REMEDIES FOR BREACH OF ALIEN'S RIGHTS UNDER INTERNATIONAL LAW A CRITICAL APPRAISAL

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1. ABSRACT

Non-citizens include asylum seekers, rejected asylum seekers, immigrants, non-immigrants, migrant workers, refugees, stateless persons, and trafficked persons. This book argues that regardless of their citizenship status, non-citizens should, by virtue of their essential humanity, enjoy all human rights unless exceptional distinctions serve a legitimate State objective and are proportional to the achievement of that objective. Non-citizens should have freedom from arbitrary arrest, arbitrary killing, child labour, forced labour, inhuman treatment, invasions of privacy, refoulement, slavery, unfair trial, and violations of humanitarian law. Additionally, non-citizens should have the right to consular protection, equality, freedom of religion and belief, labour rights (for example, as to collective bargaining, workers' compensation, healthy and safe working conditions, etc.), the right to marry, peaceful association and assembly, protection as minors; and social, cultural, and economic rights. There is a large gap, however, between the rights that international human rights law guarantee to non-citizens and the realities they face. In many countries, non-citizens are confronted with institutional and endemic discrimination and suffering. The situation has worsened since 11 September 2001, as several governments have

detained or otherwise violated the rights of non-citizens in response to fears of terrorism. This book attempts to understand and respond to the challenges of international human rights law guarantees for non-citizens human rights.

2. RESEARCH OBJECTIVE

The primary objective of the this research is to study the rights of aliens as provided under various International Human Rights Instruments which make no discrimination among the people worldwide as to race, sex, region, language and so on. Further, an effort is made to

analyse the provisions of some of the important international and regional instruments which directly or indirectly speaks about the human rights of aliens, and remedies available for breach of such rights under International Law.

Thus, the main objectives of the research paper are as follow:

- To Understand the concept of aliens
- To understand the problems of aliens
- To understand the various rights provided to aliens for their protection under various laws.
- To understand what are the remedies available under International Law.

3. RESEARCH PROBLEM

As far as the treatment of aliens is concern, it is noted that the aliens present in a foreign state are often victims of arbitrary and intolerant treatment from the state authorities, such as immigration officials and other executive authority. It is also worth to note that aliens may be prohibited from entering certain professions or from owning certain types of property. In a sense that, a state is a party to major international human rights instruments, it has legal obligations to protect the aliens present in its territory and this legal obligation arises as being a state party to international human rights instruments, more specifically to UDHR, ICCPR, CERD and so on. These instruments oblige states to ensure the safety of everyone in its territory. In addition, states have also legal obligation to protect aliens as provided under their Constitutions which include aliens in the enjoyment of the rights enshrined therewith. States and their law of lands have failed to grant every person including alien the right to have justifiable disputes settled by a court of law or another independent and impartial forum.

4. RESEARCH QUESTIONS

In this article, the researcher raises the following questions with respect to the rights of aliens from the perspective of modern International.

1. Who are aliens? Is there any precise and universally accepted definition for the term Alien?
2. Are there any documents containing the provisions for the protection of rights of aliens?
3. Are there any universally recognized documents protecting the rights of aliens?
4. What are the universally recognized rights of aliens?

5. What are the problems faced by the aliens in a foreign state?
6. What are the remedies available under International Law?

5. RESEARCH METHODOLOGY

The research focused on already collected and recorded information or data emanating from secondary sources in the literature, reports, journals, books, unpublished works and internet. This research was based on doctrinal or non empirical method of research. In order to tackle the research problem, the researcher has analysed the principles of international law which governs the treatment of aliens. This includes admission and expulsion of aliens, and analysis of the treaties which make provisions for minimum standards for the treatment of aliens. This includes the analysis of the International Covenant on Civil and Political Rights (ICCPR) which governs the admission and expulsion of aliens. It is worth noting that India is a state party to this Covenant. The Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live which was adopted in 1985 by the General Assembly (DHRINCL), this declaration recognises that the human rights expounded in the Universal Declaration of Human Rights (UDHR) and other international instruments.

6. SCOPE AND LIMITATIONS

This paper will deal with the major themes on the rights of aliens and remedies available for injury to Aliens and will try to address the major issues faced by states in this regard. The topics covered in this paper are not exhaustive and the author acknowledges that due to paucity of space, word limit and time, the vast area cannot be covered in this paper. The author also acknowledges that the law of State responsibility is predominantly seen in judicial pronouncements and no attempts of codification have been made by international organizations. Also, that this law is ridden with contradictions of standards of treatment and practices by various states.

7. CHAPTERISATION

1. Introduction: This chapter deals with meaning and definitions of an alien under International Law along with some of the general problems faced by them when they are in a foreign state.

2. Historical Background: The Second chapter focuses upon the **Historical Development** in respect of treatment of Aliens which attempts to trace the treatment of aliens in different ages.

3. Rights of Aliens: This section examines the various rights of aliens under various International Instruments which make no discriminations among peoples in respect of race, sex, religion, region, language and so on.

4. Remedies under International Law: This section deals with the different modes of remedies available for violation of the rights of aliens. The issue whether Compensation for the expropriated property should comply with any international standard and what is the kind of reparation that must be made in terms of compensation.

5. Conclusion: The Conclusion basically contains the answers to all the research questions raised in the research paper and whether the Hypothesis Questions stands ground or not is addressed.

CHAPTER 1

1. INTRODUCTION

Aliens play a very important role in the development of the country by contributing to the economy of a state in the world. Aliens are known as non-citizens, foreigners, etc. The aliens in the international filed play a very important role in the development of the international relations. In the era of the globalisation, liberalisaton and privatization, aliens bring along with them foreign exchange which is the need of the hour in India.

Aliens are the people who visit other country for a purpose and they are not tourist. They will be permitted to other country or visiting countries on the basis of passport of their home country.

Human rights and Fundamental Freedoms have all along been the basic norms of democracy and democratic values. Though modern constitutions, without exceptions, ensure to its citizens equality and equal protection besides right to life, liberty and property, they are yet to go a long way in accommodating the rights and interests of resident aliens[1].

[1]Dr. Sathish Chandra, Civil and political rights of Aliens – a study in National and International Laws, pp.9, (Deep and Deep Publications, New Delhi 1st edn, 1982).

An Alien is a person in a country who is not a citizen of that country. An alien is an individual who according to the laws of a given state, is not considered its national. This means that the definition of alien is a definition by exclusion. Anyone who is not a national of a certain country is considered and treated as an alien by that country.

Citizens when they stay outside their country they face lot of problem as they are not the citizen of the country they are staying but are aliens in the soil of that country. The main problem they face is discrimination between the citizens and non-citizens by the government, the people try to exploit them as they are new to the place. This paper tries to bring out the problems of aliens, rights under International law, various international conventions, and under human rights.

MEANING AND DEFINITION OF THE TERM 'ALIEN':

According to Article 1 of "Principles concerning Admission and Treatment of Aliens" as adopted by the Asian – African legal consultative organization at its 4th Session, an alien is a person who is not a citizen or national of the State concerned.[2]

An Alien is a person in a country who is not a citizen of that country. An alien is an individual who according to the laws of a given state, is not considered as it's national. This means that the definition of alien is a definition by exclusion. Anyone who is not a national of a certain country is considered and treated as an alien by that country. Even those who possess two or more nationalities, outside the countries of those nationalities, will be considered and treated as an alien everywhere.

Two conclusions can be drawn from this: firstly, the importance of the concept of nationality regarding the definition of aliens, and secondly, the obvious but often overlooked fact that any one is an alien outside the territory of the country of one's nationality. As such, if being an alien is something that we all can be, and are sometimes there must be nothing inherently wrong or inferior in this status.[3]

According to Merriam Webster's Collegiate Dictionary, "a citizen is a member of a state to whom he or she owes allegiance and is entitled to its protection". Hence, from this definition,

[2] http://www.unhcr.org/refworld/docid/44eae2224.html (last visited on 14 January 2013).
[3] Carmen Tiburcio, The Human Rights of Aliens under International and Comparative Law, pp.2, (Martinus Nijhoff Publishers, Dicho, U.S, 1st edn, 1984).

it is implicit that a non-citizen is someone who is not a member of a state nor owes allegiance to the state he or she currently resides.

Non-citizens should have freedom from arbitrary arrest, arbitrary killing, child labour, forced labour, inhuman treatment, invasions of privacy, refoulement, slavery, unfair trial, and violations of humanitarian law. Additionally, non-citizens should have the right to consular protection, equality, freedom of religion and belief, labour rights (for example, as to collective bargaining, workers' compensation, healthy and safe working conditions, etc.), the right to marry, peaceful association and assembly, protection as minors; and social, cultural, and economic rights. [4]

Aliens and their problems

Citizens are persons who have been recognized by a State as having an effective link with it. International law generally leaves to each State the authority to determine who qualifies as a citizen. Citizenship can ordinarily be acquired by being born in the country (known as *jus soli* or the law of the place), being born to a parent who is a citizen of the country (known as *jus sanguinis* or the law of blood), naturalization or a combination of these approaches.

A non-citizen is a person who has not been recognized as having these effective links to the country where he or she is located. There are different groups of non-citizens, including permanent residents, migrants, refugees, asylum-seekers, victims of trafficking, foreign students, temporary visitors, other kinds of non-immigrants and stateless people. While each of these groups may have rights based on separate legal regimes, the problems faced by most, if not all, non-citizens are very similar. These common concerns affect approximately 175 million individuals worldwide—or 3 per cent of the world's population.

Non-citizens should have freedom from arbitrary killing, inhuman treatment Non-citizens should have freedom from arbitrary killing, inhuman treatment, slavery, arbitrary arrest, unfair trial, invasions of privacy, refoulement, forced labour, child labour and violations of humanitarian law. They also have the right to marry; protection as minors; peaceful association and assembly; equality; freedom of religion and belief; social, cultural and economic rights; labour rights (for example, as to collective bargaining, workers' compensation, healthy and

[4] "World demographic trends: report of the Secretary-General" (E/CN.9/2003/5, Para. 53).

safe working conditions); and consular protection. While all human beings are entitled to equality in dignity and rights, States may narrowly draw distinctions between citizens and non-citizens with respect to political rights explicitly guaranteed to citizens and freedom of movement.

For non-citizens, there is, nevertheless, a large gap between the rights that international human rights law guarantees to them and the realities that they face. In many countries, there are institutional and pervasive problems confronting non-citizens. Nearly all categories of non-citizens face official and non-official discrimination. While in some countries there may be legal guarantees of equal treatment and recognition of the importance of non-citizens in achieving economic prosperity, non-citizens face hostile social and practical realities. They experience xenophobia, racism and sexism; language barriers and unfamiliar customs; lack of political representation; difficulty realizing their economic, social and cultural rights—particularly the right to work, the right to education and the right to health care; difficulty obtaining identity documents; and lack of means to challenge violations of their human rights effectively or to have them remedied. Some non-citizens are subjected to arbitrary and often indefinite detention. They may have been traumatized by experiences of persecution or abuse in their countries of origin, but are detained side by side with criminals in prisons, which are frequently overcrowded, unhygienic and dangerous. In addition, detained non-citizens may be denied contact with their families, access to legal assistance and the opportunity to challenge their detention. Official hostility—often expressed in national legislation—has been especially flagrant during periods of war, racial animosity and high unemployment. For example, the situation has worsened since 11 September 2001, as some Governments have detained non-citizens in response to fears of terrorism. The narrow exceptions to the principle of non-discrimination that are permitted by international human rights law do not justify such pervasive violations of non-citizens' rights.

CHPTAER 2

2. HISTORICAL DEVELOPMENT

Since time immemorial aliens have been protected by certain rules of humanitarianism and fair treatment. It has always been the part for the treatment of aliens to follow certain basic patterns, dictated by morals, religion or comity. Among the ancients that is Greeks, Romans as well as among the Hindus, it is known that law was at first part a part of religion. The ancient city

codes were a collection of rites, liturgical directions, and prayers, joined with legislative provisions. That is to say, at that time, the basis of every society was worship.

Thus a citizen by participating in the religion could enjoy all his civil and political rights, and in some situations, missing these ceremonies would lead to loss of rights of citizenship.[5]

In line with above, if we had to define a citizen at that time, it would be the person who had the religion of the city. The local gods supposedly did not want to receive prayers from strangers and access to temples was not only denied to them, but also their presence during scarifies was actually considered a sacrilege. As religion, at that time was a domestic matter, anyone who came from another culture, another city, was excluded from this privilege.[6]

1. ANTIQUITY

It can be observed that religion established a deep and in effaceable distinction between strangers and citizens. It even forbad that the privilege of citizenship be granted to a stranger.[7]

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

2. ANCIENT ISRAEL

Among the Jews, some important traits were found which today characterize the present idea of Nationalism. These traits were: the idea of being a chosen people, the consciousness of national history and the national messianism.

[5] Carmen Tiburcio, the Human Rights of Aliens under International and Comparative Law, pp.22, (Martinus Nijhoff Publishers, Dicho, U.S, 1st edn, 1984).

[6] Carmen Tiburcio, the Human Rights of Aliens under International and Comparative Law, pp.22, (Martinus Nijhoff Publishers, Dicho, U.S, 1st edn, 1984).

[7] Ibid PP.22

The idea of the Jewish people being chosen by god was developed at the beginning of Jewish history and has been present throughout the ages. "for thou art an holy people unto the lord thy god, and the lord has chosen thee to be a peculiar people unto himself, out of all the nations that are upon the earth". This view point put the Jews in a position isolated from strangers. It also brought with it an idea of racial purity that prevented the Jews from mixing with other peoples. Marriage with strange woman was expressly forbidden and during a certain period, the Jews were told to repudiate not only the wives they had taken from foreign tribes, but also the children born of these women.[8]

3. GREECE

The Greeks began writing law about the middle of the 7th century BC. By this time, their earliest literary works, the poems of Homer and Hesiod, had already achieved their final forms. So from these sources, it is possible to know the treatment of aliens in primitive Greece.[9]

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

Aristotle also cites this passage of the Cyclops after mentioning as example of the contrast between the Greeks and Barbarians, and Plato uses is as well in the same context.

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Aristotle, in his Politics, uses as a starting point the idea that the state is composed by a body of citizens, and that," citizenship is not determined by residence or by rights at Private Law, but by constitutional rights under the system of public law, a citizen is one who permanently shares in the administration of justice and the holding of office". Further, when examining those eligible for citizenship, he excludes aliens. He justifies this by quoting Homer in the Iliad, who says," like an alien man without honour". Further, he concludes that the mixture of races may lead to revolutions.[10]

[8] Carmen Tiburcio, the Human Rights of Aliens under International and Comparative Law, pp.25 (Martinus Nijhoff Publishers, Dicho, U.S, 1st edn, 1984).
[9] Ibid pp.25.
[10] Supra pp.26

It was also very common place in Greek literature to find a comparison between Greeks who were not ruled by tyrants and therefore were free and foreigners, usually Persians and Trojans who were ruled by tyrants and were therefore slaves.[11]

In Athens, the situation of foreigners and natives differed substantially, although access to the city was allowed to the former. Four classes of foreigners existed: -

1. the isolates, who had been granted, either in accordance with a treaty or by popular decree, some or all civil rights,

2. the meteques (moetics), who had been granted the right to live in the city but with several limitations, such as not being able to own immovable property, marry, either transmit property after death or receive it, among others,

3. The non resident aliens, who lived in the city, but without authorization and on a temporary basis,

4. The barbarians who lived entirely apart from the Greek civilization were denied all rights and had no protection whatsoever.[12]

4. ROME

In the twelve tables of Rome which is a codification dating back to around 450 BC, The aliens and the enemy were classed together. However, because in early Latin, the word hostis meant peregrines, it may be difficult for us nowadays to know if the Romans meant to put the enemy and aliens on the same level or if they were employing the term with the old Latin meaning.

This consolidation did not contain any provision regarding marriage between Romans and Non Romans. It did declare, however, that the title of the owner ship was to remain permanently without the scope of a peregrine.[13]

It should be observed that, in Rome, the inferior conditions of foreigners were due mainly to religious reasons, not to a feeling of hatred or suspicion against aliens. Rome, historically speaking, accepted foreigners in its midst.

5. MIDDLE AGE

[11] Carmen Tiburcio, the Human Rights of Aliens under International and Comparative Law, pp.26 (Martinus Nijhoff Publishers, Dicho, U.S, 1st edn, 1984).
[12] Ibid pp.26.
[13] Supra pp.27.

The invasion of the Roman Empire by Germanic tribes did not change the overall picture substantially. These tribes had no consciousness of a German nationality or race, and "from the Goths on to Charles magne, the Germanic tribes could enter civilization only by entering into the heritage of Roman universalism". They did not fight French or German battles but a Christian battle and the alien then, in spite of still existing practical inequality, had some rights.[14]

Moreover, these barbarian tribes did not create a unified system of laws; they either followed Roman law or the law of the individual tribes. A system of personal law was therefore created. Each individual was regulated by the law of the corresponding tribe, and this fact also contributed to an improvement in the treatment of aliens at that time.[15]

6. MODERN AGE

The Westphalia Peace Treaty of 1648 ended the thirty year war and created a new system of International law. According to this treaty, the European states recognized their common political interests and formed an international community; it was established that a political equilibrium was fundamental to the maintenance of peace, and France was recognized as the main international power.[16]

CHAPTER 3

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND RIGHTS OF ALIENS:

In 1985, the United Nations proclaimed the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live. The Declaration was designed to ensure that the fundamental human rights provided in the International Covenants on Human Rights would also be guaranteed to non-citizens. The Covenants are legally binding documents, which require each state that has ratified them to protect certain human rights for all individuals within its territory and subject to its jurisdiction. The Declaration serves as a guide for states as they design and implement laws to protect human rights.

[14] Carmen Tiburcio, the Human Rights of Aliens under International and Comparative Law, pp.27 (Martinus Nijhoff Publishers, Dicho, U.S, 1st edn, 1984).
[15] Supra pp.29
[16] Ibid,pp.30

The Universal Declaration of Human Rights (1948)

This document defines the fundamental rights of all people -- regardless of legal status. Article 14(1) provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution." Article 15 stipulates, "Everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

International Covenant on Civil and Political Rights (1976)

Every nation who has ratified the Covenant has agreed to grant "all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (article 2.1). The rights mentioned above include the right to fair procedure, freedom of expression, and protection from tyranny and injustice. This Covenant further prohibits the expulsion of lawful aliens from a nation without fair procedures, except when national security does not permit. The alien must also be provided with representation.

Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live (1985)

Establishes the rights of legitimate aliens to "security", "privacy", "to be equal before the courts", "to choose a spouse, to marry", "freedom of thought", "the right to leave the country", and the right to be joined by a spouse and dependent children (article 5). Also, the Declaration makes clear that aliens have the right to a safe working environment (article 8).[17]

Convention Relating to the Status of Stateless Persons (1960)

Establishes a state's obligation to "facilitate the assimilation and naturalization of stateless persons" (article 32) as well as a stateless person's right to the basic freedoms listed above.

World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001)

[17] www.umn.edu/humanrts/edumat/studyguides/noncitizens.html. (Last visited on 18/01/2013 at 10 am).

Adopted on September 8, 2001, in Durban South Africa, acknowledges that immigrants have been denied asylum and human rights by racist agendas in many nations and calls for states to ensure that the laws and policies relating to all immigrants are in accordance with the Universal Declaration of Human Rights.

Convention on the Elimination of All Forms of Racial Discrimination (1969)

This Convention calls for an end to all forms of discrimination, including prejudice against aliens seeking asylum or citizenship, as stated above.

International Convention on the Protection of All Migrant Workers and Their Families (1990)

Clarifies the wide-ranging freedoms due to those migrant workers who are legally employed in a country other than their own, including: freedom of expression (article 12), protection from discrimination (article 7), and the right to procedurally fair process (article 16.7). The treaty allows for states to limit the employment options of migrant workers (articles 51, 52) and to take action against migrant workers considered 'irregular'—those whose presence is not sanctioned by the state in question.

Migration for Employment (ILO 97) 1952

This treaty stipulates that each member state will "facilitate the departure, journey, and reception of migrants for employment" (article 4). Upon arrival migrant workers are entitled to help finding employment (article 2), medical care (article 5), and to be treated no different than a legal citizen in regards to protection from discrimination, social security, housing, and right to be collect a salary (article 6).

Protocol against the Smuggling of Migrants by Land, Sea, and Air (2001)

This protocol condemns the practice of smuggling migrants and makes clear that the migrants in question are to be immune from criminal charges (article 5) and to be swiftly and humanely returned to their country of origin (article 18). Provisions for the education of citizens about the harms of smuggling (article 15) and for preventing further smuggling by addressing the legal and socio-economic causes of smuggling migrants (article 15) are also established.

Discrimination (Employment and Occupation) (1960)

It calls for foreign nationals to be free from discrimination when seeking employment.

Regional and National Instruments of Protection

Europe

Amsterdam Treaty Amending the Treaty on the European Union and the Treaties Establishing the European Communities (1999)

The Amsterdam treaty went into force on May 1, 1999. The treaty expanded on details of immigration and asylum which had been initially discussed in the treaty of Maastricht. Under the Treaty of Amsterdam, the European Council must adopt the following defining measures within five years since the treaty went into force: each member state is responsible for examining an asylum claim and must set minimum standards on the reception of asylum seekers, minimum standards on the qualification of third country nationals as refugees and beneficiaries of subsidiary protection, minimum standards on procedures for granting and withdrawing refugee status, and minimum standards for giving temporary protection.

Common European Asylum System (ECRE)

ECRE was developed at the Tampere European Council of 1999. ECRE is based on the full and inclusive application of the Refugee Convention and Protocol. In addition, the EU agreed on a Charter of Fundamental Rights at the European Council in December 2000, which included a right to asylum. ECRE made representations to the drafting body on the content of this right to ensure that it applies to both EU citizens and third country nationals.

The Americas and Africa:

American Convention on Human Rights (O.A.S.)

Grants citizenship to a person born in a given nation if he or she has no other nationality (article 20). Protects the rights of aliens from being deported to countries where the alien's well being is threatened due to "race, nationality, religion, social status, or political opinions" (article 22.).

Council of the League of Arab States

Declares "no citizen shall be arbitrarily deprived of his original nationality, nor shall his right to acquire another nationality be denied without a legally valid reason" (article 24). The right to seek political asylum (article 23) is also established.

Key assistance agencies

The following organizations play key roles in assisting and protecting non-citizens worldwide:

United Nations Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD) was created in 1965 to monitor and review the actions of states in fulfilling their obligations to the International Convention on the Elimination of All Forms of Racial Discrimination. The Convention was designed to eliminate discrimination perpetrated by governments on the basis of race, color, descent, and national or ethnic origin.

Thus, from the careful study of each and every provision of the above said conventions, the rights of aliens can be summarized as follows:

1. The right to life and security of the person, including freedom from arbitrary arrest or detention
2. Protection against arbitrary or unlawful interference with privacy, family, home or correspondence
3. Equality before the courts, including the free assistance of an interpreter
4. The right to choose a spouse, to marry, and to found a family
5. Freedom of thought, opinion, conscience and religion
6. The right to retain language, culture and tradition
7. The right to transfer money abroad
8. The right to leave the country
9. The right to freedom of expression
10. The right to peaceful assembly
11. The right to own property individually or in association with others
12. Liberty of movement and freedom to choose their place of residence within the borders of the country

13. The right of spouse and minor or dependent children to join a lawful alien, as provided by national law
14. The right to safe and healthy working conditions, fair wages, and equal pay for equal work
15. The right to join trade unions
16. The right to social services, health care, education, and social security.
17. Protection from torture or cruel, inhuman, or degrading punishment
18. Freedom from being subjected to medical or scientific experimentation without the alien's free consent
19. Protection against arbitrary or unlawful expulsion from the country
20. The right to defend oneself from expulsion, except where compelling reasons of national security require otherwise
21. Protection from being arbitrarily deprived of lawfully acquired assets
22. The right to communicate at any time with the consulate or diplomatic mission of the country of which he or she is a national.

CHAPTER 4

Remedies under International Law:

Reparation of the wrong:

It is well established principle of International Law that the state whose rights have been violated has a right to request the delinquent state for the performance of such acts as are necessary for the reparation of the wrong done. Thus reparation for the wrong suffered is an important remedy available to the wronged state.[18] The term reparation has been used in Article 36(2) of the statute of International Court of Justice also. The permanent court of International Justice in Chorzow factory case,[19] explained the true meaning of reparation as "It is a principle of International Law that the breach of an engagement involves an obligation to make reparation in an adequate for….Reparation must, so far as possible, wipe out all the consequences of the illegal act and re – establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award,

[18] Dr.Avtar Singh, (ed.) "V.M.Shukla's Legal Remedies", p.no.66 (Eastern Book Company, Lucknow, 6th edn, 1991).
[19] (1928), PCIJ Series A, No.17, p.no. 47.

if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to International Law."

Thus, reparation may consist of 'Restitution', 'Compensation or damages' and 'Satisfaction'.

1. Restitution

The wronged state has a right to demand the return of specific articles, property, land etc. wrongfully taken by the delinquent state. Restitution in kind is designed to re – establish the situation which would have existed if the wrongful act or omission had not taken place.

2. Damages or compensation

Restitution is the normal form of reparation. It is only when restitution is not possible, that the aggrieved state is indemnified through damages or compensation. Damages or compensation are to be measured by pecuniary standards. Grotiouus has pointed out that money is the common measure of valuable things. Theoretically speaking, the consequences of the wrongful act of a state may be endless but there must be an end to its liability. Hence, in each case, it has to be decided to what extent the delinquent state should be held liable. In Chorzow factory case[20], the PCIJ explaining the meaning of reparation observed.

"Reparation must, so far as possible, wipe out all the consequences of the illegal act….". The question, therefore, is whether the obligation to compensate for the damage, resulting not directly from the unlawful act, but also from subsequent events. In the Alabama Arbitration case[21], in addition to claiming damages for the loss of captured vessels, United States claimed a number of consequential losses also, e.g., enhanced payments of maritime insurance, the prolongation of the war and the additional cost of suppressing the rebellion and expenses incurred in pursuing the raiders. The arbitral tribunal found Great Britain liable but disallowed the American claims for indirect loss.

The delinquent state would be liable for all the proximate consequences of its wrongful acts but not for the remote consequences. In arbitration awards in the case of damage to Portuguese Colonies[22] and Spanish Zone in Morocco[23], the principle laid down in this connection was that

[20] (1928), PCIJ Series A, No.17, p.no.47.
[21] (1872), 1 Moore, International Arbitrations, p.no 653.
[22] (1928), 2, RIAA, p.no1013.
[23] (1925), 2, RIAA, p.no 617.

"it is necessary to exclude losses which are only connected with initial act by an unexpected concatenation of exceptional circumstances which could only have occurred with the help of causes which are independent of the author of the act and which he could in no way have foreseen."

On the basis of this criterion, compensation was allowed to the members of the families of those who lost their lives in the Lusitania[24], but not to life insurance companies for having had to pay prematurely. The payments made by the life insurance companies depend on pre – existing contracts and not on the acts of Germany which was entirely alien to and ignorant of those contracts.[25]

2. Satisfaction

Satisfaction is a form of reparation which is awarded to compensate for the moral injury or the non – material damage to the personality of the state. In addition to the pecuniary damages, the delinquent state may be required to express official regrets and apologies. The expression 'official regrets' and 'apologies' is reparation in the nature of 'satisfaction' to the aggrieved state.[26]

Claim by A state for reparation for violation of rights of its nationals

Private person whose rights have been violated by a foreign state cannot put their claims before an international tribunal in their own capacity. But states have a right under international law to protect the life, liberty, property and honour of their nationals living abroad. So whenever, the rights of nationals of a state are violated by some unlawful act of another state, it has a right to demand reparation from the delinquent state. It should be noted that in such cases, the state does not act merely as the legal representative of the individual, but asserts its own rights. Thus, the reparation which it claims has the same international character as any other reparation due from one state to another. The PCIJ, in Mavrommatis Palestine concession case[27] observed: "it is an elementary principle of International Law that a state is entitled to protect its subjects when injured by acts contrary to International Law committed by another state, from whom

[24] (1923), 7, RIAA, p.no 32.
[25] Germany's responsibility to Portugal (1930), RIAA, p.no 1076.
[26] I' m Alone case, (1935), 3 RIAA, p.no 1609.
[27] (1924), PCIJ Series A, p.no.12.

they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by reverting to diplomatic action or International Judicial proceedings on his behalf, a state is in reality asserting its own rights, its right to ensure, in the person of its subjects respect for the rules of International Law….. Once a state has taken up a case on behalf of one of its subjects before an International Tribunal, in the eyes of the latter, the state is the sole claimant.

Further, as Oppenheim points out[28]: "From the time of the occurrence of the injury until the making of award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward." The principle of 'nationality of Claims' has been stated by the PCIJ, in the following word:

The right is necessarily limited to intervention on behalf of its own nationals, because in the absence of a special agreements, it is bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection and it is as a part of the function of the diplomatic protection that the right to take up a claim and to ensure respect for the rule of International Law must be envisaged.[29]

Exhaustion of Local Remedies

It is a well established rule of International Law that an International Tribunal will not entertain a claim put forward by a state on behalf of an alien on account of alleged denial of justice unless the person in question has exhausted the legal remedies available to him in the state concerned.[30] The underlying principle of this rule is that the respondent state must be given the opportunity before it is made internationally responsible, of doing justice its own way. So long as there has been a final pronouncement on the part of the highest component authority within the state, it cannot be said that justice has been definitely denied and that a valid International claim has arisen. The ICJ in the Interhandel case[31] observed: "Before resort may be hard to an

[28] Dr.Avtar Singh, (ed.) "V.M.Shukla's Legal Remedies", p.no.70 (Eastern Book Company, Lucknow, 6th edn, 1991).
[29] Penevezys – Soldutiskis railway, (1939), PCIJ Series A/B, No.76, p.no16.
[30] Dr.Avtar Singh, (ed.) "V.M.Shukla's Legal Remedies", p.no.70 (Eastern Book Company, Lucknow, 6th edn, 1991).
[31] (1959), ICJ Reports, p.no 27.

international Court in such a situation, it has been considered necessary that the state where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.

However, Oppenheim points out[32] that 'local remedies' rule will not be applicable to a claim " if it is clearly established that, in the circumstances of the case, an appeal to a higher municipal authority would have had no effect, for instance, when the supreme judicial tribunal is under the control of the executive organ whose acts are the subject – matter of complaint or when the decision complained of has been given in pursuance of an unambiguous municipal enactment with the result that there is no likelihood of a higher tribunal reversing the decision or awarding compensation, or as a rule, when the injury to the alien is the result of an act of the government as such."

The Calvo Clause

The government of a state, while entering into a contract with an alien, may insert a clause known as Calvo Clause, whereby alien agrees that 'doubts and controversies that may arise on account of this contract shall be decided by the competent tribunal of the state in conformity with its law, and shall not give rise to any foreign diplomatic intervention or international reclamation'. Thus, under this clause, an alien agrees that disputes shall be disposed by the local tribunals and he renounces any claim upon his home state for its protection.

An objection has been raised against 'calvo clause' because under such clauses an individual renounces the right which International Law confers not upon him, but upon his home state, of protecting him against treatment which contravenes the rules of International Law.[33] But in actual practice, Arbitral Tribunals have constantly upheld the validity of the calvo clause. The validity of the clause was upheld in the ofinoco steamship Co's case[34] between United States and Venezuela, where the clause protected the state against responsibility for losses caused by discrimination in permitting navigation facilities and also by acquisition of vessels during a revolution, though subsequently on a reference by the United States of the dispute to the

[32] Dr.Avtar Singh, (ed.) "V.M.Shukla's Legal Remedies", p.no.71 (Eastern Book Company, Lucknow, 6th edn, 1991).
[33] Ibid p.no.71.
[34] Supra Note 20 at p.no72.

permanent Court of Arbitration, it was held that the rejection of the claims was not justified.[35] A subsequent decision goes to this extent that if by virtue of the calvo clause, a foreign contracting party is confined to local remedies only and if the national forums are denying or delaying remedies, he can seek the aid of the home government and the latter can demand the application of International Law.[36]

Remedies against Criminal Acts of a State

Some acts by reason of their gravity, their ruthlessness, and their contempt for human life may be termed as criminal acts,[37] e.g., order of the government of a state for the whole - sale massacre of alien's resident within its territory. Similarly, the preparation and launching of an aggressive war may be described as a criminal act.[38]

A state, victim of such criminal acts, may use force against the guilty state. The charter of the U.N contains provisions of a penal nature to deal with crimes of war.[39] It is now well established rule that an individual who has committed a war crime may be punished according to International Law by the aggrieved state. The criminal responsibility of the state is in addition to the international criminal liability of the individuals guilty of crimes committed in violation of International Law.

Refusal of Reparation by the Delinquent State

If the delinquent state refuses reparation for the wrong done, the aggrieved state can adopt such means and measures as are necessary to enforce adequate reparation. These measures should be consistent with any existing obligations of pacific settlement.

The aggrieved state must, first try to secure reparation through peaceful or amicable means. But if the peaceful means fail, the aggrieved state may resort to any of the compulsive methods to enforce reparation. The peaceful means may be:

1. Negotiation
2. Good offices and Mediation
3. Conciliation
4. Arbitration
5. Judicial Settlement

[35] Dr.Avtar Singh, (ed.) "V.M.Shukla's Legal Remedies", p.no.72 (Eastern Book Company, Lucknow, 6th edn, 1991).
[36] U.S v. Mexico, General Claim Commissions, 1926.
[37] H.Lauterpacht (ed), Oppenheim's International Law, Vol 1, p.355(Longmans, Green and Co,London,8th edn,. 1955)
[38] Supra Note 23 at 72.
[39] See Chapter VII of the U.N. Charter.

6. Trough the machinery of the U.N.

The compulsive methods to secure reparation may be:

1. Restoration
2. Reprisals
3. Pacific Blockade
4. Intervention
5. Trough the machinery of U.N.

Peaceful means to secure reparation

1. **Negotiation**

   The aggrieved state must, first, request the delinquent state to perform such acts as are necessary for reparation of the wrong done. For this purpose, it must invite the delinquent state to settle the issue of reparation through negotiations or any other amicable or peaceful method of settlement of disputes.

   Negotiation is the "term for such intercourse between two or more states as is initiated, and directed, for the purpose of effecting an understanding between them or settling a dispute".[40] In negotiation, there is exchange of viewpoints between the parties to the dispute and a decision of the dispute on the conference table. The drastic nature of wars the ultimate form of self – help, led at an early date to the creation of a legal obligation to negotiate in advance of an appeal to force.

2. **Good offices and Mediation**

   When parties are not inclined to settle their differences by negotiation, or when the negotiation fails, a third state may offer its good offices or mediation for procuring a settlement. In the case of good offices, the third state brings the disputing parties to a conference table but it does not take part in negotiations. In mediation, on the other hand, the third state participates in the negotiations between the disputing parties and tries to help the parties in arriving at some satisfactory solutions.[41]

[40] H.Lauterpacht (ed), Oppenheim's International Law, Vol 1, p.867(Longmans, Green and Co, Londons,8th edn, 1955)

[41] Dr.Avtar Singh, (ed.) "V.M.Shukla's Legal Remedies", p.no.74 (Eastern Book Company, Lucknow, 6th edn, 1991).

3. Conciliation

Oppenheim defines conciliation as a "process of settling a dispute by referring it to a commission of persons whose task is to elucidate the facts and to make a report containing proposals for a settlement, but which does not have the binding character of an award or judgment".[42]

Article 33(1) of the U.N. charter mentions conciliation as one of the peaceful procedure to be first adopted by the parties to find a solution.

4. Arbitration

Arbitration means "the determination of a difference between states through a legal decision of one or more umpires or of a tribunal, other than the International Court of Justice, chosen by the parties."[43]

The reference of the dispute to arbitration is within the discretion of the parties, but once it is referred, the parties are legally obliged to respect the 'award' given by the arbitrators. If a party refuses to respect the award, then the other party may enforce it through such compulsive means as are open to it under International Law.

Arbitration has several advantages over judicial settlement. Arbitration proceedings can be conducted in private. The procedure is very simple. There not much expense or waste of time. Moreover, there are certain technical matters which require a court to possess technical knowledge and parties can appoint arbitrators having that knowledge.

5. Judicial Settlement

The question, what should be the extent of reparation for an International wrong, may be determined by the International Court of Justice. But the jurisdiction of the I.C.J. is not compulsory. No state can be compelled to litigate against its will. Oppenheim has rightly pointed out that " International society has not yet reached, as national societies have, the point at which any creditor or party injured can summon his debtor before a court without the latter's consent to go there".[44]

[42] H.Lauterpacht (ed), Oppenheim's International Law, Vol 2, p. 12 (Longmans, Green and Co, Londons,7th edn, 1952)
[43] Supra p.no 22.
[44] H.Lauterpacht (ed), Oppenheim's International Law, Vol 2, p. 57 (Longmans, Green and Co, Londons,7th edn, 1952)

Parties: Only states may be parties to disputes before the court.[45] All members of the U.N are ipso facto parties to the Statute of the I.C.J.[46]The statute being integral part of the Charter of the U.N., A non member of the U.N . may become a party to the statute of the I.C.J. on conditions to be determined in each case by the General Assembly on the recommendation of the Security Council. The U.N. and specialized agencies, not being states cannot appear as a party, but they may trough the General Assembly or the Security Council, request the court to give an advisory opinion on any legal question arising within the scope of their activities.[47]

Enforcement of Judgments

Under article 94 of the charter, each member of the U.N has undertaken to comply with the decision of the I.C.J. in any case to which it is a party. If any party fails to comply with the decision, the other party may have recourse to the Security Council, which may make recommendations or decide upon measures to be taken to give effect to the judgment.

6. **Through the machinery of the U.N.**

The aggrieved state whose rights have been violated by the delinquent state may utilize the machinery of the U.N., for the reparation of the damage through the peaceful means.

Responsibility for the pacific settlement of disputes rests on the Security Council, the General Assembly and the signatories of the charter themselves.

Compulsive methods to secure reparation

Following are the compulsive means for settlement of differences.

1. Retortion

Retortion consist in retaliation for unfriendly, discourteous or inequitable acts of another state by the acts of similar kind, for example, revocation of diplomatic relations, withdrawal of fiscal and tariff concessions etc.

1. **Reprisals**

[45] Article 34 of the Statute of I.C.J.
[46] Article 93 of the Charter of the U.N.
[47] Article 96 of the Charter of the U.N.

"Reprisals are such injurious and otherwise internationally illegal acts of one compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency".[48]

Reprisals, in contradiction to retortion, are measures which are otherwise unlawful, but may be taken exceptionally when one state violates the rights of another state. The sole purpose of reprisals is to force the delinquent state to abide by law.

2. Pacific Blockade

When blockade is resorted to in peace time, it is known as pacific blockade. In blockade, there is the blocking by men of war, of the approach to the entire or a part of the coast belonging to the delinquent state, for the purpose of preventing ingress and egress of vessels or aircrafts of the delinquent state. The object of pacific blockade is to put a ban on maritime transport of the delinquent state and thus to compel it to settle the difference with the aggrieved state.

3. Intervention

"Intervention is dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things"[49]Thus, intervention is dictatorial interference by a state or group of states in the internal or external affairs of another state by way of use of force.

4. Through the machinery of the U.N.

There are two situations when the use of force is permitted by the Charter;

a.) Use of Force by the U.N. through the Security Council under Chapter VII of the Charter

Chapter VII of the U.N. Charter [50] deals with collective measures and the enforcement action. Article 39 empowers the Security Council to determine the existence of any threat to the peace, breach of the peace or act of aggression. If the Security Council makes such a determination, it must then decide whether it is necessary to recommend the use of sanction in order to maintain or restore International peace and security. Before making such a recommendation, the council may call upon the parties concerned to comply with such provisional measures as it deem necessary or desirable.[51] Such provisional measures shall be without prejudice to the

[48] Dr.Avtar Singh, (ed.) "V.M.Shukla's Legal Remedies", p.no.81 (Eastern Book Company, Lucknow, 6th edn, 1991).
[49] Supra Note at 36, p.no83.
[50] Article 39 to 51 of the Charter of the U.N.
[51] Article 40 of the U.N. Charter.

rights, claims or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

b.) Use of force in exercise of the right of individual or collective self – defence

The law of self defence now finds expression in Article 51 of the U.N. Charter. It provides "Nothing in the present charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a member of the U.N., until the Security Council has taken the measures necessary to maintain International peace and security. Measures taken by members in the exercise of the right of self defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present charter to take at any time such action as it deems necessary in order to maintain or restore peace and security". It is said that the Charter has not restricted the right of self defence only to cases where there is armed attack. The charter guarantees the inherent right of self defence. The charter merely clarifies the legal position under Article 51 with respect to self defence when an armed attack occurs. Self defence thus continues to remain a lawful means of protecting certain essential rights, and not only the right to be free from an armed attack.[52] The second interpretation is that the charter modified the customary right of self defence. In view of limitation contained in Article 2(4) and Article 51 of the Charter, a state may act in individual self defence only if an armed attack occurs against it.

CHAPTER 5

5. Conclusion

The modern rules concerning human rights (which prohibit ill treatment of all individuals regardless of their nationality) are of fairly recent origin. But for more than two hundred years, International law has laid down a minimum international standard for the treatment of aliens. States are not obliged to admit aliens to their territory, but, if they permit aliens to come, they must treat them in a civilized manner. To put it in technical terms, failure to comply with the minimum international standard engages the international responsibility of the defendant state, and the national state of the injured alien may exercise its right of diplomatic protection that is, may make a claim, through diplomatic channels, against the other state, in order obtain

[52] Dr.Avtar Singh, (ed.) "V.M.Shukla's Legal Remedies", p.no.87,(Eastern Book Company, Lucknow, 6th edn, 1991).

compensation or some other form of redress. Such claims are usually settled by negotiation, alternatively, if both parties agree, they may be dealt with by arbitration or judicial settlement.

The defendant state's duties are owed, not to the injured alien, but to the alien's national state. The theory is that the claimant state itself suffers a loss when one of its nationals is injured. Consequently, the claimant state has complete liberty to refrain from making a claim or to abandon a claim, it may agree to settle the claim at a fraction of its true value and it is under no duty to pay the compensation obtained to its national. In these respects, the injured individual is at the mercy of his national state. However, international law does not entirely disregard the individual. The compensation obtained by the claimant state is usually calculated by reference to the loss suffered by the individual, not by reference to the loss suffered by the claimant state.

Thus, the remedies available for breach of aliens' rights under International law are very prominent and effective which can be had through various peaceful means. But if the peaceful means fail, the aggrieved state may resort to any of the compulsive methods such as retortion, reprisals, pacific blockade, and intervention. The role of General Assembly and Security Council are very much considerable as for as settling the dispute between delinquent state and aggrieved state.