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INTERNATIONAL PROVISIONS PROTECTING THE HUMAN RIGHTS OF NON-CITIZENS

Study prepared by the Baroness Elles

*Special Rapporteur of the Sub-Commission
on Prevention of Discrimination
and Protection of Minorities*



UNITED NATIONS

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UNITED NATIONS

New York, 1980

NOTE

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The opinions expressed in the present study are those of the Special Rapporteur.

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PREFACE

Rules of international law may recognize that certain rights are reserved to nationals and that distinctions between nationals and aliens do not necessarily mean unfair discrimination, but even recognizing this distinction, do aliens get fair treatment and protection of those rights which are due to them? Extensive and frequent violations have continued in many parts of the world against non-citizens, including refugees and stateless persons, regardless of the numerous contemporary international conventions concluded since the Second World War in furtherance of the protection of the human rights of all individuals, and in which these rules are recognized.

The provisions of the conventions are not always clear as to their meaning and intent. There is ambiguity in some of the texts, certain rights are reserved in municipal law to citizens, and there is a lack of consensus among States as to the meaning of a minimum standard of treatment of aliens.

In Economic and Social Council resolutions 1790 (LIV) and 1871 (LV1) the concern of the United Nations was expressed for adequate guarantees of protection of the human rights of non-citizens under contemporary international human rights instruments. A most useful survey¹ was prepared by the United Nations Secretariat which showed that there were serious lacunae in existing instruments and that although some provisions covered to an extent some types or categories of alien, there was no instrument providing for protection of the rights of all non-citizens. There was a need for further data on aspects not covered by the survey. While States were under no obligation to receive foreigners or to allow them to stay, once they had accepted them, States should guarantee their fundamental rights.

Although there may be no lack of provisions, difficulties may arise from the manner in which they are implemented by the competent State authorities. It is only necessary to consider the plight of millions of refugees in different parts of the world to recognize this truth. Rights which may be relevant to aliens and which may not be included in the International Covenants or other human rights instruments should also be determined. An analysis of the provisions of contemporary international, regional, multilateral and bilateral instruments relating to human rights, examining the extent to which they apply to non-citizens and evaluating the protection they purport to guarantee may provide a basis for action.

This study has consequently been undertaken by the Special Rapporteur pursuant to resolution 10 (XXVII) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, with the following objectives:

- (i) To determine whether existing provisions contained in contemporary human rights instruments afford adequate protection;
- (ii) To examine whether a new Declaration should be drawn up, while conforming to the principles already established;
- (iii) To make proposals to ensure that the full potential of existing international instruments should be developed to enable non-citizens to enjoy their rights;
- (iv) To make recommendations for the adoption of more effective and comprehensive measures which would guarantee protection to individuals, including stateless persons and refugees, who are not citizens of the country in which they live.

The study does not seek to cover all aspects of all aliens everywhere in all circumstances. That would be beyond the mandate of the Special Rapporteur in accordance with the above-mentioned resolution. Readers will bear in mind that, for the purpose of this study, "individuals who are not citizens" is understood to mean physical persons who do not possess the nationality of the country they are in and are aliens according to the municipal legislation of that country. The term is also used to include stateless persons and refugees as defined in the relevant Conventions and Protocol.

In customary international law it is nationality that provides the link between the individual and the State when a claim for State protection is made.² Although other criteria may be applied, it is also a function of nationality to indicate or identify which persons come within the provisions of a treaty.³ The importance of nationality is therefore evident when the effects of the provisions of international instruments are being considered in relation to the individual, particularly as there may be more than one answer to the question "Of which nationality is the individual?", depending on the purpose for which the question is asked.

The terms "inhabitant", "citizen" and "national" have been used indiscriminately in the past, but they do not necessarily describe the same relationship between an individual and the State. The "citizen" and the "national" do not have the same significance in United States immigration law. "British subject", "Commonwealth citizen", "British protected person" and "citizen of the United Kingdom and Colonies" also imply different rights and duties. Nationality does however indicate some kind of attachment or allegiance to a State without necessar-

² See "Draft convention on nationality" (A.J.I.L., vol. 23, *Special Supplement*, April 1929, p. 13), art. 1.

³ Van Panhuys, *The Role of Nationality in International Law* (Leyden, Sijthoff, 1959), p. 141.

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ily implying the enjoyment of civic rights under municipal law.

Contemporary human rights instruments have tended to use the term "citizen" to distinguish someone who is the member of a State and who owes allegiance to that State by virtue of his nationality from other individuals who do not have that relationship with his State.⁴ In this study "subject", "national" and "citizen" will be assumed to have the same meaning, and the term "alien" will cover any individual who is not a citizen of the country in which he finds himself, including the stateless and the refugee.

Individuals who are not citizens "of the country in which they live" are taken to be persons who, according to national legislation, are permanent residents of or have their home in that country for the time being. Many meanings are ascribed to "resident" by municipal legislation, ranging from the fact of being one hour in a country whereby an individual is within the territorial jurisdiction of a State, to being an "habitual" or "ordinary" resident, with consequent obligations, for instance liability for tax payments to the host State.

The meaning adopted by the Special Rapporteur implies a degree of permanence and therefore excludes transient aliens, such as tourists, members of visiting sports teams, those attending short-term conferences, travellers, nomads or vagrants moving from one country to another, none of whom would normally be eligible to acquire certain economic rights and who, equally, would not incur fiscal obligations. Air pilots, seamen, members of the armed forces and prisoners of war are not specifically considered in this study in view of the special conventions in force, although it is not assumed that such conventions as do exist are not capable of improvement. Diplomats and consular representatives, as well as officials working for international organizations, also come within the provisions of special conventions and are therefore not separately considered.

It is further assumed that the individual is engaged in peaceful pursuits in time of peace and is not taking part in any internal or international conflict or act of aggression.

Collection of informative material has followed the now customary lines for the preparation of similar studies, and the Special Rapporteur has had the benefit of valuable debates in the Sub-Commission on the item.

The approach to the subject has also followed the general instruction laid down by the Sub-Commission at its sixth session and amended by the Commission at its tenth session. The essential quality of universality and the need for making the world community as a whole aware of the relevant activities of United Nations bodies and specialized agencies imposed restrictions on the inclusion of material which may be relevant to only one region or one country at the present time. A case in point is the famous *Re the "Key Gibraltar" Oil-Drilling Rig case*,⁵ which is concerned with the social security rights of a worker employed by a British company serving on a Panamanian-registered oil rig on the continental shelf of the Netherlands. This case may eventually have important repercussions on social security rights for oil-rig workers anywhere in the world.

The select bibliography in annex V includes only those works published before June 1977, when the study was completed for consideration by the Sub-Commission. Many useful and informative works and studies which have been published on the subject of non-citizens since that date⁶ as well as recent issues of United Nations publications which are periodically up-dated⁷ are therefore not included.

Finally, the reader's attention is drawn to the fact that the text of the draft declaration set out in annex I is an amended version of the original text,⁸ which appeared in June 1977. The provisions of the draft declaration were fully discussed during the thirtieth session of the Sub-Commission and the text was circulated to Governments for their comments. The views expressed by members of the Sub-Commission at the thirtieth session and the replies from Governments were fully considered by the Special Rapporteur,⁹ and the draft declaration was consequently modified.¹⁰ The present version, which appears in annex I below, is now under consideration by the relevant organs of the United Nations. Establishment of a text which would be universally acceptable to Member States, taking into account their different legal systems and divergent political, economic and social structures, should help to strengthen guarantees of protection to all those who, whether voluntarily or through coercion, are not citizens of the country in which they are living.

Diana ELLES

September 1979

⁴ For example, International Covenant on Civil and Political Rights, art. 25; International Convention on the Elimination of All Forms of Racial Discrimination, art. 1 (2).

⁵ Case No. C.I.202/1977. *Common Market Law Reports*, vol. XXIV, part 175, 27 February 1979, p. 362.

⁶ For example, G. S. Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford, Clarendon Press, 1978); Ian Brownlie, "A treatment of aliens: assumptions of risk

and international standard", in *Festschrift für F. A. Mann* (1977).

⁷ For example, *Human Rights—International Instruments: Signatures, Ratifications, Accessions, etc.*, 1 January 1979 (ST/HR/4/Rev.1).

⁸ E/CN.4/Sub.2/392, annex I.

⁹ E/CN.4/Sub.2/L.682 and Add.1.

¹⁰ E/CN.4/Sub.2/L.682, annex.

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ABBREVIATIONS

EEC	European Economic Community
ILO	International Labour Organisation
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation

Abbreviations used in foot-notes:

A.J.C.L.	American Journal of Comparative Law
A.J.I.L.	American Journal of International Law
A.S.I.L.	American Society of International Law
B.Y.I.L.	British Year Book of International Law
Columbia L.R.	Columbia Law Review
I.C.J.	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.L.A.	International Law Association
O.J.	Official Journal of the European Communities
P.C.I.J.	Permanent Court of International Justice
<i>Recueil des Cours</i>	Académie de droit international de La Haye, <i>Recueil des Cours</i>
R.G.D.I.P.	Revue générale de droit international public
T.L.R.	Times Law Reports

"It is true that these rules are, as we shall see, still somewhat vague, but the central idea is nevertheless well established. It is essentially the principle that States are required by international law to respect foreigners' dignity as human beings by granting them the rights necessary for that purpose. This principle is absolute and admits of no exception."

A. VERDROSS,

"Les règles internationales
concernant le traitement
des étrangers",
Recueil des Cours, 1931,
III, vol. 37.

I. HISTORICAL BACKGROUND

A. Movement of peoples

1. Exodus, for reasons of famine, drought, persecution, wars and poverty and for many other causes, has been the fate of mankind from earliest times, identified and confirmed by archaeologists, palaeographers, historians and other scientists. Depending on the customs and habits of the host peoples and on the number, appearance or purpose of the immigrating group, either friendship and hospitality or suspicion and antagonism—or indeed, a mixture of these reactions—have been accorded. Foreigners were and often are regarded either as potential friends and allies or as enemies, both potential or actual.

2. Movements of people from one part of the globe to another have provided a major element in universal history. Over the centuries peoples have moved from north China to south-eastern Asia, from the vicinity of Lake Victoria to western Africa, from the eastern states of North America to the western areas of the continent. The development of agriculture led to a greater permanence of habitation but despite greater stability, migrations continued in different parts of the world. Over the last century, mainly for economic and social reasons, massive migrations from eastern Europe to North America, from southern Europe to South America, caused shifts in populations.

3. Commerce and trade have also provided the motivation for people to travel from one land to another, from ancient times to the present day. In comparatively recent times, it has been the treaties of commerce and establishment which have provided evidence of the obligations of States towards the recognition of the rights of foreigners within their territories.

4. Increased transport facilities, scientific and technological improvements in systems of communication, economic imbalance within countries, within continents and universally, together with religious and political persecution, deportations, mass expulsions, the effects of war, famine and invasion are all potent forces in continuing movements of peoples from one country to another during this century.

5. Since 1945 over 10 million people have emigrated away from European countries but in the same period over 10 million people, including their dependants, are now living and working in the nine member States of the European Community, away from their home country. In Asia, over 7 million people have been transferred between India and Pakistan since 1947. In Africa, labour migrations are estimated to involve some 5 million people each year. The Office of the United Nations High Commissioner for Refugees has assisted some 15 million people since 1951 in various parts of the world.

6. In recent years, several thousand refugees have entered Thailand from Viet Nam and from Demo-

cratic Kampuchea and mass movements of peoples continue to flow in South-East Asia. In Cyprus, about 200,000 Cypriots were deprived of their homes. It is claimed that hundreds of political refugees fled from Chile to Western Europe and elsewhere, while other political refugees left Portugal to settle in South America and thousands of others departed from Africa to live in Portugal.

7. These are but a few examples of the uprooting of families from their homelands, for a variety of reasons, which have resulted in their having to seek a new life in a foreign country with all the complexities of a new language and new laws and economic and financial structures with which to contend.

8. Thousands of other individuals, with or without their families, in the course of their studies or their careers, for instance as members of commercial enterprises, spend years away from their country of nationality.

9. Movements of people may be voluntary, involuntary, temporary or permanent, seasonal or periodic, with controlled or uncontrolled entry to the host State, but in all cases their human rights and freedoms are put at risk. Hence the necessity for the alien wherever he may be, whoever he may be, to know what fundamental human rights the international community should protect and how he may be guaranteed that respect which is due to him. Equally it is of importance that Member States should acknowledge their obligation to observe and respect the human rights and fundamental freedoms of all aliens within their jurisdiction, in accordance with international law and the criteria laid down by contemporary human rights instruments.

B. Status of aliens

10. For centuries domestic legal systems have accorded special recognition to the position of aliens. The Greek city states of the fifth century B.C. applied one law for citizens and another for foreigners. The right of entry to follow certain trades and the right to own property were regulated by law.¹ Duties to foreigners were defined and agreements with foreigners were to be honoured. A special court was established in Piraeus and at the time of Solon, foreign craftsmen were encouraged to settle in Attica with the promise of Athenian citizenship. Provision for the equal treatment of non-nationals or non-citizens, including the right to retain their possessions, was included in a Treaty of Alliance in the fifth century B.C.²

¹ See Plato, *Laws*, Everyman Edition, pp. 347 and 379.

² See Thucydides, *Peloponnesian War*, Everyman Edition, p. 279.

11. Roman law, the *jus civile*, originally applied only to Roman citizens, the foreigner being a so-called "outlaw", in a position of legal inferiority. It is significant that in the Twelve Tables of Rome, the word "*hostis*" was used, being interchangeable for "alien" or "enemy".

12. After the breakdown of the Greek city states, the Stoics formulated the concept of natural law which was considered to be universal, applicable not only to citizens but to everyone in the territory. Natural rights were not "the particular privileges of citizens of certain States, but something to which every human being, everywhere, was entitled in virtue of the simple fact of being human and rational".³

13. The term *jus gentium* in its legal sense was the law applicable within the Roman Empire between foreigners in their relations with each other and with Roman citizens. Cicero, a follower of the Stoic philosophy, uses the term in the sense of "universally applicable laws" and identifies the *jus gentium* with the Stoic concept of natural law. Irrespective of race or nationality, the Stoics viewed man as a citizen of the world in which all are equal.

14. Feudal laws applicable in part of Europe during the Middle Ages were based on the principle of allegiance to a feudal lord whose jurisdiction was territorially limited. Rights were granted to foreigners and legislation affected such matters as length of stay and the right to marry. Specific provision was made in the Magna Carta of 1215 guaranteeing freedom of travel throughout England to all foreign merchants who had not previously been forbidden entry. Even in the event of war, the foreigner from an enemy country was to be given safe conduct and protection, provided English merchants in the enemy country were unmolested.

15. Throughout the course of history, treaties, local usage, convention and tradition combined to form the customary rules or laws regulating the relationship between a State and strangers who came within its territorial limits.

16. Capitulations, or treaties by which a State or ruler conferred privileges on communities, subjects of another State but living in their territory, were known at the time of Charlemagne. Foreigners whose presence was accepted by the State of residence were not accorded the rights of citizens and were not expected to be bound by the laws and customs, which in some countries were intimately associated with the national religion. It was found convenient to apply the penal and civil system in force in their own country. The first known concessions on this basis were accorded to the subjects of Charlemagne by the Caliph Harun al-Rashid, and similar concessions were accorded in capitulations up to this century.⁴

17. The rise and strengthening of the concept of the nation-state and the increase in interstate com-

mmercial and economic activities have contributed to the development of legal relationships between States. Peace treaties, treaties of establishment and commercial agreements, containing provisions to protect individuals living in States other than their own, have built up what some scholars consider to be an internationally accepted standard of conduct towards aliens.

18. The great religions of the world all recognize the intrinsic value of the human being and the respect due between man and man regardless of any distinction whatsoever. The consequence of this belief is the realization and expression by theologians of certain basic and natural rights belonging to man as such.⁵ In the sixteenth and seventeenth centuries the doctrine of international law developed from an exposition of moral standards to a form of positive law which should guide the relations between States. The contribution of Gentilis, of Grotius and of Vattel reflected the rise of the power of the nation-state and the practical necessity for establishing rules of conduct, based on the concept of natural law, between entities which were developing closer and more complex relationships in different fields of mutual interest.

19. In the aftermath of serious conflicts, it frequently happens that some new advance in international relations takes place, one such example being the concern expressed by the League of Nations after the First World War for the protection of minorities.⁶ Early attempts at international co-operation for the abolition of the slave trade resulted in a number of treaties and conventions concluded during the nineteenth and twentieth centuries, with effective if not total success.⁷ Considerable efforts were also made, through the adoption and ratification of conventions, for the humanitarian treatment of prisoners of war and civilians within territory occupied by a belligerent State.⁸ The blurring of the distinction between the peaceful civilian and the combatant during the Second World War necessitated a new approach and far wider considerations. The destruction and cruelties of the Second World War gave a new impetus to the recognition of the rights of individuals to be protected at the international level. The deliberate policy of States, together with their failure to protect these rights, contributed to the taking of international action attaching individual responsibility for war crimes and other crimes against human beings, perpetrated in the name of authority. Individuals acting on behalf of States were recognized to be criminally responsible for violating international law.⁹

20. A view is now held that the individual as such, regardless of nationality, has become the subject of

³ Maurice Cranston, *Human Rights Today* (London, Amersand, 1962), p. 9.

⁴ The Montreux Convention of 1937 was concerned with the abolition of capitulations.

⁵ Francisco de Vitoria, *De Indis*.

⁶ The Treaty of Osnabruck, 1648, concluded after the Thirty Years War, is another example.

⁷ For a detailed exposition of the subject, see M. Ganji, *The International Protection of Human Rights* (Genève, Droz, 1962), pp. 88-112.

⁸ Geneva Conventions, 1864, 1907, 1911 and 1937.

⁹ Charter of the International Military Tribunal, Nuremberg, art. 6.

international law and receives direct protection of his rights and freedoms through legally enforceable international provisions.¹⁰

C. Treatment of aliens

21. The two apparently irreconcilable theories that aliens should receive equal treatment with nationals and that there is a minimum standard of treatment which every alien may expect have each had their proponents. It was held to be a fundamental principle that a person who voluntarily entered the territory of a State not his own and resided there accepted the consequences including the legal institutions of the host State.¹¹ Certain rights were usually reserved to nationals, such as electoral rights, both as to voting and standing for election, taking part in coastal trade, fishing in territorial waters, owning a ship of the host State and, in some cases, owning property or land.¹² The plea of non-discrimination has been consistently rejected in decided cases, although frequently recognized in treaties, either as between aliens of different nationalities or as between aliens and nationals.

22. Acceptance of the theory that equal treatment should obtain between nationals and aliens does not however imply that States may treat foreigners as they please provided nationals are treated in the same manner.¹³ The theory is based on the implied premise that States apply certain fundamental principles in their own legislative systems. If States should fail to accord basic rights to their own citizens, this constitutes no grounds or excuse for failing to respect the fundamental rights of aliens, universally recognized according to the rules of customary international law. Paradoxically, the minimum standards which are applicable in the treatment of an alien may entitle him to a higher standard or greater protection of his rights than are available to the citizen of the State in which he happens to be. According to Calvo,¹⁴ however, the alien could not claim any greater measure of protection than that available to nationals. Supported by other Latin American scholars, this belief was incorporated into the Montevideo Convention, 1933 (art. 9), although it was by no means universally agreed.

23. In the twentieth century, certain minimum standards of treatment to which an alien may be entitled have become part of customary international law, based on the general principles of law recognized by civilized nations (Statute of the International Court of Justice, art. 38 (c)). These standards, which give guidance to States in their treatment of aliens, have been elaborated in judicial

decisions¹⁵ and have been inferred from the operation of municipal laws and provisions of treaties, in particular of peace treaties and of treaties of establishment and commerce or of commerce and navigation.¹⁶ Guarantees of protection have also been included in the written constitutions of some States.¹⁷ Despite the general acceptance that certain minimum standards exist, it has been considered by some scholars that they are incapable of exact definition and impossible to codify.¹⁸

24. As a contribution to the progressive codification of international law, the Codification Committee of the League of Nations had examined the question of "the Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners".¹⁹ The Harvard Law School undertook the preparation of a draft code on the subject, to serve as a basis for discussion at the Hague Conference, 1930,²⁰ but at that time, sovereign States were reluctant to come to any conclusions owing to the great complexity of the subject. The most effective guarantees which States could grant were held to be the national treatment, so assimilating the rights of aliens to those of nationals.

25. Still with no established and definitive international standards, the treatment of aliens was one of the subjects to which priority was to be given in the preparation for codification by the International Law Commission.²¹ The view was held that an authoritative statement or restatement was required to give effective recognition of the provisions of the Charter relating to the human rights and fundamental freedoms applicable to nationals and aliens alike.²² It was also considered desirable to take into consideration rules relating to the treatment of the stateless as well as refugees.²³

26. Emphasis had hitherto been placed on pecuniary damages for injuries to aliens in so far as States owed responsibility for those injuries. The Special Rapporteur who had been entrusted by the International Law Commission to prepare a draft code on the matter of State responsibility held that the tra-

¹⁵ In the *Neer Case*, reference is made to the "reasonable state" (United States-Mexico General Claims Commission, *Opinion of 15 October, 1926*, p. 73). In the *Corfu Channel Case*, the Court placed reliance on what have been termed "general and well-recognized principles" including "elementary considerations of humanity, even more exacting in peace than in war" (*I.C.J. Reports, 1949*, p. 22).

¹⁶ A. H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Leyden, Sijthoff, 1949), p. 99.

¹⁷ The majority of constitutions of newly independent States contain guarantees for the protection of human rights.

¹⁸ Borchard, *op. cit.*, p. 38.

¹⁹ For a résumé of past efforts to codify the topic, see: F. Garcia Amador, Special Rapporteur, "International responsibility" (*Yearbook of the International Law Commission, 1956*, vol. II, pp. 176-180, document A/CN.4/96), chap. II.

²⁰ A.J.I.L., vol. 23, *Special Supplement*, April 1929, pp. 133 *et seq.*

²¹ Report of the International Law Commission on its first session, Lake Success, 1949 (*Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*), p. 3.

²² *Survey of International Law in relation to the Work of Codification of the International Law Commission* (United Nations publication, Sales No. 1948.V.I.(1)), pp. 46-47.

²³ *Ibid.*, p. 48.

¹⁰ H. Lauterpacht, *International Law and Human Rights* (London, Stevens, 1968), p. 27.

¹¹ E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, Banks Law Publishing Co., 1915), p. 179.

¹² J. L. Brierly, *The Law of Nations*, 6th ed. (Oxford, Clarendon Press, 1963), p. 270.

¹³ D. Anzilotti, cited in *Recueil des Cours*, 1929, vol. 1 (t. 26), p. 457.

¹⁴ *Le droit international*, 5th ed., 1885, vol. VI, p. 231.

ditional approach of damage or injury and reparation was no longer consistent with the contemporary development of international law. The injury was now to be considered in terms of the alien, the subject harmed, and reparation was due to the individual as the object of such reparation and not to the State.²⁴

27. On the appointment of a new Special Rapporteur, in 1963, on the subject of State responsibility, the members of the International Law Commission agreed, *inter alia*, that there would be no question of neglecting the experience and material gathered on certain particular aspects of the topic, especially that of responsibility for injuries to the person or property of aliens.²⁵

28. The earlier conflict between the doctrines of equality of treatment and minimum standards has been resolved—if only in theory—by the provisions of the Charter of the United Nations relating to non-discrimination and to the promotion of respect for and observance of human rights and fundamental freedoms for all. The two views have been synthesized by the setting of a universal standard, which should enure to the benefit of both national and alien alike.

29. The United Nations has provided a forum for discussion of the observance by a State Member of

the human rights and fundamental freedoms of individuals within its territory, regardless of nationality. There have been objections by States claiming that certain topics fall essentially within their domestic jurisdiction.²⁶ Resolutions have been passed, the recommendations of which have been disregarded or not implemented.²⁷ In other cases of allegations of flagrant violation of the human rights of aliens no action has yet been taken by the United Nations.²⁸ Despite failures, the adoption and ratification by some States of human rights instruments indicate their willingness to adapt their laws and procedures to conform with internationally recognized standards.

30. The Universal Declaration of Human Rights has set the standard of treatment, but it will be the way in which States implement the provisions of contemporary legally binding international instruments in the field of human rights which will ensure that “whatever his race, degree of culture and colour may be, man, so long as he lives in political association, even if he has a nomadic existence, does not lose the rights of human personality which are his according to international law. He may everywhere request the respect, enjoyment and exercise of these rights, on condition of subjecting himself to the authority of territorial laws and of observing the local laws.”²⁹

²⁴ F. García Amador, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, N.Y., Oceana Publications, 1974), p. 128. The draft convention contained in this work is a slight revision of Draft No. 12, Harvard Law School, published in 1961.

²⁵ Report of the International Law Commission on the work of its twenty-seventh session, 1975 (*Official Records of the General Assembly, Thirtieth Session, Supplement No. 10 (A/10010/Rev.1)*), p. 6, containing a historical review of work on State responsibility and reference to the appointment of Mr. Roberto Ago as Special Rapporteur. See also “Report of Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility” (A/CN.4/152) in *Yearbook of the International Law Commission*, 1963, vol. II.

²⁶ Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London, Oxford University Press, 1963), pp. 58 *et seq.*

²⁷ Erica-Irene Daes, “Protection of minorities under the International Bill of Human Rights and the Genocide Convention”, in *Xenion: Festschrift für Pan. J. Zepos*, vol. II (Athens, Ch. Katsikalis, 1973), pp. 73-74.

²⁸ It may be recalled that numerous communications have been received by the Secretary-General under Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 for consideration by the Sub-Commission.

²⁹ P. Fiore, *Il diritto internazionale codificato*, No. 522, quoted in Roth, *op. cit.*, p. 92.

II. WHO PROTECTS THE ALIEN?

A. The international community

31. Certain minimum standards of treatment for aliens have been recognized as rules of customary international law by the decisions of international courts and tribunals. The courts have been guided by the current international standards which States normally apply or would be expected to apply to any individual, regardless of his nationality.¹ While the alien may be entitled to appeal in the event of receiving treatment below the minimum standard, it is the State of his nationality, as a subject of international law, which has the right to vindicate this violation in the international courts. The courts' concern in the field of human rights has mainly been confined to the right to life, liberty and property, economic, social and cultural rights being protected—if at all—under bilateral treaty provisions, generally on a reciprocal basis.

32. The alien therefore has had some measure of protection under customary international law. But there was no effective international protection for an individual as against his own State.

33. There have been two parallel developments in the field of human rights since the Second World War which must be distinguished and considered together at the same time, in so far as they affect the position of the alien. First, with the adoption of the Charter of the United Nations the individual, whatever his nationality, has acquired "a status and a stature which has transformed him from being an object of international compassion into a subject of international right" and his rights have come to be recognized independently of the State.² Situations which involve a breach of the specific Charter provisions dealing with human rights come within the jurisdiction of the United Nations General Assembly. It is in the exercise of this jurisdiction that the United Nations has the opportunity, if it so wishes, to show its concern for the protection of the rights of all individuals, whoever and wherever they may be.

34. The second post-war development in the field of human rights has been the inclusion in international instruments of certain categories of rights, in particular economic, social and cultural rights, many of which were formerly accorded only to citizens unless provided for by treaty. Although these instruments contain non-discrimination clauses, there has been a marked reluctance on the part of States to accept "nationality" as one of the grounds which would ensure equal treatment for aliens and nation-

als. It is the interpretation of these instruments and the implementation of their provisions in municipal law which indicate the willingness of States to fulfil their obligations to all individuals within their jurisdiction.

1. EXAMINATION OF THE SCOPE AND EFFECT OF PROVISIONS OF CONTEMPORARY INTERNATIONAL INSTRUMENTS ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY

35. In considering the applicability to aliens of provisions of contemporary human rights instruments, a series of questions arise as regards substance and procedure.

36. The complexities and difficulties arising from the drafting of contemporary instruments have resulted in vagueness, imprecision and ambiguity in the interpretation of many of the provisions. Not only is there lack of clarity in the meaning of the words contained in these instruments but the concepts of individual rights and freedoms are dissimilar in the different countries and regions of the world, according to different cultural and legal traditions.

(a) *Scope and force of the instrument*

37. To ensure the effective guarantee of protection under international instruments of the human rights and fundamental freedoms of aliens, the following considerations are raised:

- (i) Is the instrument of a legally binding character?
- (ii) Does it contain provisions which are immediately applicable or are its provisions to be implemented progressively?
- (iii) Is it in force?
- (iv) Is the State in which the alien is residing a party to the instrument?
- (v) Is the State which is alleged to have violated the rights of the alien a party to the instrument?
- (vi) Does the instrument apply to aliens?
- (vii) Is the right which is alleged to have been violated one which is not reserved to nationals within the terms of the instrument?
- (viii) What reservations were made on the ratification of the instrument?
- (ix) Are there any exemptions or derogations which may be relevant and which may remove any entitlement of an alien to protection?
- (x) Has any limitation or restriction been imposed on the rights of individuals on grounds of nationality?

¹ See B. Cheng, "The contribution of international courts and tribunals to the protection of human rights under international customary law", in *Nobel Symposium 7: International Protection of Human Rights* (Stockholm, Almqvist and Wiksell, 1968).

² H. Lauterpacht, *International Law and Human Rights* (London, Stevens, 1968), p. 4.

- (xi) Have the provisions of the instrument been implemented in national legislation or do they require to be so implemented?
- (xii) Does the existing local law meet the requirements of the international instrument?
- (xiii) Is there a monitoring of the internal law of the State party?
- (xiv) What methods of enforcement are available to an alien, either through national tribunals or through international bodies?
- (xv) Is there any means of ensuring that the State which is responsible for injury to the individual takes both practical measures to punish the wrong done, and legislative or administrative measures to ensure, so far as is humanly possible, that similar wrongs are not permitted against other individuals in the future?
- (xvi) Has the individual access to a consular official of his nationality to protect his rights under the relevant international instrument?

(b) *The rights of the individual*

38. Does the individual fulfil the pre-conditions necessary for him to claim protection under the instrument? His position and status must be considered:

- (i) Does he come within the category of persons accorded protection by the instrument?
- (ii) Is the right which he alleges to have been violated enumerated in the instrument and is it a right which is accorded to aliens?
- (iii) Was the alleged violation committed by an agent of the State or under its authority?
- (iv) Have all domestic remedies been exhausted?
- (v) Is there a competent international body which can receive the complaint of the individual?
- (vi) Have all the pre-conditions necessary for admissibility to the relevant international body been fulfilled?
- (vii) Is there an effective means of remedying the wrong to the individual?
- (viii) What is the critical date for determining alienage, statelessness or citizenship?
- (ix) Are group applications permissible?

2. THE CHARTER OF THE UNITED NATIONS

(a) *Its contents*

39. The provisions of the Charter impose legally binding obligations on Member States to promote and encourage respect for human rights and fundamental freedoms for all, with no distinction as to race, sex, language or religion (Art. 1, para. 3), to assist in their realization (Art. 13, para. 1 b) and to promote individual respect for and observance of human rights and fundamental freedoms (Art. 55 c), Members pledging themselves to take joint and separate action in co-operation with the organization for the achievement of such purposes (Art. 56). Under Article 76 c, Member States adhere to the declaration that one of the basic objectives of the

trusteeship system is to encourage respect for human rights and fundamental freedoms. The United Nations also undertakes to promote higher standards of living, full employment and conditions of economic and social progress and development (Art. 55 a) and solutions of international, economic, social, health and related problems and international cultural and educational co-operation (Art. 55 b).

(b) *Its nature: elaboration of international instruments to implement its contents*

40. The Charter, in Article 55 c, recognized the international nature of the protection of human rights of every individual, without defining what these rights were. The recognition given to the human rights of citizens in customary international law was now accorded for the first time in a legally binding instrument to "all individuals", national and alien alike. What the Charter does not say is that there should be no distinction made between alien and nationals. The non-discrimination clause refers to race, sex, language and religion. In promoting the observance of human rights, in accordance with the provisions of the Charter, if it was to be interpreted closely, economic, social and cultural progress are concomitant with human rights and the alien, although his human rights and fundamental freedoms must be respected, may not necessarily expect equal treatment with nationals.

3. INTERNATIONAL INSTRUMENTS OF UNIVERSAL APPLICATION

41. The Universal Declaration of Human Rights, adopted on 10 December 1948, recognizes the equal and inalienable rights of all members of the human race. Some of the rights enumerated in the Declaration confirm and restate rules which form the basis of the standard minimum treatment which an alien is entitled to expect. Its value has been, and is, not only that it has set standards for all States to follow in their relations with all people within their jurisdiction, but also that it has provided and will continue to provide the impetus and incentive for the adoption of numerous international instruments dealing either with particular rights or freedoms or with specified categories of persons.³

42. The Universal Declaration has been referred to specifically in numerous modern constitutions, especially in those of newly independent States. Where it is not named, nevertheless, most constitutions now include a guarantee of protection of the rights and freedoms of individuals. The provisions of the European Convention on Human Rights were inspired by the Universal Declaration, and the Court of Justice of the European Communities has declared that the European Community law recognizes the principle of guaranteeing and safeguarding the human rights of the European Community

³ For example, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Convention relating to the Status of Refugees.

citizens. Its universal impact on States and on individuals has influenced the progress and development of international law since its adoption.

43. The entry into force of the International Covenants on Human Rights⁴ constituted a major advance of great significance in the history of human rights. The objectives of the International Covenant on Economic, Social and Cultural Rights are declared to be the setting of standards to be achieved progressively, not necessarily to be implemented immediately. It is too early in point of time to assess the effects of the Covenant, a legally binding instrument, not only for the States which have ratified and deposited their own instrument of ratification or accession with the Secretary-General of the United Nations but also for every State Member which proceeds to ratify the Covenant in the future.⁵ The progressive attainment of higher economic, social and cultural standards throughout the Member States should be seen as a desirable contribution to peace and stability among nations, with consequent benefits for all individuals, be they nationals or aliens. A realistic approach is however necessary. With the present wide disparities in economic and social development there is no reason to suppose that the progressive achievement of these standards implies equal and simultaneous progress for all individuals within the jurisdiction of the member State, including aliens. Taking into account the considerations raised above, the Rapporteur will seek to show how far the provisions of the Covenants do effectively guarantee protection of the alien.

B. The host State

44. States have jurisdiction over all persons within their territory, including aliens, and are expected to accord to aliens the minimum standard of treatment recognized by customary international law. This does not imply that an alien is either entitled to or may have to accept equal treatment with nationals of the host State. The alien, although subject to the laws of the host State and to its territorial supremacy, may receive protection from his State of nationality. To the extent that a State may exercise its discretionary power to take measures for the protection of its nationals abroad, these aliens may receive better treatment than the nationals of the host State. It is recognition of this right of protection, which all States possess, and of the sovereign equality of States that imposes an obligation on the host State to treat aliens within its territorial jurisdiction in accordance with certain legal rules and principles.⁶ Continued violations of the rights of aliens in many parts of the world give grounds for doubting whether there are sufficient sanctions available against a host State

without some judicial body of the highest quality and esteem, with the power to enforce judgements. The political considerations and pressures within the United Nations, the failure of diplomatic negotiations to prevent these continued violations, together with the deep desire of the majority of nations to avoid anything but a peaceful settlement of such violations, do nothing to inhibit deprivation of the human rights of aliens.

45. It is consequently compelling on all host States, as members of the international community, to recognize, in relation to other States, certain general standards of decent treatment of individuals, including aliens, being "born free and equal in dignity and rights".⁷ The view has been held that the protection granted by a State to the life, liberty and property of aliens is a measure of its level of civilization.⁸ The theory of private ownership being repugnant to some States, though to a limited extent practised by many States, the view with regard to the protection of property has undergone some modification. Personal liberty, the right to exercise civil rights in conformity with the public law of the State and freedom of religious worship are also owed protection by the host State.

CONTEMPORARY INTERNATIONAL INSTRUMENTS

46. The concept that the host State shall protect the human rights and fundamental freedoms of all individuals within its jurisdiction is based on the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family and the dignity and worth of the human person. The acceptance of the principle is manifested in contemporary international instruments, although distinctions, limitations, derogations, reservations and restrictions may be permitted.⁹

Universal Declaration of Human Rights

47. The Universal Declaration of Human Rights proclaims that everyone has the right to recognition everywhere as a person before the law (art. 6). The intention underlying the inclusion of the word "everywhere" was to ensure the protection of civil rights of individuals who were living outside their own country. No one may be deprived of the enjoyment of his fundamental civil rights, except in so far as they are limited or restricted by law, in accordance with article 29 of the Universal Declaration.

48. In the discussions that were held relative to the drafting of article 6, the rights recognized to a "person before the law" included the right to marry and the right to be represented in a court of law.¹⁰ These rights were in fact expressly included in the Declaration, so that it was not considered necessary to use the term "fundamental civil rights" in the text. It was also evident that there was difficulty in reaching

⁴ The International Covenant on Economic, Social and Cultural Rights entered into force on 3 January 1976; the International Covenant on Civil and Political Rights and the Optional Protocol thereto entered into force on 23 March 1976.

⁵ Formalities of ratification and of accession are set out in article 27.

⁶ L. Oppenheim, *International Law: A Treatise* (ed. H. Lauterpacht), vol. I, *Peace* 8th ed. (London, Longmans, Green, 1955), p. 686.

⁷ Universal Declaration of Human Rights, art. 1.

⁸ G. Schwarzenberger, *The Frontiers of International Law* (London, Stevens, 1962), p. 77.

⁹ E/CN.4/AC.1/SR.37, pp. 2-8

¹⁰ E/CN.4/21. p. 61.

agreement on an understanding between peoples with such divergent civilizations and legal terminology.¹¹

International Covenants on Human Rights

49. States parties to the International Covenant on Civil and Political Rights undertake to ensure to all individuals within their territories and subject to their jurisdiction the rights recognized in the Covenant (art. 2 (1)). Further, the States parties have to ensure that the individual whose rights have been violated shall have an effective remedy, determined by competent judicial, administrative or legislative authorities provided for by the legal system of the State (art. 2 (3) (a) and (b)). States parties undertake to adopt the legislation necessary to give effect to the rights recognized in the Covenant.

50. It was recognized that the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent and that the International Covenants on Human Rights should contain a clear expression of economic, social and cultural rights in a manner which relates them to the civic and political freedoms proclaimed by the Covenants.¹²

51. Under the International Covenant on Civil and Political Rights a State party undertakes to ensure the rights recognized in the Covenant for all individuals within its territory and subject to its jurisdiction. It is not clear from the *travaux préparatoires* nor from the provisions of the Covenant that aliens would necessarily be included as beneficiaries of rights under the Covenant. A State exercises, within its territory, territorial jurisdiction over its possessions, its nationals and their property. Territorial jurisdiction over foreigners is limited by the personal jurisdiction which foreign States may claim over their nationals who are abroad as well as by treaty provisions. Concern was expressed by delegates for the protection of their own nationals when abroad, but there is no evidence in the summary records disclosing that any concern was shown for aliens living within their territorial jurisdiction.

52. The International Covenant on Economic, Social and Cultural Rights provides that States undertake to take steps to the maximum of their available resources to achieve progressively the full realization of the rights recognized (art. 2 (1)). How these available resources are to be distributed, and whether to nationals and aliens equally, is not stated. States are free to decide their own policies in their own way in order to attain the objectives of the Covenant. Article 1 states that peoples are to "freely pursue their economic, social and cultural development". The term "peoples" is not precisely defined, and since they "have the right to self-determination", it may be considered that the term applies to national groups and would not include aliens.

53. Positive discrimination against aliens in relation to economic rights is permitted under article 2 (3), by "developing countries". Again, this term is far from clear and is presumably not static.¹³ The apparent implication of this provision is that there is no standard of international law or practice on which an alien may rely, whereas there is in fact a standard of law binding on all States.

International Convention on the Elimination of All Forms of Racial Discrimination

54. The International Convention on the Elimination of All Forms of Racial Discrimination imposes on States parties a duty to provide effective protection and remedies to all within their jurisdiction whose rights and freedoms are violated contrary to the provisions of the Convention (art. 6). The Convention does not apply to distinctions between citizens and aliens (art. 1 (2)).

Peace treaties

55. Terms of peace treaties may provide for guarantees to aliens, as in the peace treaties between the Allied Powers and Bulgaria, Finland, Hungary and Romania in 1947.¹⁴ Clauses in the treaties concluded with each of the four last-mentioned Powers provided that the "State shall take all measures necessary to secure to all persons under Bulgarian, Finnish, Hungarian or Romanian jurisdiction, without discrimination as to race, sex, language or religion, the enjoyment of human rights and of fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting". The four States further undertook to release persons who had been in confinement for political reasons, regardless of citizenship and nationality, and not to enact any laws or measures in the future which would be incompatible with the purposes of the foregoing provisions.¹⁵ It may be considered that to be released from prison is not a human right, but nevertheless, in so far as an amnesty for political prisoners is a humanitarian act, it was recognized in those treaties that nationality was not to be taken as a ground for discrimination.

56. In the preamble to the Peace Treaty between the Allied Powers and Japan, 1951, it was stated that the conclusion of the treaty would "enable Japan... in all circumstances to conform to the principles of the Charter of the United Nations, to strive to realize the objectives of the Universal Declaration of Human Rights, to seek to create within Japan conditions of stability and wellbeing as defined in Articles 55 and 56 of the Charter of the United Nations and already initiated by post-surrender Japanese legislation...".

¹¹ A. Verdoort, *Naissance et signification de la Déclaration universelle des droits de l'homme* (Louvain, 1964), pp. 107-111.

¹² General Assembly resolution 421 E (V) of 4 December 1950.

¹³ According to OECD classifications, there are over 100 developing countries, including those in the Organization of Petroleum Exporting Countries (OPEC).

¹⁴ Bulgaria, art. 2; Finland, art. 6; Hungary, art. 2; Romania, art. 3 (1)

¹⁵ Bulgaria, art. 3; Finland, art. 7; Hungary, art. 3; Romania, art. 4.

57. This was the first peace treaty to refer specifically to the Universal Declaration of Human Rights, and this significant inclusion may be taken to imply the firm intention to seek to promote respect for and observance of human rights and fundamental freedoms in accordance with the provisions of the Charter.

Treaties of establishment

58. Treaties of establishment sometimes contain provisions which are pertinent. Thus, the Treaty concerning the establishment of the Republic of Cyprus contained a model constitution guaranteeing the fundamental rights and liberties for all, by which the new Republic of Cyprus undertook to secure for everyone within its jurisdiction human rights and fundamental freedoms, comparable to those contained in the European Convention and the first Protocol of 1952, articles 1-3.

Regional conventions

59. Regional conventions may also bear on this question. Thus, every member State of the Council of Europe which has ratified the European Convention on Human Rights is under the Convention, and also by the Statute of the Council of Europe (art. 3), under a duty to protect the rights and freedoms of all individuals within its jurisdiction, regardless of nationality.

C. The State of nationality

60. According to the rules of customary international law, as elaborated by decisions of international courts and tribunals, States are to grant protection to the life, liberty and property¹⁶ of all individuals within their jurisdiction. If they fail in this duty towards an alien, responsibility is incurred to the State of which that alien is a citizen.¹⁷ "It is an elementary principle of international law", it has been held, "that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels".¹⁸

61. The State's right to grant diplomatic protection to one of its citizens abroad depends on certain pre-conditions. Whenever the rights of an alien have been infringed, all domestic remedies must have been exhausted in the State where the act took place and there must have been a denial of justice. The State, "by taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf... is, in reality, asserting its own right, the right to ensure, in the per-

son of its nationals, respect of the rules of international law".¹⁹ There are a number of other qualifications to be considered, including the time and period of the nexus of nationality and non-nationality of the State of residence.

62. The State of nationality, however, has complete discretion in the exercise of its right to grant protection, even if the essential pre-conditions have been fulfilled. This discretionary element is one of the many defects in the only general international protection available to aliens:²⁰

- (i) The individual has no right to obtain protection. The State may refuse, for instance for practical reasons, to exercise its right. Alternatively, the State may decide to take legal protective measures even against the wishes of the individual, who cannot waive the right of protection of the State;
- (ii) There must be a genuine link of nationality between the individual and the State whose protection he is seeking, and that bond of nationality must be real and effective.²¹ It is possible for a State to exercise diplomatic protection in favour of an individual of another nationality, through the operation of treaty provisions, but stateless persons would not be able to benefit from such protection;
- (iii) There must not be a link of nationality between the individual and the State alleged to have committed the injury at the critical time;
- (iv) The injury must be imputable against the State concerned under the legal rules of State responsibility;
- (v) Even if the State of nationality does exercise its right, there may be considerable delay in obtaining redress, with consequent suffering to the individual, or it may indeed be ineffective;
- (vi) The remedies available will not be dependent on any codified rights but on the rules of international law, which have not been clearly defined.

63. The diplomatic protection of the State of nationality may, however, give the alien a greater measure of protection than the national, who may have suffered from a gross violation of human rights and has no legal protection further than that accorded by his national courts.²²

D. Third States

1. TRUSTEESHIP SYSTEM

64. In accordance with the basic objectives of the trusteeship system established by the Charter, "to encourage respect for human rights and for fundamental freedoms for all without distinction as to

¹⁶ Qualifications relating to the right to protection of property are discussed in chap. IV below.

¹⁷ E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, Banks Law Publishing Co., 1915), pp. 179-180.

¹⁸ *The Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, p. 12.

¹⁹ *Panevezys-Saldutiskis Railway Case*, P.C.I.J., Series A/B 76, p. 16.

²⁰ H. Golsong, "International protection of human rights", *Recueil des Cours*, 1963, vol. III, p. 8-11.

²¹ *Nottebohm case*, I.C.J. Reports, 1954, p. 23.

²² Lauterpacht, *op. cit.*, p. 121.

race, sex, language or religion" (Art. 76 c), in the many Trusteeship Agreements concluded between 1946 and 1947 Administering Authorities undertook their responsibilities towards trust territories in those terms.²³ The first obligation of the Administering Authority, in accordance with Article 76 b of the Charter, is "to promote the political, economic, social and educational advancement of the inhabitants of the trust territories".

65. The Agreement for the United States trusteeship of the Pacific Islands (1947) confirms that priority must be given to promoting the advancement of the inhabitants, and only subject to that obligation shall the Administering Authority accord equal treatment to nationals of United Nations Member States who are within the trust territory.

66. The Trusteeship Agreement concluded in 1950 for the Territory of Somaliland contains the acceptance by the Administering Authority as a standard of achievement for the Territory, of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948.

67. This system now applies to very limited areas of the world, and is more of historic interest.

2. PROTECTING POWERS

68. In situations of armed conflict the alien, whether, for instance, an enemy alien or a resident in occupied territory, may be protected by provisions of the four Geneva Conventions of 12 August 1949.²⁴ The task of watching over the application of the provisions of these Conventions may be entrusted to a neutral Power.

69. The extent to which provisions of human rights instruments may be applicable in such situations is outside the scope of this report, which is concerned with the rights of the resident alien in time of peace.

E. International organizations

70. The constitutions of the many international organizations operating under the auspices of the United Nations for humanitarian purposes, such as specialized agencies under Article 57 of the Charter, contain provisions for member States to implement stated objectives by a gradual process and by various methods, for the benefit of the international community. The purposes and objectives of these specialized agencies are fundamental and are clearly stated to be for the benefit and improved well-being of all mankind, regardless of nationality, or any other distinction.

²³ A list of Trusteeship Agreements which included the objectives of the United Nations as expressed in Article 76 of the Charter is given in *United Nations Action in the Field of Human Rights*, (United Nations publication, Sales No. E.74.XIV.2), p.7.

²⁴ G. Draper, *The Geneva Conventions of 1949* (Leyden, Sijthoff, 1969).

1. INTERNATIONAL LABOUR ORGANISATION (ILO)

71. Since its foundation the ILO has had as one of its main tasks the protection of foreign workers. The preamble of the Constitution contains among its objectives the defence of the interests of workers employed abroad. The Declaration of the aims and purposes of the ILO,²⁵ annexed to the Constitution, states that "all human beings, irrespective of race, creed or sex" have the right to pursue their material well-being and their spiritual development (part II (a)). Action to achieve these objectives must be at both national and international level. There is an express obligation to provide facilities for training and the transfer of labour, including migration for employment and settlement, although there is no express proviso that equal treatment in every respect must be accorded to migrants or other non-nationals.

72. The Constitution itself demands that every member State should effectively observe within its jurisdiction any convention to which it is a party (art. 24), thus recognizing the right of all working within the territory, regardless of nationality, to the rights specified.

73. Many of the conventions adopted by the ILO under its Constitution are specifically concerned with the rights of the migrant worker.²⁶

2. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)

74. The preamble to the Constitution²⁷ declares that the purpose of nations accepting the Constitution of FAO is to promote the common welfare, and to raise levels of nutrition and standards of living of the peoples under their respective jurisdictions, bettering the condition of rural populations, and so contribute toward an expanding world economy, ensuring humanity's freedom from hunger. Policies to this end are to be adopted at national and international level.

3. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO)

75. The purpose of the organization is "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations" (Constitution,²⁸ art. I, para. 1).

²⁵ Adopted on 10 May 1944 by the General Conference of ILO, at its twenty-sixth session held at Philadelphia.

²⁶ See below, chap. III, sect. D.

²⁷ Signed on 16 October 1945 at the first session of the Conference of FAO, held in Quebec.

²⁸ Adopted by the Conference for the Establishment of an Educational, Scientific and Cultural Organization of the United Nations, held in London from 1 to 16 November 1945.

76. UNESCO also has as one of its main objectives international peace and the common welfare of mankind, to be advanced through the educational, scientific and cultural relations of the peoples of the world. Objectives are to be achieved through the encouragement of co-operation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture (art. I, para. 2 (c)). The rights contained in the multilateral instruments in which UNESCO is interested are recognized as being applicable to everyone including aliens, with the exception of the right to the protection of certain material interests under the Universal Copyright Conventions of 1952, as revised on 24 July 1971.²⁹

4. WORLD HEALTH ORGANIZATION (WHO)

77. In the preamble of the Constitution of WHO,³⁰ States parties declare the principle that "the enjoyment of... health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition".

78. In order to achieve its objective, one of the functions of WHO is to propose conventions, agreements and regulations and make recommendations with respect to international health matters (art. 2, para. 1 (k)).

F. Bodies established under international instruments

79. Committees or other agencies or bodies with the competence to investigate any reported violation of human rights have been envisaged in post-war international instruments. The lack so far of international machinery to ensure the implementation of human rights provisions has been and continues to be one of the main weaknesses in contemporary international law. The committees which have been established or which will be set up on the entry into force of the relevant instruments are described below.

1. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

80. Articles 28-40 set out the functions and powers of the Human Rights Committee, whose members are elected from nationals of ratifying States. Article 41 allows a State party, under certain conditions, to submit a communication to the Committee concerning the failure of another State party to honour its obligation under the Covenant. States must declare they are willing to abide by the terms of this article.

²⁹ See below, chap. V.

³⁰ Adopted by the International Health Conference, held in New York from 19 June to 22 July 1946.

81. An extension of the principle of petition is contained in the Optional Protocol to the Covenant, whereby not only States parties accepting the protocol but also individuals may submit a communication to the Human Rights Committee for consideration. The right of communication is accorded, under certain conditions, to any individual who considers his rights to have been violated by that State party (art. 1).

82. An individual who suffers a violation of any right set out in the Covenant is accorded a right of petition to the Committee provided (i) that the State which is alleged to have committed the violation is a party to the Covenant and to the Protocol, (ii) that he is subject to the jurisdiction of that State party (art. 1, Protocol). According to this article, the individual does not have to be within the territory of the State party. The State party to the Covenant undertakes to ensure to all individuals within its territory and subject to its jurisdiction the rights set out in the Covenant. If article 1 of the Protocol is followed, an individual who is not within the territory of a State but who is subject to its jurisdiction could submit a communication to the Committee, although the State, in accordance with article 2 (1) of the Covenant, has not undertaken to guarantee that individual's rights. In the drafting of this latter article, the view was held that it was not possible for a State to protect the rights of persons subject to its jurisdiction if they were outside its territory. Reliance would have to be placed on negotiations through diplomatic channels.³¹ *Per contra* it would seem that an individual may submit a petition alleging violation by a State party even though he may be an alien residing in another State. For the purposes of the right of petition, the individual may still be subject to his State's jurisdiction, since a State may claim personal jurisdiction over its nationals and their property if they are abroad.

2. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

83. Eighteen experts of high moral standing and acknowledged impartiality, elected from among nationals of the States parties to the Convention, form a Committee on the Elimination of Racial Discrimination (art. 8). Their task is to receive reports on the legislative, administrative or other measures which States parties have adopted and to make recommendations (art. 9).

84. A State party may report to the Committee instances of another State party failing to observe the provisions of the Convention (art. 11). The terms of reference of the Committee would also enable a State party to report racial discrimination against its own nationals resident in the territory of another State party, according to the provisions of the Convention. Failure to settle the dispute may lead to the appointment of an *ad hoc* Conciliation Commission (art. 12).

³¹ A/2929 (Official Records of the General Assembly, Tenth Session, Annexes, agenda item 28 (part II), document A/2929), chap. V, para. 4.

3. CONVENTION AGAINST DISCRIMINATION IN EDUCATION AND PROTOCOL INSTITUTING A CONCILIATION AND GOOD OFFICES COMMISSION

85. Under the Convention any dispute concerning the interpretation or application of the Convention shall, failing other means of settlement, be referred by the States parties to the International Court of Justice (art. 8). The Protocol of 1962 provides for a formal procedure, by setting up a Conciliation and Good Offices Commission under the auspices of UNESCO.

4. CONSTITUTION OF THE ILO

86. A Commission of Inquiry may be set up by the Governing Body to receive a complaint from one member State against another, for failure to implement provisions of a Convention to which they are both parties.

87. A Fact-Finding and Conciliation Commission on Freedom of Association—a freedom which is for the benefit of all “without distinction” under the Freedom of Association and Protection of the Right to Organise Convention, 1948—examines complaints of infringements. The member State concerned must consent to a complaint being referred to the Commission.

88. The powers of the bodies which have already been constituted nearly all have the same limitations to effective protection. They can only make an investigation or recommendation to Governments on the complaint of a member State against another member State, or by a State party against another State party to the Convention of which non-implementation is the subject-matter of the complaint. Aliens will, of course, only be protected to the extent that they acquired rights under the relevant Convention. A State party may be willing to bring a complaint against another State which has violated the rights of one or more of its nationals, but it is unlikely that a State would do so for individuals who are not their own nationals.

G. Regional organizations

89. Post-war economic and political interdependence has led to the establishment of regional organizations based on mutual interest and co-operation. The statutes or treaties establishing these regional organizations all contain affirmation by the respective member States of the principles and aims of the United Nations Charter and of their resolve to ensure the progress and improvement of the living conditions of their peoples. Member States of four major geographical areas of the world have established organizations to protect and improve the rights of the nationals of their regions, Africa, Asia, America and Europe.

90. Some of the organizations have elaborated declarations and conventions on human rights and have established mechanisms of control to ensure observance of the terms of the conventions.

1. AFRICA

Charter of the Organization of African Unity (OAU)

91. The Charter of OAU³² proclaims in its preamble that member States reaffirm the principles of and their adherence to the United Nations Charter and the Universal Declaration. One of the purposes of the OAU is to promote international co-operation, having regard to the United Nations Charter and the Universal Declaration (art. II (e)). The two first listed purposes of OAU being to promote the unity and solidarity of the African States and to collaborate efforts to achieve a better life for the peoples of Africa, it is not clear from the Charter whether the human rights of non-African aliens would be guaranteed protection.

Charter of the African and Malagasy Common Organization (OCAM)

92. In the preamble of the Charter the African and Malagasy Chiefs of State affirm that, “true to the spirit, principles and objectives of the Charter of the United Nations and the organization of African Unity”, they agree *inter alia* to strengthen co-operation and solidarity to accelerate economic, social, technical and cultural development.³³

*Charter of the Union of Central African States*³⁴

93. The member States reaffirm their adherence to the principles of the Universal Declaration of Human Rights and of the Charters of the United Nations and OAU, and are determined to co-operate towards the formation of a broader union which would transcend ethnic and national differences.

2. AMERICA

*Charter of the Organization of American States (OAS)*³⁵

94. Member States acknowledge the dignity of the individual and recognize as their principal aim the protection of the individual. The American States also proclaim the fundamental rights of the human person, without any distinction as to race, nationality, religion or sex (art. 5 (j)). Further, national jurisdiction is exerted equally for all inhabitants, both nationals and aliens. This principle confirms the practice of earlier inter-American treaty provisions that aliens receive equal treatment with citizens.

³² United Nations, *Treaty Series*, vol. 479, p. 39; in force 1: September 1963.

³³ I. Brownlie, *Basic Documents on African Affairs* (Oxford Clarendon Press, 1971), pp. 25-26.

³⁴ *Ibid.*, pp. 46-47.

³⁵ Signed at the Ninth International Conference of American States, Bogotá, 30 March-2 May 1948.

*American Declaration of the Rights and Duties of Man, 1948*³⁶

95. The Declaration, although not binding, is of interest as it is one of the first post-war instruments to state that "international protection of the rights of man should be the principal guide of an evolving American law". It goes on to state that "the affirmation of essential human rights by American States together with the guarantees given by the internal régimes of the States establish the initial system of protection considered by the American States as being suited to the present social and judicial conditions". Two important principles were thus recognized: first, that the protection of human rights is an international obligation concerning all human beings, and secondly, that the protection of human rights must be guaranteed by national legislation, which, even if not adequate at present, must be the guide for the direction of the future evolution of national laws.

*Inter-American Commission on Human Rights*³⁷

96. The Commission, set up in 1969 to operate under article 33 of the American Convention on Human Rights and regulated by statute, is an autonomous body of the OAS. Its functions are to "keep vigilance over the observance of human rights", including those set out in article 41 of the Convention. The Commission may receive complaints from individuals and transmit those complaints to Governments with requests for information.³⁸ Its powers are limited to making recommendations, which can be ignored by Governments, but there appears to be no bar in the statute to a Government's communicating an alleged breach by another Government.

*American Convention on Human Rights*³⁹

97. The States signatories recognize in the preamble of the Convention that the essential rights of man are not derived from his being a national of a certain State but are based upon attributes of the human personality, and that therefore they justify international protection in the form of a Convention. The principles maintained by States signatories are set out in the Universal Declaration.

98. The States parties undertake to respect the rights and freedoms recognized in the Convention and ensure to all persons subject to their jurisdiction full exercise of these rights and freedoms (art. 1). It is specifically stated that, for the purposes of the Convention, "person" means every human being.

3. ASIA

*South East Asia Collective Defence Treaty*⁴⁰

99. The States parties proclaimed their faith in the aims and principles of the United Nations Charter, their desire to defend the principles of democracy, individual freedom and the rule of law, and to encourage the well-being and economic development of the peoples of the treaty zone.

*Final Communiqué of the Afro-Asian Conference, Bandung, Indonesia*⁴¹

100. The text of the communiqué contains a declaration to the effect that the Afro-Asian Conference fully supports the fundamental principles of human rights as defined in the United Nations Charter, and considers the Universal Declaration as a common objective towards which all peoples and nations should work. The Conference further declared its full support for the principle of the right of peoples to self-determination, as defined in the United Nations Charter. The legitimate right of peoples to self-determination may and often does necessitate the choice between the relative human rights of aliens and the overriding rights of the local peoples.

*Pacific Charter*⁴²

101. In accordance with the provisions of the United Nations Charter, the signatories to the Pacific Charter uphold the principles of equal rights and self-determination of peoples. They also undertake to co-operate in the economic, social and cultural fields in order to promote higher living standards, economic progress and social well-being "in this region".

4. EUROPE

*Statute of the Council of Europe*⁴³

102. One of the aims of the Council, expressed in the Statute, is to achieve, by agreement and common action, the maintenance and further realization of human rights and fundamental freedoms. Respect for human rights and the rule of law are conditions of membership (art. 3), and failure to observe these conditions can result in suspension from membership (art. 8).

*Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*⁴⁴

103. Under this Convention the contracting parties which are member States of the Council of Europe

³⁶ Contained in the Final Act of the Ninth International Conference of American States, Bogotá, 1948, amended in 1967.

³⁷ Protocol of Amendment to the Charter of the Organization of American States, OEA/Series E/XIV.1.

³⁸ A. Schreiber, *The Inter-American Commission on Human Rights* (Sijthoff, 1970), pp. 45-49.

³⁹ Signed at San José, Costa Rica, 22 November 1969.

⁴⁰ Done at Manila, 8 September 1954.

⁴¹ 18-24 April 1955.

⁴² 8 September 1954.

⁴³ Signed at London, 5 May 1949.

⁴⁴ Signed at Rome, 4 November 1950.

undertake to secure to everyone within their jurisdiction the rights and freedoms contained in the Convention, subject only to the restrictions and limitations which are permitted under the Convention (art. 1). States parties are thereby bound to respect the human rights of everyone, including aliens, resident within their jurisdiction and to accord equal treatment in the observance of these rights, subject to derogations permitted under the Convention.

*European Court of Human Rights*⁴⁵

104. Any complaint by a contracting party to the European Convention on Human Rights of a breach of the Convention is submitted to the European Commission of Human Rights, which investigates the alleged breach with a view to a friendly settlement. If a settlement is not achieved and the case is admissible, the Commission draws up a report for submission to the Committee of Ministers of the Council of Europe. An individual may have a right of petition, if the member State alleged to have violated his human rights has so expressly declared (art. 25). Petitions are only accepted by the Commission if domestic remedies have been exhausted. Provided therefore an alien is within the jurisdiction of a contracting party to the Convention, he may submit a claim to the Commission alleging violation of his rights. As stated above, the State which is the subject of the complaint must have made the relevant declaration under article 25 for the complaint to be considered.

105. Since any alleged breach of the Convention may be referred to the Commission by any of the contracting parties, a State may refer an alleged violation of the rights of any individual regardless of nationality.

European Economic Community (EEC)

106. By the Treaty of Rome⁴⁶ establishing the EEC, member States affirm that the essential objective of their efforts shall be the constant improvement of the living and working conditions of their peoples.

107. Any discrimination on the grounds of nationality is prohibited, this principle being qualified by the field of application of the treaty, and without prejudice to any special provisions in the Treaty (art. 7). The application of the Treaty is presently confined to the formation of a common economic and labour market, with freedom of movement for workers, goods and services and a common transport system. The period of transition allowing for the progressive establishment of the market being terminated, the rights of EEC nationals resident in member States other than their own are, in accordance with the Treaty, protected within the field of employment.

108. In cases of discrimination against nationals of another member State, the institutions of the Community (the Council) may adopt provisions to prohibit such discrimination.

Court of Justice of the European Communities (European Court of Justice)

109. The Court's jurisdiction derives from the European Communities Treaties and has as its main function to ensure respect of the law in the interpretation and application of the EEC Treaty (art. 164)⁴⁷ including the observance of "general principles of law" (art. 215).⁴⁸ In the *Nold Case* (4/73), the Court stated that fundamental rights are an integral part of the general principles of law, that in safeguarding these rights the Court must look to the institutional traditions common to the member States. It cannot uphold measures which are incompatible with these fundamental rights. The Court's judgement also confirmed that international treaties of human rights, to which member States were signatories, could supply guidelines to be followed within the framework of Community law. The nine member States and also individuals are subjects of Community law and can bring actions before the Court. Successful actions have been brought by individuals under article 48 of the EEC Treaty, relating to freedom of movement for EEC nationals between the nine member States.⁴⁹

⁴⁵ Set up at Strasbourg, January 1959.

⁴⁶ Signed at Rome, 25 March 1957 ("EEC Treaty").

⁴⁷ Set up in 1958 at Luxembourg.

⁴⁸ EEC Treaty.

⁴⁹ See below, chap. IV.

III. WHO IS PROTECTED BY INTERNATIONAL INSTRUMENTS?

110. Progress towards universal protection for the human rights and fundamental freedoms of all persons everywhere, envisaged by the International Bill of Human Rights, may have made a significant advance by the entry into force of the International Covenants. They reinforce the adoption of instruments concerned to protect certain categories of persons who, for diverse reasons and in differing circumstances, find themselves in a relatively weak position in society and who, being more easily exploited, are less able to take measures for their own protection. Sometimes as the result of an incident or event which shocks the conscience of mankind, international instruments have been drafted to provide the protection required to prevent or mitigate the consequences of the continuance of the abuse or a repetition of similar events. Categories of persons residing outside their country of nationality have been the subject of separate instruments,¹ although no single instrument has been adopted to give universal protection to the rights of aliens as such.

111. World conditions are evolving rapidly and in many parts of the globe radical changes are taking place, with the establishment of increasingly complex political, economic and social structures. Against this background, an analysis of contemporary international instruments in the field of human rights will attempt to show how far they provide, in scope, in effect and in extent, requisite guarantees for the protection of the rights and freedoms of aliens.

A. Aliens generally

112. The classes of persons whose rights and freedoms are protected under post-war international instruments are qualified by non-discrimination clauses. International law recognizes that certain rights are reserved to nationals, and distinctions between nationals and aliens do not necessarily mean discrimination. There are legitimate distinctions which do not constitute discrimination because they are founded on just grounds and apply to all aliens.² Neither does inequality of treatment as between a national and an alien necessarily mean unjust or inhuman treatment. Indeed, equality of treatment among unequals may be as unjust as inequality of treatment among equals. Equality consists in the same treatment of similar persons.³ In regard to their obligations to the host State and their

allegiance, aliens are not and cannot be similar to nationals.⁴

113. The fact that a right is fundamental and essential—for example, the right to vote—does not mean that it may not be denied to aliens, just as it may be denied to delinquents, children or lunatics.⁵

114. The *travaux préparatoires* relating to the drafting of the Universal Declaration of Human Rights show the concern of delegates to distinguish between the rights of citizens and those that may accrue to aliens. Discussions which took place in the Sub-Commission on the term “national origin” indicate the approach of delegates. The term was not considered to be synonymous with nationality. It did not refer to an individual from a foreign country but was of sociological significance.⁶ The anxiety expressed was not as between nationals and aliens, but as between nationals who were born in the country and those who had become naturalized citizens. It was stated that the grounds on which discrimination was prohibited were not exhaustive but were by way of example. This does not imply that all grounds are to be acceptable or that nationality was one of the grounds on which there should be no discrimination. The emphasis of the Sub-Commission that “national origin” was used in the sense of national characteristics and not in the sense of a citizen of a State confirms this view.⁷ Legal capacity, for instance, is one of the grounds which determine the rights from which an individual may benefit, but is omitted from any general enumeration of grounds for equality of treatment.

115. The term “nationality” is not included in any of the non-discrimination clauses used in the international instruments in the field of human rights considered in this report, with one or two notable exceptions.⁸

116. The following is a list of non-discrimination clauses in international instruments:

(a) *Charter of the United Nations*: “race, sex, language, or religion” (Art. 1 (3)).

(b) *Universal Declaration of Human Rights*: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (art. 2).

(c) *International Covenant on Economic, Social and Cultural Rights*: “race, colour, sex, language, religion, political or other opinion, national or social

⁴ For example, aliens are not liable for military service or for the payment of certain taxes.

⁵ E. W. Vierdag, *The Concept of Discrimination in International Law* (The Hague, Nijhoff, 1973), p. 11.

⁶ E/CN.4/Sub.2/SR.5.

⁷ E/CN.4/52, p. 5.

⁸ ILO Conventions on Maternity Protection (No. 103) and on Plantations (No. 110).

¹ For example, the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees.

² *The Main Types and Causes of Discrimination* (United Nations publication, Sales No. 1949.XIV.3).

³ Aristotle, *Politics* (ed. Modern Library, New York), book VII, chap. 14, p. 307.

origin, property, birth or other status" (art. 2 (2)). There is the added rider that developing countries may determine to what extent they would guarantee the economic rights recognized in the Covenant to non-nationals. This discriminatory provision is in contrast to the principles of the Covenant and might create a double standard between developing and developed countries.⁹ It also creates difficulties for Governments which implement the "open door" policy. This provision is further open to criticism in that there is no legal definition of "developing country". Moreover, as the term itself implies, there is change in the status of a country as its economy improves. Secondly, the need of certain countries for financial, scientific and technological contributions from developed countries—and which these countries willingly give—should be able to be met with confidence. Unless there are bilateral agreements with specific undertakings to protect the economic rights of non-nationals, there is no protection under the Covenant from arbitrary confiscation of property, possessions and means of livelihood of any alien living in a developing country. Any government which singles out a particular group of non-nationals, for instance on the basis of race, is acting in contravention of the principles contained in the Convention on the Elimination of All Forms of Racial Discrimination.

(d) *International Covenant on Civil and Political Rights*: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (art. 2 (1)). A State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. Under article 4, discrimination is prohibited on grounds of race, colour, sex, language, religion or racial origin. Article 26, under which a State is bound to implement legislation for the protection of the rights set out in the Covenant, gives the same grounds for non-discrimination as in article 2. There is no mention of "nationality", nor is distinction as between aliens and nationals prohibited. Article 1 (2) of the Covenant enunciates the right of peoples to permanent sovereignty over their national wealth and resources. This provision implies that Governments have the right to take measures to control aliens and their financial, commercial and industrial enterprises, taking into account that such control would be without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. The inclusion of the term "national origin" as a prohibited ground of discrimination in article 2 (1) is not contradictory, in that the term refers to sociological distinctions.¹⁰

(e) *International Convention on the Elimination of All Forms of Racial Discrimination*: "race, colour, or national or ethnic origin". A State may make distinctions between citizens and non-citizens (art. 1 (2)).

⁹ Adopted by the Third Committee of the General Assembly by 41 votes to 38, with 21 abstentions.

¹⁰ See A/2929, chap. VI, paras. 180-182, comments during debate on article 24 of the Covenant.

(f) *Proclamation of Teheran*: "race, language, religion or political belief". The Proclamation, which was not legally binding, refers to the right of the individual to participate in the political, economic and social life of "his country" (para. 5). This term would refer to the State with which a person has his closest links or ties, in other words, the country of which he is a national or citizen.¹¹ While an alien is not specifically prohibited from taking part in the life of his country of residence, the Proclamation does not declare any right so to do.

(g) *Declaration of the Rights of the Child*: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". These grounds are prefixed by the words "without any exception whatsoever ... without distinction or discrimination on account of ...". The declaration is not *per se* a legally binding document.

(h) *ILO Conventions*. The principle underlying the ILO Conventions is the progressive improvement of economic and social conditions of employment throughout the world, taking into account the different economic, social and cultural situations in member States. The emphasis is therefore on flexibility and allows for divergence of action in each State. Most ILO Conventions lay down minimum standards to be implemented within national policies and the majority do not specifically provide for their application to aliens:¹²

- (i) The important Convention concerning Discrimination (Employment and Occupation) (No. 111) does not include nationality in the enumeration of grounds on which discrimination is prohibited. It follows the more general line of United Nations conventions: race, colour, sex, religion, political opinion, national extraction or social origin.
- (ii) Some Conventions grant benefits on a reciprocal basis, such as the Convention on Equality of Treatment (Social Security) (No. 118). Ratifying States grant benefits to the aliens who are nationals of another ratifying State.
- (iii) Two ILO Conventions, No. 103, on Maternity Benefits, and No. 110, on Plantations, contain specific reference to non-discrimination on grounds of nationality.
- (iv) The Convention on Freedom of Association and Protection of the Right to Organise (No. 87) is applicable to all without any distinction whatsoever, aliens and nationals having equal rights under the terms of the Convention. ILO Conventions do not contain any provision corresponding to article 2 (3) of the International Covenant on Economic, Social and Cultural Rights. In so far as the rights of non-nationals may be limited, the provisions of ILO Conventions are of equal application to all ratifying

¹¹ J. Ingles, *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, including His Own, and to Return to His Country* (United Nations publication, Sales No. 64.XIV.2).

¹² See N. Valticos, *Droit international du Travail* (Paris, Dalloz, 1970), pp. 497-502.

States, regardless of the economic development of the States concerned.¹³

- (v) In implementation of one of the tasks of the ILO, to protect "the interests of workers when employed in countries other than their own",¹⁴ conventions for the benefit of migrant workers have been adopted.¹⁵

117. Non-discrimination clauses in regional instruments include the following:

(a) *European Convention on Human Rights*: "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (art. 14).

(b) *European Social Charter* (Turin, 1961): "race, colour, sex, religion, political opinion, national extraction or social origin" (preamble). Under part I (18), aliens, provided they are nationals of one of the contracting parties, have equal rights in regard to employment, subject to restrictions based on cogent economic or social reasons.

(c) *American Convention on Human Rights* (San José, 1969): "race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition" (art. I). States parties undertake to respect the rights and freedoms of all persons subject to their jurisdiction (art. I (1)), and it is stated in article I (2) that "person", for the purposes of the Convention, means "every human being". The provisions clearly apply to nationals and aliens alike, except where the term "person" is replaced by "citizen".

(d) *American Declaration of the Rights and Duties of Man* (Bogotá, 1948): "race, sex, language, creed or any other factor" (art. II).

B. Refugees

I. INTERNATIONAL INSTRUMENTS

(a) *Meaning of "refugee" accorded by international instruments*

118. The meaning generally accorded to the term "refugee" is that of a person seeking asylum in a foreign country. The Statute of the Office of the United Nations High Commissioner for Refugees (Statute)¹⁶ provides for the international protection and assistance of any person who "as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or ... unwilling to avail himself of the protection of that country". The High Commissioner also has responsibility to all those who were classified as refugees

¹³ "Comparative analysis of the International Covenants on Human Rights and International Labour Conventions and Recommendations", ILO *Official Bulletin*, vol. LII, 1969, No. 2, pp. 5-7.

¹⁴ ILO Constitution, preamble.

¹⁵ See sect. D. below, on migrant workers.

¹⁶ General Assembly resolution 428 (V) of 14 December 1950.

under earlier Conventions (art. 6. A (i) and (ii)), as well as any other person who is outside the country of his nationality and has fears of persecution, and is unwilling to avail himself of the protection of the Government of the country of his nationality (art. 6. B). The refugee, if he has voluntarily reavailed himself of the protection of the country of his nationality or if, having lost his nationality, he has voluntarily reacquired it, can no longer claim protection from the High Commissioner's Office (art. 6. A (ii) (a) and (b)). Protection also ceases to apply in cases where the refugee has acquired a new nationality and enjoys the protection of the country of his new nationality; if he re-establishes himself voluntarily in the country he left; if the circumstances in connexion with which he has been recognized as a refugee cease to exist and he "continues to refuse to avail himself of the protection of the country of his nationality" (art. 6. A (ii) (c), (d) and (e)). In this latter case, he remains an alien in his country of residence but does not come under the protection of the High Commissioner. Those refugees who are receiving help from other organs and agencies of the United Nations are also excluded from the High Commissioner's protection (art. 7 (c)).

119. Where a refugee has dual nationality he has to be able to show that he fears persecution or no longer enjoys the protection of either of the countries of nationality (art. 7 (a)). The task of the Office of the High Commissioner for Refugees becomes increasingly heavy. Voluntary repatriation, assistance in rehabilitation, integration in countries of asylum and resettlement in other countries remain current problems. To these have been added acts of kidnapping and even assassinations of refugees in countries of asylum.¹⁷ Missing persons as a result of armed conflict¹⁸ and the return of refugees in Africa to their countries following independence are further evidence of the need for the High Commissioner to have maximum support from the world community in his humanitarian work.

120. The Convention relating to the Status of Refugees consolidated previous agreements and conventions, and extended their scope and the protection they afforded. The meaning of status of refugee in the Convention is similar to the meaning ascribed in the Statute, but with some modifications.

(a) The Statute and the Convention protect persons who became refugees as a result of events occurring before 1 January 1951, but the Convention provides for events in Europe only, as well as "events occurring in Europe or elsewhere ...". Contracting States, on ratification, must declare whether they

¹⁷ Statement by United Nations High Commissioner for Refugees to the Third Committee of the General Assembly, 17 November 1975 (*Official Records of the General Assembly, Thirtieth Session, Third Committee*, 2161st meeting, paras. 1-10), introducing his report (*ibid.*, *Thirtieth Session, Supplement No. 12* (A/10012) and *Supplement No. 12A* (A/10012/Add.1)).

¹⁸ Following recent events in Lebanon and Cyprus, at least 400,000 and 180,000 persons, respectively, displaced within their own countries, have received aid from the High Commissioner. These displaced persons are not refugees under the terms of the Convention. At the end of 1975, the estimated total of displaced persons from Indo-China outside their country of origin was 250,000 (*UNHCR*, No. 2, April 1976, p. 6).

apply the restriction to the geographical area of Europe or not (art. 1. B (1)).

(b) The Statute extends the competence of the High Commissioner to include any other person outside the country of his nationality, or stateless, who has well-founded fear of persecution by reason of his race, religion, nationality or political opinion (art. 6. B). There is no limitation as to date or geographical area.

(c) The Statute excludes from protection a refugee who only on grounds of personal convenience or of an economic character refuses to return to his country following a change in the circumstances of the country (art. 6. A (ii) (e)).

(d) The Convention makes specific provision for an individual (who is a refugee under article 1. A (1)) who can show compelling reasons arising out of previous persecution why he continues to refuse the protection of the country of his nationality. This provision applies where the circumstances have changed in his country of nationality and he could otherwise have returned there (art. 1. C (5) and (6)).

(e) Both the Statute and the Convention withhold protection from a refugee who is already receiving assistance from other United Nations organs and agencies. The Convention does not withhold protection if such assistance has ceased and the position of the refugee has not been settled definitely (art. 1. D).

121. Both in the Statute and in the Convention there is denial of assistance to anyone about whom there are serious reasons for considering that "he has been guilty of acts contrary to the purposes and principles of the United Nations". Although no precise meaning is attached to this phrase, it would include any act which failed to observe or respect the human rights and fundamental freedoms of others.

122. The Protocol relating to the Status of Refugees¹⁹ extended the definition of refugee to include all refugees on a basis of equality, regardless of the dateline of 1 January 1951, and without any geographic limitation. Existing declarations by States confining their recognition to refugees from events in Europe (art. 1. B (1) (a), Convention) remain valid, unless extended under article 1. B (2). By the end of 1976,²⁰ 68 States had ratified the Convention, and 63 had ratified the Protocol, four within the preceding year. Eligibility for refugee status being within the competence of the High Commissioner, the interpretation of the Statute has been liberally applied. Should any controversy arise concerning status, the opinion of an advisory committee may be requested (art. 1).

(b) *Extent of protection given to refugees*

123. The international protection of refugees and the provision of the requisite financial resources are a responsibility of the world community long recognized as such through the work effected under the auspices of the League of Nations and continued by the International Refugee Organization up to 1971. The establishment of the Office of the United

Nations High Commissioner for Refugees confirms this universal obligation, and although the General Provisions of the Statute of his Office allowed for review concerning the continuation of the Office beyond December 1963, the annual number of refugees still demands and requires United Nations protection. The functions of the High Commissioner laid down in the Statute include the promotion of the conclusion and ratification of international conventions for the protection of refugees, supervising the application and proposing amendments thereto; promoting the execution of measures calculated to improve the situation of refugees; assisting efforts to promote voluntary repatriation; promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States and endeavouring to obtain permission for refugees to transfer their assets, especially those necessary for their resettlement (art. 8).

(c) *Rights of refugees*

124. The rights protected under the Convention have been listed and classified in the survey prepared by the Secretary-General²¹ according to whether provisions (a) assimilate refugees to nationals, (b) accord refugees most favoured treatment granted to nationals of a foreign country, or enjoy treatment as favourable as possible for refugees, and in any event not less favourable than that accorded to aliens generally.²² Refugees are in any case entitled to equality of status and of treatment as between themselves. The Convention does not attempt to modify in any way the municipal laws of States in regard to their treatment of aliens, but to provide for the refugee the protection which he no longer has from his own country of nationality. In particular, protection is sought to obtain exemption for the refugee where the country of residence takes exceptional measures against the person, property or interests of nationals of his country of nationality. It is accepted that national legislation may prevent the contracting parties from applying the general principle expressed (art. 8).

125. The Convention, while imposing obligation on contracting States towards refugees within their territorial jurisdiction, does not impose any duty on States to grant entry to persons seeking refuge. The sovereignty of the State to retain the right to determine who shall enter its territory is not impaired. The State does, under the rules of international law, owe a duty to receive into its territory refugees who are its nationals. Admission of refugees remains within the discretionary powers of the administrative authorities of a contracting State.²³

126. Economic and social rights for refugees are recognized in provisions of the ILO Convention concerning Migration for Employment (Revised, 1949). Contracting States have an obligation to assist refu

²¹ E/CN.4/Sub.2/335.

²² *Ibid.* pp. 20-22.

²³ A. Cassese, "Sul soggiorno del rifugiato politico in Italia" *Rivista di diritto internazionale*, vol. XLII, 1959, pp. 653-661, in which reference is made to a decision to that effect by a national court.

¹⁹ Taken note of in General Assembly resolution 2198 (XXI) of 16 December 1966.

²⁰ E/CN.4/907/Rev.13.

gees in getting work and to take measures to help them until jobs are found. The extent to which help is given with social security benefits depends on whether such benefits are based on contributions (annex II, art. 11). Freedom to practise their religion and freedom as regards the religious education of their children must be at least as favourable as that accorded to nationals. The interpretation of this article must be considered in relation to article 18 of the International Covenant on Civil and Political Rights, from which there may be no derogation.

127. Under article 18 (3) of the International Covenant, manifestation of one's religious beliefs may be subject to limitations prescribed by law for specific reasons, but such limitations could not be imposed on the right of a refugee to manifest his religious beliefs unless it also applied to nationals. Where large numbers of refugees settle in a new country and do not share the same beliefs or follow the same religious practices as the nationals, their right to manifest their beliefs is protected. Rituals and observances, ceremonies and modes of worship, which may involve special forms of diet or dress, may be included in this freedom to manifest their belief.

128. Freedom as regards the religious education of their children, as Mr. Krishnaswami, Special Rapporteur of the Sub-Commission, states in his study,²⁴ presents problems for those who are uprooted as a result of massacres, persecutions and other major disturbances. The practical difficulties of availability of appropriate religious instructors or religious buildings may not enable those responsible to fulfil their obligations in this regard, and in particular, in State educational systems which do not provide the necessary facilities for the religious education desired, the child, far removed from his original environment, may become the object of care of persons with a religion totally different from that of his parents. So that, while recognizing the stated or presumed wish of the parents, the ultimate consideration must be the best interests of the child.²⁵

129. The guarantees which exist to protect many of the fundamental rights and freedoms of refugees are those accorded to "aliens generally". No clear meaning is attached to this description and it is presumed that the refugee may rely on the provisions of multilateral and bilateral agreements as well as domestic laws and administrative practices governing the rights of aliens. Alternatively, he may have to rely on the rules of customary international law, which have been shown to be imprecise and capable of different interpretations.

(d) *Travel documents*

130. The first post-war multilateral instrument for the benefit of refugees was the Agreement relating to the Issue of a Travel Document to Refugees who are the Concern of the Intergovernmental Committee on Refugees, signed in London on 15 October 1946. The

provisions of the Agreement enabled contracting States to issue travel documents, which would be reciprocally recognized by States parties, to persons who were residing in those States and who could no longer obtain passports from the authorities of the country of their nationality. Other travel documents enabling refugees to move outside and return to the territory of the State of residence were later issued under the Convention (art. 28). Some States which had signed the London Agreement have not yet ratified the Convention, so that in those States the Agreement is still of some importance.²⁶

2. REGIONAL INSTRUMENTS

(a) *Africa*

131. The OAU Convention governing the Specific Aspects of Refugee Problems in Africa (1969), while recognizing the 1951 Convention and the 1967 Protocol as constituting the basic and universal instruments relating to the status of refugees, extends the definition of the term "refugee" to take account of the complex and difficult refugee problems arising in African States. Article I (1) defines "refugee" in terms similar to those in article 1. A (2) of the 1951 Convention without, however, any limit as to date or geographical area. The meaning is extended in article I (2) to include every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. To come within the meaning of "refugee" it is not necessary to fear persecution for reasons of race, religion, etc., but provision is made for disturbances similar to those which were referred to in the 1951 Convention as "events occurring before 1 January 1951".

132. Provision is also made for a person who has several nationalities and who does not, on grounds of fear, avail himself of the protection of any one of the countries of which he is a national.

133. The clauses defining exceptions to the granting of protection are similar to those in the 1951 Convention. Three important differences are to be noted: first, that the provisions of the OAU Convention will not apply where a country asked to grant asylum has serious reasons for considering that an individual has been guilty of acts contrary to the purposes and principles of the Organization of African Unity;²⁷ secondly, the Contracting States of Asylum shall determine whether an applicant is a refugee; and thirdly, the provisions of the Convention shall apply to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinion.²⁸

²⁶ A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. 1 (Leyden, Sijthoff, 1966), p. 33.

²⁷ See articles II and III of the Charter of OAU.

²⁸ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, arts. II and III.

²⁴ *Study of Discrimination in the Matter of Religious Rights and Practices* (United Nations publication, Sales No. 60.XIV.2).

²⁵ *Ibid.*, pp. 27-28.

134. Under the terms of the Convention the refugee must abstain from any subversive activities against any member States of OAU, and signatory States undertake the obligation of prohibiting refugees resident in their territories from attacking member States of OAU or undertaking any activity that might cause tension between them.

135. A certain restraint on the freedom of movement of the refugee in the country of asylum is imposed by article II (6), which recommends that, for reasons of security, refugees should be settled at a reasonable distance from the frontier of their country of origin.

136. Member States are called upon to accede to the 1951 Convention and the 1967 Protocol and to apply their provisions to refugees in Africa, there being no specific provision in the OAU Convention for the protection of the human rights of refugees.

137. The provisions included in the OAU Convention of 1969 concerning refugees in Africa reflect the situation of the continent at that time and take into account the emergent new States which have achieved independence, exercising their right of self-determination, and are working towards achieving African unity. The Convention reflects and expands on considerations contained in the Declaration on the Problem of Subversion, adopted at the second session of the Assembly of Heads of State and Government of OAU.²⁹ States undertake to observe strictly the principles of international law with regard to all political refugees, nationals of member States of OAU, to endeavour to promote voluntary repatriation of the refugees to their countries of origin, and to guarantee the safety of political refugees from non-independent African Territories. Finally, and of political significance and importance, member States are to support them in their struggle to liberate their countries. According to the same instrument, there must be no tolerance of subversion against another member State of OAU. Encouragement to undertake political activity is dependent on the objective to be achieved.

(b) Europe

138. The European Agreement on the Abolition of Visas for Refugees³⁰ provides exemption for refugees who are resident in the territory of a contracting party from having to obtain visas to visit the territory of another party. They must hold a valid travel document under the 1951 Convention or the London Agreement, and the visit is limited to a maximum of three months. A visa may be necessary where a refugee seeks to obtain employment or wishes to remain longer than three months.

139. The terms of the Agreement are subject to reciprocity between contracting States and are subject to national legislation governing the entry of aliens (art. 4). Each contracting State reserves the

²⁹ Held at Accra, October 1965.

³⁰ Open for signature to member States of the Council of Europe; by unanimous vote of the Committee of Ministers, a Government which is party to the 1951 Convention or the London Agreement may be invited to accede (art. 10).

right to prohibit the entry of persons it deems undesirable (art. 5).

140. An agreement for the transfer of responsibility for refugees who move legally from one member State to another is being prepared by a committee of government experts at the instruction of the Committee of Ministers.³¹

C. Stateless persons

141. A person may be stateless either because he does not acquire at birth the nationality of any State or because he loses his nationality and does not acquire another.³² Causes for such loss of nationality include expulsion, persecution, deprivation by operation of law (including on marriage), acquisition of a territory by a foreign State or by municipal legislation on the declaration of independence of States exercising their right to self-determination, or failure to fulfil the necessary administrative procedures required by the State of nationality.

142. It has been said that statelessness is an evil and is generally recognized as such, involving, as it does, hardship and inhumanity offensive to human dignity.³³ Being persons without any nationality under the law of any State, the stateless are *de jure* unprotected persons.³⁴

143. There are no rules in international law which can oblige a State to confer its nationality on anyone

³¹ Council of Europe Recommendation 775, Doc. 3703.

³² P. Weis, *Nationality and Statelessness in International Law* (London, Stevens and Sons, 1956), pp. 119-138.

³³ H. Lauterpacht, in *Yearbook of the International Law Commission*, 1953, vol. I, 211th meeting, paras. 12-17.

³⁴ The absence or deprivation of the link of nationality between the individual and the State leaves that individual unprotected. The consequent hardship caused by the condition of statelessness demands consideration and action. A study undertaken at the request of the Economic and Social Council by the United Nations Department of Social Affairs emphasized the practical difficulties incurred, including in particular issuance of travel documents (E/1112). The Hague Codification Conference, 1930, had adopted a recommendation in its Final Act that "States should, in the exercise of their power of regulating questions of nationality, make every effort to reduce as far as possible causes of statelessness", and that the League of Nations should continue the work which it had already undertaken for the purpose of arriving at an "international settlement of this important matter" (resolution A. 1). No further steps were taken by the League and it was at the second session of the Commission that the matter was raised once more. In 1951, the *Ad Hoc* Committee of the Council responsible for drafting the Convention relating to the Status of Refugees recommended the addition of a protocol relating to the status of stateless persons, but it was decided to adopt a separate convention on stateless persons rather than a protocol. The Council further adopted a resolution (319 B III (XI) of 16 August 1950) concerning the problem: States were asked to examine sympathetically any application for naturalization made by stateless persons who were habitually resident in their territory. They were also asked to re-examine their nationality laws with a view to reducing the causes of statelessness created by the operation of those laws. This attempt at encouraging States, by means of a resolution, to take measures to protect the human rights of individuals without any nationality has not proved successful. The Conference held under the auspices of the United Nations in 1959 did not come to any conclusion as to how limitations on the freedom of the State to deprive citizens of their nationality may be imposed, and no proposals have so far been submitted.

or prevent it from withdrawing its nationality. Though it is true that the rights of aliens who are stateless may be protected by the States parties to the Convention on the Status of Stateless Persons, adopted in 1954, it is evident that there are certain lacunae which prevent stateless persons generally from being guaranteed the protection they need:

(a) Only 31 States have so far ratified the Convention;³⁵

(b) The Convention does not seek to eradicate the causes of statelessness, nor to reduce statelessness as such;

(c) Except where more favourable treatment is accorded under the provisions of the Convention, the same treatment is to be accorded as to aliens generally (art. 7 (1)). There is no guarantee that the treatment must be the minimum standard required under international law; it could be on the basis of equality of treatment, which may be below what customary international law recognizes as the minimum standard of treatment;

(d) Treatment accorded to aliens generally is to apply in the fields of wage-earning employment and self-employment and in the liberal professions (arts. 17-19). Under these provisions, stateless persons will not be protected by, or receive equal treatment with those aliens who benefit from, bilateral, regional and multilateral treaties;

(e) The provision contained in article 31 relating to the expulsion of the stateless person does not give adequate protection. Recent instances of collective expulsion have shown that the stateless individual, not having any sanction against his host country, can only appeal to world public opinion, which is not necessarily an effective guarantee of human rights;

(f) Article 31 (3) does not define the "reasonable period" within which the individual must seek legal admission to another country. Further, there is no definition as to the limitation on the kind of internal measure which contracting States have the right to apply, if deemed necessary.

144. On signature, ratification or accession, reservations may be made to any articles of the Convention with the exception only of articles 1 (definition), 3 (non-discrimination), 4 (freedom to practise one's religion), 16 (1) (access to courts of law) and the final clauses (arts. 33-42).

145. The provision of article 1 of the Convention on the Reduction of Statelessness, which entered into force on 13 December 1975, imposes the obligation on a contracting State to grant its nationality to any person born on its territory who would otherwise be stateless. States where *jus sanguinis* obtains may well be reluctant to ratify a Convention which would introduce the principle of *jus soli* into their legal régime, a principle which would contribute, if accepted, to the reduction of statelessness.

146. A limitation on the power of a State to withdraw nationality is imposed by article 8 (1), by which a person cannot be deprived of his nationality if the result is to leave him stateless. There are a certain number of exceptions to this limitation on the

freedom of the State, including cases where nationality has been obtained by misrepresentation or fraud.

147. There is no protection provided for those individuals who, on renouncing their former nationality, failed to complete administrative procedures in the host country which would have granted them citizenship of that country.

148. The conclusions of the International Law Commission in 1954, quoted in 1971, are still valid today:

"The most common observation made by Governments was that some provisions of legislation conflicted with certain articles of the draft conventions. Since statelessness is, however, attributable precisely to the presence of those provisions in municipal law, the Commission took the view that this was not a decisive objection for, if Governments adopted the principle of the elimination, or at least the reduction, of statelessness in the future, they should be prepared to introduce the necessary amendments in their legislation."³⁶

D. Migrant workers³⁷

149. A migrant worker is a person who migrates from one country to another with a view to being employed otherwise than on his own account. The term includes any person regularly admitted as a migrant for employment.³⁸ The non-national migrant worker is subject not only to discrimination accorded to an alien *qua* alien but also to the economic, social and cultural disadvantages suffered by financially disadvantaged groups in society. The migrant workers' condition has been the concern of States, regional organizations, specialized agencies and the United Nations for a number of years. Conflicting tendencies in policies towards migration, assimilation, integration or preservation of national, ethnic or linguistic identity, have led to the realization that a more flexible approach is necessary, which has been reflected in recent international instruments.

150. The problem of the migrant worker exists in every continent. This has been emphasized by recent regional seminars, studies and conferences. Ratification of the ILO Conventions are relevant to all continents and all conditions of work. This was stressed at the Fourth African Regional Conference,

³⁶ *Yearbook of the International Law Commission, 1954*, vol. II, document A/2693, para. 12 (quoted in A/CN.4/245, 23 April 1971, para. 361).

³⁷ For a detailed exposition on this subject see report by Halima Warzazi, "Exploitation of labour through illicit and clandestine trafficking" (E/CN.4/Sub.2/351); General Assembly resolution 2920 (XXVII) of 15 November 1972; and completed report by Mrs. Warzazi (E/CN.4/Sub.2/L.629, 4 July 1975). By resolution 12 (XXXIII) of 11 March 1977, the Commission on Human Rights recommended that the report, together with the report of the seminar on the human rights of migrant workers held in Tunis from 12 to 24 November 1975 (ST/TAO/HR/50), be considered by the Council. See General Assembly resolution 31/127 of 16 December 1976.

³⁸ ILO Convention concerning Migration for Employment (Revised), 1949 (No. 97), art. 11. I, and Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975 (No. 143) (hereinafter referred to as "Migrant Workers Convention, 1975").

³⁵ E/CN.4/907/Rev.13, 27 January 1977.

held in Nairobi in November-December 1973, with reference to the number of ILO Conventions ratified by African States.³⁹ Lack of a solid economic base, absence of a common language, difficulties of communication and transport, the disparity between standards of living in rural and urban areas and the urgent need for increased scientific and technological "know-how" all contribute to the problem of inequality of treatment and employment disadvantages experienced by the migrant worker.⁴⁰

151. With the development of international transport and communications, the multiple characteristics of migrant workers each demand individual attention, and it is frequently this lack of individual solution to specific problems that exacerbates the discriminatory provisions for migrants. Discrimination can take many forms, according to the status and circumstances of the worker. He may:

- (i) be temporarily in a foreign country, with the intention to return to his own country;
- (ii) be a permanent resident;
- (iii) have entered with a fixed-period work permit;
- (iv) have a long-term work permit, with a conditional right to become a permanent resident;
- (v) be a seasonal worker;⁴¹
- (vi) be a frontier worker;⁴¹
- (vii) have left his family in his home country with the intention of returning there;
- (viii) have left his family in his home country involuntarily, having to fulfil housing and residence qualifications before his family can join him;
- (ix) be a national moving to another country in the same geographical region;
- (x) be from a third country, either as an individual or under bilateral agreement;
- (xi) be an illegal immigrant;
- (xii) be an illegal immigrant granted an amnesty;
- (xiii) be a spouse or child of a migrant worker.

152. The improvement in the general standard of living in areas throughout the world where migrant workers settle has two main consequences: first, continuing and increasing divergency between the rich and the poor (including large numbers of migrant workers) and secondly, more extensive and sophisticated national and regional social security and other welfare legislation, which, even with legislative provision for equality of treatment, can entail social and cultural deprivation.

³⁹ See also *Equality of Opportunity in Employment in the American Region: Problems and Policies* (Geneva, ILO, 1974).

⁴⁰ Record of the Fourth American Regional Conference, ILO GB 192/4/10, p. 3. ILO, *Employment Status and Conditions of Non-national Workers in Africa*, AFR 1973/4/II.

⁴¹ These categories, as well as artistes and members of the liberal professions who have entered the country on a short-term basis, seamen, persons coming specifically for purposes of training or education and employees entering for a limited time, are excluded from the provisions of the Migrant Workers Convention, 1975.

1. INTERNATIONAL INSTRUMENTS⁴²

153. The ILO has concluded a number of conventions to protect the worker from discrimination. The flexible nature of these conventions enables member States progressively to include non-nationals within the terms of the relevant instruments, according to their economic and social development. Some of these conventions apply regardless of nationality (for instance, the Convention on Freedom of Association). Specific conventions give protection to the migrant worker.

*Migration for Employment Convention (Revised), 1949 (No. 97)*⁴³

154. The Convention provides that treatment not less favourable than that which is applied to nationals must be granted by member States to immigrants lawfully within their territory "without discrimination in respect of nationality, race, religion, or sex". Equal treatment in the following matters, in so far as they are regulated by law or regulations, is to be applied: remuneration, including family allowances, where they are part of the remuneration, hours of work, overtime, paid holidays, restrictions on work at home, minimum age for admission to employment, apprenticeships and vocational training, women's work and the work of young persons (art. 6. 1 (a) (i)). Equality of treatment applies not only as between aliens and nationals, but also as between aliens of different nationality. Housing and trade union rights, and conditions governing return to the country of origin, were also provided for in the Convention. The alien recipient of equal treatment in the field of employment must be lawfully within the territory. If he is not lawfully within the country he will be ineligible for the social security and other protective benefits for workers.

155. National and regional legislation may distinguish between different types of workers, *inter alia*, according to: category of work, whether residence permit is required, length of permit granted and on what conditions, whether dependants are allowed to enter with the migrant, whether there is a quota on entry of any nationality, whether a work permit has been obtained or whether one is necessary, whether there is a restriction on the type or class of work undertaken. Under treaty provisions, bilateral or multilateral, migrants from States which are parties to the instrument may enter on more favourable conditions or without restrictions at all. The Convention only applies to "migrants for employment", or salaried workers. Its provisions do not apply to the self-employed, to seasonal or frontier workers, to members of the liberal professions and artistes, or to seamen (art. 11).

Social Security (Minimum Standards) Convention, 1952 (No. 102)

156. There is provision for equality of treatment between aliens and nationals, subject to limitations

⁴² See paras. 35-43 above.

⁴³ See E/CN.4/Sub.2/351, pp. 30-32.

under special rules relating to payment of benefits drawn from public funds. Nationals of States bound by the relevant Convention receive equality of treatment in regard to contributory social security schemes.

Plantations Convention, 1958 (No. 110)

157. The provisions of this Convention are to be applied to all plantation workers, regardless of nationality, tribe or trade-union membership.

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

158. The Convention defines discrimination to include "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" (art. 1. 1 (a)).

159. Nationality is not one of the grounds on which discrimination is prohibited. It may be included by determination of the member State after consultation with representative employers' and workers' organizations and other appropriate bodies (art. 1. 1 (b)).

Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117)

160. With a view to improving economic development, one of the stated objectives of the Convention is to avoid dislocation of family life by a closer study of the causes and effects of migrating movements and to adopt suitable measures (art. 3. 2 (a)).

Equality of Treatment (Social Security) Convention 1962 (No. 118)

161. The benefits of this Convention, which concerns equality of treatment of nationals and non-nationals in respect of social security, are applicable to migrant workers in so far as the State in which they are working is able to provide the benefits listed for their own nationals. Equality of treatment in regard to social security is conditioned on reciprocal treatment by the country of the migrant's nationality.

Employment Policy Convention, 1964 (No. 122) and Recommendation

162. The objective is for member States to implement policies of full employment, within an international programme. Applicability to non-nationals would be at the discretion of member States.

Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)⁴⁴

163. The preamble to the Convention, which was adopted in June 1975 at the sixtieth session of the

International Labour Conference, recalls that "the definition of the term 'discrimination' in the Discrimination (Employment and Occupation) Convention does not include distinctions on the basis of nationality". As a consequence the Convention provides for further standards to promote equality of opportunity and treatment of migrant workers and, with regard to matters regulated by law or regulations or subject to the control of administrative authorities, to ensure treatment at least equal to that of nationals.

2. REGIONAL INSTRUMENTS

EEC Treaty

164. In order to realize one of the objectives of EEC, free movement of workers is ensured, by the end of the transitional period at the latest (art. 48 (i)). Any discrimination based on nationality between workers of member States is abolished as regards employment, remuneration and other conditions of work and employment. Persons employed in the public service are specifically excluded. Regulation 1612/68⁴⁵ of the Council, in implementing the Treaty provisions, refers to "the right of workers ... to pursue activities as employed persons". Workers, both qualified and unqualified, and their families are to benefit, freedom of movement constituting a fundamental right. The enjoyment of this right must be without discrimination for permanent, seasonal and frontier workers, and also for those who pursue their activities for the purpose of providing services.

165. The migrant worker who is a national of a member State of EEC may move freely from one member State to another and, despite provisions laid down by law, regulation or administrative practices of a member State, is exempt from any limitation imposed on the right of foreign nationals to take up and pursue employment, any special recruitment procedure for foreign nationals, and any conditions of registration for employment or recruitment of non-resident workers. In order to obtain entry to another member State and take up employment, there must be a vacancy available. The restriction by number or percentage of foreign nationals employed does not apply to EEC nationals. Linguistic tests and vocational tests may however be imposed as conditions of suitability of employment.

166. Restrictions on the movement of workers who are EEC nationals, and their families, were abolished in 1968, the only requirement for entry to another member State being a valid identity card or passport. Visas or equivalent documents may be required for any member of the family of the worker who is not an EEC national.

167. In the preamble of regulation 1612/68, reference is made to the objective of the abolition of any discrimination based on nationality between workers of the member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to

⁴⁴ See International Labour Conference, 60th Session, 1975, Report V (2), *Migrant Workers*.

⁴⁵ O.J., 19 October 1968, No. L257/2.

move freely within the Community in order to pursue activities as employed persons. Freedom of movement is subject to limitations justified on grounds of public policy, public security or public health. Personal conduct has also been considered as grounds for restricting the right.⁴⁶

168. EEC non-nationals are still excluded from activities connected with the exercise of official authority. It is no longer possible, however, to reserve certain types of employment to nationals.⁴⁷ A number of other agreements between EEC and third countries have as one of their objectives the progressive economic development of those countries. Included in the programme is a provision for the elimination of discriminatory practices which would impede participation by natural or legal persons of member States of the Community and of the African, Caribbean and Pacific States in tendering procedures and other procedures for the award of contracts.⁴⁸

European Social Charter

169. The Council of Europe adopted the Charter in consideration of the belief that enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin. In the Charter, the term "migrant worker" implies a national of one of the contracting parties who is lawfully resident or working regularly within the territory of another contracting party.⁴⁹

170. Restrictions may be imposed if based on cogent economic or social reasons (part I, 18). The right of entry may be subject to regulations, which contracting parties undertake to apply "in a spirit of liberality" as well as to subsidiary regulations concerning employment of foreign workers (art. 18 (1) and (3)). The Charter, unlike the EEC Treaty and its regulatory provisions, does not accord to nationals of one contracting State an unconditional right of entry into the territory of another contracting State to take up employment.

171. Bilateral agreements, particularly between neighbouring States, provide protection of specific rights or general rights of workers on a reciprocal basis, but they do not give the salaried workers

unconditional right of entry to the other State, and equality of treatment is reserved to employment, social security and related rights.

172. The draft European Convention on the legal status of migrant workers, on which an opinion had been given by the Council of Europe in 1971, has still not been adopted. The Special Representative of the Council of Europe for National Refugees and Over-Population has, nevertheless, together with his Advisory Committee, undertaken activities connected with the vocational guidance, training and retraining of migrant workers.⁵⁰

173. The recent economic recession has created new problems for migrant workers and the countries from which they come. Arrangements for resettling and readapting returning migrants and for their re-employment, and the necessity for measures to prevent discrimination between migrants and nationals with respect to selection for redundancy demand the concern of and action by States in order that migrants' basic rights may be protected.

*Final Act of the Helsinki Conference on Security and Co-operation in Europe*⁵¹

174. This important statement recording agreement between 35 States on issues of joint concern includes consideration of economic and social aspects of migrant labour. There is a general exhortation to ensure equality of rights between migrant workers and nationals of the host country, *inter alia*, with regard to conditions of employment and work and to social security, and to ensure that migrant workers may enjoy satisfactory living conditions, especially housing conditions.

3. BILATERAL AGREEMENTS⁵²

175. A number of association agreements between the EEC and other countries⁵³ have given further protection for the economic, social and cultural rights of workers. A fixed period of years is envisaged in which progressive freedom of movement of workers from the associated country will be achieved. A Council of Association has been established to determine the rules to be applied and the rate of progress which can be made, taking into account the economic situation both of the Community and of the associate State. Bilateral agreements between individual member States and third countries may contain more favourable conditions, in which case those terms are not affected.⁵⁴

176. Migrant workers are the subject of numerous bilateral treaties covering economic, social and cul-

⁴⁶ European Court of Justice, Van Duyn Case (41/74), O.J., vol. 18, No. C. 53:

"In imposing restrictions justified on grounds of public policy, a member is entitled to take into account as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization, the activities of which the member State considers socially harmful but which are not unlawful in that State, despite the fact that no restriction is placed upon nationals of the said member State who wish to take similar employment with the same body or organization."

On the other hand, the Court stated unequivocally that article 48 has a direct effect on the legal orders of the member States and confers on individuals rights which the national Court must protect.

⁴⁷ European Court of Justice, *EEC Commission v. French Republic* (4 April 1974).

⁴⁸ Convention of Lomé, 28 February 1975, Protocol. No. 2, chap. 8, article 18 (2) (b).

⁴⁹ European Social Charter, appendix, para. 1.

⁵⁰ Council of Europe Recommendation 796 (1976).

⁵¹ *Conference on Security and Co-operation in Europe, Final Act, done at Helsinki on 1 August 1975*, Cmnd. 6198 (London, HMSO, 1976).

⁵² See *Liste des instruments internationaux de sécurité social adoptés depuis 1946* (Geneva, ILO, 1974).

⁵³ For example EEC and Greece Association agreement, O.J., No. 26, 18 February 1963, 294, arts. 5, 30, 31, 44-49, 62.

⁵⁴ See Additional Protocol to Ankara Agreement of 23 November 1970, art. 39 (5).

tural matters between individual States; they include the following specific subjects: unemployment insurance,⁵⁵ social security,⁵⁶ accidents at work,⁵⁷ transfer of social security rights,⁵⁸ family allowances,⁵⁹ co-operation between social security organizations,⁶⁰ and mutual recognition of contributions for unemployment insurance.⁶¹

E. National minorities

1. MEANING OF TERM

177. Since it is one of the overriding tasks and obligations of the Sub-Commission to study and make recommendations concerning the protection of minorities, an attempt should be made in the light of post-war treaties to consider the position of national minorities. No precise meaning has been attached to the term, both words giving rise to different interpretations. "National" has been taken to have a sociological connotation or to refer to a particular group of individuals of common racial origin. The latter has been the meaning ascribed in the Universal Declaration and other international instruments in relation to the term "national origin" in the "discrimination" clause. "National" can also have a politico-legal meaning denoting a relationship with a particular State. For the purposes of this report, the latter meaning will be ascribed to the word "national". The term "minority" has been the subject of much discussion but so far no definition has been generally accepted.⁶² For the purpose of this report "national minority" will be taken to mean: "persons who belong to a group owing allegiance on account of nationality to a State other than the one in which they are residing and who are numerically less than the other inhabitants of the State of residence".

2. IMPORTANCE OF THE CONCEPT OF PROTECTION OF MINORITIES

178. The significance accorded to the protection of minorities in the Peace Treaties after the end of the First World War has been changed, for several historical, geographical, political and economic reasons:⁶³

- (i) The growing importance of the concept of international and universal protection for the human rights and fundamental freedoms of the individual has minimized to some extent the attention of world organizations to the protecting of minorities *qua* groups;
- (ii) Economic imbalance has caused considerable voluntary and involuntary migration of people to settle and work in countries other than their own and so form national minority groups in different geographical areas, whether in the same or in different countries.
- (iii) The former policy of assimilating minorities to the other inhabitants of the country has been giving way to deliberate policies of encouraging the preservation of different traditions and characteristics.
- (iv) The development of the right to self-determination creates new minority problems.⁶⁴

3. INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights

179. There is no mention of minorities in the Universal Declaration, in which emphasis is placed on the human rights of the individual. During debates on the drafting of the Universal Declaration the inclusion had been proposed of "the right of persons belonging to racial, national, religious or linguistic minorities to establish their own schools", but this proposal was rejected. A draft resolution was adopted by the Third Committee, and subsequently by the General Assembly (resolution 217 C (III) of 10 December 1948), by which the Assembly requested the Commission and the Sub-Commission to study the question further in order that the United Nations might adopt effective measures for the protection of minorities.⁶⁵

International Covenant on Civil and Political Rights

180. The protection of human rights granted to ethnic, religious and linguistic minorities in article 27 of the International Covenant on Civil and Political Rights is not extended to national minorities. During the debates in the Commission on the drafting of the article, an amendment to include "national", was not adopted.⁶⁶ A measure of protection against incitement to discrimination, hostility or violence by the

⁵⁵ Federal Republic of Germany-Austria, 19 May 1951.

⁵⁶ Federal Republic of Germany-Austria, 22 December 1966.

⁵⁷ Federal Republic of Germany-Finland, 7 October 1957.

⁵⁸ Federal Republic of Germany-Yugoslavia, 10 March 1956.

⁵⁹ Algeria-France, 6 May 1972.

⁶⁰ Belgium-Poland, 24 March 1947.

⁶¹ Denmark-Norway, 18 January 1951.

⁶² See F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (United Nations publication, Sales No. E.78.XIV.1), chap. I, sect. A.

⁶³ Erica-Irene Daes, "Protection of minorities under the International Bill of Human Rights and the Genocide Convention", in *Xenion: Festschrift für Pan. J. Zepos*, vol. II (Athens, Ch. Katsikalis, 1973), pp. 47-51.

⁶⁴ See the position of the Asian minorities in East Africa described in: Ben Whitaker, ed., *The Fourth World: Victims of Group Oppression* (New York, Schocken, 1979), pp. 37-71.

⁶⁵ *Official Records of the General Assembly, Third Session, Part I, Third Committee, Summary Records of Meetings*, pp. 716-736; and comments on the relevant debates in A. Verdoodt, *Naissance et signification de la Déclaration universelle des droits de l'homme* (Louvain, 1964), pp. 287-299.

⁶⁶ E/CN.4/SR.368-371; and see *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 35, document A/5000, paras. 119-124. Immigrants entering voluntarily should not be regarded as forming minority groups, as the integrity and security of the host State might be undermined. They should be encouraged to become part of the national fabric.

advocacy of national hatred is provided in article 20 of the Covenant, and contracting parties undertook to implement national legislation to provide that protection.

Convention on the Prevention and Punishment of the Crime of Genocide

181. The crime of genocide includes acts of a State committed against a national minority with intent to destroy it in whole or in part. Such acts include killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group (art. II). The protection given to a national minority is for its very survival against attack and elimination.

International Convention on the Elimination of All Forms of Racial Discrimination

182. Measures to remove discrimination on grounds of race affect the position of national minorities. The Convention allows distinctions as between citizens and non-citizens (art. 1 (2)), but discrimination between aliens of different nationalities is prohibited (art. 1 (3)). In effect, all aliens, regardless of nationality, are to be treated equally under the legal provisions of States parties concerning nationality, citizenship or naturalization, and preference cannot be given to any one group, or more restrictive measures taken against another group.

Convention on the Reduction of Statelessness

183. On a transfer of territory, no person shall become stateless as a result of the transfer; this provision should be embodied in any treaty between contracting States to the Convention and other States (art. 10 (1)). This provision could have the effect of allowing a minority to retain its nationality in the transferred territories, having the option to acquire the new nationality, or, without option, acquiring the nationality of the State to whom the territory has been transferred.

4. POST-WAR INSTRUMENTS OF LIMITED GEOGRAPHICAL APPLICATION

184. Treaties concluded since the Second World War have been concerned with the protection of minority groups in situations where, through occupation, annexation, succession, or forced transfer of peoples, groups of nationals of one country found themselves involuntarily living in the territory of another State. They contain certain general provisions with regard to the protection of the human rights and fundamental freedoms of national minorities:

(a) There is a right of option to retain the nationality of the ceding State contained in the Peace Treaty concluded between the Allied Powers and

Italy (art. 19, para. 2). This right was subject to certain conditions. Option was given to those whose customary language was Italian. Those who took advantage of the option could be required to leave the ceded territory and transfer to Italy within a year (art. 19, para. 3). A right to decline the new nationality and to remain in the transferred territory was recognized. Rights of option were contained both in the Protocol accompanying the Treaty with Czechoslovakia of 29 June 1945 relating to the cession of Carpatho-Ukraine and in the Agreement with Poland of 6 July 1945.

(b) The effect of transfer of residence would be to change nationality *ipso facto* as in the provisions of the agreement between Czechoslovakia and Hungary concerning exchange of populations of 27 February 1946.⁶⁷

(c) Provision was made in the Peace Treaties with Italy, Bulgaria, Finland, Hungary and Romania (1947) that the contracting States should take all measures necessary to secure to all persons under their jurisdiction, without distinction of race, sex, language or religion, the enjoyment of human rights and fundamental freedoms.

(d) Within the limits of law and on the basis of reciprocity, the possibility of national, political, cultural and economic development is guaranteed for Czechs living in Poland, and for Poles living in Czechoslovakia, in the Treaty of Friendship and Mutual Aid between Poland and Czechoslovakia.

(e) A reciprocal declaration of non-discrimination, which included provisions relating to the protection of the language and culture of each minority (including school studies) was made by Denmark and the Federal Republic of Germany in favour of minorities (29 March 1955). Respect for the terms of this agreement is guaranteed under the European Convention on Human Rights.

(f) Protection under the aegis of a joint Italian-Yugoslav Committee was provided "to examine complaints on questions" for the benefit of Yugoslavs living in the Italian zone and Italians living in the Yugoslav zone, in the agreement between Great Britain, Italy, the United States of America and Yugoslavia on the settlement of Trieste (5 October 1954).

F. Women

1. MARRIED WOMEN

185. The attitude towards women prevalent in the early 1950s, at the time of the drafting of the International Covenants on Human Rights, was such that it was considered unrealistic for States to undertake guarantees in point of time in achieving equality of pay between the sexes.⁶⁸ The status of women and

⁶⁷ Referred to in the Peace Treaty with Hungary of 10 February 1947 (art. 1, para. 4 (e)).

⁶⁸ A/2929, chap. V, para. 27.

opportunities for employment have considerably improved in the last decade, but the non-national married woman suffers discrimination on grounds both of sex and of nationality.

186. Non-discrimination clauses in the Charter of the United Nations, the Universal Declaration, the International Covenants, the Convention on the Elimination of All Forms of Racial Discrimination and the ILO Conventions contain "sex" as one of the prohibited grounds for discrimination. The failure to achieve equality of treatment or of opportunity for women nationals enhances the difficulties for the woman alien who seeks equality of opportunity in a foreign country. The linguistic, social and cultural difficulties for the married woman who accompanies her husband to a foreign country in search of employment require further study and efforts from the community. The need of guarantees for her protection are doubly clear, both as an alien and as a woman.

187. The effect of marriage on the nationality of a woman⁶⁹ has automatic consequences on the protection of her human rights and freedoms. By operation of national law, she may lose her original nationality and may or may not acquire a new nationality. By losing her nationality, she loses involuntarily the protection of her State. If she does not remain stateless but automatically acquires the nationality of her husband, she involuntarily acquires the protection of the new State.

Convention on the Nationality of Married Women

188. The Convention on the Nationality of Married Women of 29 January 1975⁷⁰ contains provisions for the protection of women from loss of nationality on marriage.⁷¹

189. The Convention deals only with the personal status of the woman alien. Under article 3 (1) an alien wife may acquire the nationality of her husband through specially privileged naturalization procedures. There is no provision for similar facilities for the alien husband who desires to acquire the same nationality as his wife. Since admission or entry to the territory of a State remains in the discretion of the State authorities, unless the individual demanding entry is a national, the alien husband of a wife who wishes to reside in her country must rely on that State's discretion, first to allow him entry, and secondly, to allow him to acquire the nationality of his wife. In concentrating on the nationality of women on marriage, the Convention leaves open the problem of the woman who acquires her husband's domicile. If she is living outside the jurisdiction of her husband's domicile, her right of access to a tribunal may be denied her, in countries where domicile governs the personal status of the individual.

⁶⁹ See E/CN.6/254/Rev.1.

⁷⁰ General Assembly resolution 1040 (XI).

⁷¹ The European Court of Justice ruled that a woman who lost her own nationality and arbitrarily acquired the status of another nationality on marriage did not cease to retain the right to an expatriation allowance (*Mrs. Roccatto v. EEC Commission*, Case 75/74) O.J. No.L.137, 9 November 1974.

2. MARRIED AND SINGLE WOMEN

Convention on the Political Rights of Women

190. The provisions of the Convention on the Political Rights of Women⁷² do not appear to apply to alien women. The second preambular paragraph refers to "the right of everyone to take part in the government of his country", and the operative paragraphs serve to remove discrimination as between men and women, not as between nationals and aliens.

Declaration on the Elimination of Discrimination against Women

191. The Declaration on the Elimination of Discrimination against Women,⁷³ not *per se* a legally binding instrument, applies to all women, regardless of nationality, and seeks to obtain legal protection for the equal rights of men and women (art. 2). The purposes of the Declaration are therefore to provide at least equal treatment for women aliens as for men aliens, and specifically it is stated in article 5, "Women shall have the same rights as men to acquire, change or retain their nationality". Further, "marriage to an alien shall not automatically affect the nationality of the wife", so that the personal status of the wife is not changed involuntarily. The right to a nationality is also thereby preserved, with the avoidance of resulting statelessness.

ILO Maternity Protection Convention (Revised), 1952 (No. 103)

192. The provisions of the Maternity Protection Convention (Revised), 1952, apply to all working women, whether employed in industry or in non-industrial or agricultural work, including those doing "piece-work" in their own homes (art. 1 (1)). The convention applies equally to women nationals and foreigners, the term "woman" meaning all persons of female sex of whatever age, nationality, race, religious beliefs, single or married (art. 2).

G. Children

193. The child is the subject of many human rights instruments, although the rights accorded to the child are in vague terms. The child may be referred to as such, or within the context of the family, or it may be inferred from the rights declared (for instance, education) that a child is the subject of these rights.

1. INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights

194. The family, being the natural and fundamental group unit, is entitled to protection by society and

⁷² General Assembly resolution 640 (VII) of 20 December 1952.

⁷³ General Assembly resolution 2263 (XXII) of 7 November 1967.

by the State (art. 16 (3)). The protection to be given to the family is owed, not only by the State, which might give priority to its nationals, but by society as a whole, to any and every family, regardless of nationality. Childhood is entitled to special care and assistance, and all children, whether born in or out of wedlock, shall enjoy the same social protection (art. 25 (2)). Elementary education is to be compulsory (art. 26 (1)). There is no distinction of any kind, and education shall be directed to the full development of the human personality and strengthening of human rights and fundamental freedoms (art. 26 (2)).

International Covenant on Civil and Political Rights

195. Every child has the right to measures of protection, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, but there is no prohibition of discrimination on account of nationality (art. 24 (1)). The meaning of "national origin" was confined to ethnic groups within the country and does not include aliens.⁷⁴ Every child has the right to a name (art. 24 (2)) and also to a nationality (art. 24 (3)), but there is no right as such for a child to acquire the nationality of the country in which he is born.

International Covenant on Economic, Social and Cultural Rights

196. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions (art. 10 (3)). This would presumably mean that children of alien parents should receive the same care and protection as children of parents who are nationals. There is a clear obligation imposed on Member States to protect all children from physical and moral danger. This would mean not only measures to punish anyone who contravenes such obligation but also measures to minimize, as far as is humanly possible, any occurrence of such dangers. States parties also undertake to provide for the healthy development of the child (art. 12 (2) (a)). Educational provisions are included for children in this Covenant (art. 13).

Convention against Discrimination in Education

197. This Convention imposes obligations on States parties to undertake to give foreign nationals who are resident in their territory the same access to education as that given to their own nationals (art. 3 (e)).

ILO Minimum Age Convention, 1973 (No. 138)

198. Provisions relating to the minimum age for employment of children, as well as being included in the International Covenant on Economic, Social and Cultural Rights (art. 10 (3)), are also included in the ILO Minimum Age Convention. Under article 2, a

member State must specify a minimum age of admission to employment or work within its territory, so the effect of such a declaration would be to include all children, nationals and aliens.

Declaration of the Rights of the Child

199. In the Declaration, the protection of social and cultural rights, the right to a nationality and the overriding importance of family care are principles to be observed for all children, "without any exception whatsoever" (principle 1).

*Convention on the Prevention and Punishment of the Crime of Genocide*⁷⁵

200. The forcible transfer of children from one national, ethnic, racial or religious group to another may constitute the crime of genocide (art. II (e)). The suppression of this crime would require the return to their homeland of the children transferred. Persons in the receiving State housing the children who have been transferred may be considered guilty of "complicity in genocide", even if they did not themselves effect the transfer (art. III (e)).

2. REGIONAL INSTRUMENTS

European Social Charter

201. The Charter lays down certain standards which are to be the aims and objectives of contracting States. In part I (7), it is stated that children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed, and to appropriate social and economic protection. Article 7 of part II imposes obligations on contracting States to ensure protection of children and young persons in relation to the minimum age of admission to employment, continuance of compulsory education, working hours, fair remuneration, and regular medical control.

202. Rights arising under the European Social Charter apply to aliens in so far as they are nationals of other contracting parties lawfully resident or working regularly in the territory of the contracting party. Reunion of the family of a foreign worker permitted to take up employment is to be facilitated but is not mandatory, so presumably only those children who are aliens and have been permitted entry under this provision are entitled to the aforementioned benefits.

203. Regulation 1612/68 promulgated under article 48 of the EEC Treaty entitles any national of the nine member States to take up employment in any of the member States, and to transfer his family with him provided there is accommodation available. The children of EEC nationals receive all the benefits of social security and education on the same basis as the nationals of the member State where the parent is employed.

⁷⁴ See para. 51 above.

⁷⁵ See Daes, *loc. cit.*, pp. 73, 74.

*American Convention on Human Rights (San José, 1969) (not in force)*⁷⁶

204. In the Convention it is stated that, for the purposes of the Convention, "persons" means every human being (art. 1 (2)). Children, regardless of nationality, would therefore be entitled to the rights set out in the Convention in so far as they are applicable to children. The Convention also accords to every child the right to measures of protection required by his condition as a minor on the part of his family, society and the State⁷⁷ (art. 19). The Convention provides further that any child born in the territory of a contracting State who would otherwise be without a nationality has the right to the nationality of that State, so avoiding the possibility of statelessness (art. 20).

American Declaration of the Rights and Duties of Man

205. All children have the right to special protection, care and aid (art. VII).

⁷⁶ Came into force on 18 July 1978, after the study was completed. (Ed.).

⁷⁷ Similar to article 24 of the International Covenant on Civil and Political Rights.

European Convention on Human Rights

206. The Convention contains provisions for the protection of the family similar to those in the Universal Declaration (art. 9 (1)) and stipulates that "everyone has the right to respect for his private and family life ..."

207. The obligations on States parties to the Convention to admit to their territory aliens who are dependants of persons working or residing in their territory, were expressed by the European Commission on Human Rights:

"a State which signs and ratifies the European Convention on Human Rights and Fundamental Freedoms 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."⁷⁸

⁷⁸ Application 434/58, *Yearbook of the European Convention on Human Rights, 1958-1959*, decision of 30 June 1959, p. 372; see R. Plender, *International Migration Law* (Leyden, A. W. Sijthoff, 1972), pp. 192-195.

IV. HUMAN RIGHTS AND THEIR PROTECTION

A. Rights and their availability to aliens

208. Human rights and fundamental freedoms in the Universal Declaration of Human Rights constitute "a common standard of achievement for all peoples and all nations". A common standard, based on common agreement among nations, has guided States in their treatment of aliens, reinforced by the provisions of bilateral treaties, based on the principle of reciprocity. Certain rights and freedoms in bilateral treaties, which have been recognized in decisions of international courts and tribunals, related to the treatment of the alien. Conventions concerning economic and social progress, particularly those of ILO, were also intended to be applicable to all within the territory of the State.¹

209. These rights and freedoms are now enumerated in post-war international instruments, in which emphasis is laid on the obligations of States towards their own citizens. How far States are prepared to grant the same protection to aliens is evidenced by their domestic laws, as well as by contemporary bilateral agreements. Multilateral agreements, including those on a regional basis, also contain undertakings by States towards the nationals of other ratifying States.

210. Some Conventions have been adopted which have been designed specifically to protect certain categories of persons who by definition are not citizens of the State in which they live (refugees, stateless persons).

1. ECONOMIC RIGHTS²

(a) *The right to work*

211. The right to work, including the right to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to just and favourable remuneration, to equal pay for equal work, to rest, leisure and reasonable limitation of working hours, and to periodic holidays with pay, is, in principle, recognized to everyone in the International Covenant on Economic, Social and Cultural Rights (arts. 6 (1), 7).³ Rights under the Covenant are to be achieved progressively with no prohibition

against distinctions between citizens and aliens. By article 2 (3) positive discrimination is permitted by developing countries against non-nationals. This provision is not in accordance with the spirit of the Universal Declaration. It is also contrary to the ILO Migration for Employment Convention (Revised), 1949, which is applicable to all migrant workers regardless of nationality, including those who come from States which have not ratified the Convention.

212. The ILO Migrant Workers Convention, 1975, recognizes the right of the migrant worker, once "regularly admitted as a migrant worker", to equality of treatment with nationals in the field of employment. Although the provisions of this convention are not immediately enforceable, but are to be achieved progressively, ratifying States undertake to pursue national policies designed to promote equality of opportunity (part II, art. 10). ILO Conventions do not generally contain provisions relating to applicability to aliens, but the norm is that their provisions should be applied to everyone within the territory of the ratifying State.⁴ Express provision is made in the ILO Abolition of Forced Labour Convention, 1957, to prohibit any form of forced labour as a means of national discrimination.

213. States may and do impose conditions on entry of aliens regarding the right to employment, taking into account the employment situation in the country concerned,⁵ although the constitutions of many States recognize the right to work and equitable conditions of work for all individuals.⁶ Once a work permit has been granted, however, it would be untenable, in modern employment situations, to impose different conditions of employment on persons doing the same kind of work in the same establishment, solely on the ground that they were of a different nationality.⁷ States have shown more willingness and preparedness to award equal rights and treatment to aliens on a reciprocal basis within the terms of regional agreements, even if they have been reluctant to do so on a unilateral basis.⁸ Instruments may either include provisions granting immediate equality in the field of employment rights to nationals of ratifying States, or encourage progressive realization of equal treatment and at the time of ratification of the instrument "freeze" restrictions vis-à-

¹ N. Valticos, *Droit international du Travail* (Paris, Dalloz, 1970), p. 502.

² The enumeration used in this section follows that used by M. Ganji, Special Rapporteur to the Commission on Human Rights, in *The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress* (United Nations publication, Sales No. E.75.XIV.2).

³ E/CN.4/Sub.2/351, pp. 29-30.

⁴ ILO, *Official Bulletin*, vol. LII, 1969, No. 2, p. 6; and E/CN.5/523, para. 8.

⁵ See, for instance, Daniel Hoffheimer, "Wandering between two worlds: employment discrimination against aliens", *Virginia Journal of International Law*, vol. 16, No. 2 (Winter 1976); and paras. 303-304 below.

⁶ See Ganji, *op. cit.*, paras. 14-20.

⁷ For exceptions, see chap. V. below.

⁸ Arab Labour Mobility Convention, 1968; Nordic Agreement, 1954; EEC Treaty, regulation 1408/71, under art. 48.

vis aliens, as in the European Convention on Establishment (Council of Europe, 1955) and the European Social Charter (1961).

214. Opportunities for employment arise not only for the employee but also for the self-employed and individuals with professional qualifications. The considerable flow and interchange of technically and professionally trained personnel from many parts of the globe demand consideration for more realistic policies, both in countries of origin and in host countries, as well as recognition of the difficulties which face this category of aliens. Within the European Community, rulings by the European Court of Justice in two recent cases have contributed to the speeding up of the process of freedom of establishment⁹ and the freedom to provide services¹⁰ within the Community, in accordance with the relevant provisions of the EEC Treaty (arts. 52 and 55 and arts. 59 and 60, respectively). No restriction may now be imposed on the freedom of establishment of EEC nationals on the grounds of nationality. Further legislation will be necessary to facilitate the exchange of persons in relation, for example, to the mutual recognition of diplomas and professional qualifications¹¹ and to observance of standards of professional conduct. Recent developments in this field include the right of doctors to set up a practice in another member State, provided possession can be shown of the necessary qualification equivalent to that required by the host State for its own nationals. It is also recognized that some conditions may be needed in regard to language qualifications.

215. A recent directive has now allowed for the freedom of services to be provided by lawyers.¹² Following the ruling in the van Binsbergen Case, neither nationality nor residence are to be a bar to the provision of services. A lawyer may now appear in the courts of another member State, under the same conditions as lawyers established in the host country. He must observe two codes of professional conduct, that of the country from which he comes and that of the host country. He may be required by the host country to respect rules of local conduct and to work in conjunction with a lawyer practising before the relevant judicial authority. Registration with a professional organization in the host country is no longer necessary, but the lawyer must be able to show that he possesses the necessary qualification in his own country. For the host State to demand the national diploma prescribed by its own legislation would be to impose a restriction incompatible with the freedom of establishment guaranteed by the Treaty (art. 52).¹³

216. The scope of measures concerning the movement and residence of foreign nationals has been

further extended to enable them to remain in the territory of another member State where they have been engaged in a self-employed activity, and to enjoy equality of treatment with nationals of the State concerned.¹⁴ These measures reveal the complexity of the matters involved, but they also show the beneficial effects of the rulings of the European Court of Justice based on recognition of the rights and freedoms of individuals within the Community.

217. The refugee, under the provisions of the Convention relating to the Status of Refugees, is not guaranteed complete equality of treatment.¹⁵ He is to be accorded the most favourable treatment accorded to nationals of a foreign country in the same circumstances.¹⁶ The stateless are not treated any worse than aliens,¹⁷ the implication being that aliens may not expect the same treatment as nationals.

218. Numerous bilateral agreements have been concluded relating to the transfer of workers, either on a reciprocal basis¹⁸ or for the benefit of the nationals of one of the ratifying States. There are long-standing links between some countries of emigration and host countries, evidenced by agreements protecting the employment rights of migrants.¹⁹

(b) *The right to form trade unions and to join trade unions and the right to strike*

219. The right of freedom of association, under the relevant ILO Convention, is recognized without any distinction whatsoever.²⁰ The International Covenant on Economic, Social and Cultural Rights (art. 8) and the International Covenant on Civil and Political Rights (art. 22) both recognize the right to strike.

220. At the time of the adoption of the Migrant Workers Convention, 1975, proposals were made to encourage members of the ILO to extend equality of opportunity and treatment to migrant workers in a number of aspects of employment, including membership of trade unions.²¹

221. Recognition of the right to form and join trade unions is contained in many constitutions.²² Restrictions on the right of aliens may be imposed.²³

¹⁴ Council Directive of 17 December 1974 (75/34 EEC), O.J., No. L 4, 28 January 1975.

¹⁵ In a recent survey by UNHCR in 13 European countries, four countries treat refugees as nationals; one as nationals of the EEC; eight on the same level as aliens from non-EEC countries (UNHCR, No. 2/April 1976, p. 5).

¹⁶ Art. 7.

¹⁷ Valticos, *op. cit.*

¹⁸ For example, German Democratic Republic-Hungary Manpower Agreement, 1967.

¹⁹ For example, Migration Agreement between Argentina and Italy, 1948.

²⁰ Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), art. 2.

²¹ Migrant Workers Recommendation, 1975 (No. 151).

²² Ganji, *op. cit.*, paras. 21-22.

²³ See chap. V below.

⁹ *Reyners v. The Belgian State* (Case 2/74).

¹⁰ *Van Binsbergen v. The Industrial Society for the Engineering Industry at The Hague* (Case 33/74).

¹¹ See H. Bronkhorst, "Freedom of establishment and freedom to provide services under the EEC Treaty", *Common Market Law Review*, vol. 12, No. 2 (May 1975), pp. 245-253.

¹² Directive adopted 22 March 1977, comes into force March 1979. O.J., No. L 78, 26 March 1977.

¹³ *Thieffry v. The Paris Bar Council* (Case 71/76).

(c) *The right to social security,
including social insurance*

222. The principle of the right of all human beings, without distinction, including nationality, to enjoy the fruits of social progress and to benefit from provisions of comprehensive social security schemes is recognized in the Declaration on Social Progress and Development (art. 1). The right of non-nationals to social security is recognized and enforceable under the terms of various ILO conventions, in particular the Equality of Treatment (Social Security) Convention, 1962 (No. 118), and of international, regional and bilateral instruments. Social security benefits may be available to all individuals within the territory of a State; they may depend on reciprocal treatment by the country of the worker's nationality, on either a bilateral or a multilateral basis.²⁴ Particularly, equality of treatment without any conditions of residence may be conditional on the ratification of the relevant convention by the other State concerned.²⁵ Special residence conditions may also be imposed for benefits, other than those of grant, which depend either on a direct financial participation by the persons protected on by their employer, or on a qualifying period of occupational activity.²⁶ Some conventions may recognize the desirability of achieving social benefits for all, but this objective is to be obtained progressively, and in the attainment of this objective, distinction against aliens is not prohibited.²⁷ Positive discrimination is allowed in favour of nationals in the case of developing countries.²⁸ The ILO Migrant Workers Convention, 1975, has been adopted with the purpose of achieving equality of treatment with nationals, including equality of treatment in the field of social security related to employment. All migrant workers in the territory of a ratifying State are protected under the provisions of the Convention, even though they may be nationals of a State which has not ratified the instrument.²⁹

223. Stateless persons and refugees are accorded equal treatment with nationals in respect of social security, subject to certain limitations.³⁰ They benefit from the ILO Equality of Treatment (Social Security) Convention, 1962, clearly without any conditions of reciprocity (art. 10).

224. Under the relevant ILO conventions, maternity benefits are payable without distinction of nationality; employment injury benefits, invalidity, old age

and survivors' benefits and medical care and sick leave benefits are payable to all workers within the territory of the State, conditional on observance of the national laws relative to contributions.³¹

225. It was envisaged in the Council of Europe that the objective of raising progressively the system of social security, including equality of treatment for the nationals of ratifying States, would culminate in multilateral agreements.³²

226. With increasing prosperity within the member States of the Council of Europe, this objective was achieved. There is now provision for social security benefits to be paid to all nationals of ratifying States who live and work in the territory of other ratifying States.³³

227. Nationals of a member State of the European Community who live and work in one of the eight other member States are entitled to social security benefits.³⁴ The claims of EEC nationals who have acquired pension rights or other benefits under social security schemes while working and residing in a member State of the EEC other than the State of nationality have been the subject of many decisions of the European Court of Justice.³⁵

228. Acquired rights and rights in the process of acquisition in regard to social security are recognized within the European Community. Refugees and stateless persons living in one of the member States would also benefit on the same basis as EEC nationals.³⁶

229. Bilateral agreements on a reciprocal basis confer rights to social security to the nationals of one State working in the territory of the other State. These agreements may operate in practice for the benefit of one or other of the contracting parties, the case where one is a country of emigration.

230. The application of these principles may vary according to State practice. Benefits may be payable subject to quantity and length of period of contribution to the State or para-State funds. A different residence period may be required for nationals of one ratifying State and other aliens.³⁸

231. The granting of a pension may depend on a specific type of labour. Aliens may be entitled to a pension of at least two thirds if the requisite period of time has been spent in the employment of the

²⁴ The Nordic Agreement, 1954, provides for benefits to be paid to nationals of the Nordic States. Council of Europe, European Convention on Social Security, 1972.

²⁵ ILO Equality of Treatment (Social Security) Convention, 1962 (No. 118). A general survey has been carried out on the application of this Convention and was published in 1977 (see International Labour Conference, 63rd session, 1977, Report III (part 4B)).

²⁶ ILO Social Security (Minimum Standards) Convention, 1952 (No. 102).

²⁷ For example, in the International Covenant on Economic, Social and Cultural Rights.

²⁸ *Idem.* (art. 2 (3)).

²⁹ Migrant Workers Convention, 1975.

³⁰ Convention relating to the Status of Stateless Persons, art. 24 (1) (b); Convention relating to the Status of Refugees, art. 24 (1) (b).

³¹ ILO Conventions Nos. 103, 121, 128 and 130.

³² European Social Charter, art. 12 (4).

³³ European Convention on Social Security, 1972.

³⁴ Under EEC Regulation 1408/71.

³⁵ See N. P. M. Elles, *Community Law through the Cases* (London, Stevens, 1973), pp. 88-115.

³⁶ Convention relating to the Status of Refugees, art. 24 (3); Convention relating to the Status of Stateless Persons, art. 24 (3). Similar provisions apply under the Nordic Agreement 1954, to nationals of ratifying States.

³⁷ There are over 150 bilateral agreements covering general and specific social security provisions between the nine member States of the EEC and between them and third countries; see *Liste des instruments internationaux de sécurité sociale adoptés depuis 1954* (Geneva, ILO, 1974).

³⁸ Agreements between the Nordic countries provide for a residence qualification of three years for their nationals and 15 years for other aliens.

country granting the pension. Payment of benefits may depend on physical presence in the territory of the host State.

(d) *Continuing improvement in the standard of living, including adequate food, clothing and housing*

232. International efforts towards the achievement of this aspiration are recognized in the International Covenant on Economic, Social and Cultural Rights (art. 11) and in several ILO conventions.³⁹

233. Members of the ILO are encouraged to provide welfare, housing and health facilities equally with nationals to those migrant workers lawfully within their territory.⁴⁰ This approach reflects increasing economic prosperity. Equality of treatment with nationals was not accorded to refugees or stateless persons in the field of housing; they were to be accorded treatment not less favourable than that given to aliens generally.⁴¹ Presumably, following equality of treatment with nationals for migrant workers, refugees and stateless persons also should be able to expect the same treatment as nationals.

234. These rights are recognized in regional as well as international instruments, and the benefits of economic progress are intended for the nationals of all the member States comprising the region.⁴² Many modern constitutions refer to the obligation of the State to provide for the well-being of its citizens. In practice the grouping of States to form economic regions is gradually removing economic and social distinctions between nationals of those States. In areas of increasing and progressive economic development the general well-being achieved for nationals is also being extended to all individuals living within the region, and temporary support in case of need may be given by a State to all, including aliens. The conditions of modern living, increasingly concentrated in large urban centres, should be directed to the removal of unequal treatment and economic deprivation of one category of alien compared with other aliens who are nationals of member States constituting a territorial region.

(e) *The right to enjoyment of the highest attainable standards of physical and mental health*

235. Progressive attainment of recognition of this right, under the International Covenant on Economic, Social and Cultural Rights (art. 12), is gradu-

ally being achieved, mainly on a regional basis, and is largely covered by social security provisions.⁴³

236. The application of the ILO Social Security (Minimum Standards) Convention, 1952, is left to the decision of States parties. The terms of the Convention are implemented if protection is extended to 50 per cent of all employees (which would include aliens), or to 20 per cent of all residents, or to all residents whose means do not exceed a prescribed level. In each case aliens would benefit, but not all aliens.

237. The European Economic Community regulations concerning health care are based on the principle that all EEC nationals benefit from the health service provisions of the member State in which they happen to be.⁴⁴

2. SOCIAL RIGHTS

The right of the family, motherhood and childhood to protection and assistance

238. The individual who seeks work in a country other than his own frequently leaves his family in his home country, whether from choice or on account of economic necessity, national legislation or the provisions of international agreements, and hardship may result. Bilateral agreements between the emigrating and the host country may impose a period during which workers are to enter unaccompanied by their families. The initiative taken by ILO in the Migrant Workers Convention, 1975 (part II, art. 13), may encourage States to permit to migrants the right to be accompanied by their families. Workers may be permitted to enter the host country with their families and be granted residence permits.⁴⁵ Certain formalities may be necessary, such as application to the local authorities of the country of emigration.⁴⁶ Regulations under regional instruments may impose obligations on the host State to permit a worker to enter its territory accompanied by his dependants.⁴⁷

239. In relation to aspects of social policy concerning motherhood, the ILO Maternity Protection Convention (Revised), 1952, prohibits any distinction on grounds of nationality.

240. The ILO Social Policy (Basic Aims and Standards) Convention, 1962, refers to the need for States to lay down a school-leaving age, a minimum age for employment and conditions of employment.

241. The implementation through national legislation of the provisions of the Convention ensures that all individuals within the State's jurisdiction, including aliens, will benefit from these provisions.

³⁹ Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117); Indigenous and Tribal Populations Convention, 1957 (No. 107); Plantations Convention, 1958 (No. 110), which specifically prohibits distinction on grounds of nationality.

⁴⁰ ILO Migrant Workers Recommendation, 1975 (No. 151).

⁴¹ Convention relating to the Status of Refugees, art. 21; Convention relating to the Status of Stateless Persons, art. 21.

⁴² Convention establishing the Latin American Free Trade Association; West African Economic Community, Articles of Association, 1962; East African Community and Common Market, Treaty for East African Co-operation, 1967; Charter of the Organization of American States, 1948; Inter-American Charter of Social Guarantees, 1948; Cartagena Agreement (Andean Pact), 1969; Nordic Council Agreement; EEC Treaty, 1957; European Social Charter, 1961.

⁴³ Including ILO conventions on the subject.

⁴⁴ Subject to the necessary documentary formalities.

⁴⁵ Agreement between Sweden and Turkey, art. 7.

⁴⁶ Agreement between the United Arab Republic and the Republic of Sudan, art. 13; see also E/CN.4/L.629, paras. 108-115.

⁴⁷ EEC Regulation 1612/68.

3. CULTURAL RIGHTS

(a) *The right to education*

242. Recognized by international conventions,⁴⁸ multilateral⁴⁹ and bilateral agreements and national legislation,⁵⁰ this right is accorded in principle to all children, regardless of nationality.

243. Concentration on the teaching of the language of the host State is of urgent necessity if children are to benefit from the educational, cultural and eventual vocational training opportunities available. Considerable efforts are made by Governments of countries of immigration to arrange special classes in which migrants and their children are taught the language of the host country.⁵¹ Not only is the right of admission to the educational system of the host State granted to EEC nationals but general measures are also taken to facilitate their attendance.⁵² A recent tendency to encourage children to learn the language and culture of their country of origin may be of concern to those families who intend to return to their country but is not of assistance to children whose experience is confined to the host State.

244. Special efforts may be envisaged for adult education and vocational training programmes to open up promotional opportunities.⁵³ The complex educational problems raised by the differences in language, tradition and culture of distinct groups living within a territory must be taken into account.⁵⁴

(b) *The right to participate freely in cultural life*

245. Recognized to all individuals, regardless of nationality, by international conventions,⁵⁵ the right to participate freely in cultural life includes the protection of moral and national interests resulting from scientific, literary or artistic production. Rights of publication and translation may be restricted to nationals of contracting States under the Universal Copyright Convention (as revised on 24 July 1971) (arts. V and V *ter*).

⁴⁸ The right to elementary education is recognized in the International Covenant on Economic, Social and Cultural Rights (art. 13), the Convention relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons (art. 22 (1)) and the Convention against Discrimination in Education (art. 3 (e)).

⁴⁹ EEC Regulation 1612/68.

⁵⁰ For example, the Compulsory Education Act, 1969 (Netherlands), applies to all children of compulsory school age, regardless of nationality.

⁵¹ See Draft Directive on Schooling of the Children of Migrants (EEC).

⁵² Casagrande Case (9/74).

⁵³ Agreement concerning the movement, employment and residence of Algerian nationals and their families in France, signed on 27 December 1968, art. 3 (United Nations, *Treaty Series*, vol. 677, p. 343).

⁵⁴ Charles Ammoun, *Study of Discrimination in Education* (United Nations publication, Sales No. 1957.XIV.3).

⁵⁵ International Covenant on Economic, Social and Cultural Rights, art. 15 (1); Convention relating to the Status of Refugees, art. 14; Convention relating to the Status of Stateless Persons, art. 14.

246. Effective prohibition of the employment of aliens in the higher teaching posts is the result of failure so far to reach international agreement on academic qualifications, degrees and diplomas.⁵⁶ Member States of the Council of Europe may benefit from this recognition, which applies not only to university degrees but also to the recognition of academic qualifications required for entry to a university.⁵⁷

247. The right of an alien minority living permanently in a country to cultivate its religious, cultural and professional links may be recognized by the host State.⁵⁸

248. Regional instruments which have been concluded in this field include: the Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Latin America and the Caribbean and the European Convention on the Academic Recognition of University Qualifications (1959).

4. CIVIL RIGHTS

249. There exist decisions in international jurisprudence prior to the First World War which expressly refer to human rights, when there had been violation of the civil rights of an alien. It was stated in the case of *Dr. Pedro Andres Fornos Diaz v. the Government of the Republic of Guatemala* that "the fundamental rights and powers of the human individual in civil life are placed under the protection of the principles governing the commonwealth of nations, as international rights of man".⁵⁹

250. Certain rights are accorded to all individuals as members of the human race. These personal rights are recognized in decisions of international courts and tribunals, in international and regional instruments, and in constitutions of States.

251. Article 4 of the International Covenant of Civil and Political Rights provides that there may be no derogation from the right to life (art. 6); the right not to be subjected to any form of torture (art. 7); the right not to be held in slavery (art. 8 (1)); the right not to be held in servitude (art. 8 (2)); the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (art. 11); the right not to be held guilty of a criminal offence which did not constitute a crime when it was committed (art. 15); the right to recognition everywhere as a person before the law (art. 16); the right to freedom of thought, conscience and religion (art. 18).

252. The international minimum standard of treatment to be accorded to aliens is reflected in the provisions contained in the Universal Declaration of Human Rights. The rights of the alien recognized under international law include the right to life,

⁵⁶ See International Labour Conference, 59th Session, 1974, Report VII (1), *Migrant Workers*, p. 19.

⁵⁷ European Convention on the Equivalence of Diplomas Leading to Admission to Universities, 1953, and Protocol, 1964.

⁵⁸ Declarations by the Governments of Denmark and the Federal Republic of Germany, 1955. See *Protection of Minorities* (United Nations publication, Sales No. 67.XIV.3), pp. 34, 36.

⁵⁹ A.J.I.L., 1909, vol. 3, p. 743.

liberty and security of person (art 3), the right not to be held in slavery (art. 4), the right not to be subjected to torture or cruel treatment (art. 5), the right to recognition as a person before the law (art. 6), the right to an effective remedy by the competent national tribunals (art. 8), the right not to be subjected to arbitrary arrest (art. 9), the right to a fair and public hearing by an independent tribunal (art. 10), the right not to be held guilty of any offence under retroactive penal laws (art. 11 (2)), the right not to be subjected to arbitrary interference with his privacy, family, home or correspondence (art. 12), the right to marry (art. 16), the right to freedom of thought, conscience and religion (art. 18), and the right to own property (art. 17 (1)), though this latter right is not recognized in all legal régimes, either to nationals or aliens.⁶⁰

253. A comparison of these two enumerations shows that the rights recognized in the Universal Declaration, reflecting the standard minimum treatment due to aliens, may be the subject of derogations under the provisions of the Covenant. It should be recalled, however, that powers of derogation reserved to States under this instrument are subject to State obligations under international law (art. 4 (1)).

254. Member States of the Council of Europe which have ratified the European Convention on Human Rights have obligations to accord protection to all individuals within their jurisdiction.

(a) *Detention and arrest*

255. The right to liberty and security of person (art. 9) and prohibition of arbitrary arrest or detention are not absolute rights under the provisions of the International Covenant on Civil and Political Rights and may be subject to restrictions. The right not to be subjected to arbitrary arrest or detention is limited, in the case of aliens, by the sovereign right of States to prohibit entry into their territory, which empowers the State's authorities to arrest and detain any person who is suspected of attempting to enter illegally. The alien may also be arrested and detained if he is subject to deportation. In accordance with national legislative practices, he may be brought before a judicial authority and apply for a writ of habeas corpus.⁶¹ Specific provision is made in the European Convention that everyone who is arrested shall be informed promptly, in a language which he understands, of the reason for his arrest and of any charge against him (art. 5 (2)).

(b) *Access to court and remedies*

256. The right to an effective remedy by the competent national tribunals is ensured to any person whose rights and freedoms have been violated. Aliens are not specifically excluded under the Inter-

national Covenant. The right to an effective remedy in the national courts is recognized in the European Convention. Recommendations that right of access to the courts and to procedural rights in judicial proceedings should be equally available to nationals and to resident aliens were contained in Judge Abu Rannat's *Study of Equality in the Administration of Justice*.⁶²

257. Refugees and stateless persons have the right of access to courts in the territory of all contracting States, which need not be the State in which they are residing.⁶³

258. Everyone within the jurisdiction of the ratifying State, including aliens, is protected under the Convention.

(c) *The right to a fair and public hearing*

259. The provisions of article 14 of the International Covenant apply to criminal and civil proceedings. Similar provisions are contained in the European Convention, protecting aliens as well as citizens. Failure to accord the alien the right to a fair and public hearing before a competent, independent and impartial tribunal would amount to a denial of justice and give the alien grounds for appeal to an international or relevant regional body seeking a remedy for violation of his rights.

(d) *Protection from arbitrary interference with privacy, family or correspondence*

260. This protection is guaranteed, both in the International Covenant on Civil and Political Rights (art. 17) and in the European Convention on Human Rights (art. 8). While the Convention applies to all individuals within the jurisdiction, protection of their family life does not extend to according right of entry or of residence to their relations who may live in another country.⁶⁴

(e) *The right to marry*

261. The Universal Declaration (art. 16) specifies that there should be no distinction on grounds of nationality in the exercise of the right to marry. Discussion in the Commission on the relevant clause in the draft International Covenant on Civil and Political Rights included proposals to insert a prohibition of discrimination on grounds of "race, nationality or religion". It was held, doubtless correctly, that no such provision was necessary, taking into account the provisions of art. 2 (1). It does appear clear that the intention was that everyone of marriageable age, regardless of nationality, should have the right to marry and found a family.

262. Protection of the right to marry is provided in the European Convention on Human Rights (art. 12) and in the American Convention on Human Rights (art. 17).

⁶⁰ A.C. Kiss, "Condition des étrangers en droit international et les droits de l'homme", in *Miscellanea W. J. Ganshof van der Meersch*, vol. I (Brussels, Bruylant, 1972), pp. 504-505.

⁶¹ *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* (United Nations publication, Sales No. 65.XIV.2).

⁶² United Nations publication, Sales No. E.71.XIV.3, para. 543.

⁶³ Convention relating to the Status of Refugees, art. 16; Convention relating to the Status of Stateless Persons, art. 16.

⁶⁴ J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford, Clarendon Press, 1969), p. 188.

(f) *The right to own property*

263. Included in the Universal Declaration as an objective for a common standard of achievement, this right is not universally recognized⁶⁵ and is omitted from the International Covenants. Recognition of the right to protection of acquired property was discussed in the Commission in the drafting of the Covenants, but consideration of the question was postponed *sine die*. No one questioned the right of the individual to own property but it was felt that States should be left free to work out detailed regulation of the right.⁶⁶ While most countries had legislation protecting property rights, too many difficulties arose in relation to the drafting of limitations.

264. The right of foreigners to own property was discussed in relation to article 2 (2) of the International Covenant on Economic, Social and Cultural Rights. The granting of permanent sovereignty over the national wealth and resources to a State did not sanction unwarranted expropriation or confiscation of foreign property nor was it an intended threat against foreign investment.⁶⁷ Decisions of international courts⁶⁸ and customary international law have for long recognized the right of the alien whose property was expropriated by the State to prompt, full and effective compensation.⁶⁹ For those States which still recognize the right of individual ownership of movable and immovable property, this rule would still apply. Where compensation is payable, provision may be made for remitting all or some of the compensation to a country of choice.⁷⁰

265. Contemporary enforceable international instruments⁷¹ and regional⁷² and bilateral agreements⁷³ all recognize the principle of the right of the alien to acquire and own movable and immovable property.

266. Clauses for the reparation and restitution of property were included in the Peace Treaties of 1947

between the Allied Powers and Bulgaria (arts. 21, 22), Romania (arts. 22, 23), Hungary (art. 11 referring to material objects, arts. 23 and 24 generally) and Finland (arts. 23, 24).⁷⁴

267. A series of treaties of friendship and commerce between the United States of America and other States contain a statement of the principle of protection of acquired property: "Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for the public benefit and in accordance with due process of law, nor shall it be taken without just compensation".⁷⁵ It may be stipulated that national treatment is to be the minimum, combined with most-favoured-nation treatment, or further, that property shall be protected "in no case less than that required by international law".⁷⁶ Treatment accorded to nationals is not always considered to be sufficient, but is the minimum to which an alien has a right.⁷⁷

268. The transfer of assets abroad is of particular importance to the alien, who may wish to send part of his earnings and/or savings to his home country.⁷⁸ Transfer of earnings comprises an important source of foreign currency and income for countries of emigration. Refugees and stateless persons have an enforceable right to transfer their assets to a country of resettlement.⁷⁹

(g) *Freedom of movement*

269. Three main concepts are contained in this fundamental freedom: freedom for the individual (i) to reside anywhere within his own country; (ii) to leave it when he so desires and (iii) to return to his country. Recognized in international instruments, with or without specific limitations,⁸⁰ in regional instruments⁸¹ and in bilateral agreements,⁸² they are not always recognized by national legislation.⁸³ The right to leave any country should include protection

⁶⁵ Eight States had abstained on the vote on the Universal Declaration as a whole.

⁶⁶ See para. 307 below; see also A/2929, chap. VI, para. 197.

⁶⁷ A/2929, chap. IV, para. 21.

⁶⁸ Decision of Claims Commission between the United States and Panama, 29 June 1933, the Sabla Case: "It is axiomatic that acts of a government in depriving an alien of his property without compensation impose national responsibility".

⁶⁹ G. Schwarzenberger, *Manual of International Law* (Professional Books Ltd., 1976), p. 84; and see, for example, United States Department of State Bulletin No. 724, 14 September 1953, on the expropriating of the United Fruit Company by the Government of Guatemala.

⁷⁰ See initial report of Mauritius under article 40 of the International Covenant on Civil and Political Rights, CCPR/C/1/Add.2.

⁷¹ International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (d) (v); Convention relating to the Status of Refugees, art. 13; Convention relating to the Status of Stateless Persons, art. 13.

⁷² First Protocol to the European Convention on Human Rights, art. 1: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions"; European Convention on Establishment, art. 4.

⁷³ For example: Agreement between Bahrain and Kuwait, under which they accord reciprocal rights to their respective nationals on the same basis as their own nationals with regard to property.

⁷⁴ See also Agreement between the USSR and Sweden relating to compensation for expropriated Swedish private property (1946).

⁷⁵ Treaty of Friendship and Commerce between the United States and the Federal Republic of Germany, 29 October 1954; and see Drucker, "Communist Compensation Treaties", I.C.L.Q., 1961, vol. 10 (art. V4).

⁷⁶ Treaty between the United States and Ireland, 1950.

⁷⁷ Treaties of establishment and navigation, such as the one concluded between France and Sweden, 16 February 1964.

⁷⁸ Provided for in art. 19 (9) of the European Social Charter subject to being "within legal limits".

⁷⁹ Convention relating to the Status of Refugees, art. 30; Convention relating to the Status of Stateless Persons, art. 30.

⁸⁰ International Covenant on Civil and Political Rights, art. 12. Convention relating to the Status of Refugees, art. 26, and Convention relating to the Status of Stateless Persons, art. 26: "... subject to any regulations applicable to aliens generally in the same circumstances".

⁸¹ EEC Treaty, art. 48; Protocol 4 to the European Convention on Human Rights, art. 2 (1) and (2); European Agreement on Regulations Governing the Movement of Persons between the States of the Council of Europe.

⁸² Equality of treatment with nationals, for example, in the Treaty between the Philippines and the Spanish State on Civil Rights and Consular Prerogatives, signed at Manila on 20 May 1948.

⁸³ See chap. V below.

from reprisals, sanctions or penalties.⁸⁴ Restrictions on the right of aliens to leave any country should be exceptional.⁸⁵

270. Since the signing of the Final Act of the conference on Security and Co-operation in Europe at Helsinki on 1 August 1975,⁸⁶ some visits across frontiers have taken place between Eastern and Western European States.

271. Encouragement for freedom of movement within one region is given under conventions concluded by neighbouring States.⁸⁷ In one treaty it is covered by a general provision prohibiting discrimination on grounds of nationality.⁸⁸

272. Positive rights may be connected with the return of a refugee or other individual to his country, including obligations on a State to assist in resettlement.⁸⁹

(h) *Right to a nationality*

International provision

273. Provision is made in international instruments for a general right to acquire a nationality in the case of children.⁹⁰ The specific right of nationality of the host State is granted to anyone born in the territory of the State, in the Convention on the Reduction of Statelessness (art. I (1)). Compliance with complicated provisions relating to registration and other procedural formalities is required for successful applications under the Convention.⁹¹

National provision

274. The alien living permanently in a foreign country may have the possibility to acquire that State's nationality subject to certain conditions, varying from State to State, and also subject to the exercise of discretionary powers by the competent authorities. The following are some examples:⁹²

⁸⁴ See Uppsala Declaration, adopted on 21 June 1972.

⁸⁵ J. Ingles, *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country* (United Nations publication, Sales No. 64.XIV.2), pp. 57-58.

⁸⁶ Not a legally binding instrument, but "Basket 3" of the Agreement contains programmes for the development of the recognition of human rights and fundamental freedoms.

⁸⁷ Nordic Agreement (1954); American Convention on Human Rights, art. 22; European Convention on Establishment; European Agreement on Regulations Governing the Movement of Persons between the States of the Council of Europe.

⁸⁸ EEC Treaty, art. 7, and right of movement under arts. 48 and 52. National regulations may require nationals of other member States (as for all aliens) to report to the State authorities, but in so far as this regulation does not entail restriction on freedom of movement, such rules do not constitute discrimination prohibited under the Treaty (art. 7). *Watson and Belmann*, Case 118/75.

⁸⁹ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), art. V (3).

⁹⁰ International Covenant on Civil and Political Rights, art. 24 (3).

⁹¹ The United Kingdom, having signed the Convention in 1961, felt bound to make provision for the retention of British nationality to Uganda Asians who had not become Ugandan nationals. See Sharma and Wooldridge, "Some legal questions arising from the expulsion of the Ugandan Asians", *I.C.L.Q.*, vol. 23, part 2 (1974).

⁹² Answers from Governments to question 6 of the questionnaire (see annex IV).

Austria: Ordinary residence for at least 10 consecutive years in the territory of the State; freedom from certain judicial convictions and criminal proceedings; no local banishment to have been issued against the applicant; past behaviour demonstrating a positive attitude toward the State and showing that the applicant does not constitute a danger to public order or national security;

Barbados: Conditions relating to minimum age of 18, physical, mental and moral health, residence for a minimum of five years. Marriage to a citizen or adoption by a citizen may also make an applicant eligible;

Brazil: Civil capacity, uninterrupted period of residence of at least four years, ability to read and write the Portuguese language, exercise of a profession or possession of an income sufficient for the maintenance of the applicant and his family, absence of charges, indictments or sentence in Brazil for a wilful crime punishable with not less than one year's imprisonment, and good health;

Finland: A minimum age of 18, residence and home in the State for the past five years; evidence that the applicant has been leading a respectable life; maintenance for himself and his family considered to be adequate;

Greece: A minimum age of 21, declaration before the mayor of the place where he intends to reside, residence of at least three years (not required for an applicant born in the State), of good moral character;

Norway: Residence for the previous seven years, a minimum age of 18, proof of capacity to maintain self and family, and a record of good conduct.

275. There are grounds on which naturalization will not be granted, for example, where criminal offences of a serious nature have been committed.

276. Arbitrary deprivation of a nationality may be prohibited and the right to change one's nationality may be protected,⁹³ though these rights would be very difficult to enforce. The nationality of a woman on her marriage is likewise protected, for the benefit both of alien women marrying nationals and of women marrying aliens.⁹⁴

5. POLITICAL RIGHTS

277. The use of the term "citizen" distinguishes the national from the alien, giving emphasis to the fact that "anyone who is not a citizen is excluded from the relevant provision. It has been unanimously agreed that according to common international law the alien may be excluded from the possession of the rights which normally belong solely to the nationals of the State".⁹⁵

278. The same view was expressed in the Commission on Human Rights, the majority of the members maintaining that it is the inherent right of every citizen to take part in the conduct of the affairs of his country, through directly or indirectly chosen representatives.⁹⁶ The denial to aliens of the right to take

⁹³ American Convention on Human Rights, art. 2 (3).

⁹⁴ Convention on the Nationality of Married Women.

⁹⁵ A. H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Leyden, Sijthoff, 1949), p. 151.

⁹⁶ A/2929, chap. VI, para. 172.

part in national elections is not considered discriminatory⁹⁷ since they remain within the personal jurisdiction of their country of nationality.⁹⁸ There could be no question of recognizing a right of aliens to vote in their country of residence.⁹⁹ The International Covenant on Civil and Political Rights accords the right to citizens to take part in the conduct of public affairs, to vote and be elected in genuine periodic elections and to have access to the public service of their country (art. 25). The assertion that these rights apply to citizens would imply that these rights are not to be accorded to aliens. Indeed, non-nationals do not claim to exercise the political rights specifically stated to belong to citizens.¹⁰⁰ Provisions of other instruments support this view, as well as the practice and laws of States.

(a) *Right to take part in the conduct of public affairs*

279. The right of citizens to take part either through direct or indirect suffrage in the government of the State is protected under international and regional instruments.¹⁰¹

280. On the principle that aliens remain under the personal jurisdiction of their State of nationality and interference by an alien in the internal affairs of a country is incompatible with the sovereignty of States, the political activities of aliens may be restricted.¹⁰² Provisions permitting States to restrict the political activities of aliens in relation to the right of freedom of association and of peaceful assembly are contained in regional instruments¹⁰³ and in national legislation.¹⁰⁴

(b) *Right to vote and to be elected*

281. In regional instruments, this right is reserved to citizens.¹⁰⁵ Aliens are excluded from the right to vote and to take part in elections by most national legislations.

⁹⁷ Denial of political rights to foreigners is held to be "a legitimate distinction which does not constitute discrimination" (*The Main Types and Causes of Discrimination* (United Nations publication, Sales No. 1949.XIV.3), para. 126); see also H. Santa Cruz, *Study of Discrimination in the Matter of Political Rights* (United Nations publication, Sales No. 63.XIV.2), pp. 26-27.

⁹⁸ This view is supported by Chizhov, *International Law* (Moscow, Foreign Languages Publishing House), p. 164, in which he states "Soviet citizens abroad are not freed from their responsibilities to their own State".

⁹⁹ E/CN.4/SR.61, p. 15.

¹⁰⁰ F. Capotorti, statement in the Third Committee of the General Assembly, 1963, A/C.3/SR.1257.

¹⁰¹ For example, International Covenant on Civil and Political Rights, art. 25; Convention on the Political Rights of Women, preamble.

¹⁰² Eighth International Conference of American States, Lima, 1938, article XVIII of the Declaration of Lima.

¹⁰³ European Convention on Human Rights, art. 16.

¹⁰⁴ Parteiengesetz 2, 24 July 1967, Federal Republic of Germany, which prohibits any political party which has a majority of aliens among its members or on its Board.

¹⁰⁵ American Convention on Human Rights, art. 23 (1) (b); the European Convention on Human Rights, First Protocol, art. 3, refers to "the people", an unclear term.

282. Governments of Member States who replied to question 3. I (iii) of the questionnaire (annex IV) stated that political rights were reserved to their nationals, with the exception of the United Kingdom, where the right to vote is given to nationals of Ireland resident in the United Kingdom on the relevant date. No electoral rights are granted to aliens in the Soviet Union and aliens cannot be elected to Soviet State organs.¹⁰⁶ In Sweden, in 1976, aliens were granted the right to vote for the first time and to be elected in municipal, county and ecclesiastical elections. They had to have completed three years' residence in Sweden prior to the elections.¹⁰⁷

(c) *Access to public service*

283. Access to public service is generally reserved to citizens under international¹⁰⁸ and regional conventions and treaties.¹⁰⁹ Reciprocal rights may be granted under bilateral agreements to nationals of States parties conditional on residence in the other State.¹¹⁰ Offices restricted to nationals include those of cabinet minister, envoy or diplomat, posts in courts or other administrative authority subordinate to the Government, and any post or commission elected by the national Government.

B. Rights and freedoms of particular concern to aliens

1. ASYLUM

284. The right of everyone to seek and to enjoy in other countries asylum from persecution is recognized in the Universal Declaration of Human Rights (art. 14 (1)). There is so far no binding instrument which gives anyone the right to asylum in any country other than his own, although there is provision to protect an alien from being returned to the country from which he came if his life or personal freedom are threatened because of his race, nationality, social status or political opinions.¹¹¹ Principles on the right of asylum are contained in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; and in America, the American Convention on Human Rights contains legally binding provisions relating to asylum.

285. Arguments for and against extending the right of asylum and adopting a legally binding international instrument have continued for several

¹⁰⁶ The granting of political rights to aliens would create favourable conditions for anti-Soviet subversive activity. See Chizhov, *op. cit.*, p. 163.

¹⁰⁷ CCPR/C/1/Add.9, p. 31.

¹⁰⁸ International Covenant on Civil and Political Rights, art. 25 (3).

¹⁰⁹ EEC Treaty, art. 48 (4). American Convention on Human Rights, art. 23 (1) (e).

¹¹⁰ Convention concluded between Portugal and Brazil on 7 September 1971 on the equality of rights and duties of the nationals of the two countries.

¹¹¹ Convention relating to the Status of Refugees, art. 33 (1).

years.¹¹² The International Covenants contain no provision on the right of asylum, although the domestic legislation of many States contains provisions relating to the grant of asylum. In debates on the subject during the drafting of the Covenants, the only point on which there appeared to be consensus was that the right of asylum should not be conferred on all persons desiring it.¹¹³

2. EXPULSION AND DEPORTATION

286. There have been several cases of collective and individual expulsion of aliens since 1945, as well as deportation. It has been held that discriminatory expulsions on racial grounds are contrary to international law, relying on the human rights provisions of the United Nations Charter, the force of the Universal Declaration and, with more recent effect, the International Convention on the Elimination of All Forms of Racial Discrimination and the legally binding International Covenant on Civil and Political Rights. The collective expulsion of aliens is expressly prohibited under the European Convention on Human Rights (Fourth Protocol, art. 4).

287. Aliens generally,¹¹⁴ and refugees in particular,¹¹⁵ may be expelled from a territory in which they are lawfully residing only in pursuance of a decision reached in accordance with due process of law. The grounds on which refugees may be expelled are restricted to national security or public order. For aliens generally, there is no such restriction on the grounds for expulsion, though it has been suggested that the specific safeguards which were included for the protection of refugees should be extended to all aliens who were liable to be expelled. The alien needs to be protected against arbitrary action, but protection for one alien against arbitrary expulsion needs to be balanced by the interests of the State.¹¹⁶ Where national security is involved, the State being endangered, the rules of natural justice have to take second place and further, it has been held that "where public authorities of a State decided to deport an alien on grounds of security, that consti-

tuted an act of State falling within the public sphere and did not constitute a determination of his civil rights or obligations within the meaning of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms".¹¹⁷

288. Once a deportation has been made, there are two aspects which should be of concern to States. First, the conditions in which deportees may be detained must be of reasonable standard, and second, the country to which a deportee is sent must not be such where his life or freedom would be in danger. This principle of *non refoulement* is recognized in the case of refugees or those seeking asylum¹¹⁸ but not so far with regard to aliens generally.

3. EXTRADITION

289. Regional agreements¹¹⁹ relating to the extradition of aliens contain provisions regulating and safeguarding the rights of alleged offenders. There have been many recent cases whereby the refusal of a State to hand over the alien to the claimant State has been on grounds of protecting the life and freedom of the individual.¹²⁰ Extradition procedures may be regulated by national legislation.¹²¹ The increasing threat of terrorism to world peace has impelled some States to take measures to supplement and, where applicable, modify agreements on extradition and mutual assistance already in force. Extradition has been refused even where loss of life is involved on the grounds of a "political offence", although there has not been up to now a legal definition of this term. The European Convention on the Suppression of Terrorism, together with the Additional Protocol to the European Convention on Extradition, is designed to remedy this lacuna, so that certain specified offences shall not be regarded as political. It has been emphasized that the terms of the new convention are not in contradiction with international or constitutional principles governing the right to seek asylum.

¹¹² Renewed attempts to elaborate a draft Convention on Territorial Asylum were encouraged by General Assembly resolution 3272 (XXIX) of 10 December 1974, with the establishing of a Group of Experts (see A/10177, 29 August 1975). In accordance with General Assembly resolution 3456 (XXX) of 9 December 1975, a Conference of Plenipotentiaries was convened in January 1977 to consider a draft Convention on the subject (A/CONF.78/C.1/L.104/Add.1).

¹¹³ A/2929, chap. VI, paras. 65-69.

¹¹⁴ International Covenant on Civil and Political Rights, art. 13.

¹¹⁵ Convention relating to the Status of Refugees, art. 32 (2).

¹¹⁶ Sharma and Wooldridge, *op. cit.*, p. 408.

¹¹⁷ As per Lord Denning in relation to the appeal made by Mr. Agee to the European Commission of Human Rights, in *Regina v. Secretary of State for Home Department, ex parte Hosenball* (T.L.R., 29 March 1977).

¹¹⁸ Convention relating to the Status of Refugees, art. 33.

¹¹⁹ European Convention on Extradition; Nordic Agreement.

¹²⁰ *The Times* (London), 19 May 1975, concerning the refusal of the British Government to extradite General Gowan.

¹²¹ The Fugitive Offenders Act 1948 regulates these procedures between the United Kingdom and other members of the Commonwealth.

V. RESTRICTIONS AND LIMITATIONS ON THE HUMAN RIGHTS OF ALIENS

290. The principles established in contemporary international instruments in the field of human rights are subject (i) to the right of derogation by the States parties according to the terms of the relevant instrument;¹ (ii) to reservations which may be made on deposit of the instrument of ratification or accession with the appropriate body; (iii) to a general clause in the instrument enabling a State party to impose restrictions and limitations on grounds which may be legally defined; (iv) to limitations and restrictions contained in substantive clauses of the instrument.

291. Such restrictions and limitations may be imposed on the human rights and freedoms of all individuals within the State's jurisdiction (for instance by suspension of the constitution). On the ground of public emergency or national security, for example, a State may impose certain restrictions on the rights of aliens and still be acting in accordance with the terms of its obligations under existing human rights instruments to which it may be a party.

292. The general principle of universality of human rights and fundamental freedoms, based on the inherent dignity of man and recognized in international instruments, is not only liable to total disregard by States generally, but national legislation may also contain measures which fail to guarantee the protection of the human rights of individuals who reside within their territorial jurisdiction.

293. The individual who most frequently, both in point of time and of place, gets singled out for distinction from his fellow men is the alien.

1. RESERVATIONS²

294. No provision is made for reservations in the International Covenants, but this omission has not prevented States from declaring reservations on deposit of the instrument of accession with the Secretary-General of the United Nations. Reservations may be general or specific. They may be made by a State on account of existing economic and social conditions and the consequent impossibility for the time being of fulfilling certain obligations and so

¹ See E. Daes, "The individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights" (E/CN.4/Sub.2/L.627; E/CN.4/Sub.2/L.642 and Add.1-5). In view of the substantial study undertaken by Mrs. Daes, the Rapporteur considers it necessary to confine this chapter to matters strictly relevant to existing national practices and legislative measures.

² See "Reservations, declarations, notifications and communications relating to the International Covenant on Civil and Political Rights and the Optional Protocol thereto" (CCPR/C/2, 14 February 1977).

apply to all individuals.³ Or they may be directed to certain provisions which for reasons of public policy or national security affect the rights of aliens.⁴

2. LIMITATIONS

295. Certain substantive clauses of the International Covenant on Civil and Political Rights may be subject to some form of limitation or restriction on specified grounds. Rights to a public hearing (art. 14 (1)), to freedom of expression (art. 19 (3)), to freedom of peaceful assembly (art. 21), to freedom of association (art. 22 (2)), and to freedom of expression of one's religion or beliefs (art. 18 (3)) are subject to such restrictions as are provided by law and which are necessary to protect national security, public health or morals or the protection of the rights and freedoms of others.

296. The provisions of the International Covenant on Economic, Social and Cultural Rights may be subject to such restrictions as are determined by law, but only in so far as these may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society (art. 4).

297. The rights set out in this Covenant are to be achieved progressively and are therefore not immediately enforceable, but both the Covenant and ILO Conventions generally contain provisions for the development of national policies which would include all residing within the territory.

3. DEROGATIONS⁵

298. Any derogation made by States must be in accordance with international law. In the case of aliens, the minimum standard of treatment recognized as a rule of customary international law should be observed and respected.⁶

299. Provisions of international human rights instruments do not prohibit any distinctions made on grounds of nationality, but such distinctions may be made only subject to the above-mentioned conditions. While certain specified civil and political rights are protected from any derogation,⁷ States

³ Madagascar reservation to article 13 (2) of the International Covenant on Economic, Social and Cultural Rights.

⁴ United Kingdom, reservation to article 13 of the International Covenant on Civil and Political Rights.

⁵ See annex III.

⁶ International Covenant on Civil and Political Rights, art. 4. See above, paras. 284-289.

⁷ International Covenant on Civil and Political Rights, art. 4 (2).

may, in time of public emergency, take measures derogating from their obligations arising under the International Covenant on Civil and Political Rights. Distinctions on grounds of nationality are not expressly prohibited,⁸ though article 4 of the Covenant provides that derogations must be limited to the exigencies of the situation and be consistent with other obligations under international law.

4. DISTINCTION AND DISCRIMINATION

300. Distinction between nationals and aliens may be permitted either because the term "national" has been omitted from the enumeration contained in the "non-discrimination" clauses or because there may be specific provision permitting discrimination on grounds of being a non-national.⁹

301. States may, in their constitutions, recognize the provisions of the Universal Declaration of Human Rights, and simultaneous with this recognition and support, in their national legislation and procedural measures may apply limitations to the rights of individuals in general and aliens in particular.

302. Replies from Governments of Member States to the questionnaire (annex IV) contained the following information relating to the limitations which may be imposed by municipal legislation on the rights of aliens.

(a) *Employment*

303. Employers may be restricted as to the number of aliens they may employ.¹⁰ Certain professions may be reserved to nationals, such as that of arms dealer, proprietor of a private detective agency,¹¹ newspaper proprietor,¹² lawyer, notary or insurance broker.¹³

304. Permits for employment may be required on the part of some aliens, while others may be protected under bilateral or multilateral agreements.¹⁴ Special rules may apply to an alien who wishes to carry on a business.¹⁵ Public offices are in nearly all cases reserved to nationals¹⁶ but may exceptionally be permitted to nationals of a State with whom there exists a bilateral agreement on a reciprocal basis. Under treaties of establishment, equality of treatment may be accorded to nationals of ratifying States.¹⁷

⁸ Art. 4 (1).

⁹ International Convention on the Elimination of All Forms of Racial Discrimination, art. 1 (3).

¹⁰ Madagascar.

¹¹ Niger.

¹² Brazil.

¹³ Turkey.

¹⁴ Federal Republic of Germany.

¹⁵ Sweden.

¹⁶ See para. 283 above.

¹⁷ For instance, Convention between Madagascar and France.

(b) *Social rights and benefits*

305. These rights are generally reserved to those aliens who are nationals of States which have ratified social security conventions on a reciprocal basis.¹⁸ The basic old age pension may be reserved to nationals, with a limited extension to aliens who are nationals of a State party to a reciprocal agreement or who have been resident for a minimum period of time.¹⁹

(c) *Cultural rights*

306. The high costs of educational systems result in reservations to the provision of compulsory and free primary education.²⁰ With regard to admission to higher education, conditions relating to length of residence within a country may be imposed.²¹

(d) *Civil rights*

307. Restrictions may be imposed on the right of aliens to acquire real estate,²² or such acquisition may be dependent on reciprocity under bilateral agreements.²³ There may be a prohibition on the acquisition of property by aliens in certain areas of a country, particularly near frontier regions, on the ground of national security and defence. Certain types of property may only be held by nationals.²⁴

308. Access to tribunals may only be available subject to prior deposit of security for costs, or restricted to those aliens covered by agreements granting reciprocal rights. Legal aid is not granted in all cases to aliens, where in like circumstances it may be granted to nationals; it may, however, be available on a basis of reciprocity under bilateral agreements. Compensation under an Official Liability Act may also only be available on a basis of reciprocity.²⁵

309. It is a sovereign right of States to confer a right of entry into its territory on any person other than a national. It equally has the right to deny entry to any person other than a national, and there is no fundamental right of "immigration". The right to employment consequently frequently depends on obtaining a prior right of entry to the State concerned, considered in relation to the availability of employment and the prevailing economic situation. Within a region, freedom of movement between States ratifying a Convention of Establishment²⁶ or multilateral treaty²⁷ may be granted to the nationals of those States. Within the nine member States of the European Community, there is to be no discrimination on grounds of nationality²⁸ in the application

¹⁸ Sweden.

¹⁹ Norway.

²⁰ Madagascar.

²¹ Federal Republic of Germany.

²² Sweden.

²³ Bahrain.

²⁴ Greece; also Barbados and Brazil, which prohibit foreign ownership of ships sailing under the national flag.

²⁵ Austria.

²⁶ Ratifying States of the Council of Europe and of the European Convention on Establishment, which is not open to States which are not members of the Council of Europe.

²⁷ EEC Treaty.

²⁸ EEC Treaty, art. 7.

and implementation of the Treaty, which includes the right of movement between the member States for workers and self-employed persons.²⁹

310. Freedom of movement within a State may be contingent on an alien possessing a valid residence permit, with or without an area restriction.³⁰ Special formalities are imposed in some States, such as registration, declaration of residence, report of change of address, and certain areas may be closed to aliens in the interest of defence and national security. Refugees and stateless persons may be subject to the same regulations as those which govern the movement of aliens generally.³¹

(e) *Political rights*³²

311. Every State reserves these rights to its nationals, with the exception of the United Kingdom, which grants the right to vote in elections to citizens of the Irish Republic if they are resident within the territory on the relevant date. Restraints may be imposed on aliens in respect of the rights to freedom of expression, of association and of peaceful assembly.³³

312. So far, only those limitations and restrictions have been considered which may be imposed by States on the rights and freedoms of aliens. There are also restraints imposed on States, in law and in treaties, in their conduct towards aliens. First, there is the rule of customary international law that States must respect a certain minimum standard of treatment towards aliens, even irrespective of the treatment they may mete out to their own nationals. Secondly, in the provisions of international instruments there are specified grounds on which limitations and restrictions may be imposed on all individuals.

313. The European Convention on Human Rights spells out the obligation imposed on States to limit the application of any restriction to the purposes described in the Convention, thus placing a bar on arbitrary actions by State authorities.

314. Thirdly, the basis on which a State may take action on the grounds of public policy must be

defined by law.³⁴ In a decision of the European Court of Justice it was held that an EEC national may not be deported from another member State, except on grounds of public policy or public security, which are based exclusively on the personal conduct of the individual concerned.³⁵ In order to safeguard the interests of public policy, public health and public security, there may be exceptions to the right of freedom of movement. Provision may be made for the imposition of restrictions on the exercise of this right where there is sufficient justification.³⁶ If grounds of public policy are pleaded as justification for derogation from the request of a worker to freedom of movement, a strict interpretation is to be applied. Following this decision, deportation of an EEC national of another member State ordered for the purpose of deterring other aliens is not permissible, since it does not relate exclusively to the conduct of the individual concerned, nor would previous criminal convictions constitute grounds for deportation.³⁷ This limitation imposed on States when claiming as a defence grounds of public policy has the effect of prohibiting any collective expulsions.

315. Restrictions on the right of a State to expel an alien are contained in the International Covenant on Civil and Political Rights, and the collective expulsion of aliens is expressly forbidden in the Fourth Protocol to the European Convention on Human Rights (art. 4), and in the American Convention (art. 22 (9)).

316. Provisions against arbitrary expulsion of refugees and of stateless persons are contained in the relevant conventions (arts. 31 and 32 respectively) and in the Convention relating to the Status of Refugees there is an emphatic prohibition against *refoulement*, the return of a refugee to a frontier or territory where his life or freedom might be threatened (art. 33 (1)).

317. Similar provisions are contained in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (art. II (3)).

318. The expulsion of aliens (or nationals) who are indentified as one ethnic or racial group would be contrary to international provisions.³⁸

²⁹ EEC Treaty, arts. 48 and 52.

³⁰ "United Nations standards concerning the relationship between human rights and migration" (E/CONF.60/SYM.IV/3/Add.2), p. 5; and see CCPR/C/1/Add.2, p. 13, and CCPR/C/1/Add.9, p. 12.

³¹ Convention relating to the Status of Refugees, art. 26; Convention relating to the Status of Stateless Persons, art. 26.

³² See also paras. 307-310 above.

³³ European Convention on Human Rights, art. 16.

³⁴ International Covenant on Economic, Social and Cultural Rights, arts. 4 and 8; International Covenant on Civil and Political Rights, arts. 4, 12, 14, 18, 19, 21, 22; European Convention on Human Rights, arts. 8, 9, 10, 11, 15, 16, 17.

³⁵ Van Duyn Case (41/74).

³⁶ Royer Case (48/75).

³⁷ Bonsignore Case.

³⁸ International Convention on the Elimination of All Forms of Racial Discrimination, art. 4.

VI. DUTIES OF ALIENS

319. In accordance with the Universal Declaration of Human Rights, everyone has duties to the community in which he lives and in which alone the free and full development of his personality is possible (art. 29). This formulation accepts that man is a member of society, that as a member of society he has responsibilities towards his fellow men and that if he seeks respect for his own rights and freedoms, he must himself respect the rights and freedoms of others.

320. The recognition that every right carries with it a corresponding duty and that rights and duties are correlative was generally agreed in discussions on article 29 in the Third Committee.¹ The concept is repeated in the preamble to each of the International Covenants, States parties realizing "that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant".

321. The interdependence of rights and duties has some bearing on the recognition of rights to aliens.

The duty of the citizen is established by the nexus of nationality and the acceptance of owing allegiance to his State. The lack of that nexus of nationality does not mean that an alien owes no duties to the State in which he resides. Both the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons (art. 2), recognize that the refugee as well as the stateless person has general obligations which are formulated: "Every refugee/stateless person has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."

322. The inequitable or censurable conduct of an alien may lead to the imposition of limitations or restrictions by a State and to the withdrawal of its protection. For the alien to claim protection of the State in which he is living, he must conform to the laws of that State, refrain from interfering in the political affairs of the State and contribute as a member of society generally to the development and progress of the country in which he has voluntarily chosen to live.

¹ A/2929, chap. III, paras. 12-14.

VII. METHODS OF ENFORCEMENT OF HUMAN RIGHTS AND REDRESS OR REMEDY FOR INFRINGEMENT

323. Effective protection of human rights and freedoms is dependent on the machinery available to the individual to obtain redress in the event of one of his rights being violated. Hitherto the alien has been in a position of some advantage over the national. Whereas nationals, having exhausted all local remedies, have no other course of action, aliens have had, and still have, the possibility of receiving the diplomatic protection of their State of nationality.¹ In order to seek redress for the violation of the rights of any one of its nationals, the State may resort to any amicable means for the settlement of the dispute, including mediation, good offices, negotiation, or conciliation procedures.² The establishment of international or regional machinery will accrue to the benefit not only of aliens but also of nationals whose rights have been violated by their own State.

324. The diplomatic protection granted to an alien by his State of nationality is exercised at the discretion of the State. The duty of a State and its responsibility towards aliens in case of injury have not yet been precisely defined.³ Should satisfaction, redress or compensation not be obtained through the national courts of his State of residence, the alien may have the possibility of seeking a remedy through one of the bodies established under post-war human rights instruments, or rely on treaty provisions between his State of residence and his State of nationality for the settlement of disputes.

325. Refugees and stateless persons are accorded equal treatment with nationals with regard to matters pertaining to access to courts in the country of habitual residence.⁴ Equal treatment is not always adequate, and only those States parties to the conventions concerned would be bound by these provisions. Refugees and stateless persons are in a worse position than other aliens, there being no State to which they can look for diplomatic protection.

326. One of the conditions precedent for petitioning any international or regional body on grounds of the violation of human rights is the necessity to have made every effort to obtain redress through the local courts.⁵

¹ See chap. II, sect. C, above.

² P. Weis, "Diplomatic protection of nationals and international protection of human rights", *Revue des droits de l'homme-Human Rights Journal*, 1971, Nos. 2-3, p. 645.

³ F. García Amador, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, N. Y., Oceana Publications, 1974), p. 17.

⁴ Convention relating to the Status of Refugees, art. 16; Convention relating to the Status of Stateless Persons, art. 16.

⁵ For example, article 5 of the Optional Protocol to the International Covenant on Civil and Political Rights.

A. International machinery

1. DISCRIMINATION

327. In the International Convention on the Elimination of All Forms of Racial Discrimination provision has been made for the setting up of a Committee consisting of 18 members elected by States parties from among their nationals (art. 8).

328. The convention does not apply to exclusions, restrictions or preferences made by a State between citizens and aliens, but an alien could claim violation on the basis of unfair discrimination between members of his nationality and those of another nationality. An alien may further claim violation on grounds of race, regardless of nationality. A claim to be a victim of a violation may only be made against a State which has declared the competence of the Committee to receive individual communications (art. 14).

2. VIOLATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

329. The International Covenant on Economic, Social and Cultural Rights, which recently entered into force, contains no provision for the enforcement by individuals of the rights which are to be achieved progressively. The responsibility of ratifying States is to submit in biennial stages reports indicating factors and difficulties in the fulfilment of their obligations under the Covenant (art. 17 (2)).⁶

330. In accordance with article 24 of the ILO Constitution, members of industrial associations of employers and workers may submit representations to ILO on non-observance by a State of the provisions of a Convention which it has ratified. Further, representations may be made, in accordance with article 26 of the Constitution, by a State member of the organization against any other State which has not satisfactorily implemented a convention ratified by both States, without necessarily causing any damage either to the complainant State or one of its subjects. This procedure is also available to the Governing Body of ILO, either on its own initiative or by claim of a delegate to the General Conference.

331. The Committee on Freedom of Association of the Governing Body of ILO⁷ receives complaints of infringements of trade union rights, which may originate from Governments or from associations of

⁶ Economic and Social Council resolution 1988 (LX) of 11 May 1976 sets out the procedures for the implementation of the Covenant.

⁷ Set up by the Governing Body at its 117th session.

employers or workers. In this last case, for a complaint to be admissible it must be presented by a national organization directly involved, by an international organization in consultative status with ILO, or by another international organization where the complaint concerns matters directly affecting an affiliated organization. Even where a State has not ratified the Convention on Freedom of Association, it is sufficient to be a member State of ILO in order to bring a complaint against another State member. The Committee has held that it is not competent to deal with matters arising from national legislation concerning aliens, unless they have a direct effect on the exercise of trade union rights.⁸

332. Reciprocity and hence applicability only to nationals of the contracting parties applies to the ILO Convention on Equal Treatment (Social Security), 1962 (No. 118).

3. VIOLATION OF CIVIL AND POLITICAL RIGHTS

333. A Human Rights Committee of 18 members has been established with the competence, *inter alia*, to receive reports from States parties on the measures they have adopted in relation to rights under the International Covenant on Civil and Political Rights. The Committee may also receive and consider communications to the effect that a State party claims that another State party has failed to fulfil its obligations under the Covenant.⁹ In order for an individual to have the right to make a communication the State party against which the complaint is lodged must have ratified the Optional Protocol to the Covenant.

334. In so far as the rights violated are recognized to aliens in the Covenant, and the conditions of admissibility have been fulfilled, this machinery will be available for the protection of the rights of any individual, regardless of nationality, who is subject to the jurisdiction of the State party making the complaint. This procedure does not prevent States parties from having recourse to other procedures for settling disputes in other general or special agreements (art. 44).¹⁰

335. Pre-conditions for application by an individual to the Human Rights Committee¹¹ for a remedy against a violation of his rights include:

- (i) All available domestic remedies must be exhausted;
- (ii) There must be no abuse of the right of submission;
- (iii) The claim must not be anonymous;

⁸ *Freedom of Association—Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO*, 2nd (revised) ed. (Geneva, ILO, 1976).

⁹ These communications may only be made by those States parties which have made the relevant declaration under article 41.

¹⁰ For a description of the procedure under the Covenant and under the Optional Protocol, see Capotorti, "International measures of implementation", in *Nobel Symposium: International Protection of Human Rights* (Almqvist and Wiksells, 1968).

¹¹ Optional Protocol, arts. 1-5.

- (iv) The same matter is not being examined under another procedure of international investigation;
- (v) The State against whom the claim is made must be a party to the Covenant and to the Optional Protocol.

336. The right to initiate proceedings before the Human Rights Committee was considered in discussions on the Committee's jurisdiction. Without the introduction of the right of individual petition, the alien would be unlikely to be protected at all. States would be reluctant to complain about matters which did not concern their own citizens.¹²

337. The right to submit a communication under the procedure laid down in Economic and Social Council resolutions 1235 (XLII) of 6 June 1967 and 1503 (XLVIII) of 27 May 1970 is subject to the consideration that there must be evidence of consistent gross violation, which implies that denial of rights must be extended over a long period and affect a sizable number of individuals. This pre-condition is a serious drawback to the possibility of any individual who has suffered gross violation of his personal rights being able to seek redress within the provisions of resolution 1503 (XLVIII).

338. The communications are examined by a working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The working group refers to the Sub-Commission those communications which appear to the majority of the group to reveal a consistent pattern of gross and reliably attested violations of human rights. These communications are then discussed in the Sub-Commission which, in turn, may decide by majority vote to refer to the Commission on Human Rights particular situations disclosed in the countries concerned. Neither of these bodies is judicial, nor quasi-judicial, and the length of time alone between sessions would preclude justice being done to any individual in the recognized meaning of the term. This international machinery is still, so far, however, the only one of universal application which may be of some effect for the protection of human rights.

4. SLAVERY

339. The Economic and Social Council, in its resolution 1126 (XLI) of 26 July 1966, noted with appreciation the report on the question of slavery prepared at its request by Mr. Mohamed Awad¹³ and requested the Commission on Human Rights to submit to the Council specific proposals for effective and immediate measures which the United Nations could adopt to put an end to slavery in all its practices and manifestations. The following year, by resolution 13 (XXIII) of 21 March 1967, the Commission on Human Rights requested the Sub-Commission to undertake regular consideration of the question of slavery in all its forms, including the slavery-like practices of *apartheid* and colonialism, and to report to the Commission its recommendations on measures designed to help the United Nations and Member

¹² A/2929, chap. VII, paras. 70-73.

¹³ United Nations publication, Sales No. 67.XIV.2.

States in dealing with this question. On the recommendation of the Sub-Commission, contained in its resolution 7 (XXVI) of 19 September 1973,¹⁴ the Economic and Social Council by decision 17 (LVI) of 17 May 1974 authorized the Sub-Commission to review developments in the field of slavery and the slave trade in all their practices and manifestations, including the slavery-like practices of *apartheid* and colonialism, the traffic in persons and the exploitation of the prostitution of others. The working group may receive information from individuals on these matters. Individuals are requested (in para. 4) to submit reliable information to the working group.

340. This constitutes a step forward in an area where effective consideration of the actual problems has been somewhat hampered by the difficulty of obtaining evidence from individuals harmed, although non-governmental organizations in consultative status, particularly the Anti-Slavery Society, have each year brought forward evidence of alleged gross violations. The new element of the right of the individual to submit information should at least be a means of drawing the attention of the United Nations to continuing violations committed on persons who, by the nature of the offence, are generally aliens and who have no possibility or hope that the Government of the State in which they find themselves will be willing to grant them protection or take effective measures to eradicate the continued violation of their human rights.

B. Regional machinery for the protection of the rights of individuals

1. EUROPEAN CONVENTION ON HUMAN RIGHTS

341. Any individual, including an alien residing within the territorial jurisdiction of the contracting parties to the Convention, is guaranteed protection under the provisions of the European Convention. The individual need not be a national of any of the contracting States to benefit from the measures available. The observance of obligations under the Convention is ensured by the establishment of the European Commission of Human Rights and the European Court of Human Rights.

European Commission of Human Rights

342. Provided that the contracting party against which a complaint has been lodged has made a declaration recognizing the competence of the Commission to receive individual petitions (art. 25), any individual may submit a petition addressed to the Secretary-General of the Council of Europe claiming that rights set out in the Convention have been violated by the State of residence. The following conditions must also have been satisfied: every effort must have been made to get redress from the country concerned through local courts or other action; from

the date on which the final decision of such local courts has been taken, not more than six months have elapsed (art. 26); the violation constituting the breach must have been by a public authority.

343. The European Commission set out the principles of State responsibility in regard to affording the means of redress for an injury suffered by an individual. The rule requiring the exhaustion of domestic remedies as a condition of the presentation of an international claim is founded upon the principle that the respondent State must first have the opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to be done to the individual.¹⁵

European Court of Human Rights

344. The European Commission, having decided on the admissibility of the petition, should take steps to secure a friendly settlement. Should the Commission fail to reach a friendly settlement the case may go to the Court provided that the contracting parties concerned have accepted the option pertaining to the Court's jurisdiction, (art. 46). Apart from the Commission, contracting parties may also bring a case before the Court. Individuals cannot be a party in the case, although the case may have originated in an individual petition.

345. Recent developments have shown that an individual petitioner may be present to assist the Commission in its presentation to the Court¹⁶ and to that extent may take part in the Court's proceedings. The initiation of proceedings by an individual may result in condemnation of an offending State, by a binding decision of the Committee of Ministers or by a judgement of the Court.

346. A contracting party may refer to the Commission and bring before the Court a case concerning alleged violation of the rights of any individual resident in one of the contracting States, provided the State against which the complaint is made also recognizes the jurisdiction of the Court (art. 48).

2. THE EUROPEAN COMMUNITIES TREATIES

347. The European Court of Justice, established under the Treaties of the European Communities, may only act within the limits of the powers conferred upon it by the particular Treaty provisions, or by subsequent agreement to which all member States are parties.

348. The Court has nevertheless elaborated certain principles and methods within the provisions of the Treaties to increase the protection of individuals and has contributed in furthering legal protection of the individual's fundamental human rights. The Court has affirmed: "Compliance with fundamental rights is an integral part of the general principles of law of which the Court of Justice ensures respect. It is necessary to consider whether the Community

¹⁴ See E/CN.4/1128, part B.

¹⁵ Interhandel case, *I.C.J. Reports*, 1959, p. 27.

¹⁶ Lawless case.

provision in question has violated any fundamental rights whose observance must be ensured in the Community legal order.¹⁷ Within the Court's jurisdiction would fall legislative and administrative acts of the institutions of the Community, including staff regulations laid down by the Commission.

349. Considerable case law has built up concerning the interpretation of regulations relating to pensions and other social security benefits available to migrant workers who are citizens of one of the member States working in another member State. Although the main body of case law has been concerned with the rights of individuals who are nationals of the European member States, the Court also has jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment (art. 179).

350. It is possible for a national of one of the nine member States of the European Community to apply to the European Court of Justice for a ruling on the interpretation of the social security provisions in force. A recent ruling concerned the applicability in national legislation of article 119 providing for the implementation of equal remuneration for men and women. This ruling could affect the rights of all individuals and not be confined to nationals of the Community.

3. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

351. The Commission, under the provisions of its statute and its regulations, may receive individual communications containing complaints of violations of human rights within the American States signatories. Anonymity, incompatibility with the provisions of the Statute, irrelevance or being substantially identical with another communication would render the communication inadmissible. The powers of the Commission are limited to referring the case to the State concerned and making recommendations to that State to take appropriate measures to ensure observance of the rights which have been violated. The reports may be published (Statute, art. 9 c).

C. Provisions under treaties for the settlement of disputes on a reciprocal basis

352. Numerous bilateral treaties concerned with social or humanitarian issues, such as frontier workers' protection, freedom of movement for nationals of both States parties, social security arrangements, exchanges of labour force, or the right to occupy posts usually reserved to nationals (generally treaties of establishment and friendship or treaties relating to social security benefits), contain provision for the settlement of disputes between the States parties affecting the rights of their nationals. In the case of establishment agreements, disputes are settled through diplomatic negotiation, failing which,

recourse may be had to a mixed advisory committee entrusted with the application of the terms of the treaty or to a joint conciliation commission, followed by a commission of arbitration, which is empowered to give final and binding decisions.¹⁸ Application may, in some cases, be made to the President of the International Court of Justice in the event of failure to appoint members of an arbitration tribunal.

Claims relating to property

353. Indemnities payable by way of compensation for loss of property rights may be claimed by various methods, according to the terms of some bilateral treaties. There may be a statement of principle, the global sum may be agreed, or it may be agreed that cases would be dealt with on an individual basis.¹⁹ Alternatively, a fixed sum is payable to the claimant State, for distribution among the interested parties, or a mixed claims commission may be established under the terms of the agreement.²⁰

D. National courts

354. The individual must seek national remedies before having recourse to any regional or international implementation machinery. Replies from Governments to questions 3.I (v), 3.II (vi), 3.III (vii) and 3.IV (v) of the questionnaire (annex IV) confirmed that aliens generally had the same rights and treatment as nationals before their national courts and tribunals. One Government indicated that an alien may be asked to put down a deposit for costs of the action.

355. The national courts in the member States of the Council of Europe are bound by the terms of the European Convention to guarantee equal protection to all individuals resident within their jurisdiction regardless of nationality or civil status.²¹ National courts in the member States of the European Community also have a duty to protect the rights of individuals which are conferred on them by virtue of articles of direct application under the EEC Treaty.²²

E. Protection of claimant and assistance in submission of petition

356. Individuals who, pursuing their case before the European Commission of Human Rights, may have to put in a personal appearance at Strasbourg,

¹⁸ See *Survey of Treaty Provisions for the Pacific Settlement of International Disputes, 1949-1962* (United Nations publication, Sales No. 66.V.5).

¹⁹ D. Bindschedler, "La protection de la propriété privée en droit international public", *Recueil des Cours*, 1956, vol. II, pp. 273 et seq.

²⁰ Agreement between Italy and Yugoslavia, 23 May 1949, art. 3; Agreement between Yugoslavia and Turkey, Protocol of 5 January 1950.

²¹ J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford, Clarendon Press, 1969), p. 18.

²² Van Duyn case.

¹⁷ Nold case (Case 4/73).

the seat of the Commission, are protected by the Agreement relating to persons participating in proceedings of the European Commission and Court of Human Rights.²³

357. Freedom of movement and of transit to attend the Commission are guaranteed. The alien is specifically protected and granted an absolute right to return to the country from which his journey commenced provided there is no delay in his return (art. 4 (3)). Certain limits are permissible, where for instance there would be a high security risk.

358. Under the agreement, individual applicants who take part in proceedings (including making a communication with a view to completion) instituted before the Commission under article 25 are protected, in complete freedom, at Strasbourg.

359. A system of legal aid was introduced by the Council of Europe for the benefit of those individuals who are not citizens of the country in which they live and who therefore may not be eligible for financial support through the ordinary national schemes.

F. Overlapping of machinery available

360. From the description of the various bodies and authorities competent to examine violations of human rights, it would seem that the individual may have a choice of methods by which to claim redress. The alien living in the territory of a State which is party to the International Covenant on Civil and Political Rights and also a member of the Council of Europe and a contracting party to the European Convention would be able to select either of these avenues, but he will have to use his powers of selection with care. The European Convention protects 19 rights, the Covenant 23. The wording and import are not the same in the two instruments, in particular, restrictions on expulsion of individual aliens (art. 13). In relation to the rights of aliens, the limits which may be imposed by States to restrict the political activities of aliens are explicit in the European Convention (art. 16).

361. The individual living in a State which has accepted the Optional Protocol under the United Nations Covenant and which has also made a declaration under article 25 of the European Convention will have a choice of system. The European Com-

²³ A. H. Robertson, "Agreement relating to persons participating in proceedings of the European Commission and Court of Human Rights", in *Miscellanea W. J. Ganshof van der Meersch*, vol. I (Brussels, Bruylant, 1972), pp. 545 *et seq.*

mission and eventually the Court may make a binding decision, whereas the United Nations Human Rights Committee may refer back to governments. The European Commission will not deal with petitions submitted under article 25 if the subject-matter is substantially the same as that already submitted under another procedure of international investigation or settlement and there is no relevant new information (art. 27 (1) (b)). The European Commission would be prevented from considering a complaint already made to the United Nations committee, whereas, once proceedings are terminated in Strasbourg, the United Nations Committee could receive a petition.

362. There is further overlapping in the availability of machinery for those individuals who reside in one of the nine member States of the European Community which are also parties to the European Convention on Human Rights and have ratified the United Nations International Covenants.²⁴

363. States parties to the Convention and to the Covenant may make a reservation as to the competence of the United Nations Human Rights Committee, with the effect that that body could not receive individual complaints which are or have been the subject of examination by the European Commission. Denmark, Norway and Sweden have made reservations to that effect.²⁵

364. The theoretical arguments which now surround the possibility of alternative means of redress after the adoption of human rights instruments with no adequate or effective means of implementation must be viewed with caution. The process through the European Commission is slow, for a variety of reasons, and is only available to any individual within the territorial jurisdiction of the 18 contracting parties²⁶ to the European Convention.

365. The alien will for some time, unless the Human Rights Committee proves itself to be an effective protector of the rights of all individuals, regardless of political and other considerations, have to rely on the discretionary diplomatic protection accorded by his State of nationality. The refugee and the stateless, deprived of this means of redress, form that corpus of aliens who remain with minimum guarantees of protection of their rights.

²⁴ P. Pescatore, "The protection of human rights in the European Communities", *Common Market Law Review*, vol. IX, 1972, pp. 73-79.

²⁵ Council of Europe Doc. 3773 (Information report on the protection of human rights in the United Nations).

²⁶ *Editor's note*: Now 21.

VIII. CONCLUSIONS

366. From the foregoing analysis and examination of contemporary international multilateral and bilateral instruments in the field of human rights, the following main conclusions may be drawn:

(1) The problem of the protection and treatment of aliens is not transient, temporary or local, but continuing and universal. It is not an isolated problem in point of time or of place, and therefore a universal approach is needed and an effort to reach universal consensus on this problem must be made.

(2) The many conditions attaching to the implementation and enforcement of provisions contained in international instruments have by no means been universally fulfilled.

(3) The wording of international instruments as they relate to aliens is unclear and imprecise, "nationality" not being included in the non-discrimination clauses. Both in the International Covenant on Economic, Social and Cultural Rights and in the International Convention on the Elimination of All Forms of Racial Discrimination, provision is made for distinction between nationals and aliens.

(4) Effective measures protecting the rights of individuals, including aliens, have so far been implemented at regional level. There has not so far been successful implementing machinery at international levels. The Human Rights Committee set up under the International Covenant on Civil and Political Rights and the obligation of the Economic and Social Council to receive reports under article 17 of the International Covenant on Economic, Social and Cultural Rights will now provide an opportunity to remedy this lacuna.

(5) Diplomatic protection available to citizens abroad by their State of nationality is discretionary and has some imperfections, but it remains for the time being the only effective form of protection available to the alien.¹ A stateless person does not, of course, benefit from this form of protection.

(6) Instruments adopted to protect certain categories of aliens—the refugee, the stateless person and the migrant worker—are limited in their scope and effect. They cover a limited range of persons, they are ratified by only some States Members of the United Nations, and the rights recognized in these instruments are in some instances limited in their standard to a level below that available to nationals.

(7) Constitutions of international organizations proclaim concern for all individuals, but owing to the lack of resources and international co-operation, States are not always able at the present time to fully implement such policies.

(8) ILO Conventions, which play a considerable role in the improvement of the standard of living of all workers, have a flexible approach to the obligations of States, depending on the economic and social development of the area and the consequent possibility of applying benefits of economic progress to all individuals, alien as well as national.

(9) Regional organizations whose members have comparatively similar economic and social development may protect the rights of all individuals who are nationals of the member States of the region. Aliens may benefit in particular with regard to conditions of employment, social security and other social benefits and educational opportunities, on a reciprocal basis.

(10) More favourable treatment may be given to the nationals of parties to bilateral agreements as compared with the treatment of other aliens. Refugees and stateless persons may, in some cases, also benefit from more favourable treatment under the relevant conventions.

(11) States usually recognize the right of aliens to have access to courts and tribunals and to a fair and public hearing on an equal basis with nationals, but there may be procedural and other formalities applicable to aliens which are not necessary or required in the case of nationals. Legal aid is not always available to aliens and may be the reason for an alien being unable to enforce the recognition of his rights or obtain redress for a violation of those rights.²

(12) Political rights are usually reserved to nationals. There is evidence of one State giving voting rights to aliens for municipal elections and one State giving voting rights to aliens, on historical grounds, of one particular nationality.

(13) The requirements for an alien to acquire the nationality of a State of residence vary considerably from State to State even within the same region of the world.

(14) Reservations may be made on ratification of instruments, limitations and restrictions may be imposed by States on the rights and freedoms recognized in those instruments and derogations may be made in certain circumstances.

(15) Derogations may not be made from certain rights.³

(16) Some limitations and restrictions are imposed on States in their treatment of aliens, both by international law and by treaty.

(17) Aliens have duties and obligations to the State in which they reside, although not precisely the same ones as those owed by citizens.

¹ R. Lillich, "The diplomatic protection of nationals abroad: an elementary principle of international law under attack", *A.J.I.L.*, vol. 69, No. 2 (April 1975).

² P. Weis, "Diplomatic protection of nationals and international protection of human rights", *Revue des droits de l'homme-Human Rights Journal*, vol. IV, Nos. 2-3 (1971), p. 643.

³ See annex III.

(18) Implementing machinery for the enforcement of human rights is inadequate and, in so far as it exists, not significantly effective. This applies to the protection of all individuals, nationals and aliens. Regional machinery is, in some areas, available to aliens as well as to nationals. It is effective, but it takes a long time for the individual to have redress.

(19) Overlapping of the competence of the European Court of Human Rights and the Human Rights Committee established under the International Covenant on Civil and Political Rights should not be allowed to impede any individual petition by an alien against a ratifying State party.

(20) Finally, it must be concluded that the rights of aliens are not universally protected. The application of the provisions of international human rights instruments to aliens is unclear and uncertain, and existing means of implementation are inadequate. The efforts made in certain regions of the world to protect the rights of all individuals, evidenced in multilateral and bilateral agreements, show that it is not impossible for States to guarantee protection for the rights of aliens as well as of their own citizens. This factor should be an encouragement to all States to seek to attain the standard set out in the Universal Declaration of Human Rights in accordance with the obligations laid down in the Charter of the United Nations.

IX. RECOMMENDATIONS

367. The conclusions drawn from the analysis, examination and research of the subject of this report emphasize the need for action by States, and by regional and international organizations, for the rights and freedoms of aliens to receive more adequate and more effective protection.

368. The Rapporteur therefore proposes the following recommendations for the consideration of the Sub-Commission:

NATIONAL ACTION. States should be urged:

- (1) To set up commissions to study their national laws with a view to ensuring that they correspond to the provisions for the protection and guarantee of all the human rights and fundamental freedoms contained in the Universal Declaration of Human Rights and the International Covenants on Human Rights in cases where these rights were heretofore protected by national legislation;¹

In relation to refugees and stateless persons:

- (2) To ratify, if they have not already done so, the Convention relating to the Status of Refugees and the Protocol of 1967 to that Convention;
- (3) In the case of member States of the Organization of African Unity, to ratify, if they have not already done so, the Convention Governing the Specific Aspects of Refugee Problems in Africa;
- (4) To accede, in the case of member States of the Council of Europe which have not yet done so, to the European Agreement on the Abolition of Visas for Refugees of 20 April 1959;
- (5) To study the matters of *refoulement*, expulsion and detention with a view to achieving a similar approach in the legislation and administrative procedures regarding the treatment of refugees;
- (6) To make every effort to assist in the settlement of refugees who are for the time being receiving provisional shelter and so contribute to the integration of those refugees in the community of the host State on a permanent basis;
- (7) To make every effort to accord to refugees as far as possible equal treatment to that of nationals;

¹ Replies from Governments of Member States to question (8) of the questionnaire, "Does the Member State consider that the guarantees accorded to the human rights of aliens are sufficient or should further measures be envisaged? If so, what kind of measure would be considered more effective than those in existence at the present time?", indicated that measures were sufficient or satisfactory. One Government replied that a commission had been set up, as proposed in recommendation No. 1 above.

- (8) To make every effort to recognize the basic right of the refugee to retain the unity of his family;²
- (9) To give a liberal interpretation to the term "refugee";
- (10) To give every moral, financial and practical support and assistance to the United Nations High Commissioner for Refugees in his humanitarian work;
- (11) To ratify the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness. In particular, States are requested to make every effort to implement article 1 of the latter Convention and grant nationality to any child born within their territory who would otherwise be stateless;
- (12) To recognize the rights of the stateless on the same basis, as far as possible, as nationals;

In relation to migrant workers:

- (13) To ratify the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975, and to implement the recommendations contained in part II of that Convention with all possible speed;
- (14) To support and encourage the work of the ILO in its efforts to promote the adoption of policies to improve the working and living conditions of all workers, especially migrant workers;
- (15) To study the recommendations concerning the exploitation of labour through illicit and clandestine trafficking submitted by Mrs. Halima Warzazi (E/CN.4/Sub.2/L.636) with a view to implementing the measures proposed for host States and for the country of origin;

In relations with other States:

- (16) To consider with other neighbouring States the formation of regional organizations for the improvement of the standard of living of all individuals within the region and the protection of the rights of all individuals within the jurisdiction of the States belonging to the region, on a basis of mutual assistance and reciprocity;
- (17) To conclude bilateral and multilateral agreements for the protection of their nationals working in the territory of another State, in particular in relation to working conditions and social security benefits;

² Recommendation B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.

In relation to civil rights:

- (18) To ensure that every facility is given through their administrative procedures and practices for aliens to be properly and adequately represented in courts and tribunals in order to obtain redress for violation of their rights;
- (19) To grant legal aid, whenever necessary, to aliens on the same basis as to nationals;
- (20) To be willing to exert their discretionary power of diplomatic protection for their citizens abroad whose rights have been violated;
- (28) To request the Commission to propose to the Economic and Social Council to invite the Human Rights Committee to ask States parties to the International Covenant on Civil and Political Rights to include in their reports the measures taken to protect the rights of aliens;
- (29) To make every effort to improve the legislation of Member States regarding the right of territorial asylum;
- (30) To encourage by all means, particularly through the United Nations University, the teaching of the principles of the international law of human rights, using seminars, conferences and educational courses in order to inculcate respect and observance of the rights and freedoms of individuals under the law, including the rights of aliens;

Generally:

- (21) To ratify the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the latter Covenant.

INTERNATIONAL ACTION.

- (22) To consider extending the definition of the term "refugee" under the present Convention and Protocol to include all those categories of refugees who are not now covered, including displaced persons;
- (23) To consider the inclusion of the term "nationality" as a ground for non-discrimination in future human rights instruments, taking into account the distinctions recognized in customary international law between a national and an alien;
- (24) To request the International Institute for the Unification of Private Law (UNIDROIT) to study and make proposals on the approximation of laws relating to naturalization with a view to simplifying the legal and procedural requirements for aliens to acquire the citizenship of the country in which they live, especially as between countries within a geographical region;
- (25) To consider the recommendations concerning the exploitation of labour through illicit and clandestine trafficking made by Mrs. Halima Warzazi (E/CN.4/Sub.2/L.636, p. 6), with a view to adopting them;
- (26) To encourage, by the dissemination of information, Governments and non-governmental organizations in consultative status with the United Nations to report situations which reveal abuse or violation of the rights of aliens to the appropriate bodies within the United Nations;
- (27) To request the Commission to propose to the Economic and Social Council to invite States parties to the International Covenant on Economic, Social and Cultural Rights, when submitting their reports in accordance with article 17 of the Covenant, to indicate where relevant the progress made in achieving protection for the rights of aliens;
- (31) In recognition of the conclusions reached in chapter VIII of this report that there is no international instrument which is directed to the protection of the human rights of aliens and that those instruments that do exist are unclear, or are to be implemented progressively, or contain many limitations, restrictions and powers of derogation, to support the adoption of a declaration on this subject. Such a declaration:
 - (a) would be in accordance with the view expressed by the International Law Commission that a statement or restatement of the law was required regarding the treatment of aliens;
 - (b) would be in line with the suggestions made by Mr. F. García Amador, former Special Rapporteur of the International Law Commission, in his scholarly work on the recent codification of the law of State responsibility for injuries to aliens;³
 - (c) would reflect and be evidence of State practice, resulting from bilateral and multilateral agreements, and be a source of encouragement to those States which do not so far recognize all economic, social, cultural and civil rights to aliens;
 - (d) would provide a clear statement seeking to maintain a just balance between the sovereignty of States and the protection of the rights and freedoms of all individuals;
 - (e) would draw the attention of States to the rights of aliens, who are not yet provided for as such in any international instrument in the field of human rights;
 - (f) may by custom become recognized as laying down rules binding upon States and serve as a first step towards the adoption of a Convention on the same subject-matter.

³ Discussing methods of codification on the treatment of aliens, Mr. García Amador confirms that "an enumeration—a provision itemizing the various rights and guarantees, the violation of which would give rise to responsibility—would naturally be the most effective method". F. García Amador, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, N.Y., Oceana Publications, 1974), p. 7.

ANNEXES

Annex I

DRAFT DECLARATION ON THE HUMAN RIGHTS OF INDIVIDUALS WHO ARE NOT CITIZENS OF THE COUNTRY IN WHICH THEY LIVE^a

The General Assembly,

Considering that the Charter of the United Nations encourages the promotion of universal respect for and observance of the human rights and fundamental freedoms of all human beings,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, 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,

Considering that the Universal Declaration of Human Rights proclaims further that everyone has the right to recognition everywhere as a person before the law and aims at ensuring that all are equal before the law and are entitled without any discrimination to equal protection of the law, and that all are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination,

Being aware that the States parties to the International Covenants on Human Rights now in force undertake to guarantee that the rights enunciated in these covenants will be exercised without discrimination of any kind as to race, colour, sex, or language,

Conscious that, with improving communications and the development of peaceful contacts and friendly relations between countries, individuals increasingly reside and work in countries of which they are not citizens,

Reaffirming the principle of the sovereign equality of States,

Noting that the International Convention on the Elimination of All Forms of Racial Discrimination provides that States may make certain distinctions, exclusions, restrictions or preferences between their own citizens and the citizens of other countries,

Noting further that existing international instruments need to be supplemented in order to protect the human rights of individuals who are residing and may be working in countries of which they are not citizens,

Proclaims this Declaration:

Article 1

For the purposes of this Declaration, the term "non-citizen" shall apply to any individual who lawfully resides in a State of which he is not a national.

Article 2

1. Non-citizens shall observe the laws in force in the State in which they reside and refrain from illegal activities prejudicial to the State.

2. Every State is entitled to expect that non-citizens will respect the customs and traditions of the people of the State.

Article 3

Every State shall make public any laws, regulations or administrative measures which distinguish between citizens and non-citizens or affect the rights of non-citizens.

Article 4

Notwithstanding any distinction which a State is entitled to make between its citizens and non-citizens, every non-citizen shall enjoy at least the following rights, always respecting the obligations imposed upon a non-citizen by article 2, and subject to the limitations provided for in article 29 of the Universal Declaration of Human Rights:

- (i) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;
- (ii) The right to equal access to and equal treatment before the tribunals and all other organs administering justice, and to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (iii) The right to freedom of movement and to choice of residence within the borders of the State, subject to such restrictions as are provided by law and are absolutely necessary for compelling reasons of public policy, public order, national security, or public health or morals;
- (iv) The right to leave the country and return to his own country;
- (v) The right to marriage and choice of spouse;
- (vi) The right to own property alone as well as in association with others;
- (vii) The right to freedom of thought, conscience and religion;
- (viii) The right to freedom of opinion and expression;
- (ix) The right to freedom of peaceful assembly and association;
- (x) The right to retain his own language, culture, and traditions.

Article 5

No non-citizen shall be subjected to arbitrary arrest or detention.

Article 6

No non-citizen shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7

1. No non-citizen shall be subjected to arbitrary expulsion or deportation.

^a Revised text, issued as E/CN.4/1336 of 5 December 1978. The original draft declaration prepared by the Special Rapporteur appeared in June 1977 (E/CN.4/Sub.2/392, annex I); the text was amended in July 1978 in the light of the replies of Governments and the comments of members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities at the thirtieth session (E/CN.4/Sub.2/L.682 and Add.1) and further revised in September 1978 in the light of comments of members of the Sub-Commission at the thirty-first session (E/CN.4/1336).

2. A non-citizen may be expelled from the territory of a State 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 the purpose before the competent authority or a person or persons especially designated by the competent authority.

3. Collective expulsion of non-citizens is prohibited.

Article 8

Notwithstanding any distinction which a State is entitled to make between its citizens and non-citizens, every non-citizen shall enjoy at least the following economic and social rights, always respecting the obligations imposed on a non-citizen by article 2:

- (i) The right to just and favourable conditions of work, to equal pay for equal work, and to just and fair remuneration;
- (ii) The right to repatriate earnings and savings, in accordance with national laws in force;
- (iii) The right to join trade unions and participate in their activities, subject to national laws in force;

- (iv) The right to public health, medical care, social security, social service and education, provided that the minimum requirements for participation in national schemes are met and that undue strain is not placed on the resources of the State.

Article 9

1. No non-citizen shall be subjected to arbitrary confiscation of his lawfully acquired assets.
2. Any non-citizen whose assets are expropriated in whole or in part in accordance with national laws in force shall have the right to just compensation.

Article 10

Any non-citizen shall be free to communicate with the consulate or diplomatic mission of his country or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of his own country's interests in the State where he resides.

Annex II

INTERNATIONAL, MULTILATERAL, REGIONAL AND BILATERAL INSTRUMENTS IN THE FIELD OF HUMAN RIGHTS

I. MULTILATERAL INSTRUMENTS CONCLUDED UNDER THE AUSPICES OF THE UNITED NATIONS

Charter of the United Nations, 1945

- * Universal Declaration of Human Rights, 1948
- * International Covenant on Economic, Social and Cultural Rights, 1966
- * International Covenant on Civil and Political Rights, 1966
- * Optional Protocol to the International Covenant on Civil and Political Rights, 1966
- * Convention on the Prevention and Punishment of the Crime of Genocide, 1948
- * Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968
- * International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- * Convention relating to the Status of Refugees, 1951
- * Protocol relating to the Status of Refugees, 1966
- * Convention relating to the Status of Stateless Persons, 1954
- * Convention on the Reduction of Statelessness, 1961
- * Convention on the Political Rights of Women, 1952
- * Convention on the Nationality of Married Women, 1957
- * Convention on the International Right of Correction, 1952
- * Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962
- * Slavery Convention, 1926
- * Protocol, 1953, amending the Slavery Convention signed at Geneva on 25 December 1926
- * Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956
- * Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949
- Convention on the High Seas, 1958

2. MULTILATERAL INSTRUMENTS NOT INCLUDED UNDER 1 ABOVE

Charter of the International Military Tribunal, Nuremberg, 1945
London Agreement relating to the Issue of a Travel Document to Refugees who are the Concern of the Intergovernmental Committee on Refugees, 1946
Geneva Conventions of 12 August 1949
Convention between the European Economic Community and 46 African, Caribbean and Pacific States, Lomé, 1975

3. INTERNATIONAL LABOUR ORGANISATION CONVENTIONS

- * Freedom of Association and Protection of the Right to Organise, 1948 (No. 87)
- Fee-Charging Employment Agencies (Revised), 1949 (No. 96)

- Migration for Employment (Revised), 1949 (No. 97)
- Social Security (Minimum Standards), 1952 (No. 102)
- Maternity Protection (Revised), 1952 (No. 103)
- * Abolition of Forced Labour, 1957 (No. 105)
- Plantations, 1958 (No. 110)
- * Discrimination (Employment and Occupation), 1958 (No. 111)
- Social Policy (Basic Aims and Standards), 1962 (No. 117)
- Equality of Treatment (Social Security), 1962 (No. 118)
- Employment Injury Benefits, 1964 (No. 121)
- * Employment Policy, 1964 (No. 122)
- Invalidity, Old-Age and Survivors' Benefits, 1967 (No. 128)
- Medical Care and Sickness Benefits, 1969 (No. 130)
- Minimum Age, 1973 (No. 138)
- Migrant Workers (Supplementary Provisions), 1975 (No. 143)

4. CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

International Labour Organisation
Food and Agriculture Organization of the United Nations
United Nations Educational, Scientific and Cultural Organization
World Health Organization

5. REGIONAL INSTRUMENTS

- Charter of the Organization of African Unity, 1963
- Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969
- Charter of the African and Malagasy Common Organization, 1966
- Convention of the African and Malagasy Common Organization on Establishment, 1971
- Charter of the Union of Central African States, 1968
- Charter of the Organization of American States, 1948
- American Declaration of the Rights and Duties of Man, 1948
- American Convention on Human Rights, 1969
- Arab Labour Mobility Convention, 1968
- South East Asia Collective Defence Treaty, 1954
- Final Communiqué of the Afro-Asian Conference, Bandung, 1955
- Pacific Charter, 1954
- Statute of the Council of Europe, 1949
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 1950, and Protocols
- Treaty of Rome Establishing the European Economic Community (EEC Treaty), 1957
- European Social Charter (No. 35), 1961
- European Agreement on the Abolition of Visas for Refugees (No. 31), 1959
- European Convention on Establishment (No. 19), 1955
- European Convention on Extradition (No. 24), 1957
- Additional Protocol to the European Convention on Extradition (No. 86), 1975

* Texts of those instruments marked with an asterisk are contained in *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No. E.78.XIV.2).

European Agreement on Regulations Governing the Movement of Persons Between Member States of the Council of Europe (No. 25), 1957,
 European Convention on the Academic Recognition of University Qualifications (No. 32), 1959
 European Code of Social Security, 1964, and Protocol (No. 48), 1964
 Economic Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights (No. 67), 1969
 European Convention on Social Security (No. 78), 1972
 European Convention on the Suppression of Terrorism, 1977
 EEC Association Agreement with Greece, 1962
 EEC Association Agreement with Turkey, 1964
 Nordic Agreement on Common Labour Market, 1954

6. TREATIES OF LIMITED GEOGRAPHICAL APPLICABILITY

Peace Treaties between the Allied and Associated Powers and Bulgaria, Finland, Hungary, Italy and Romania, 1947
 Treaty of Peace with Japan, 1951
 Memorandum of Understanding between the Governments of Italy, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia regarding the Free Territory of Trieste, 1954
 Treaty between the United Kingdom of Great Britain and Northern Ireland, Greece and Turkey and Cyprus concerning the Establishment of the Republic of Cyprus, 1960

7. TRUSTEESHIP AGREEMENT

Between the United Nations and the United States of America for the Territory of the Pacific Islands, 1947
 Between the United Nations and Italy for the Territory of Somaliland, 1950

^a Selected examples from the numerous bilateral agreements which concern economic, social, cultural and civil rights of persons, and their property.

8. BILATERAL AGREEMENTS^a

Senegal-Gabon, 1973 (employment, residence and movement of workers)
 Senegal-Gambia, 1966 (circulation of persons)
 Senegal-Mali, 1965, (family allowances and accident benefit)
 Libya-Sudan, 1965 (exchange of workers)
 Czechoslovakia-Belgium, 1945 (repatriation of nationals)
 Poland-Czechoslovakia, 1947 (friendship and mutual aid)
 Belgium-Poland, 1947 (social security)
 Czechoslovakia-Hungary, 1946 (concerning exchange of populations)
 Denmark-Norway, 1951 (unemployment insurance)
 Federal Republic of Germany-Austria, 1951 (unemployment insurance)
 Federal Republic of Germany-Austria, 1966 (social security)
 Federal Republic of Germany-Finland, 1957 (accidents at work)
 Federal Republic of Germany-Yugoslavia, 1956 (transfer of social security rights)
 Algeria-France, 1972 (family allowances)

9. GENERAL ASSEMBLY RESOLUTIONS

428 (V) of 14 December 1950 containing the Statute of the Office of the United Nations High Commissioner for Refugees
 2920 (XXVII) of 15 November 1972 concerning exploitation of migrant workers
 31/35 of 30 November 1976, "Report of the United Nations High Commissioner for Refugees"
 31/127 of 16 December 1976, "Measures to improve the situation and ensure the human rights and dignity of all migrant workers"

10. DECLARATIONS AND PROCLAMATIONS

* Proclamation of Teheran, 1968
 * Declaration of the Rights of the Child, 1959
 * Declaration on Social Progress and Development, 1969
 * Declaration on Territorial Asylum, 1967
 OAU Declaration on the Problem of Subversion in Africa, 1965

Annex III

Rights from which there can be no derogation*

<i>Subject</i>	<i>International Covenant on Civil and Political Rights</i>	<i>European Convention on Human Rights</i>	<i>American Convention on Human Rights</i>
	<i>Article</i>	<i>Article</i>	<i>Article</i>
Life	6	2	4
Slavery	8	4 (1)	6
Torture	7	3	5
Recognition before the law	16		3
Imprisonment for non-fulfilment of contractual obligations	11		
Criminal guilt	15	7	
Religion	18		12
Family			17
Name			18
Child			19
Nationality			20
Participation in government			23 (reserved to citizens)

*Under the following articles of the instruments referred to: International Covenant on Civil and Political Rights, article 4 (2); European Convention on Human Rights, article 15 (2); American Convention on Human Rights, article 27 (2).

Annex IV

INFORMATION REQUESTED

On 13 May 1975, a request was sent to Governments, regional organizations, specialized agencies and non-governmental organizations to provide information required in order to complete the report.

The questionnaire was dispatched in the following form:

QUESTIONNAIRE

1. In accordance with resolution 10 (XXVII) adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, a report is to be prepared on "The problem of the applicability of existing international provisions for the protection of human rights to individuals who are not citizens of the country in which they live".
In paragraph 4 of the resolution, the author is requested "to include an analysis of contemporary international, regional, multilateral and bilateral instruments relating to the human rights of individuals who are not citizens of the country in which they live".
Governments regional organizations, specialized agencies and non-governmental organizations concerned are therefore requested to consider the following questionnaire in order to assist the author in her task.
2. The meaning of terms used are as follows:
 - (i) "Contemporary"—On the basis of the exchange of views on this subject during the meetings of the Sub-Commission, only those instruments adopted, signed and/or ratified after 1945 should be taken into account.
 - (ii) "Instruments"—These include *inter alia*, Charters, Treaties, Conventions, Covenants, Statutes, Acts, Agreements, Protocols, Declarations.
 - (iii) "Protection"—Legal, administrative and procedural measures by which human rights may be enforced. General statements guaranteeing human rights are also included.
 - (iv) "Human rights" and "fundamental freedoms"—Those set out in the Universal Declaration of Human Rights and the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, and the Optional Protocol to the latter Covenant.
 - (v) "Individuals who are not citizens of the country in which they live":
 - (a) Anyone who, according to national legislation, is classified as an alien and
 - (b) who is a permanent resident in that country according to national legislation, or who has his home for the time being in that country.
3. I. *Multilateral instruments*
 - (i) Which multilateral instruments in the field of human rights concluded under the auspices of the United Nations have been signed and ratified?
 - (ii) Which of the rights contained in these instruments are recognized as applying to everyone, including all aliens?
 - (iii) Which of these rights are recognized as being reserved to citizens or nationals?
 - (iv) (a) Are there any derogations from, or limitations or restrictions imposed on, one or more human rights, on grounds of nationality? If so,
 - (1) On which human rights?
 - (2) On what legal basis?
 - (b) Are such derogations, limitations or restrictions contained in
 - (1) national legislation and/or
 - (2) administrative practice?Please give details.
 - (v) What machinery is available to an alien to enforce the rights guaranteed
 - (a) nationally?
 - (b) internationally?
 - II. *Multilateral instruments other than those mentioned under I above*
 - (i) What multilateral instruments
 - (a) guaranteeing human rights
 - (b) which contain provisions guaranteeing all or some human rightshave been signed or ratified?
 - (ii) Which of the rights contained in these instruments are recognized as applying to everyone, including all aliens?
 - (iii) Which of these rights are recognized as being reserved
 - (a) to citizens or nationals?
 - (b) to citizens or nationals of the States parties to the instrument?
 - (iv) Which instruments provide for derogations from or limitations or restrictions on any of these rights?
 - (v) (a) Are there any derogations from or limitations or restrictions imposed on one or more human rights on grounds of nationality? If so,
 - (1) On which human rights?
 - (2) On what legal basis?
 - (b) Are such derogations, limitations or restrictions contained in
 - (1) national legislation and/or
 - (2) administrative practice?Please give details.
 - (vi) What machinery is available to an alien to enforce the rights guaranteed
 - (a) nationally?
 - (b) internationally?

III. Regional instruments

- (i) Which regional instruments
 - (a) guaranteeing the protection of human rights,
 - (b) which contain provisions guaranteeing all or some human rightshave been signed or ratified?
- (ii) Which of the rights guaranteed in this instrument or instruments apply to everyone, including aliens?
- (iii) Which of these rights are recognized as being reserved to citizens or nationals?
- (iv) Which of these rights are recognized as being reserved to nationals of the member States of the region?
- (v) Which instruments provide for any derogations from or limitations or restrictions on any of these rights?
- (vi) (a) Are there any derogations from or limitations or restrictions imposed on one or more human rights, on grounds of nationality? If so,
 - (1) On which human rights?
 - (2) On what legal basis?(b) Are such derogations, limitations or restrictions contained in
 - (1) national legislation and/or
 - (2) administrative practice?Please give details.
- (vii) What machinery is available to an alien to enforce the rights guaranteed
 - (a) nationally?
 - (b) internationally?

IV. Bilateral instruments

- (i) What bilateral instruments
 - (a) guaranteeing human rights
 - (b) which contain provisions guaranteeing human rightshave been signed or ratified?
- (ii) Do any bilateral instruments contain guarantees
 - (a) on a reciprocal basis?
 - (b) for the benefit of the nationals of one of the parties?If so which, and what are the relevant provisions?
- (iii) Which instruments provide for derogations from or limitations or restrictions on any of these rights?
- (iv) (a) Are there any derogations from or limitations or restrictions imposed on one or more human rights on grounds of nationality? If so,

- (1) On which human rights?
 - (2) On what legal basis?
- (b) Are such derogations, limitations or restrictions contained in
 - (1) national legislation and/or
 - (2) administrative practice?Please give details.
- (v) What machinery is available to an alien to enforce the rights guaranteed
 - (a) nationally?
 - (b) internationally?

4. Are any conditions required to be fulfilled before protection of human rights under any of the above-mentioned instruments is obtainable? For example, length of residence, type of work undertaken or profession, knowledge of language, nationality or country of origin, marriage, certificate of recognition of good character, professional or other qualifications, adequate financial means?
5. In the instruments referred to, is there any provision for better treatment of one type of alien than another and on what grounds? (For example, refugees, stateless). What difference in treatment between such aliens and other aliens exists in practice?
6. Where equal treatment is not available to aliens, what conditions are required by law for non-nationals, including dependants, to acquire the nationality of the Member State?
7. Which human rights, if any, are guaranteed by the Constitution of the Member State?
8. Does the Member State consider that the guarantees accorded to the human rights of aliens are sufficient or should further measures be envisaged? If so, what kind of measure would be considered more effective than those in existence at the present time? .
9. Any other information which may be considered relevant or helpful in the preparation of the report including a copy of the relevant provisions referred to above.

Annex V

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