other state and, again in theory, such state can have no control over the alien's destination. In exclusion proceedings states generally assume a greater latitude in regard to the destination to which the individual is to be removed, and it is not uncommon to secure his removal to the port of embarkation.\(^1\) The wide choice available to state authorities must be reviewed against the fact that the excluded alien will only rarely be entitled to appeal against the proposed destination, or to depart voluntarily.\(^2\) Once he has passed the frontier, however, state practice frequently allows him to benefit from certain procedural guarantees. Thus he may be able to appeal not only against the expulsion itself, but also against the proposed destination, and he may be given the opportunity of leaving voluntarily.\(^3\) Of course,

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in the final analysis, if no other state is willing to receive him, then the only state to which the alien can lawfully be removed is his state of nationality or citizenship. If he is unable to secure admission elsewhere, his appeal against removal will generally fail.¹

The question remains whether expulsion to a particular state can ever amount to a breach of an international obligation. States Parties to the Conventions on the Status of Refugees and Stateless Persons have assumed specific obligations in regard to expulsion.² Refugees are not to be expelled save on grounds of national security or public order. In most cases they are to be permitted the right of appeal and a reasonable period in which to seek legal admission into another state.³ Only in the most serious cases is the refugee to be returned to a state in which he will face persecution.⁴ Stateless persons are to enjoy similar rights,⁵ although there is no corresponding and explicit reference to the likelihood of persecution. However, it is established in principle that a state is not free to


4. Ibid., Article 33.

take up the claims of persons other than its nationals,1 and nationality for the purpose of exercising diplomatic protection has been limited to those situations where there exists a real or substantial connection between the individual and the state.2 Nevertheless, there are important exceptions to the nationality of claims rule. These were expressly referred to by the International Court of Justice in the Reparation for Injuries Case,3 and other examples have already been noted in the case of stateless persons, refugees and the politically persecuted.4 Once such exceptions are firmly established, it becomes possible for a third state or other subject of international law to complain about the expulsion of an alien to any state in which he may face prosecution, punishment or persecution, whether that state be his own or not. Reference may be made once more to those obligations which a state owes er ga omnes, although admittedly it is not clear whether the obligations and the legal relationship in question are based on a rule of general or customary international law or upon a particular treaty régime.5 The present state of international law favours the latter and,

4. O'Connell, International Law, p. 1030. See below, Chs. XIV-XVI.
especially, the circumstance of regional membership of an international organisation endowed with competence to take action. The concept of generalised obligations owed to the international community as such does not, at the moment, offer a very profitable line of inquiry. There is no doubt that a state may protest where its own national is expelled to a third state in which he is then prosecuted, but it is necessary to involve third parties, be they states or international organisations, if the individual is to be protected against arbitrary expulsion to his own state and if such action is to be construed as the breach of an international obligation. It is submitted that this state of affairs already exists within the area of application of the European Convention on Human Rights. The European Commission on Human Rights has recognised that, in certain circumstances, expulsion may amount to inhuman or degrading treatment within Article 3 of the Convention. A State Party to the Convention must also be understood, 

"... as agreeing to restrict the free exercise of ... rights under general international law, including its right to control the entry and exit of foreigners to the extent and within the limits of the obligations .... accepted under the Convention."

Article 24 provides that any High Contracting Party may refer alleged breaches of the Convention by another High

1. Note the case of Greville Wynne, a British subject deported from Hungary to the USSR to face prosecution for political offences; the extradition procedure was not used: Contemporary Practice, 1962 - II, pp. 210-214; 1963 - I, p. 29.


3. Application 434/58; 2 Yearbook 354, 373.
Contracting Party to the Commission. It does not have to show the breach of any obligation to itself. The state which brings a complaint under Article 24, 1:

"is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe."

Thus, every State Party to the Convention has an independent and sufficient interest in the fulfilment of its obligations. It is therefore open to any such state to allege that the expulsion of an individual, whatever his nationality and wherever he might be sent, constitutes a violation of the European Convention. An expulsion which violated the rights and freedoms guaranteed would incur the international responsibility of the state, in so far as its action amounted to the breach of an international obligation owed to the regional community. In practice, such a violation might be based either on a failure by the state to permit to the individual the usual guarantees of extradition procedure, 2 or upon the nature of the régime to which it was proposed to remove him. 3 Once this is admitted it becomes possible to challenge the arbitrary and undesirable consequences of a


2. For example, the rule against the surrender of political offenders, the rule of speciality and the general requirement that the requesting state make out a prima facie case. Cf. Article 6, European Convention on Human Rights.

3. E.g. by reference to Article 3, the prohibition on torture, inhuman or degrading treatment or punishment.
"straightforward application of the immigration laws". 1.

The case for simplified extradition procedures will continue to be strongly argued, particularly between allied or friendly states. 2. Delay and expense are reduced, and expulsion under the immigration laws circumvents the inconveniences of a weak case, the absence of the offence charged from the extradition treaty, and even the absence of a treaty itself. 3. It is significant that modern expulsion laws have been developed with regard to the requirements of due process and with recognition of the right of appeal. To this extent these laws reflect the growth of human rights principles and they may be taken as some evidence of contemporary state attitudes to the rights of the individual. In the past it has often been difficult for one threatened with expulsion ever to challenge an order, or to question its merits. In R v. Secretary of State, ex parte Château-Thierry 4, the Court of Appeal held that under the Aliens Restriction Act 1914 it was wholly within the discretion of the Secretary of State whether or not to allow the alien the privilege of voluntary departure. The fact that the alien was a political

1. In 1972, two Moroccan Air Force officers who had been involved in the attempted assassination of the King of Morocco were summarily returned to that country from Gibraltar under the provisions of the local immigration laws. They were subsequently executed: The Guardian, 18th, 19th August 1972; The Times, 19th, 22nd August 1972; The Observer, 20th August 1972, 14th January 1973.

2. See, for example, the arrangement between the United Kingdom and the Republic of Ireland contained in the Backing of Warrants (Ireland) Act 1965; also the inter-NATO provisions for the surrender of military deserters: 199 U.N.T.S., 67; see below, pp. 551-552


refugee was again a matter for the Minister to consider in his discretion, and it was not for the Court to determine whether the power of deportation might lawfully be used to secure the mutual surrender of military deserters. In effect the Minister might, by designating a particular vessel, secure the alien's departure to any desired country.

Although in this case the tone of the judgement is in favour of an arbitrary and uncontrollable power, other decisions have emphasised the limits, admittedly wide, within which the Home Secretary's discretion is confined. In Sarno's case in 1916, the court stated that if it appeared that a misuse of the power conferred upon the Executive was imminent, then the court was free to deal with the matter. In Sacksteder's case, two years later, the court again ruled that it might go behind an apparently valid order for the arrest and detention of an alien against whom a deportation order has been made if it is a "mere sham not made bona fide". By contrast, in Muller v. Superintendent, Presidency Jail, Calcutta, the Supreme Court of India expressly held that the fact that a request for extradition had been made did not fetter the decision of the Government to choose the less

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cumbersome procedure of expulsion. The Government had a
discretion to expel an alien in conformity with its territorial
supremacy and no question of good faith could arise merely
because the Government exercises the right of choice which
the law confers.

In the United Kingdom the **locus classicus** is without
doubt the decision of the Court of Appeal in the **Soblen**
affair. Dr. Soblen, although admitted in fact to the
United Kingdom for urgent medical treatment, was refused
leave to land and detained under the **Aliens Order 1953**. A
deposition order was then made against him under Article
20(2)(b) of that Order on the ground that the Secretary of
State deemed his departure to be conducive to the public good.
Dr. Soblen challenged the validity of the deportation order,
**inter alia**, on the ground that an alien refused leave to land
under Article 1 of the Order could not thereafter be deported
under Article 20 and that, even if valid on its face, the
order was being used for the unlawful purpose of extraditing
a political fugitive for a non-extraditable offence. This
challenge was rejected by the Court of Appeal, which held
that the provisions for the removal of those refused leave
to land and the provisions enabling the deportation of those
already admitted were not mutually exclusive, but were

1. **R v. Governor of Brixton Prison, ex parte Soblen [1963]**
   2 Q.B. 243. See also Goodhart, *Extradition and Deportation*,
   79 L.Q.R. 41; O'Higgins, *loc. cit.* Thornberry, *Dr. Soblen and

2. Articles 1, 2(b). The legality of his detention was
   unsuccessfully challenged in **R v. Secretary of State, ex parte
   Soblen [1963]** 1 Q.B. 829.
"cumulative and complementary". It was further held that the Home Secretary might deport an alien to the state of his nationality even though he had fled after conviction for a non-extraditable offence, and even though a request had been received for his return. It was lightly suggested that if the Home Secretary had acted simply at the request of a foreign state, that might be unlawful, but Lord Justice Donovan made the following pertinent comment:

"If country A is an ally of country B, each of them may well think it conducive to the public good of their own citizens that they should co-operate to see that a national of one of them who gives defence information to a common potential enemy, should not escape the consequences inflicted upon him by due process of law."

His Lordship also remarked that if the deportation order was to be regarded as invalid, it must be for some other reason than the consequence to which it will lead. Lord Denning, however, was somewhat more explicit in his description of the grounds upon which the court exercises control. He said:

"... it depends on the purpose with which the act is done. If it was done for an authorised

1. This finding clouds the distinction between exclusion and deportation proceedings which even today may have significant consequences for the individual. For the alien who has been admitted benefits fully from the right of appeal against removal and against destination. If, however, it emerges that he was never given leave to land, then he may be removed summarily and without any trial on the merits: Immigration Act 1971, Sch. 2, para. 8. The alien is then once again left to his common law remedy of habeas corpus: R v. Governor of Pentonville Prison, ex parte Azam [1973] 2 W.L.R. 949, per Lord Denning at p. 960.

2. Soblen had been convicted and sentenced to life imprisonment in the United States for espionage offences


4. Ibid., at p. 307.

"purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful ... Was there a misuse of the power or not? The courts can always go behind a deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or no."

If it could be shown that the deportation order was a sham in that the Home Secretary did not genuinely consider it to be in the public interest to expel the alien, then a challenge on these grounds would succeed. But there was no such evidence in this case for attributing to the Home Secretary anything in the nature of a sham or want of bona fides or any unlawful or improper purpose.¹

The evidentiary burden is thus considerable, and it may well be increased by the Executive's refusal to reveal the evidence relating to its decision. But if that burden could be satisfied, then the court has the power to strike down the deportation order. This illustrates an approach to the power of expulsion which is common in municipal systems and illustrates also the meaning of the presumption that expulsion must follow only from a decision reached "in accordance with the law". This latter requirement flows from international law itself. State practice, in the form of municipal attitudes, reflects these international standards. Indeed, it may be taken as evidence of a sufficient opinio juris and for the proposition that the discretionary power of expulsion is confined by international law. As in municipal law, so also in determining whether there has been a breach of an international obligation, the fact of delivery up to

persecution may bear directly on the question of bona fides. The power of expulsion is a discretionary power limited by reference to its function and, while the margin of appreciation left to states is wide, it is not beyond control. Actual decisions may be a matter of policy and non-justiciable, but it does not follow from this that the power may be exercised in bad faith, dishonestly or for some ulterior and unlawful purpose.

(3) The Justification for Expulsion

The inquiry into the function and purpose of expulsion has given the first indication of the limits which confine this discretionary competence of states. The source of these limits is to be found as well among the complex of rights and obligations which make up the legal relationship between the "receiving state" and the "protecting state". The requirement of justification follows both from the aim and purpose of expulsion, which is the protection of the state, and from the obligation owed by the receiving state to the protecting state, which is to accord a certain standard of treatment to the nationals of the latter admitted to its territory. That expulsion is a discretionary power subject to control is recognised both in state practice and in the provisions of municipal law, which provisions themselves point the way to where states think the law now stands. Continental jurisprudence refers frequently to the basis of expulsion.

as lying in reasons of 'ordre public', public safety and morality. The European Convention on Establishment 1955\(^1\) contains a useful summary of the meaning to be given to these terms and the conditions of their application. Section I of the Protocol declares that each Contracting Party shall have the right to judge by national criteria the reasons of 'ordre public', national security, public health or morality, the circumstances which constitute a threat to national security or an offence against 'ordre public' or morality, and whether the reasons for expulsion are of a "particularly serious nature".\(^2\) Although a treaty provision, this statement can be taken as expressing the general rule of international law.\(^3\) Practice accepts that it is for each state to determine whether the continued residence of aliens is desirable. In Ben Tillett's case in 1898, the arbitrator observed that there was no difference between the parties on this point:\(^4\).

"the right of a state to exclude from its territory foreigners when their dealings or presence appears to compromise its security cannot be contested .... Moreover the state in the plenitude of its sovereignty judges the scope of the acts which lead to the prohibition."

2. See also Section III which provides that the concept of 'ordre public' is to be understood in the wide sense generally accepted in continental countries and that this embraces, for example, exclusion for political reasons. However, Contracting Parties undertake, in the exercise of their rights, to give particular consideration to family ties and periods of residence.
3. Hereafter the grounds which justify expulsion will be referred to generically as "reasons of 'ordre public'".
Thus, a considerable margin of appreciation is left to states, but it is a margin that has its own boundaries. The expelling state is required to balance its own interests against those of the individual. It is, therefore, obliged to take account of the alien's acquired rights or legitimate expectations, and to arrive at a decision which bears a reasonable relationship to the facts. It has been doubted whether the state is obliged to prove the legitimacy of its reasons for expulsion, and in one case the tribunal held that when expulsion is based on grounds of public safety it will not, as a rule, review the decision of the competent state authorities. But this appears to be a little extreme, and the better view is that the expelling state must show "reasonable cause". For 'ordre public' is not a term without meaning, nor is it the shorthand description of a sovereign and absolute power. In the Guardianship of Infants Case, Judge Lauterpacht described it as a "general legal conception", a "general principle of law", whose content stood to be determined by reference to the practice and experience of municipal law. Admittedly, his words were directed to the limitation of 'ordre public' as an implied reservation to treaty obligations, but the evidence of state practice suggests that a similar view is valid for expulsion.

1. See below, pp. 396ff.
matters, even in the absence of specific conventional obligations.

Expulsion is a drastic measure which, by its very nature, presupposes substantial justification. In Zerman's case the character of the individual expelled was notorious and he suffered no pecuniary loss by reason of his expulsion. Nevertheless, the arbitrator, Sir Edward Thornton, awarded substantial damages. Whereas expulsion on mere suspicion might be warranted in time of war or other disturbance, no such circumstances existed in the present case and "reasons of safety" could not be advanced as a sufficient ground. If the Mexican Government had had good reasons for the expulsion, then it was at least under an obligation of proving its charges before the Commission. Mere suspicion was disallowed again in the case of Lorenzo Oliva in 1903. The decision in this dispute was given by the Mixed Claims Commission established to resolve certain matters between Italy and Venezuela. It should be noted, however, that the Commission's awards were largely based on the admission of liability by the Venezuelan Government where the claim was for injury to the person and "wrongful" seizure of property. This same Commission gave the decision in the Boffolo case and the

4. Article IV.
propositions which it there formulated have since been frequently cited: (1) every state possesses the general right of expulsion; but (2) expulsion should only be resorted to in extreme instances and must be accomplished in the manner least injurious to the person affected; (3) the state exercising the power must, when occasion demands, state the reason for such expulsion before an international tribunal, and an insufficient reason or none being advanced, accepts the consequences. The only reasons advanced in the present case were contrary to the Venezuelan Constitution and could not be accepted. Umpire Ralston maintained the distinction between the right to exercise a power and the rightful exercise of that power, and assumed that there was jurisdiction to inquire into the reasons and circumstances of the expulsion.  

The Belgium-Venezuela Commission gave a decision to similar effect in the Paquet case, and suggested also that the very refusal to give reasons to the government of the foreigner affected itself characterised the expulsion as arbitrary. However, it is doubtful to what extent the requirement of explicit reasons applies in cases other than those submitted to arbitration. In a recent incident involving the expulsion of United Kingdom citizens from Tanzania, the view was expressed in Parliament that there was in fact


no obligation to give reasons for deportation. It was
some evidence in this case, however, that expulsion had
followed participation in local affairs. It is important
that a requirement to give precise reasons should not be
confused with an overall requirement that expulsion should
be based on "reasonable cause". This may appear to be only
a matter of detail, but it gives substance to both the
obligation not to proceed in an arbitrary manner and the
right to judge reasons of 'ordre public' in the light of
national criteria. States have not hesitated to protest
where the alleged reasons constituted insufficient evidence
that a just cause existed. Thus, in Loubriel's case in 1923,
the United States expressed the opinion that justification
allegedly based on "motives of internal order" and "reasons
of gravity and facts well known to the Government of
Venezuela" was too vague, and that it had a right to be
informed in greater detail.

Similarly, in the case of Mr. Sawkins, who was expelled
from Cuba in 1847 for "reserved political motives which cannot
be revealed", the Queen's Advocate advised that a demand
should be made for compensation and to secure his return.

1. 702 H.C. Deb., (Written Answers), col. 145; British Practice,

2. See also Craven's case 1863: 6 B.D.I.L., 193.

   Eugene Wiener, Moore, Digest, vol. IV, pp. 82-85; Whiteman, I
   Damages in International Law, p. 425 (although the United
   States refrained from complaint, it maintained its view that
   only the proof of facts justifying expulsion was sufficient,
   and not the simple assertion as to their existence).

4. 6 B.D.I.L., 113.
Again, in Davidson's case in 1855, the Queen's Advocate expressed the opinion that the arbitrary expulsion of a British subject who was unconvicted of crime and without any previous legal proceedings required substantial justification. In Fürst's case in 1860 it was noted that the charges raised were of a "vague and indefinite character, inconsistent with the admitted facts and unsupported by any proof or corroboration whatsoever". More recently the Secretary of State for the Commonwealth expressed doubt as to the substance of reasons advanced by the Kenyan Government justifying expulsion in terms of the need to root out "bad weeds" and those who defy the call for racial harmony.

Faced with a simple assertion of 'ordre public', states governments have tended to go beyond and look to the facts. In 1883 the Law Officers of the Crown considered that whatever may have been the public excitement produced by Salvation Army meetings in Switzerland, there was hardly any ground for contending that the mere presence of two of its officers was a source of danger to the state. By comparison, in Mr. Gallenga's case in 1860, the Queen's Advocate observed that there was some evidence to justify the revocation of a

1. 6 B.D.I.L., 114.
2. Ibid., pp. 119-121. In the opinion of the Queen's Advocate, Her Majesty's Government was entitled to require both an apology and adequate pecuniary compensation. See also Mr. Raphael's case, above, p. 358.
4. Case of Miss Charlesworth and Miss Booth 1883: 6 B.D.I.L., 167-170. See also regarding the deportation of Jesuit missionaries from Haiti for alleged collaboration in a plot: 4 Canadian Yearbook of International Law, (1966), 244-245.
residence permit for "political reasons" in troubled times and no complaint was made.¹

The incidence of civil disturbance is itself instructive in respect of those limits which bind the general class of exceptional state measures. It is accepted between states that such circumstances may justify the arrest and detention of suspects, but in one case it was advised that a claim might be made for the unreasonable expulsion which followed, unless satisfactory evidence of involvement in the alleged plot was forthcoming.² This view was maintained in regard to expulsions from Hawaii in the years 1895-1898.³ Martial law might justify exceptional measures, but nothing justified unreasonable detention, maltreatment and enforced departure.⁴ These standards were not only insisted upon in its relations with other states, but they were also applied by the British Government to itself in regard to expulsions from South Africa in 1900. In April of the following year the Government set up a Commission to examine the various claims for compensation. In the view of Her Majesty's Government, the validity of the expulsions derived from the authority of a military commander in a theatre of war, rather than from the sovereign capacity of a state. Nevertheless, the Government

¹. 6 B.D.I.L., 119. Mr Gallenga was a correspondent for The Times who had written a number of critical dispatches.


³. 6 B.D.I.L., 178-193. On the annexation of Hawaii to the United States the claims were submitted to the United Kingdom-U.S.A. Claims Tribunal, but they were dismissed in 1925 on the ground that no liability had passed to the United States.

⁴. The claims proposed were in some cases reduced by reason of the complainants' "loose talk": 6 B.D.I.L., 190 (Thomas and McDowall).
agreed, in response to the representations of a number of states, to pay compensation in respect of those who had been expelled without justification although, in the view of the Legal Adviser, this decision was founded in policy rather than strict law. However, the principles generally relied upon are, without doubt, also applicable to expulsions in time of peace.

In preliminary discussions, the Legal Adviser observed that the right of expulsion was one to be exercised in an equitable manner and without undue prejudice or favour to the nationals of one foreign state as compared with the nationals of others. The Foreign Office inclined to the view that the simple fact of expulsion, "with its more or less inevitable attendant hardships or losses," should not itself be regarded as a sufficient ground for compensation. However, the President-Designate of the Commission was eventually instructed:

"to investigate whether the power of expulsion is shown in any case to have been exercised unreasonably or capriciously, or whether it was attended in its exercise with the infliction of any unnecessary hardship .... The principle in these assessments should be that of fair and

1. 6 B.D.I.L., pp. 209ff. Claims on behalf of their nationals were presented by the governments of Austria, Belgium, Denmark, France, Germany, Greece, Holland, Italy, Sweden and Norway, Russia, Spain, Switzerland and the United States. A total of £1,294,216 was claimed, and a total of £107,140 was paid out, for the most part in lump sum settlements to the governments of the claimants. See Whiteman, I Damages in International Law, pp. 497-511, especially on the outcome of the United States claim and the distribution of compensation.

2. 6 B.D.I.L., 209 at p. 213

3. Ibid., at p. 214.

4. Ibid., at p. 216.
"reasonable compensation for direct damage, excluding consequential damages except for natural and proximate consequences of the act complained of..."

In determining liability, and on the general question of the formulation of defences, the Commission made the following significant points:

"Mere opinions - such as that a certain person has no claim to compensation - are of no value, unless supported by reasons and proof....
General statements - such as that a certain person was concerned in a plot, or was an 'undesirable' - are likewise useless, without authenticated reasons and proofs."

Despite these encouraging beginnings, the general findings and conclusions of the Commission are open to criticism. In a confidential report, Sir John Ardagh, advocate for the defence, recorded the difficulties with which he was faced. He noted the lack of precise information and the frequent total absence of materials for justification and defence. On the arrests following the so-called "Race Course plot", he wrote:

"No accusation was made against them and no reason or explanation given for their summary arrest ... [The] prisoners were neither tried, nor examined, nor told what they were accused of ... [It] is very greatly to be regretted that in a measure which affected such a large number of foreign subjects, no step, with the exception of communicating with the Consuls, should have been taken to ascertain whether any culpability attached to them individually, or whether there were reasonable grounds for a

1. 6 B.D.I.L., at p. 218. Note also the general grounds which the claimant was required to establish in order to justify a claim, and the grounds for the disallowance of any such claim: ibid., at pp. 218-219. On the issue of damages, see below, pp. 403ff.
2. 6 B.D.I.L., at pp. 219-221.
3. Ibid., at pp. 220-221.
"proceeding of an apparently arbitrary nature, in the event of an appeal to their Governments having to be answered."

Referring to the Commission's awards of £5 and £10, Sir John Ardagh concluded that these were wholly illusory, "as even a solatium or act of grace".

The Commission's Report proceeded on the dual assumption that a Military Commander has an "absolute right" of expulsion and that every state has an "indisputable right to expel aliens whose presence is considered dangerous". The claims fell into two main classes: on the one hand, those by employees of the Netherlands South African Railway Company; and on the other hand, the claims of those allegedly implicated in the various plots. Little regard was paid to the first class, and the Commission described the Company as "a body actively hostile to this country". In the main, its attention focussed on the manner in which the expulsions were carried out and the treatment which was accorded to those expelled. The allegations in these matters were rejected as wholly unfounded by the Commission, which also concluded that there were reasonable grounds for the deportation of all those suspected of complicity in the plots, and that the wide discretion was "exercised with wisdom and moderation". In fact these findings bear little relation to the agreed awards. During the Commission's deliberations, Sir John Ardagh himself negotiated amicable settlements by way of lump

1. 6 B.D.I.L., at pp. 223ff.

2. Ibid., at pp. 229-230, "and that the civilised world owes ... a debt of gratitude for ...[the adoption of] a policy of wholesale deportation in preference to one of suppression by force."
sum agreements, and these were in turn approved by the Commission.\(^1\) It is apparent that the British Government, from the standpoint of policy at least, recognised the justice and the substance in the criticisms made by Sir John Ardagh in his confidential report.

The examples from state practice and the awards of arbitral tribunals permit the setting down of a number of further conclusions. (1) Expulsion is a measure designed for the protection of the state and for the preservation of 'ordre public'. (2) 'Ordre public' is a "general legal conception" and its content is determined by law. (3) Whether or not reasons of 'ordre public' exist is open to impartial adjudication in the light of the prescribed function of expulsion and of the international obligations owed by one state to another; but (4) in practice a considerable margin of appreciation is left to states to determine whether its national interests are affected by the continued presence of the alien. It should now be apparent that general international law does prescribe boundaries to the exercise of this discretionary power. The relevant standards may not be capable of precise definition in the abstract, but they are clearly operative in any set of given circumstances.\(^2\).

Expulsion and Respect for "Acquired Rights"

It is recognised that in exercising its discretion, the state must also take the interests of the individual into

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1. 6 B.D.I.L., 230. The Commission noted that the amounts agreed were larger than it would have awarded.

account, and weigh them in the balance with the competing demands of 'ordre public'. Thus, it will be relevant to consider, for example, length of residence in the state, the conduct and character of the individual, family and other connections, and compassionate circumstances. In addition, the discretion must be exercised with due regard for acquired or vested rights. In its judgement in German Interests in Polish Upper Silesia the Permanent Court of International Justice referred to provisions of the Geneva Convention 1922 which confirmed the obligation of the states involved:

"to recognise and respect rights of every kind acquired before the transfer of sovereignty by private individuals, companies and juristic persons."

Later the Court emphasised that the principle of respect for acquired or vested rights was:

"a principle, which as the Court has already had occasion to observe, forms part of generally accepted international law."

Although in principle the property and contractual rights of individuals depend in every state upon municipal law, this does not exclude conformity of the latter with the standards of international law, at least in so far as the rights of foreigners are concerned.

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3. Ibid., p. 42. See also German Settlers in Poland, A.O., (1923), Ser. B, No. 6 at pp. 35,36.


In the form in which it is usually proposed, the doctrine of respect for acquired rights is commonly limited to rights "properly vested under municipal law ... of an assessable value". Whether such a limitation is fully justified in view of the Permanent Court's reference to "rights of every kind" is open to debate. However, if the restrictive interpretation is adopted, then it is clear that its terms do not include the interests or "legitimate expectations" of those who have established themselves within a state's territory solely by virtue of a period of substantial residence, whether or not accompanied by engagement in some profession. Thus, in Joblonsky v. German Reich the Upper Silesian Arbitral Tribunal noted:

"... as a rule the freedom to use one's working capacity and to exercise a profitable activity which rests on the general principle of industrial liberty does not constitute a subjective vested right. For such a right to exist there must be some title of acquisition and the recognition by the law of some concrete power."

Hence it may be argued that the "right of residence" or the right to earn a living is not protected as such, and that international responsibility is not engaged until some injury

1. O'Connell, International Law, p. 763. This description would, of course, cover most cases of "confiscatory expulsion".

2. Ann. Dig. 1935-37, Case No. 42. Cf. Commonwealth Immigrants Act 1962, section 7(2), and now the Immigration Act 1971, section 1(2),(5) and especially section 7. See also Niederstrasser v. Polish State, Ann. Dig. 1931-32, Case No. 33 (licence to exercise a profession not as such protected by the Germano-Polish Convention 1922); Hausen v. Polish State, Ann. Dig. 1933-34, Case No. 40 (the obligation to respect rights of every kind did not extend to the alleged acquired right to continue employment as a teacher); case of Lazar Rokach, American-Turkish Claims Settlement, Opinions and Report prepared by F.K. Nielsen, (1937), pp. 503, 508; Amerasinghe, State Responsibility for Injuries to Aliens, (1967), pp. 148ff.
to the person or property occurs. As a definitive conclusion this can no longer be accepted. It has already been seen that there is a growing body of law and principle which protects the individual in the enjoyment of rights which defy assessment in pecuniary terms. The receiving state owes certain obligations to the international community as a whole and other, more specific, obligations to the protecting state. These latter obligations derive from the legal relationship between the two states which is constituted by the former's admission of the alien onto its territory.¹

It must be emphasised once again that expulsion is a measure primarily directed to the protection of the interests of the state. It is not essentially a measure for the punishment of aliens, although obviously its effects may be devastating.² The alien who is admitted for any substantial period of time, and especially one who is admitted for permanent residence, has many interests which require protection. He may establish himself in business, he may marry

1. See above, pp. 353ff.

2. It is misleading in the extreme to adopt that habit of municipal courts, which is to characterise deportation as "not punishment", and from that characterisation to deduce certain consequences, such as the absence of a right of appeal. See, for example, Muller v. Superintendent, Presidency Jail, Calcutta, [1955] I.L.R. 497 (Supreme Court of India); Bugajewitz v. Adams 228 U.S. 589 (1913), per Holmes J., at p. 591: "... nor is the deportation a punishment; it is simply a refusal by the government to harbour persons whom it does not want." In Lavoie v. INS 418 F.2d 732 (1969) the court held that deportation proceedings were civil and not criminal; the VIth Amendment guarantees declared and affirmed in Miranda v. Arizona 384 U.S. 436 (1966) did not, therefore, apply. But cf. Woody v. INS 385 U.S. 276 (1966), at p. 285; Gastelum-Quinones v. Kennedy 374 U.S. 469 (1963), at p. 479. Note too, Schiedermair, Handbuch des Ausländerrechts der Bundesrepublik Deutschland, (1968), p. 154: "die Ausweisung is im übrigen eine Verwaltungsmaßnahme und keine Strafe......" and therefore the principle ne bis in idem does not apply where expulsion is ordered after conviction and punishment.
and have children. His interests will not all come within
the limited doctrine of acquired rights, but overall he has
what may be loosely called "legitimate expectations". In a
recent United Kingdom decision,¹ decided prior to the
introduction of the immigration appeals system, Lord Denning,
M.R., said with reference to the duty to give a hearing:²

"It all depends on whether he has some right
or interest or ... legitimate expectation, of
which it would not be right to deprive him
without hearing what he has to say ... If
[the alien's] permit is revoked before the
time limit expires, he ought ... to be given
an opportunity of making representations;
for he would have a legitimate expectation of
being allowed to stay for the permitted time."

In his Lordship's view, however, a distinction was to be
drawn between this situation and the case of an alien not
permitted to stay for a day longer than the length of his
permit. In such a case the alien has no right at all, for he
is present only by licence of the Crown. Lord Denning
contrasted two cases involving Commonwealth immigrants.³.
In one case the immigrant had a statutory right to enter if
he satisfied certain conditions, and the rules of natural
justice applied to his examination by the Immigration Officer.
In the other case, there was no such right, but admission
might be allowed in the complete discretion of the authorities.
The rules of natural justice were here held to be inapplicable,

1. Schmidt v. Secretary of State [1969] 2 Ch. 149.
2. Ibid., pp. 170, 171.
3. Re H.K., (an infant) [1967] 2 Q.B. 617 and R v. Secretary
   of State, ex parte Avtar Singh (Divisional Court, 25th July
   Consider also the notion of a "vested right of residence"
   propounded by Learned Hand J: Mignozzi v. Day 51 F.2d 1019,
   1021 (1931); Di Pasquale v. Karnuth 158 F.2d 878, 879 (1947),
   and see below, pp. 423-425.
and the authorities to be under no obligation to give reasons for exclusion or to permit an opportunity of making representations.

With respect, the analogous application of these authorities to the case of premature withdrawal of permission to remain is not justified. Legitimate expectations are also involved where the renewal of permission is in issue, and this view seems to be recognised in the content of the new rights of appeal. In many cases of established residence the alien who is refused permission to remain will be as badly off as one whose permission is suddenly withdrawn, and in both cases there exists the possibility of an infraction of personal and property rights. A straightforward classification of the alien's continued residence as involving nothing greater than a "privilege" solves nothing. It certainly does not meet the argument that discretion in the granting of privileges is, and requires to be, confined and structured.

There are a number of precedents which recognise this wider doctrine of "legitimate expectations", and which may be called in aid for the purpose of determining the nature of those interests which require protection. In 1890, for example, the Law Officers advised on the sudden withdrawal of

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1. Immigration Act 1971, section 14. See also the recommendations of the Wilson Committee on Immigration Appeals, Cmnd. 3387, paras. 128-130; Expulsion of a Foreign National (Germany) Case, 32 I.L.R., p. 253.

2. Note Davis, Discretionary Justice, pp. 130, 172-176, on the analogous problems in the United States procedure on parole - "only a privilege".
trading licences by the Haitian Government. They expressed the view that British subjects,

"were entitled to assume that the Haitian Government would continue to recognise their obligations in respect to the property of foreigners to the same extent, and would allow them to carry on business on the same terms as heretofore ... [The] present Haitian Government ... are not entitled suddenly and violently to change, to the detriment of foreigners, the reasonable conditions under which they originally established themselves."

A similar attitude was expressed by the Assistant Legal Adviser regarding the same Government's actions in 1911-1912, and the sudden, unjustified withdrawal of trading licences and the imposition of compulsory winding-up orders was described as an "offence against international comity".2.

The nature of the interests protected is apparent also in cases where advice is given on the formulation of claims for compensation.3. There is a distinct lack of ideal cases involving claims for expulsion alone, and the protecting state will often confine itself to diplomatic representations and protest. In other cases expulsion will figure as but one of the heads in a wider claim for damages. Personal injury and property loss are clearly among the most important of these heads and serve more directly to raise the issue of international responsibility.

1. 6 B.D.I.L., 346-347. See also Dr. Gamble's case 1852, ibid., p. 347, in which the Queen's Advocate advised that a claim for compensation might be pressed for the sudden and unmotivated order by the Mexican authorities that the complainant suspend his medical practice. More recently, note remarks by the Secretary of State on the refusal of re-entry by the Cyprus Government to an alien resident for over 40 years: 706 H.C. Deb., cols. 184-185, cited in British Practice, 1965 - I, pp. 46-47.

2. 6 B.D.I.L., 154-155.

3. E.g. Cowrie's case 1896: 6 B.D.I.L., 177 (six months salary to cover cost of removal); Hawaiian Cases 1895-1898: ibid., pp. 178ff (business loss as well as imprisonment to be taken into account; two years' profits suggested as a guide).
In the assessment of damages for wrongful expulsion, Whiteman notes that consideration is generally given to the following matters: ¹ (a) the expenses of removal and return; (b) actual property losses; (c) interruption to established business ventures; ² (d) the number of dependants; (e) the character of the claimant; ³ (f) the indignity involved in the expulsion; and (g) the affront to the claimant's state. ⁴ The Commission set up by the British Government after the South African expulsions of 1900 drew a clear distinction between actual pecuniary loss, for which damages were recoverable, and so-called "moral" damages, which were not recoverable. In Charilaos' case, ⁵ the Commission was faced with a total claim of £616 for loss of property, together with a claim for the loss of £2 to £3 per day from the claimant's tea-room. The Commission first disallowed £281, as no cogent evidence had been produced as to the existence of various items, including cash, securities and jewellery. Next, it was noted that furniture values depreciated in time of war by about 75 per cent., and the claim was again correspondingly reduced. The full value of clothes and a bicycle was allowed but, "on the reasonable assumption that the values (had) been inflated", the provisional total

1. Whiteman, I Damages in International Law, p. 513.
2. Gowen and Copeland's case, ibid., p. 491; $20,000 allowed for loss of guano deposits and exploitation rights.
3. Compare Boffolo's case, a man of "low character" who was permitted to return within a month - $380, with Oliva's case, a man of standing and character and recognised by the Venezuelan Government as a worthy concessionary - $7,720, plus an indemnity for business losses.
4. It may be that the state can also claim for the loss incurred by receiving groups of nationals without adequate notice; see Brownlie, op. cit., p. 506.
5. 6 B.D.I.L., 227ff.
was then reduced by one half to £59. A further reduction of £1 4 was then made because the Consul who acted for Greece would not vouch the respectability of the claimant, and there was no evidence as to other means of livelihood or whether the furniture and effects had been left in good order. On the other hand, the full value of stock-in-trade (£45) was allowed, and the final total arrived at was £90.

The general findings of the Commission have been criticised above, and it is difficult to say that their approach in this one case would be typical of other arbitral tribunals. Each case will depend on its own particular facts, but it is clear that the major difficulties will arise in respect of the evidence concerning property and other interests. In arranging for the distribution of the lump sum which it received on behalf of American claimants, the United States Government distinguished between three classes: (1) those wrongfully deported who suffered no loss of property and no hardship - these were entitled only to nominal damages; (2) those wrongfully deported and who did suffer in consequence - these were to be treated generously; and (3) those who were rightly deported, but who were treated with unnecessary severity - these were entitled to some consideration. ¹ In making its awards, the United States Government paid particular attention to business and property losses which were capable of more precise measurement. ² In the Phelps claim, for example, the loss was corroborated and an award

¹. Whiteman, I Damages in International Law, p. 498.
². See the breakdown of awards in Whiteman, op. cit., pp. 501-506.
was made to the full extent. In many cases, however, little corroborative evidence was available, and consideration was then given to the circumstances of arrest, detention and deportation as the basis for other awards. These were substantial where no reasons for the arrest and deportation were forthcoming, and where the claimant had not been allowed to communicate with friends. In one case the claim was rejected because the claimant had suffered "no damage by his deportation from South Africa to his home in America". In one case the claim was rejected because the claimant had suffered "no damage by his deportation from South Africa to his home in America".

(4) The Manner of Expulsion

An expulsion which is founded on just cause may nevertheless be tainted by the manner in which it is carried out. Oppenheim notes that as deportation is not, theoretically, a punishment, it must be effected with as much forbearance as the circumstances and conditions allow. The expulsion must in the first place be permitted by the local law, and it has already been seen that expulsion is permitted only in pursuance of a decision reached in accordance with law. Less settled

1. E.g. cases of Anderson and Crus, Whiteman, op. cit., pp. 504-505.
2. Maloney's case, ibid., p. 505. The claimant had been a bartender, had been continually under the eyes of the police, and was well known as a "longstall for pickpockets". Actual pecuniary loss and indignity are not essential prerequisites to an award of damages, and these may be allowed where the other wrongs done to the alien are "aggravated"; Whiteman, op. cit., p. 514; Zerman's case, Moore, International Arbitrations, vol. IV, p. 3348.
4. See above, p. 384. See also the cases of Jaurott and Scandella, both involving summary expulsion from Venezuela in breach of the local law. In the first case, that law permitted only the expulsion of those foreigners who had not established their domicile, and in the latter case the alien was denied the hearing to which he was entitled. Both claims were settled by agreement: Whiteman, op. cit., pp. 432-436, 506; Hackworth, Digest, vol. III, p. 696.
is the question whether a hearing must be permitted to the alien. The Chevreau affair involved just such an expulsion without proper hearing. In the circumstances, it was thought that Chevreau's arrest might have been justifiable, but the Arbitrator noted that the British authorities were thereafter under a duty to proceed to a full inquiry without delay. M. Chevreau ought to have been informed of the suspicions against him and to have been given an opportunity to state his own case. The French Government in fact claimed no express indemnity for the deportation itself, apart from the general claim in respect of arrest, detention, ill-treatment, and loss or property. By their compromis, the parties had requested the arbitrator to decide whether the arrest, detention and deportation had taken place in circumstances which gave rise to a claim in international law. Both parties also accepted that the rules to be applied were those previously laid down by the various international commissions, and that, whereas the facts alleged might give rise to an international claim, such claim was ill-founded if the measures had been taken in good faith and on reasonable suspicion, particularly in a zone of military operations.

The right to a hearing was given a limited recognition in the code adopted by the Institute of International Law in

2. Ibid., p. 1125.
3. Ibid., p. 1129. A total sum of £2,100 was allowed, representing £2,000 for the arrest and detention and £100 for the loss of a violin. The evidence of ill-treatment was held insufficient to found a claim in international law.
Article 21 of the code declared that every individual expelled had the right to have recourse to a court or administrative tribunal passing judgement completely independent of the government. Such a hearing was to be granted in all cases where the individual claimed to be a national or maintained that his expulsion was contrary to law or treaty, but where political issues were involved it was admitted that the expulsion might take place before an appeal was heard. It will be seen later that many states do permit some form of review of, if not appeal against, expulsion orders, but in practice it is very difficult to apply the concept of denial of justice in this area. Arbitrators and others have frequently fallen between two stools and have never satisfactorily resolved the dichotomy between due process and what they have characterised as sovereign powers. In Ben Tillett's case, for example, the arbitrator concluded that Belgium was not liable for the summary expulsion of a political agitator without accusation or criminal charge.2 The Government, in evaluating the facts and ordering the expulsion, had acted "in the plenitude of its sovereignty", and the case then turned solely on the question of whether there had been any ill-treatment.

A more recent attempt to introduce the requirement of a hearing is to be found in Article 13 of the Covenant on Civil and Political Rights. This declares that, except where compelling reasons of national security otherwise require,

1. XII Annuaire de l'Institut de droit international (1892-94), 218, 222.

2. 6 B.D.I.L., 124-150.
the alien shall be allowed to submit reasons against his expulsion and to have his case reviewed by the competent authority or person or persons designated by that authority. Although most states do make provision for some sort of a hearing, it is doubtful whether Article 13 can be regarded as expressing a rule de lege lata. Thus, the requirement is subject to wide exceptions and, additionally, there is little restriction on the quality or character of the "competent authority".¹

An essential distinction should be noted, however, between the notion of a hearing and appeal on the one hand, and the availability of judicial review on the other. Not infrequently states will reserve to the executive branch the power of appreciating the facts and reasons behind an expulsion, while they will permit the judicial branch to review the legality of their actions. For example, under French law, expulsion may be ordered where the presence of the alien represents "une menace pour l'ordre public ou le crédit public".² Certain guarantees are declared in favour of lawful residents and provision is made for a right to be heard, except in cases of absolute emergency so certified by the Minister.³ The judicial tribunals are not entitled to question the occasion for an expulsion order or the reasons

¹. Note the rejection by the Committee of Experts of the proposals to include similar, but more detailed, rights for aliens in the Fourth Protocol of the European Convention on Human Rights, below, pp. 480ff.

². Ordonnace du 2 nov. 1945, article 23.

³. Ibid., articles 24, 25 and 26.
which lie behind it.\textsuperscript{1} Nor are the administrative tribunals permitted to review the appreciation of fact upon which is based either the conclusion that the alien is a danger to 'ordre public', or that the occasion is one of urgency.\textsuperscript{2} But they may decide on the legality of the order of expulsion,\textsuperscript{3} and this involves consideration of the question, whether there has been an "excès ou détournement de pouvoir."\textsuperscript{4}

This particular aspect of control is inherent in the requirement that a decision on expulsion be "in accordance with law".\textsuperscript{5} It is remarkable that municipal law generally is not content simply to review the form of an order of expulsion, but that it is prepared also to examine the possibility of an absence of bona fides. This fact points up the character of the power as a controlled discretion and may be taken as additional evidence of where states think the law now stands. International law demands that an alien be permitted to obtain redress for wrongs done to him by the

\textsuperscript{1} Cour de Cassation (Ch. crim.), arrêt du 17 déc. 1937, (Keledjian), Clunet 1938, p. 485; arrêt du 20 déc. 1936, (Yahia Ali), Rev. cr. dr. int. privé, 1967, p. 517, note Aymond.

\textsuperscript{2} Cons. d'État, arrêt du 24 oct. 1952, (Eckert), Clunet 1953, p. 67; (Yahia Ali), loc. cit.


\textsuperscript{5} Note the availability of habeas corpus declared by the court in R v. Governor of Brixton Prison, ex parte Soblen [1963] 2 Q.B. 243 and R v. Governor of Pentonville Prison, ex parte Azam [1973] 2 W.L.R. 949. Consider also R v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 W.L.R. 1262 - the court would not interfere with a "policy" decision, but it could and should intervene to ensure that the council acted fairly and after due regard to conflicting interests. Cf. Liversidge v. Anderson [1942] A.C. 206.
state in which he is present. While the content of that law may, to a wide degree, be a matter of purely domestic concern, there is, as Nielsen observed in the Neer case, clear recognition of the scope of sovereign rights relating to matters which are the subject of domestic regulation;¹.

"it is also clear that the domestic law and the measures employed to execute it must conform to the requirements of the supreme law of the family of nations, which is international law, and that any failure to meet these requirements is a failure to perform a legal duty, and as such an international delinquency."

This notion of an "objective duty" is inherent in Ago's description of international responsibility in terms of an "internationally wrongful act", which itself springs from the failure to carry out an "international obligation".². That expulsion should be in accordance with the local law expresses also the rule which is prescribed by international law, and it is essential that the further consequences of that rule should not be ignored. Thus, the local law is required to conform with the standards of international law:³. it must not therefore offend against the norm of non-discrimination, nor must it permit the use of expulsion as an instrument of genocide, persecution or confiscation. The prescriptive requirement of decisions in accordance with the law necessarily implies that the discretion is confined and that decisions are controlled by the law. A full appeal on the merits, or even some special administrative tribunal which hears representations, may not be demanded,


especially in political and security matters where the executive enjoys the widest margin of appreciation. But there must be available some procedure whereby the underlying legality of executive action can be questioned, such as the writ of habeas corpus in common law jurisdictions.\(^1\) The requirement of a hearing on the merits or of an opportunity to make representations, although commonly found in municipal systems, cannot be said to have gained recognition as a rule of international law. The principle, however, may be offered *de lege ferenda*. But there can be no doubt that the first rule, which denies the arbitrary and capricious nature of expulsion, is to be accepted *de lege lata*.

It has been seen that expulsion may be unlawful if it results in certain consequences injurious to the basic rights of the individual. Expulsion may similarly be tainted by reason of the personal treatment afforded to the individual by the expelling state. In Dillon's case in 1928, heard before the Mexico-U.S.A. General Claims Commission,\(^2\) Commissioner Nielsen noted that the sovereign right of expulsion was not denied by the United States Government, but that complaint was centred on the manner of the expulsion. Mexico and the

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1. This principle follows also from the standards of equality and national treatment and non-discrimination in the matter of legal remedies; see Articles 14, 16 and 26, International Covenant on Civil and Political Rights 1966, which 'embody and crystallize' pre-existing rules of customary international law. Cf. *North Sea Continental Shelf Cases*, I.C.J. Rep. 1969, p. 3 at pp. 37–41, and above, Chs. III, V.

United States had agreed, by the General Claims Commission of 1923, that all claims outstanding between the parties were to be decided "in accordance with the principles of international law, justice and equity".\(^1\) Nielsen noted that although there may be no rule as to the precise and proper methods of expelling an alien, "when resort is had to a use of unnecessary force or other improper treatment there may be ground for a charge, ..... account being taken of the manner in which expulsion might have been effected."\(^2\)

In an earlier case, an American citizen expelled from Mexico with unnecessary cruelty was awarded $2,000, even though it appears that the expulsion was based on proper grounds.\(^3\) The Umpire, Sir Edward Thornton, noted:

"There is no excuse for the cruelty with which the claimant appears to have been treated ... and the unnecessary and painful march to which he was subjected together with his subsequent imprisonment."

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1. Article I, Mexico-U.S.A. General Claims Convention, 8th September 1923, U.N. Rep., vol. IV, p. 11. Compare the Special Claims Convention of the same year for claims arising from "revolutionary acts": ibid., p. 779. Article II of this Convention declared that settlement was to be in accordance simply with justice and equity, and not according to the generally accepted rules and principles of international law, for the Mexican Government felt "morally bound to make full indemnification."

2. U.N. Rep., vol. IV, p. 368 at pp. 369-370. Cf. the case of Hannah Jenkins, American-Turkish Claims Settlement, cited in Nielsen, Opinions and Report, (Washington, 1937), p. 463: "It is probably a correct view that the departure of an alien from a nation's territory may be compelled by virtue of a sovereign right, the precise methods of whose exercise are not prescribed by international law. The legal right to this harsh measure undoubtedly exists." (at page 465). In the circumstances of this case, there was no evidence of arbitrary action upon which an international claim could be based.

3. Gourrier's case (1868): Whitman, I Damages in International Law, pp. 483-484, 507; see also Snelling's case, ibid.
The Mnn1 case in 1903 involved the expulsion of a Dutch citizen from Venezuela. The measure had been accompanied with a variety of indignities, including the stripping of the complainant in public, and this was held to be unnecessary and oppressive, going beyond what would have been justifiable in the admittedly troubled times. The Netherlands and Venezuela agreed that the claims between them were to be decided according to justice, "upon a basis of absolute equity without regard to objections of a technical nature or the provisions of local legislation". Five hundred dollars in gold were awarded in this case solely for the indignities, the Commission noting that expulsion is justified only where the foreigner's presence is detrimental to the welfare of the state, and when accomplished "with due regard to the convenience and personal and property interests of the person expelled". These statements regarding the treatment of aliens expelled are of general validity, and in each case it will be necessary to consider the circumstances of any arrest or detention which may precede expulsion. If the arrest is wrongful or the detention unreasonable, these facts will aggravate the damages which may be due for unlawful expulsion. The obligations which a state owes in these matters are clearly established and any breach will involve the guilty state in international responsibility. It should be noted


that detention may not only be too long, but may also be
unreasonably short, leaving the alien no time in which to
arrange his affairs. These matters also must be taken into
account in assessing the damage done. 1

In recent years the British Government has continued
to protest about the conditions in which expulsions are
carried out. In 1966, for example, the United Kingdom High
Commissioner in Nigeria expressed concern at both at the
absence of any reason given for the expulsion of a resident
journalist and at the shortness of notice. Although the
decision itself was not reconsidered, a temporary postponement
in its execution was obtained. 2 In 1967, strong representations
were made on the expulsion of twelve United Kingdom citizens
from Kenya on twenty-four hours notice. Although there
was express recognition of the Kenyan Government's right of
expulsion, complaint was made about the shortness of notice
and the general lack of consideration. 3

1. See, for example, Jaurett's case (1904), Whiteman, I
Damages in International Law, p. 433; Orazio de Atellis, Moore,
International Arbitrations, p. 3333.

2. 731 H.C. Deb., (Written Answers), col. 45: British Practice

3. 750 H.C. Deb., cols. 97-100: British Practice, 1967, pp. 112-
114. See also on detention without trial and the duty to
178ff. Note Ben Tillett's case, 1898, in which the British
Government, admitting the right to expel, nevertheless argued
that arrest was unnecessary and was accompanied by hardship.
The arbitrator deduced the permissibility of means necessary
to ensure expulsion from the general right to expel (6 B.D.I.L.,
12ff., 147). On the facts, the allegations of ill-treatment
were found to be unproven.
An analysis of expulsion in practice reveals that general international law is by no means silent as to the limits within which this power may be exercised. For it is a power which is essentially discretionary, and international law operates to confine and structure that discretion. One can go much farther now in the description of these limits than the somewhat generalised conclusions usually found, to the effect that the power of expulsion must not be exercised "arbitrarily", or "unjustly", or "without consideration". However, it is essential that any description of the power of expulsion in practice should take account of the legal context in which it finds its meaning. Expulsion serves as a measure to terminate that relationship of reciprocal rights and duties which is established between receiving and protecting state on the admission of an alien into the territory of the former. But if in terminating that relationship, any of the obligations are violated by the expelling state, then international responsibility is invoked and a new set of legal relationships is established. It may also be that international responsibility is incurred in respect of those obligations owed erga omnes, or owed to some other subject of international law, such as the obligations concerning basic human rights and the principle of non-discrimination.

With this fundamental legal relationship as a starting point, the rôle and limits of discretion may then be summarised. First, the function of expulsion is to protect the essential interests of the state and to preserve 'ordre public'. Second, from its function it follows that the power of expulsion must not be "abused". If its aim and purpose are
to be fulfilled, the power must be exercised in good faith and not for some ulterior motive, such as genocide, confiscation of property, the surrender of an individual to persecution, or as an unlawful reprisal. ¹ Third, the function of expulsion, together with the requirement of good faith, involves the subsidiary point that expulsion requires "justification". The expelling state must show "reasonable cause", although in determining whether its interests are adversely affected, or whether there is a threat to 'ordre public', international law allows that state a fairly wide margin of appreciation. However, 'ordre public' is a general legal conception, the content of which is determined by law. Fourth, the principle of good faith and the requirement of justification demand that due consideration be given to the interests of the individual, including his basic human rights, his personal interests, including family and other connections with the state of residence, his property interests and other legitimate expectations. These must be weighed in the balance against the competing demands of 'ordre public'. Fifth, general international law imposes as a precondition to the validity of an order of expulsion the requirement that it be made in accordance with law. This rule entails the further requirement that there should be available an effective remedy whereby an unlawful exercise of discretion may be challenged. This emphasis on the control of discretion and on the permissible limits of its exercise is commonly found

¹ There are difficulties in determining when a reprisal is lawful. Brownlie observes that, in principle, it should be a reaction to a prior breach of legal duty and be proportionate; Principles of Public International Law, (2nd ed., 1973), p. 524.
in municipal law and, to that extent, may support the finding of a general principle. In addition, international standards favour a system of appeals and opportunity to make representations, but it is recognised that exceptions may be made in "security" cases. Sixth, the expulsion must be carried out in accordance with the standards which international law has established for the treatment of aliens. Due regard must, therefore, be paid to the dignity of the individual and to his basic rights as a human being.

Each of the above propositions indicates significant limitations upon the discretionary power to expel aliens. The standards which they propose may not be susceptible of precise definition in the abstract, but they are clearly operative in given circumstances. Moreover, they receive some support both from the provisions of treaties and from the provisions of municipal law. The importance of the former will be seen in the following pages, for they may not only reflect the controls on discretion which are imposed by general international law, but seek also to define those controls with greater precision in the light of the express aims and purposes of the particular treaty.

To conclude, general international law prohibits abuse of the power of expulsion by confining the discretion in terms of its function and by reference to the obligations owed both to the international community and expressly to other states. In addition, the manner of exercise of the discretion is structured within those boundaries by reference to standards of judicial control, proportionality and general treatment.
The thesis advanced in the preceding pages may be briefly summarised by way of introduction to the rôle of expulsion in domestic law. First, general international law controls the exercise of the power to expel within certain limits, notably by reference to its essential function and to the principle of good faith. It also imposes certain standards, particularly in its insistence that expulsion should only follow a decision reached in accordance with the law and in the consequence to that condition, which is that the discretionary power is subject to control by the law. Treaty stipulations, and especially those to be found in treaties of establishment, reflect the character of states' power as a controlled discretion. To this extent, they are additional evidence of the position in general international law, but they have the further consequence of confining and structuring the discretion by reference to the expressed purposes of the treaty in question. Treaties and the treaty standards of national treatment and most-favoured-nation treatment are also of particular importance, for they bring out the details in the general standards of international law concerning access to the courts and the availability of judicial remedies. Customary international law presupposes certain limits to the reasons of 'ordre public' which may justify expulsion and these, too, may be clarified by treaty
stipulations. It will be seen that domestic law approaches the power of expulsion in just the same way, and this approach is further evidence of where states now think that the law on expulsion now stands.


In 1798 an act was passed which gave the President authority to order the departure of any alien whom he deemed to be dangerous. In fact, the power was never used and the act was allowed to expire after two years. Thereafter, and especially towards the end of the nineteenth century, a number of statutes were enacted which introduced deportation as a sanction against those entering in violation of the law. It was not until 1910 that a statute first authorised the removal of lawfully admitted aliens on the ground of subsequent misconduct. Since that date the classes of deportable aliens have been increased and deportation now fulfils the dual function of supplementing the powers of exclusion and removing those later found to be, or considered to be, undesirable.

The Constitution of the United States makes no mention of any power regarding the entry and removal of aliens, but the Supreme Court has held such power to be "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."
Because such power is inextricably bound up with international relations, the argument continues, therefore its exercise is in the hands of the executive branch and largely beyond the control of the courts, or "with such opportunity for judicial review ... as Congress may see fit to authorise or permit." 1

In practice, however, the constitutional requirements of "due process" have been recognised as essential limitations upon the exercise of discretion, and these now guarantee certain procedural rights at least, 2 if not actually imposing any substantive limitation upon the power of Congress to create new classes of deportable aliens. 3 In an early decision, the Supreme Court held that the Government was not competent under statute to take into custody an alleged illegal entrant and to deport him without first giving him an opportunity to be heard. Such hearing did not need to be

1. Carladon v. Landon 342 U.S. 524 (1952), and note the dissent of Black J; Circella v. Sahli 216 F. 2d 33 (1954). See also per Brewer J. dissenting in Fong Yue Ting v. U.S. 149 U.S. 698 (1893): "The doctrine of powers inherent in sovereignty is one both indefinite and dangerous .... The governments of other nations have elastic powers - ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of despotism."


3. In Hitai v. INS 343 F. 2d 466 (1965) the Court of Appeals, Second Circuit, held that the appellant could not rely on the guarantee of human rights without distinction contained in Article 55 of the United Nations Charter. This provision was not self-executing and the question of immigration was a policy decision of the legislative branch binding on the judiciary.
in accordance with judicial proceedings, but should be that which was appropriate to the circumstances. The full benefits of due process have been denied as a result of the nature which the courts have attributed to deportation proceedings. While admitting the severity of the measure, the tendency has been to describe them as civil and not criminal proceedings. Deportation is not, therefore, punishment, and removal on account of conviction for crime cannot come within the prohibition on cruel and unusual punishment in the Eighth Amendment.

In the same way, deportation statutes cannot be unconstitutional by reason of ex post facto provisions. In the leading case of Harisiades v. Shaughnessy the Supreme Court held that the United States had the power to expel an alien notwithstanding his long residence, that the exercise of this power violated neither due process nor freedom of speech, and that deportation because of membership of a "subversive organisation" prior to the effective date of the statute did not constitute an ex post facto law within the constitutional prohibition.


2. Sugai v. Adams 225 U.S. 559 (1913), per Holmes J. at p. 591; Zang v. District Director of Immigration 120 F.2d 762, 764 (1941).

3. Circella v. Subbi 216 F.2d 33 (1954). The alien in question had been born in 1893, had entered the United States in 1902, and was ordered to be deported in 1954.

4. Ibid.

subject to the "civil" procedure of deportation cannot rely upon the otherwise far-reaching implications of the Supreme Court decision in the Miranda case. In criminal prosecutions this decision precludes the use of statements made by a person in custody unless he is first told of his right to remain silent and of his right to have a lawyer present at the interrogation.

Despite these disadvantages, the expulsion process must involve what is sometimes characterised as "procedural", as opposed to "substantive" due process. In effect, this preserves the dichotomy generally assumed to exist between the reserved domain of "sovereign" powers and the requirements of international law standards. In one case the Supreme Court expressly noted that without a hearing there would be no constitutional authority for deportation, and that his constitutional requirement derives from the self-same source as the power of Congress to legislate. In practice, while the remedies available to the alien tend to go only to the legality of the order of detention or deportation, and not to


2. Pang v. INS 368 F.2d 637 (1966); Lavoie v. INS 418 F.2d 732 (1969), cert. den. 400 U.S. 854 (1970); Valeros v. INS 387 F.2d 921 (1967); Gordon and Rosenfield, Immigration Law and Procedure, ch. 5, pp. 9-12. Cf. United Kingdom Immigration Act 1971, Sch. 2, para. 4 - the duty to answer questions is imposed on all who seek entry. In U.S. v. Sacco 428 F2d 264 (1971) it was held that the alien registration acts do not violate the rule against self-incrimination because they are "essentially non-criminal and regulatory provisions".

3. Wong Yang Sung v. McGrath 339 U.S. 33, 49-50 (1950); the court also held that the provisions of the Administrative Procedure Act 1946 applied to deportation proceedings. This ruling was promptly negatived by the Immigration and Nationality Act 1952, s.242(b), 8 U.S.C. s.1252(b), prescribing an exclusive procedure for deportation: Marcello v. Bonds 349 U.S. 302 (1955).
the merits, it will be seen that the courts have developed the concept of legality beyond the merely formal meeting of statutory requirements.

Most attempts to broaden out the protections of due process, however, have failed on account of the non-criminal character of deportation. While there is growing recognition that, even if not criminal, the consequences of deportation may be far more devastating than imprisonment, this has not significantly affected actual decisions. It has been argued, for example, that the resident alien of all people will frequently have established strong family ties and acquired property interests, and that these and other relevant considerations together amount to a "vested right of residence" worthy of greater protection than is provided by mere procedural guarantees. In Harisiades' case, however, the Court observed that by withholding his allegiance to the United States the

1. In Vajtauer v. Commissioner of Immigration, New York 273 U.S. 103 (1927) the court held that want of due process is not established in habeas corpus proceedings merely by showing that the decision is erroneous, and that if there was some evidence supporting the order that was sufficient. See now the requirement of "substantial evidence", below, pp. 433-434. Where the alien applies for "discretionary relief", for example, suspension of deportation, the Attorney General is not required to give a hearing: 8 U.S.C. s.1254(a)(1),(2). In Jay v. Boyd 351 U.S. 345 (1956) the Supreme Court held that the use of confidential information in security or public interest matters on such applications was reasonable; note the dissenting judgements of Warren C.J., (at p. 361), Black J. (at p. 368), Frankfurter and Douglas JJ. (at p. 370).

2. Mignozzi v. Day 51 F. 2d 1019, 1021 (1931), per Learned Hand J: "To root up all those associations which we call home, to banish him to be an outcast in a country of whose traditions and habits he knows nothing and where his alienage is a daily living fact, not a legal imputation - these are consequences whose warrant we may properly scrutinize with some jealousy and insist that logic shall not take the place of understanding." Cf. R v. Friedmann (1914) 10 Cr. App. Rep. 72.
alien leaves outstanding a foreign call on his loyalties:¹.

"So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure. That aliens remain vulnerable to expulsion after long residence is a practice bristling with severities. But it is a weapon of defence and reprisal confirmed by international law as a power inherent in every state."

Despite the somewhat archaic sentiments expressed here, the concept of a vested right of residence remains unaccepted by the courts of the United States and, whatever right the alien may have, it is not generally such as may be opposed to the paramount power of Congress to determine whether he shall be permitted to remain. In several cases, however, it has been held that a resident alien who departs from and then returns to the United States is not thereby liable to be excluded, and that he is entitled to be dealt with only in deportation proceedings.².

In Stacher v. Rosenberg in 1963,³ the District Court of California held that a resident alien could not be removed in exclusion proceedings where he had planned his whole trip and his return while domiciled and personally present in the United States. In addition, the court observed that there was in fact no other country to which the alien, a resident for over fifty years, could be deported.⁴. Noting that the alien's "undesirability" arose from conduct since admission,

4. Ibid., pp. 513, 514.
the court stated that his was the typical case for which the
expulsion procedure was designed and intended. This approach
was affirmed by the Supreme Court in *Rosenberg v. Fleuti*
in the same year. In the Court's view, the statutory
 provision that an alien having a lawful permanent residence
in the United States should not be regarded as making an
"entry" in to the United States if his departure to foreign
parts was not intended or reasonably to be expected by him, should be so interpreted as to protect resident aliens only
briefly absent. An alien does not make an entry, and does not
thereby become liable to be excluded, unless he intended to
depart in a manner which can be regarded as "meaningfully
interruptive" of his permanent residence. So far, these
decisions mark the limit to the substantive protection which
the courts are prepared to allow. There has been but little
advance since *Harisiades*, and although the alien resident
will not now be arbitrarily excluded, he gains no special
privilege of exemption from the deportation law.

3. Immigration and Nationality Act 1952, section 101(a)(13);
8 U.S.C. s.1101(a)(13).
4. *Di Pasquale v. Karnuth* 158 F.2d 878, 879 (1949), per Learned
   Hand J: (alien had taken overnight sleeper from Buffalo to
   Detroit on route passing through Canada), "... it is well
   that we should be free to rid ourselves of those who abuse our
   hospitality; but it is more important that the continued
   enjoyment of that hospitality, once granted, should not be
   subject to meaningless and irrational hazards." The judge
   referred also to the alien's "vested right of residence.
   may nevertheless be fairly substantial, for the grounds of
   exclusion are far wider than those for deportation. See above,
   Ch. VIII.
(a) **Grounds for Removal.**

It has been estimated that the eighteen general classes of deportable aliens entail some seven hundred different grounds for removal.\(^1\) An overall view of the situation will suffice for present purposes.

The power of expulsion is applicable to all aliens, that is, to "any person not a citizen or national of the United States".\(^2\) Any claim to citizenship is to be determined judicially rather than by an administrative decision in the deportation proceedings themselves, for the authorities only have jurisdiction if alienage is established.\(^3\) Moreover, if the person concerned establishes a *prima facie* case of citizenship, this can be rebutted only by clear, unequivocal and convincing evidence of fraud or error.\(^4\)

Assuming that the question of alienage is not in issue, the grounds for removal fall into two main categories: (1) those which derive from an entry in breach of the immigration laws, or continuing residence in breach of entry conditions; (2) those which derive from conduct after entry. The statute provides that any alien shall be deported who at any time was within one or more of the classes of aliens excludable under the law at the time of entry.\(^5\) This means, in effect, that the

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1. Gordon and Rosenfield, op. cit., ch. 4, p. 5. The statute declares that all the enumerated grounds for deportation apply retrospectively, and the alien does not benefit from any period of limitation: 8 U.S.C. s.1251(d).

2. 8 U.S.C. s.1101(a)(3).

3. Pignatello v. Attorney General 350 F.2d 719 (1965); 8 U.S.C. s.1105(a)(5). An application to file petition for naturalisation does not give the alien any status, right or immunity from the initiation of deportation proceedings until the question of naturalisation is settled: Millan-Garcia v. INS 343 F.2d 825 (1965).


5. 8 U.S.C. s.1251(a)(1).
question of "exclusion" is always open, and the fact that the alien has received permission to enter does not mean that the matter cannot be reviewed. In Leon v. Murff, for example, the court held that an alien subsequently found to be of "constitutional psychopathic inferiority" was nevertheless deportable, although she was gainfully employed and not a public charge.¹ Deportation is also demanded in respect of those who entered without inspection,² and those who, by reason of mental disease or condition, become public charges within five years of entry, unless they can show that such condition arose after they were admitted.³ Still within the class of deportable aliens are those who obtained entry into the United States by fraudulent marriage to a United States citizen. If such marriage is annulled or terminated within two years of admission, the burden is on the alien to show that it was not contracted in order to avoid the immigration laws.⁴ Entry with a visa or travel document obtained by fraud also amounts to an entry in breach of the laws, but provision is made in favour of those aliens otherwise admissible who are related to United States citizens or to aliens admitted for permanent residence.⁵ The non-immigrant

1. 250 F.2d 436 (1957).
2. 8 U.S.C. s.1251(a)(2).
3. Ibid., s.1251(a)(3); Leon v. Murff 250 F.2d 436 (1957).
4. 8 U.S.C. s.1251(c).
5. Ibid., s.1251(f). Provision is also made for the removal of those who re-enter, without the permission of the Attorney General, after they have been deported. In certain circumstances, removal may be effected under the original deportation order: ibid., s.1252(f). Cf. United Kingdom Immigration Act 1971, sections 15(5),16(1),24(1); R v. Kelly [1960] 1 W.L.R. 1556.
who violates his conditions of entry becomes liable to deportation,\(^1\) either because he has remained in violation of law,\(^2\) or because he has failed to maintain non-immigrant status,\(^3\) for example, by accepting employment. It has also been held that one who entered the United States temporarily as a non-immigrant with the intention of remaining permanently if possible did not "lawfully enter".\(^4\).

Additional and extensive grounds for removal apply in respect of the alien's conduct after he has been admitted to the country. The statute provides for the deportation of any alien who, within five years of entry, is convicted of a crime involving "moral turpitude", and is confined or is sentenced to confinement for a year or more. Also caught by this provision is one who at any time after entry is convicted of two crimes involving moral turpitude not arising out of a single scheme, but regardless of whether the alien is in fact confined or whether the convictions were in a single trial.\(^5\). It has been held that the phrase "involving

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1. For details of the various categories of non-immigrants, see above, Ch. VIII.

2. 8 U.S.C. s.1251(a)(2).

3. **Ibid.**, s. 1251(a)(9).


5. 8 U.S.C. s.1251(a)(4). This section is not to apply where the alien is subsequently granted a full and unconditional pardon, or if the court recommends that he should not be deported. Representations may be made by the authorities against such a recommendation, and the possibility of relief is absolutely denied to those convicted of drugs offences: **Ibid.**, s.1251(b); s.1251(a)(11).
moral turpitude" is not unconstitutional on the ground of vagueness, but that it "conveys sufficiently definite warning as to proscribed conduct when measured by common understanding and practices".\(^1\) Other specific crimes and offences, not necessarily involving moral turpitude, may also lead to deportation. These include, for example, one convicted of carrying or possessing an automatic weapon or "sawn-off" shotgun,\(^2\) one who is convicted once within five years of entry or twice within any period of interfering with the armed forces of the United States,\(^3\) one who has been involved in prostitution,\(^4\) or the smuggling of aliens,\(^5\) and one who has become a public charge, in the opinion of the Attorney General, from causes not affirmatively shown to have arisen after entry.\(^6\) Particularly stringent provisions apply to those in any way involved with drugs offences.\(^7\) The statute demands the deportation of any alien who has at any time been convicted of possessing drugs or of conspiring to

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2. 8 U.S.C. s.1251(a)(14).


violate drugs laws,¹ and of any alien who is, or at any time after entry has been, a drug addict, whether or not he has been convicted or cured.

Wide provisions have also been enacted in order to deal with subversives of various kinds, and deportation is required of aliens both on account of their personal beliefs and advocacy and on account of their membership in or affiliation to certain designated organisations.² This covers, for example, anarchists and those who advocate opposition to all organised government, and those who are members of or affiliated to the Communist Party or any other totalitarian party of the United States or any other state, or who advocate the doctrines of world communism, etc. As a general rule, the alien must know what he is doing when he joins a designated organisation, and it has been held that it is for the Government to produce evidence of "meaningful association" with the organisation.³

The immigration laws of the United States are among the most complex and detailed in the world, although the classes of deportable aliens which those laws lay down are those common to most systems. Deportation is accepted as the most appropriate sanction for (1) those who enter or remain

1. See the case of John Lennon, against whom deportation proceedings have been instituted (March 1973) because of a conviction for possessing marijuana in the United Kingdom in 1968: The Times, 3rd May 1972; The Guardian, 19th April, 3rd 18th May 1972; 24th March, 3rd April 1973.

2. 8 U.S.C. s.1251(a)(6),(7).

in violation of law; (2) those convicted of serious crime; (3) those who otherwise offend against 'ordre public' or public morality; and (4) those who are politically undesirable. The details of the law represent a partial attempt to substitute rules for discretion - if an alien comes within class X, Y or Z then, upon the order of the Attorney General, he shall be deported. ¹ This approach is quite different to that of the law of the United Kingdom, France or Germany, each of which, in its own way, employs the satisfaction of a general condition as the necessary prerequisite to the exercise of discretion and leaves a wide margin of appreciation to the executive to order deportation in "security" cases.

Expulsion under the United States law depends greatly upon the individual satisfying certain objective criteria. Whether these criteria exist is clearly a matter of fact which is capable of impartial determination, far more so than the question whether an alien's removal is "conducive to the public good", or whether he "constitue une menace pour l'ordre public", or whether "seine Anwesenheit erhebliche Belange [des Staates] aus anderen Gründen beeinträchtigt". But this first impression of control given by American law is a little deceptive. Although the fact of deportability must be established by clear, unequivocal and convincing evidence, it will be seen that the powers of the Executive are less closely confined and structured where the alien applies for "discretionary relief", such as suspension of deportation, adjustment of status to that of permanent resident, or voluntary departure.

¹ 8 U.S.C. s.1251(a).
(b) Hearing, Decision, Appeal and Destination.

Deportation is not considered to be a criminal proceeding, and in consequence many of the safeguards which attach to such proceedings are denied to the alien, although it will be seen that the special procedure which the statute applies has gone some way towards redressing the balance. The decision to commence deportation is within the discretion of the Attorney General, but this is not uncontrolled and a decision may be subject to judicial review if it is motivated by some unconstitutional reason, such as race, religion, colour or other arbitrary classification. In practice, deportation proceedings will be commenced with the issue and service of an order to show cause why the alien should not be deported, and the alien will only normally be arrested where this is in the public interest or if he is likely to abscond. The order to show cause must state the grounds upon which the prima facie case of deportability is based, in such a way as to enable the alien to meet the allegations against him. Although attempts to introduce the full requirements of judicial process have generally failed, the statute itself does provide for the minimum rights essential to a fair hearing. This hearing takes place before a special inquiry officer, who is empowered to determine deportability, to make orders of deportation, to permit voluntary departure, to determine the country to which the alien is to be removed,

1. U.S. v. Sacco 428 F.2d 264, 271 (1970); note also the difference between exclusion and deportation proceedings, and the inapplicability of the Miranda rules, below, p. 399, 422.

2. 8 U.S.C. s.1252(a).

3. Ibid., s.1252(b).
to pass on applications to withhold deportation on the ground of anticipated persecution,¹ to determine the validity of visas, etc., and to take any other appropriate and consistent action.² The special inquiry officer is authorised to conduct the whole hearing, and to this end may administer oaths, present and receive evidence, interrogate, examine and cross-examine witnesses.³

The statute expressly provides that the alien shall be given reasonable notice of the case and of the time and place of the hearing; that he may be represented by counsel at his own expense; that he shall have a reasonable opportunity to examine the evidence against him, to present his own evidence and to cross-examine Government witnesses.⁴ It is further expressly provided that no decision of deportability shall be valid unless "based upon reasonable, substantial and probative evidence".⁵ As a general rule, the burden of proof is on the Government, but it is incumbent on the alien to show the time, manner and place of his entry into the United States.⁶

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1. See above, p. 237.
2. 8 C.F.R. 242.8(a). Certain matters are reserved to the District Director, such as waiver of inadmissibility and refugee status.
3. No special inquiry officer may conduct a hearing in any case in which he has previously acted in an investigating or prosecuting capacity: 8 U.S.C s.1252(b).
4. This appears to rule out the possibility of the government relying upon confidential evidence. Compare exclusion proceedings, above, pp. 236-237, and applications for discretionary relief: Jay v. Boyd 351 U.S. 335 (1956); 8 C.F.R. 242.17(a).
5. 8 U.S.C. s.1252(b) — clearly this is a most significant guarantee for the alien.
6. Ibid., s.1361, which also provides that the alien may rely upon, and request the production of, visas, etc. Where the Government's case is based upon the alien having become a public charge under s.1251(a)(3) or (8), it is for the alien to show otherwise.
In a number of early cases it was held that there must be a showing of "sufficient" evidence upon which to found the deportation.¹ This was later modified to a requirement of "substantial" evidence,² and the Supreme Court has now held that no order for the deportation of a resident alien may be entered, no matter how long or short his period of residence, unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true.³

If the alien admits that he is liable to deportation, then in certain circumstances he may be allowed the privilege of voluntary departure.⁴ In all other cases the special inquiry officer must prepare a full and reasoned decision which is based on the evidence received. This decision may then be made the subject of an administrative appeal to the Board of Immigration Appeals,⁵ either at the instance of the alien

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3. Woodby v. INS 385 U.S. 285 (1966): "To be sure, a deportation proceeding is not a criminal prosecution ..., But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case" (at p. 285). Cf. Lim v. Mitchell 431 F.2d 197 (1971); and see 8 U.S.C. s.1105a (a)(1); 8 C.F.R. 242.14(a).
4. 8 U.S.C. s.1251(b); s.1254(e). The discretion to permit voluntary departure applies in all cases other than those where there is reason to believe that the alien is deportable under s.1251(a)(4),(5),(6),(7),(11),(12),(14),(15),(16),(17),(18), i.e. generally, as a subversive, criminal, prostitute, drugs offender or one involved in violation of the aliens registration requirements. The Attorney General may authorise the payment of removal expenses if this is in the best interests of the country.
5. 8 C.F.R. 242.21. The special inquiry officer may re-open the hearing at any time before the Board of Immigration Appeals secures jurisdiction over the appeal.
or of the Commissioner of the Immigration Service. The Board may review the decision of the special inquiry officer, which thereafter is open to challenge in the courts on the ground that it is illegal or arbitrary or that it involved a denial of due process. 1

Where it is decided that the alien shall be deported, it is then necessary for the special inquiry officer to specify the state to which he may be removed. The alien is given first choice, and removal may be ordered to the state designated by him if that state is willing to admit him and unless the Attorney General considers that this would be prejudicial to the interests of the United States. If the first choice fails, it is for the special inquiry officer to order deportation to any state or country of which the alien is a national or citizen. If that country in turn is unwilling to receive him, then there is a discretionary power to seek removal to any one of seven different destinations, including the state from which the alien entered the country, the state in which he was born and, finally, any country which is willing to receive him. 2 It remains within the discretion of the Attorney General whether or nor to suspend deportation and to adjust the status of the alien to that a permanent resident. 3


3. 8 U.S.C. s.1254(a); 8 C.F.R. 242.17(a). On persecution claims, see further below pp. 525ff.
This power may be exercised in favour of those resident in the United States for at least seven years, who are of good moral character, and whose deportation would result in extreme hardship to the spouse, parent or child of a United States citizen or alien resident. In each case it is for the applicant to show that he is eligible for discretionary relief, and, moreover, that the discretion should be exercised in his favour.

(2) The Law of the United Kingdom.

Although it is now generally assumed that the power to expel aliens is inherent in every sovereign and independent nation, it was never at any time very clear whether the exercise of this power lay within the prerogative of the Crown. There are a number of early dicta to the effect that the Crown may expel even alien friends. There are also a number of historical examples, but little use seems to have been made of any such prerogative in the years after the Revolution of 1688. What power there was resided in statute, the purpose of which seems to have been to enact the power rather than

1. Ten years' residence and "extremely unusual hardship" for those within p. 434 above, note 4.

2. 8 C.F.R. 242.17(d).


to declare its continuing existence.\(^1\) In *Attorney-General for Canada v. Cain*,\(^2\) however, the Privy Council did not doubt that the Crown possessed the power to expel even a friendly alien from Canada, and to remove him to the country whence he came. The court expressed the further view that, in the grant of the privilege of entry, the Crown might attach whatever conditions it deemed fit. Since 1905, the power of expulsion in the United Kingdom has been regulated by statute, but there are many more recent decisions which tend to reflect this return to primitive notions of "sovereign" rights.\(^3\)

The *Aliens Act 1905* introduced a limited statutory power of expulsion. It provided (1) that if an alien was convicted of an offence for which he was liable to imprisonment without the option of a fine, the court might recommend his expulsion, either in addition to or in lieu of sentence;\(^4\) (2) that if an alien were found within twelve months of his last arrival to be in receipt of poor relief, or to be living in insanitary conditions due to overcrowding, or to have been convicted in a foreign country for an extradition crime, then a court might, on proceedings taken, certify the facts to the Secretary of State.\(^5\) As noted elsewhere, the primary purpose

\(^1\) E.g. 33 Geo. III c.4; 45 Geo. III c.155; see 6 B.D.I.L. 98-101.


\(^4\) Section 3(1)(a).

\(^5\) Section 3(1)(b).
of this Act was to relieve the social cost of immigration, particularly the maintenance at public expense of the alien prison population. There was no time limit for the expulsion of criminal aliens, but it is to be noted that the Secretary of State might only order expulsion after due recommendation or certification by the courts. In the years to 1914 some 2,866 expulsion orders were made on the recommendation of a court, and there is some evidence of a corresponding reduction in the alien prison population. Most of the recommendations were carried out, although in some few cases no order was made in the light of various considerations, such as the youth of the offender, lack of friends in or connection with any other country, and long residence in the United Kingdom.

With the outbreak of the First World War control of aliens was established on a new basis, and within one day there was passed an Act requiring all aliens to register with the police and giving the Home Secretary power to exclude or deport any alien without appeal. As amended in 1919, this statute and the Aliens Orders made thereunder remained the basis of control until 1973. In each case, leave to land was required and this might be given subject to conditions, for


2. E.g. Home Office Reports, 1908, 1911, 1914.


example, as to registration with the police or prohibiting employment. It appears to have been completely within the discretion of the Secretary of State whether to revoke, vary or cancel such conditions. Similarly, extensive powers were granted to order the deportation of an alien, either on the recommendation of the court which had convicted him of an offence punishable with imprisonment, or in circumstances in which the Home Secretary deemed such deportation to be conducive to the public good. In most cases, the court's recommendation could be challenged on appeal against sentence, and occasionally account would be taken of mitigating factors such as the possibility of persecution, and length of residence in the United Kingdom. But after 1914 the Home Secretary's power

1. Aliens Order 1953, Article 5.

2. Ibid., Article 5(3); but note Lord Denning's remarks on the premature withdrawal of permission to remain in Schmidt v. Home Secretary [1969] 2 Ch. 149, at pp. 170-171. For application of the Aliens Order 1920 and the Special Restriction (Coloured Alien Seamen) Order 1925, and their effect on all coloured seamen regardless of nationality, see Little, Negroes in Britain, (1947), pp. 63-67.

3. Aliens Order 1953, Article 20(1). Under Article 21 the Home Secretary might give directions for the alien's removal, with any dependants, on a ship or aircraft, and might specify the country to which he was to be returned. The alien was liable to be detained whenever a deportation order had been made and whenever consideration was being given to the recommendation of a court.


was no longer tied to the recommendation of a court. He was free to order deportation on the grounds of public good, and this he might do regardless of recommendation, regardless even of conviction. Although the courts declared their jurisdiction to go behind a deportation order in the case of a "misuse" or "unlawful" exercise of the power, in practice the evidentiary burden was difficult to satisfy and no allegation of improper purpose was ever upheld. The courts refused to sit on appeal from the Home Secretary and declined even to demand that deportation proceedings provide opportunity for a hearing within the minimum requirements of the rules of natural justice. In those days a very wide margin of appreciation was conceded to the executive.

1. Expulsion for breach of landing conditions might be ordered either on public good grounds or on the recommendation of a court after conviction for such breach under Aliens Order 1953, Articles 25 and 26. After 1956, and in pursuance of its obligations under the European Convention on Establishment, the Government permitted aliens resident for two years or more the privilege of making representations before the Chief Metropolitan Magistrate against any decision to deport. The Magistrate in turn might make his recommendation to the Home Secretary which, although not binding, was followed in practice: Report of the Wilson Committee on Immigration Appeals, Cmd. 3387, para. 53, Appx. VII, Table 7.


Under the Commonwealth Immigrants Act 1962 the Secretary of State was empowered for the first time to order the deportation of a Commonwealth citizen, but this power was limited to the occasion of a recommendation by the court which had convicted him of an offence punishable with imprisonment. The power of the court was also limited, and no recommendation was to be made against such citizen who satisfied the court that he was "ordinarily resident" in the United Kingdom at the date of conviction and that he had been continuously so resident for at least five years prior to that date. This Act also provided for the prosecution of Commonwealth citizens who entered or remained in breach of the immigration laws, and they might be convicted and, on the recommendation of the court, deported. The prosecution, conviction and recommendation were essential pre-conditions to an exercise of the power of expulsion, and it was not until the Immigration Act 1971 that a general power to deport for the public good was introduced in respect of Commonwealth citizens. It was recommended in 1965 that the Home Secretary should have the power to repatriate those who evaded immigration

1. Commonwealth Immigrants Act 1962, section 6. The power was limited to those who had attained the age of seventeen: ibid., section 7(1). British protected persons and Irish citizens were also liable to be deported, but provision was made for appeal against the recommendation as against a sentence of the court: ibid., section 8(4).

2. Ibid., section 7(2). In calculating the period, no regard was to be paid to continuous periods of detention exceeding six months. This limited statutory recognition of a "vested right of residence" is carried over into the new law; see below, p. 447. Cf. the concept of effective nationality

3. Ibid., section 4(1).

4. Immigration from the Commonwealth, Cmnd. 2739, para. 25.
immigration controls or who remained beyond their permitted
time, and this was eventually enacted in the Immigration
Appeals Act 1969.¹

The Act of 1962, in fact, made it no offence for
Commonwealth citizens to enter the United Kingdom without
being examined by an immigration officer. If they did so,
and remained unexamined for the statutory period of twenty-four
hours, then they could not be prosecuted or required to submit
to examination. They could only then be deported if
subsequently convicted for a criminal offence and recommended for
deporation.² In 1969, the Immigration Appeals Act introduced
rights of appeal against, inter alia, a decision to vary
conditions of entry for both aliens and Commonwealth citizens,
and any decision to deport for breach of conditions or
otherwise without a recommendation of the court. For the first
time an alien might challenge a decision that his removal was
conducive to the public good, and both adjudicators and the
Immigration Appeals Tribunal were empowered to review any
discretionary decision, where they were of the opinion that
the discretion should have been exercised differently.³ This
statutory innovation gave belated recognition to the substantial
requirements of due process. It accepted the principle that

¹ See now Immigration Act 1971, section 3(5).

House of Lords adopted a restricted interpretation of the 1962
Act in view of the "common law rights of British subjects" to
enter the United Kingdom. See also, R v. Governor of Pentonville
Prison, ex parte Azam [1973] 2 W.L.R. 949; Immigration Act 1971,
sections 4(2), 16(1),(2); Sch. 2, para. 9.

³ Immigration Appeals Act 1969, section 8(1); see now,
Immigration Act 1971, section 19.
the executive's power is one of controlled discretion and reflected the impact of the standards observed above, particularly the pressure exerted by developments in the light of the European Convention on Human Rights.

Despite the recommendations of the Wilson Committee on Immigration Appeals,¹ the Government of the day attempted to grant an appeal against decisions or actions of the Home Secretary which were based on political reasons, and also those based on reasons of national security. A special procedure was introduced, with appeal directly to a specially constituted Tribunal.² But this was no appeal in the ordinary sense of the word: evidence could be presented by the Government in the absence of the appellant and his advisers,³ and the Tribunal's decision was not binding on the Secretary of State.⁴ The deficiencies of this procedure, and its dubious results, were illustrated in the Dutschke affair of 1970,⁵ where the

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1. Cmnd. 3387, paras. 143-144.
2. Immigration Appeals Act 1969, section 9. For aliens the special procedure was applicable not only in national security cases, but also where the decision or action was taken wholly or mainly in the interests of the relations between the United Kingdom and any other country or otherwise on grounds of a political nature: Aliens (Appeals) Order 1970 (S.I. 1970 No. 151), article 8.
4. Ibid., section 9(2); article 8(2).
Tribunal upheld the decision to refuse permission to remain on the ground that the appellant was "likely to be a security risk in the future". The new law has abandoned any formal procedure in security and political cases, and the Government's view was expressed by Lord Windlesham in the House of Lords:¹.

"These cases, by their very nature, require political judgements to be made as to what does or does not constitute a threat to the security of the state or what amounts to undesirable political activity."

Although he enjoys no legal right of appeal, the non-patrial alien or Commonwealth citizen remains free to challenge the legality of his detention by way of the writ of habeas corpus. This is not, however, entirely satisfactory and the procedure involved tends to remove the "margin of appreciation" farther from control.².


The new law applies controls to all non-patrials,³ and provides that they shall be liable to deportation (1) for failure to comply with a condition attached to their leave to enter or for failure to depart at the expiry of such leave;⁴. (2) if the Secretary of State deems deportation to be conducive to the public good;⁵. (3) if another person to whose family he

¹. 320 H.L. Deb., col. 998; 819 H.C. Deb., cols. 375-377. Provision has now been made for informal representations to be put before an advisory committee; ibid.

². See below, pp. 476ff.

³. The power to deport does not apply to any diplomatic agent or other person entitled to like immunity from the jurisdiction; Immigration Act 1971, section 8(3); Immigration (Exemption from Control) Order 1972 (S.I. 1972 No. 1613), articles 3, 4. See below, Appendix.


⁵. Ibid., section 3(5)(b). This is the first time that "public good" grounds have been applied to Commonwealth citizens.
or she belongs is or has been ordered to be deported;\(^1\) (4) if, after attaining the age of seventeen, and having been convicted for an offence punishable with imprisonment, the court recommends deportation.\(^2\) In addition, specific powers are laid down for the summary removal of "illegal entrants",\(^3\) and for the compulsory repatriation of mental patients.\(^4\).

The statute makes no mention of the powers previously used by both the courts and the Crown to secure the "voluntary" departure of a person from the Realm.\(^5\) There have been a number of cases in which a convicted person has been offered the choice of remaining in the United Kingdom to be punished for the crime for which he has been convicted, or of leaving the country.\(^6\) Section 11 of the Habeas Corpus Act 1679 forbids the sending of any prisoner out of the Realm, and imposes the penalty of life imprisonment on any one taking

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1. Immigration Act 1971, section 3(5)(c).

2. Ibid., section 3(6). A person is deemed to have attained the age of seventeen at the time of conviction if he appears to the court to have done so, on consideration of any available evidence: ibid., section 6(3)(a).


4. Immigration Act 1971, section 30, amending Mental Health Act 1959, section 90. This power applied previously only to aliens; it may be exercised where the Home Secretary is satisfied that it is in the interests of the patient to remove him. Cf. earlier agreements for the mutual retention of lunatics: 6 B.D.I.L., 104-106.

5. Provision is made, however, for "assisted repatriation": Immigration Act 1971, section 29. Payment of expenses is not to be made unless it is shown that it is in the individual's interest to leave the United Kingdom to reside permanently elsewhere, and that he wishes to do so; see 320 H.L. Deb., col. 1000.

part in the offence.\(^1\). Section 12, however, exempts from
the prohibition persons who "by Contract in Writing agree
with any Merchant or Owner of any Plantation or other person
whatsoever to be transported to any parts beyond the Seas".\(^2\).
The legality of any such departure may therefore be assumed
where the individual's decision is voluntary and by contract
in writing. The practice may also be justified by reference
to the Crown's prerogative of mercy and the "conditional
pardon". It has also been accepted that the requirement
of departure may be included in an order binding a person
over to come up for judgement when called upon.\(^3\). As might
be expected, these measures were most frequently employed
when other effective removal procedures were lacking. This
situation has now been remedied, and the question of who
shall be permitted to remain in the United Kingdom has been
entrusted by Parliament, in the first place, to the Home
Secretary and the Appeals Tribunals. The use of alternative
measures by the courts today may well be an usurpation of
these essentially executive functions.\(^4\).

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1. Previously the penalties of Praemunire attached to the
offence; see now Criminal Law Act 1967, Sch. 4.

2. Also excepted are convicted felons who pray in open court
to be transported; Habeas Corpus Act 1679, section 13.

3. R v. Ayu [1959] 1 W.L.R. 1264. However, it was held that
a condition that a person should return to a specified country
and not come back to the United Kingdom for a certain period
could not be inserted in a binding over made under the
933 (condition requiring return to Ireland cannot be made a
term of a probation order under the Criminal Justice Act 1948,

4. See observations of the Divisional Court in R v. East
The Immigration Act does recognise the notion of a "vested right of residence", at least as regards Commonwealth and Irish citizens who were ordinarily resident in the United Kingdom at the entry into force of the Act. They may not be deported on grounds conducive to the public good if they are ordinarily resident at such date, if they are so resident at all times thereafter and at the date of the Secretary of State's decision. Once they have been ordinarily resident for five years, then they are also immune from deportation on any ground at all. It is for the individual concerned to show that he comes within the benefit of these exceptions, but it is provided that if he has at any time become ordinarily resident in the United Kingdom, he is not to be treated as having ceased to be so merely because he remained in breach of the immigration laws.

A non-patrial who is admitted subject to a time limit or other condition may have his leave varied at any time by restricting, removing or varying such condition. A right

1. Immigration Act 1971, section 7(1); cf. Commonwealth Immigrants Act 1962, section 7(2), now repealed. Resident aliens are to be considered as having received indefinite leave to land and to remain: Immigration Act 1971, section 1(2), but they still continue to be liable to deportation.

2. Immigration Act 1971, section 7(1)(a).

3. Ibid., section 7(1)(b),(c). In calculating the five year period, similar principles on imprisonment apply as under the earlier legislation: Ibid., section 7(3),(4).

4. Ibid., section 7(5).

5. Ibid., section 7(2).

6. Ibid., section 3(3)(a).
of appeal is granted in respect of any refusal to vary the conditions of admission on the application of the individual concerned, or otherwise, where the conditions are varied without his application. No variation is to take effect while any appeal is pending, nor is the appellant to be required to leave the United Kingdom during that period. However, there is no appeal if the Secretary of State certifies that the appellant's departure would be conducive to the public good, as being in the interests of national security or of the relations between the United Kingdom and any other country, or for reasons of a political nature.

This exclusion applies only to appeals within the statutory system. It is clear that in the case of unlawful action, habeas corpus would lie to bring the Minister's discretion once more under control. In all other cases where the variation of conditions is in issue, it will be relevant to consider whether the person concerned has complied with the conditions under which he was admitted; whether his continued residence is desirable in the light of his character, conduct and associations; whether he is a danger to national security and whether, if allowed to remain, it may become


2. Ibid., section 14(3). There is also no appeal where the variation in conditions is made by statutory instrument or is due to the refusal of the Secretary of State to make a statutory instrument: ibid., section 14(4).

impossible to secure his return to any other country. These criteria are prescribed by the Immigration Rules and they serve as an indication of the limits within which the discretionary power to vary conditions must be exercised.

Where a deportation order is made on the recommendation of a court, then there is no appeal within the statutory system. Any court which has the power to sentence the individual for the offence may recommend deportation, unless that court commits him to be sentenced or further dealt with by another court. It is also possible for a recommendation to be made where the offender is sentenced to life imprisonment. However, the right to appeal to a higher court remains, and

1. Statement of Immigration Rules for Control after Entry: Commonwealth Citizens, 1973 H.C. No. 80, paras. 4-5, 27; id., EEC and other Non-Commonwealth Nationals, 1973 H.C. No. 82, paras. 4-5, 25. The Rules give fairly detailed instructions in respect of applications by crewmembers, visitors, students, young Commonwealth citizens on working holidays, businessmen, the self-employed, au pair girls, Commonwealth trainees, foreign student employees, work-permit holders, seasonal workers, those who have married while in the United Kingdom, those who wish to settle and those who request political asylum. Where a foreign national is required to register with the police (1973 H.C. No. 81, paras. 56-57; Immigration (Registration with Police) Regulations 1972, S.I. 1972 No. 1758), such condition will generally not be lifted although it will lapse when the time limit on the applicant's stay is removed, which is usually after four years: 1973 H.C. No. 82, paras. 26, 29-30.

2. E.g. committal to the Crown Court under the Magistrates Courts Act 1952, section 29, as amended by the Courts Act 1971, section 56, Sch. 8, para. 3. See also Crompton, The Power to Recommend Deportation, 126 Justice of the Peace, 660 (1962); Rogerson, Deportation, 1963 Public Law 305.


4. Immigration Act 1971, section 6(5). Thus, a person convicted on indictment may appeal against the recommendation to the Court of Appeal (Criminal Division) with leave of that court (Criminal Appeal Act 1968, sections 9, 11(1)), and a person convicted by a magistrates' court may appeal against the recommendation to the Crown Court (Magistrates Courts Act 1952, section 83(1),(3), as amended by the Courts Act 1971, section 56, Sch. 9).
in no case may a recommendation be made unless the person concerned is given seven days notice, informing him of those who are not liable to deportation and those who may benefit from any of the statutory exceptions.\(^1\) A deportation order may not be made while it is still open to the person concerned to appeal against the relevant conviction, sentence or recommendation, or while such appeal is pending.\(^2\) The Immigration Rules declare that in deciding whether or not to give effect to the court's recommendation, consideration will be given to every relevant factor, including the age of the offender, length of residence and strength of connections in the United Kingdom, previous criminal record, and any representations which may be made.\(^3\) In each case the public interest is to be balanced against any compassionate circumstances of the case.\(^4\) This provision emphasises once again the essential function of deportation, and it is in the balancing of interests that the adjudicators and the Immigration Appeals Tribunal will find their most important rôle.

Deportation may be ordered also for breach of conditions of admission, and again there is no appeal where such action is taken for reasons of national security or for other political

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1. Immigration Act 1971, section 6(2); see above p. 447, notes 1-5.
2. Ibid., section 6(6); 1973 H.C. No. 80, para. 35; 1973 H.C. No. 82, para. 42.
3. 1973 H.C. No. 80, paras. 40-41; 1973 H.C. No. 82, paras. 47-48
reasons. The Immigration Rules declare that deportation in these cases will normally be the proper course, although each case will be considered on its merits. An appeal may be made to the adjudicator in the first instance, and thence with leave to the Immigration Appeals Tribunal.

Deportations on the ground of public good will generally occur in two types of cases. In the first type, deportation in effect will be on the ground of criminality, for example, where the individual has been convicted, but the court has made no recommendation, or where criminal activities are only suspected and not proven. Other grounds, such as vagabondage or living off social security may also be relevant. Where deportation is ordered in these cases, then there is a right of appeal direct to the Tribunal. But, as already noted, there is no statutory right of appeal in cases involving national security or other political reasons. Here the individual must rely on the common law remedies, such as habeas corpus, which is available against any person suspected of detaining another unlawfully, and which is particularly useful in the case of detention pending deportation.

1. Immigration Act 1971, sections 3(5)(a), 15(3).
2. 1973 H.C. No. 80, para. 42; 1973 H.C. No. 82, para. 49.
3. Immigration Act 1971, section 15(1), Sch. 3, paraa. 2, 3. No order of deportation may be implemented pending the outcome of any appeal, but detention or control of the appellant may be required. See also The Immigration Appeals (Procedure) Rules 1972 (S.I. 1972 No. 1684).
5. Ibid., section 15(7)(a); Derrick v. Secretary of State [1972] Imm. A.R. 109.
Appeal also lies direct to the Tribunal where a deportation order is made against the wife or children under eighteen of any person who himself is ordered to be deported.¹ Any member of such family may depart voluntarily if he does not wish to appeal or if his appeal is dismissed,² and before any order is made the Secretary of State will consider, for example, how long the family has been resident, what ties they have in the United Kingdom other than with the deportee, and whether the wife can maintain herself and her children in the foreseeable future without relying on public funds. It is perhaps a little curious to find these provisions directed solely at the wife, and it would appear that the Immigration Rules, unlike the statute itself, do not envisage the woman either as breadwinner or as prospective deportee.³ In fact, this aspect of discrimination against women is only one example among many more. Wives have for long suffered from the prohibition on their separate use of the family passport, and it is settled that if a woman who is a patrial should marry a non-patrial, she will have no right to have her husband settle with her in the United Kingdom. Both these practices have been justified by the Government on the ground that they conform with international usage,⁴ and that the latter, in particular, operates as an acceptable and useful

¹. Immigration Act 1971, section 15(7)(b),(c).
². 1973 H.C. No. 80, paras. 44-48; 1973 H.C. No. 82, paras. 51-55
⁴. On international passport practice, see 814 H.C. Deb., cols. 227-228; 817 H.C. Deb., col. 871 (1971); 829 H.C. Deb., cols. 967-968; 838 H.C. Deb., cols. 979-980 (1972). On the international practice that the family should follow the head of the household (male), see 846 H.C. Deb., cols. 37, 40-41 (November 1972); 849 H.C. Deb., col. 663 (January 1973). See also Secretary of State v. Dumont [1972] Imm. A.R. 119.
barrier against people "marrying their way through the controls".¹ The Immigration Rules do make certain concessions to the independent status of the woman. It is provided that a wife is not to be regarded as part of the family if she is living apart from her husband, and her deportation will not normally be considered if she has herself qualified for settlement in the United Kingdom. Children approaching the age of eighteen, if they have spent some years in the United Kingdom, or if they have left the family and established themselves, are also not normally to be deported.²

Although rights of appeal against deportation are frequently restricted, in all cases the individual concerned has a right of appeal against directions for his removal on the ground that he ought to be removed, if at all, to a country or territory specified by him and other than the one named in the directions.³ In most cases, a person to be deported will be removed to the country of which he is a national or which has most recently issued him with a travel document.⁴ It has been held that an appeal against proposed destination will only succeed, inter alia, if the appellant can show another country which is willing to receive him.⁵

¹ Under-Secretary of State for the Home Department, 21st February 1973, 851 H.C. Deb., col. 640; see also cols. 608, 632-3.
² 1973 H.C. No. 80, paras. 44-48; 1973 H.C. No. 82, paras. 51-55.
³ Immigration Act 1971, section 17.
⁴ 1973 H.C. No. 80, para. 54; 1973 H.C. No. 82, para. 61.
⁵ Secretary of State v. Croning [1972] Imm. A.R. 51; Secretary of State v. Fardy, ibid., p. 192; Ali v. Immigration Appeals Adjudicators, The Times, 14th October 1972.
In each case consideration is to be given to the public interest generally, and to any additional expense which may fall on public funds. ¹

(b) Appeal.

The appellate bodies established by the Immigration Appeals Act 1969 are continued by the Act of 1971. They are empowered to review the decisions of the Secretary of State or any immigration officer. Section 19 provides that an adjudicator shall allow the appeal if he considers (1) that the decision or action in question was not in accordance with the law or with any immigration rules applicable to the case; or (2) where the decision or action involved the exercise of a discretion by the Secretary of State or any officer, that

¹ Appeal may also be made against the refusal to revoke a deportation order: Immigration Act 1971, section 15(1)(b); Dervish v. Secretary of State [1972] Imm. A.R. 48 (note the consideration given to the humanitarian aspects, at pp. 49-40); Secretary of State v. Udoh [1972] Imm. A.R. 89. The right of appeal in such cases can only be exercised from outside the United Kingdom and by application made to the appropriate British representative overseas or direct to the Home Office. The Secretary of State does not initiate review of deportation orders until they have been in force for at least three years: 1973 H.C. No. 80, para. 56; 1973 H.C. No. 82, para. 63. There is no appeal if the Secretary of State certifies that the appellant's exclusion from the United Kingdom is conducive to the public good: Immigration Act 1971, section 15(4); such cases would also be beyond the purview of common law remedies, e.g. habeas corpus, if the appellant were outside the jurisdiction. The deportation order is described as an order requiring the person concerned to leave the United Kingdom and prohibiting him from re-entering: Immigration Act 1971, section 5(1); it may be revoked at any time by the Secretary of State and ceases to have effect if the person becomes a citizen: ibid., section 5(2). It has been held that the deportation order need not be served for it to come into force: C. v. E. (1946) 62 T.L.R. 326; but if it is not served or otherwise brought to the attention of the person concerned, it is no offence to enter in breach of the order: Immigration Act 1971, section 24(1)(a). In most cases an order cannot be made against a person unless he is told of the decision and given notice of his rights of appeal, if any: ibid., section 15(2); section 18.
the discretion should have been exercised differently.¹ In the exercise of his functions, the adjudicator may review any determination of a question of fact upon which the decision or action was based, but it is expressly provided that, where the decision or action is otherwise in accordance with the Immigration Rules, a refusal to depart from those rules shall not be construed as an exercise of discretion.² In one case it was held that this latter restriction prohibited the adjudicator from allowing an appeal on considerations of natural justice:³

"to urge that for reasons of natural justice these rules should not be applied ... can really only mean that the Secretary of State is being requested ... to depart from the rules. This he has refused to do and since his decision is in accordance with the Immigration Rules, such decision cannot be treated as having involved the exercise of a discretion."

Other rules also operate to bar the exercise or review of "discretionary" powers. For example, under the old law it was provided that an extension of stay "may be granted" to a Commonwealth trainee if the Department of Employment submits a favourable report to the Home Office.⁴ It has been held that the discretion only comes into play where a favourable

¹. Immigration Act 1971, section 19(1)(a); in any other case he is to dismiss the appeal: section 19(1)(b).

². Section 18(2).


report is received, and that without such report the immigration officer does not enjoy any choice between alternative courses of action. In another case, the Tribunal has ruled that the applicant who seeks an extension of stay must bring himself within one or other of the categories set out in the rules. For example, he must qualify as a person of independent means or as a person setting up in business on his own account. It is not permissible to pick certain factors from one category and to add them to certain factors from another category, so as to arrive at some composite type of immigrant. The categories are bound by the rules and exceptions must be a matter for special decision by the Secretary of State. They are not, therefore, subject to review as an exercise of discretion.¹.

The issue of discretion will be of particular importance where deportation is ordered on the grounds of public good, otherwise than in security and political cases. The Tribunal will then be required to weigh the interests of 'ordre public' against those of the individual,² and an indication of the correct approach was given by the Divisional Court in R v. Peterkin (Adjudicator), ex parte Soni.³ On an appeal against the refusal of an entry certificate, the adjudicator had taken the view that he should not interfere with the decision unless it could be shown that the entry certificate officer, in the exercise of his discretion, had taken into account


some matter which he ought to have excluded or had failed
to take into account some matter which he ought to have included.
This restricted view of his rôle was rejected by the court. In
its judgement, it reaffirmed that the actions of inferior
tribunals remain subject to the controlling jurisdiction of
the superior courts and the prerogative remedies of certiorari
and mandamus. In the opinion of the court, the adjudicator
was required ¹ to apply his mind afresh to the problem
presented by the facts and to determine what in his judgement
was the correct exercise of discretion.² He had erred in
law in following a rule previously applied with some
strictness by the Court of Appeal to the exercise of discretion
by a High Court Judge. In the circumstances of the case,
however, the Divisional Court declined to interfere while it
was still open to the appellate tribunal to deal with the
error. But, as the Lord Chief Justice observed:³

"our supervisory powers are still available
if in the end, when the appellate system
has worked outside it, injustice or breach
of the law remains."

It is important once again to note the interaction
between the statutory system of appeals and the common law
remedies. The former provides the appellant with the means of
challenging the merits of a policy decision. It also allows

¹. Under the Immigration Appeals Act 1969, section 8(1)(a)(ii),
re-enacted in Immigration Act 1971, section 19(1)(a)(ii).

². Here he ought to have considered anew the degree of hardship
which would be caused to a girl if she had to leave England in
order to live with her husband in his own country.

the exercise of discretion to be confined and permits due recognition to be given to competing considerations. The common law remedies, such as certiorari, mandamus and habeas corpus, do not generally intrude upon the "policy" side of decision making, but influence and structure the exercise of power by requiring it to conform with certain minimum conditions of fairness and by controlling abuse. They define, as it were, the outer fringes of the power, and represent the substance of that requirement of international law, that decisions be in accordance with and controlled by the law.

It is to these remedies in particular that one must look when the statutory rights are excluded, for clearly control may be hampered by the Secretary of State's certificate that national security or political reasons are involved. The common law remedies operate to prevent manifest abuse, but there is still much to be said in favour of the independent development of something akin to the continental and EEC concept of 'ordre public'. At the moment, jurisdiction is divided between the court's power to make recommendations and the authority of the Secretary of State to act on his own initiative. This division will continue to hamper the development of controlling principles which are of general application, and it subjects the individual to the liability of arbitrary recommendations by the lowest courts of the land. The Wilson Committee recommended that this power should be taken away from the courts, but today there is little sign of the jurisdiction being confined to one authority, nor any sign of a coherent jurisprudence emerging from the courts.

It may be that with the development of the Community law concept of 'ordre public' some cohesion may be introduced. The Immigration Rules, however, pay scant attention to the requirements of Directive 64/221, and the deportation provisions are declared equally applicable to all. It has been argued above that these provisions do not as a whole meet the obligations which the United Kingdom has assumed within the Community.

(3) Some European Examples and Conclusions.

Régimes for the control of aliens within national frontiers vary considerably from state to state, and in the countries of continental Europe the system of residence permits is a common feature. For example, in France three categories of permits are employed, which involve distinctions between temporary, ordinary and privileged residents. The temporary resident's permit may be issued to tourists and students, and to all who make first application for permission to remain, even if they intend to settle permanently in France. The permit is valid for a year at most, but may be restricted to a lesser period according to the validity of the bearer's

3. EEC nationals are subject to their own régime; see, for example, décret du 5 janv. 1970.
4. Ordonnance du 2 nov. 1945, article 10. Every alien aged sixteen and over who wishes to remain in France for longer than three months must apply for a residence permit within a week of his arrival: ibid., articles 6, 19; décret du 30 juin 1946, article 3.
passport or visa. It may be withdrawn at any moment where it is established that the bearer has ceased to maintain the conditions of issue. The ordinary resident's permit is issued by the 'Préfet du Département' where the alien resides. It is valid for three years and may be renewed as of right if the bearer continues to comply with the conditions of issue, particularly those regarding employment and financial resources. In principle, such permits are valid for the whole of metropolitan France, although certain restrictions are anticipated and, for example, residence in particular 'département' may be made subject to authorisation.

The permit for privileged residents in effect recognises the special status acquired by aliens long established in France. It may be issued to aliens with uninterrupted residence of at least three years, who were aged thirty-five or more at the time of admission. The permit is valid for ten years and is renewable as of right (en plein droit). Its validity extends to the whole of metropolitan France and it cannot be restricted by individual measures, although residence in certain 'départements' may be curtailed in the manner considered above. The holders of these permits are

1. Ordonnance du 2 nov. 1945, article 11. The alien who wishes to engage in some professional activity is further obliged to solicit the issue of a "carte de commerçant, carte de travail, ou carte pour les exploitants agricoles". Special provisions again apply to EEC nationals: décret du 5 janv. 1970.
3. Ibid., article 8; ordonnance du 2 nov. 1945, article 14.
4. Ibid., article 4; cf. ordonnance du 2 nov. 1945, article 7.
5. Ordonnance du 2 nov. 1945, article 16.
dispensed from the cautio judicatum solvi, and they may only be deprived of their status by decision of the Ministry of the Interior. In addition, they are not subject to 'refoulement' as a consequence of the withdrawal of or failure to renew their permit, and they may be dealt with only in expulsion proceedings.

In the Federal Republic of Germany, the residence of aliens is also made subject to possession of a residence permit (Aufenthaltserlaubnis). There is no express provision for a hearing on applications for such permits, but this is required indirectly by Article 103 of the Constitution (Bonner Grundgesetz, 1949), which leads in turn to the possibility of an appeal against a prejudicial decision. Residence permits may be applied for either before or after admission, although there is no appeal in the former case. Work permits (Arbeitserlaubnisse) are also required, as in

1. Ordonnance du 2 nov. 1945, article 17. There are also additional advantages in matters of employment.


3. Ausländergesetz 1965, Article 2(1), BGBl. I, 353. Special provision is also made for EEC nationals; cf. Article 2(3). Entry without a permit, where that is required, and residence without such permit are punishable with a fine and up to one year's imprisonment: Ibid., Article 47(1)(1),(2). Arbeitserlaubnisse may be limited in time, restricted to particular areas or made subject to other conditions: Ibid., Article 7.

4. Grundgesetz, Article 19(4); Schiedermair, Handbuch des Ausländerrechts der Bundesrepublik Deutschland, (1968), pp. 214-227; AuslG. Article 6(1).

5. AuslG. Article 5; Schiedermair, op. cit., p. 226.
France, and recent legislation provides that these may be either restricted to a particular job with a specified employer, or unlimited.\footnote{1} Unrestricted work permits may be issued where the applicant has been regularly employed for the last five years, where he has married a German national who is ordinarily resident in the Federal Republic, where he is ordinarily resident himself and has been granted privileged status (Aufenthaltsberechtigter), or where he has been recognised as a refugee by the German authorities.\footnote{2} The special permit is valid for five years and, after ten years' residence, is subject to no further time limit.\footnote{3} Unless the alien is in an exempted category, the issue of work permits generally is conditional on possession of the requisite residence permit, but a work permit may also be issued to one whose deportation has been temporarily suspended.\footnote{4}

Reference was made above to the privileged status of the 'Aufenthaltsberechtigter'. Once again, this classification is the source of substantial benefits for the long-term resident, who has established roots and economic ties in the Federal Republic. The Ausländergesetz 1965 permits this title of "privileged resident" to be granted to aliens resident for at least five years and who have adapted themselves economically and socially to the life of the state. Those who

\footnote{1}{Verordnung über die Arbeitserlaubnis für nichtdeutsche Arbeitnehmer, 1971 BGBl. I, 152, Articles 1, 3.}

\footnote{2}{Ibid., Article 2.}

\footnote{3}{Ibid., Article 4. The law declares the circumstances in which a work permit may be refused or withdrawn (ibid., Articles 6, 7), but any such decision must be supported by reasons (ibid., Article 14), which may thereafter be challenged.}

\footnote{4}{Ibid., Article 5.}
benefit from this status are not subject to area restrictions, to time limits or other conditions, and the grounds upon which they may be expelled are substantially reduced. The alien has no right to the grant of these privileges, but once his status has been recognised he cannot then be reduced to the residence permit class, although he continues to be liable to expulsion on the limited grounds. In certain circumstances the residence permit and the status of privileged resident terminate automatically, for example, where the alien ceases to hold a valid passport or where he changes or loses his nationality. In such cases there is no right of appeal against this automatic working of the law, although if any measures are taken to effect actual deportation, then it is open to the alien to challenge their legality.

Both the French and the German systems employ the "refus de séjour" as an intermediate stage between lawful residence and expulsion. The alien whose residence permit is refused or withdrawn comes under a duty to leave the state with due dispatch, although he is not at that time generally subject to police measures. Expulsion itself is predicated


2. The AuslG. declares simply that the alien "kann" be granted privileged status: Article 8(1).

3. AuslG. Article 9.


upon more substantial grounds. French law is not very specific in the matter, but simply authorises the expulsion of an alien whose presence "constitue une menace pour l'ordre public ou le crédit public".\(^1\) German law on the other hand describes in some detail eleven grounds which may justify expulsion in such a way as to impose distinct and significant restrictions on the discretion of the authorities.\(^2\) In France and in Germany the alien who is expelled comes at once under a duty to leave. In practice, a reasonable time is allowed for departure and expulsion will be delayed pending the outcome of any appeal.\(^3\) The departure itself is encouraged by the imposition of penalties for failure to leave and, in Germany, by provisions which authorise the physical

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1. Ordonnance du 2 nov. 1945, article 23. For the limits of judicial and administrative review, see above, pp.408-409, and ibid., articles 24-28. Expulsion may also be ordered by the 'Préfets' of frontier and coastal 'départements'.

2. AuslG. Article 10(1). A general provision is retained to order the expulsion of an alien when "seine Anwesenheit erhebliche Belange der BRD aus anderen Gründen beeinträchtigt:" ibid., Article 10(1), Nr. 11. Schiedermair has noted that expulsion under this essentially political provision cannot be effectively challenged on appeal, "weil es sich insoweit um eine Regierungsakt und nicht um eine Verwaltungsakt handelt": op. cit., p. 163. See below, pp. 476ff, for examples of the further limits imposed by the courts on the discretion of the authorities. Cf. VerwRspr. Bd. 18 S. 737 (OVG, Hamburg, 1967); VerwRspr. Bd. 21 S. 353 (BVerwGe, 1970); VerwRspr. Bd. 21 S. 981 (OVG Münster, 1969); VerwRspr. Bd. 21, s. 982 (VG, Baden-Württemberg, 1970).

3. Ordonnance du 2 nov. 1945, articles 24, 25. It has been held that the provisions for appeal against expulsion in article 25 apply only to those aliens who show that they have entered France lawfully and who hold residence permits: Cons. d'État, 2 fév. 1962, Annuaire Français de Droit International (1963), 997. Cf. VerwRspr. Bd. 19 S. 481, 483; AuslG. Article 12(1); Schiedermair, op. cit., p. 169.

removal (Abschiebung) of the alien. In France, the emphasis is on repeated prosecution for illegal residence, rather than forcible removal. German law makes no specific provision in respect of destination and the first choice is given to the alien. It is generally accepted that the state of nationality is obliged to receive the alien, although both France and Germany have concluded a number of bilateral treaties specifically governing the return of expellees.

Both régimes give specific recognition to the rights of refugees and stateless persons. In Germany, the expulsion of ordinarily resident refugees is permitted only for serious reasons of public safety and order, and similar provisions restrict the choice of destination. Under French law the power of expulsion in cases of national security or those involving 'ordre public' is retained, but a right of appeal to the French Refugee Authorities is guaranteed.

1. AuslG. Article 13; note the limitations imposed by Article 14.
3. It has been suggested that for the state to select a destination would be to involve the authorities in an interference with the reserved domain of other states: Schiedermair, op. cit., p. 171. On the effect of expulsion, see VerwRspr. Bd. 19 S. 481.
5. In France, known as "conventions de prise en charge de personnes à la frontière": Batiffol and Lagarde, op. cit., p. 198; in Germany, as "Übernahme-" or "Schubabkommen": AuslG. Article 22; Schiedermair, op. cit., pp. 178, 227ff.
7. Loi du 25 juillet 1952, article 5. The alien is excused from the penalties imposed by article 27, ordonnance du 2 nov. 1945 for failure to leave if he shows that it is impossible for him to depart from French territory: Kiss, Répertoire de la Pratique Française en matière de Droit International Public, vol. IV, p. 423; Batiffol and Lagarde, op. cit., p. 197. Such alien may nevertheless be obliged to reside in a given area and to report periodically to the police: ibid., article 28.
cases of expulsion and deportation, French and German law both provide a discretionary power to suspend execution of the measures in cases of hardship and in view of other compassionate circumstances.¹

The content of French and German law is a further illustration of the current tendency of states to afford to the alien at least some sort of appeal in the matter of expulsion. As is the case in many states, both French and German law also recognise that the long-resident alien occupies a position different to that of one who has just arrived or who is still on the point of initial entry. His special status warrants special protection, and there is an increasing readiness on the part of states to restrict expulsion to grounds of the most serious nature. Any alien who is deported suffers a punishment distinctive by reason of his alienage, and the longer he has been resident in the host country, the greater will be the hardship. At the present time it cannot be said that there is a rule of general international law which forbids the expulsion of resident aliens, but there is a generality of practice sufficient to indicate the special position of this class. This is balanced by recognition of the fact that the receiving state is entitled to expect more from the resident alien, than from the transient alien. Thus, it is the former who may on occasion be called upon to perform military service,² and who is required to submit to the

¹. E.g. AuslG. Article 17 (Duldung); Schiedermair, op. cit., pp. 195-199.
². See Opinion of the King's Advocate 1824, on the question of the liability of British subjects to military service in the Netherlands: 6 B.D.I.L., 248-249.
jurisdiction and to seek his remedies in the local courts. ¹.

In return, state practice as evidenced by the content of municipal law suggests a restriction on the permissible grounds for expulsion, together with a more thoroughgoing examination of the individual's interests and expectations.

It may be that the most significant confinement of the discretionary power of expulsion can be achieved by way of the regional treaty-based organisation such as the EEC. Here, as in matters of entry and exclusion, the concern is with the development of Community law, as similarly, under the European Convention on Human Rights, the concern is with the concept of a European 'ordre public'. It has been suggested also that the measure of expulsion may well be incompatible with the development of a political, economic and legal community. Expulsion is essentially a measure of self-defence, to be applied in the interests of the community as a whole. In many cases the local law will be adequate to cover minor criminal infractions, and it is debatable to what extent the discriminatory provision of deportation is additionally justifiable.

Municipal law accepts that, whether it be a civil or a criminal proceeding, deportation is a severe penalty which must be founded on serious reasons. In the systems examined there is recognition also of the requirement of a hearing as a necessary pre-condition to the making or execution of an

¹. See Mr. Crutchett's case (1864); 6 B.D.I.L., 252-253. It is also necessary to consider the case where the long-resident alien may have acquired the "effective nationality" of the host state: Brownlie, Principles of Public International Law, (2nd. ed., 1973), p. 506. Cf. Nottebohm Case, I.C.J. Rep. 1955, p. 4, at p. 23.
order of expulsion. Some states will permit an appeal on the merits, while others simply allow the alien to put forward representations. But in every case it is open to the alien to challenge the legality of the measure, and to require that the law control not only formal illegality, but also the arbitrary or abusive exercise of power. These points emphasise the inherently discretionary nature of the "right" of expulsion, although it is to be admitted that one must still seek after further and substantive limitations on the margin of appreciation enjoyed by state authorities, particularly in "political" matters.

Nevertheless, it is implicit in existing provisions of municipal law that the state's power of expulsion is not sovereign and unlimited. The variety of these provisions may be reduced to a common emphasis on the general principles which international law proposes as fundamental, namely, that expulsion should be based on "reasonable cause" and founded on a decision taken in accordance with law; that the power should not be abused and that irregularities should be controlled by the law; that no decision on expulsion should be taken without consideration of the alien's acquired rights and other legitimate interests and expectations; and that the alien should be treated with due regard to his inherent dignity and to his basic human rights. Certainly, there remain areas of penumbra, especially in the state's margin of appreciation in the matter of reasonable cause, but the standards of international law throw some light even here, limiting the discretion by reference to the principle of good faith. The power of expulsion may be a sovereign right, in that it pertains
to every state for that state's protection, but it is a power which is limited, particularly by treaty obligations, and generally by the obligations imposed by customary international law.
CHAPTER XIII

The Impression of Treaty Obligations upon the General Power of Expulsion

(1) Introductory

Expulsion may not only be accomplished in such a way as to depart from the standards of general international law, but it may also violate obligations expressly assumed in treaties. Bilateral treaties of commerce and establishment play a major role in putting nationals of states parties in a privileged position in matters of entry and expulsion, but due regard must be paid also to the compelling effect of multilateral treaties and other international instruments, whose primary concern is with human rights. The importance of such instruments in the setting of standards has been examined above, and for present purposes a brief recapitulation of their relevance to expulsion will suffice.

The Universal Declaration of Human Rights 1948 does not deal directly with the distinction between aliens and nationals, and it deals only briefly with matters of entry and expulsion. Article 13(2), for example, declares that everyone has the right to leave any country including his own, and to return to his country. Article 15 prescribes the right of everyone to a nationality and to protection against the arbitrary deprivation of nationality. Since 1948

1. See above, Chs. IV, V.
significant advances have been made in the development of human rights principles, particularly the norm of non-discrimination, and these culminated in the multilateral treaties of the 1960's. However, it is notable that the International Convention on the Elimination of All Forms of Racial Discrimination 1966 expressly reserves to states the authority to apply "distinctions, exclusions, restrictions or preferences" between citizens and non-citizens. The international covenants of the same year do not draw such a hard and fast distinction. Thus, Article 2 of the International Covenant on Economic, Social and Cultural Rights declares that the rights enumerated are to be guaranteed without discrimination of any kind, such as, inter alia, national origin or other status. Paragraph (3) of that same Article, however, makes provision in favour of "developing countries" to determine, "with due regard to human rights and their national economy, .... to what extent they would guarantee ... economic rights ... to non-nationals". Subsequent articles of the Covenant refer without distinction to the rights of every one, for example, to gain his livelihood.

1. Article 1(2).

2. In London Borough of Ealing v. Race Relations Board [1972] the House of Lords drew a distinction between "nationality" and "national origins". The Council had refused to include a man on their housing list by reason of his Polish nationality, and the Court held that this was not caught by the anti-discrimination provisions of the Race Relations Act 1968. However, the words of Article 2(2) of the International Covenant cover also discrimination by reference to "national origins .... or any other status". This appears to favour an interpretation which includes non-citizens for most purposes.

3. Article 6.
and to education. Article 25 provides scope for fairly wide derogations and declares the "inherent right of all peoples to enjoy and utilise fully their national wealth and resources". It might be argued that this permits and justifies the expropriation of foreign-owned property, and even the removal of a substantial alien minority, if that minority exercised control over a major portion of the national economy.  

The International Covenant on Civil and Political Rights refers expressly to "citizens" when it deals with political rights and with participation in public affairs and in the public service. The general guarantee, however, applies to all individuals within the territory of a state party and "subject to its jurisdiction". The right of derogation, which is permitted under Article 4, is limited both by reference to a state's other obligations under international law and to the principle of non-discrimination. Article 6 in turn guarantees the right of "every human being" to life and Article 7 that "no one" shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. The similar provision in Article 3 of the

1. Article 13.

2. See the arguments put forward by President Amin to justify the expulsion of Asian non-citizens, above pp. 365ff.

3. Article 25. See also Article 27, which provides for the special protection of ethnic, religious or linguistic minorities.

4. Article 2(1). Cf. Article 1, European Convention on Human Rights, which refers simply to every one within the jurisdiction of the High Contracting Parties; this appears to be wider than the provision in the International Covenant.

5. Cf. Articles 2 and 3 of the European Convention.
European Convention has been seen to be applicable to the case of deportation and this restatement in an international instrument is of importance both for its own sake and as evidence of a developing *opinio juris*. Further rights are again expressed in terms of their applicability to "everyone"¹ or, in the case of Article 12 which deals with freedom of movement, to "everyone lawfully within the territory of a State". Derogation is also permitted under this Article for reasons of *ordre public*,² but extensive guarantees are anticipated for aliens who are threatened with expulsion. Article 13 declares:³

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit reasons against his expulsion and to have his case reviewed by, and be represented for this purpose before, the competent authority or a person or persons especially designated by the competent authority."

Additionally, Articles 14 and 26 affirm the principle of equality before the law, and the right of access to the courts and tribunals for everyone.

The boundaries which, according to general international law, limit the discretion of states in the matter of expulsion

1. E.g. Articles 8, 9, 10.

2. Article 12(4) declares: "No one shall be arbitrarily deprived of the right to enter his own country". Does this mean that he may be "lawfully" so deprived? Cf. Article 3(2), Fourth Protocol, European Convention on Human Rights: "No one shall be deprived of the right to enter the territory of the state of which he is a national." See also Ingles, *Study of Discrimination in respect of the Right of Everyone to leave any Country, including his own, and to return to his Country*, U.N. Doc. E/CN.4/Sub.2/229/Rev.1.

are here defined with greater precision. However, some caution is necessary in the evaluation of recent conventional provisions, particularly in the light of the judgement of the International Court of Justice in the North Sea Continental Shelf Cases. While the details of such provisions still fail to qualify as rules of customary international law, and while the entry into force of the treaties is delayed by the absence of ratifications, nevertheless the agreements in question may still indicate the content of present human rights standards. Thus, there is throughout an insistence on certain minimum rights, on the procedural guarantees of due process and the right of appeal, and on the recognition of the rule of law as the very minimum protection against arbitrary treatment.

Rights of greater substance will usually result from bilateral treaties, and such rights are considerably more important once the treaty alien has secured admission and has established himself in business. It has already been seen that diplomatic protest would frequently follow the application of discriminatory policies to treaty aliens as regards admission, and the case is much the same in regard to policies which may be applied after entry, whether in matters of expulsion or conditions of residence. In 1874, United States Secretary of State Mr. Fish suggested that a law or ordinance affecting those of a specific faith might be the sort of law which the commercial


2. Note, for example, treaty limitations upon the nationalisation of foreign-owned property which relate the measure to the public interest and the payment of just compensation; see Article 14, United Kingdom-Japan Treaty 1963: 478 U.N.T.S., 86; Article 5, U.S.A.-Japan Treaty 1953: 206 U.N.T.S., 143. In practice the alien may also benefit from local and inter-state investment guarantees.

3. See above, pp. 329-224
treaty with Russia of 1832 expressly anticipated should also apply to treaty nationals. Nevertheless, in the case of one Rosenstrauss he concluded that the withholding of a trading licence solely on account of religious faith appeared to be in direct violation of the said treaty.3

In the case of Orazio de Atellis, the United States Government claimed that the expulsion violated not only the rights secured to inhabitants by the Constitution, but also infringed the United States-Mexico treaty of 1832 which guaranteed to the citizens of each country, while within the jurisdiction of the other, "special protection" to their "persons and property", leaving "open and free the tribunals of justice". Essentially, the treaty anticipated the protection of interests and the availability of a right of appeal, but it was never suggested that a treaty of commerce might abolish altogether the right of expulsion. In the Gardner case, the Board of Commissioners said:

"It is not to be presumed that either nation, by any article or stipulation of the treaty ..., intended to deprive itself of taking a reasonable measure of precaution against an injury likely to result immediately from the residence of one national in the territory of another."

5. Whiteman, op. cit., p. 476 and note to p. 497. In fact, Gardner was a confidence trickster who had never owned the silver mine which he claimed to have lost, nor had he been expelled.
This view has been reaffirmed in other contexts, and there seems to be a presumption that, in the absence of express provisions to the contrary, treaties of friendship, commerce and navigation "should not be considered as renouncing such an important attribute of sovereignty as the right of expulsion."1 Where such treaties exist, then it will be assumed that the immigration laws continue to apply and that expulsion remains available. But, at the same time, it must follow that the general power is limited in view of those obligations which the parties have agreed to bear. Only occasionally will the parties agree to limit expulsion to serious infractions of 'ordre public',2 but it is more common to find express and reciprocal guarantees in the matter of access to the courts and in the provision of rights of appeal. It is this type of provision which, by submitting discretionary powers to control by the law, ensures a certain protection against arbitrary treatment.


The European Convention does not guarantee any right of residence in a particular state. Expulsion, as such, is not directly covered, but it is apparent that an arbitrary or otherwise unlawful expulsion might violate some other protected right, and it has already been seen that the Convention can be brought in issue in matters of entry and exclusion. A refusal to admit and an order of expulsion may amount similarly to a contravention of, for example, Articles 3, 5, 8 and 14 of the Convention. In one case, the Commission observed:

"L'expulsion d'un étranger peut, dans certaines conditions exceptionnelles, constituer un traitement inhumain ou dégradant au sens de l'article 3 ..."

Regard must also be had, both in matters of entry and expulsion, to the special position occupied by the family. Forcible removal or the refusal of entry might well effect the separation of husband and wife, and to that extent could constitute a breach of Article 8 of the Convention. In Application 2535/65 v. Federal Republic of Germany, the applicant alleged just such a breach in regard to the proposed

1. Application 238/56: 1 Yearbook 205; Application 3325/67: 10 Yearbook 528; see also Residence of an Alien Trader (Germany) Case [1954] I.L.R. 209.

2. See above, pp. 293ff.

3. Application 984/61: Recueil 6. The Commission had in mind the expulsion of an individual to a state in which he faced persecution or the death penalty.

4. See above, p. 298

5. Recueil 17, p. 28.
deportation of her husband on account of his many criminal convictions. In the circumstances, the Commission declared the claim inadmissible as being manifestly ill-founded. It noted that the applicant had the opportunity of leaving Germany with her husband and of living with him in Austria, his own state. The applicant had married after the expulsion order had been made, and consequently knew the situation and the risks involved.¹

In fact this case illustrates just one aspect of the position which currently prevails in German municipal law. Under the Federal Constitution, general international law and the specific provisions of bi- and multilateral treaties are incorporated into the local law.² Where treaties such as the European Convention on Human Rights, the European Convention on Establishment or the Treaty of Rome are concerned, the individual can plead his treaty rights before the national courts.³ For example, in a decision in 1956, the Federal Administrative Court (Bundesverwaltungsgericht) held that, by virtue of Article 6 of the Constitution and Article 8 of the European Convention, the family is under the "special protection" of the state.⁴ The alien threatened with expulsion in this case had subsequently married a German woman who was mother to a number of illegitimate children. In the view of the court, due regard must be paid to the likely effect of the

¹. See also Application 3898/68 v. United Kingdom, cited in Case Law Topics No. 2, pp. 10-11.
². Grundgesetz, 1949, Article 25.
⁴. Cited in 2 Yearbook 584.
order of expulsion on the family. If the unity and the integrity of the family are likely to be compromised, then it is essential that the interests of family protection be taken into account and set against the competing demands of 'ordre public'. These conditions had not been fulfilled and the expulsion was accordingly annulled. The discretionary power which the authorities enjoyed was thus to be confined within the limits of its essential function, namely, the protection of the state. The demands of public interest are not absolute and they can, and must, yield where the interests of the family are dominant. By contrast, the expulsion of a divorced husband and father was upheld in a more recent decision. The divorce, said the court, had removed the appellant from the family unit, but again it noted that even the divorced parent without custody has a right of access, and this too must be weighed in the balance against the public interest.

Although the alien may be able, indirectly, to invoke one or more of the rights guaranteed by the Convention, there are obvious deficiencies in this sort of protection. The Council of Europe has attempted in the past to encourage states to accept more specific obligations in favour of aliens, and in 1968 the Fourth Protocol to the Convention entered into force. However, many of the provisions which were originally

1. Note the "public interests" set out in Article 8(2). The court in this case accepted the family as a unit, even though the husband had no parental connection with the children born prior to the marriage.

intended to benefit aliens were substantially altered by the Committee of Experts.¹

Article 2 of the Protocol prescribes freedom of movement and residence for every one lawfully within the territory of a State Party and for the freedom of every one to leave any country, including his own.² These rights are subject to the usual restrictions "in accordance with law and necessary in a democratic society", but here again it is to the substance of the rights and of the permitted restrictions that one may look, in order to ascertain the limits within which state's discretion is confined.³ The final wording of this Article represents a compromise between the recommendations of the Consultative Assembly and the Committee of Experts. For example, the word "lawfully" was substituted for "legally" in order to take account of the wide discretionary powers commonly granted to administrative authorities in matters of entry and exclusion. It was also agreed by the Committee that an alien who is admitted under certain conditions of entry which he transgresses can no more be regarded as "lawfully" in the country.⁴ In addition, it should be noted


3. Article 2(3), and note the somewhat wider provision of paragraph (4). Cf. Article 12(3), Covenant on Civil and Political Rights, which appears to be narrower in scope.

that Article 2 does not grant or guarantee the right to work to aliens lawfully present, nor does it ensure freedom of choice in the matter of place of work. To regulate the issue of work permits in the light of social and economic needs is therefore quite permissible.\(^1\).

- Article 3 of the Protocol declares that no one shall be expelled\(^2\) by means either of an individual or collective measure from the state of which he is a national, and that no one shall be deprived of the right to enter the territory of the state of which he is a national.\(^3\). This provision may raise particular problems in regard to nationality. The Committee of Experts proposed the inclusion of a clause to the effect that "a state would be forbidden to deprive a national of his nationality for the purpose of expelling him,"\(^4\), but this was dropped because of doubts about touching on the controversial character of dematuralisation measures. In subsection (2), the phrase "No one shall be deprived of the right to enter" was substituted for the original wording, "Every one shall be free to enter" in order specifically to permit to states the power to investigate claims to nationality

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1. See the provisions for the control of employment in the law of the United Kingdom, above, pp. 261-263.

2. The Committee preferred "expelled" to "exiled", even though it applies normally only to aliens. Expulsion was to be understood in its usual sense, to drive away from a place, but it was agreed that extradition was not included: Council of Europe, Explanatory Reports, p. 47.

3. Note Patel et al v. United Kingdom, above, pp. 296ff. Cf. Article 12(4), International Covenant on Civil and Political Rights: "no one shall be arbitrarily deprived of the right to enter his own country." The Committee rejected this formulation of "his own country" as being vague and imprecise.

at the port of entry, and also to permit the imposition of any necessary quarantine measures.\(^1\)

It is the content of Article 3 which remains the basis of the continuing failure of the United Kingdom to ratify the Fourth Protocol. Under the Commonwealth Immigrants Act 1968, and now under the Immigration Act 1971, the United Kingdom authorities have the power to deport or otherwise remove non-patrial United Kingdom citizens. As a rule, such citizens will be removed to that Commonwealth territory to which they can be said to "belong". Alternatively, when permission to land has been refused, the prospective entrants may be subjected to the "shuttlecocking" procedure which involves removal to the point of embarkation for the United Kingdom.\(^2\) Immigration control as currently practised by the United Kingdom demands the mandatory exclusion of any non-patrial United Kingdom citizen who arrives without a special voucher or other entry clearance.\(^3\) Acceptance of the obligations in Article 3 of the Protocol would entail a complete review of existing controls, and continued distinctions between different classes of United Kingdom citizens would constitute violations of Article 3 alone.

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1. Council of Europe, *Explanatory Reports*, p. 48. However, it was accepted that the right declared was not absolute, in the sense of a right to remain in that territory. Thus, the extradited criminal sentenced in another state would not enjoy an unconditional right to seek refuge in his own state: ibid., p. 49.

2. In Patel et al v. United Kingdom the Government argued that if a person were sent repeatedly back and forth between different countries, that might ultimately raise a question under Article 3 of the Convention, which prohibits inhuman treatment. Otherwise, Article 3 was directed solely at the prevention of physical or mental maltreatment and suffering and could not be extended to a refusal of entry under immigration laws: Decision of the Commissioner as to Admissibility, 10th October 1970, pp. 23-24. But the Commission felt that such measures raised issues of law and fact properly dealt with on an examination of the merits: ibid., 35-37.

3. See above, pp. 260-261
and in conjunction with Article 14. 1.

Some sort of solution would appear to be provided by Article 5(4) of the Protocol. This provides that the territory to which the Protocol applies, and each territory to which it is applied by declaration of a Contracting Party, shall be treated as separate territories for the purposes of the references in Articles 2 and 3 to the "territory of a state". Article 5(1) makes provision for the extension of the Protocol to any territories for the international relations of which the Contracting State is responsible. If the United Kingdom were to take advantage of this provision, it would be entitled to continue to exclude and expel those United Kingdom citizens who derive their status from connection with a dependent territory. Immigration controls could be maintained, for example, in respect of United Kingdom citizens from Hong Kong. However, the United Kingdom would not be entitled to maintain such restrictions against United Kingdom citizens resident in independent countries, such as Uganda or Kenya, which are not within the purview of Article 5(1). The necessary changes in the immigration laws do not, at the present time, appear to be acceptable to the Government of the United Kingdom.

Finally, Article 4 of the Protocol prohibits the collective expulsion of aliens. This was inserted solely on the initiative of the Committee of Experts, and it bears little or no relation to what was actually proposed by the Consultative Assembly. The latter body wished to include wide

1. Note the observations of the Commission in Patel's case, above, pp. 296ff. See also, Belgian Linguistics Case, above, pp. 176-181.
ranging provisions regulating the individual expulsion of aliens, but these were rejected by the Committee of Experts.\(^1\)

The Assembly had proposed: \(^2\) (1) a lawfully resident alien\(^3\) should be expelled only if he endangers national security or offends against 'ordre public' or morality; (2) except where imperative reasons of national security otherwise require, an alien who has been lawfully resident for more than two years in the territory of a Contracting Party should not be expelled without first being allowed to avail himself of an effective remedy before a national authority within the meaning of Article 13 of the Convention; (3) an alien who has been lawfully residing for more than ten years should be liable to expulsion only for reasons of national security or if the reasons mentioned in (1) are of a particularly serious nature.\(^4\).

For a number of reasons, the Committee of Experts was unwilling to touch on the question of individual expulsions. It argued that these were adequately covered already by Article 3 of the European Convention on Establishment, and that further provisions would result in the risk of conflict between the two sets of rules.\(^5\) More to the point was the

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3. Note the intended restriction by way of the word "lawfully", p. 480, above.

4. Note the decisions of German courts, which have largely adopted these criteria in respect of treaty aliens and as a general basis for controlling the discretion of the authorities: below, pp. 496-498. Note also the notions of "Aufenthaltsberechtigter", "résident privilégié", and "settled" Commonwealth citizen, in German, French and United Kingdom law respectively.

5. On Article 3, see further below, p. 492
refusal of the Committee to accept any express limitations on the reasons which may justify expulsion. A majority maintained that the state concerned should alone be competent to appreciate the reasons which, according to its own law, might lead to expulsion,\(^1\) and that such matters were not the proper subject of control by the organs of the Convention.\(^2\)

These conclusions are, perhaps, the more surprising in the light of the obligations which states have assumed under Article 15 of the Convention.

Paragraph (1) of this Article permits States Parties, in time of war or other public emergency threatening the life of the nation, to take measures derogating from their obligations under the Convention. This exceptional competence is qualified by the condition that the measures taken be those strictly required by the exigencies of the situation, and providing that they are not inconsistent with the states' other obligations under international law.\(^3\) The words "public emergency threatening the life of the nation" suggest the application of an objective test to the facts in any given situation, and this has been the interpretation adopted by the Court and the Commission. In the first Cyprus case

\(^1\) Recognition was given to the overriding principle that "the decision of expulsion must be taken in accordance with law," i.e. within the reasons and procedure provided by internal law: Council of Europe, Explanatory Reports, p. 51. A provision permitting review of the legality of expulsion proceedings was considered acceptable, but not a substantive appeal going to the merits.

\(^2\) Council of Europe, Explanatory Reports, p. 51

\(^3\) Additional restrictions are imposed by paragraphs (2) and (3).
(Greece v. United Kingdom), the Commission ruled that it was competent to declare on the existence of a public danger and on whether the measures taken were required, although "the Government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation."

In the Lawless Case, the approach of the Court reflects a similar view, although its concern was primarily with the facts of the situation and the notion of a "margin of discretion" was not called directly in aid. The provisions of Article 15, and of the second paragraph of each of Articles 8 to 11, are open to both an objective and a subjective interpretation. The latter has been rejected in practice, and neither the Commission nor the Court will accept a Government's simple assertion in the matter as conclusive. It has been argued, and this is in line with what has been said earlier on expulsion in general international law, that the "margin of appreciation" occupies a middle position in these interpretations. The state enjoys a certain freedom of decision largely because it is in the best position to know the relevant facts, and because it is best placed to assess the measures which those facts may reasonably require. Whereas the existence of the facts can be determined objectively, the

1. Application 170/56: 2 Yearbook 177.
2. Yearbook 438.
3. These paragraphs permit restrictions on the rights and freedoms guaranteed which are reasonably necessary in a democratic society.
the state's actions on the facts are controlled by the requirements of reasonableness and good faith. Thus, the measures taken must not be employed for purposes other than the intended purposes. Article 18 of the Convention declares:

"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

This important provision expresses the essence of the notion of abuse of rights in international law, and the municipal law prohibitions on bad faith and "détournement de pouvoir".1

In further debate on the Fourth Protocol, the Committee of experts studied the possibility of including certain procedural guarantees in favour of aliens about to be expelled. These would have provided for a hearing and the opportunity to make representations before the competent authority, except in cases where the state considered that compelling reasons of national security required otherwise. The Committee rejected this proposal on the ground that to limit guarantees to those of a procedural nature was insufficient - it was better to have no provision at all. First, the guarantees would not apply where the state "considered" compelling reasons otherwise required.2 Second, the "competent authority" might well be the same body which had taken the original decision and there could, therefore, be no guarantee of impartiality.

1. See Application 493/59: 4 Yearbook 322, in which the applicant alleged that his detention in Ireland was ordered by the Government not for the purposes of preserving 'ordre public', but in order to remove a political opponent.

2. Cf. Lawless Case, above. See also present United Kingdom law and practice on expulsions in security cases, below, pp. 443 - 444
The Committee's reaction to the recommendations of the Consultative Assembly is unfortunate. In the light of the extent of the obligations already assumed by States Parties to the European Convention, it was to be hoped that there would be a greater willingness to accept guaranteed provisions in favour of aliens. The Committee's observations reflect the continuing desire of states governments to retain the broadest margin of appreciation in their dealings with aliens, and for the time being discretion in this respect must remain only indirectly confined by the Convention. Development of the concept of a "European public order", however, could prove to be the means by which all states parties came to recognise their own interest in and concern with the treatment of aliens throughout the Continent. The guarantees which the Convention does provide reflect closely those standards of general international law examined above. There can be no doubt that an expulsion would also be in breach of the Convention if it resulted in personal injury or damage to the property of an alien, if it was executed in breach of the local law, or if it led to the alien's removal to a state in which he faced political or other persecution. Although states alone may be competent to decide upon the adequacy of reasons for expulsion, the Convention clearly requires that the alien be permitted to challenge the legality of his arrest and detention. The fundamental assumption throughout the Convention is that discretionary powers are subject to control, and that state actions which are arbitrary, in that they are inspired by bad faith or otherwise reveal a "détournement de pouvoir", may be challenged.

1. Article 5(1)(f),(4).
(3) Expulsion and Treaties of Establishment

The general effect of those provisions which govern entry and residence in treaties of commerce and establishment have been examined above.1 "Establishment" is not confined to entry alone, but is a term of art applicable to all the provisions of a commercial treaty which affect the activities of aliens. The treaty itself will commonly attempt to lay down standards of treatment whose general object is non-discrimination with regard to treaty nationals and companies, and these standards may be expressed in terms of most-favoured-nation treatment, national treatment, or treatment in accordance with the international law standard.2

As a general rule, treaty provisions of this nature are not to be so construed as to affect existing laws on entry and residence, or the power to enact future regulations. In addition, the rights prescribed are limited by reference to the aims of such treaties, namely, the encouragement of bilateral trade and investment.3 There is, therefore, an

1. See above, pp. 327ff.


underlying assumption that the power of expulsion is retained, but it should be noted that the very aims and purposes of the treaty in question also indicate the confines of state discretion. The power of expulsion cannot be used in such a way as to frustrate those aims and purposes, and it is in this light that one should view the reservation common to such treaties which permits either party to apply measures necessary to maintain public order. 1.

The fact that the treaty alien remains liable to expulsion is frequently balanced by provisions which guarantee to him national and most-favoured-nation treatment regarding access to the courts, 2 and protection and freedom from unlawful molestation in no case less than that required by international law. 3 It has already been noted that international law demands that the alien should enjoy those procedural rights which are necessary to protect his substantive rights. 4 Today, the rights of access to the courts and to the equal application of justice are firmly established in general international law, whereas, in an earlier period, they resulted most frequently from the provisions of bilateral treaties. 5 These general principles


5. Neufeld, The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna, pp. 100ff.
are strengthened by the rule that a state may not adduce deficiencies in its own law with a view to avoiding its obligations, either generally, under international law, or specifically, under treaty.\(^1\)

The total effect of treaty stipulations may not seem to be very great. There will be the usual affirmation of civil rights and freedoms, and to that extent the treaty national may be protected against arbitrary executive action. Some guarantees may also be given in respect of legally acquired rights or interests and, for example, expropriation is often limited to public purposes and to the prompt payment of just compensation.\(^2\). The laws and regulations which govern admission, residence and expulsion are expressly retained, but the treaty will call for their liberal application. It follows also that entry and residence must be equitably accorded, for they are the necessary preconditions to the exercise of those economic rights which it is the aim and purpose of the treaty to secure.\(^3\). However, in practice little or no clear restriction is offered in respect of the reasons of 'ordre public' which may be called upon to justify expulsion. Thus, the European Convention on Establishment 1955 expressly provides that each Contracting Party shall have the right to judge reasons of 'ordre public' by national


\(3\). There will not necessarily be any liberalisation in favour of those entering for purposes other than trade and investment; *Piot*, La Convention d'Établissement du 25 novembre 1959 entre la France et les États-Unis d'Amerique, Ann. Fr. (1960), 953, 957–958, 960 and *passim.*
criteria. A limited right of appeal is called for in the case of treaty aliens lawfully resident in the territory of Contracting Parties for two years or more, and they are to be allowed to make representations against their removal before the competent authority. Most states parties permit representations on the merits to be made before some sort of advisory committee, while at the same time the normal judicial proceedings are left open, by which the alien may challenge the legal basis of the executive action. The reasons of 'ordre public' which justify expulsion fall within that margin of appreciation which states enjoy. Action within the prescribed limits is only occasionally opened to direct judicial challenge, as is the case, for example, in the Federal Republic of Germany.

Nevertheless, the extensive claims of state authorities and the apparent meaning of treaty stipulations regarding 'ordre public' can be deceptive. There is already a considerable body of authority for the view that 'ordre public' is not to be allowed to nullify obligations assumed under treaty.

1. Article 3(1); Protocol, Section 1(a)(1),(3). The standard of national treatment is demanded in respect of access to the courts and administrative tribunals, in the protection of rights and interests: Article 7. Section 3 of the Protocol declares that 'ordre public' is to be understood in the wide sense generally accepted in continental countries, but as such it is clearly a concept of, and limited by, the law. Cf. Guardianship of Infants Case, below, pp. 493-496.

2. Article 3(2).

As presently understood, the concept has been described thus: 1.

"Il est employé pour mettre en échec le norme ... invoqué de façon purement négative, sous forme d'exception; et il est donc de son essence d'être imprévisible dans son intervention et illimité dans son domaine. Il justifie d'avance la substitution d'un Droit d'exception au Droit en vigueur."

Characterised in this way, the exception of 'ordre public' represents an unlimited reserve of sovereign power, which can be applied by public, executive, administrative and judicial authorities. In the Guardianship of Infants Case, the Swedish Government argued that not even a treaty can modify rules of 'ordre public', which guarantee the integrity of those legal principles whose respect is necessary and vital for the state. 2. To this claim for the exclusive application of certain internal laws, the Netherlands objected that, if it were allowed, the operation of 'ordre public' would enable any contracting state to destroy the very object of the Convention in dispute. 3. In this case, a Dutch child residing in Sweden had been placed and maintained under the Swedish régime of "protective custody" and it was alleged that this constituted an impediment to the guardian's right to custody which was to be determined by the national law of the child.

Sweden maintained its view that the 1902 Hague Convention must be interpreted as containing a reservation authorising, on the ground of 'ordre public', the overruling of a foreign


3. Ibid., pp. 99-100. See also, Belgian Linguistics Case, above, pp. 176-181.
law which would normally be recognised as the proper law.

In its judgement, the Court did not feel obliged to pronounce upon the Swedish contention, but a number of views were expressed in separate opinions on the purview and scope of 'ordre public'.

Lauterpacht stated the general principle that a state is not entitled to whittle down its treaty obligations concerning one institution by enacting in the sphere of another institution provisions whose effect is to frustrate the operation of a crucial aspect of the treaty. In his opinion, 'ordre public' did cover the institution of exceptional measures for the protection of minors, even to the exclusion of guardianship. In addition, this was a principle which must be recognised as a general principle of law in the field of private international law:

"the notion of 'ordre public' ... being a general legal conception, its content must be determined in the same way as that of any other general principle of law in the sense of Article 38 [of the Statute of the International Court of Justice], ... namely, by reference to the practice and experience of the municipal law of civilised nations in that field."

On the general applicability of 'ordre public' in treaty relations, he noted:

"When [the] State is bound by a treaty in relation to a particular subject-matter it can invoke

1. I.C.J. Reports, 1958, p. 55, at p. 70. The Court dismissed the Netherlands claim by a majority of 12-4. In its view, the 1902 Hague Convention concerning the Guardianship of Infants did not cover protection of children and young persons as this was understood by the Swedish law. In addition, the law in question did not and could not have any extra-territorial effect.

2. Ibid., Separate Opinion, p. 79 at p. 83.

3. Ibid., pp. 89-90.

4. Ibid., p. 92.

5. Ibid., p. 100, emphasis supplied.
public order only if, in case its action is challenged, it is prepared to submit the legality of its action to impartial decision. It is that jurisdiction which removes the notion of and recourse to 'ordre public' from the orbit of uncertainty, pure discretion and arbitrariness and which endows the treaty with the character of an effective legal obligation."

Judge Spender was even less willing to compromise. He characterised 'ordre public' as a concept of municipal law and noted that treaty and conventional obligations were to be faithfully observed; the two did not mix and the provisions of municipal law could not prevail over those of treaty or convention. If any such reservation were implied, it would be of such an indefinable character, so variable and unpredictable, so dependent upon the will of the parties, that there would be very little left in the legal sense of any obligations.

These views, and particularly those expressed by Judge Lauterpacht, can be usefully applied to the reservations of 'ordre public' which have been met in treaties of commerce and establishment, and also in the provisions of municipal law. Unbridled resort to the let-out clause of 'ordre public' could easily defeat the whole object of such treaties, although from a realistic point of view it is uncertain to what extent states parties would be willing to make these provisions justiciable. The case is stronger where a multilateral treaty provides the basis for a regional

1. I.C.J. Rep. 1958, Separate Opinion, p. 120 et seq.
2. Ibid., p. 128. Spender concluded that there could therefore be no "reservation, exception or exclusion" of 'ordre public'; in the course of his judgement he referred expressly to the Greco-Bulgarian Communities Case P.C.I.J. (1930), Ser. B, No. 17, p. 32. See also I.C.J. Rep. at p. 130 and per Cordova, dissenting, pp. 140-142; Treatment of Polish Nationals Case, P.C.I.J. (1932), Ser. A/B, No. 44 at p. 24.
arrangement and for the judicial settlement of disputes. It is very strong indeed where economic, social and legal relationships are brought under one régime, as in the EEC.¹

The courts of the Federal Republic of Germany appear to have begun to adopt a restricted interpretation of the 'ordre public' clause, and to have gone some way towards giving it substantive meaning. These developments are not solely due to a familiarity with the clause in the local law, but represent also a response to its inclusion in many treaties to which the Federal Republic is a party. In two cases it was held that working without the requisite permit was contrary to 'ordre public',² and this conclusion was based upon the requirements of economic order and upon the presumption that entry under treaty must be in accordance with the immigration laws.³ In each of these two cases the court was called upon to interpret the 1960 Treaty of Establishment between Germany and Greece, but to this end it applied the definition and interpretation of 'ordre public' to be found in the 1955 European Convention. In another case in 1970 a Turkish national had entered Germany under a similar treaty, but his residence permit was so restricted as to prevent him from setting up his own business.⁴ The court noted that the issue of residence permits and the imposition

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¹. See further below, pp. 503-504; also Lyon-Caen, loc. cit., pp. 703-705.
⁴. BVerwGE, 36. 45.
of conditions was a matter for the discretion of the authorities, and the appellant was unable to rely in this case on any specific provisions of the treaty, which required that entry and establishment be in accordance with the laws. However, the court affirmed that the discretion of the authorities was subject to control by the courts, and that an exercise of that power which was *ultra vires* or otherwise improper could be struck down. In the circumstances of this case, the fact that the appellant was married to a German woman was not itself sufficient reason to permit unconditional residence. Such a decision did not impose separation on the couple, although in actual cases of expulsion family and marriage considerations must be weighed against the public interests.

It has also been held that for an alien to lend his passport to another for the purposes of illegal entry endangered the interests of the Federal Republic, and was itself sufficient ground for expulsion. In other cases, it has frequently been emphasised that public safety and order, not revenge and punishment, are the proper issues which underlie the decision on expulsion. Conviction for crime is not itself sufficient, although it may be a lawful precondition to the exercise of the discretion. There will

1. Cf. Article 114, Verwaltungsgerichtsordnung (VwGO), 1960; BGBl. I, 17. See also the powers of adjudicators under the Immigration Act 1971, section 19 and below, pp. 454ff.

2. VerwRspr. Bd. 19 S. 439, decision of the OVG, Münster 1970. See also Ausländergesetz 1965, Articles 3(1), 10(1), Nr. 6, 11.

3. VerwRspr. Bd. 19 S. 964, decision of the BVerwGe 1969; here expulsion following conviction for manslaughter was upheld - the case involved diminished responsibility, there was a possibility of repetition and consequently a danger to public order. Cf. VerwRspr. Bd. 20 S. 847, decision of the BVerwGe 1969; expulsion must not offend against the principle of proportionality, but "wer die Verkehrssicherheit gefährdet, gefährdet die innere Sicherheit des Staates" (at p. 851). See also United Kingdom practice where a court does not recommend deportation, below p.151
be a misuse of discretion if the authority limits the exercise of its judgement to establishing simply the existence of one of the conditions of expulsion, such as a conviction. Moreover, the authority must base the exercise of discretion upon the principle of proportionality. There must be facts which support the necessity of the measure, or otherwise it does not justify its purpose: 1.

"Die Ausweisung [hat] nicht den Zweck, ... ein bestimmtes menschliches Verhalten zu ahnden, sondern einer künftigen Störung der öffentlichen Sicherheit und Ordnung oder einer Beeinträchtigung sonstiger erheblicher Belange der BRD vorzubeugen."

(4) Expulsion and the European Economic Communities

The basic principles of freedom of movement within the Member States of the EEC have been examined above and need no further elaboration. 2 One fundamental rule underpins this new régime, that in the application of the Treaty there is to be an end to discrimination based on nationality. 3 However, the self-same article which prescribes this "règle de base" provides also that non-discrimination cannot be called in where there are specific or particular rules which demand a different approach. In so far as the Treaty of Rome, in Articles 48 to 57, advances the cause of freedom of movement and the right of establishment, it also reserves to states the power to curtail those freedoms in the interests

2. See above, Ch. X.
of 'ordre public', public safety and public health.\footnote{1}

Directive 64/221 attempts to confine and structure these concepts, to which Member States may resort on occasion in order to justify the refusal of admission, the refusal of a residence permit, and the expulsion of an EEC national.\footnote{2}

It has been argued that the inclusion of these "let-out" provisions represents a significant retention of sovereign powers and pure discretion.\footnote{3} In view of what has been said above, however, it can be seen that they are not unlimited. They are confined indirectly by the aims and purposes of the European Communities and directly by the express effect of Community law. Thus, Directive 64/221 provides, for example, that these exceptional powers may be exercised only on grounds which relate to the individual.\footnote{4}

It is important to remember that the community worker has a legal right to a residence permit and that therefore the provisions of 'ordre public' must operate by way of exception.\footnote{5} In a German case in 1962, it was held that the concept of 'ordre public' was to be understood in the wide sense current in continental countries, and reference was made to the Protocol of the European Convention on Establishment. Nevertheless, the court went on

\begin{itemize}
  \item \footnote{1} Articles 48(3), 56(1).
  \item \footnote{2} See above, pp. 322ff.
  \item \footnote{3} Desmedt, \textit{La Police des Étrangers}, 1966 Cahiers de Droit Européen, pp. 55, 56.
  \item \footnote{4} Article 2(2); general economic grounds are absolutely ruled out.
  \item \footnote{5} \textit{Re Residence Permits [1966]} C.M.L.R. 5, decision of the Berlin Verwaltungsgericht (1962)
\end{itemize}
to declare that it had the power to examine the reasons advanced in order to establish whether they met the requirements of 'ordre public' as a matter of law.¹

There have been further developments since that date. For example, the European Court of Justice has held that the term "Community worker" is a term of Community law:²

"If this could arise from internal law, each State would then have the power to modify the concept of 'migrant worker' and to eliminate certain categories at will from the protection of the Treaty."

The same reasoning is equally applicable to the Treaty concept of 'ordre public'.³ In City of Wiesbaden v. Barulli, the court noted that since Directive 64/221 the legal bases of many earlier decisions had been altered, although even here a somewhat reserved approach was adopted.⁴ The court felt

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3. But note Re Expulsion of an Italian Worker [1965] C.M.L.R. 53, in which the OVG Münster concluded that the question whether an alien has violated 'ordre public' falls to be decided by German law, whether the power of expulsion is exercised under Articles 48(3) and 50(1) of the Rome Treaty or under Article 2(2)(ii) of the Treaty of Friendship between Germany and Italy. This latter provision declared that after a period of "ordinary residence" of more than five years Italian nationals were only to be expelled from the Federal Republic on grounds of state security, or when the threat to public safety, order or morality is particularly grave. See also, VerwRspr. Bd. 20 S. 844, decision of the OVG Rheinland-Pfalz (1969) to similar effect. The court took note of Article 3(2) of the Directive 64/221, which declares that conviction alone is not a sufficient ground for expulsion, but held that the authorities had not, in the circumstances, abused their discretion.

the definitions of that Directive to be fairly narrow:¹.

"... they do not create a particular concept of 'ordre public' of paramount significance. Consequently one must proceed from the concept customary in the countries concerned and so consider the definitions as modifications .... Here we are dealing with inter-state and supra-national law."

If the provisions of Directive 64/221 are to be taken as modifications, then clearly they override national law notions and subject them to a Community law standard. Also one should not underestimate the strength and scope of the modifications, for they severely limit the circumstances in which repressive measures may be taken by state authorities.

Such measures are thus not justified by reason only of the criminal conviction of the individual,² nor by the simple expiry of the individual's identity document.³ Health reasons are specifically listed, and it is expressly provided that diseases or disabilities occurring after the initial residence permit has been issued do not justify either a refusal to renew such permit or an order of expulsion.⁴

The exercise of that discretionary power which is retained is structured by the requirement of certain procedural guarantees, and there must be available some form of appeal

¹. [1968] C.M.L.R. 239, at p. 245. The court also referred to the freedom of people to move about, inquiring into or seeking work, as a privilege rather than a right: ibid., p. 246, sed quaere.

². Directive 64/221, Article 3(2).

³. Ibid., Article 3(3), (4).

⁴. Ibid., Article 4 and Annex. Cf. United Kingdom Immigration Act 1971, section 30; Mental Health Act 1959, section 90. For some early examples of agreements for the mutual retention of lunatics, see 6 B.D.I.L., 103-106.
against, or review of, decisions to refuse admission, to
refuse the issue or renewal of a residence permit, or to
order expulsion.¹ The Directive declares that the Community
national shall have the same possibilities of review as are
available to the local citizen in respect of acts of the
administration,² but in regard to deportation proceedings,
the reference to national treatment is clearly inapplicable.
National authorities have, in many cases, opted for the
informal procedure of permitting representations before an
advisory committee. It is open to debate whether such
procedures fulfil states' obligations under the Treaty,
particularly as the appointment and membership of the committees
remains in the hands of state authorities.

The EEC Treaty has created its own legal order, which
is directly applicable both to Member States and to their
nationals as a result of the partial transfer of sovereignty
from those States to the Community.³ Part of this Community
law is comprised in the concept of 'ordre public'. To define
this notion as a reserved element of "sovereign rights" is to
assume to Member States a way out of their obligations. The
aims and purposes of the EEC touch social, economic and legal
relationships in a manner beyond the countenance of most
bilateral treaties of commerce and friendship, and beyond even
the provisions of the European Convention on Establishment.

². Directive 64/221, Article 8.
International standards as hitherto applied are still relevant, but they have been overtaken by a substantive law which is supra-national. Within the sphere of application of the Treaties, the legality of action taken in the name of 'ordre public' stands to be determined by impartial decision. Otherwise, and this was made clear in the Guardianship of Infants Case, the notion of 'ordre public' would remain within the "orbit of uncertainty, pure discretion and arbitrariness".1.

Article 7 of the Treaty of Rome proposes the general rule of no discrimination on the basis of nationality. Logically, therefore, the nationals of Member States should be subject to a general régime of 'ordre public' and not to those particular régimes which individual states may oppose to aliens qua aliens. The power to exclude or to expel is exceptional, the basis of the principle of free movement itself is the control of discretion. From these premises it follows that the individual faced with the prospect of repressive measures is entitled to an effective judicial guarantee. Such guarantee in turn must be capable of recognising those substantive rights with which the Community national is endowed. It is open to serious debate whether "expulsion" itself is an acceptable sanction in a community which is based on national treatment and supra-national co-operation. It has been said that the principle of non-discrimination on the basis of nationality reaches beyond the establishment of the community, and that it must not be ignored in its establishment.2. Taking that as a starting

point, one may then go on to the specific question, whether there is a presumption in favour of "sovereign" powers, or a presumption in favour of Community law, in which every derogation is exceptional and must be justified. Within the EEC, it must be the latter presumption which is dominant. The régime benefits from the existence of machinery for the resolution of disputes, and if the question of measures purportedly taken for reasons of 'ordre public' were to come before the European Court of Justice, that court would find itself dealing with just another concept of Community law. In order to ascertain the substance of that concept, the Court would look to the aims and purposes of the Treaty of Rome and, in particular, the content of Directive 64/221. It must apply the appropriate objective standards, bearing in mind the principle that 'ordre public' does not represent an area of pure discretion, permitting the avoidance of treaty obligations. Member States still retain a margin of appreciation, but their freedom of decision is now more closely confined. In determining the weight to be given to their own interests, they must now pay due regard not only to the interests and rights of the individual, but also to the interests of the Community as a whole. 'Ordre public' is no longer to be judged solely in accordance with national criteria.
PART V

REFUGEES AND THE RIGHT OF ASYLUM IN INTERNATIONAL LAW
INTRODUCTION

Because developments in the customary law affecting refugees tend also to present a minimum standard of treatment for the whole class of aliens, the final part of this thesis investigates the doctrine of asylum and the principle of non-extradition of political offenders. Chapter XIV examines briefly the theoretical basis for the granting of protection and takes a first look at the problem of defining the political offence. Chapter XV makes use of the practice in municipal systems in regard to asylum and extradition, and draws certain conclusions about the criteria of persecution and the nature of the political offence. Notice is also taken of contemporary developments which seek to exclude certain crimes from the benefits of non-extradition. Finally, in Chapter XVI, the customary international law position is discussed in the light of state practice, and it is proposed that there is now sufficient authority to support a rule of international law which prohibits the return of aliens to persecution. It is also observed that, while customary international law justifies the non-extradition of political offenders, at times it also imposes on states a duty to extradite, for example, in the case of international crimes.
CHAPTER XIV

The Theoretical Basis for the Grant of Asylum in General International Law

The general issue of standards in regard to the entry and expulsion of aliens is raised in particularly pertinent manner by the problems of refugees. It is possible that developments in asylum and concern for the exceptional category of displaced persons show that customary international law aids the class of aliens as a whole. The entry and expulsion of refugees invites consideration of the broader, public policy issues of human rights, and of the related question of the individual as a subject of international law. There are certain obligations imposed on states in respect of the treatment of individuals which do not depend upon their status either as nationals or as aliens. It will be seen that in many cases the problems of asylum and the exercise of protection call for a re-examination of traditional concepts of territorial jurisdiction, and for a further appreciation of the extent to which the discretion and competence of states may be limited by extant and developing rules of general international law.

The word "asylum", especially in the manner of its use in the phrase "right of asylum", has lost much of its pristine simplicity. Originally, the word connoted "sanctuary", a "place of refuge", with the church and its high altar standing as

the paradigm of such places. Once he had reached his asylum, the fugitive was safe and there he might expiate his guilt. The supreme penalty of excommunication would fall on whoever dared to violate the sacred place. With the growth of nation states, however, and with the corresponding development of notions of territorial jurisdiction, the institution of asylum underwent a radical change. It came to imply not only a place of refuge, but also the right to give protection, and it was a right which came to be exercised more and more in favour of the exile, of the person driven, for one reason or another, from his own land.

The anomalous position of exiles was recognised over two hundred years ago by the jurist Wolff, who wrote:

"exiles do not cease to be men ... [By] nature the right belongs to them to dwell in any place in the world which is subject to some other nation."

But this was a "right" which even Wolff tempered with recognition of the fact of territorial sovereignty and, while compassion should be shown to those in flight, admission could be and should be refused for good reasons. The final question on admission and settlement must be left to nations themselves.


2. Wolff, Jus Gentium Methodo Scientifica Pertractatum, (1764), s. 147.

3. Ibid., s. 148; s. 149; see also Vattel, ed. Chitty (1834), I. 19. 229-230; Grotius, De Jure Belli et Pacis, (1646) iii. 20. xli.
The practice of asylum remains of importance to a class of aliens which, at present, shows little sign of diminishing in numbers. It is, therefore, essential to maintain a broad impression of the concept and not to limit one's thinking to the occasion of defecting security personnel, scientists and prima ballerinas. Greater emphasis is required to be given to the fundamental postulate of asylum, which is the idea of protection. International law is concerned with protection primarily in three separate, though not always separable, ways. First, it is concerned with the position of refugees, as that term is understood in the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto. Secondly, it is affected by the particular practice of "granting political asylum", which states claim in the exercise of their territorial jurisdiction. Finally, international law stands to be involved by reason of the principle of non-extradition of political offenders. The practice of extradition is largely governed by bilateral treaties, and it is necessary to assess the extent to which such treaties are governed by, and how far they have contributed to, general principles of international law concerning asylum.

It is not suggested that the three aspects of protection just described should be retained as formal categories, and individual cases may well traverse the whole field without fulfilling the conditions of any particular classification. However, the three categories are all linked, at least at one level, by the notion of territorial jurisdiction. While this is of assistance in establishing the basis in international law of the state's exercise of protection, it also serves as an indication of the areas and ways within which the
competence of states may be confined. Treaties are of particular potency in this respect, but it will be seen that customary international law now not only proposes certain limits to discretionary powers, but also prescribes alternative bases for the treatment of refugees. The political offender and the refugee are commonly distinguishable by reason of the former's commission of an offence, and by the fact that the persecution of the latter results from factors such as race or religion, over which the individual has little or no control. It remains to be seen whether there is sufficient ground between the two for them both to be brought within the purview of one rule or principle of international law.

The competence of states in the matter of asylum is usually interpreted in two senses. The first is that referred to as "diplomatic asylum", by which is understood the grant of protection against the local jurisdiction in embassies, consulates and on war ships. The basis of this practice is defended by reference to the notion of extra-territoriality, but the extent to which it has been recognised by states remains controversial. In the Asylum Case in 1950, the International Court of Justice described the practice as involving,

"a derogation from the sovereignty of [the local] State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State."

The Court contrasted this with the practice of extradition:

"In the case of extradition, the refugee is within

2. Ibid. See also Haya de la Torre Case, I.C.J. Rep. 1951, p. 71.
"the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State."

The Court was here dealing with the specialised practice of diplomatic asylum which is peculiar to Latin America, and recognition of the practice on a universal level has not materialised. In 1949, an additional article was proposed to the Draft Declaration on the Rights and Duties of States, then under consideration by the International Law Commission. As finally adopted it declared:

"Every State has the right to accord asylum to persons of any nationality who request it in consequence of persecution for offences which the State according asylum deems to have a political character."

Brierly moved that the words "in its territory" should be added after the word "asylum", but this was opposed and rejected on the ground that such a restriction would not be compatible with existing law. More recently, however, diplomatic asylum has been characterised as a limited institution of regional international law. Arangio-Ruiz, Special Rapporteur to the Economic and Social Council Committee on the Draft Declaration on the Right of Asylum, therefore proposed that


3. Ibid., paras. 87, 88.
discussion be limited to the right of states to grant "territorial asylum", which is the second of the two contexts in which the word "asylum" is currently employed.¹

It is frequently argued that to ground the "right" of asylum in the context of every state's competence to exercise territorial jurisdiction is simply to reiterate the obvious. Territorial protection is seen as the natural complement to territorial sovereignty; the right of asylum is merely ²

"the right of the government either to extradite or to expel any offender who comes within its jurisdiction .... This right is exercised by the government in the light of its own interests and its obligations as a representative of social order."

In 1949, Morgenstern settled the competence of states upon the "undisputed rule of international law" that every state has exclusive control over the individuals in its territory. This includes all matters of exclusion, admission and expulsion, as well as protection against the exercise of jurisdiction by other states.³

In the previous year the United Nations had adopted the Universal Declaration of Human Rights, Article 14(1) of which declares:

"Every one has the right to seek and to enjoy in other countries asylum from persecution."

This was the first major step in the development of the law of asylum which has taken place since 1945, and it points to its relationship with the wider context of human rights. At


the time of its adoption there was some debate as to the extent to which Article 14 gave any right to the individual, or imposed any duty upon states. Lauterpacht, however, noted: 1.

"... few persons ... will appreciate the fact that there was no intention to assume even a moral obligation to grant asylum."

This conclusion is amply supported by the discussions which preceded the Declaration. The original draft of Article 14 would have substituted the words, "and to be granted", for the "and to enjoy" which was finally adopted, 2. but this was vigorously opposed, particularly by the United Kingdom. 3.

Current opinion interpreted the right of asylum as the right of every sovereign state to protect the refugee within its territorial jurisdiction, and the corresponding duty as that of respect for the asylum by the state of which the refugee was a national. The French delegation proposed that the United Nations should be empowered to secure asylum for refugees, but this, too, was defeated. 4. The reaction to these proposals underscores the fact that, at the time, the majority of states were not prepared to grant to the individual a true right of asylum which might be enforced, either directly or indirectly, against a prospective state of refuge. The substantive quality of Article 14 was thus of little value, simply permitting the refugee to take flight, to quit his


country and to knock on every door, but with little or no assurance of admission. As general international law was constituted at that time, the right of asylum was a right of states, not of individuals. The question for today must be, whether the discretion which states have assumed in the matter of asylum is now to be confined by principles of international law.

In many ways Article 1 is something of an historical curiosity and developments in related fields have brought its exhortatory optimism almost to the point of obsolescence. While it may not be possible to affirm that the persecuted individual enjoys a substantive right against a state of refuge, the actual grant of protection is close to being regarded primarily as a humanitarian duty rather than as a gesture of sovereignty. Progressive development in the laws of extradition, in the concept of political offence, in the notion of persecution and in the principle of non-discrimination has improved the condition of the individual. Persuasive principles and rules of international law in regard to human rights now operate as significant restrictions on the previously dominant aspect of territorial competence.

Already, there are many states which affirm the "right of asylum" in their constitutions. Thus, the Preamble to the French Constitution of 1946 declares that anyone persecuted because of his activites in the cause of freedom has the right

2. See also on expulsion, below, pp. 582-584.
of asylum in the territories of the Republic. 1. Article 16(2) of the Constitution of the Federal Republic of Germany states shortly, "Politisch Verfolgte geniessen Asylrecht". 2. Article 10 of the Italian Constitution of 19^7 declares that any alien debarred in his own country from the effective exercise of those liberties which are guaranteed by the Italian Constitution shall have the right of asylum and that no alien may be extradited for political offences. This provision has been declared to have binding force by a decision of the Corte d'Appello of Milan in 1964.3. In its judgement the Court held that the right of asylum was not only guaranteed by the Constitution, but also by the provisions of the Universal Declaration and the European Convention on Human Rights, both of which were an integral part of the Italian legal system.

It was said: 4.

"Under Italian law the right of asylum is a genuine subjective right which may be invoked and give rise to proceedings before the ordinary courts which are by their institutional function obliged to protect human rights and fundamental freedoms; the executive branch of the Italian Government, under the Constitution, does not enjoy discretionary powers in respect of such requests. Reasons must therefore be given for any decision to refuse asylum and such decision must be notified to the alien concerned, who is entitled to appeal against it in the ordinary courts."

It is, however, rare to find discretion confined and structured to this extent, but the Italian legal system is by no means

2. See further, below, pp. 567ff.
4. Ibid., p. 538, emphasis supplied.
alone in setting limits to the discretion of state authorities. 1.

The importance of the political offence exception in extradition treaties will become apparent in the discussion of municipal law provisions which follows, but it may be noted that international law already has some bearing on the concept. 2. For example, the 1948 Genocide Convention provides that genocide and other enumerated acts are not to be considered as political crimes for the purpose of extradition. 3. More recently, the International Law Commission has been seised of the task of preparing Draft Articles dealing with the protection of diplomats, particularly with the view to ensuring that offences against such persons, and others entitled to the protection of international law, should not take the benefit of any conventional immunity. 4. Although the substance of the "political offence" may be affected at some points by international law, nevertheless the decision in particular cases remains within the discretion of the state authorities concerned. While the political offence is clearly one aspect of asylum as a whole, it also stands out

1. On principles relevant to the confining and structuring of discretionary powers, see Davis, Discretionary Justice, pp. 55, 97, and above, pp. 351-353

2. See also Wortley, Political Crime in English Law and in International Law, 45 B.Y.I.L. (1971), 219-253.

3. Article VII. For many years the United Kingdom failed to ratify the Genocide Convention on the ground that it amounted to a restriction upon the right of asylum. See statement by Mr. Heath, as Lord Privy Seal, in 1962, 663 H.C. Deb., cols. 422-424. See now Genocide Act 1969.

as an aspect which may involve strictly political considerations, and little or no reference to humanitarian issues.

Before entering on an examination of municipal law and practice, a few general points may be made in regard to the nature of political offences. Most authorities favour two classes of political offence: the "purely political offence", consisting of an act or acts directed exclusively against the political order of a state;¹ and the "délit complexe", or "relative political offence", where an apparent common crime is inextricably bound up with a political act or motive. Some writers go farther and affirm the existence of a third category, the "délit connexe", where the political connection is more remote.² In the latter cases it becomes necessary to determine whether or not the political aspect of the offence is predominant. In the Pavan case, for example, which concerned the murder of an alleged Fascist spy by an Italian in France, the Swiss Federal Court held that this was not an offence which was political in the straightforward sense, for it did not involve an attack on the state or its fundamental institutions.³ On the issue of predominance, the court said:

"the crime is invested with a predominantly political character only where the criminal action is immediately connected with its political object ... Such a connection can only be predicated where the act is in itself an effective means of obtaining this object ... or where it is an

1. See Re Giovanni Gatti, Ann. Dig. 1947, Case No. 70.
4. Ibid., p. 348.
"incident in a general political struggle in which similar means are used by both sides."

In the circumstances, the court found that the act in question was but a single act of personal terrorism. By contrast, the plea of "relative political offence" was upheld in another Swiss case, *In Re Ficorilli.* The court took the view that a relative political offence was one which, while having all the characteristics of a common offence, acquired a political character by reason of the motive behind it or the purpose for which it was committed. Here the accused was charged with having, while a member of a neo-fascist group in late 1944, carried out the execution of another man as a traitor. The court considered that an offence must be regarded as predominantly political when it is,

"the consequence and manifestation of an extraordinary agitation or tension between political parties, and of disturbances which lead the parties to use methods of violence against their opponents, causing disorders and large numbers of crimes of violence."

These two cases give a first indication of the reasoning commonly employed by national courts and state authorities in their determination of what constitutes a political offence. While the terminology will vary from system to system, it will also become apparent that the characterisation of an offence as political is itself, inherently, a political decision. As such, it is open to the influence of ideology and alliance, whereas provisions in favour of refugees as a class are founded more particularly in considerations of humanity. Developments in this latter


2. Strictly speaking, it is inherently, but not exclusively, a political decision, and involves consideration of politico-legal factors.
respect will be found not only in the generalised, sometimes rarified, area of human rights instruments. They are reflected also in the provisions of municipal law, in itself important as evidence of current state practice. Not only do such provisions recognise the special status of the refugee and the political offender, but they also protect that status with substantive and procedural guarantees, limiting the discretion of state authorities. On the international level it will be seen that a maturing theory of international obligation operates to secure the fundamental rights of both refugees and the general class of aliens.¹

The object of this Chapter is to examine the provisions of selected municipal systems in order to ascertain the manner in which the problems of refugees and political offenders are faced. It has already been suggested that general international law imposes obligations on states which restrict their freedom to exclude or expel aliens who are threatened with persecution. But, from the point of view of municipal law and state practice, there will frequently be difficulties in the way of finding that the threat of persecution exists. Political divisions and the pressures of military alliance will both tend to influence a final decision, even though international instruments have attempted to lay down an objective criterion.

Nevertheless, the standards of international law have made a considerable impact on the criteria employed by states. Chief among these standards is the principle of non-discrimination which, in the context of persecution, is effectively extended beyond the confines of race so as to include discriminations on the ground of political opinion and religion. This general principle is itself supported by recognition of certain standards of human rights and persecution may be viewed in terms of physical and mental suffering, harassment and even economic disadvantage.

The issues in regard to the non-extradition of political
offenders are less clear. Customary international law justifies
the refusal to surrender, but it also imposes certain limits upon
the category of crimes which may legitimately be classified as
political. In some cases, for example, international crimes, it
actually imposes a duty either to surrender or to try the person
accused. Within these limits there is considerable freedom of
decision, and the concept of political offence is still largely
the child of municipal law.

(1) Law and Practice in the United States of America

In common with many states, the United States regards
the grant of protection as inherent in its sovereign, territorial
power. The practice of diplomatic asylum is not accepted,
although there have been some notable exceptions, including
the protection extended to Cardinal Mindszenty in the United
States embassy at Budapest after the 1956 Hungarian uprising.¹
Immigration and entry into the country are strictly controlled
by statute and the courts have conceded to Congress plenary
power in respect of the entry and expulsion of all aliens.²
In 1934 it could be said that,³

"Asylum necessarily means absolute immunity from the
jurisdiction of another State, subject only to the
will of the State of asylum, and it must be borne
in mind that the right of the State of asylum is
sovereign and unlimited, excepting in so far as
the State freely imposes limits on itself."

Policy guidelines recently published emphasise that the
objectives of the United States in its exercise of protection

1. See United States: Policy Guidelines for Asylum Requests
   928; see also Moore, Digest, vol. II, 755ff; Hackworth, Digest,
   vol. II, 621ff.
are "to promote institutional and individual freedom and humanitarian concern for the treatment of the individual."¹.

The primary consideration which forms the basis of that policy is the 1967 Protocol relating to the Status of Refugees, together with the substantive provisions of the 1951 Convention and, in particular, the express prohibition on the forcible return of refugees to conditions of persecution.

While the immigration laws themselves recognise no individual right of asylum, nevertheless there have been a number of statutory and administrative dispensations for the admission of specified classes of refugees. In 1948 the Displaced Persons Act introduced a power which, in the years up until 1952, permitted the entry of over 400,000 refugees by way of mortgaging future national quotas.² This statute was followed in 1953 by the Refugee Relief Act, under which 6000 refugees were admitted from Hungary in 1956-1957.³ Use has also been made of the provision in the 1952 Immigration and Nationality Act which authorises the Attorney General to allow entry on parole and, following the 1956 uprising this power was exercised, on President Eisenhower's instructions, in favour of another 32,000 Hungarian refugees.⁴

1. 11 Int. Leg. Mat. 228. The policy guidelines prescribe procedures for the handling of asylum requests, and anticipate co-ordination with the United Nations High Commissioner for Refugees.

2. 62 Stat. 1009. On national origins quotas, see Konvitz, op. cit., pp. 10-27; the mortgages were subsequently wiped out by statute in 1957. Refugees may, of course, be admitted through the normal channels as quota immigrants, special immigrants from Western Hemisphere countries, or non-immigrants.

3. 67 Stat. 403.

4. 1952 Act, section 212(d)(5); 8 U.S.C. s.1182(d)(5); see also Paktorovics v. Murff 260 F. 2d 610 (1958).
The particular political offender is also expressly provided for in the immigration laws, largely as a result of the decision of the court in Castro v. Williams. Castro, the former President of Venezuela, was excluded from the United States under section 2 of the Immigration Act 1907 on the ground that he had committed a crime involving moral turpitude prior to entry, namely, the murder of a General Paredes. The court granted a writ of habeas corpus to secure his discharge from the custody of the immigration authorities, and observed:

"General Paredes was killed while engaged in an insurrection against the Government of Venezuela while General Castro was president. If General Castro ordered him to be killed, the offence was plainly political."

Castro was admitted to the United States and today purely political offences, whether they involve moral turpitude or not, will be discounted as automatic grounds for exclusion.

The entry of refugees is now largely governed by the Act of 1965, which makes provision for a seventh preference of six per cent (10,200) within the annual world-wide quota. This takes the form of "conditional entries" approved by the Attorney General and which apply to two categories of entrants. The first class includes aliens who (1) because of persecution or fear of persecution on account of race, religion or political opinion have fled (i) from a Communist or Communist

1. 203 F. 155 (1913).
2. Ibid., at p. 158.
3. 8 U.S.C. s.1182(9),(10).
4. 8 U.S.C. s.1153(a)(7)A.
dominated country or area, or (ii) from any country within the general area of the Middle East, and (2) are unable or unwilling to return to such country or area on account of race, religion or political opinion.

The second class of refugees to which the statute refers comprises "persons uprooted by a catastrophic national calamity as defined by the President who are unable to return to their usual place of abode." In view of the very limited quota percentage which is available for refugees, no very substantial group of persons could be accommodated under this head.

Applicants for entry under the special provisions deal only with the Attorney General and are not required to have visas. In practice, the Attorney General acts through the Immigration and Nationality Service which has offices abroad for the processing of applications. The individual who applies for conditional entry must still satisfy the normal entry requirements, other than those in respect of documentation, and he may therefore be excluded for medical, criminal, subversive or other substantive reasons. In addition, a refugee may be refused admission if he has not maintained his

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1. Defined as the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south.

2. Refugees from Communist dominated countries in the Western Hemisphere, such as Cuba, are not covered by the provisions regarding conditional entry, but are considered as "special immigrants" and are not, therefore, within the world-wide quota to which the seventh preference relates. During the peak years, 1961-1968, 271,470 refugees were admitted from Cuba under the special refugee programme: Evans, The Political Refugee in United States Immigration Law and Practice, 3 The International Lawyer, (1969), 204.

3. 8 U.S.C. s.1153(a)(7)B.

4. See above Ch. VIII.
status, for example, if he has settled in another state. The requirement that the alien be "not firmly resettled" in his first state of refuge is not found in the statute, but was apparent in administrative practice under the earlier refugee legislation, and it has been sanctioned by a number of recent court decisions. In 1968 the United States District Court of California held that aliens who had left China in 1950 and 1955 and who entered the United States after extended residence in the Dominican Republic were outside the scope of the Act. They had stopped fleeing, and "a non-resettled status is a sine qua non for qualification". The Supreme Court has also held that the statute requires that the alien's presence in the United States be a consequence of his flight in search of refuge, "reasonably proximate to the flight and not following a flight remote in point of time or intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge".

In determining whether the question of resettlement arises in his case, the authorities will consider, for example, whether the alien has established any business in the first state of refuge, whether he has occupied any official position inconsistent with his status, and the duration of his stay.


2. Min Chin Wu v. Fullilove 282 F. Supp. 63. See also Alidede v. Hurney 301 F. Supp. 1031, in which the court considered the fact that the applicant had obtained Turkish citizenship and had run his own restaurant in Turkey for eight years subsequent to the time when he fled from a Communist country, and concluded that he was no longer a refugee.

A temporary refuge in a third state would not affect that status, but the delimitation of what is temporary will clearly depend on all the circumstances.¹

The privilege of conditional entry is granted in anticipation of a subsequent adjustment of status to that of permanent resident, generally after two years. However, neither those who enter in this manner nor those who enter on parole are considered, in law, to have been "admitted" into the United States. They remain, as it were, at the frontier, and any subsequent proceedings for adjustment of status or removal will follow the form of exclusion rather than deportation proceedings. This may have a drastic effect on the alien's legal and procedural position. In ruling that such an alien is "not within the United States", the Supreme Court has held that he is not therefore entitled to the benefit of provisions which authorise the suspension of deportation on the ground of anticipated persecution.²

(a) Protection from Persecution

Although there is no right to asylum as such, no enforceable right either to enter or to remain in the United States, nevertheless there are a number of possible sources of relief open to the alien threatened with the prospect of a return to persecution. For example, one who is excluded

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¹ Cf. parallels in United Kingdom practice regarding the notion of "not firmly resettled": 469 H.C. Deb., col. 811 (1949).
² 8 U.S.C. s.1153(g),(h). See further, below, p. 527
at a port of entry may apply for the discretionary grant of parole if he can show that he would be subject to persecution if he returned to the country whence he came.\(^1\) An alien against whom deportation proceedings are commenced may resist removal by submitting a claim of "anticipated persecution" under section 243(h) of the 1952 Act. This latter provision was first introduced in the Internal Security Act 1950, which declared that no alien was to be deported to any country in which the Attorney General should find that he would there be subjected to physical persecution.\(^2\) The substance of this safeguard was re-enacted in 1952, with greater emphasis on the discretion of the Attorney General:\(^3\)

"The Attorney General is authorised to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution."

The phrase "persecution on account of race, religion or political opinion" was substituted in 1965 for the rather limited criterion of physical persecution.\(^4\) The intention of Congress in passing this amendment, with its clear reference to the provisions of the 1951 Convention Relating to the Status of Refugees, has been considered by one court as effecting "a significant, broadening change".\(^5\) The burden on the applicant has been lightened and he is no longer required to

1. 8 U.S.C. s.1182(d)(5).
2. 64 Stat. 987, section 23.
3. 66 Stat. 163, section 243(h).
4. 79 Stat. 911, section 11(f); 8 U.S.C. s.1253(h).
show the likelihood of actual bodily harm. But the wording underlines the fact that the withholding of deportation is a matter for the discretion of the Attorney General, and that in order to qualify for relief the alien must be "within the United States". The alien faced with removal after the refusal of admission cannot, therefore, invoke this section, even if he has been paroled into the country. This has been affirmed by the Supreme Court in the leading case of Leng May Ma v. Barber. By a majority of five to four, the Court held that the alien who is on parole is not, in law, within the United States, and that a distinction must be maintained between those who come seeking admission and those who have actually entered, whether legally or illegally. It is the latter who are entitled to rights not otherwise extended to those "merely on the threshold of initial entry". The judgement of the Court was vigorously criticised by the dissenting judges, led by Chief Justice Warren, for whom it was a mystery how an alien could be paroled "into the United States" under one section of the Act, and yet not be "within the United States" for the purposes of another section.

An alien who is ordered to be deported is usually allowed at least one month to wind up his personal affairs, and he is

1. In INS v. Stanisic 395 U.S. 62 (1969), the Supreme Court remanded a persecution claim, decided according to the earlier criteria, for reconsideration in the light of the 1965 amendment.

2. 357 U.S. 185 (1958); see also Rogers v. Okan 357 U.S. 193.

3. In Paktorovics v. Murff 260 F. 2d 610 (1958), the Court of Appeals (Second Circuit) distinguished Ma v. Barber in the case of a Hungarian refugee invited to the United States and admitted on parole. The court held that the alien was entitled to procedural process and that his parole could not be revoked without a hearing at which the basis for the discretionary revocation might be contested on the merits. Subsequent decisions have limited this ruling to its special facts: Ahrens v. Rojas 292 F. 2d 406; Fun v. Esperdy 335 F. 2d 656.
free to apply for a longer period.¹ The alien may also be permitted to leave voluntarily, and on this point the courts have shown that they have jurisdiction to control the outer limits of discretion. In one case where the Attorney General persisted in ordering deportation, although the alien's ability to depart voluntarily was apparent, his conduct was held to be an abuse of discretion.² The court's powers of review, however, will usually be limited to cases of manifest abuse or of failure to exercise discretion.³

If administrative relief in the form of voluntary departure or stay of deportation on compassionate grounds is not forthcoming, the alien may still be able to rely on section 243(h). The federal courts have exclusive jurisdiction to review final orders of deportation, and this includes the power to review the Attorney General's denial of discretionary relief.⁴ However, because of the wide discretion which section 243(h) confers and because of the essentially political nature of the determinations, the courts are generally reluctant to proceed to an examination of the merits.⁵

¹. This is generally a matter for the discretion of the District Director of the Immigration and Nationality Service: 8 C.F.R. 243.3; Gordon and Rosenfield, Immigration Law and Procedure, ch. 5, p. 120. It occasionally happens that deportation is stayed indefinitely where warranted by compassionate circumstances; see, for example, Lowenstein, The Alien and the Immigration Law, (1958), case no. 376, p. 273.

². In Re Burgoa No. 1558, S.D.N.Y. (1946)

³. Frangoulis v. Shaughnessy 210 F. 2d 527 (1954); 8 U.S.C. s.1254(e).

⁴. 8 U.S.C. s.1105a.

⁵. Carlsdon v. Landon 342 U.S. 524, 527 (1952): "The power to expel aliens, being essentially a power of the political branches of government, the legislative and the executive, may be exercised entirely through executive officers, with such opportunity for judicial review as Congress may see fit to authorise or permit."
Constitutional challenges to orders of deportation have not been very successful. Deportation itself has been characterised as essentially a civil proceeding and, in reliance on this premise, courts have ruled that it cannot be "cruel and unusual punishment" within the prohibition of the Eighth Amendment. Although this characterisation still governs judicial attitudes to deportation, the courts have at times shown that they recognise the drastic nature of the measure.

While they have not been prepared to broaden out the substantive protection of section 243(h), they have emphasised that the Attorney General's discretion is only to be exercised after the alien has had the opportunity of presenting his case.

However, whereas a valid finding of deportability must be supported by clear, unequivocal and convincing evidence, this requirement does not govern the grant of discretionary relief. A full, fair hearing is not necessary. All that is demanded is that the alien's plea be given due consideration, and that he have an opportunity to submit evidence and establish his case. The burden is on the alien to show a clear probability of persecution in the proceedings before the special inquiry officer.

1. Soewapadji v. Wixon 157 F. 2d 289 (1946). In Weinberg v. Schlotfeldt 26 F. Supp. 283 (1938), however, the court discharged an alien from custody on the ground that, as a Jew, he should not be returned to Czechoslovakia. It was common knowledge that Jews in that country were being persecuted and their property confiscated, and that they were driven to find refuge in other states.

2. E.g. Bridges v. Wixon 326 U.S. 135, 154 (1946): "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of his right to stay and live and work in this land of freedom. That deportation is a penalty - at times a most serious one - cannot be doubted." See further, below, pp.


4. Fu v. INS 386 F. 2d 750 (1967).
prospective areas of control, it is to be noted that the decision of the special inquiry officer may be based on confidential information. In *Dolenz v. Shaughnessy* the court held that the use of such information did not violate due process and that the question, whether another state would subject an alien to persecution was a political issue into which the courts should not intrude.¹

The evidential burden which the alien must satisfy is considerable, but if he is denied a hearing the courts will insist that he be given one. In one case the court held that the refusal of the special inquiry officer to re-open a hearing in order to permit a Haitian resident to apply for relief was arbitrary and an abuse of discretion.² The court found that it was a matter of common knowledge that the régime in Haiti was one which might well indulge in persecution of the alien in question. However, if a hearing is given, then the Attorney General's finding may not be challenged for error of law in applying the statutory standards. It is not the province of the court to reassess the alien's speculations, to consider, for example, whether it amounted to persecution to return aliens to Hong Kong on the ground that the Colony would imminently fall from British into Chinese Communist hands.³ It is probably a correct conclusion to state that the

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¹ 206 F. 2d 750 (1953); 8 C.F.R. 242.17(c). In *Kam v. Esperdy* 274 F. Supp. 485, 489 (1967), the court declined to interfere on the ground that the Immigration and Nationality Service "has better sources of information than this court". See similarly, *Almeida v. Murff* 159 F. Supp. 484 (1958); *Kasravi v. INS* 400 F. 2d 675 (1968); *Musardin v. INS* 415 F. 2d 865 (1969).


grant of discretionary relief remains primarily a political matter, and subject to the interpretation which the Attorney General gives to the concept of persecution. Although the courts declare themselves confined to the question of whether there has been an abuse of discretion, in their approach to this problem they must, of necessity, relate their own notion of persecution to the facts known and alleged. In one case, for example, the court held that there was no abuse of discretion when an opponent of the Batista régime was ordered to be returned to Cuba.¹ But in coming to this conclusion, the court referred expressly to the fact that he had held government positions, that he had never been imprisoned for more than a few hours at a time, and that he had been permitted to obtain a passport and to leave the country. Other cases have decided that the plea of anticipated persecution could not be founded on the likelihood of punishment for an ordinary crime, even in a Communist country,² and that compulsory military service is not the sort of hardship or deprivation which is contemplated by the statute.³

Clearly, political opposition by the alien in his own land, which resulted in the likelihood of persecution, would come within section 243(h),⁴ and even relationship to a person

⁴ Official hostility to members of a given religious sect, if substantiated, would meet the statutory requirements: Blazina v. Bouchard. In Lena v. INS 379 F. 2d 536 (1967) the court ruled that a refusal to stay deportation was not arbitrary where the special inquiry officer had found that Greeks in Turkey do, and are permitted to, practice their religion. Such discrimination as exists is directed against the Greek Orthodox Church, rather than individuals.
in opposition may be a good ground for discretionary relief.¹ When "physical persecution" was the governing criterion the courts inclined to the view that economic restrictions as such were not contemplated unless they were so severe as to deprive a person of all means of earning a livelihood.² In 1969, however, it was ruled that the 1965 amendment had considerably broadened the application of section 243(h).³ The court declared that the necessary degree of persecution would be met by the infliction of suffering or harm on those who differ in race, religion or political opinion, in ways regarded as offensive. This would include the deliberate imposition of substantial economic disadvantages. This description of persecution offers the basis for a much wider concept than has hitherto been adopted, but it must be balanced against the courts' recognition that executive decisions in these matters are influenced by foreign policy considerations. The alien who seeks to bring himself within section 243(h) faces many difficulties. The information which he has concerning his home state will not be of the best, and against him there is the unknown quantity of government material off the record. While executive discretion is not unlimited, in practice a fairly wide margin of appreciation is allowed. It has been said

1. Mercer v. Esperdy 234 F. Supp. 611 (1964). Defection alone is not considered sufficient to render an alien liable to persecution on his return (Blazina v. Bouchard 286 F. 2d 510 (1961)), unless he is likely to face long years of imprisonment (Sovich v. Esperdy 206 F. Supp. 558; 311 F. 2d 21 (1963)).


that it is not the purpose of the immigration laws to facilitate
the grant of protection within the United States. ¹ But once
an alien refugee has been admitted to the United States, or is
on parole or under conditional entry, then he is fairly sure
of enjoying an asylum so long as he behaves himself. If
deporation proceedings are commenced against him, then he
will benefit from certain minimum procedural and substantive
guarantees.

(b) Extradition and Political Offence

Under United States law, the surrender of fugitive
criminals is dependent on treaty, and the Supreme Court has
recognised that the conclusion of such treaties is within
the province of the federal government. ² The exception in
favour of political offenders has, however, long been
recognised. In 1876, for example, the Secretary of State,
Mr. Fish, was able to reply to an inquiry about the absence
of any reference to immunity for political offenders in the
extradition treaty between the United States and Great Britain:³.

"The public sentiment of both countries made it
unnecessary. Between the United States and Great
Britain, it was not supposed, on either side,
that guarantees were required of each other
against a thing inherently impossible...."

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¹. Evans, The Political Refugee in United States Immigration
Law and Practice, 3 The International Lawyer (1969), 204, 249,
253. Although section 243(h) is founded on the 1951 Convention
it has been held that this provides the court with no substantive
grounds for interfering with the executive's discretionary
determinations: Muskardin v. INS 415 F. 2d 865, 867 (1969). It
has also been held that the status of the alien as a refugee or
political exile is itself immaterial to the grant of discretionary
relief under section 243(h): Fu v. INS 386 F. 2d 750 (1967).

². U.S. v. Rauscher 119 U.S. 407 (1886); Factor v. Laubenheimer

³. Moore, Digest, vol. IV, s.604.
Neither the treaties nor the laws of the United States attempt to define the concept of "political offence", and, as in the United Kingdom, it is for the committing magistrate first to decide whether the offence charged is of a political character. There is no appeal, as such, from the magistrate's decision to commit, but the legality of detention may be challenged on petition for a writ of habeas corpus. This proceeding is limited to the questions, whether the magistrate had jurisdiction, which includes review of the political character of the offence, whether the offence charged is within the treaty, and whether there was evidence reasonably sufficient to justify the magistrate's decision.

One formal difference exists between the law of the United States and the law of the United Kingdom, and it can be traced back to the Anglo-American negotiations of 1870-1876. The second limb of section 3(1) of the United Kingdom Extradition Act 1870 provides that there shall be no surrender if the individual in question, 2.

"prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character."

When the United Kingdom proposed just such a provision for inclusion in an extradition treaty with the United States, it

1. Cf. Immigration and Nationality Act 1952, 8 U.S.C. s.1182(a)(9)-(10), which excepts those who have committed "purely political offences" from the classes of excludable aliens.

2. Extradition Act 1870, 33 and 34 Vict. c.52, on which see further, below, pp. 543ff.
met with strong opposition. The United States Secretary of State, Mr. Fish, thought that a treaty article expressed in terms similar to section 3(1) "would confer a very dangerous power on a police magistrate or court". It was, in his view, out of the power of the United States Government to agree that the question whether the crime was of a political character should be decided by anyone but the Secretary of State, and that there was a danger of error and contradictory decisions if inferior magistrates were permitted to decide such questions.

In the United States, the substance of these views was expressed in the case of In Re Lincoln: "It is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith. Such matters should be left to the Department of State."

In both the United States and the United Kingdom the final decision on surrender rests with the Secretary of State, although any determination by the judicial branch against surrender is binding on the executive.

In 1935 the Harvard Draft Convention on Extradition proposed that the category "political offence" should include: "treason, sedition and espionage, whether committed by one or more persons ... [and] ..."

1. 6 B.D.I.L., 665-668.
2. Ibid., p. 666.
4. Whiteman, Digest. vol. 6, 1027, 1044, 1046; see also at pp. 799-857 for examples of treaties exempting political offenders.
"... any offence connected with the activities of an organised group directed against the security or governmental system of the requesting state," and that it should not exclude other offences having a political character. It is doubtful, however, whether this statement ever reflected American practice, which tends to place the political offence in strict association with a political disturbance or uprising. In 1908, for example, in response to a Russian request for the surrender of one Rudewitz, the Secretary of State referred to, 1.

"the principles of international jurisprudence, which, proclaimed and acted upon by the courts of this and other countries, declare that a person acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he is taking part is a political offender and so entitled to an asylum in this country."

Characterisation of the political offence in terms of a political movement, a political object and a violent conflict between opposing factions does have the advantage of setting a finite limit to to what is generally described as the purely political offence. It also permits one to assess other offences principally in the light of considerations of humanity. Thus, disregarding for the moment the nature of the particular offence, one may seek to answer the question, Would the individual, if surrendered, be prejudiced by reason of irrelevant distinctions, such as race, colour, religion or political opinion? If he would be so prejudiced, then that itself may be the occasion for a refusal to surrender. It is on the basis of these latter considerations that one may

rationalise the refusal of the United States authorities to surrender those responsible for landing three Czech civil aircraft in the American zone of Germany in 1950. ¹ Not every case, of course, will be clear cut. It will be frequently necessary to weigh the seriousness of the offence, which demands punishment, against the demands of humanity, which require compassion. ²

Among recent extradition cases, the various decisions of the courts in the Artukovic affair present a useful illustration of the American approach to political offence. ³ The cases concerned a request by Yugoslavia for the extradition of Artukovic who was charged with having ordered the killing of thousands of persons in the years 1941-1942, while he was Minister of the Interior in the "Pavelic" Government of Croatia. A number of the early decisions established that the Extradition Treaty of 1891 between the United States and Serbia was still extant, and Artukovic contended that the offences of which he was accused were "of a political character" within Article VI. The District Court agreed, and their judgement was in turn affirmed by the Court of Appeals. ⁴ The acts attributed to Artukovic had been committed by him in his official capacity, and while various factions were competing for power within the country. The crimes did not

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¹ Whiteman, Digest, vol. 6, 808; refusal was also based on the fact that there was no relevant treaty in existence. See also the similar incident involving a hijacked Czech train, ibid., p. 811.

² Note in particular recent developments in regard to the hijacking of civil aircraft (e.g. Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971: 65 A.J.I.L., 455; 10 Int. Leg. Mat. 1151).

³ 140 F. Supp. 245; 247 F. 2d 198; 355 U.S. 393; 170 F. Supp. 393

⁴ 247 F. 2d 198.
lose their character as political offences because they were also asserted to be war crimes. In the view of the court, the General Assembly Resolutions of 1946 and 1947 recommending the removal of war criminals to the states where their crimes were committed did not have sufficient force of law to alter the general rule relating to political offences. After a further appeal, the case was remanded to the District Court for a rehearing. This court held that the evidence established that all the counts of complaint were political in character and not, therefore, extraditable. It is to be noted that the Department of State, while maintaining that a political offence is generally an offence against the government itself or incident to a political uprising, expressed the view in a memorandum to the District Court that murder, even if done with genocidal intent and, therefore, in some sense, with political motives, is nevertheless murder within the offences listed in the treaty. Were this view to be accepted, then it might be said that international law had effectively established an outer boundary to the political offence exception. In fact, and in the light of events since 1948, it can hardly be doubted that this is now the case, even in regard to those states which have not ratified the Genocide Convention.

During the proceedings in the Artukovic affair the Court of Appeals referred to Re Castioni as the "leading case" on the question of political offence. Reliance was placed

1. 355 U.S. 393.
3. Ibid., Memorandum submitted by Theodore Hocke, United States Commissioner.
4. 247 F. 2d 198. On Re Castioni see further below, pp. 553-554.
on this decision again in the case of Re Gonzalez in 1963.\(^1\)

The proceedings involved the extradition of a Dominican national charged with murder. The court held that the evidence amply showed that the accused was one of those who, acting in a military or quasi-military capacity under a former political régime, had actively participated in the torture and killing of two prisoners. Moreover, there was no evidence of such a condition of uprising or political disturbance at the time of the murders as would justify application of the political offence exception.\(^2\) The requirement of an uprising was tempered to some extent by recognition of possible exceptions involving, for example, offences committed for the purpose of escaping from a tyrannical régime. While affirming the principle that the legal process of the United States was not to be used as an instrument of reprisal against domestic political opponents,\(^3\) the court maintained that it was not able to look behind an ordinary request for extradition and to determine the bona fides of the requesting government.\(^4\)

The political offence exception is kept within strict limits and its content stands to be more clearly confined in the future. Thus, Article 4 of the 1971 Treaty of Extradition

4. Cf. Jimenez v. Aristegueta 311 F. 2d 547 (1963). The court granted the extradition of an ex-president of Venezuela, whose surrender was requested for financial offences. On one level it would clearly be difficult to disassociate the ordinary request from the fact of former office and the possibility of political revenge. The United States court avoided the difficulty by basing itself on the fact that the financial crimes were not committed in connection with an uprising or political disturbance, and that embezzlement by a public official was an extraditable offence.
with Canada provides that there shall be no surrender where the offence is one of a political character, or where it is shown that the request has been made for the purpose of trying the individual or punishing him for an offence of a political character. Subsection (2), however, expressly declares that this exception shall not apply to hijacking, nor to kidnapping, murder or assault upon the life or physical integrity of a person to whom a Contracting Party has the duty according to international law to give special protection.

The immigration laws of the United States do recognise the undesirability of returning an alien to a state in which he will face persecution. It is also accepted, as one aspect of this general issue, that the purely political offence should not operate as a bar to admissibility. While the alien refugee or political offender may have no enforceable right of entry, he does have the guarantee that his case will receive due consideration, particularly after he has been lawfully admitted. The provisions of United States law are cogent evidence of an acceptance of developing humanitarian principles, although in practice a considerable margin of appreciation remains with the executive branch, in regard both to the likelihood of persecution and to the question of the good faith of a requesting government in extradition proceedings. The procedural rights which the laws confer upon the alien faced with removal indicate the limits of this discretion. The opportunity for arbitrary action is correspondingly reduced and any blatant disregard of the statutory provisions may be struck down as an abuse.

(2) Law and Practice in the United Kingdom

In the United Kingdom decisions on the grant of protection to refugees and others similarly placed are divided between the executive, the judiciary and the immigration appeals tribunal. Originally, the executive and the judiciary had little or no power to refuse entry to or expel any alien, regardless of his status. In an identical dispatch to Her Majesty's representatives abroad in 1852 the position was explained as follows:¹

"By the existing law of Great Britain, all foreigners have the unrestricted right of entrance and residence in this country ... The general hospitality thus extended ... has from time to time been the means of affording a secure asylum to political refugees of all parties ... It is obvious that this hospitality could not be so freely given, if it were not so widely extended. If a discretionary power of removing foreigners were vested in the Crown, appeals would constantly be made by the dominant party in foreign countries for the expulsion of their political opponents who might have taken refuge in Great Britain ... [It] would be difficult to defend such hospitality, which would then be founded upon favour and not upon equal laws."

This was but one of many defences of the "right of asylum" contemporary to an era since overcome by the restrictions of more divisive policies.² The benefits of an asylum in Great Britain were cherished.

¹ 6 B.D.I.L., 53-55. See further, below, pp. 546ff.

Britain were demonstrated in the case of The Queen v. Simon Bernard in 1858, which involved a charge of being accessory before the fact to the murder of one of the Gardes de Paris killed in the Orsini plot to assassinate Napoleon III.¹ The Lord Chief Justice, Lord Campbell, summing up on a point of law, found that Bernard had an asylum in Britain:²

"that asylum amounts to this, that [foreigners] are at liberty to come to this country and to remain in our country at their own will and pleasure and that they cannot be disturbed by the Government of the country as long as they obey the laws of the country..."

This right was not only defended in the courts. Throughout the nineteenth century, Her Majesty's Government received many requests for the surrender or expulsion of refugees, but in no case were these requests acceded to. When in 1882 certain Cuban refugees were handed over to the Spanish authorities by officials in Gibraltar, the action was strongly disapproved and Her Majesty's Minister at Madrid pressed unofficially for their return.³ Again, when Venezuela complained of the activities of refugees in Trinidad, the official response was that the right of asylum to political refugees must be maintained unimpaired.⁴ Being a haven for refugees had its drawbacks also, and in 1902 it was noted that the Government had had "more than once to complain of wholesale deportation of foreign Anarchists to British ports".⁵

¹ 8 St. Trs. (N.S.), col. 1055.
² Ibid., col. 1061.
³ 6 B.D.I.L., 44. See also Kiss, Répertoire de la Pratique Française en Matière de Droit International Public, vol. IV, 436.
⁴ 6 B.D.I.L., 65.
⁵ Ibid., pp. 74, 231-236.
three years the first legislation affecting entry into the United Kingdom had been enacted, and within twelve years free entry was a thing of the past. Admission became dependent upon authorisation, which in turn was made a matter of discretion.

Although the right of entry and the inviolability of asylum in respect of political refugees continued to be affirmed in the nineteenth century, concurrent developments were in hand to provide a legal basis for the surrender of fugitive criminals.¹ The necessity of statutory provision in this respect was accepted, but only if the principle of non-extradition of political offenders were specifically included. The difficulty was to arrive at any satisfactory definition of political offence, such as would guarantee the safety of the refugee. In the early extradition treaties surrender was permitted only for the listed offences, and political crimes such as treason or sedition were not mentioned.² The general rule against including such offences was accepted by all who gave evidence to the 1868 Select Committee on Extradition,³ but, beyond that, it did not prove easy to put the principle into statutory form.

The Select Committee recognised that political offences and ordinary crimes will often shade off one into another, and debate surrounding the suggestion that political offences be

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¹ 6 B.D.I.L., 453-456. Despite one or two precedents, earlier British state practice recognised no customary duty to surrender offenders.


³ See the statement by Lord Hammond, 6 B.D.I.L., 660.
equated with treason\(^1\) emphasised the need for a wider definition. J. S. Mill commented that it might be necessary to include, for example, not only acts committed in an insurrection, but also acts committed with a view to, or as a first step towards, an insurrection.\(^2\) Eventually, the Committee resolved: \(^3\)

"Every [extradition treaty] should expressly except from the liability to extradition such persons as are accused of crimes which are deemed by the party to the arrangement of whom surrender is demanded, to be of a political character."

This approach was reflected in section 3(1) of the Extradition Act 1870:

"A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character."

Under the statute, the determination of the question whether an offence is of a political character may take place at three different points of time. First, the Secretary of State may refuse to issue the original order authorising the arrest of the person concerned. \(^4\) Secondly, the magistrate, and a higher court on habeas corpus proceedings, may decide the question, and are to receive evidence which may be tendered to

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1. See, for example, the statements made by Sir T. Henry, Chief Metropolitan Magistrate: 6 B.D.I.L., 661.

2. Ibid.

3. Ibid., p. 664.

4. Extradition Act 1870, section 7.
show that the offence is political. Thirdly, the Secretary of State may then reconsider all the circumstances, including the nature of the offence and may, despite committal by the magistrate, decline finally to order surrender.

However, if no extradition offence were involved, the executive had at that time no discretionary or other power to refuse admission to and expel any alien. The first statutory provision which directly affected the "right of asylum" was included in the Aliens Act 1905. This brought in powers to refuse entry to certain classes of undesirable aliens and to make orders of expulsion. It was expressly provided, however, that where an immigrant proved that he was seeking admission solely to avoid persecution or punishment on religious or political grounds, or persecution involving danger of imprisonment or danger to life or limb on account of religious belief, he was not to be refused entry merely on the ground of want of means or the probability of his becoming a charge on the rates. The Act also introduced a system of appeals against refusal of entry, and although the Appeals Boards were bound by the decision of the Secretary of State in any question whether an offence was of a political character,

2. Section 11 authorises the Secretary of State to order surrender, but imposes no duty. Where the magistrate commits the prisoner, he informs the Secretary of State and may "send such report upon the case as he may think fit": section 10.
3. On expulsion, see below, pp. 548-551.
5. Section 2.
6. Section 8(4).
these provisions were liberally interpreted. This situation came to an end in 1914, with the enactment of the Aliens Restriction Act. Entry and expulsion were brought within the discretion of the Secretary of State and retained there by the Aliens Restriction (Amendment) Act 1919.1

(a) The Protection of Refugees

With little or no law on the topic, the extent of the practice of granting protection to refugees and others must be assessed by reference to ministerial statements and actual cases. In 1954, for example, it was said in the House of Commons that the United Kingdom follows the traditional practice in granting political asylum in appropriate cases:2

"The normal criterion for deciding whether a foreigner is entitled to be regarded as a political refugee is whether there are good grounds for thinking that his life or liberty would be endangered because of his political opinions if he were required to leave the United Kingdom. It is the right of every sovereign state to grant asylum ..." 

It was also affirmed in the same debate that political asylum is a privilege which is not lightly to be invoked, for its grant necessarily implies that the refugee's own state is one which employs methods of political persecution.3 In 1959 it was emphasised that there was no question of there being political considerations involved when deciding whether asylum should be granted, and that the only criterion was that of

1. The powers of control under the two Acts were continued in force each year by the Expiring Laws Continuance Act, until the enactment of the Immigration Act 1971, which established a permanent régime.

2. 529 H.C. Deb., cols. 4-5.

3. Ibid., cols. 48-50.
persecution. From the evidence of actual cases, however, it is apparent that the "objective standard" is determined in the light of political interest and alliance. In the case of Dr. Cort, for example, who sought a refuge from compliance with military service duties in the United States, asylum and permission to remain in the United Kingdom was refused. Such permission was readily granted, on the other hand, to the Soviet ballerina, Natalia Makarova, who had expressed a desire for "freedom to develop as an artist".

In 1961 a more realistic description was given in respect to United Kingdom policy on asylum during debate on the case of Captain Galvão. While statements continued to be made to the effect that persecution was the only true criterion, it was also admitted at the time that other factors might be considered. In this case, it was relevant to bear in mind that Captain Galvão "wished to use this country as a base for insurrection against another power which happens to be a NATO ally". In view of the necessary involvement today of


3. 529 H.C. Deb., cols. 1507-1516 (1954). See also the similar case of Perez-Selles: 583 H.C. Deb., cols. 1409ff. The Home Secretary said at the time: "The right of asylum is the right of a sovereign state to grant it; there is no right to claim it. Each state interprets its rights in its own way ... It is not true that there is any bias at all in favour of Iron Curtain countries, except in so far as the systems and actions of those countries may create the facts which justify the grant of political asylum": ibid., col. 1421.

4. The Guardian, 5th, 7th, 14th September 1970. In response to a question regarding the numbers of Soviet and other foreign people who had claimed asylum for reasons connected with improving their artistic, financial or political position, it was declared that no figures were available: 810 H.C. Deb., (Written Answers), col. 179.

5. 649 H.C. Deb., col. 431.
political considerations, it has been suggested that more might be achieved by laying down a different criterion to that of persecution as described in the 1951 Convention on Refugees. Ideally, the individual who satisfied certain predetermined and objectively defined criteria would automatically enjoy the benefits of protection, without possibility of interruption by a politically motivated decision of the executive. If that ideal solution remains unacceptable, it may still be possible to arrive at criteria which are less abusive of the country from which the applicant comes. "Persecution" would not be specifically alleged, but instead diplomatic reference might be made collectively to notions of suffering, deprivation, oppression or discrimination. Though somewhat attractive, as a solution this suggestion would still be susceptible to political influence. It is apparent that states will continue to regard asylum primarily as a political, rather than a humanitarian matter. While this is the case, it is essential to secure, if not entry and residence, then at least certain guarantees against forcible removal or return to possible persecution. It is in this area that municipal law has shown the most significant progress.

Although political asylum in the United Kingdom is apparently secure in the discretion of the executive, it is now possible for a person refused entry or faced with deportation to appeal against such decisions on grounds analogous

to those of anticipated persecution discovered in the law of
the United States. There are, however, certain limitations.
Thus, there is no statutory right of appeal while in the
United Kingdom for a person refused admission, unless at the
time he was in possession of a valid entry clearance.¹ There
is also no right of appeal against deportation, where this
is ordered as a result of the recommendation of a court or
on the ground that it is conducive to the public good, and in
the interests of national security or for other political
reasons.² The Immigration Act 1971 makes no specific
reference to persecution, but the criteria of the 1951 Convention
are repeated in the Immigration Rules, made under the Act, and
these undoubtedly do have the force of law. The Wilson
Committee, upon whose recommendations the appeals procedure
was established,³ expressly anticipated the possibility of
appeals by refugees and proposed that these be heard as a matter
of urgency, especially where the applicant might risk severe
penalties by delaying his return home.

The Wilson Committee also recommended that where the
appellant is or claims to be a refugee within the competence
of the United Nations High Commissioner for Refugees, the
latter's representative in the United Kingdom should receive
notice of the proceedings and be given an opportunity to
attend and to make known his views to the appellate authorities.

1. Immigration Act 1971, sections 13(5), 17(5).
2. Ibid., sections 3(5), 6, 15(3).
4. Ibid., para. 145.
This suggestion has now been incorporated in the Rules of Procedure, under which the United Kingdom representative is to be treated as a party to the appeal upon giving written notice at any time during the course of the appeal that he wishes to be so treated.¹

Despite the various limitations on the right of appeal against deportation, in all cases it is open to the non-patrial to appeal against his removal to a particular state or states.²

Clearly, the possibility of persecution would present grounds for objection to destination, but in cases where there is no appeal against the deportation itself it has been held that this is properly a matter for representation to the minister, rather than for the appeals tribunal or the courts.³ Where the appellant appeals against a proposed destination, he will only succeed if he shows, inter alia, that there is another state which is willing to admit him.⁴

Where the person concerned is entitled to appeal against the deportation order itself, then the persecution issue can

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¹ The Immigration Appeals (Procedure) Rules 1972 (S.I. 1972 No. 1684), Articles 7(3), 17(3).
² Immigration Act 1971, section 17.
³ Ali v. Immigration Appeals Tribunal, The Times, 22nd September, 1972 (Q.B.D.); 14th October 1972 (C.A.) - "the efficacy of the deportation order must be preserved". See also Secretary of State v. Fardy [1972] Imm. A.R. 192, 196.
⁴ Secretary of State v. Croning [1972] Imm. A.R. 51, 55-56, holding that under the Immigration Rules of the day (Cmnd. 4295, para. 46), a Commonwealth citizen should normally be returned to the country of his citizenship, and that there was no duty on the Secretary of State to specify any other country. It is for the appellant to produce cogent reasons to support a departure from the normal arrangements.
be raised before the appeals tribunal. The Immigration Rules state quite clearly:

"A deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion."

Under the Immigration Act adjudicators and the Appeals Tribunal are empowered to allow appeals where the decision or action involved the exercise of a discretion and they consider that the discretion should have been exercised differently, or if the decision or action is not in accordance with the law or the Immigration Rules. Such powers offer considerable scope for independent examination of the facts in persecution cases, and for substantial control over the discretion of the executive.

While certain advances have been made in securing procedural and substantive guarantees for refugees, there remain a number of areas into which neither the courts nor the appeals tribunals can intrude. For example, under the Visiting Forces Act 1952 any NATO deserter found in the United Kingdom is liable to summary arrest and removal to his


3. The executive will continue to retain a broad margin of appreciation in cases where deportation is ordered as being conducive to the public good and in the interests of national security, etc., and where deportation is ordered after a recommendation of the court. Nevertheless, in both cases the jurisdiction of the appeals tribunal and of the Secretary of State remains subject to control by the courts, for example, on application for the writ of habeas corpus. A blatant refusal to consider known facts, or any other manifest abuse of discretion, could be struck down. See above, pp. 456-458. See also on the practice of "disguised extradition", above, pp. 373ff.
home state. There is no possibility of review by way of habeas corpus, and no requirement of proceedings in the nature of extradition. Additionally, there are no provisions which would exempt a deserter on the ground that he was a political refugee. Such cases do not involve any exercise of discretion and they are, to all intents and purposes, beyond control.

(b) Extradition and Political Offence

At the time of enactment of the Extradition Act 1870 it was accepted that surrender for straightforward political offences, such as treason and sedition, was out of the question. These, and like offences, were consequently not listed in the Schedule to the Act. What was additionally required was that there should be some safeguard against governments which chose to mask their political motives behind ordinary criminal charges. The statute therefore provided that there should be no extradition if the offence for which surrender was demanded was an offence of a political character, or if the requisition was made with a view to trial or punishment for an offence of a political character. The interpretation of this provision has been a source of great difficulty for the courts of the United Kingdom. Section 3(1) appears to mean that there is to be no surrender in the following circumstances: (a) where the

1. See the reports concerning deserters from the United States forces: The Guardian, 2nd, 3rd, 5th, 13th, 14th, 15th October 1970.

offence charged is, say, murder, and that murder was committed in a "political context"; and (b) where the charge is, say, X, but the intention of the requesting state is to try or punish for the offence Y, which itself is an offence committed in a "political context". The court may thus be involved in the determination of two separate issues: (i) the nature of a "political context" and its relation to an offence actually committed; and (ii) the purpose of the request, in conjunction a "political context". 1

The first case in which a court had to consider section 3(1) and the first issue mentioned above was the now classic Re Castioni. 2 Switzerland requested the surrender of Castioni for having shot and killed a member of the local government during civil disturbances, and the magistrate committed him for extradition on a charge of murder. On a motion for habeas corpus the court held that it was free to review the magistrate's decision as to the political character of the offence. In the present case, the accused's action was "incidental to and formed a part of political disturbances", and it was, therefore, of a political character. This definition or description, of the context in which an offence may become "political" was adopted in preference to that proposed by John Stuart Mill in debate in the House of Commons, which would have included "any offence committed in the course of a furthering of civil war, insurrection or political commotion".

1. It is apparent that Parliament anticipated a review of the intentions, and hence of the good faith, of the requesting state; see exchanges in the Anglo-American negotiations for a treaty of extradition: 6 B.D.I.L., 665-668 (1870-1876).

2. [1891] 1 Q.B. 149.

3. The definition preferred by the court had been advanced by Sir James Stephens, one of the judges in the case, in his book, History of the Criminal Law of England.
Denman J. attempted to illustrate the notion of political offence and declared that the act should be done, 1

"as a sort of overt act in the course of acting in a political manner, a political rising, or a dispute between two parties in the state as to which is to have the government in its hands."

This decision represents the first, and what has become perhaps the most influential, attempt to place limits to the idea of "political context". The requirement of parties in a state in opposition and conflict was emphasised in the following case, Re Meunier. 2 An anarchist accused of bomb outrages was ordered to be extradited to France for, said the court, such acts did not come within the purview of political offence understood as occurring in a "two or more parties" type of situation. Thus, by limiting the nature of "conflict" the court set further limits to the notion of "political context", 3 and this approach has dominated later decisions. In the Schtraks case, 4 for example, Israel requested surrender on the basis of charges for perjury and kidnapping. The applicant contended, inter alia, that the offences which he had committed arose from the conflict in Israel between the orthodox faction and the governing secular faction, and that this conflict was of a political character. The House of Lords did not agree with this contention and held that it was plain 5 that

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the offences charged did not come within the concept of political offence since, if made good, they showed no more than that Schtraks had involved himself in a family quarrel. The fact that that quarrel had become a political issue in Israel did not make the offences political offences, nor did it support the idea of a political conflict as that was understood by the court.

It was accepted that any attempt to lay down a precise definition of political offence was neither practicable nor desirable, but a number of efforts were made to clarify the issues. Lord Reid, for example, expressed the opinion that section 3(1) was clearly intended to give effect to the principle that there should be an asylum for political refugees in the United Kingdom. Lord Evershed agreed, as did Lord Radcliffe, who added that the word "political",

"does indicate ... that the requesting state is after [the fugitive] for reasons other than the enforcement of the criminal law in its ordinary, ... common or international aspect."

What is not clear is whether the "reasons" to which his Lordship refers are the reasons which motivate the state in its pursuit, or reasons which relate to the intrinsic character of the offence and the context in which it was committed. The former possibility, which invites consideration of the motivation behind a state's request, is not supported elsewhere in Lord

2. Ibid., p. 598.
3. Ibid., p. 591.
4. It is not inconceivable that a state might pursue the man who blew up its Houses of Parliament solely with a view to enforcing the laws against criminal damage.
Radcliffe's judgement. In his view it was essential to concentrate upon the character of the offence charged:

"... the Act allows for no exception ... unless it establishes the political character of the very offence for which extradition is sought. In other words, neither the Secretary of State nor the court is entitled to enquire under section 3(1) whether the requesting state is asking for extradition under one charge while really intending to try or punish the fugitive for another and different charge. ... [Section 3(1)] envisages two alternative ways of identifying a political offence - one, a charge that on the fact of it smacks of the 'political', say caricaturing the Head of State or distributing subversive pamphlets, and the other, a charge which ostensibly criminal in the ordinary sense is nevertheless shown to be 'political' in the context in which the actual offence occurred."

There is much in this judgement which is out of line with previous decisions and which appears to do violence to the intended meaning of the statute. First, the Secretary of State is expressly authorised to look at all the circumstances of a given case, including the bona fides of the requesting state, and to refuse surrender where he considers that this would be unjust or oppressive. Secondly, it is not clear how those offences which "smack of the political" could ever be made the basis for an extradition request, in that they are not included within the Schedule to the Act.


3. However, it may be that his Lordship viewed the first limb of section 3(1) as a limit to the discretion of the Crown in the conclusion of extradition treaties and in their implementation by Order-in-Council; see section 3(b) of the Act and remarks of Lord Diplock in Cheng v. Governor of Pentonville Prison [1973] 2 All E.R. 204, at p. 208.
also favoured maintaining the requirement of political disturbance and opposition and, in his view, to categorise as political all offences committed for a political object, with a political motive or for the furtherance of some political cause would be to lose sight of this fundamental idea. While approving the decision in Kolczynski's case, he felt that its ratio had been expressed in terms too wide and general. The facts in that case did not support the idea of a disturbance, but the decision might be rationalised by reference to Lord Radcliffe's notion of political asylum.

Lord Reid did not think that an actual disturbance of public order was essential to the concept, but that the offence must be committed in the course of some "dispute" between the governing party and another party with political aims, with a view to furthering the purposes of the party concerned and not for any other purpose or from any other motive.

"If a person takes advantage of his position as an insurgent to murder a man against whom he has a grudge, I would not think that that could be called a political offence..... the motive and purpose of the accused in committing the offence must be relevant, and may be decisive. It is one thing to commit an offence for the purpose of promoting a political cause, and quite a different thing to commit the same offence for an ordinary criminal purpose."

The relevance of motive, intention and purpose was referred to by both Lord Diplock and Lord Simon in Cheng's case.

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Cheng had been tried and convicted in the United States for his involvement in the attempted murder, in New York, of the Vice-Premier of Taiwan. Lord Diplock and the majority of the House of Lords dismissed the appeal against extradition, and found that the concept of political offence was necessarily limited to offences against the government of the requesting state. Acts done in one state with a view to the overthrow of the régime in another state were not covered. On the general issue, Lord Diplock declared that prima facie,

"an act committed in a foreign state was not 'an offence of a political character' unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its policy, or to enable him to escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering so long as he was there ..... [It] cannot be supposed that the purpose of Parliament ... was to provide complete immunity for offences committed for political motives directed against the government of a foreign state, wherever those offences happened to be committed. The immunity ... was at most a qualified immunity depending on where the offence was committed."

Lord Simon's dissent, with which Lord Wilberforce was in agreement, was based principally on the ordinary and literal sense of the words "offence ... of a political character", and on the absence of express words limiting their application to offences against the requesting state. He noted also that

1. [1973] 2 All E.R. 204, per Lord Hodson at p. 207; Lord Diplock at pp. 209-210; Lord Salmon at p. 223. Lord Wilberforce followed the dissent of Lord Simon at pp. 210-221.

2. Ibid., p. 209.

3. Ibid., pp. 213-214. See also his discussion of Re Pavelic Ann. Dig. 1933-34, Case No. 158, Ibid., pp. 218-220.
the motivation for Cheng's action was, at least in part, the desire to change United States policy regarding Taiwan and, while conscious of the need to combat "terrorism", he declared that this was a matter for governments to deal with:

"there is no advantage in marginal and anomalous judicial erosion of traditional immunities."

Despite Lord Simon's strong dissent, the decision in Cheng's case may be reconciled with previous statements on the requirement of a conflict or dispute between factions in a given state. Lord Diplock described section 3(1) as having a dual purpose: (a) to avoid the United Kingdom's involvement in internal political conflicts of foreign states; and (b) the humanitarian purpose of preventing the offender being surrendered to a jurisdiction in which there was a risk that trial or punishment might be unfairly prejudiced by political considerations. It is an awareness of this latter purpose which accounts for recent judicial utterances linking political offence with political asylum. This link was expressly approved by Chapman J. in Re Gross, who suggested that political character could be assumed if the alleged offender "could claim with any prospect of success political asylum". Although attractive, in that it serves to emphasise the humanitarian aspect of protection, this approach tends to confuse the "political" in asylum with the "political" in offence. State practice shows that the word has a varying content. There is

2. Ibid., p. 209.
no reason in principle why a state should not, at one and the same time, refuse to grant asylum because it disapproves of the individual concerned, and refuse to allow extradition because it is based on a political offence. As Lord Reid observed in the Schtraks case, \(^1\)

"We [the courts] cannot inquire whether a fugitive criminal was engaged in a good or bad cause. A fugitive member of a gang who committed an offence in the course of an unsuccessful putsch is as much within the Act as the follower of a Garibaldi."

It is the matters which are beyond consideration by the courts which are precisely those which a government will consider in the exercise of its discretion to grant asylum. While it ought also to have regard to the humanitarian aspects, it will nevertheless pay particularly close attention to the political aspects, including the demands made on it by military and other alliances and its own approval or disapproval of the "rebel cause".

While such political matters are not for the courts, it may be that more general, humanitarian issues are raised by the second limb of section 3(1), in so far as it allows an investigation of the intentions of a requesting state. This provision was considered by the Lord Chief Justice, Lord Russell, in Re Arton in 1896. \(^2\). As regards an application for extradition made with a view to try or punish the prisoner for an offence of a political character, Lord Russell took this to include the case where,

"a person having committed an offence of a political

\(^1\) [1964] A.C. 556, 582-583.

\(^2\) [1896] 1 Q.B. 108.

\(^3\) Ibid., at p. 114, emphasis supplied.
"character, another and wholly different charge (which does come within both the Extradition Act and the treaty) is resorted to as a pretence and excuse for demanding his extradition in order that he may be tried and punished for the offence of a political character which he has already committed."

Although it is open to question whether the court's insistence upon an offence already committed is absolutely required by the words of the statute, this interpretation has been supported in later decisions and in similar contexts.¹ However, Lord Russell also declared that the question of the good faith of the requesting state could not be argued before the court:²

"that is not a question which the judicial authorities of this country have any power to entertain ... This question bears on the political aspects of extradition, and it must be determined upon a consideration of matters into which this court is not competent and has no authority to enter."

This point is more controversial, and the circumstances preceding the Extradition Act suggest that such an investigation by the courts was intended. Section 3(1) of the Act proposes a situation where a request has been made with a view to try or punish the individual for an offence of a political character. It apparently invites consideration of the motives and intention of the requesting state and, particularly, the question of bona fides. That such matters are open to consideration seems to be implied in the judgement of Cassels J.

¹ See, for example, R v. Governor of Brixton Prison, ex parte Keane [1971] 2 W.L.R. 1243 (H.L.); [1971] 2 W.L.R. 194, per Parker L.C.J., at p. 198 (Q.B.D.).

in Kolczynski's case.¹ In his view, the applicants were not to be surrendered because they would be punished "as for" a political offence. Cassels also stressed that the concept of political offence must always be considered according to the circumstances existing at the time. These words seem to embody the casuistic approach which has generally characterised the decisions of United Kingdom courts; thus, by avoiding, perhaps intentionally, any precise definition they have left themselves free to consider each successive case on its merits. The facts in Kolczynski's case can be read as falling within either part of section 3(1). First, the offence charged, revolt on the high seas, was committed in a political context and in order to escape from an oppressive régime. Secondly, if surrendered, the applicants would be tried not just for the specific offence, but also additionally for the political offence of attempting to escape.

In other cases the courts have shown little consistency in their approach to the question of good faith and the motives of the requesting state. They are, for example, loath to consider the likelihood of persecution or discrimination on grounds unrelated to the particular offence before them.² Additionally, the recent judicial references to the criteria of political asylum do not appear to have been made with the intention of

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². See R v. Governor of Brixton Prison, ex parte Kotronis [1971] A.C. 250 (good faith is presumed in the case of friendly foreign powers, i.e. those with which diplomatic relations are maintained). Cf. Zacharia v. Republic of Cyprus [1962] 2 All E.R. 438, especially per Lords Hodson and Devlin (application under section 10, Fugitive Offenders Act 1881); R v. Governor of Brixton Prison, ex parte Keane [1971] 2 W.L.R. 1243, per Lord Pearson at p. 1248, to the effect that assurances from the Attorney-General of Ireland were properly admitted and might be taken into account (Backing of Warrants (Ireland) Act 1965).
(3) European Developments

France has long been a preferred destination for refugees and after the Second World War it took positive steps, along with many other European nations, to alleviate the condition of those who, for one reason or another, had been driven from their own states. In 1952 there was established the OfficeFrançais de Protection des Refugiés et Apatrides for the purpose of assuring to refugees and stateless persons certain legal and administrative rights, to provide them with certain services and, in particular, to set on an official basis the recognition of their status. 1. Maurice Schumann, the Foreign Secretary at the time, said: 2.

"... la France exerce un droit d'asile qui est inscrit dans la Constitution. Elle assure aux réfugiés un statut qui leur est consenti par les arrangements internationaux."

This appreciation of international provisions on the status of refugees is reflected throughout the provisions of French law. Article 2 of the law which set up the Office Français declares that the status of refugee will be accorded to all those who come within the mandate of the High Commissioner for Refugees, and who conform to the definition prescribed by Article 1 of the 1951 Convention. 3. Where such recognition is refused, the individual affected may appeal to a special commission composed of a member of the Conseil d'État, who is president of the tribunal, a representative of the

3. In acceding to the Convention, France has limited its obligations in respect of events occurring in Europe.
United Nations High Commissioner, and a member of the Conseil de l'Office. This same Commission is also empowered to hear appeals from refugees affected by decisions which bear upon Article 31 of the 1951 Convention (refugees unlawfully in the country of refuge), Article 32 (expulsion), and Article 33 (prohibition of "refoulement"). There is no absolute bar against expulsion, but French practice accepts the obligations in the Convention and limits such measures to cases of the most serious infractions of 'ordre public'. The rights which the refugee enjoys are of particular importance, for the tribunal is empowered to examine matters relating to 'ordre public' and to look into decisions which are normally reserved to the executive authorities. In any case in which the order to expel or return a refugee is found to be justified, it may still not be carried out if, for example, that refugee finds it impossible to leave France or if his leaving might result in persecution or death. Where this is the case, the Minister of the Interior has power to require the individual to reside within certain areas and periodically to report to the police.

In addition to the specific provisions for refugees, France also adheres to the usual practice of denying extradition in respect of political offences. The surrender of criminals


2. Loi du 25 juillet 1952, Article 5(a), (b).

from France is governed by treaties and by the law of 1927.\(^1\)

Both sources recognise the principle of non-extradition of political offenders, but there is a tendency to restrict the concept of political offence with greater detail than is to be found in the law of the United Kingdom or of the United States. For example, Article 5(2) of the law of 1927 provides that there shall be no extradition,

"lorsque le crime ou délit a un caractère politique ou lorsqu'il résulte des circonstances que l'extradition est demandée dans un but politique .."

Where acts are committed during civil war or insurrection there will likewise be no surrender, unless the acts amount to "odious barbarism". In one case it was held that the finishing off of a wounded policeman during civil disturbances in Italy was,\(^2\).

"un crime de droit commun .... un acte de barbarie odieux contraire aux lois de l'honneur et de la guerre, depuis longtemps indiscutées par les nations civilisées."

Other examples illustrate the varying and pragmatic approach. Thus, in the extradition treaty with the Congo of 1900 it was stated that there would be an exception in favour of any offence which the requested party considered to be "un délit politique ou un fait connexe à un semblable délit".

This exception was not to operate, however, in the case of offences against a foreign Head of State or against members of his family, which amounted to murder, assassination or poisoning.\(^3\). Article 4 of the treaty with Germany is even

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more explicit: 1.

"L'extradition ne sera pas accordée si l'infraction pour laquelle elle est demandée est considérée par la partie requise, d'après les circonstances dans laquelle elle aura été commise, comme une infraction politique ou comme un fait commis pour préparer une telle infraction, l'exécuter, en assurer le profit, en procurer l'impunité ou commis en vue de s'opposer à l'accomplissement d'une infraction politique.

Ne sera pas réputée infraction politique:
1. Celles que les parties contractantes ont l'obligation de poursuivre en vertu de conventions internationales.
2. L'attentat à la vie d'un chef d'État ou d'un membre du gouvernement.......

In the Federal Republic of Germany the "right of asylum" is also expressed in the Constitution, Article 16 of which declares, "Politisch Verfolgte geniessen Asylrecht". German law, however, is remarkable for the substantive effect which has been given to this right, both by the courts and by the legislature. The result of these developments is that there is now embraced within the one class of "Asylberechtigten" not only the refugee and the stateless person, but also the political offender and the politically persecuted. 2. In addition to the basic constitutional right, the aliens law (Ausländergesetz) of 1965 specifically introduces certain practical extensions. It provides that aliens who enjoy the right of asylum and who are lawfully resident within the Federal Republic may only be expelled for the most serious reasons. 3. Article 14 of this law provides that no alien shall be deported to any country in which his life or freedom is

3. Article 11(2), AuslG. 1965: "schwerwiegenden Gründen der öffentlichen Sicherheit und Ordnung".
threatened on account of his race, religion, nationality or political opinion.¹. These rights are not without qualification, however, and may be denied to those who use their asylum to fight against democratic freedoms.². It has been argued that, despite the provisions of the constitution, the grant of asylum remains a privilege which can be refused at any time in the interests of national security;³.

"Das Asyl als Rechtswohlthat endet daher an dem Punkt, an dem die Gefahr für die BRD und ihre Bewohner beginnt."

In practice the tendency of decided cases is to emphasise the subjective nature of the right of the individual and to control executive discretion, rather than to express recognition of some precarious privilege. At the same time, the courts have widened the class of the politically persecuted who are entitled to benefit from that right.⁴. The phrase "politisch Verfolgte" is clearly wider than the related phrase "politisch Verbrecher", and in order to qualify under the Constitution the refugee is not required either to commit any offence or to wait upon the beginnings of a programme of persecution.⁵.

In one case which was decided recently it was held that the

¹. There are some exceptions in cases involving national security. See also Schiedermair, Handbuch des Ausländerrechts der Bundesrepublik Deutschland, (1968), pp. 105ff.


⁵. BVerfGE 9, 174 (1954), in which the court took into account the possibility of persecution resulting from the refugee's overstaying his visa and his contacts with exile groups. See also Weissmann, op. cit., p. 403.
possibility of punishment for "Republikflucht" was a sufficient ground for the grant of refugee status. In the view of the court, the punishment for absence abroad amounted to political persecution and not to a purely criminal punishment as the refugee authorities and the lower tribunals had held:

"[Die Bestrafung wegen Republikflucht] diente dem Zweck, die politische Herrschaft des Kommunismus zu sichern. Sie ist nicht vergleichbar mit Strafen, durch die auch in Rechtstaaten dem unerlaubten Grenzübertritt gewehrt wird."

The court also considered evidence of the applicant's opposition to the Hungarian régime, his refusal to join the party and the fact of assistance given to another refugee. In the circumstances, he could not be described simply as a "Wirtschaftsflüchtling".

The Ausländergesetz 1965 devotes a complete chapter to the law of asylum and provides for the recognition as "Asylberechtigten" of (1) refugees in the sense of Article 1 of the 1951 Convention, as revised by the 1967 Protocol; and (2) aliens who come within Article 16 of the Constitution, so long as they have not been granted refugee status in another

1. EVerwGE 39. 27 (1971); see also, Yugoslav Refugee (Germany) Case 26 I.L.R., 496; Homeless Alien (Germany) Case, ibid., p. 503; Refugee (Germany) Case 28 I.L.R., 297.

2. Ibid., pp. 28-29. The nature of such penalties was to be distinguished by reference to their purpose, which should not be to hinder or prevent journeys abroad.

3. Ibid., pp. 30-31: "Politisch Verfolgte geniessen Asylrecht ohne Rücksicht auf ihre Zahl."

4. EVerwGE 39. 27, 28 (1971); AuslG. 1965 BGBI. I, 353, Article 28(1).

(*) "Republikflucht" - the crime of fleeing from the state, commonly found in the penal codes of totalitarian régimes.
state or otherwise been granted protection. One of the most remarkable developments in the German law of asylum has been its extension into the field of extradition. The surrender of fugitive criminals is nominally governed by the Deutsches Auslieferungsgesetz (DAG), 1929. Article 3 of this law declares that extradition is not to take place where the offence for which it is requested is a political offence or an offence connected with a political offence. Political offences are themselves described as offences against the organisation of the state, against members of the government, and so forth. Murder and attempted murder, however, are expressly excluded from this definition, unless they occur in open combat. No mention is made of motive or purpose as being relevant to the concept of political offence and, if it were taken literally, the standard would not provide very great protection for the political offender. In a decision in 1955, the Bundesgerichtshof observed that although there

1. Article 28(2), AuslG. 1965; EVerwGE 4. 243 (1957). Cf. Kimminich, Der internationale Rechtsstatus des Flüchtlinge, (1962), pp. 406-407, and see the notion of "not firmly resettled" in the practice of the United States and the United Kingdom, above, pp. 524-525. Articles 29 and 30 provide for the establishment of a tribunal to recognise the status of refugees (Bundesamt für die Anerkennung ausländischen Flüchtlinge), and it is expressly provided that refugees, once "recognised", shall enjoy the status and rights declared in the 1951 Convention (Article 44). Article 35 establishes a body authorised to represent the interests of refugees before the Bundesamt and in appeals to the administrative courts.

2. Article 3(1) DAG: "... eine politische ist oder mit einer politischen Tat derart im Zusammenhange steht, dass sie diese vorbereiten, sichern, decken oder abwehren sollte...". Cf. Article 4, Franco-German Extradition Treaty, above, pp. 566-567

3. Article 3(2) DAG.

4. Article 3(3) DAG: "... im offenen Kampf".
were certain international usages in the granting of asylum, international law provided no definition of "politically persecuted person". The court therefore felt itself compelled to define the term by reference to, inter alia, the extradition treaties concluded by Germany with other states. Because most of these treaties provided that protection was not to be granted to political offenders who had committed offences against the life of others, other than in open combat, the court deduced that the term "politisch Verfolgte" in Article 16 of the Constitution was correspondingly limited. 1

This decision was strongly criticised by Kimminich in 1962 as an unwarranted restriction upon a basic constitutional right. He observed, 2

"Artikel 16 ... gewährt politische Verfolgten das Asylrecht; er enthält keine Einschränkung aus der zu entnehmen wäre, dass ein politisch Verfolgter dann kein Asylrecht genießt wenn seine Auslieferung wegen eines vorsätzlichen Verbrechens gegen das Leben verlangt wird."

The German-Greek treaty which was before the court simply provided that there was to be no surrender for political offences, and the character of such offences therefore stood to be decided according to the law of each contracting party. In the case of Germany, Article 16 reaches beyond the provisions of the extradition statute, which in turn must yield to the basic law. 3 These views were supported by an earlier decision in which it was specifically held that the right to asylum was

1. BGHSt 8, 65 (1955).
3. See Article 123(1), Grundgesetz.
not limited to the DAG definition of "politisch Verbrecher", but that it included one who, although he would not be prosecuted for political offences in his home state, would nevertheless be liable to persecution in the wide sense.¹ This decision and the criticism advanced by Kimminich have since been justified in a decision of the Bundesverfassungsgericht.² The 1955 ruling is effectively annulled and subsections (2) and (3) of the DAG can no longer be said to represent good law.³

European jurisprudence tends to favour a threefold characterisation of political offence: (1) the purely political offence, or one which is directed solely at the political order of a state; (2) the "délit complexe", where the same act is directed both at the political order and at private rights; and (3) the "délit connexe", which is an offence not itself directed against the political order, but which is closely related to another act which is so directed.⁴ The theory of preponderance is clearly relevant to offences within the last two categories, but otherwise there is little evidence to support a distinct European approach. The disparity is especially noticeable in regard to the relevance of motive or intention. Thus, in the Pavan and Ficorilli cases⁵, ideals or motives were considered to be important in the determination

1. BGHSt 3, 395.
2. EVerfGE 9. 17⁴. The court was also of the opinion that "politisch Verfolgte" could include one who qualified by reason of his activities in the BRD, although a heavy burden of proof would be required in such cases.
5. See above, pp. 516-517.
of relative political character, while in the French case

Re Giovanni Gatti the court considered that motive alone did
not give a common crime the character of a political offence: 1.

"Le caractère politique d'un acte ne dépend pas
de l'existence ou de la non-existence de motifs
politiques, qui sont le secret de la pensée de
l'auteur, mais uniquement de l'acte considéré
en lui-même ... ce qui caractérise l'infraction
politique, c'est la nature du droit auquel il est
porté atteinte."

Although caution may be required in the assessment of
motives which underlie an apparently common crime, the strict
view favoured in the above case is not representative. In an
Italian case in 1961, for example, it was held that under
Italian law the phrase political offence includes ordinary
offences committed wholly or in part for political motives. 2.

Germany had requested the surrender of its national who had
been convicted of anti-Jewish utterances, but the Italian
court denied extradition, holding that the characterisation
of an offence as a subjectively political crime was independent
of the moral aspects of the objects which the wrongdoer hoped
to achieve. Such crime was involved where the wrongdoer
had acted to promote aims which were in opposition to the
general order of the society in which he lived, by advancing
ideas or engaging in activities which were designed to uphold
or impose particular solutions of a political or socio-economic
kind. In contradistinction to the views adopted in the Gatti
case, the court considered that particular importance must be
attached to motives, "whatever may be the legal right or
interest offended against".

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1. Giovanni Gatti, Cour de Grenoble, Ch. des mises en accusation,
Dig. 1947, Case No. 70.

The practice of states reveals, in particular, three occasions involving the grant of protection to the individual: (1) asylum for the "politically" persecuted; (2) asylum for refugees on humanitarian grounds; and (3) non-extradition of political offenders. None of these categories should be applied, or thought of, as a rigid classification, for in many cases it will not be clear whether an alien is received into a state because he is politically persecuted, because he is a refugee subject to other forms of persecution, or because he has committed a political offence. In each case, however, and in the final analysis, the grant of asylum will tend to be justified in terms of the "self-evident" proposition that sovereign and independent states may extend protection in the exercise of their sovereignty. These notions require re-examination in the light of contemporary developments which point up restrictions on sovereign competence and emphasise the international, humanitarian duties of states.

The postulates of the practice of asylum have been considered above, together with the first formal attempt of the General Assembly to give expression to the "right of asylum". Article 14(1) of the Universal Declaration of

1. See above, Ch. XIV.
Human Rights amounted to little more than a recognition of the right to take flight, and reflected the contemporary view that the grant of protection represented not so much the exercise of a humanitarian duty as an exercise of uncontrolled discretionary power. In 1949, Messrs Alfaro, Scelle and Yepes proposed the following draft article to the International Law Commission:

"Every state has the right to accord asylum to persons of any nationality who request it in consequence of persecution for offences which the state according asylum deems to have a political character."

In the form adopted, this article made no substantial impact on developments in the following years. Indeed, the view of asylum which it expresses is a very narrow one and limits protection to the consequence of persecution for offences deemed political. As regards imposing upon states any duty, legal or moral, to grant asylum, the proposed draft differs not at all from Article 14 of the Universal Declaration.

However, the idea of a humanitarian duty incumbent upon states was establishing itself as an alternative to the traditional concepts of sovereignty and territorial jurisdiction. In 1956, Garcia-Mora emphasised contemporary developments when he wrote:

"As long as the law of nations does not provide for a centralised machinery to which the individual could resort directly for the adequate protection..."

1. But cf. Lauterpacht, International Law and Human Rights, (1950), at p. 345, where he advances the proposal that the right of asylum should be an absolute right, limited only by distinct considerations of national security and economic stability.


"of his rights and values, asylum as a human right is fulfilling a gap in the international legal order."

But when, in the following year, France proposed a Declaration on the Right of Asylum to the Economic and Social Council, states' reactions showed once again that they were unable to reconcile any such right with their own ideas about sovereignty.

After its first unsuccessful involvement with asylum in 1949 the International Law Commission has tended to keep away from the subject. In 1959 the General Assembly passed a resolution calling on the Commission to take up codification of the right of asylum, and in 1962 the Commission did include the "principles and rules of international law relating to the rights of asylum" in its future work programme. No date has been fixed, however, for that work to start. In view of the doubts and misgivings of the Commission, undoubtedly justified by the contemporary state of opinion, it has fallen to the Human Rights Commission and to the Third and Sixth Committees to sponsor the most recent developments in the law and practice on asylum. In 1960 the Human Rights Commission adopted a draft declaration on the right of asylum, and this has formed the substance of subsequent argument and debate.

Article 1 called upon all states to respect the grant of asylum by a state, in the exercise of its sovereignty, to persons


entitled to invoke Article 14 of the Universal Declaration. Article 2 recognised that the situation of persons forced to flee on account of persecution was a matter of concern to the international community, and Article 3 emphasised the principle of non-refoulement and the prohibition on expulsion of persons to a territory "if there is a well-founded fear of persecution endangering ... life, physical integrity or liberty in that territory". Exception was only to be permitted for "overriding reasons of national security or safeguarding of the population". The Third Committee adopted the substance of Article 1 in 1962, although it included the category of persons "struggling against colonialism" as an extension of those entitled to invoke Article 14. The Committee also emphasised that asylum was not to be granted to those suspected of crimes against peace, war crimes, or crimes against humanity as defined in international instruments.

Discussion in the Sixth Committee in the same year went somewhat farther. The Special Rapporteur, Arangio-Ruiz, recognised the regional quality of diplomatic asylum and under his guidance debate was limited to territorial asylum.

Article 1 of the Draft Declaration adopted by the Sixth Committee reproduced almost unchanged the first article proposed by the Third Committee. It reaffirmed the view of the Commission


on Human Rights that the plight of persons covered by the article was of concern to the international community, and supported the measures suggested for lightening the burden on a state which found it difficult to grant or continue asylum. The draft favoured by the Sixth Committee also embodied the principle of non-return, although the admission of exceptional measures taken in order to safeguard the population was qualified, and limited, by reference to the specific example of a "mass influx of people." At the end of 1966, the General Assembly took note of the Sixth Committee's report containing the Draft Declaration and recommended that it be forwarded to Member States for further consideration.

The following year the proposed Draft was adopted unanimously by the General Assembly as the Declaration on Territorial Asylum, in a form unchanged from that recommended by the Sixth Committee. The General Assembly recalled the codification to be undertaken by the International Law Commission in this area, and emphasised its recognition of the grant of asylum as "a peaceful and humanitarian act ... [which]

1. U.N. Doc. A/6570, Annex, p. 2 et seq. (Article 2). The suggested measures were to be undertaken by states individually or jointly or through the United Nations "in a spirit of international solidarity".

2. Ibid., Article 3. In any case in which exceptional measures might be justified, it was anticipated that the state concerned would consider the grant, under appropriate conditions, of a provisional asylum, pending departure to another state. Article 4 of the Draft Declaration obliged states granting asylum not to permit those to whom it was granted to engage in activities contrary to the purposes and principles of the United Nations.


4. G.A. Res. 2312 (XXII), 14th December 1967, GAOR (22nd), Supp. 16.
... as such cannot be regarded as unfriendly by any other State". It recommended that states should base their practice upon the principles contained in the Declaration, but without prejudice to existing instruments dealing with the status of refugees and stateless persons. Whether this Declaration will now lead to an international convention on asylum remains uncertain. It does look forward to action in this respect, and the Sixth Committee has since expressed its conviction that the Declaration should be regarded as a transitional step, leading eventually to the adoption of binding rules of international law.\footnote{1} It is reasonable to conclude, however, that the International Law Commission continues to delay its engagement in this task because of well-founded doubts as to the extent of international agreement which could presently be obtained.\footnote{2} Some of the continuing jealousy with which states regard their discretion in asylum has been apparent in recent debates designed to strengthen the protection and inviolability of diplomats and others entitled to the special protection of international law. It has been doubted whether a convention was in order, and whether such matters could be included within the general area of state responsibility by reason of their close involvement with highly political and divisive issues.\footnote{3}.

\footnote{1}{U.N. Doc. A/6912, Report of the Sixth Committee, paras. 64, 65}
The 1967 Declaration is welcome as a restatement of general humanitarian principles. However, it continues to emphasise the sovereign competence aspect of territorial asylum and to reaffirm the position of the state as sole judge of the grounds upon which such protection may be extended. Little indication is given of the boundaries within which that discretion is confined, and reference to Article 14 of the Universal Declaration discovers mention only of "asylum from persecution", which is not to include prosecution for non-political crimes or acts contrary to the purposes and principles of the United Nations. But even if the subjective right of the individual is not proclaimed directly, there exists a substantial body of evidence in support of certain rules of customary international law which do regulate the exercise of powers within this area. An examination of the provisions of municipal law has shown the extent to which the principle prohibiting the return of refugees to a persecuting state has established itself in state practice. It is difficult to imagine that the unfettered right to return a refugee in such circumstances would ever be claimed today. The antecedents of the rule of non-return are firmly established, both in regard to admission and expulsion, and the present state of the law owes much to the original work of the League of Nations. In 1933, for example,

1. Article I(1)(3).

2. On occasion, states may seek to effect such return and to justify their action as a "straightforward application of immigration regulations". See, for example, the case of the two Moroccans summarily deported to Morocco from Gibraltar, whither they had fled following involvement in a plot to kill the king of Morocco: The Times, The Guardian, 19th August 1972.
the Convention concerning the International Status of Refugees was signed, and the States Parties agreed not to exercise their powers of expulsion or refoulement in respect of those refugees who had been authorised to reside in their territory, "unless the said measures are dictated by reasons of national security or public order". It was also agreed "in any case not to refuse entry to refugees at the frontiers of their country of origin"; and it is clear that provisions of this nature were the groundwork for greater protection of the rights of the individual and a corresponding confinement of the discretion of states.

The criterion generally adopted to distinguish the refugee was the fact of his not actually enjoying the protection of the government of his state of origin, whether or not he was "legally" entitled to such protection. It was pointed out in a contemporary work that there could never be a satisfactory and comprehensive definition of "political

1. 159 L.N.T.S., 199.
2. Article 3(1). The United Kingdom made a reservation to the effect that this provision should not be applicable to refugees admitted for a temporary visit or purpose, and that "public order" should include matters relating to crime and morals. In Brozoza's case, arrêt du 9 juin 1937, the Cour de Toulouse noted, "que la Convention du 28 octobre 1933 admet que l'impossibilité pour un apatride de quitter le territoire constitue un cas de force majeure excluant l'applicabilité de toute penalité": Kiss, Répertoire de la Pratique Française en Matière de Droit International Public, vol. IV, p. 461. See also Keledjian, Ann. Dig., 1935-37, Case No. 137; cf. Guéron, (1939), Kiss, op. cit., pp. 461-462; Persager, (1949), ibid., p. 462.
3. Article 3(2), not accepted by the United Kingdom.
refugee", and that those hitherto adopted were, at best, technical definitions for legal and administrative purposes.

In the writer's opinion, it was important not to lose sight of the "essential quality" of the refugee as one, 1.

"who has sought refuge in a territory other than that in which he was formerly resident as a result of political events which rendered his continued residence in his former territory impossible or intolerable."

The notion of the intolerability of continued residence caused by political conditions goes to the heart of the problem, and it predates the broad criteria adopted after the Second World War.

These criteria were comprehensively described in the 1951 Convention Relating to the Status of Refugees. 2. As amended by the 1967 Protocol, this Convention defines as a refugee a person who, 3.

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former residence is unable or, owing to such fear, is unwilling to return to it."

Although the Convention does not guarantee a right of entry in

1. Simpson, Refugees - A Preliminary Report of a Survey, (Royal Institute of International Affairs, 1938), p. 1. See also by the same author, The Refugee Problem, (1939), which is undoubtedly one of the best available accounts of the refugee problem of the inter-war years and of the measures, national and international, which were taken to deal with it.

2. 189 U.N.T.S., 150.

so many words, it does oblige states parties not to impose penalties for illegal entry on refugees, provided that they report to the authorities without delay and show good cause for their actions. Articles 32 and 33 are of particular importance to the refugee. The former declares that a refugee lawfully within a state shall be expelled only on grounds of national security or public order, and that he shall be permitted a hearing and appeal against such order of expulsion, "except where compelling reasons of national security otherwise require". Article 33 declares again the rule prohibiting the expulsion or return of a refugee to the frontiers of a territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Derogation is permitted only for overriding reasons of national security. In the Refugee (Germany) Case, the court held that a refugee who had obtained an extension to his residence permit on the basis of untruthful statements was not "lawfully" with the Federal Republic. The restriction on permissible grounds of expulsion did not, therefore, apply to him in the manner foreseen by Article 32. However, the court also held that the right inherent in Article 33 was not similarly tied to lawful presence, and it must be interpreted

1. Article 31(1).

2. The Contracting States also agree to allow such refugee a reasonable period in which to seek legal admission to another state; Article 32(3); Expulsion of an Alien (Austria) Case, 28 I.L.R., 310. During that period the Contracting States have the right to apply such internal measures of control as they deem appropriate; see, for example, article 28, ordonnance du 25 nov. 1945; Kiss, op. cit., vol. IV, p. 462.

3. Article 33(2).
to mean that no refugee, whether lawfully or unlawfully within the territory, may be expelled to a place of persecution.¹

The definition of "refugee" provided by the 1951 Convention, as amended, has been adopted in Article I of the OAU Convention on Refugee Problems in Africa.² Article II deals specifically with "asylum" and provides that Member States shall use their best endeavours to receive or to secure the settlement of refugees defined in Article I.³ It affirms that the grant of asylum is a peaceful and humanitarian act and restates the prohibition on measures which would compel a refugee to return to or remain in a territory where he faces persecution.⁴ No express concession is made to overriding considerations of national security, although if a Member

1. 28 I.L.R., 297. In the Yugoslav Refugee (Germany) Case 26 I.L.R., 496, the court held that lawful residence in the state could be established even if preceded by an illegal entry. See also, Homeless Alien (Germany) Case, ibid., p. 503.


3. The 1951 definition originally qualified refugee status by reference to flight "as a result of events occurring before 1st January 1951". In Molefi v. Principal Legal Adviser [1971] A.C. 182, the Judicial Committee of the Privy Council, on an appeal from Lesotho, considered that the events contemplated were happenings of major importance involving territorial or profound political changes. In this case the appellant claimed the benefit of the Convention and the right not to be expelled to South Africa. It was conceded that he was outside his country and that he had a well-founded fear of persecution (at p. 195), but the Privy Council agreed with the Lesotho Court of Appeal that the 1948 elections which brought the Nationalists to power in South Africa, and the pre-1951 legislation and repressive government policy, were merely the background to later events (at p. 197). Because the appellant had remained in South Africa up until 1961, it was the view of the court that he could not be said that he was outside his country "as a result of events occurring before 1951". The 1967 Protocol will avoid strictly legal interpretations of this nature, and the OAU Convention goes further, to provide that the benefits of refugee status shall also apply to those forced to leave on account of external aggression, occupation, foreign domination or events seriously disturbing public order: Article I(2).

4. Article II(2),(3).
State finds difficulty "in continuing to grant asylum to refugees", then recourse is to be had to other Member States and through the OAU.\(^1\).

Regional conventions of this nature,\(^2\) together with developments in municipal law, provide further evidence of the present state of general international law. In view of the criteria proposed by the International Court of Justice in the North Sea Continental Shelf Cases,\(^3\) it may be affirmed that the prohibition on the return of refugees to countries of persecution has established itself as a general principle of international law, binding on states automatically and independently of any specific assent. Earlier state practice supports the contention that, for example, Articles 32 and 33 of the 1951 Convention reflected or crystallized a rule of customary international law at the time of their formulation, and practice since that date reaffirms this conclusion. The high standard of proof which is required on the issue of opinio juris can in this case be satisfied.\(^4\) The relevant provisions are of a "fundamentally norm-creating character",\(^5\) and the fact that expulsion or return may be permitted in exceptional

1. Article II(4),(5). In such cases provision is to be made for temporary residence.


cases does not deny this premise, but serves simply to indicate
the boundaries to the exercise of discretion. Secondly, the
relevant conventions have enjoyed widespread and representative
participation. The time factor also operates in favour of
the rule against return as a rule of customary international
law, binding on states which have not ratified or acceded to
the treaties. Referring to the requirement of *opinio juris*
and the evidence of state practice, the court stated:  

"Not only must the acts concerned amount to
a settled practice, but they must also be
such ... as to be evidence of a belief that
this practice is rendered obligatory by the
existence of a rule of law requiring it."

That such an obligation is recognised is evident from both
municipal law and state practice, and it is an international
obligation which goes beyond the conventional relationship.
Depending on the particular circumstances, its breach may
therefore involve international responsibility towards other
contracting parties, towards the international community as
a whole, or towards a regional institution. International
obligations established on a regional basis will continue to
be of importance in the protection of individual rights,
particularly while there is a continuing reluctance among

1. In June 1971 the United Nations High Commissioner for
Refugees reported that there were sixty states parties to the
E/5037. By November 1971 the number of parties to the latter
instrument had risen to forty-eight.

2. I.C.J. Rep. 1969, p. 44. The Court cited discussion of
opinio juris in the *Lotus* case, P.C.I.J. (1927), Ser. A, No. 10,
at p. 28.

also, *Second Report on State Responsibility*, Roberto Ago,
1970 - II, p. 177,
states to embody the subjective right of asylum in a multilateral treaty. The bilateral recognition of the principle of non-extradition of political offenders, although important as one aspect of asylum, tends to understate the broader humanitarian issues. It would appear that customary international law imposes no duty upon states to surrender fugitive criminals, and it has been suggested that the extradition process itself is but a gloss upon the rule of law which permits the grant of asylum. It is perhaps a little difficult today to include the "ordinary" criminal within the practice of asylum, given the premise that all nations have a common interest in the suppression of crime. Bilateral extradition treaties reflect this interest, and may bring the obligation to surrender within the purview of international law. What is not so clear is the extent to which international law may affect the provisions of such treaties and, in particular, the content of the exception in favour of the political offender.

This exception amounts to a reciprocal agreement between states on the right to grant asylum in certain defined circumstances. As Lauterpacht noted in 1944:

"We are confronted with the impressive fact that in the legislation of modern states there are few principles so universally adopted as that of the non-extradition of political offenders."

1. 6 B.D.I.L., 453-456; McNair, Extradition and Exterritorial Asylum, 28 B.Y.I.L., (1951), 172. But note recent developments in regard to specific offences, such as genocide, hijacking, etc.

2. O'Connell, International Law, p. 720. This view also seems to be supported by certain remarks of the International Court in the Asylum case: "In the case of extradition the refugee is within the territory of the state of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty", I.C.J. Rep. 1950, 266, 274.

In respect of Europe, an attempt has been made to set down principles of extradition which would be acceptable to as many of the members of the Council of Europe as possible, and in 1957 the European Convention on Extradition was opened for signature. During the negotiations certain fundamental differences were at once apparent, which seemed to stem from the conflict of irreconcilable attitudes: (1) the view that extradition should be facilitated, with the chief aim being the suppression of crime; and (2) the restrictive view, which requires the introduction of humanitarian considerations. These differing approaches are reflected in the provisions which deal with the political offence exception. Article 3(1) of the Convention forbids the extradition of those accused of political offences, or of offences connected with political offences, and provides that the requested party shall determine the character of the particular offence. The form adopted did not receive unanimous agreement among the Committee of Experts, especially by reason of its mandatory character. The Committee therefore decided that reservations should be permitted under Article 26.

Subsection (2) attempts to take account of the humanitarian aspect and provides that extradition shall no be granted, if the requested Party has substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the

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"person's position may be prejudiced for any of these reasons."

The practice common in European bilateral treaties of excluding the assassination of a Head of State from the class of political offences is recognised by subsection (3). Once again this was not accepted by all the delegations and it was anticipated that there would be further reservations on this point. This express acceptance by the framers of the Convention that States Parties should be able to make reservations to various provisions is one element which militates against the treaty as representative even of an existing regional custom. In the North Sea Continental Shelf Cases the International Court was faced with the argument that the Federal Republic of Germany was bound by Article 5 of the Geneva Convention on the Continental Shelf because it had crystallized an emergent or existing rule of customary international law. The Court, however, noted that Article 6 was one of those provisions which might be made the subject of reservations, and observed:

"whereas this cannot be so in the case of general or customary rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exerciseable at will by any one of them in its own favour."

1. Such a provision is commonly called an "attentat" clause, and seems to have originated in the Belgian law of 1856: 6 B.D.I.L., 668-669. Although it will depend on the precise rôle of the Head of State within a given system, in many cases assassination will be the most political of all political crimes. See also, section 4(5), Fugitive Offenders Act 1967; article 3, 1922 United States-Venezuela Extradition Treaty: 49 L.N.T.S., 435.


If one applies this statement to the European Convention, it is apparent that, with respect to the states parties, (1) there is no general or customary rule of international law, regional or otherwise, which forbids the extradition of political offenders. This conclusion is supported by both the variety of state practice and the fact that decision on the character of a given offence is left, inevitably, to the authorities of the requested party, that is, it is a unilateral action only occasionally limited by express treaty obligations. (2) This first conclusion must now be interpreted in the light of a rule or principle which requires the refusal of surrender on humanitarian grounds, that is, generally, where his position is likely to be prejudiced by reason of irrelevant distinctions or where there is a possibility of the violation of fundamental human rights.  

(3) There is no general or customary rule of international law which excludes the assassination of a Head of State or member of government from the category of political offence.  

Although stated with reference to a European context, these conclusions are capable of wider application. Refugees and political offenders are particularly susceptible of violation of basic human rights, and it is these considerations which dominate questions concerning their entry, expulsion or extradition. Political offence is only one aspect of asylum but it is evidently the one aspect in which political considerations will vie with humanitarian considerations.

1. Cf. Article 3, European Convention on Human Rights. See also Application 480/58: 2 Yearbook 35; Application 984/61; Application 1082/63: 6 Yearbook 480. On the problems of defining international obligation in this area, see above, pp. 376ff  

2. Cf. current developments in regard to hijacking and the protection of diplomats, above, p. 579.
The present difficulty of defining "political offence" with any precision has already been noticed in various municipal systems. Courts approach the problem from a number of different angles and interpretations vary from the somewhat rigid views of the courts of the United States and the United Kingdom, to the broader, contemporary approach of the courts of the Federal Republic of Germany which tend to reject strict categorisations in favour of applying the general criteria of persecution. Nevertheless, it may still be argued that the rule of non-extradition of the political offender is a rule of municipal law and not of international law. The political offender who is extradited will thus generally be barred from pleading that he has a right not to be tried before the court of the requesting state, unless he otherwise able to take the benefit of the rule of specialty. This proposition does not rule out the possibility.

3. In the Delivery without Extradition (Germany) Case, Ann. Dig. 1919-22, Case No. 185, the court held that where a Dutch policeman had brought the accused to the frontier and there handed him over to the German authorities, the extradition treaty did not contain any provision conferring upon an accused person the right to invoke the absence of extradition proceedings as a reason preventing prosecution. See also Katz v. Officer Commanding the Polish Military Prison, Jerusalem, Ann. Dig. 1943-45, Case No. 45; Cook v. United States 288 U.S. 102 (1933).
that the state which orders the extradition is acting in violation of an international obligation.

There are a number of precedents, both executive and judicial, which favour the view that there is no reason and no rule of international law which precludes a state from surrendering political offenders if it so wishes. 1. Many treaties expressly exclude from the political offence exception the assassination or attempted assassination of the Head of State, 2. and in 1946, by an exchange of notes, France and Belgium agreed to the mutual surrender of collaborators. In one case the Cour de Paris held that the offences of intelligence with the enemy and carrying arms against Belgium were not political offences. The court stated that in wartime collaboration in a country occupied by the enemy excludes the idea of a criminal action against the political organisation of the state, which is the characteristic of the political offence. It also took into account the fact that French law punished the same offences as ordinary crimes, and that the offences were to the prejudice of an allied country. 3. In Spiessens case,


2. European Convention on Extradition 1957, Article 3(3); United Kingdom Fugitive Offenders Act 1967, section 4(5); see also Article 4(2)(i),(ii), United States-Canada Extradition Treaty 1971, removing from the political offence exception attempts upon those to whom a state owes a duty of protection under international law, and the crime of hijacking; United Kingdom Hijacking Act 1971.

however, the Cour de Colmar held that the fact that crimes against the external security of the state are punished as ordinary crimes does not deny them the character of political offences. Extradition in France was governed by the law of 1927, from which there could only be derogation by treaty. In the circumstances, the exchange of notes between France and Belgium could not be regarded as such a treaty, for it had not been published, ratified or approved by law. Extradition was, therefore, refused. 

If municipal law condones the surrender of political offenders, the individual may be additionally prejudiced by the fact that there is no other state in a position, or interested to claim that there has been a breach of international law. The political offence is manifestly one area which involves political considerations, and the traditional view has been that, while international law permits and favours the non-extradition of political offenders, it leaves it to individual states to interpret this competence more or less after their own fashion. Recent developments in international law have introduced limitations to the permissible content of political offence and it is clear that a state is no longer free, for example, to refuse extradition in respect of the crime of genocide. Contemporary international action suggests the possibility of further limitations regarding the hijacking.

3. Whiteman, Digest, vol. 6, p. 855. Nevertheless, in some cases there is a duty to extradite, for example, in the case of those charged with international crimes. Under Article VII, Genocide Convention 1948, the Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties.
of civil aircraft and offences against diplomats. It is too early to characterise these specific limitations as reflecting rules of general, as opposed to conventional, international law. In each case it will be necessary to view the offence within a broader context, and with due consideration given to humanitarian issues and the fundamental rights of the individual. That these matters remain of principal concern is evidenced by the fact that proposals to remove offences from the political exception are generally balanced by reference to the right, and the duty, of the "receiving state" to institute proceedings in the alternative. It is precisely at the point where persecution results or basic human rights are violated that international law is involved. The International Court has recently declared that there are certain obligations, relative to fundamental rights and the principle of non-discrimination, which states owe erga omnes. The principles of international responsibility in such circumstances are not fully worked out, but the general notion indicates clear limits to the competence of states and suggests the class of case in which expulsion, extradition or the refusal of entry might constitute the violation of an international obligation, even though no other state has a direct interest, as it were, in the individual affected.


To a certain extent the principle of non-extradition of political offenders can be subsumed within the general area of humanitarian concern for the individual. It is this concern which has produced a substantial body of law and principle which is directly applicable to the refugee and which now, indirectly, requires a re-examination of the traditional view of the individual in international law and the territorial competence of states. In many ways the treatment which states must accord to refugees represents a certain minimum standard, which is capable of benefiting the class of aliens as a whole. The essential purpose behind the various treaties and conventions has been to confine and structure the discretion of state authorities, to set ascertainable limits to their competence.
GENERAL

CONCLUSIONS
In the Introduction it was emphasised that the general competence of states in regard to their treatment of aliens is characterised by its essentially discretionary nature. The theory was advanced that this discretion in turn invites a presumption in favour of controls and limits according to law. It is submitted that this conclusion is fully justified, in the areas of state power which have been examined, by the examples taken from existing rules of general international law and by the evidence of state practice.

First, it was shown that the state is limited in its freedom to decide upon the fundamental distinction between aliens and nationals. Thus, it is not free to invoke the competence which international law extends to it in order to avoid the obligations which international law also imposes. It may not, therefore, automatically impose its nationality on immigrant and resident aliens, nor may it resort to an ad hoc procedure of denationalisation as a preliminary step to expelling its nationals. These limitations are balanced, however, by the doctrine of effective nationality. Just as a state may not acquire the right to exercise diplomatic protection without, in some cases, showing the existence of a substantial connection between the individual and itself, so too that right may become diluted in respect of the alien who, by long residence, has established a close association with the host state. This conclusion has as its corollary a limitation of the powers of the host state to expel long resident aliens who, in some sense, have set up "effective nationality". The existence of such limitations was later revealed in the practice and municipal law of the states examined.
In regard to passports and other travel documents, it was noted that one is here dealing principally with an institution of municipal law. The relation of the travel document with the "right to travel" was discussed, but it was felt that there were insufficient developments in this field to warrant the conclusion that any obligation was imposed upon states. Regional practice, however, indicates a movement towards reducing the formalities involved in the crossing of frontiers, and the rôle of regional organisations such as the EEC and Benelux was stressed. The passport entails certain consequences on the plane of international law and it may serve particularly as some evidence of nationality and as a guarantee that the holder was returnable to the state which issued the document. In this latter respect, it is proposed that there is a sufficiency of state practice and sense of legal obligation to justify the conclusion that a rule of customary international law is involved, and that states' freedom is thus confined.

In Part II a brief and general survey was undertaken of the availability of standards in the context of movements across frontiers. These, it is suggested, are important in assessing the extent of state discretion and in effectively limiting any doctrine of absolute territorial sovereignty. The principle of non-discrimination was examined in the light of the particular position of aliens. It was noted that certain distinctions on the ground of alienage are permitted under international law, but the principle of non-discrimination on racial grounds has established itself as a peremptory norm. State measures against aliens must, therefore, be seen against the broader background and the fact of alienage will not, of itself, justify
measures which are actually based on racial distinctions. Finally, the present status of the doctrine of the reserved domain of domestic jurisdiction, the presumption in favour of certain areas of absolute state discretion, was discussed. Once again the point was made that this issue must be examined in a wider context. The developing theory of international obligations which may be owed to the community of states at large, or to some regional organisation, commands a constant reappraisal of claims to absolute discretion.

In Part III, the substantive problems involved in the entry and exclusion of aliens were investigated. The claim of states to an unfettered right of exclusion was mentioned and first indication given of the possibility of certain limits to the discretion was indicated. A detailed examination of the practices and procedures of two systems was then employed, first, to show how such matters are governed in the municipal sphere and, secondly, to investigate the possibility that states, in the local law, are developing or crystallizing certain standards of international law. In this respect, the principle of non-discrimination was shown to operate and it is suggested that if an alien is to be excluded, he at least has the right not to be excluded on purely racial grounds. In addition, the practice of providing certain procedural guarantees, particularly in favour of those who relied on the issue of visas, suggests that recognition is being extended to the principle that decisions must be taken in accordance with law. The operation of this general principle as a controlling factor on discretionary powers was also emphasised.

Finally, the existence of a significant number of international obligations to grant admission to both nationals and aliens was
raised as evidence of further restriction upon the so-called "unfettered right" of exclusion. The significance of the European Convention in the protection of individual rights was stressed and it was observed that the fact of exclusion may bear upon a number of other rights. The powers of the state are correspondingly confined by the specific obligations of the convention. The more general obligation to permit entry which is assumed in treaties of establishment was contrasted with the very detailed regulation which governs the movement of persons within the EEC. In the latter case, the concepts of Community law override the provisions of local jurisdiction and create individual rights enforceable on a regional level. This situation is almost unique but suitable recognition was also given to bilateral treaties of establishment.

With these limitations in mind, attention was then turned to what is perhaps the most crucial issue affecting aliens, the power of expulsion. The traditional view of this power was noted and rejected as inadequate. Instead, a detailed examination of the power, particularly in the light of its function and purpose, was undertaken. Reference was made to the doctrine of abuse of rights to illustrate the limits of expulsion, and the practice of disguised extradition was criticised. In the light of recent developments, particular attention was given to the broadening concept of international obligation as indicative of limitations to state competence, in cases where the only state which has a right to exercise diplomatic protection is unwilling to do so. In most cases, however, it is the legal relationship between the host state and the receiving state which is the source of international obligation. It was shown that
these obligations cannot be avoided by resort to any doctrine of 'ordre public' and that expulsion requires substantial justificatio
In this respect, reasons of state must be balanced against the notion of respect for acquired rights, although it was suggested that a general broadening of this doctrine is demanded in the case of resident aliens. This view was later supported by the provisions of municipal law which grant a privileged position to the "settled alien". Moreover, the competence to expel may not be employed to effect a de facto expropriation or any other policy, such as genocide, which is proscribed by established rules of international law.

Finally, reference was made to the permitted manner of expulsion, including a consideration of the right of appeal. It is not thought that such a right is required by international law, but there is good evidence for the view that decisions must be in accordance with law, that is, that misuse or abuse of the power should be open to review. In addition, the expulsion itself must not be executed in such a way as to do violence to the fundamental rights of the individual. In such circumstances, the standards of treatment required by international law may be invoked.

In view of the limitations imposed by international law, the inquiry into the regulation of expulsion in municipal systems is especially important. This revealed evidence of states' recognition of international obligations, in regard to the principle of decisions according to law and to the special position of the resident alien. In both cases it is proposed that an emergent rule of customary international law here finds additional support
from state practice. In the matter of those grounds which may justify removal, the evidence of state practice reveals a wide freedom of decision. The grounds disclosed, although consistent from state to state, cannot be said to reflect any rule of international law. On the contrary, customary international law appears even to justify the retention by states of reserve powers in respect of matters relating to 'ordre public'. The influence of the reserved domain finds its expression here, but it is to be remembered that even 'ordre public' is a general legal conception. Municipal systems also reveal recognition, in one form or another, of the requirements of due process of law. Again, this supports the view that expulsion is a discretionary power confined and structured by the law.

Further support is to be found in the obligation imposed by treaties. Although it is rare to find that a state will surrender its power of expulsion, the power will be limited by reference to the aims and purposes of the treaty, and to the specific obligations assumed. This principle was illustrated in practice by reference to the European Convention and to relevant provisions of EEC law. In the context of treaties of establishment the limits of 'ordre public' were explained and it is proposed that this concept is subject to law, even though in itself it expresses the wide margin of appreciation which states enjoy in certain matters. This proposition finds support also in the approach adopted by municipal courts and in the rôle of the concept in the law of the EEC.

Finally, an examination was undertaken of states' obligations in regard to refugees. It is thought that these
in many ways represent a minimum standard for the treatment of aliens. Here, particularly, municipal law reflects the requirements of general international law. It is proposed that the consistency of state practice over a substantial period of time, together with the provisions of multilateral treaties, reveals the existence of a rule of customary international law which prohibits the delivery of persons up to persecution. The position of the political offender is less clear. Customary international law justifies the refusal to surrender but it also requires surrender, for example, in the case of international crimes.

These conclusions reaffirm the general thesis remarked upon above, that states' powers in the matter of the entry, establishment and removal of aliens are essentially discretionary, that is, they are confined and structured by international law with greater precision than is generally realised. Admittedly, certain powers are exercisable within broader limits than others, but the principle of control is retained.
APPENDIX

EXCEPTIONAL CATEGORIES
APPENDIX

Exceptional Categories

There are a number of categories of people who, by virtue of the rules of general international law, or of treaty, or as the result of practice, enjoy privileges and exemptions in the matter of entry into foreign states. Included within these exceptional categories one finds diplomats, special missions, the officials of international organisations, crewmembers, refugees and stateless persons. The position of the last two categories has been discussed above, and consideration will now be given briefly to those remaining.

(1) Diplomats and Consuls

The privileges and immunities of diplomats have long been based on customary international law, and those of consuls most frequently on bilateral treaties. It is recognised that the "right of legation" is founded essentially on necessity, the practical convenience of maintaining normal contact, and the mutual consent of states.\(^1\) Privileges and immunities follow as essential to the successful performance of diplomatic functions, and it is apparent that a foreign diplomat who arrives at the frontier of the state to which he has been

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accredited is to be admitted. The Vienna Convention on Diplomatic Relations 1951 provides that those entitled to diplomatic privileges and immunities are to enjoy them as from the moment of entry. This presumably admits of at least a formal submission to immigration control, but it is now clearly established that objections to the appointment of any particular individual as head of a mission should be raised before he is dispatched to take up his appointment. The Vienna Convention declares the customary rule that the sending state must make certain that the agrément of the receiving state has been given in respect of the person whom it proposes to accredit. It is further provided, and generally recognised in practice, that the receiving state is not obliged to give reasons for the refusal of agrément, so that in effect it exercises a totally discretionary power in the first matter of admission.

Once admitted, the diplomatic agent enjoys personal inviolability and general immunity from criminal and most civil and administrative jurisdiction. He is not, therefore,

4. Article 4; cf. Harvard Research, Article 9(1)(a).
5. Article 4(2); cf. Harvard Research, Article 9(1)(b).
7. Articles 29-36. These immunities cover also members of his family forming part of his household and, within limitations, administrative, technical and service staff: Article 37; cf. Harvard Research, Article 19. See also Vienna Convention, Article 27(5), inviolability of the diplomatic courier; Article 40, diplomats in transit. Cf. Harvard Research, Article 15; United Kingdom Diplomatic Privileges Act 1964, section 2(5).
subject to alien registration laws nor to deportation. However, the receiving state may declare the head of a mission, or any member of the diplomatic staff, to be persona non grata at any time.

The sending state is then obliged to recall the person concerned or to terminate his functions with the mission. If it refuses to do so, or fails to act within a reasonable time, then the receiving state may itself refuse to recognise that person as a member of the mission. The provisions of immigration and other laws would then apply, although before that moment the diplomat must be given a reasonable time in which to effect his own departure. On the question of the personal acceptability of diplomats, it is clear that the receiving state has absolute powers of judgement. This is primarily a political matter, but the diplomat is generally guaranteed treatment in accordance with his status.

Recently, there has been a movement towards raising consuls more or less to the level of diplomatic agents, and in many respects they now enjoy similar privileges. Because of the predominance of certain established practices, the International Law Commission proposed draft articles on Consular Relations in 1963. These subsequently formed the

1. Article 9. Other members of the mission staff may also be declared unacceptable and the receiving state is in no case obliged to give reasons. A person may be declared non grata or not acceptable prior to arrival. Cf. Harvard Research, Article 12.

2. Privileges and immunities normally run until the diplomat has left the country: Article 39(2).


basis of the Vienna Convention on Consular Relations of the same year. Article 46 of this Convention provides that consulate members, their families and private staff, shall be exempt from aliens registration laws and any residence permit requirement. This immunity does not extend, however, where the consular employee is not employed full-time, or where he engages in some private occupation.

Many municipal systems reflect either the express provisions of these conventions or the customary rules upon which they are based. For example, the Vienna Convention on Diplomatic Relations has been enacted in the United Kingdom by the Diplomatic Privileges Act 1964, and it is further expressly provided in the Immigration Act 1971 that the laws affecting non-patrials shall not apply to any person so long as he is a member of a diplomatic mission. Members of his family who form part of his household are likewise entirely exempt from control, as are those who have similar immunity from jurisdiction as is conferred on a diplomatic agent. The Immigration Act empowers the Secretary of State to exempt other classes from control, and this power has been exercised in application of the Consular Relations Act 1968.

Consular officers in the service of states with which consular

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2. See Vienna Convention on Consular Relations, Articles 53, 54, and note the restricted immunity from arrest given by Article 41.

3. Immigration Act 1971, section 8(3).

4. Ibid., section 8(2); see also The Immigration (Exemption from Control) Order 1972, Article 3 (S.I. 1972 No. 1613).
conventions have been concluded\textsuperscript{1} are exempted from any provision of the Immigration Act relating to non-patrials. They do not, therefore, require leave to land, nor are they subject to registration or deportation.\textsuperscript{2} Consular officers and employees of states with which no convention exists are exempted from all control except those provisions which relate to deportation.\textsuperscript{3} In the United States, accredited diplomats and the like come within the class of "non-immigrants", together with members of their families. Other diplomatic staff, employees and servants are likewise admitted on a basis of reciprocity.\textsuperscript{4} Ambassadors, public ministers, career diplomats and consular officers are exempted from deportation, and even if they fail to maintain their status they are not to be required to depart from the United States save with the approval of the Secretary of State, unless they fall within the provisions aimed at anarchists and subversives.\textsuperscript{5}

The identification of diplomats and others is facilitated by the practice of issuing diplomatic passports and diplomatic visas, and possession of one or other of these documents

\textsuperscript{1} See the Schedule to S.I. 1972 No. 1613.

\textsuperscript{2} This exemption extends also to consular employees and family members.

\textsuperscript{3} S.I. 1972 No. 1613, Article 4(h),(i),(j).

\textsuperscript{4} Immigration and Nationality Act 1952, 8 U.S.C. s.1101(a)(15)(i),(ii),(iii).

\textsuperscript{5} 8 U.S.C. s.1251(e). Adjustment to the status of permanent resident may be granted under s.1255b (a). For analogous provisions of French law, see ordonnance du 2 nov. 1945, especially article 4; and for the law of the Federal Republic of Germany, see Ausländergesetz 1965, BGBl. I, 353, Article 49; Verordnung über Reiseausweise als Passersatz und über die Befreiung vom Pass- und Sichtvermerkszwang 1952, BGBl. I, 295, Article 2.
would constitute *prima facie* evidence of status.\footnote{Cf. \textit{8 U.S.C. s.1101(a)(11)}. There seems to be no rule, either of general international law or practice, by which diplomats are exempt from visa requirements. Privileges and immunities do not commence until entry, but international comity would demand that visas be issued promptly and that documentary requirements be reduced to a minimum.} However, it should be noted that accreditation and acceptability are essentially political matters, and that the resolution of any dispute as to whether a given individual is entitled to diplomatic immunity is within the hands of the receiving state.\footnote{N.b. Diplomatic Privileges Act 1964, section 4.} In \textit{United States v. Coplon and Gubitchev},\footnote{88 F. Supp. 915 (1950); \textit{United States v. Melekh} 190 F. Supp. 67 (1960).} the District Court had to consider whether any effect was to be given to the fact of possession by Gubitchev of a diplomatic passport and visa. In an aide-mémoire submitted to the court, the USSR argued that the United States having formally admitted Gubitchev to the United States on a diplomatic visa, the official organs of that country had thereby recognised his diplomatic status.\footnote{Gubitchev was in fact an employee of the United Nations Secretariat. On the status of international officials generally, see below, pp. 611 ff.} The court preferred the views of the United States Government, and declared:

"The visa which was affixed to the defendant's passport did not of itself constitute a grant of diplomatic immunity for all of his activities in this country ... That diplomatic visas are on occasion granted ... as a matter of courtesy and do not thereby constitute a recognition of diplomatic status has been (the Government's) proclaimed policy and is set forth in its promulgated and published regulations."

In order to ground a claim of immunity it was necessary that...
the defendant was not only "in an intimate association with the work of a permanent diplomatic mission," but also that his accreditation to the United States Government should be certified by the Department of State. 1.

(2) Special Missions

Ad hoc diplomacy and the use of special missions are phenomena of increasing importance 2. They may be employed even in the absence of diplomatic relations, but once again their status depends in the first place upon the consent of the receiving state. It is generally assumed that special missions have no special status in customary international law, but that they benefit from the ordinary principles of sovereign immunity and the express or implied conditions of the invitation received by the sending state. 3. Indeed, at the 1965 Senate Hearing on the Vienna Convention on Diplomatic Relations the Legal Adviser affirmed that the conventional privileges and immunities did not apply to the "personal rank of ambassador accorded by the President to a United States representative" 4. The application of such privileges would depend upon the nature of the representative's assignment abroad and, by implication, upon the consent of the receiving state.

1. In R v. Governor of Pentonville Prison, ex parte Teja [1971] 2 Q.B. 274, the Divisional Court held that a foreign state's unilateral action in appointing a diplomatic agent, apparently to prevent his extradition, did not confer diplomatic immunity on that representative and, until the United Kingdom had accepted and received the intended representative as a persona grata, the diplomatic agent was not immune from proceedings in English courts.


Although special missions may have no special status in customary international law, in 1965 the International Law Commission referred specifically to the "modern rules of international law" concerning the practice. As a result of its further endeavours in this field, the United Nations General Assembly in 1969 adopted and opened for signature the Convention on Special Missions. This is in large measure based upon the principles contained in the Vienna Convention on Diplomatic Relations. Thus, Article 2 emphasises the importance of the consent of the receiving state, although Article 7 notes that the existence of diplomatic relations is itself irrelevant. The appointment of the members of missions is, like that of diplomats, subject to the right of the receiving state to decline to admit any individual without giving reasons. Privileges and immunities are generally co-extensive with the entry of the mission into the state and its departure therefrom. Heads of state and "persons of high rank" are to enjoy the facilities, privileges and immunities accorded by international law, while privileges and immunities in other cases are extended by analogy with the corresponding provisions of the Vienna Convention. However, it is expressly provided that the severance of diplomatic relations

2. G.A. Res. 2530 (XXIV), 8th December 1969, Annex: (a) Convention; (b) Optional Protocol concerning the Compulsory Settlement of Disputes.
3. Articles 8, 12.
4. Article 43.
5. Article 21.
6. Articles 24-27, 29, 31, 39, 42; note Article 46.
shall not ipso facto operate to terminate the functions of the special mission.¹.

There is sufficient in common between the provisions of the General Convention and those of the Vienna Convention to warrant the conclusion that similar principles apply to the admission of special missions, as to that of diplomats.².

(3) **International Officials**

The privileges and immunities of diplomats are well founded in customary law, since codified and developed in international conventions. The status of officials of and representatives to international organisations is not so well settled, but is largely dependent on treaty. Previously, international officials were treated by analogy with diplomats,³ although this practice could clearly compromise their independent status by subjecting them to the vagaries of national passport régimes and to the personal objections of receiving states.⁴ Article 105(2) of the United Nations Charter declares that the representatives of Members and the officials of the Organisation are to enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.⁵ The

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¹. Article 20.
². See, for example, The Immigration (Exemption from Control) Order 1972 (S.I. 1972 No. 1613), Article 4(a).
⁵. See also Articles 19, 42(3), Statute of the International Court of Justice; Turack, *The Passport in International Law*, (1972), ch. 18; Zoernsch v. WaldoCK [1964] 1 W.L.R. 675.
content of the said privileges and immunities has been amplified in the General Convention on the Privileges and Immunities of the United Nations, and supplemented in agreements concluded by the United Nations and the specialised agencies with those states in which they are situated.

The General Convention provides that the representatives of Member States, while exercising their functions, are to be exempt in respect of themselves and their spouses from immigration restrictions and aliens registration. This same privilege is to apply to the classes of officials of the United Nations specified by the Secretary-General. The status of representatives and officials thus depends on treaty and on the provisions of local law. The Agreement between the United States and the United Nations regarding the headquarters of the United Nations of 1947 deals specifically with the question of access. The United Nations undertakes to prevent the headquarters district from becoming a haven for

1. General Convention on the Privileges and Immunities of the United Nations, Article IV, section 11(d); see also, ibid., section 14. Such exemptions are to apply both in the states being visited and in those through which the representative passes in transit. The principal representatives of Members are entitled to diplomatic privileges and immunities generally. Cf. United Nations - United States Headquarters Agreement, Article 15.


criminals,\(^1\) and the United States guarantees that federal, state and local authorities will not impede transit to and from the headquarters.\(^2\). This guarantee is assumed irrespective of the relations which may exist between the United States and the governments of the individuals concerned.\(^3\). Laws and regulations continue to apply in respect of entry into the United States and visas may be required. However, these are to be issued promptly, without charge, and the laws are to be applied so as not to interfere with the privileges conferred.\(^4\). Should any individual abuse his privileges, then the removal of the alien in question may be effected in accordance with the special procedure laid down.\(^5\).

Article VII of the General Convention makes provision for the issue of United Nations "laissez-passer",\(^6\) to be recognised by Member States as valid travel documents. This has been characterised as a "privilege of dubious value".\(^7\).

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1. U.N.- U.S.A. Headquarters Agreement, Article III, section 9(b)
2. Ibid., Article IV, section 11; see also Immigration and Nationality Act 1952, 8 U.S.C. s.1101(a)(15)(C).
3. Ibid., section 12.
4. Ibid., section 13(a). Except as provided the United States retains "full control and authority over the entry of persons ... into the territory of the United States and the conditions under which persons may remain or reside there:" section 13(d). Cf. Article IX, section 27.
5. Ibid., section 13(b)(1),(2),(3). It is declared that the Headquarters Agreement is to complement the General Convention, but the latter has not been ratified by the United States.
but in practice it is recognised by a large number of states parties to agreements with the specialised agencies.¹. The major exception remains the United States, which has not ratified the General Convention and which still insists on the possession of national passports and visas. The attitude of the United States Government towards section 24 of the General Convention was stated by Secretary of State Marshall in 1947:².

"The language does not authorise or require, and is not interpreted by the Department of State as authorising or requiring the United Nations or any Member State to issue or accept a document which is a substitute for a passport or other document of nationality; it provides only for a certificate attesting to the United Nations affiliation of the bearer in respect to travel and will be accepted by the United States as such."

Although the United States has also admitted that passport and visa requirements should not be imposed so as to prevent the proper exercise of the functions of international officials, continued insistence upon national travel documents may tend to perpetuate notions of national dependence. For most purposes


2. Whiteman, Digest, volume 8, p. 333. Cf. Headquarters Agreement with Switzerland 1946, Article VII, sections 21-25: 1 U.N.T.S. 164. United Kingdom law does not deal expressly with the United Nations "laissez-passer", but U.N. officials generally are not subject to immigration control and do not require leave to land: International Organisations Act 1968; Immigration Act 1971, section 8(2); The Immigration (Exemption from Control) Order 1972, Article 4(g). The Immigration Rules require the production of a passport, "or other document satisfactorily establishing ... identity and nationality"; this would presumably include the laissez-passer: Immigration Rules for Control on Entry, 1973 H.C. No. 79, para. 3; 1973 H.C. No. 81, para. 3.
international officials are not to be confused with government representatives and there are sound arguments in favour of extending the exceptional régime which applies to them. Bowett has observed that,¹.

"It follows from the fact that international officials are not accredited to states (as diplomats are) that the principle of persona non grata is not applicable to them. The proper procedure is for the host state to make its representations to the Secretary-General who alone can decide whether they shall be withdrawn from the territory."

The General Convention affirms that the basis for the grant of privileges and immunities is not the personal benefit of individuals, but to safeguard the independent exercise of their functions.². The United States has guaranteed to admit representatives from states with which it does not maintain diplomatic relations or does not recognise,³ but there have been a number of cases in which host states have refused to permit the entry of the representatives of states with which they do not have normal relations.⁴. Such action is probably inconsistent with treaty obligations, particularly those assumed under Article 105 of the United Nations Charter and under the General Convention. Once a state has consented to the presence on its territory of the United Nations, in whatever form, then it would seem to be obliged, by the principle of good faith at least, to extend all those privileges and immunities anticipated by Article 105 and by

2. Article IV, section 14; Bowett, op. cit., p. 316.
4. This has arisen particularly out of the Arab-Israeli conflict; see the examples cited in Plender, International Migration Law, at p. 111.
the particular treaties. 1. Refusal to permit entry would thus constitute the breach of an international obligation. 2.

(4) Crewmembers.

Although not at first sight within the same class as diplomats and international officials, the crewmembers of ships and aircraft also benefit from their own travel régime. The International Civil Aviation Organisation and the Intergovernmental Maritime Consultative Organisation have both pioneered the widespread adoption of international standards and practices regarding the movement of seamen and aircrews. Most of the progress has been accomplished in the years since 1950 and, as with many such developments, the process began through the medium of the bilateral treaty. For example, in 1950 Italy and Belgium agreed, by an exchange of notes, to admit each other’s nationals without visas if they were the holders of valid seamen’s books. 3.

In 1955 the International Labour Organisation Joint Maritime Conference proposed the meeting which lead eventually to the 1958 Seafarers’ National Identity Documents Convention. 4.

2. For details of international regional organisations and their travel documents, see Turack, op. cit., ch. 17. On the problems raised by the entry of armed forces, see Plender, op. cit., pp. 115-120; Bowett, United Nations Forces, at pp. 79-81.
3. 68 U.N.T.S. 283. See also United Kingdom-France Agreement 1953: 186 U.N.T.S. 151 (entry for up to fifteen days was permitted, although the right to exclude "undesirables" was expressly retained); U.S.A.-Greece Treaty of Friendship, Commerce and Navigation 1951, Article XXII(6): 224 U.N.T.S. 151.
The provisions of this Convention apply to all seamen engaged in any capacity aboard any vessel other than a warship, which is employed in maritime navigation and is registered in a territory for which the convention is operative. Seamen's cards may in addition be issued to non-national seamen serving on board the issuing state's ships, and no statement of the holder's nationality is required, although he is to be entitled to re-admission to the state of issue. States parties to the Convention are obliged to admit the holder of a seaman's card for temporary shore leave, to enable him to join a ship or to transfer to another ship, to pass in transit to join a ship in another state or for repatriation, or for any other purpose approved by the host state. However, each Contracting State retains the right to exclude any particular individual or to prevent his remaining in its territory.

Further progress towards the adoption of international standards was made in the 1965 Convention on the Facilitation of Maritime Travel and Transport. The Annex to this Convention provides that a valid seafarer's identity card or a passport shall be the basic document providing public authorities with information relating to the individual member of the crew on the arrival or departure of a ship. Such

1. If any such statement on nationality is included, it is not to be regarded as conclusive: Turack, op. cit., p. 140


3. Section 3(10). Limitations are also placed on the information which public authorities can require the document to contain: section 3(10)(1). British Seamen's Cards are issued under regulations made by virtue of section 70, Merchant Shipping Act 1970, which came into force on 1st January 1973. See the form set out in Schedule 1, The Merchant Shipping (Seamen's Documents) Regulations 1972 (S.I. 1972 No. 1295).
document is to be accepted as standard, in lieu of a passport, when it is necessary for the seaman to enter or leave a country generally for the purposes of his employment.¹

The 1958 Convention has been ratified or acceded to by over twenty states, which now issue and recognise a standardised seaman's identity document on the basis of reciprocity. Similar standardisation has been made in respect of aircraft personnel,² and the ICAO has been active in encouraging recognition of crewmembers' licences as sufficient travel documents.³ Municipal systems frequently recognise the peculiar status of crewmembers and local provision is made in respect of the treaties and conventions considered.

The United Kingdom Immigration Act 1971 declares that the members of a ship's crew may enter and remain without leave until the departure of the ship or ships on which they are engaged.⁴ Aircraft personnel also do not require leave where they enter on engagement to leave on the same or another aircraft as a crewmember within seven days.⁵

¹. Additional information may be obtained from the "crew list", which many states require captains to produce to local immigration authorities. See, for example, the form set out in the Schedule to the Immigration (Particulars of Passengers and Crew) Order 1972 (S.I. 1972 No. 1667); Immigration Act 1971, Sch. 2, para. 27.

². Turack, op. cit., ch. 15.

³. In order to be recognised, such licences must contain, at the very least, a certification of re-entry to the state of issue, a photograph of the bearer and a record of his date and place of birth: Turack, op. cit., p. 150. Note the provisions of the United Kingdom-Yugoslavia Air Service Agreement 1959: 359 U.N.T.S. 339, discussed in Turack, op. cit., p. 151f.


⁵. Ibid.
neither case may a crewmember enter without leave if (a) there is a deportation order in force against him; or (b) he has at any time been refused leave to enter the United Kingdom and has not since been given leave to enter and remain; or (c) an immigration officer requires him to submit to examination under Schedule 2 of the Act. 1.

Although crewmembers enjoy certain privileges in matters of entry, if they remain longer than their permitted time, they can be dealt with under the same procedure as applies to illegal entrants and those refused leave to land. 2. Immigration officers are empowered to order the summary removal of such crewmembers, 3. although there is a limited but practically meaningless right of appeal on the ground that there was in law no power to give the directions for removal. It is of little use because it cannot be exercised while the appellant is in the United Kingdom. 4. The right of appeal against removal on objection to destination is also limited and will not apply to the ordinary case of the man who jumps ship. 5. In much


4. Ibid., section 16(1),(2). The appeal is in any case to be dismissed, notwithstanding that the ground of appeal is made out, if the adjudicator is satisfied that there was power to give the like directions on the ground that the appellant was an illegal entrant. It remains possible to challenge the legality of any detention prior to removal, and hence the removal itself, by way of habeas corpus; see per Lord Denning, M.R., in R v. Governor of Pentonville Prison, ex parte Azam [1973] 2 W.L.R. 949, at pp. 960-961.

5. Immigration Act 1971, section 17. Curiously, there is an appeal only if the crewmember who jumps ship enters in breach of a deportation order.
the same way, the provisions which permit the United States authorities to suspend deportation or to adjust the status of non-immigrant aliens to that of permanent resident do not apply in the case of crewmembers.¹.

International organisations have done much to establish a rational régime facilitating the temporary entry and sojourn of crewmembers. The primary intention has been to expedite international travel and to prevent unnecessary delays due to immigration procedures.². Seen in this light, it is perhaps not surprising that entry facilities for crewmembers have been balanced by rigorous measures for the removal of those who remain behind.

One area which has not yet been made the object of regulation is that dealing with installations on the continental shelf. The question is, whether immigration laws can touch the alien who arrives directly on such an installation from another state. In the United Kingdom the Continental Shelf Act 1964 provides for the application of civil and criminal law to structures on the shelf, which are thereby effectively assimilated to state territory.³. Offences may be prosecuted and the offence may for all incidental purposes be treated as having been committed in any place in the United Kingdom.

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¹. Immigration and Nationality Act 1952, 8 U.S.C. ss.1254(f), 1255(a).


³. Section 3. The Act also declares that provision may be made for treating as insurable employment any prescribed employment which is directed towards the exploitation of the resources of the continental shelf. Presumably this employment may also be made subject to the régime of work permits.
It appears that a landing on such a structure without the leave of an immigration officer could constitute an offence under section 24 of the Immigration Act 1971. Section 11(3) of the Continental Shelf Act declares that a "constable" on any such installation shall have all the powers, protection and privileges which he has in the area for which he acts as constable. It is questionable whether this includes an immigration officer, who may well be barred from exercising his functions on continental shelf installations.
ABSTRACT

This thesis is concerned with the problems which are raised by the movement of persons across frontiers. Its aim is to show that states' powers, which are so often described as absolute or sovereign, are in fact directly controlled by and subject to the rules of general international law. In the Introduction attention is drawn to the dangers involved in the loose usage of the word "discretion". The concept of "discretionary powers" is one which recurs throughout the following pages, and it is therefore essential to note that it is employed to signify powers which, although wide, are nevertheless confined and structured by rules.

In Chapter I the first of two preliminary topics is dealt with. Nationality, as the basis of the first distinction which is drawn against the alien, is of fundamental importance. The problems which arise from nationality, however, are also used to demonstrate the meaning of discretionary state competence (Ch. I, s.2). This is followed by a brief consideration of the approach to nationality matters of selected municipal systems (Ch. I, s.3), and it is noted that states will frequently provide for an additional class of "non-citizen nationals" who may benefit from the right of entry. Finally, the right to enter a state is mentioned and its sources considered (Ch. I, s.4), but a detailed examination is left until Part III.

Chapter II deals with the issues involved in the use of passports and other travel documents. A brief history of passports is given (Ch. II, s.1), and the role of the passport in municipal law is examined (Ch. II, s.2). It is seen that the passport still remains essentially an instrument of municipal law and that, in so far as it is related to the
"right to travel", general international law has little of importance to say. However, recent treaties have provided for a facilitation of inter-state travel by either abolishing the passport requirement altogether, or introducing and substituting a less formal document such as a national identity card. Additionally, multilateral treaties have made provision for the issue of travel documents to refugees and stateless persons (Ch. II, s.3). It is observed that the passport is of importance in one particular matter, namely, as a guarantee of the returnability of the holder to the issuing state (Ch. II, s.4), and it is proposed that, whatever its effect as proof of nationality or as indicating the right to exercise diplomatic protection, it is this one guarantee which is required by a rule of customary international law.

In Part II a brief look is taken at the availability of international standards in the context of movements across frontiers. The conflict between the international minimum standard and the doctrine of equal treatment of nationals and aliens is used (Ch. III) as a preface to more recent developments (Ch. IV). It is proposed that there is today sufficient justification and authority for invoking a more general "human rights standard", as the criterion by which to judge the treatment of aliens, and reference is made to the burgeoning notion of international obligations erga omnes. From out of these standards, the principle of non-discrimination is given particular attention (Ch. V). The meaning of non-discrimination in international law is explained, and the limits of its applicability to aliens is noted, in view of the fact that customary international law expressly or impliedly permits certain distinctions, for example, as regards political or property rights. Finally, in Chapter VI, the question of
standards is placed in the context of the reserved domain of domestic jurisdiction, of that area of absolute or uncontrolled discretion. However, it is suggested that progressive developments, particularly in the interpretation of Article 2(7) of the United Nations Charter, have introduced restrictions on the freedom of states in many areas directly relevant to aliens.

Part III brings up the substantive issues involved in the entry and exclusion of aliens. Chapter VII summarises the claim by states to absolute freedom of choice in regard to those whom it will permit to enter, but it concludes with an indication of the possibility of restraints upon this discretion. In Chapter VIII a detailed exposition is given of the entry and exclusion of aliens under the law of the United States of America. The procedures are examined, partly for their own sake, but also in order to establish whether it is possible that municipal law in any way embodies or crystallizes the rules of general international law. A similar approach is adopted in Chapter IX, which is concerned with the law of the United Kingdom. Next, in Chapter X, the nature of international obligations to grant admission is explained, and they are considered in the light of their application to both aliens and nationals. The workings of the European Convention on Human Rights are examined, and it is seen that exclusion may frequently do violence to a variety of other individual rights. Attention is then turned to the detailed provisions of EEC law, which are primarily concerned with freedom of movement. It is noted that treaties of this nature, as well as the provisions of treaties of commerce and establishment, operate as significant restrictions upon the discretionary power to refuse admission.
The object of Part IV is to investigate what is perhaps the most controversial power which states enjoy over aliens, namely, the power of expulsion. Chapter XI analyses the power in the light of its essential function and purpose, and the conclusion is drawn that the "right" to expel is far more closely confined than most writers on international law would suggest. Particular attention is given to the relation of expulsion with the doctrine of abuse of rights (Ch. XI, s.2(a)), and although the doctrine itself is not adopted, it is presented as a helpful tool in the assessment of the circumstances in which expulsion may become unlawful. The practice of "disguised extradition" is also criticised, and the view proposed that this may amount in some cases to the breach of an international obligation (Ch. XI, s.2(b)). Further analysis takes the form of an inquiry into the justification and manner of expulsion (Ch. XI, ss.3,4), and the conclusion is drawn, first, that matters of 'ordre public' are required to be weighed by the state as against the legitimate interests of the individual (Ch. XI, s.3(a)), and secondly, that the manner or execution of expulsion must not violate the individual's fundamental human rights.

The limits on expulsion which are required by general international law lead into an examination of its rôle in municipal law (Ch. XII). The respective laws of the United States and the United Kingdom are presented (Ch. XII ss. 1,2), and additional evidence is produced from the municipal régimes current in France and the Federal Republic of Germany. It is suggested that there is a sufficiency of state practice in regard to placing the long resident alien in a privileged position to warrant the conclusion that in his case expulsion is justified only on the most serious grounds. It may well be
that the long resident acquires the effective nationality of the host state.

The provisions of municipal law are then considered in the light of treaty obligations (Ch. XIII). Again, the European Convention occupies a prominent position (Ch. XIII, s.2), and it is used to illustrate the manner in which expulsion may simultaneously involve the violation of some other right or protected interest of the individual. Reference is made once more to the special régime of the EEC, and it is shown that the reservation of 'ordre public' is itself controlled by law. In the context of the EEC, it is in fact a "Community concept" and not such as would justify measures of expulsion taken purely in the national interest.

Finally, in Part V, special attention is paid to the position of refugees. It is thought that international standards in their respect may well constitute a minimum standard applicable to the class of aliens as a whole. The theoretical basis of the grant of asylum is briefly summarised (Ch. XIV), and this is followed with an examination of the law and practice of the United States and the United Kingdom in particular (Ch. XV, ss.1,2). Both asylum and the non-extradition of political offenders are examined in practice and, with the aid of some additional European examples (Ch. XV, s.3), certain conclusions are drawn as to the criteria to be used in assessing the likelihood of persecution, and as to the meaning of political offence. Chapter XVI summarises the present position in customary international law, with due reference to the relevant multilateral treaties. It is suggested that there is now sufficient evidence to justify the finding of a rule of customary international law which prohibits the return of refugees, or anyone, to persecution. It is also noted that, while
customary international law justifies the refusal to surrender political offenders, it also imposes a duty to surrender in certain circumstances, for example, in the case of international crimes.

In an Appendix following the main thesis consideration is given to certain exceptional categories of aliens who may benefit, in matters of entry and exclusion, from the rules of international law. These categories include diplomats and consuls, special missions, international officials, and the members of the crew of ships and aircraft.

In the General Conclusions, which precede the Appendix, the view is repeated and affirmed, that states' powers over the entry and expulsion of aliens are essentially discretionary and, by that very nature, confined and structured by law. Discretion involves freedom of choice and, although the margins of choice may on occasion by widely drawn, this does not mean that the power in question may be misused or abused.
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