

**STUDY OF DISCRIMINATION  
IN RESPECT OF THE RIGHT OF  
EVERYONE TO LEAVE ANY COUNTRY,  
INCLUDING HIS OWN,  
AND TO RETURN TO HIS COUNTRY**

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## NOTE

The *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country*, is the fourth of a series of studies undertaken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities with the authorization of the Commission on Human Rights and the Economic and Social Council. A *Study of Discrimination in Education*, the first of the series, was published in 1957 (Sales No.: 57.XIV.3), the *Study of Discrimination in the Matter of Religious Rights and Practices*, the second of the series, was published in 1960 (Sales No.: 60.XIV.2), and the *Study of Discrimination in the Matter of Political Rights*, the third of the series, was published in 1963 (Sales No.: 63.XIV.2). The Sub-Commission is now preparing studies on Discrimination Against Persons Born out of Wedlock and on Equality in the Administration of Justice.

The views expressed in this study are those of the author.



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## INTRODUCTION

### HISTORICAL BACKGROUND

The right of everyone to leave any country, including his own, and to return to his country is founded on natural law.

Socrates regarded it as an attribute of personal liberty. In his dialogue with Crito, he made the laws speak thus: "... we further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him. None of us laws will forbid him or interfere with him. Any one who does not like us and the city, and who wants to emigrate to a colony or to any other city, may go where he likes, retaining his property."<sup>1</sup> However, subsequent usage subjected the right to various restrictions, sometimes leading to its nullification. Thus, the struggle between the individual who wished to leave his country and those who wished to prevent him from doing so, reaches back into antiquity.

The right to leave is implicit in the great migrations which peopled the earth before the dawn of history and subsequently, such decisive mass movements as the intermittent eruption of the nomads from the deserts and steppes of Asia and Africa, the voyages of the Malayo-Polynesians into the vast reaches of the Pacific and Indian Oceans, the Hebrew exodus from the land of the Pharaohs, the settlements of Eastern Europe and the colonization of the Americas. More recently, the right to leave manifested itself in the flight of populations displaced by the conquest or partition of their homelands which incidentally raised the important question of their right to return to their respective countries.

In ancient times the right to travel was also invoked in connexion with the right of innocent passage, which was often won by force of arms. In this manner, Moses fought against the Edomites when he led Israel in search of the Promised Land,<sup>2</sup> and the Greeks warred on the Mysians when they marched to the siege of Troy.<sup>3</sup> The earliest recorded treaty of passage was concluded between neighbouring Germanic tribes during their revolt against the Romans in A.D. 70.<sup>4</sup>

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<sup>1</sup> Plato, *The Dialogues*, translation by Benjamin Jowett.

<sup>2</sup> Old Testament, Numbers, Chap. XX, No. 17.

<sup>3</sup> Horace, Epode XVII.

<sup>4</sup> Tacitus, *The Histories*, book IV, chap. LXV.

The chronicles of Chao Ju-Kua, Ibn Batuta and Marco Polo bear witness to the comparative freedom which they enjoyed in leaving and returning to their respective countries as well as in entering and leaving the many kingdoms of Asia and outlying islands through which they travelled in the middle ages.

To justify the travel and sojourn of Spaniards in the New World, the Dominican priest, Francisco de Victoria, said at the onset of the sixteenth century: "It was permissible from the beginning of the world for anyone to set forth and travel wheresoever he would."<sup>6</sup> By describing banishment as one of the capital forms of punishment, he also reinforced the right of return to one's country.<sup>6</sup>

To uphold the freedom of navigation, and more particularly the right of the Dutch to trade in the East Indies, Hugo Grotius postulated the following principle: "Every nation is free to travel to every other nation." He named it a "most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable".<sup>7</sup>

The Swiss jurist, Emer de Vattel, wrote in the eighteenth century: "It is not to be supposed that a man has bound himself to the society of which he is a member in such a way as to be unable to leave the country when his business affairs require it and when he can absent himself without harm to the country."<sup>8</sup> He also defended the right to emigrate in the following words: "They may leave a society which seems to be undergoing a process of dissolution or re-creation; and they have the right to withdraw elsewhere—to sell their lands and to carry all their goods."<sup>9</sup>

Though the causes of emigration are mainly domestic in character, among them being religious persecution, political strife, a barren soil, a harsh climate and over-population,<sup>10</sup> publicists have generally dealt with the question from an international viewpoint.<sup>11</sup>

<sup>6</sup> Victoria, *Relecciones sobre Indios y el Derecho de Guerra*, sect. III, p. 386, translation by John Pawley Bate.

<sup>6</sup> *Ibid.*, p. 387.

<sup>7</sup> Grotius, *Mare Liberum* (1604-5), chap. I, translation by Ralph Van Deman Magoffin. In *De Jure Belli ac Pacis* (1625), Liv. II, chap. II, sect. XIII, Grotius also said: *On est aussi tenu de laisser passer librement par les terres, les fleuves, et les endroits de la mer qui peuvent nous appartenir, ceux qui veulent aller ailleurs pour de justes causes* (para. 1); and *On doit laisser passer non seulement les personnes, mais encore les marchandises parce qu'aucun n'a droit d'empêcher une nation de trafiquer avec toute autre nation* (para. 9), translation by Jean Barbeyrac.

<sup>8</sup> Vattel, *Le Droit des Gens* (1757), book I, chap. XIX, sect. 221, translation by Charles G. Fenwick.

<sup>9</sup> *Ibid.*, book I, chap. III, sect. 33.

<sup>10</sup> Henry Bonfils, *Manuel de Droit International Public* (1912), chap. II, para. 410, p. 254.

<sup>11</sup> Bonfils, *op. cit.*, considers emigration as a step towards change of nationality. F. de Martens, in his *Traité de Droit International* (1883), title II, p. 236, said: "That one cannot dispute the international importance of emigration may



The first known acknowledgement in national law of the right of everyone to leave any country, including his own, and to return to his country, is found in Magna Carta, wrested by the English barons from King John at Runnymede in A.D. 1215. It guaranteed to merchants "safe and secure exit" (article 41), and to all others freedom "to go out of our Kingdom, and to return, safely and securely, by land or water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the Kingdom; excepting prisoners and outlaws, according to the laws of the land, and of the people of the Nation at war with us" (article 42). Of the same order is title I of the French Constitution of 1791 guaranteeing as a natural and civil right "the freedom of everyone to go, to stay, or to leave, without being halted or arrested unless in accordance with procedures established by the Constitution". An Act of the United States Congress also declared in 1868: "The right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness."<sup>12</sup> These provisions became the model of modern laws and constitutions on the subject until the promulgation of the Universal Declaration of Human Rights on 10 December 1948.

One should not regard the enunciation of the right in article 13, paragraph 2, of the Universal Declaration as the culmination of man's effort to enjoy it fully and without discrimination.

Suffice it to quote two historical instances in medieval and modern times which enjoin constant vigilance to prevent emasculation of the right. With a stroke of the pen, the regent for King Henry III suspended article 42 of the Magna Carta in A.D. 1216 and it disappeared in subsequent re-issues of the Charter.<sup>13</sup> There also developed in succeeding centuries a common law writ of *ne exeat regno*, by which the King would "command a man that he go not beyond the seas or out of the realm without a licence", by issuing a writ based upon information "that you design to go privately into foreign parts and intend to prosecute there many things prejudicial to us . . .". The writ was used by various English kings on a number of occasions, mostly for political reasons, but this royal prerogative gradually lost its importance and fell into desuetude except as a restraint upon absconding debtors. By the time of Blackstone he was able to affirm as an absolute personal right of Englishmen under the common law "the power of locomotion, of changing situation, or

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be attributed to its very nature. Emigration is of direct concern not only to the State from which the emigrants have migrated but also to the States through which they travel. This raises a number of juridical questions, the solution of which is intimately bound up with the very existence of the international order—the legal position of the emigrants, the rights and duties of territorial authorities with regard to them, as well as with questions of political and international law. It is impossible to solve those questions without taking into account the legal interests of the international community."

<sup>12</sup> Revised Statutes, sect. 1999 (1875), 8 U.S.C., sect. 800 (1952).

<sup>13</sup> Blackstone, *The Great Charter and Charter of the Forest* (3d ed., 1771) pp. xxxiii, xxxiv.

moving one's person to whatsoever place one's own inclination may direct without imprisonment or restraint", and consequently "go out of the realm for whatever cause he pleaseth, without obtaining the King's leave, provided he is under no injunction of staying home."<sup>14</sup>

On 13 August 1961 a Chinese wall surmounted by barbed wire was built along the dividing line between the East and West occupation zones of Berlin. People trying to cross the barricade have been shot in cold blood. Meeting soon thereafter, the Congress for Cultural Freedom called it a grotesque re-echo of the lines in Pushkin's *Boris Godunov* where the Czar gives reactionary and unnatural instructions to "take steps at this very hour that our frontiers be fenced by barriers... that not a single soul pass o'er the border, that not a hare be able to run or a crow fly..."<sup>15</sup> It is a timely and urgent warning that an ancient and basic right of the human being is in jeopardy. It is also a challenge and an opportunity for national and international action to give meaning and substance to article 13, paragraph 2 of the Universal Declaration of Human Rights.

#### NATIONAL RECOGNITION OF THE RIGHT

An analysis of the present position of the right proclaimed in article 13, paragraph 2, of the Universal Declaration of Human Rights, as reflected in the ninety country monographs upon which this study is based, reveals that it is by no means generally recognized as a constitutional or legal right.

From a close examination of the assembled material, the following facts emerge in this respect:

(a) *The right of a national to leave his country.* In twenty-four countries the right is formally recognized in constitutional texts or laws and in twelve countries by judicial interpretation. Fifty countries do not expressly recognize the right in their legislation.<sup>16</sup>

(b) *The right of a national to return to his country.* In twenty-four countries the right is formally recognized in constitutional texts or laws and in twelve countries by judicial interpretation. Forty-nine countries do not expressly recognize the right in their legislation.<sup>17</sup>

(c) *The right of a non-national to leave the country of his sojourn.* In twenty countries the right is formally recognized in constitutional texts or laws and in four countries by judicial interpretation. Fifty-six countries do not expressly recognize the right in their legislation.<sup>18</sup>

<sup>14</sup> Blackstone, *Commentaries on the Laws of England* (1775), vol. 1, book I, chap. I, sect. II, p. 134; chap. VII, p. 265.

<sup>15</sup> A reply to Mayor Brandt, Forum Service (Summit House, London), 2 September 1961.

<sup>16</sup> In four countries no information is available on this point.

<sup>17</sup> In five countries no information is available on this point.

<sup>18</sup> In ten countries no information is available on this point.

It would seem, therefore, that only about one-third of the countries studied expressly recognize the right in question.

However, it is necessary to probe more deeply into the actual situation before drawing any conclusions in this matter. The formal recognition of a right is not enough to ensure its enjoyment. The law or practice may hedge the right with so many conditions such as to whittle it away or render it nugatory.

On the other hand, the absence of legal recognition does not necessarily negate the existence of the right. A number of countries which do not have any constitutional or legislative provision or judicial precedent governing this question have stated that they recognize it "in principle", "as a rule of law", "in general practice", "according to regulations", "as an enforceable right", "always", or that "there is no authority for denial". This is particularly true as regards the right of a national to return to his country, which has thus been informally recognized by sixteen additional countries.

#### INTERNATIONAL RECOGNITION OF THE RIGHT<sup>19</sup>

##### *League of Nations and United Nations action*

Several matters intimately connected with the right of everyone to leave any country, including his own, and to return to his country have been dealt with by various bodies within the framework of the United Nations and before that by the League of Nations.

The League of Nations Passport Conference of 1926 reiterated the recommendation of the 1920 Passport Conference for the abolition of exit visas, that recommendation having been accepted already by a large number of States.

The International Conference on Treatment of Foreigners, held in 1929 under the auspices of the League, prepared a draft provision for inclusion in a convention which would give foreigners the right to leave a territory "without let or hindrance unless individually prevented by a competent authority, in conformity with the laws of the country and with international law".

An international programme to promote migratory movements has been undertaken by the United Nations and its specialized agencies, particularly the International Labour Organisation, the Food and Agriculture Organization, the World Health Organization and the United Nations Educational, Scientific and Cultural Organization.

The International Civil Aviation Organization has secured among its members simplification of government regulations to facilitate international air transport of tourists and other temporary visitors, such as the elimination of entrance and exit visas, abolition of tax clearance

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<sup>19</sup> This subject is more extensively dealt with in annex V of this report.

certificates and reduction or waiver of other documents and formalities required of incoming and departing passengers.

The problem of the refugees created by the violent dislocations due to events connected with the Second World War, at first dealt with by the United Nations Relief and Rehabilitation Agency (UNRRA) and later by the International Refugee Organization (IRO), is now handled by the Office of the High Commissioner for Refugees whose competence is limited to persons who became refugees as a result of events occurring before 1 January 1951. Refugees from Palestine are the concern of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

Legal protection of refugees is effected by the promotion of international conventions aimed at improving the situation of refugees. The most important of such conventions is the 1951 Convention Relating to the Status of Refugees, article 28 of which obligates Contracting States to issue travel documents to refugees in their territory, especially those unable to secure such documents from the country of their lawful residence.

Pursuant to article 28 of the 1954 Convention Relating to the Status of Stateless Persons, the Contracting States undertook a similar obligation to issue travel documents to stateless persons lawfully staying in their territory. Paragraph 13 of the Schedule to the Convention also entitles a stateless person to whom a travel document has been issued in accordance with article 28 to re-enter the territory of the issuing State at any time during the period of its validity.

The United Nations Convention on the Elimination or Reduction of Future Statelessness, adopted 15 August 1961, contains several provisions safeguarding departing nationals against loss of nationality, particularly on racial, ethnic, religious or political grounds, unless they have in the meantime acquired another nationality.

On 27 April 1961 the Economic and Social Council unanimously adopted a resolution requesting the Secretary-General to call a world-wide conference on international travel and tourism as soon as possible, but not later than the autumn of 1963. A group of experts appointed by the Secretary-General to prepare the conference, submitted a report and a draft provisional agenda dealing, *inter alia*, with the facilitation of governmental formalities regarding travel such as passports, visas, income tax clearance, and foreign exchange licence.

The Vienna Convention on Diplomatic Relations, adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on 18 April 1961, allows persons enjoying diplomatic privileges and immunities and members of their families to leave the territory of the receiving State, even in case of armed conflict. A similar provision applicable to consular officials adopted by the International Law Com-

mission in 1961, will be considered for inclusion in a Convention on Consular Relations by an international conference to be convened under the auspices of the United Nations.

### *Regional and bilateral action*

Besides the world-wide arrangements indicated above, many countries have attempted, on a regional basis, to lessen the problems of travel by easing border requirements.

In Western Europe, these efforts have resulted in an arrangement among Scandinavian countries allowing nationals of the five countries<sup>20</sup> to travel freely throughout the region without travel documents; a recommendation in 1952 by the Committee of Ministers of the Council of Europe<sup>21</sup> that member Governments should as soon as practicable conclude bilateral agreements for the purpose of simplifying passport and frontier formalities; the abolition by January 1956 of visas for nationals of all member States of the Council of Europe; reciprocal entry of nationals of countries acceding to the European Convention of Establishment signed by the Ministers of the Council of Europe on 13 December 1955; free entry and departure within three months of nationals of ten member countries<sup>22</sup> of the European Agreement of 13 December 1957; a recommendation of the Council of the Organization for European Economic Co-operation (OEEC)<sup>23</sup> on 16 April 1957 for the establishment of a standard identity card which has since been accepted for purposes of foreign travel by the majority of the member countries; and the elimination of obstacles to the free movement of persons, services and capital within the European Economic Community (EEC)<sup>24</sup> established by the Treaty of Rome of 25 March 1957.

Article VII of the American Declaration of the Rights and Duties of Man adopted at Bogotá in 1948 by the Ninth International Conference of American States,<sup>25</sup> recognizes indirectly the right of every person to leave his country by providing that he may not "leave it except by his own will".

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<sup>20</sup> Denmark, Finland, Iceland, Norway and Sweden.

<sup>21</sup> Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey and the U.K.

<sup>22</sup> Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands and Turkey.

<sup>23</sup> Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Switzerland, Sweden, U.K. and Turkey. Associate members: Canada and the U.S.A.

<sup>24</sup> Belgium, France, Federal Republic of Germany, Italy, Luxembourg and the Netherlands.

<sup>25</sup> Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, U.S.A., Uruguay, Venezuela.

The Organization for the Collaboration of Railways has adopted a number of decisions facilitating and promoting travel by rail or automobile within the socialist area by nationals of member countries.<sup>26</sup>

The Asian-African Legal Consultative Committee, which met in Tokyo in February 1961,<sup>27</sup> prepared draft Principles Concerning Admission and Treatment of Aliens, article 15 of which defines the rights, as well as the restrictions, which may be imposed on an alien leaving any State.

Article 29 of the General Convention signed at Tananarive on 12 September 1961 by the Chiefs of State or Government of the Union Africaine et Malgache<sup>28</sup> allows nationals of the Contracting States "to enter freely the territory of any one of the other Parties, to travel in that territory, to set up residence there and to depart at all times within the framework of the laws and regulations and security measures". The Protocol of 27 March 1962 permits the entry, travel and departure of nationals of Contracting States on the simple presentation of a valid passport or one that has lapsed not more than five years, in the absence of which they must comply with any previous formalities such as an entry or exit visa.

The Foreign Ministers of the Association of Southeast Asian States (ASA) agreed on 6 April 1962 to take immediate action to facilitate and encourage the flow of nationals among member countries<sup>29</sup> and decided to abolish visa requirements for officials and to waive visa fees for nationals visiting each other's country.

Apart from the foregoing regional arrangements, separate and independent bilateral agreements between States, too numerous to list in this report, provide for the mutual waiver of passports, visas, or visa fees. In many instances they cut across regional groupings, thus providing the necessary stimulus or justification towards widening further the scope of existing multilateral arrangements to promote not only intra-regional but also inter-regional travel.

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<sup>26</sup> Albania, Bulgaria, People's Republic of China, Czechoslovakia, German Democratic Republic, Hungary, People's Democratic Republic of Korea, People's Republic of Mongolia, Romania, Poland, Democratic Republic of Viet-Nam, and the U.S.S.R.

<sup>27</sup> Cameroon, Central African Republic, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Upper Volta, Madagascar, Mauritania, Nigeria, Senegal and Chad.

<sup>28</sup> Cameroon, Central African Republic, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Upper Volta, Madagascar, Mauritania, Nigeria, Senegal and Chad.

<sup>29</sup> Federation of Malaya, Philippines and Thailand.

## I. ORIENTATION OF THE STUDY

### ARTICLE 13 (2) AND RELATED ARTICLES

Article 13 of the Universal Declaration of Human Rights proclaims:<sup>1</sup>

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

It will be seen that the right of everyone to leave any country, including his own, and to return to his country, as provided in paragraph 2, is only an extension of the freedom of movement set forth in paragraph 1. Moreover, when one has no freedom of movement within a State—for example, when he is confined to a particular locality or reservation—he is in effect prevented from leaving the State itself. At the same time, freedom of movement and residence carries with it by implication the right of a national to enter or return to his country for that purpose.

The right enunciated in article 13 (2) may very well be regarded as the right of personal self-determination. A study of discrimination in respect in this right accordingly involves consideration of a number of related rights of the individual.

Other articles of the Declaration which have a direct and important bearing upon the subject include article 2, on non-discrimination; article 3, on personal liberty; article 4, on slavery; article 7, on equality before the law and equal protection of the law; article 8, on the right to an effective remedy; article 9, on exile; article 10, on fair trial in the determination of rights and obligations; article 14, on asylum; article 15, on nationality; article 17, on property; article 29, on limitations upon the exercise of rights and freedoms; and article 30, the safeguarding clause.

Article 2 provides:

"Everyone is entitled to all the rights and freedoms set forth in this 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.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a

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<sup>1</sup> The legislative history of article 13 of the Universal Declaration of Human Rights is summarized in annex III.

person belongs, whether it be independent, trust, non-self-governing or under any other limitation or sovereignty.

This article sets forth in considerable detail the principle of non-discrimination and is, therefore, basic to this study.

Article 3 provides :

Everyone has the right to life, liberty and security of person.

The concept of liberty can hardly ever be divorced from the the right of a person to leave any country, including his own, and to return to his country. As we have already indicated, freedom of movement or locomotion is a constituent element of personal liberty.

Article 4 provides :

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Hereditary attachment of the slave or serf to the land denies to him the right envisaged in article 13 (2).

Article 7 provides :

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

This article restates the principle of non-discrimination with respect to equality before the law and, as concerns our study, to equal protection against violation of the right enunciated in article 13 (2).

Article 8 provides :

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

This article enables an aggrieved party to appeal to a competent judicial or administrative body to seek effective redress for violation of the right proclaimed in article 13 (2) if it is recognized by the law or the constitution of his country.

Article 9 provides :

No one shall be subjected to arbitrary arrest, detention or exile.

Exile would, among other things, deny the victim the right to return to his country.

Article 10 provides :

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

This article underlines the right of everyone to a fair and public trial in the determination, among others, of his right to leave any country, including his own, and to return to his country. It should be pointed out that this article aims at having the rights of the aggrieved party determined by an independent and impartial body rather than left to the discretion of a subordinate official.



Article 14 provides :

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

This article re-enforces one's right to leave any country, including his own.

Article 15 provides :

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

The right to change one's nationality presupposes the right to leave one's country. On the other hand, the guarantee against arbitrary deprivation of nationality ensures one's right to return to one's country.

Article 17 provides :

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

The right of a person to leave any country may be seriously impaired if he is not allowed to take his property with him, in whole or in part. His right to leave is, in that sense, dependent on the recognition of his right to own property.

Article 29 provides :

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Paragraphs 2 and 3 of this article establish reasonable limitations upon the right under study. This article being restrictive, no other limitations are permissible.

Finally, Article 30 provides :

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

This omnibus article is designed to forestall the destruction of any right, including the one set out in article 13 (2), under the guise of ensuring the enjoyment of other rights equally guaranteed by the Universal Declaration of Human Rights. In other words, the Declaration establishes no hierarchy or priority among the rights which it proclaims as essential to the full development of human dignity and freedom.

Another important text which must be given due weight is that of article 12 of the draft Covenant on Civil and Political Rights, adopted by the Third Committee of the General Assembly at its 959th meeting on 17 November 1959, the relevant portions of which read as follows:<sup>2</sup>

(2) Everyone shall be free to leave any country, including his own.

(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Covenant.

(4) No one shall be arbitrarily deprived of the right to enter his own country.

The article has not yet been adopted by the General Assembly itself, which is awaiting completion of other articles of the Covenant by the Third Committee.

### TRAVEL DOCUMENTS

Documents requesting safe passage through foreign territory and promising protection to the traveller were first issued by the Roman Empire. In some cases passports were issued not only by the country of which the traveller was a national, but also by the country of his sojourn. In addition to identifying the traveller, they guaranteed him a safe journey.

The modern passport was introduced in a few European countries during the sixteenth and seventeenth centuries for the purpose of facilitating travel; however, during the latter part of the eighteenth century it became an instrument of repression and control in certain police States. In the nineteenth century many countries in Latin America and Europe abolished the requirement of passports for travel abroad.

The First World War ushered in a new régime of unprecedented passport control which continued even after the cessation of hostilities. It was against this background that the League of Nations sought to implement the provisions of article 23 of the Covenant which solemnly recognize that "freedom of communications and or transit" was one of the ways of developing co-operation among nations, and imposed upon Members of the League the obligation to guarantee and to maintain it.

Quite naturally, during the Second World War barriers were again erected against international movement of persons, even between friendly countries, with a consequent expansion of controls. A passport became once more an indispensable prerequisite for such movement in almost all cases. Some countries still impose sanctions today upon those of their nationals who leave their country or return thereto without a passport.

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<sup>2</sup> See *Official Records of the General Assembly, Fourteenth Session, Annexes*, agenda item 34, document A/4299.

A great deal has been done to facilitate international travel since the Second World War. Bilateral and multilateral agreements waiving passport requirements for persons travelling between the countries concerned—particularly for tourists and other short-term visitors—have become more frequent, and border and customs formalities have been considerably simplified. But the possession of some kind of identification document continues to be required, if only because authorities at the border must have a means of ascertaining the traveller's nationality.

Normally, a national who wishes to leave his own country, or to return thereto after travelling abroad, must possess a travel document—passport, *laissez-passer*, tourist card, tourist permit, or something similar—issued to him by his Government. On the other hand, the foreigner who wishes to leave the country of his sojourn usually possesses a travel document issued by his own country and his problem is simply to obtain an additional document or endorsement, such as an exit visa.

It will be seen that the right of an individual to leave a country, or to return thereto, is often inextricably linked to the possibility of his obtaining a passport and sometimes also a visa. It should be borne in mind, however, that in many cases the travel document by itself does not confer any right upon the person to whom it is issued; at most, it is only a means of facilitating the exercise of his right to travel. An individual in possession of all the required travel documents may still be prevented by the authorities, for one reason or another, from leaving a country or even from returning to his own country from abroad.

Much will depend on whether the passport is regarded merely as a political document, or as a licence to travel; or whether its issuance is considered a matter of right or merely a privilege. The problem is illustrated by the view of some countries that while the issuance of a passport is only a privilege, there is nothing to prevent a national from leaving the country without a passport. The difficulty, however, lies in the fact that many countries will not admit anybody who does not possess a passport or other travel document. Hence, the refusal of a travel document usually has practically the same effect as denial of permission to leave, and sometimes of permission to return to one's country.

There are thus two separate but closely linked problems: (a) the question whether a travel document should be granted or withheld, and (b) the question whether an individual should or should not be permitted to cross the national borders. Countries deal with these problems in a variety of ways. Some of them, for example, issue a travel document only after the applicant has produced certificates indicating that he has met certain legal obligations; others do not require such certificates until the traveller attempts to cross the border.

The reasons for which an individual may be denied the necessary travel document are sometimes laid down by law or government decree, but more often they can be discovered only from an intimate knowledge

of the practices obtaining in a country. Where the reasons are set forth in legal form, the laws or regulations may be directly connected with the issuance of travel documents or they may have only an indirect connexion thereto. In any case they are decisive in the determination of the question whether an individual should be allowed to leave the country or not. For example, in all countries there are laws relating to personal status or capacity, deprivation of liberty, and non-performance of legal obligations which impose restrictions upon the possibility of an individual leaving the country. Sometimes these laws are in specific terms, but more often they leave to the administrative authorities the definition and interpretation of the restrictions. The decisions of these authorities, and their decrees, instructions, or notifications are rarely subject to legislative approval or judicial review.

#### THE MEANING OF "DISCRIMINATION" IN RESPECT OF THE RIGHT

The right set forth in paragraph 2 of article 13 of the Universal Declaration of Human Rights has three aspects: (a) the right of a national to leave his own country, (b) the right of a foreigner\* to leave the country of his sojourn, and (c) the right of a national to return to his country.

Discrimination in respect of the right of everyone to leave his own country can be a very serious matter. If this right is restricted or curtailed unjustly, the victim is confined to the territory of his country, although such confinement takes place without physical restraint. Consequently, he may be frustrated in his efforts to marry and found a family, or to achieve a standard of living adequate for the health and well-being of himself and of his family. He may be unable to associate with his kith and kin, or to obtain education and employment not available in his own country or to seek, receive and impart information across national frontiers. He may even be prevented from going to other countries to observe or practice the tenets of his religion, or to seek asylum from persecution or to change his nationality. All these rights and freedoms are consecrated in the Universal Declaration of Human Rights.<sup>3</sup> Apart from a deprivation of other rights, it is also quite possible that discrimination with regard to the right in question may give rise to mental health cases and other social problems.

Discrimination in respect of the right of everyone to return to his country can also be very serious because it would amount to exile. Besides, a national normally has considerable interests and ties in his own country and there are many rights which he can enjoy fully only in his own country. These include the right to social security and other

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\* Whenever the term "foreigner" is used in this study it refers to a non-national, including what is known as a "stateless person".

<sup>3</sup> Universal Declaration of Human Rights, articles 14, 15, 16, 18, 19, 20, 23, 25 and 26.

workers' benefits as well as the right to participate in the cultural life and government of one's own country.<sup>4</sup> In the case of naturalized citizens, denial of the right to return to their country could have the effect of arbitrarily depriving them of their nationality.<sup>5</sup>

Discrimination in respect of the right of a foreigner to leave the country of his sojourn would produce even more serious effects than discrimination preventing a national from leaving his own country. The foreigner would experience not only the inconvenience visited upon a national prevented from leaving his own country but also those besetting a national prevented from returning to his own country.

Earlier studies of discrimination have stressed the importance of the right of everyone to leave any country, including his own, and to return to his country. In the study of discrimination in education<sup>6</sup> attention was drawn to the fact that if a State provides inferior educational facilities for members of a particular group, there is a greater need for them to travel abroad than for the rest of the population. The Sub-Commission, after examining the study, proposed as a general principle that "No travel restrictions designed to prevent any person or distinct group of persons, directly or indirectly, from making use of educational facilities offered to him or them abroad, shall be imposed". In the study of discrimination in the matter of religious rights and practices,<sup>7</sup> a similar observation was made concerning the training of religious personnel, and the Sub-Commission, after examining the study, proposed as a general principle that when training for religious personnel is available only outside the country, "no permanent limitations shall be placed upon travel abroad for the purpose of undergoing such training". In the same context the Sub-Commission proposed, also as a general principle, that "Everyone shall have the freedom, as acts of devotion, to journey to sacred places, whether inside or outside his country".

It may therefore be said that disregard of the right of everyone to leave any country, including his own, and to return to his country, frequently gives rise to discrimination in respect of other human rights and fundamental freedoms, resulting at times in the complete denial of those rights and freedoms.

The meaning of the term "discrimination", when applied to the right set out in paragraph 2 of article 13 of the Declaration, may be seen when that paragraph is read in connexion with article 2. In this context it is clear that the right to leave any country, including one's own, and to return to one's country, is to be enjoyed by everyone without distinction of any kind, such as race, colour, sex, language, religion, political or

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<sup>4</sup> *Ibid.*, articles 21, 22, 24 and 27.

<sup>5</sup> *Ibid.*, article 15.

<sup>6</sup> United Nations, *Study of Discrimination in Education*, by Charles D. Ammoun, Sales No.: 57.XIV.3.

<sup>7</sup> United Nations, *Study of Discrimination in the Matter of Religious Rights and Practices*, by Arcot Krishnaswami, Sales No.: 60.XIV.2.

other opinion, national or social origin, property, birth or other status; and also without distinction on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, Trust, Non-Self-Governing or under any other limitation of sovereignty. If unjustified distinctions of any kind prevent the full enjoyment of this right, such distinctions are discriminatory.

Following previous studies conducted under the auspices of the Sub-Commission, "discrimination" would also occur in respect of the right of everyone to leave any country, including his own, and to return to his country if any limitation is placed on that right which is not, in the words of article 29 (2) of the Declaration, "determined by law solely for the purpose of securing the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society".

Discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country can only result from action by a Government or by public authorities. It is hardly conceivable that action by private individuals or groups could result in discrimination in respect of this right, except in so far as it might influence the conduct of public officials. This fact is of incalculable importance. Where discrimination in this area is of the Government's own making, it can be abolished by Governments at will.

Discrimination may be direct, as in the case of regulations or administrative action preventing nationals or foreigners from leaving a country on any of the grounds mentioned above, or preventing nationals from returning to their own country on any such ground. Or it may be indirect, as in the case when regulations or administrative procedures formulated in seemingly non-discriminatory terms apply mainly to the members of particular groups; thus, for example, a general prohibition against religious pilgrimages involving travel to or from a foreign country would be considered as a serious discrimination only by those for whom a pilgrimage is an essential part of their faith.

Discrimination in this field is almost invariably of an indirect character, and there is hardly any case where it is spelled out in national law or regulations. It occurs in fact almost always as a result of administrative action. Such action, far from being the result of the whim of a particular official, frequently is systematic and dictated by established government policy. Such systematic abuse of the discretion granted to administrative authorities by law often constitutes *de facto* a total negation of the right.

Perhaps the most serious form of discrimination in respect of the right of everyone to leave his country occurs when all nationals, with the exception of the ruler or members of a small governing clique, are not allowed to go abroad for any purpose whatsoever. When this occurs the national or territorial boundaries are converted into veritable, if sometimes invisible, prison walls.

Of course even in such a case the prohibition or egress may be felt as discrimination only by members of certain groups which differ in status from that of the predominant element of the population who feel that they must go elsewhere for compelling reasons. To other members of the population such a prohibition may be less important.

Frequently denial of the right of everyone to leave a country has a spiralling psychological effect; many individuals, quite content to remain in a country as long as they know that they are free to leave whenever they choose, become anxious to get out as soon as they know that their freedom to do so is being, or has been, denied. This is particularly true when they happen to belong to a racial, religious or other group which is being singled out for unfair treatment. Sometimes they develop a morbid fear of being hemmed in—a sort of collective claustrophobia—and as a consequence develop an excessive and unreasoning desire to go abroad. Frequently, as soon as the barriers are lowered or the unfair treatment ends, this fierce craving disappears.

The material effects of the denial of the right to leave a country are sometimes even more serious than the psychological ones. For example, denial of the ultimate right to move elsewhere, to a man seeking to leave a country because he is being persecuted, may be tantamount to the total deprivation of liberty, if not life itself.

## II. GROUNDS OF DISCRIMINATION

### INTRODUCTION

Hardly any State admits that discrimination plays any part whatsoever in its determination of an individual's right to leave the country, or of the right of a national to return thereto; indeed, many States indicate that they take vigorous measures to prevent any such discrimination.

Many individuals are not permitted to leave their country, and their right to do so is thereby negated, but only rarely can it be established that this is due to discrimination. More often it appears to be the result of a generally-applied policy, explained on the basis of national security, public order, public health or morals, or protection of the rights and freedoms of others. However, when such normally justified restrictions are abused, or when other limitations are placed upon the rights, discrimination may enter the picture.

Because the right of a national to leave his country is so little recognized in law, and is circumscribed by so many restrictions when so recognized, it is hardly ever possible to deduce solely from the perusal of legal texts the extent to which this right is enjoyed by the nationals of a country. One must rather examine searchingly the practices in vogue in the country—the actual *de facto* situation prevailing there—before drawing any conclusions about discrimination in respect of this right. The practices may permit or even ensure the full enjoyment of this right to all elements of the population in the absence of any legal standard, or conversely they may so restrict the exercise of the right in the case of certain elements—which may even constitute the bulk of the people of the country—as to render the right itself nugatory.

Normally all Governments welcome the return of their nationals from foreign places. Indeed many Governments claim the sovereign right to compel the return of a national residing abroad whenever it is in the public interest, and to punish him for refusing to obey. It is only in very exceptional cases—where discrimination rarely plays a part—that a national seeking to return to his country from abroad is turned away. However, it is clear that a national may opt either to return or not to return to his country.

There are indirect ways of preventing an individual from returning to his country. For example, some Governments require nationals seeking to leave the country for long-term or permanent residence elsewhere to renounce their nationality before leaving. Other Governments deprive



nationals of nationality if they leave or stay away from the country for a stated period or if they engage in specified activities abroad. Here discrimination may occur if such measures are in fact applied only to members of a particular ethnic, religious, or linguistic group, or to persons holding certain political or other opinions.

Foreigners are hardly ever refused permission to leave the country of their sojourn; indeed, the Governments of many countries do everything possible to facilitate their exit. In addition, it must be borne in mind that the foreigner normally enjoys the protection of his own Government. Occasionally the right of a foreigner to leave a country may not be recognized, or impediments may be placed in the way of its exercise either because he has unfulfilled obligations to the country or to some of its inhabitants, or because his presence is useful to the country. In the latter case, the individual concerned may feel that he is being discriminated against.

Even certain countries which fully recognize the right of everyone to leave any country, including his own, and to return to his country, subject the exercise of that right to the criterion that the travel should not be against the interest of the State, and permit wide administrative discretion in the determination as to whether a particular journey is, or is not, against the State's interest. Thus while recognizing the right as such, they make its denial or restriction possible on the basis of subjective and sometimes completely arbitrary judgements. The very nature of these judgements opens the door to discrimination, and at the same time makes it extremely difficult to detect. The reasons given for the refusal of permission to make a particular journey are hardly ever couched in discriminatory terms, and they rarely refer to the race, language, religion, political opinion, or other characteristics of the individual or of the group to which he belongs.

A scientific method of establishing the existence of discrimination in respect of the rights set out in paragraph 2 of article 13 of the Declaration would be to examine statistical data indicating the number of applications made for permission to cross a national border received in each country and the characteristics (race, language, religion, etc.) of each applicant, the number of such applications granted, and the number refused. From such statistics one might infer, in some cases, the existence of a pattern of refusal, indicating the possibility of discrimination. Subsequently, a more detailed analysis of individual cases might reveal the actual discrimination.

Although statistical data were requested for use in this study, no Government or non-governmental organization submitted material of the type needed. Most Governments do not prepare statistics of this nature. Indeed, a requirement that the applicant for a travel document, or for permission to leave or enter a country, should reveal his race, colour, language, religion, political opinion or affiliation, national or social origin, property, birth or other status would be suspect as laying

the basis for discriminatory action. It is therefore necessary to look carefully into the procedures followed in various countries for approving or rejecting requests for authorization to leave the country or to return thereto, in order to know to what extent these practices open the door to possible discrimination, now or in the future.

### RACE OR COLOUR

Sometimes nationals are prevented from leaving their own country on the ground of race or colour. In most cases where this treatment occurs it is usually only a small element of a larger pattern of discriminatory treatment imposed upon a particular ethnic group. The purpose of such treatment is almost always to maintain the group and its individual members in a subordinate position, frequently in order that they may be exploited economically.

In the known cases of this type, there is no law or regulation preventing members of a particular ethnic group from travelling abroad. In practice, however, the requirements which such individuals must meet in order to obtain a passport are sometimes made far more stringent than those which must be met by members of the predominant population group. Sometimes requirements of general application are prohibitive in the case of members of a particular group, especially if account is taken of the low economic status of the group concerned. In still other cases, members of a particular ethnic group are refused permission to travel as a matter of discriminatory policy based on racial considerations; they are prevented from leaving the country even if they meet all the requirements.

A number of examples of these discriminatory practices may be found in the reports of the United Nations Committee on South West Africa.

In 1958, the United Nations Committee on South West Africa quoted in its report to the General Assembly a press article<sup>1</sup> outlining the conditions under which a "Native" inhabitant of the Territory might secure a passport. According to the report, a passport could be issued:

... by the Secretary of the Interior following an investigation into the character of the applicant and the nature and duration of his visit overseas, and provided that he has made provision for his dependents during his proposed absence. An applicant for a passport is required to deposit \$100, to be refunded on his return on the surrender of his passport, in order to provide return fare in case he is repatriated by overseas authorities or to provide for his maintenance if he should become destitute. Certain further requirements, however, are laid down by the Native Affairs Department of the Union Government. It was stated in the same report that this Department would give favourable consideration to "Natives" wishing to travel overseas provided the purpose of their trip fell into three main categories: (a) for study purposes, if the study would be of practical

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<sup>1</sup> Report of the United Nations Committee on South West Africa, *Official Records of the General Assembly, Thirteenth Session, Supplement No. 12* (A/3906), para. 23; the quotation is from *Cape Times*, 3 October 1957.

use to the "Native"; (b) for attending conferences of recognized religious denominations; or (c) for the purpose of accompanying their employer.

It should be noted that the principal enactments which govern the matter under consideration, in particular the Departure from the Union Regulation Act, 1955 and the Immigrants Regulation Act, 1913, as amended, do not stipulate such conditions for issuance of a passport.

In 1959, the Committee on South West Africa dealt with a case of withdrawal of a passport from a student which later became widely known and which was not the only instance in which a South West African student was denied permission to go abroad. According to petitions received by the Committee, Mr. Hans Beukes, a second-year student of the University of Cape Town, was granted a scholarship by the Norwegian National Union of Students (Norsk Studentsamband) to study for three years at the University of Oslo. Mr. Beukes was selected for this scholarship, offered to a "Non-European" student at a South African University, by a selection committee consisting of two Professors at the University of Cape Town and the President of the National Union of South African Students. After some delay and indecision, the Union Government granted Mr. Beukes a passport on 15 June 1959 to enable him to proceed to Norway. Upon arrival at Port Elizabeth to embark on his journey, however, he was met by three police officers and an emigration official, who seized his passport. He was told that he had been associating with persons believed to be engaged in subversive activities and his person, luggage and personal correspondence were searched. Later, the official reason was given that the withdrawal of the passport was in the public interest. The Union Government's action aroused considerable disapproval by the Teachers' Educational and Professional Association, students of the University of Cape Town, the press in the Union of South Africa and other representatives of public opinion in the Territory.<sup>2</sup>

The General Assembly, having received the report of the Committee dealing with the above petitions, adopted on 17 November 1959, resolution 1358 (XIV), the operative part of which reads:

*The General Assembly,*

...

1. Is of the opinion that the withholding or withdrawal from a qualified South West African student of a passport for the purpose of studying abroad is not only a direct interference in the educational and general advancement of an individual but a hindrance to the educational development of the Territory of South West Africa which was entrusted under the Covenant of the League of Nations to the administration of the Union of South Africa;

2. Considers the withdrawal by the Union of South Africa of the passport granted to Mr. Beukes to be an act of administration contrary to the Mandate for South West Africa;

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<sup>2</sup> *Official Records of the General Assembly, Fourteenth Session, Supplement No. 12 (A/4191)*. Report of the Committee on South West Africa, paras. 226 and 227, and annexes XXX and XXXI.

3. Expresses the hope that the Government of the Union of South Africa will reconsider its decision so that Mr. Beukes may take advantage of the scholarship offered him to study at the University of Oslo in circumstances permitting him to maintain normal relations with his family and his country.

The Committee has repeatedly drawn the attention of the General Assembly to the severe and complex problem of controls exercised over the free movement of the "Non-European", and more particularly the "Native" population in the Territory. In its report to the fifteenth session of the General Assembly, the Committee stated with regard to this situation, that:

"Europeans", on the other hand, are free to travel, to enter and leave... They are also free to immigrate, emigrate or travel, without restriction or permit between the Territory and the Union of South Africa, whereas the borders of the Territory are closed to "Non-Europeans" except on individual permits.

The Committee, as it has at past sessions, feels it must once again reiterate its opinion that the unwarranted restrictions, based on race and colour, placed on the freedom of movement of the "Native" population of South West Africa, who form the overwhelming majority of the total population, are in flagrant disregard of the principles and purposes of the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights. The Committee urges the Mandatory Power to eliminate the discriminatory and oppressive restrictions which limit the freedom of movement of the indigenous inhabitants of the Territory.<sup>3</sup>

In a number of countries the granting, refusal or withdrawal of passport facilities is usually within the sound and reasonable discretion of the authorities. However, in some countries those whose ethnic origin differs from that of the predominant group are relegated to an inferior status, under which they are denied the right to leave the country and other rights. In these circumstances, the discretionary power exercised by the authorities becomes absolute, arbitrary and discriminatory. Members of a large group of the population are denied travel facilities solely on the ground of their race or colour in situations in which members of the predominant group would receive them; or if granted passports they are able to secure them only after protracted negotiations, delays, investigations in respect of security and monetary resources, inquiries in regard to domicile, citizenship, and other matters. Sometimes when passports are granted, they are withdrawn without any apparent reason.

In the case of members of many ethnic groups, particularly indigenous and tribal peoples who do not often leave their own country, it is almost impossible to determine to what extent this is the result of actual discrimination and to what extent it merely reflects the backwardness of the groups in question, or their lack of opportunity or resources. Here again the question arises whether this state of affairs is a further reflection of a general pattern of discrimination practised against these groups.

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<sup>3</sup> *Official Records of the General Assembly, Fifteenth Session, Supplement No. 12 (A/4464), paras. 354, 361, 362.*

Once a national has left his country legally, he is most unlikely to be barred from returning to that country on the basis of his race or colour. However, many cases have been noted where individuals, because of the difficulties mentioned above, left their country without a passport or other travel document. Such individuals may find it very difficult to prove their nationality when they seek readmittance to their own country and may face prosecution for the criminal offence of departing or entering without a passport.

For example, as regards indigenous inhabitants of South West Africa, the General Assembly entrusted the Special Committee with the task of securing, in consultation with the Mandatory Power, their return to the Territory. In its report the Committee stated:

The Prime Minister stated that inhabitants of the Territory who had left would be at liberty to return. If, however, any of them should have contravened the law appropriate judicial authorities would have to consider, on their return, relevant circumstances in each case. The Chairman and Vice-Chairman endeavoured to obtain from the South African authorities assurances that technical offences arising from departure without passports would not be prosecuted. The South African authorities said that such persons could seek to regularize their position by asking for passports from the nearest South African consulate abroad. If passports were issued, no action would be taken on the return of the person concerned. In this connexion they mentioned the case of Mr. Hans Beukes, who had left South Africa after his passport had been withdrawn and had then appeared as a petitioner in New York and had subsequently been pursuing his studies in Norway. It had, therefore, been decided to issue him a new passport if he should apply for one at the South African legation, Stockholm. However, the authorities declined to give a blanket undertaking that other cases of persons who had left South Africa or South West Africa without travel documents would be overlooked.<sup>4</sup>

## SEX

In a number of countries, women lose civil capacity upon marriage, and consequently the married woman needs her husband's authorization or consent in order to obtain a passport. This was the case in England formerly under the rules of the common law, but has been changed by statute and a married woman now ranks, as regards her proprietary rights, as a person wholly separate from her husband.<sup>5</sup> The modern trend towards relaxation of the rigour of Roman family law to give separate civil capacity to the married woman is further exemplified by the Inter-American Convention on the Granting of Civil Rights to Women, signed at Bogotá in 1948, which has already been ratified by fourteen Latin American States.<sup>6</sup>

<sup>4</sup> *Report of the Special Committee for South West Africa* (A/5212), para. 39. See also *Report of the Committee on South West Africa Concerning Implementation of General Assembly Resolutions 1568 (XV) and 1596 (XV)* (A/4926).

<sup>5</sup> *Halsbury's Laws of England*, 3rd. ed., vol. 19, p. 822, note (f); p. 823, note (m).

<sup>6</sup> Argentina, Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay.

In some countries also, irrespective of the grant of separate civil capacity to the married woman, the husband is the one empowered to fix the family domicile. In this case, the married woman cannot emigrate except together or by agreement with her husband.

In Belgium, passports applied for by young unmarried women, widows or divorcees less than thirty-five years old, can only be valid for a limited duration and for one or more specified countries, ostensibly to protect them from any attempts to engage them in the white slave traffic or to prevent them from being stranded without funds in some distant country where it would be difficult for the Belgian authorities to act on their behalf.<sup>7</sup> For similar reasons, in the Federal Republic of Germany, females under the age of eighteen years wishing to emigrate may be denied a passport unless they get the authorization of the Guardianship Court required by Section 9 of the Regulation of 14 February 1924 against Emigration Abuses.<sup>8</sup> In the Philippines, a daughter who has already attained the age of majority but is below twenty-three years of age cannot leave the parental home without the consent of the father or mother with whom she lives, except to become a wife, or when she exercises a profession or calling, or when the father or mother has contracted a second marriage.<sup>9</sup> It is conceivable that the paternal policy reflected in these laws could be considered discriminatory against their sex by the women concerned, especially those who have already attained the age of majority.

At its seventh session in 1948, the Economic and Social Council had occasion to deplore legislative or administrative provisions which deny to a woman the right to leave her country of origin and reside with her husband in another country.<sup>10</sup>

In a case brought by Chile before the United Nations, the General Assembly invoked articles 13 and 16 of the Universal Declaration of Human Rights and adopted a resolution the operative part of which is as follows:<sup>11</sup>

*Declares* that the measures which prevent or coerce the wives of citizens of other nationalities from leaving their country of origin with their husbands or in order to join them abroad, are not in conformity with the Charter; and that when those measures refer to the wives of personnel belonging to foreign diplomatic missions, or members of their families or retinue, they are contrary to courtesy, to diplomatic practices and to the principle of reciprocity, and are likely to impair friendly relations among nations;

*Recommends* the Government of the Union of Soviet Socialist Republics to withdraw the measures of such a nature which have been adopted.

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<sup>7</sup> *Répertoire Pratique du Droit Belge*, vol. IX, Brussels, 1951, p. 333, No. 22.

<sup>8</sup> *Reichsgesetzblatt I*, p. 107.

<sup>9</sup> Civil Code of the Philippines, article 403.

<sup>10</sup> Resolution 154 D (VII), 23 August 1948.

<sup>11</sup> Resolution 285 (III), 25 April 1949.

## LANGUAGE

Cases of direct discrimination on the ground of language in respect of the right of everyone to leave any country, including his own, and to return to his country are very rare. Almost every government maintains that adherence to a particular linguistic group is not a valid ground for determining the issuance of a passport.

The Government of Malaya, however, has stated that membership in a particular group "might result in restriction of the geographical validity of the passport or in extreme cases refusal to issue a passport, but could not result in refusal to allow re-entry of a citizen even without a travel document".<sup>12</sup> It appears that the restriction is intended for the protection of a national who does not speak a widely-spoken language, or the language of the country where he intends to travel. If he travels anyway without a passport that will not be a bar to his returning to his country. Nevertheless, he may consider himself to be discriminated against because of the inconvenience, not to mention the attendant difficulties, of going abroad without a travel document.

It should be noted also that a general ban on foreign travel or on travel to specified countries could in fact constitute discrimination in the case of members of a group which do not have adequate educational opportunities in their mother tongue in their own country but could find such opportunities elsewhere or only in the countries excepted.

## RELIGION

Individuals are sometimes directly restricted in the exercise of their right to leave a country on the ground of religion.

According to a non-governmental organization in consultative status with the Economic and Social Council,<sup>13</sup> Jews who reside in Hungary and Romania encounter difficulties in leaving these countries. With reference to Hungary, this Organization states that:

A numerically large Jewish population is found today in Hungary: 80-90,000 . . .

The right of Jews to leave is today virtually non-existent . . . Such restriction did not exist in 1946-1950. During that period approximately 40,000 Jews emigrated from Hungary. Between 1950 and 1956, emigration almost completely ceased. During and immediately after the uprising of 1956, 20,000 Jews were among the 170,000 who fled the country. Since the end of 1957 there has taken place a liberalization of the general ban on travel abroad that followed the uprising of 1956. A growing number of Hungarian citizens have been granted leaves of two to four weeks for the purpose of visiting relatives. It is to be hoped that this liberalization will be extended to permit those Jews desirous of leaving for Israel to go there.

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<sup>12</sup> Information furnished by the Government on 21 November 1960.

<sup>13</sup> Information furnished on 3 October 1960 by the Coordinating Board of Jewish Organizations.

With reference to this statement, the Government of Hungary states that:<sup>14</sup>

Under the terms of article 49/2 of the Constitution of the People's Republic of Hungary, the law punishes severely any discrimination against citizens on the ground of sex, religion or membership in an ethnic group. It follows that the competent Hungarian authorities could not, and did not, enact any law limiting the emigration of persons of the Jewish religion and that in practice, as concerns emigration, persons of the Jewish religion are treated in the same manner as other citizens. The statement of the Coordinating Council of Jewish Organizations, that "the right of Jews to leave is today virtually non-existent", does not correspond to the facts, since many persons and families of the Jewish religion have emigrated during recent years.

With reference to Romania, the same Organization states that:<sup>15</sup>

Between the end of World War II and the end of 1952, perhaps one-half of the post-war Romanian Jewish population of 400,000 emigrated to Israel. The figures are:

1944-1948 .....	56,562
1949 .....	13,595
1950 .....	46,430
1951 .....	40,206
1952 .....	3,627

Between 1953 and 1958, emigration of Jews was sharply restricted, as indicated by these figures:

1953 .....	80
1954 .....	99
1955 .....	253
1956 .....	714
1957 .....	594

The total over the latter five-year period is 1,740 persons.

The policy followed by the Romanian Government, even in the years of substantial emigration, resulted in splitting thousands of families.

According to another non-governmental source:<sup>16</sup>

When mass emigration of Jews from Romania to Israel became possible again in late 1958 and early 1959, after a virtual halt of about seven years, it was reliably reported that 120,000 persons, out of a Jewish population estimated at 222,000 registered for emigration . . .

The emigration procedure imposed by the Government was very complex. The would-be emigrant had to obtain a large number of documents from different government offices—statements concerning the payment of taxes, irreproachable conduct, etc. . . .

When emigration was stopped abruptly, an estimated 14,000 Jews who had lost their jobs, their homes, and their citizenship were unable to leave. Emigrants on their way to the Hungarian border were stopped and turned back.

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<sup>14</sup> Information furnished on 15 October 1962.

<sup>15</sup> Information furnished on 3 October 1960 by the Coordinating Board of Jewish Organizations.

<sup>16</sup> *American Jewish Yearbook*, 1960, p. 274.



There are encouraging signs that the trend had been reversed, or at least arrested, in some countries. In Bulgaria, for example, a non-governmental organization in consultative status indicates<sup>17</sup> that after 1956 there appeared to be a government policy temporarily limiting the right of Jews to leave the country. Emigration was not banned officially, but Jews experienced difficulties in obtaining passports. By 1961, however, there appeared to be no legal obstacle to prevent Jews from leaving Bulgaria and going to Israel.<sup>18</sup> In this connexion the Government states<sup>19</sup> that the emigration of Jews to Israel from the People's Republic of Bulgaria is free and that they encounter no difficulties whatsoever.

With respect to Poland, the same non-governmental organization states that:<sup>20</sup>

The Polish Government, since 1956, has pursued a most liberal policy with reference to the right of Jews to leave. This was not the case during the previous five-year period, during which the régime virtually closed its borders to the exit of Jews.

. . . Between October 1956 and January 1958, approximately 32,000 Jews . . . were allowed to leave for Israel. During 1958, 3,767 emigrated to Israel and some 800 to other countries. During the first nine months of 1959, about 2,900 left for Israel.

In Morocco, according to another non-governmental organization in consultative status,<sup>21</sup> discriminatory treatment after that country achieved independence had spurred large numbers of Jewish nationals to leave for Israel. "At this exodus", according to the Organization's statement, "the Government of Morocco has reacted with severe repressive measures: prohibiting the Jewish nationals from leaving the territory of Morocco and from sending out of the country their money and their goods. As a result there are numerous attempts at clandestine emigration, sometimes with tragic consequences which tend to create in the country a certain state of crisis and which have provoked, on the international plane, numerous protests which ought not to be ignored by the United Nations."

According to another non-governmental source:<sup>22</sup>

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<sup>17</sup> Information furnished on 3 October 1960 by the Coordinating Board of Jewish Organizations.

<sup>18</sup> *American Jewish Yearbook*, 1961, p. 296.

<sup>19</sup> Information furnished on 20 September 1962.

<sup>20</sup> Information furnished on 3 October 1960 by the Coordinating Board of Jewish Organizations. With reference to this statement, the Government of Poland stated, on 22 January 1962, that it "would be obliged for the exclusion from the publication of such information, supplied by an Organization not authorized to transmit to the United Nations information on matters falling within the competence of the Polish authorities".

<sup>21</sup> Information furnished on 26 January 1961 by the International League for the Rights of Man.

<sup>22</sup> *American Jewish Yearbook*, 1960, p. 325.

For the public record Moroccan officials maintained that there was no ban on emigration, and that Jewish demands for passports were treated without discrimination. But government offices refused to grant any passports to persons who, it was thought, might be going to Israel. Often, instead of outright refusal, passport requests were simply not answered. The Council of Jewish Communities presented to the Ministry of the Interior the names of over a thousand persons who had been refused or had not received any answer to passport requests.

However, conditions have changed according to the following newspaper article:<sup>23</sup>

Nearly half of the Jewish population of Morocco is now free to travel abroad for the first time since this country became independent five years ago.

Restrictions on Jewish passports have been lifted in the Casablanca area, where almost 50 per cent of Morocco's 180,000 Jews live.

The Governor of Casablanca, Col. Driss Ben Aomar, has issued directives stipulating that Moroccan Jews must be given the same right to obtain passports as their Moslem compatriots, official sources disclosed.

More often, members of religious groups are affected by general prohibitions against travel abroad which are immaterial to the predominant element of the population. As mentioned above, a general prohibition against religious pilgrimages would affect only those whose religion or belief prescribes such journeys. In the study of discrimination in the matter of religious rights and practices, the Special Rapporteur said:<sup>24</sup>

When a pilgrimage is an essential part of a faith, any systematic prohibition or curtailment of the possibility for pilgrims to undertake journeys to sacred places or the possibility for pilgrims to leave their own country or to enter a foreign country where the sacred place is located, would constitute a serious infringement of the right of the individual to manifest his religion or belief.

In the same way, a general prohibition against leaving a country, or a specific prohibition against going to certain countries, although applied equally to all nationals, affects primarily those who, because of the international nature of their religion or belief or the fact that its headquarters, holy places or training schools are in other countries, have close ties with those countries which they wish to preserve and even to expand.

A few instances have been reported of nationals being refused permission to return to their own country because they profess a certain religion. It sometimes happens also that members of a particular religious group are allowed to leave their country only after formally renouncing their nationality, thus making their emigration irrevocable. In the latter case, the individuals concerned thus lose the legal basis upon which to claim the right to return to their country.

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<sup>23</sup> *The New York Times*, 22 September 1961, p. 11.

<sup>24</sup> United Nations, *Study of Discrimination in the Matter of Religious Rights and Practices*, by Arcot Krishnaswami, Sales No.: 60.XIV.2.

Finally, there are cases where persons are kept from entering a country until they declare their adherence to a particular religion. This means that persons having another religious belief, or no religion at all, have to perjure themselves in order to meet the requirements for entering their own country.

#### POLITICAL OR OTHER OPINION

Although statistics are not available, there can be no doubt that the most wide-spread discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country, is that based upon political or other opinion. As noted above, in a large number of countries the authorities may refuse to grant permission to enter or to leave the country, or to issue the necessary travel document, either without stating any reason at all or on the basis of the vague criterion that such travel would be against "the interest of the State".

In many countries a person whose views or sentiments on important matters of national policy vary seriously from the position of the Government may find that his efforts to leave are beset by difficulties; he may encounter unusual delays in obtaining the necessary permission, or find that conditions are imposed which he cannot fulfil, or he may be halted at the border even though he possesses all the required documentation. Sometimes the purpose of such harassment is to prevent the individual from embarrassing the Government by his activities while abroad, or to prevent him from joining others of like sentiment outside the country to work against the Government, but sometimes it is a matter of discrimination on the ground of political opinion. An increasingly prevalent situation is that in which the bulk of the people of a country is denied the right to travel to certain other countries because their Government does not want them to come in contact with ideologies which are incompatible with its own basic philosophy.

In such circumstances a national may find it necessary to leave his country clandestinely—that is, by avoiding inspection by the responsible authorities at the frontiers—and to seek asylum in another State. However, by his clandestine exit he will probably have committed an offence under the laws of his own State and may have to pay a penalty should he return.

A recent example which might be cited is the conviction of Mr. Nelson Mandela, former Secretary-General of the banned African National Congress on South Africa and Secretary of the African National Council, for having left South Africa without a passport. He was sentenced by the Magistrate of Pretoria to two years imprisonment for this offence.<sup>25</sup>

<sup>25</sup> *New York Times*, 8 November 1962.

Mention might be made also of the case of Mr. William Worthy, Jr., who was charged with unlawful entry in that he returned to the United States from Cuba without a passport and was sentenced to three months imprisonment. The defendant contended that he was indicted six months after his return because he had "reported the many positive achievements of the Cuban revolution, including the rapid elimination of all racial barriers". His counsel challenged the constitutionality of the Nationality Act of 1952 making it a criminal offence for an American citizen to travel without a passport to countries declared by the President to be off-limits in times of emergency, as violating the constitutional guarantees of freedom of movement, of speech and of the Press. The Government denied that there was any discrimination involved in the case which was simply one of illegal entry. It relied on a previous case in which the Supreme Court would not review a lower court decision upholding the State Department's refusal to renew Mr. Worthy's passport in 1957 because he had travelled to the mainland of China and Hungary. The case is now on appeal to the Court of Appeals for the fifth circuit of New Orleans.<sup>26</sup>

In a few countries certain specified individuals, such as former rulers or dictators, are exiled. Sometimes they are simply not permitted to return to their country, although they left voluntarily, or they are allowed to return only under peril of prosecution for high crimes and misdemeanours.

Occasionally also, but not very often, a national professing certain political opinions will be forced to return to his country, i.e., either his passport is cancelled or revoked, or it is endorsed as valid only for return to his country. The purpose of his recall may be to prevent him from causing further damage to the interests of his country abroad, for example, by embarrassing his Government or impairing its relations with other countries. Such acts, while not restricting the national's right to return, may have the effect of denying his right to freedom of speech including "the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".<sup>27</sup> However, it is quite possible that the recall of a national is merely part of the judicial process to make him answer for the commission of a felony.

#### NATIONAL ORIGIN

Discrimination on the ground of national origin in respect of the right of everyone to leave any country, including his own, and to return to his country, often coincides with that based on race, colour or religion. As has already been pointed out, members of groups having compelling

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<sup>26</sup> *Ibid.*, 12 October 1962.

<sup>27</sup> Universal Declaration of Human Rights, article 19.

reasons to travel abroad may consider even a general prohibition of such travel or a prohibition of travel to specified countries, to be discriminatory in their case.

During World War II American citizens of Japanese descent residing in critical areas of the United States were interned as a war measure. The Indian Government has recently issued an ordinance classifying Indians of Chinese origin as foreigners for the purpose of controlling their movements and making them liable to internment, as an emergency measure arising out of the invasion of its border by a neighbouring country.<sup>28</sup> In so far as the right to leave or enter their country is concerned, the group singled out for exceptional treatment might justly feel that they are discriminated against on the ground of national origin. On the other hand, the State could also claim justification in the interest of national security in time of war or emergency, though the differential treatment is not based on the individual record or personal behaviour of the members of the group whose freedom of movement is curtailed.

In some countries a national by naturalization, having sojourned outside the country for a specified number of years, is deprived of his nationality and consequently of the right to return to his adopted country. In this respect he suffers a disability—which he may consider discriminatory—not experienced by a national by birth.

Sometimes a distinction is also made between a national by birth and one by naturalization in the matter of securing a travel document. One instance is that requiring a national by naturalization to obtain an exit visa in addition to his passport when he leaves the country, a requirement not imposed on a national by birth for whom a valid passport is sufficient.

#### SOCIAL ORIGIN

In the old days it often occurred that only the rich and those pertaining to the nobility were free to go abroad. The abolition of class distinctions has done much to do away with this exclusive privilege.

In our time there are still vestiges of discrimination on the ground of social origin in respect of the right under study. They are often apparent in measures of a general character, designed to retain a trained labour force in a country, which affect certain social groups more severely than others. Sometimes such measures apply mainly to individuals belonging to the higher social strata; in other cases they apply mainly to persons who, in view of their lowly social origin and status, are most in need of seeking a better livelihood outside the country.

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<sup>28</sup> *The Times of India*, 31 October 1962.

In some countries, nationals recruited for employment as labourers abroad are prohibited from leaving the country unless regulations governing their recruitment are complied with, among others, those requiring the prior execution of a contract of employment or of guarantees to ensure their repatriation. In so far as these regulations are designed to protect the labourers from undue exploitation in foreign countries, they may not be considered discriminatory. It is otherwise if the regulations are so stringent as to suggest a governmental policy to prevent the emigration of labour. It was precisely to ease the lot of migrant labourers and facilitate their temporary or permanent settlement elsewhere that a Convention and Recommendation Concerning Migration for Employment was adopted by the International Labour Organisation.<sup>20</sup>

### PROPERTY

Direct discrimination on the ground of property in respect of the right of everyone to leave any country rarely occurs. In some countries, however, there appears to be a rather reprehensible practice of increasing the price of passports in order to raise revenues or to discourage travel deliberately. Whenever this occurs, the poor, who cannot afford the price, may justifiably feel that they are being discriminated against in favour of the rich.

In some countries, even though the actual fee charged for the travel document itself may not be unreasonably high, yet the procedure to obtain the travel document may be so involved and complicated as to require additional expense for professional advice and assistance in the matter. This may deter many persons—rich and poor alike—from obtaining the necessary travel document. The net result of the long and complicated procedure is that it tends to work hardship on the poor and may therefore be considered to discriminate against them.

In some cases, too, before a person is permitted to leave a country he has to pay special taxes, sometimes equal to the price of his transportation ticket. He may also be required to deposit a sum of money or file a bond to guarantee that he would not become stranded or indigent while abroad. The wealthy are able to meet these requirements, the poor are often discouraged. The result is a *de facto* discrimination on the ground of property.

### BIRTH OR OTHER STATUS

In some countries birth outside of wedlock was a ground upon which nationals were at one time denied permission to travel abroad, but today there is no known example of such restriction.

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<sup>20</sup> *Industry and Labour* (1 August 1949), vol. II, No. 3.

In certain countries, however, where monarchy has been forced to give way to a different system of government, members of the former royal house who have not expressly renounced their membership of that house and all claim to the throne and have declared themselves loyal citizens of the new State, are banished, and consequently may not return to their country even if they retain its nationality.

#### STATUS OF THE COUNTRY OR TERRITORY TO WHICH A PERSON BELONGS

It is worthy of note that the first Trusteeship Agreements entered into in 1946 between the United Nations and the Administering Authorities concerned merely guaranteed in the Trust Territories either the freedom of navigation and transit of nationals of Members of the United Nations or the free entry, travel and residence of missionaries who are nationals of Members of the United Nations. Only in subsequent agreements, namely that entered into by the United States with respect to the former Japanese Mandated Islands in the Pacific, and that by Italy with regard to Somaliland, was the right of emigration and travel expressly ensured to the inhabitants of the Trust Territory concerned.<sup>80</sup>

It is not surprising, therefore, that the Trusteeship Council has from time to time dealt with allegations of denial or discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country. Many of these cases emanated from persons seeking to re-enter a territory after having been expelled from it, or allegedly forced to flee for political reasons.

In one particular case the Trusteeship Council noted that the indigenous inhabitants of a Trust Territory were required to seek special permission to leave the territory to visit relatives elsewhere. Subsequently, a Visiting Mission noted that although transportation arrangements had been agreed upon, the Administering Authority concerned declined to undertake any obligation to return the persons involved to their own Territory after their visit abroad had been completed.

Similar complaints have been made to the General Assembly with respect to Non-Self-Governing Territories. The administering Powers usually state that the inhabitants of these Territories are accorded the same basic rights as the nationals of the metropolitan territory, but sometimes the right of a national to leave the country and return thereto is not legally, or is only imperfectly, recognized in the metropolitan territory itself. The laws and regulations dealing with the exit and re-entry of dependent peoples are often more stringent, and sometimes such people do not have the same recourses or remedies as those available to nationals of the metropolitan territory. Thus, in a number

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<sup>80</sup> United Nations, *Yearbook on Human Rights*, 1947, p. 414; 1950, pp. 366, 370.

of dependent territories provisions are in force under which a person may be refused permission to leave the territory "without making adequate provision for the support of his wife, child or children", or "without paying all tax assessed upon him". Sometimes the issue of a travel document is conditioned "upon the issuing authority being satisfied that the person to whom the travel document is issued will not become a liability on public funds if it should become necessary to effect his repatriation from another country in which he may become destitute", or permission to travel is denied to persons "who have been repatriated at public expense and have not repaid the expenditure incurred on their behalf".

With respect to the Mandated Territory of South West Africa, the Committee on South West Africa has several times drawn the attention of the General Assembly to the fact that representatives of sections of the indigenous population of South West Africa wishing to be heard by the United Nations, who had been granted hearings by the Fourth Committee, continued to be refused passports by the Union Government. In 1958, the Committee on South West Africa adopted the following recommendation to the General Assembly:

In the view of these conditions, it appears to the Committee that the Union Government is not willing to issue a passport to an inhabitant of South West Africa who has been granted a hearing by the United Nations. The Committee wishes again to emphasize the special importance, in the absence of co-operation by the Mandatory Power in supplying information about conditions in the Territory, which should be attached to the full exercise of the right of petition in respect of South West Africa. The Committee therefore recommends once more that the General Assembly urge the Mandatory Power to grant petitioners travel documents to enable them to appear before the proper organs of the United Nations for hearings, when granted by such organs, and to return thereafter to their places of residence.<sup>31</sup>

In 1961 the General Assembly entrusted the Special Committee on South West Africa with the task of achieving, in consultation with the Mandatory Power, "the repeal of all laws or regulations confining the indigenous inhabitants in reserves and denying them all freedom of movement...".<sup>32</sup>

The General Assembly also provided for special educational and training programmes for South West Africans abroad, and requested all Member States to facilitate the travel of the students concerned.<sup>33</sup> The Chairman and Vice-Chairman of the Special Committee took up the matter with the authorities of the Union of South Africa. A petitioner from Windhoek, Mr. Brian Bassingthwaite, also stated that he had been awarded a scholarship for study at Tübingen University

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<sup>31</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 12 (A/3906)*, para. 24.

<sup>32</sup> Resolution 1702 (XVI).

<sup>33</sup> Resolution 1705 (XVI).



in Germany but that his application for a passport had not been approved by the South African authorities. In its report to the seventeenth session of the General Assembly, the Special Committee said:

Since in terms of local law, no indigenous student could legally take up a scholarship abroad without a passport, the Chairman and Vice-Chairman raised with the South African authorities the question of granting passports to students awarded scholarships. They found that the South African authorities were reluctant to envisage the study abroad of South West Africans fearing that the students would be too young to benefit from such studies and might be exposed to communist influences. The South African representatives pointed out that the South West African Administration was ready to grant scholarships to the Bantu Universities of South Africa to all South West African Natives who qualified for entrance (in 1962 only two such scholarships were awarded), while Coloured students could go to the University College for Coloured Students at Cape Town.

When the Chairman and Vice-Chairman insisted on the advisability of granting passports to students so that they could take up scholarships abroad, the Prime Minister would go no further than to state that bursaries offered for post-graduate study overseas for the purpose of educational advancement would be sympathetically considered and that each case would be dealt with on its merits.<sup>34</sup>

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<sup>34</sup> *Report of the Special Committee for South West Africa (A/5212)*, paras. 40-41. According to the same report (para. 75), "in 1961 the South African authorities began to introduce into the Territory the system of Bantu education which had already been applied for several years in South Africa itself. The main features of this system as compared with the previous one are the diminution or elimination of the role of the missionary societies with greater control by the State and the use of the various local languages as media of instruction in the lower classes instead of English or Afrikaans. This only intensifies the basic policy of the South African Government in the educational field which, as noted by the previous Committee of South West Africa, is to restrict Africans to a rudimentary system of schooling and training designed to confine them to menial occupations in order to keep them in a state of subservience to the White minority. It is also the policy of the South African Government to deny Africans access to higher education thus keeping them from professional activities, from participation in the fruits of their resources, and from contact with enlightened ideas which would cause them to aspire to better ways of life than their present unbearable conditions."

### III. DIRECT LIMITATIONS

#### INTRODUCTION

Having examined the application of the principle of non-discrimination to the right of everyone to leave any country, including his own, and to return to his country, we must now consider the application of limitations to the exercise of that right.

Discrimination is less likely to occur where the limitations are prescribed by law. It also follows that the fewer the limitations, the less the opportunity for discrimination. It will readily be seen how essential it is to study not only the right itself, but also what are the permissible limitations, in order to put in its proper setting the problem of discrimination in relation to the exercise of the right in question.

Article 29 (2) of the Universal Declaration of Human Rights subjects the rights and freedoms which it guarantees "only to such limitations as are determined by law solely for the purpose of seeking due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". We have already stated that since article 29 (2) is restrictive in character, no limitations not contemplated therein are permissible under the Declaration. This arises from the principle of *inclusio unius exclusio alterius*.

Coming to Article 12 (3) of the draft Covenant on Civil and Political Rights, adopted by the Third Committee of the General Assembly,<sup>1</sup> we find the addition of three new concepts, not specifically mentioned in article 13 (2) of the Declaration, namely: national security, *ordre public* and public health. On the other hand, the phrase "general welfare in a democratic society" is omitted from article 12 (3) of the draft Covenant. This omission is significant in so far as it may be argued that the existing enumeration of permissible limitations in article 12 (3) of the draft Covenant is synonymous with, and is in fact intended to replace the concept of "general welfare" defined in article 13 (2) of the Declaration.

It should be noted also that the expression *ordre public* is enclosed in parenthesis following and obviously modifying the term "public order". As is evident from the discussions in the Third Committee the English expression "public order" was not thought to be equivalent

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<sup>1</sup> The legislative history of article 12 of the draft Covenant on Civil and Political Rights is summarized in annex IV.

to the French expression *ordre public*. In common law countries, the term "public order" simply means absence of disorder, while the counterpart of *ordre public* is "public policy". In civil law countries the notion of *ordre public* (or, in Spanish, *orden público*) is used principally as a basis for voiding or restricting private agreements, the exercise of police power, or the application of foreign law. *Ordre public* is in most jurisdictions a broad and flexible principle, often characterized by legal commentators as vague and indefinite.<sup>2</sup> Hence, by adding *ordre public* to "public order" in article 12 (3) of the draft Covenant on Civil and Political Rights, the Third Committee has permitted the introduction through the backdoor of the concept that public order and public legislation are synonymous, a concept that was not accepted by the General Assembly when it rejected the Soviet amendment to article 13 (2) of the Declaration.<sup>2 bis</sup>

Reason compels us to stand by the original English meaning of "public order" in the Declaration and to reject the mischievous implications of qualifying or tying down its meaning to the French concept of *ordre public*. If a country, for example, follows *apartheid* as a public policy, then it could invoke *ordre public* for the purpose of curtailing the right proclaimed in article 13 (2) of the Declaration on racial grounds. Needless to say, such a public policy would be alien to the general welfare in a democratic society. It would be a gross violation not only of the principle of non-discrimination enshrined in article 2 but also the injunction in article 30 against interpreting the Declaration as implying for any State the right to destroy any of the rights and freedoms proclaimed therein. It would also be contrary to criterion of consistency with other rights established by the Third Committee itself in article 12 (3) of the draft Covenant.

It is interesting to note that the Third Committee sought to qualify the term "public order" with the parenthesized words *ordre public* only in one other article of the draft Covenant, namely article 14, on publicity of trial. It rejected a proposal to limit article 17, on freedom from interference with one's privacy, family, home or correspondence, by the concept of *ordre public*. It also approved article 18 on freedom of religion, containing "public order" as one of the limitations, but without the qualifying phrase *ordre public*. It is possible that the General Assembly might in its wisdom delete the qualifying term from articles 12 and 14 for the sake of uniformity, if not to protect the integrity of the Covenant. At any rate, it is article 13 (2) of the Declaration and not article 12 (3) of the draft Covenant which figures in the terms of reference for this study.

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<sup>2</sup> Paton, *Jurisprudence*, p. 181; Roland, *Précis du Droit Administratif*, 9th ed., para. 463; Bielsa, *Derecho Administrativo*, vol. 4, paras. 707, 708.

<sup>2 bis</sup> See annex III.

For the purpose of our study, therefore we shall regard as permissible limitations to the right of everyone to leave any country, including his own, and to return to his country, only those which are provided by law and which are necessary to protect national security, public order, health or morals, or the rights and freedoms of others.

Most Governments have found it necessary to place a great variety of restrictions upon the right of everyone to leave the country. In general, they tend to accord foreigners equal treatment with nationals in the exercise of this right, and to be somewhat less strict in the case of persons who leave the country permanently than in the case of those who leave only temporarily. In some cases, specified categories of individuals, such as minors, paupers, persons under legal disability, fugitives from justice, persons who have failed to perform certain legal obligations or who are under court restraining orders, habitual criminals or members of trades or professions considered to be of national importance or interest, are not allowed to go out. In other cases no one is allowed to leave the country if there is reason to believe that his activities abroad would be prejudicial to the interest of the country, would endanger the internal or external security of the State, or would be prejudicial to the orderly conduct of the State's foreign affairs. Sometimes this right is further limited by area or time restrictions placed upon the validity of the travel document. Whether or not any such restriction is discriminatory can only be determined by careful study of the particular situation in the light of the permissible limitations mentioned above. If the restriction falls within the ambit of the justifiable restraints and is applied equally to everyone, it cannot be considered discriminatory. But if it does not fall within the purview of justifiable limitations, discrimination is the usual result.

Occasionally restrictions are placed upon the right of an individual to return to his own country. That there are two opposing points of view relating to such restraints became evident during the debate in the Third Committee of the General Assembly on article 12 of the draft Covenant on Civil and Political Rights. Some members felt that this right should not be subjected to any restriction whatsoever. However, the general consensus was that while the right was not absolute, it should not be made subject to the same kind of restrictions as the other rights defined in paragraphs 1 and 2 of the same article. It was thought inconceivable, for example, that a State should prohibit one of its nationals from entering its territory for reasons of health or morality. It was pointed out that in the draft prepared by the Commission on Human Rights, exile was the only permissible restriction recognized. Several members, however, were opposed to mentioning "exile" in the Covenant, as the laws of their countries either prohibited or did not recognize exile. Some question was raised regarding the meaning of the phrase "his own country". The view was expressed that his own country should be taken to mean the country of which the individual concerned was a

national or citizen; the necessity of being able to submit ample proof of the fact was also emphasized.

The text of the fourth paragraph of article 12, as adopted by the Third Committee, reads as follows:

4. No one shall be arbitrarily deprived of the right to enter his own country.

In effect, this is a reiteration of the prohibition against arbitrary exile in article 9 of the Universal Declaration. The right to enter one's country includes not only the right to return to one's country but also the right to enter it for the first time.

In a previous study by the Commission on Human Rights it was suggested that "arrest and detention" would be deemed arbitrary if done:

(a) On grounds or in accordance with procedures other than those established by law, or

(b) Under the processes of a law the basic purpose of which is incompatible with respect for the right to liberty and security of person.<sup>3</sup>

Applying the foregoing definition to article 12 (4) of the draft Covenant, it follows that the right to enter one's country may be denied or restricted according to law provided that such denial or restriction is not basically incompatible with the right to personal liberty and freedom of movement. It goes without saying that if the foregoing requirements are not met, then the denial or restriction becomes arbitrary and hence discriminatory.

#### NATIONAL SECURITY

In nearly all countries a travel document may be denied, or permission to leave the country refused, on the ground of national security. Sometimes the term "security of the State" is used. Frequently the authorities are not required to give any further explanation of the ground for denial because a revelation of the underlying reasons might itself prejudice national security.

"National security" is, however, a term which can be understood in a narrow sense or, on the contrary, in a very broad sense. It may be limited solely to matters of national defence, or it could cover anything that might conceivably affect public safety or the internal or external security of the State. Although national policies vary considerably, excessive zeal to protect what is currently understood as national security has often given rise to serious infringements of the right under review.

In certain countries a national who is considered a security risk by the Government may be unable to obtain a passport or exit visa. In

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<sup>3</sup> Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile (E/CN.4/826), para. 23.

some countries a national may be refused permission to leave if the Government suspects that he will engage in activities abroad prejudicial to the national security. In other countries a national can be prevented from leaving only if facts exist which give reason to believe that his journey would endanger the security of the State or render him dangerous upon his return. One Government, which exercises absolute discretion in issuing passports, states that an applicant who is considered a serious security risk may be refused a passport if such refusal is expected to be supported by Parliament.

Indeed, national security could be interpreted so broadly as to deny the basic right altogether. For example, such a ground might be cited as a pretext for prohibiting all nationals from going abroad for any purpose whatsoever.

Because it is clearly necessary to set limits upon the interpretation of such a vague term as national security, article 12 of the draft Covenant on Civil and Political Rights limits this permissible restriction, *inter alia*, by requiring it to be "consistent with the other rights recognized in this Covenant". Moreover, any interpretation of the Declaration implying a licence for any State to engage in any activity or perform any act aimed at the destruction of any right or freedom set forth therein, is expressly prohibited by its article 30.

It would appear, therefore, that any restriction based upon national security may be legitimately imposed by Governments only within the framework of a general policy permitting everyone to leave the country, and for specific reasons presenting a real danger to the security of the State. A general policy of not permitting anyone to leave the country is never justifiable except in time of war or national emergency. The requirement that a person's activities should be deemed prejudicial to the national security only if such activities are punishable under penal law and the person concerned is actually being prosecuted for such an offence, would seem to be the best safeguard against arbitrary denial of the right to leave any country on the ground of national security.

#### PUBLIC ORDER, HEALTH OR MORALS

Many countries prevent anyone regarded as being dangerous to public order, or to the safety or morals of others from crossing their borders. These include habitual criminals, pirates, pimps, prostitutes, traffickers in women and children, smugglers or purveyors of narcotic drugs or contraband goods. In so far as measures of this kind protect the interests of the law-abiding population by preventing nationals who are criminals from leaving the country and foreigners who are criminals from entering it, they cannot be considered to be discriminatory; indeed, it would seem to be the duty of the State, as a member of the international community, temporarily to suspend the freedom of movement of such criminals so that they might be apprehended and prosecuted.

The modern tendency, in fact, is to further restrict the freedom of movement of such dangerous persons, and to extent such restrictions to all international professional criminals, including gamblers, swindlers, thieves, and counterfeiters.

To justify restriction of the right of a national to leave his country on the foregoing grounds, proof should at least be given of his previous conviction of crime. It will not do simply to deny him a passport because he is a person of bad character or because he is suspected of wanting to go abroad to carry out some criminal or unlawful activity.

There are many other examples of justifiable restrictions on the right of a national to leave his country on the ground of public order. No country will grant a travel document or permission to cross a national boundary to fugitives from justice or anyone whose purpose is to avoid criminal or civil proceedings, to escape from execution of a penalty, or to evade a court decision or restraining order. In most countries an individual cannot obtain a travel document or permission to leave the country if he has any outstanding legal obligations with regard to national or military service, or for the payment of taxes.

Some countries also suspend temporarily the delivery of passports if there exist reasons of public order or grave danger abroad likely to expose the life, liberty or property of the applicant to serious risk.

Most countries subscribe to health and sanitary regulations prescribed by the World Health Organization. A person may be prevented from leaving or entering the country until he has complied with such regulations. Those who have a communicable disease, drug addicts and confirmed alcoholics are subject to more strict measures. Some countries also prohibit emigration of unskilled labourers to areas where plague or other epidemic disease dangerous to human life has broken out.

As regards entry into a country, nationals are normally favoured over foreigners and it is unlikely that health or sanitary regulations which prevent the entry of a foreigner would also bar a national. What usually happens is that a national who has an infectious or loathsome disease, for example, is admitted for treatment, or compliance with health or sanitary regulations, instead of being turned away. This arises from the fact that a State cannot shirk its responsibility towards a national or arbitrarily deprive him of the right to enter his own country. The duty of the State to receive its nationals extends also to convicted criminals and other dangerous persons mentioned above.

#### INTEREST OF THE STATE

The application of limitations on the ground of the "interest of the State" is wide-spread, though the practice varies from country to country. Sometimes the past, present or anticipated activities considered prejudicial to the public interest are mentioned as the ground for denial

of a passport. Sometimes there may be no direct reference to such activities, and the national is simply informed that his travel abroad is not in the interest of his country. Sometimes, the undesirable activity of the applicant while abroad is merely cited as the reason for denial of his application for a passport without specifically mentioning that the step is taken in the national interest.

In some countries a passport may be denied on the ground that the applicant's past or present activities have been, or his future activities might be, prejudicial to the orderly conduct of the State's foreign affairs. It may be denied because the Government believes his presence abroad would prejudice its good relations with another Government, or because his behaviour while sojourning abroad was thought to be detrimental to its reputation. The highest administrative court of one country has held that criticism of the Government does not of itself constitute ground for denial of a passport, but ground for denial exists where calumny of the republic committed abroad would tend to undermine the confidence of the community of nations in the republic.

By far the most arbitrary restriction of the right of a national to leave his country on the vague ground of public interest is the requirement that he must have a good reason for his journey before a passport is issued to him. Sometimes he is even required to present evidence of the purpose of his trip.

In most of these examples, the executive or administrative determination is all that is required to satisfy the test of public interest. Only in a few cases do Governments mention that the activities considered prejudicial to the interests of the State have to be passed upon by the courts or that the executive or administrative decisions are subject to judicial review.

The legislation and administrative regulations of many countries describe the public interest variously as "important interests", "best interests", "supreme interest", or simply "interests" of the State. Obviously, these terms are so broad that they can even mean "public policy" (*ordre public*), which we have rejected as a permissible limitation at the beginning of this chapter.

One extreme, but none the less true, example of a broad interpretation of public interest is the governmental policy of some countries which virtually confines the bulk of the population within their national boundaries. Leaders of some such countries have occasionally stated that the policy of their country is not to allow just anyone to leave, but only those whose visit abroad is expedient, but none the less the possibility of a more liberal policy is, in general, envisaged in the future.

"Public interest" is understood in American common law as something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are



affected.<sup>4</sup> It is usually used in connexion with property or business which is thus described as vested with a public interest. It has very little in common with the Roman law concept of *interest republicae*, which covers not only public interest as defined in common law but a host of other things, the sum total of which comprise the concern of the State. The closest among the Roman law maxims which approximate the "interest of State", often invoked as a ground for curtailing the right under study, would be that which says: "It especially concerns the State that peace be preserved in the kingdom, and that whatever things are against peace be prudently avoided".<sup>5</sup> In this sense, it partakes of both the permissible limitations of "public order" and "national security" and, therefore, what has been said under those two headings apply also to limitations on the ground of "interest of State", since the latter term is mentioned neither in article 13 (2) of the Declaration nor in article 12 (3) of the draft Covenant. Suffice it to say that any meaning given to the term "interest of the State", as a limitation on the right in question which has no reasonable relation to any of the concepts of national security, public order, health or morals and protection of the rights and freedoms of others, would not be justified at all and for that reason would be discriminatory.

#### LEGAL INCAPACITY

In most countries no person under legal disability or certified as incapable, mentally deranged or mentally deficient can obtain a travel document or permission to cross a national boundary without the consent of a legally designated guardian or authority. A measure of this kind, designed to protect the interest of the individual concerned, cannot be regarded as discriminatory. However, the requirement of a few countries that travel outside the country by a wife must be authorized by her husband discriminates not only against the sex but also against the civil status of married women, even though it may have originated as a measure for their protection.

In hardly any country can a minor obtain a travel document or permission to cross a national boundary without the consent of his parent or lawful guardian. Sometimes a minor may be issued a passport upon his own application unless his mother or legal guardian requests that the application be denied. This again is a normal protective measure and is, therefore, not discriminatory.

In countries, however, where parental authority is vested in the father to the exclusion of the mother, the father may give his consent against the will of the mother. Though not strictly germane to the study, it may nevertheless be mentioned in passing that this would again constitute a case of discrimination against married women. Of course, where the law prescribes who should have the custody of a minor, or where

<sup>4</sup> *State v. Crockett*, 86 Okl. 124,206, p. 816, 817.

<sup>5</sup> 2 Institutes 158.

the Court has made an order relating to the custody of such minor, the consent necessary for that minor's travel must be in keeping with the law or the order of the Court.

Protective measures of the kind described above may be defended as being necessary to secure due recognition and respect for the rights of others.

#### NON-PERFORMANCE OF LEGAL OBLIGATIONS

An individual is invariably refused a passport or denied permission to leave a country if there is reason to believe that he will depart without meeting certain legal obligations or that he intends to evade such obligations by going abroad. We are here concerned with obligations to other individuals since we have discussed obligations towards the State under the heading of "public order".

Many countries allow a national liable to pay debts, or to give support or maintenance to a spouse or child, to depart if he leaves behind sufficient means or property to meet his obligations. It is not even necessary to put up such security if he goes to countries which, like his own country, are parties to the United Nations Convention on Recovery Abroad of Maintenance, concluded on 20 June 1956. This convention makes it possible to secure from nationals abroad payment of obligations arising out of order of maintenance.

If a national has pending contractual obligations to deliver goods or perform services, he may be impeded from leaving the country until he has given a guaranty ensuring his return to the country or the performance of the contract.

Restrictions upon travel abroad to prevent evasion of outstanding legal obligations of the nature described above cannot be considered discriminatory, as their very purpose is to secure the recognition and respect for the rights of others.

#### KNOWLEDGE OF A TRADE OR PROFESSION

In a few countries the departure of skilled persons, particularly those having expert knowledge of certain needed trades or professions, is restricted by law or in practice. Such restrictions are understandable in the case of developing countries which find it necessary to prohibit the departure of persons having specified skills in order to prevent their limited supply of skilled manpower from being drained away by the better conditions offered in industrialized countries. They might even be justified in certain cases, as when technical experts receive specialized training at the expense of a Government and voluntarily contract an obligation to work at their trade or profession in the country for a reasonable period of time after completing their studies. However, they could not be justified in normal times in any highly industrialized country, nor in any country should they be applied as strictly to those

who want to leave the country temporarily as to those who want to leave it permanently.

National security may enter the picture as in the case of scientists working on vital national defence projects who may be prevented from leaving the country to insure completion of their task, though normally this condition should form part of their contract of employment. The State may also take steps to prohibit their leaving the country to avoid their special knowledge or skill from being utilized by hostile or potential enemy countries. If they happen to possess military or State secrets, they may also be prevented from leaving, though the danger of betrayal exists no less at home than abroad. Justification of such steps should meet the test of clear and pressing danger to the national security.

#### PASSPORT AND VISA RESTRICTIONS

Passports are ordinarily issued for a specified or unlimited number of journeys. The period of their validity usually extends from six months to five years; in the case of service passports, they may be valid indefinitely, i.e., for the duration of the diplomatic or consular status of the bearer. The practice of nations favours on the average five years as the term of ordinary passports. Apart from the inconvenience of having to renew the passport, or to cut short one's stay abroad, time restrictions on the validity of passports do not seem to present a particularly serious problem to travellers.

It is area restrictions, or those limiting the geographical validity of passports, which sometimes seriously curtail the right of a national to leave his country. While in some countries a passport issued to a national is valid for travel to all foreign countries, in many countries, on the other hand, the issue of a passport to a national does not enable him to travel to all parts of the world. Sometimes it is expressly provided by law that the holder of a passport issued by the particular country is permitted to travel only to the countries mentioned therein.

Sometimes the country issuing the passport may exclude certain specific countries. In some cases, while a country may not place any general area restrictions on its passports, it sometimes limits the geographical validity of a passport issued to a particular person.

In almost every case, a person desirous of leaving his country, either temporarily or permanently, intends to travel to some particular country or countries and not to any country or countries. If his passport is not valid for travel to the country or countries to which he desires to go, then it is quite possible that such limitation on the geographical validity of his passport will, so far as he is concerned, be a denial of the right to leave his country.

Some countries require a foreigner to have an exit visa before he is permitted to leave; this is in addition to the entry visa for his ad-

mission to the country. In a few countries a national must secure an exit visa or permit in addition to his passport if he wants to go abroad. Sometimes an exit visa is required only if he is leaving his country permanently. Sometimes a national must secure in addition to his exit visa, an entry visa to enable him to return to his country. An exit visa or permit may be valid for only a limited period or for a specified number of journeys. The period varies from two weeks to one month or more. The holder of an exit-entry visa must leave or return before the expiry of the visa unless it is extended for a longer period.

It goes without saying that the requirement of an exit visa and sometimes also of an entry visa for nationals, and of an exit visa in addition to an entry visa for foreigners, is a burdensome restriction on the right of everyone to leave the country. If there are no legitimate grounds for denying a passport to a national, or for denying an entry visa to a foreigner, there does not appear to be any need to require him to obtain an exit visa unless such permit is intended to be used to control his movements. There would seem to be no justification also for maintaining a system of entry visas for returning nationals and at the same time declaring that a national cannot be turned back from his country.

#### PUBLIC EMERGENCY

In article 4 of the draft Covenant on Civil and Political Rights, prepared by the Commission on Human Rights, which embodies measures of implementation of the Covenant, States Parties are allowed to derogate their obligations under certain articles of the Covenant in time of public emergency. Among those articles is article 12, guaranteeing the right of everyone to leave any country and to enter his country.

Article 4 establishes the safeguard that the public emergency must threaten the life of the nation and that its existence must be officially proclaimed. From the practice of States which constitutionally recognize the declaration of a state of siege or of national emergency, we may deduce that it is applicable, among others, to cases of war, civil war, rebellion or insurrection, and that it is only of limited or temporary duration.

From the additional safeguard in article 4 that the derogation is permissible only to the extent strictly required by the exigencies of the situation, may be implied the principle that a public emergency may not necessitate inclusion of the right set forth in article 12 among the rights to be derogated, or that this right should not necessarily be completely extinguished.

Moreover, even a public emergency is no warrant for discriminatory measures, since article 4 requires that any derogation of rights should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

## IV. INDIRECT LIMITATIONS

### INTRODUCTION

Enjoyment of the right of everyone to leave any country is often adversely affected by certain factors which do not directly limit the right itself but actually lessen the possibility of its enjoyment and open the door to discrimination. Among the economic measures which may decisively deter the exercise of the right are regulations governing the use of foreign exchange, exorbitant fees for travel documents and taxes on travel abroad, and requirements for putting up a deposit or other security before permission to travel or the required travel document is granted.

Passport formalities are normally designed to facilitate their issuance, but sometimes the procedure of obtaining a passport is so cumbersome that it tends to delay or impede the enjoyment by a national of the right to leave his country. Where the issuance of a passport is considered a privilege and not a matter of right, abuse of discretion may result in discrimination.

The nature of the remedies available to the individual who is prevented from leaving a country, or from returning to his own country, determine in large measure the equality and effectiveness of guarantees to protect enjoyment of the right. Needless to say, the total absence of any recourse to higher authorities paves the way for arbitrary, if not discriminatory, judgements.

Penalties imposed upon persons who leave a country or enter their own country without the required travel document—ranging from deprivation of certain rights to imprisonment and sometimes death—also operate no less compulsively as a restraint on the free exercise of the right. If the penalties affect only a particular group, or are applied more severely to the members of that group, there can be no doubt that they are discriminatory. On the other hand, penalties imposed upon those who leave their country to go to countries specifically excluded from their travel documents, serve to bolster a prohibition inherently discriminatory.

### ECONOMIC MEASURES

The achievement of a balance between respect for the right of everyone to leave a country and the interest of the State presents a particularly difficult problem, especially from the economic point of view.

It is increasingly apparent that economic controls infringe the right of individuals to leave their country. These controls, which are frequently necessary, are sometimes relaxed in the case of students or invalids, but even in such cases it is impossible to eliminate all restrictions. In some developing countries of Africa, for example, a student going abroad to study cannot take currency out of the country unless the Government is satisfied that he is intellectually capable of obtaining higher qualifications. The Government seeks, so to speak, to recover its financial outlay on the student, not in the form of money but in the form of technical knowledge which he would acquire abroad. Similarly, invalids are sometimes allowed to leave a country and to take with them the funds necessary for treatment elsewhere, but in other cases they are not allowed to leave the country in the absence of evidence that they can obtain the necessary care outside.

Regulations forbidding or restricting the exportation of currency, though often justified by the international payments position of the Governments issuing them, may give rise to serious questions of economic discrimination. Some regulations, by their very stringency, encourage or even oblige persons who are compelled to undertake a journey to have recourse to illegal means. Many countries, however, make exceptions in their regulations by giving special consideration to those who leave the country on religious pilgrimages, or for education, health, family or business reasons. Discrimination against particular persons or groups may arise in the classification of exceptions to the general rule or from the abuse of discretion vested in the authorities administering the regulations.

Special taxes on travel, as well as the high cost of obtaining travel documents, not only inhibit the exercise of the right to leave one's country but, as we have already stated, may also amount to a *de facto* discrimination on the ground of property. In some countries, however, it is the practice to issue passports to indigent persons without charge or at a very small fee, or to reduce the fees for persons of modest means. Sometimes special rates are applied in the case of family or group passports.

Several countries will not issue a passport unless a deposit or other security is furnished by the applicant to ensure his repatriation or to guard against the contingency of his becoming a public charge abroad. Sometimes this is required only of a national whose financial stability is in doubt, or who had been repatriated at government expense during a previous sojourn abroad. If the amount involved is large, this requirement could deter a national of modest means who wishes to leave his country. Such a requirement would be discriminatory against those who cannot make a deposit or furnish security, especially those who have been promised support or maintenance abroad by relatives or friends, or by institutions which have offered them scholarships or other grants.

A national or resident foreigner who wishes to emigrate is sometimes subjected to severe restrictions on the nature and amount of the personal and household effects that he can take out of the country. Normally a person leaving a country permanently should be able to take with him the property he may need to make a fresh start elsewhere subject to the special provisions, such as customs regulations, applicable in the matter. On the other hand, he might legitimately be prevented from taking with him personally-owned means of production important to the country's economy, such as a factory producing essential commodities. If his property is expropriated, he is of course entitled to compensation. Undue restrictions on the kind of property and amount of money he can take with him may result in a *de facto* negation of his right to leave the country. Discrimination might enter the picture if different standards were to be used for nationals and for foreigners, apart from the consideration that such restrictions affect only those who possess property.

It is worthy of note that the Convention and the Recommendation Concerning Migration for Employment adopted by the ILO in 1949 both enjoin members "to permit, taking into account the limits allowed by national laws and regulations concerning export and import of currency, the transfer of such part of the earnings and savings of migrants for employment as the migrants may desire". The Recommendation also asks members "to arrange, in the case of permanent migration, within the limits allowed by national laws and regulations concerning export and import of currency, for the transfer, where desired, of the capital of the migrants for employment to the country of immigration".

A few countries deny certain benefits, such as social security, to returning nationals who have resided abroad for many years on the ground that they have not contributed anything to the maintenance of such benefits during their absence. Sometimes nationals who have been absent a long time are discriminated against in obtaining employment upon their return. Here again the ILO Recommendation Concerning Migration for Employment has blazed the trail by providing that: "When migrants for employment or members of their families who have retained the nationality of their State of origin return there, that country should admit such persons to the benefit of any measures in force for the granting of poor relief and unemployment relief, and for promoting re-employment of the unemployed, by exempting them from the obligation to comply with any condition as to previous residence or employment in the country or place."

#### PROCEDURES

In some countries, the conditions and procedures for obtaining a passport are so complex that they render the exercise of the right to leave the country very difficult.

For example, a national of one country in which the right to leave the country is recognized in law has to submit the following documents in order to obtain a passport: (1) an application accompanied by a passport questionnaire in triplicate; (2) two photographs; (3) where the applicant is to be accompanied by his children, a notarized statement of consent from the parent remaining in the country; (4) an authorization from both parents if he is a minor; (5) a certificate attesting to the nature of the applicant's occupation or if not employed a statement indicating his means of support; (6) an invitation from the person whom the applicant is to visit containing the latter's name, date of birth and address, and his undertaking to defray the costs of the applicant's stay abroad, certified by consular authorities or a notary; (7) an authorization from the National Bank for the purchase of transportation services abroad or a certificate authorized by the competent officer that such services have been paid for in foreign currency; (8) an authorization from military authorities (if applicable).

If the applicant intends to leave the country permanently he must also submit: (a) copies of his and his family's birth certificates; (b) if married, a copy of the marriage certificate; (c) if widowed, a copy of the death certificate of the deceased spouse; (d) if divorced, a certificate to this effect; (e) if over eighteen years of age, a military identification paper or exemption from military service; and (f) a certificate from the housing organ concerning his dwelling.

When the applicant receives his passport, he must submit: (a) an undertaking by the foreign diplomatic mission concerning the issuance of visa; (b) identification papers; and (c) proof that the passport fee has been paid. (If the applicant intends to leave the country permanently he is required to submit a number of additional papers).

At the same time, the competent authorities in that country may deny a travel document: (1) if there is a penal action pending before the court against the applicant; (2) if he has violated any passport regulations; (3) if the applicant has engaged in any activity harmful to the interest of the state during his sojourn in a foreign country, or if his behaviour there was detrimental to the country's reputation; (4) if there are other important state reasons against issuing a passport; or (5) if the issuing of a passport does not seem indicated out of regard for a person in the care of the applicant, or because of any other social reason.

It is apparent that the foregoing procedure has the effect of making the enjoyment of the right to leave a country dependent upon excessive documentation which is compounded by the fact that most of the documents can be obtained only from the Government concerned, and hence subject to the approval of that Government. The proliferation of documents required is indeed the bane of modern travel.



In some countries the competent authorities have absolute discretion to grant, withdraw or to refuse the necessary travel documents to a national who wishes to leave the country. In some such countries the application for a passport may even be simply ignored and no reason need be given for the action or inaction of the competent authorities. There is usually no legal procedure by which a national can compel the grant of a passport. It follows that the absence of a well defined procedure for obtaining a passport works as effectively as an unusually complicated procedure to prevent a national from leaving his country.

### REMEDIES

In some countries where the administrative authorities have absolute discretion to grant or to refuse permission, or the necessary travel document, to a national who wishes to leave the country, there is no remedy available to him to enforce his right to leave. In others, certain remedies are provided which the aggrieved national can use when he feels that his rights have been denied. Foreigners who wish to leave a country may sometimes find remedies available to them, and in addition may be protected by laws relating specifically to the conditions under which aliens may leave the country. Moreover, they may usually avail themselves of the diplomatic protection of their own Government.

The remedies normally available fall into three main categories: administrative, judicial and legislative.

In many cases where administrative authorities are competent to decide whether a person should be permitted to leave the country, or whether a national should be permitted to return from abroad, provision is made for appeal of a negative decision to a higher administrative body. Sometimes the appeal is dealt with only by successive officials of higher rank, up to the Minister in charge of the competent department. In certain countries, however, it may be considered by an administrative tribunal or court. In other countries provision is made for judicial review of administrative decisions.

In some countries, where administrative officials have failed after a stated period to make a decision as to whether a person should be permitted to leave the country or to return thereto from abroad, the individual concerned may bring action in a court of competent jurisdiction with a view to obtaining an order of the court commanding those officials to grant the required travel document. Where discretion in the matter of granting or refusing such documents is left to the administrative authorities by law, the court can only compel them to exercise this discretion but not to act in a particular way. However, in certain cases the courts may intervene to prevent an abuse of the discretionary power.

In some countries the right of an individual to leave the country is recognized in the constitution or in the basic law, and where this is the case judicial remedies are also usually available. In such cases the aggrieved person can question before a court—whether constitutional, judicial or administrative in character—the constitutionality of laws and governmental actions preventing him from exercising this right.

Little information is available about the procedures followed in administrative appeals. In several countries the national is informed of the reasons for denial, withdrawal or restriction of a travel document; this is particularly so in countries where the denial is subject to judicial remedy or review. In some countries the reasons for denial are given at the request of the individual concerned, unless reasons of public policy are against it. In a few countries higher administrative officials to whom appeal is made can communicate the reasons for denial if this would not be prejudicial to the interest of the State. In some countries, however, reasons for denial need not be communicated to the applicant.

There are certain remedies in all countries which normally remain unaffected by passport laws, regulations and procedures. For instance, if a person's departure from the country is prevented under rules of criminal or civil procedure, he can approach the judicial authorities directly.

A similar remedy is usually available if an individual is prevented from leaving his country because of actual or anticipated non-performance of obligations to the State or to another individual, such as those incurred under the tax laws or as the consequence of a debt. In such cases he may sometimes remove the impediment to his departure without recourse to a court either by satisfying the obligations or making arrangements to do so.

Since the right of a national to return to his own country is rarely denied, it is only in exceptional cases that he would have to seek a remedy. It is true that the national wishing to return to his country may need a travel document. But many Governments point out that their competent authorities are not entitled to deny a travel document required by a national to return to his country. Some Governments also refer to special provisions they have made to facilitate the issuance of documents required by returning nationals. Thus one Government states that a national who is obstructed or refused an identification card for his return to the country can present a written petition to the Minister of the Interior.

However, a national may be prevented from returning to his country because his nationality is contested. Some Governments provide procedures by which a national may establish the fact of his

nationality, which may consist of a petition to the administrative authorities or an action before the courts.

In addition to the administrative or judicial remedies, mention should also be made of political remedies, which are available in a great number of countries to individuals whose right to leave the country, or to return thereto, has been denied. In some cases the individual concerned can bring the case to the attention of a member of Parliament who may, if he thinks fit, put the question, or even an interpellation, before the Minister concerned, and thus compel him to give an explanation. In a few cases also, the legislature may override an administrative decision by passing a special or general law covering the facts of the case.

In the special case of Trust Territories, which are governed by the Charter of the United Nations and the relevant Trusteeship Agreements, there is an international remedy of limited proportions: i.e., nationals who are prevented from leaving their own Territory or from returning thereto may submit a petition directly to the United Nations and it will be examined by the competent organ. In several such cases recommendations for correction of the acts considered to be discriminatory have been addressed by the United Nations to the Administering Authorities concerned.

## SANCTIONS

An important factor affecting the exercise of the right of everyone to leave a country, including his own, and to return to his country, is the imposition of penal or other sanctions upon those who attempt to do so without the required travel document.

A large number of countries impose penalties in the form of a fine or imprisonment, or both, upon nationals who go abroad, or attempt to do so, without the required travel document. In other countries there are no special penalties for not being in possession of such a document, but a national is compelled to observe the prescribed formalities; otherwise he may be detained until he has been exonerated or has complied with the requirements, and he may be punished for committing, or attempting to commit, an offence. Penalties are sometimes imposed upon nationals who go abroad without fulfilling their legal obligations to the State—such as the payment of taxes or the completion of compulsory military service—or their obligations to other individuals. The violation of restrictions on travel to certain countries or areas may also lead to the imposition of penalties, or to a denial of the right to leave or to return to the country.

Penalties are also imposed upon those who leave a country, or attempt to leave, if they do so clandestinely. In one country anyone who leaves by routes other than those authorized, or who leaves by

authorized routes but clandestinely, or who performs a preparatory act with a view to crossing the border illegally, is punished by imprisonment and his belongings are subject to confiscation. In another country, crossing of frontiers illegally in organized groups or with the use of force carries a heavier penalty of imprisonment than otherwise. In a few countries a national crossing a frontier illegally may be deprived of his nationality. Instances have been reported even as this study was being prepared of many people being shot dead while crossing the sealed border of a certain country illegally.

Several countries also impose penalties upon foreigners who leave the country, or attempt to do so, without an exit visa. In some countries a foreigner who is permanently resident in the country, or who is a refugee or a stateless person, or who has been granted asylum in the country, has an obligation to render military service and cannot depart from the country without exemption therefrom. If a foreigner has violated any taxation law or court decision, or has not fulfilled any other legal obligations, he will be subject to restraint until he does so. In many countries a foreigner who has departed without complying with the required formalities may be subsequently refused re-entry.

Some countries impose the same penalties upon their nationals for returning without the required travel document as for leaving without such document, while other countries punish one of these acts but not the other. One country states that a national leaving the country without a passport may be declared a prohibited immigrant should he attempt to return. Disregard by a national of conditions under which permission to leave the country is granted, such as restrictions on travel to certain countries or areas, or time limits, may lead not only to the application of penalties but also to withdrawal, cancellation, or further restriction of travel documents. Similar sanctions or consequences may result in connexion with certain activities of the national abroad, such as acts of disloyalty to his country. In these cases the national, upon return, may be liable to prosecution as well.

Nationality and citizenship laws sometimes establish certain standards of conduct for nationals—particularly naturalized citizens—going abroad, or limit the time of their stay. Disregard of these prescriptions may lead to loss or deprivation of nationality. Moreover, a returning national may be liable to answer also for such breaches of the law or regulations of his country, including those relating to issue of passports and visas or permits, as may have come to light after his departure.

It has already been mentioned that nationality may be lost to citizens by naturalization or registration who live abroad for a specified number of years without complying with certain requirements. There are, however, other circumstances in which any national, either by birth

or naturalization, may forfeit his nationality and consequently the right to return to his country. In some countries this is accomplished if the national should enter the civil or military service of a foreign state. In one country, also, a national residing continuously outside the country who has performed no public duty towards the State for fifteen years from his eighteenth birthday and who has not reported to the competent authorities for the past five years, loses his nationality by absence; this loss of nationality extends to all his children born and permanently resident abroad who have not themselves performed any duty to the State or reported as required.

But there is another way in which forfeiture of nationality is used in order to prevent or deter nationals from leaving the country. Sometimes a national is forced to renounce his nationality as a condition for the exercise of his right to leave the country. Sometimes a national is deprived of his nationality as a consequence of his departure. The national concerned is thus divested of the legal basis for exercising the right to return to his country.

Even in the absence of legal sanctions, it is generally impossible for a person to leave a country without the prescribed travel document. In many cases his passage would not be booked by any transportation company, and if he did succeed in booking a passage and reaching another country, the immigration officials of that country probably would not allow him to disembark. He would then become the responsibility of the transportation company, which would be obliged to return him to the country where his trip originated.

It is possible that penal and other sanctions, intended for general application, might be applied in such a way as to affect one element of the population of a country more severely than another. Such an abuse of power would be discriminatory. However, it does not appear to happen very often.

## V. TRENDS AND CONCLUSIONS

### INTRODUCTION

The general trend and development of legislation and practices has not been the same with regard to the right of a national to leave his country, the right of a national to return to his country, and the right of a foreigner to leave the country of his sojourn.

#### THE RIGHT OF A NATIONAL TO RETURN

As regards the right of a national to return to his own country, the situation is by and large not unfavourable, though there is still much room for improvement. Not many cases are to be found where nationals are actually prevented from returning to their country. Indeed, in many countries anyone able to prove his nationality is permitted to enter his country even without a valid travel document, although more than a score of countries require not only a valid passport but also an entry visa for returning nationals which is, to say the least, an anachronism.

Furthermore, exile has virtually disappeared, whether as a penalty or as a political measure, and most countries prohibit it by law.<sup>1</sup> Only in a few countries is exile applied as punishment, and then only for political offences, as a special measure in time of crisis, or as an optional measure in lieu of imprisonment or banishment within the country. One can discern here a positive trend towards the total prohibition of exile. Indeed it is about time this capital penalty is universally considered as falling under the interdiction in article 5 of the Universal Declaration of Human Rights against cruel, inhuman or degrading treatment or punishment.

While practically no countries prohibit by law the return of their nationals from abroad, many countries do prevent indirectly certain nationals from returning through the operation of laws governing loss of nationality. There is a growing need to curb this tendency of many Governments to deprive of nationality those of their nationals—particularly naturalized citizens—engaging in certain specific activities abroad or not heeding the order of their Governments to return, or staying abroad beyond a stated period of time.

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<sup>1</sup> See Study of the Right of Everyone to Be Free From Arbitrary Arrest, Detention and Exile (E/CN.4/813), para. 815.

There is also a tendency in certain countries to deprive departing nationals of their nationality in order to divest them of the legal basis for exercising their right to return to their country. Moreover, in a very few countries nationals who have emigrated to a particular country are not permitted to return even though they have not lost their nationality. In most cases, the foregoing measures are discriminatory because they are in fact applied only to members of a particular group. In this, as in the preceding instances, there is need to encourage world-wide ratification of the United Nations Conventions on the Nationality of Married Women and on the Elimination or Reduction of Statelessness. Article 15 of the Universal Declaration of Human Rights, prohibiting the arbitrary deprivation of nationality, should be fully implemented.

Finally, mention should be made of persons who do not dare to exercise their right to return for fear of being prevented from leaving again once they have returned, or of being punished for leaving the country clandestinely. Unfortunately, there are at present no indications that the situation in this regard will improve in the near future.

#### THE RIGHT OF A FOREIGNER TO LEAVE

As regards the right of a foreigner to leave the country of his sojourn, the situation is more favourable. Only in the most exceptional cases are foreigners detained in a country when they wish to go out. Of course this is due in large part to the fact that the foreigner enjoys the diplomatic protection of his own State in addition to whatever administrative and judicial remedies are available to him in the country of his sojourn.

Nevertheless, even a foreigner who wishes to leave the country of his sojourn has to comply with certain formalities, which in some cases may temporarily impede his right to leave. Thus he may be required to register his intention to leave, to fulfil obligations incurred in the country, or to obtain an exit visa. In a few countries he must secure a tax clearance unless he is a temporary visitor. He may definitely be prevented from leaving by order of the court if there are criminal or civil proceedings against him. Apart from these normal restrictions, the right of the foreigner to leave may be seriously threatened by the extraordinary circumstances of war or national emergency.

Occasionally, difficulties may arise for the foreigner as a result of a conflict of nationality laws. It has happened that persons who acquired another nationality and who consider themselves foreigners in the country of their former nationality, have been prevented from leaving the latter country which still claims them as its nationals. Under the law of their former nationality, for example, they are liable to military service or required to fulfil some other obligation. However,

difficulties in this respect are usually settled through bilateral agreements between the countries concerned.

One major impediment remains which sometimes prevents a foreigner from exercising his right to leave a country, and that is the existence in an increasing number of countries of economic controls. Under such controls foreigners who have financial interests in the country of their sojourn may find it necessary to liquidate those interests as a prerequisite to obtaining the necessary exit permit. Furthermore, when transfer of funds is impossible owing to foreign exchange controls, the foreigner may be free to leave, but is in fact prevented from doing so because it would mean deprivation of his livelihood.

### THE RIGHT OF A NATIONAL TO LEAVE

As regards the right of a national to leave his own country, the situation is far less favourable and may be said to be retrogressive. While it is true that wide-spread efforts to promote international travel and tourism have been successful, particularly in simplifying and reducing entry and exit procedures and formalities, notably by means of bilateral and regional agreements, it is none the less equally true that greater numbers of people are effectively confined behind their national boundaries today than in previous periods of history. Whereas Governments once erected walls to keep foreigners from entering a country, today walls are built—both figuratively and literally—to keep nationals hemmed in. This is due to various reasons of alleged national interest, including the desire of some Governments to keep their nationals out of touch with rival ideologies prevailing in other countries.

In order to obtain a passport to leave his country it may be necessary for a national to undergo prolonged investigations by the authorities of his country as regards the reason for his travel, his citizenship, race, personal status, family relations, financial stability, tax liability, obligations towards the State or other persons, religious belief, national or social origin, and to an increasing degree, also his political opinions or activities. In this connexion, he is often required to submit various documents which may be difficult or expensive to obtain. In addition he must pay the passport fee, which in some countries is quite high, sometimes as much as \$100.00. Some countries also require a deposit or other security to ensure the repatriation or return of travelling nationals. Discrimination sometimes comes into play in the various stages of the process of securing a passport, culminating in its ultimate denial.

A national in possession of a valid passport may still not be free to leave unless he has secured an exit permit or a special permission. He may have to pay a special travel tax, sometimes equivalent to 100 per cent or more of the cost of the transportation ticket. In some countries



he may be required to renounce his nationality or to leave his country forever as a condition for his going abroad, or he may simply be deprived of his nationality as a consequence of his leaving the country. Indeed in a few countries where the right of nationals to leave temporarily is considerably restricted it is comparatively easier for them to get permission to emigrate permanently. The last two instances indicate a trend in many countries to discriminate against a particular racial or religious group. It is heartening to note, however, that in some countries this trend has been arrested if not reversed.

Currency controls also operate as an impediment to a national who wishes to emigrate, perhaps to the same extent as a foreigner wishing to leave the country permanently. In the case of a national who wants to leave his country temporarily, he may be hard put because of currency regulations, perhaps more so than a foreigner who has roots outside the country.

By far the most serious obstacles to the departure of a national are restrictions legally imposed by the Government of his country. Restrictions on the ground of the interest of the State have given rise to the most controversy. To be justifiable, any restriction on the ground of public interest must be germane to the permissible limitations of national security, public order, health or morals, or the rights and freedoms of others, as may be deduced from article 29 (2) of the Universal Declaration of Human Rights and article 12 (3) of the draft Covenant on Civil and Political Rights. What has been said applies equally to other restrictions imposed by Governments on such grounds, for example, as "reasons of State", "social reasons", "public welfare" and "orderly conduct of foreign affairs". This last ground is a comparatively recent innovation intended, though not too successfully in countries where it has been introduced, to take the matter of issuance of passports outside the scope of judicial review.

The most common restrictions are specifically grounded on national security or public order, which are limitations considered permissible under the Declaration and the draft Covenant. It should be reiterated that the best safeguard against arbitrary denial of the right of any national to leave his country on any of these grounds would be to require a showing of clear and present danger to the national security or public order. If the denial of the travel document or permission to leave is predicated on the applicant's past or present activities prejudicial to the national security or public order, prudence would require that such activities in order to be considered prejudicial should be only those not justifiable under the law and that the national concerned be actually under prosecution or be convicted of crime.

It should be observed also that the requirement that the applicant for a travel document or for permission to leave must show a good reason for his travel abroad is an unjustifiable restriction of the right

and is, moreover, an unwarranted invasion of privacy. It is believed that the presumption should be in favour of the one who claims the right and that he should be called upon to present evidence of his good faith only when his right is denied on any of the permissible grounds.

The unfortunate fact is that—unlike the situation in respect of many of the rights set forth in the Universal Declaration of Human Rights—comparatively few countries appear to recognize, either in their constitutions, laws, or administrative regulations, the right of a national to leave the country. This lack of recognition not only opens the door to arbitrary action, but seriously reduces the possibility of an effective remedy when discrimination occurs.

Even where the law determines the limitations on the right, the terms of the law often give or leave wide powers of discretion to the administration. Some laws refer to the grounds for limitations in such brief, general or broad terms as to cast doubt upon the legislative object or intention. Moreover, in some countries limitations are left to be determined and applied by the administration. The possibility of discrimination arises from abuse of this administrative discretion. Given these disconcerting facts, it is obvious that the right in question is under attack from many directions. It would be a disservice if we were to take this situation for granted or worse still, treat it with indifference. That way lies the gradual and imperceptible erosion of the right until it is no more.

#### PASSPORTS AND VISAS

It is necessary to call attention to the vital function served by a passport or other travel document at present for the enjoyment of the foregoing rights. Today a passport has become a legal as well as a practical necessity. It has become a legal necessity because so many countries have made it illegal for their nationals to leave or return without a passport. It has become a practical necessity because few countries will allow a national of another country to enter or to leave without a passport. And even if countries are on the whole more generous in allowing their nationals to return to their countries without a passport, its possession makes the return so much easier. There are, of course, bilateral and multilateral agreements, and even unilateral policies, which have done away with the need for a passport and with the need for any travel document at all in some cases. But the advantages accruing from those agreements and policies are enjoyed by comparatively small numbers of people, mostly in Europe and the Americas.

There is a definite trend to penalize a national's departure or entry without a passport. Some Governments justify this on the ground of national emergency, while others simply impose the penalty as a matter of course. The actual punishment for illegal entry or exit, that is, without the proper travel document, is fine or imprisonment in most

countries and there are cases where nationals have paid with their life for it. It would seem that the inconvenience, not to say the practical impossibility of travelling anywhere in the world without a passport, is punishment enough if indeed lack of a passport should be punished at all. Punishment is out of place if we consider that the passport was originally conceived to facilitate rather than to control travel. As a matter of fact, modern passports on their face ostensibly do just that. They are issued for the benefit of the traveller so that he may prove his identity and nationality and thus show that he is entitled to the protection of his Government.

One of the recommendations contained in the report of the meeting of experts convened by the Economic and Social Council in 1947 to prepare for a world conference on passport and frontier formalities was:

The general abolition of the requirement that a passport be carried for purposes of foreign travel is not feasible at present but bilateral or multilateral agreements to waive such requirement should be encouraged on a basis of reciprocity.<sup>2</sup>

General abolition of passports cannot be suggested today any more than it could have been in 1947. But bilateral and multilateral agreements to do away with passports should be encouraged whole-heartedly. In addition, it may be urged that passport requirements be waived between adjacent States for persons holding papers which can in practice be taken as a guarantee of their identity.

Another recommendation of the experts was that the "international-type" of passport recommended by the League of Nations Passport Conferences of 1920 and 1926, "or an improved version which takes account of the characteristics" of the "international-type" should be generally used. The "international-type" of passport is a document of identity and nationality permitting its holder to travel abroad. It is in use in many countries, but its common use is most desirable.

As the meeting of experts recommended in 1947, "it should be the aim to achieve the maximum simplification of formalities for obtaining passports. It would contribute to this end if the issue of passports were decentralized as much as possible and if the applicants were not obliged to apply either in person or in writing to a central office". The applicant should be spared long and costly journeys. If a passport is to be regarded essentially as a document of identity, as suggested, the formalities and procedures relating to its issue should be simple and not work undue hardship on the applicant. There should be little need also for prior police inquiries or other investigations beyond establishing the identity, nationality and occupation of the applicant.

Fees charged for travel documents and supporting papers should be reduced to the minimum, justifiably to recover printing costs, but never as a source of revenue to support a country's foreign service

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<sup>2</sup> United Nations, *Official Records of the Economic and Social Council, Second Year: Fifth Session, Supplement No. 1* (E/436), appendix.

establishments. Taxes on travel which are gaining currency today are as incongruous as those imposed on the exercise of any of the human rights and fundamental freedoms proclaimed in the Declaration. If they are justified as taxes on the price of transportation tickets then the rate should not exceed that usually imposed on the sale or hire of other common services. Moreover, if there are no taxes on internal travel, then the levying of taxes on foreign travel would be a clear and unmitigated restriction.

Following the general lines of another recommendation of the meeting of experts in 1947, passports should be valid for travel to as many countries as possible. Indeed, the ideal rule would be free world circulation save in case of war or national emergency.

The League of Nations Passport Conference of 1926 observed that the suggestion of the 1920 Passport Conference concerning the abolition of exit visas "having been accepted by a large number of states, the Conference is of the opinion that the total abolition of exit visas both for nationals and for foreigners might be taken into consideration at the present time". In 1947 the meeting of experts recommended that "exit visas should be universally abolished, and other exit formalities reduced to a minimum". It may seem strange therefore to find more than a score of countries still insisting that both nationals and foreigners should obtain a visa or exit permit before departure, and almost as many countries requiring a national to obtain an entry permit to return to his country. These vestigial relics of a feudal past have no place in this day and age and deserve to be abolished forthwith.

Because a passport or other travel document is a legal and a practical necessity, the long accepted discretionary power over its issuance is a matter of increasing concern to the international community. Countries continue to be jealous of their powers over the movement abroad of their nationals, and to a lesser extent, over movement of foreigners out of their countries. For this there are many reasons of an economic, social or political nature. Rightly or wrongly most countries also regard the rights under study as intimately connected with their foreign relations and conduct of their foreign affairs. Moreover, the supreme interest of the country, its national security, is everywhere considered as overriding all rights, privileges and obligations. It is also well to remember the persistency of international tensions and conflicts; they are real, intense and dangerous.

It may thus be necessary to accept the inevitability of the exercise by Governments of some measure of discretionary powers. But, on the other hand, the legitimate and paramount interests of the individual must also be recognized and protected. It is true that in a number of countries, procedures have been developed which attempt to do justice both to the cause of the State and to the cause of the individual. But it is a sad commentary on the present state of the world that only

very few countries, if any, have achieved a happy balance between these two interests.

#### AVAILABILITY OF REMEDIES

The availability of an effective remedy against arbitrary action or abuse of discretion by government officials is of greatest importance—one might almost say it is the key—to the eradication of discrimination and the safeguarding of freedom in respect of the right of everyone to leave any country, including his own, and would be useful for this purpose in the absence of such a remedy. However, to be truly effective, experience in many countries has shown that administrative and judicial remedies must meet certain tests.

If an administrative remedy is to be effective, appeal to the authorities should not be limited to the lower or middle echelons of civil servants who normally deal with such documents, but should be available up to the highest policy-making level. If such an appeal fails, the national should be able to bring his case before an independent and impartial body such as an administrative tribunal or court of justice.

Certain procedural safeguards should be provided in order to ensure the applicant a fair hearing and to minimize the possibility of discriminatory or arbitrary action. In particular, the applicant should be informed of the reason for refusal of the travel document and the facts upon which the decision is based. Otherwise he is deprived of any basis for appeal. In addition, he should have the possibility of presenting evidence on his own behalf, disputing the evidence against him and having the witnesses examined. In the case of a national who wishes to return to his country but is unable to obtain the necessary permission or travel document, he should be able to approach the competent representatives of his country abroad, or reach through counsel the proper administrative authorities or the courts of his country to prove his nationality and thus to assert his right to return. In the case of a foreigner who wishes to leave the country but is unable to obtain the necessary permission or travel document, he should be able to appeal to the administrative and judicial authorities in the same manner as a national. If these appeals should fail, he should be enabled to invoke the diplomatic protection of his own Government.

## VI. PROPOSALS

### INTRODUCTION

Both national and international action are necessary in order to ensure freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country. As a matter of fact they are complementary. It would be meaningless, for example, to ensure the full enjoyment by everyone of the right to leave a country if he has nowhere to go because of artificial or legal barriers to his entering other countries. On the other hand, all agreements to facilitate international travel would be of no avail if countries continue to restrict the right of nationals and foreigners alike to leave the confines of their territorial boundaries. Action on the national and international levels must be co-ordinated so that their joint and irresistible impulse could at long last restore to its pristine glory one of the natural rights with which the Creator has endowed all human beings.

The starting point should of course be a declaration of principles which could exercise persuasive force and moral authority by virtue of their adoption by a competent organ of the United Nations.

The following draft is submitted for the consideration of the Sub-Commission :

#### DRAFT PRINCIPLES ON FREEDOM AND NON-DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY

##### *Preamble*

*Whereas* the peoples of the United Nations have in the Charter solemnly reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and expressed their determination to promote social progress and better standards of life in larger freedom ;

*Whereas* the Charter declares that it is one of the purposes of the United Nations to promote and encourage universal respect and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion ;

*Whereas* the Universal Declaration of Human Rights, further elaborating the principle of non-discrimination, proclaims that everyone is entitled to all the rights and freedoms set forth therein without

distinction of any kind, and irrespective of the political, jurisdictional or international status of the country or territory to which one belongs;

*Whereas* the right of everyone to leave any country, including his own, and to return to his country enshrined in the Declaration is an indispensable condition for the full enjoyment by all of other civil, political, economic, social and cultural rights;

*Whereas* the free and untrammelled exercise of this right is a sure means of fomenting mutual understanding, co-operation and beneficial exchanges among the peoples of the world so that they may practice tolerance and live together in peace as good neighbours;

*Whereas* this right can only be effectively guaranteed when formally acknowledged in national law consistent with the principles of the Charter of the United Nations and the Universal Declaration of Human Rights;

*Now therefore*, the following principles are hereby proclaimed as of universal application to ensure recognition and enjoyment of the right of everyone to leave any country, including his own, and to return to his country, and other related rights, and to prevent discrimination in respect of these rights:

#### I. *The right of a national to leave his country*

(a) Every national of a country is entitled, 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, to leave his country, temporarily or permanently.

(b) No one shall be forced to renounce his nationality, as a condition for the exercise of the right to leave his country; nor shall he be deprived of his nationality as a consequence of his leaving the country.

(c) The conditions prescribed by law or administrative regulations for the exercise of this right shall be the same for all nationals of a country.

(d) The right of every national to leave his country shall not be subject to any restrictions except those provided by law, which shall be only such as are reasonable and necessary to protect national security, public order, health, or morals, or the rights and freedoms of others.

(e) No deposit or other security shall be required to ensure the repatriation or return of any national.

(f) Currency or other economic controls shall not be used as a means of preventing any national from leaving his country.

(g) Any national prevented from leaving his country because of non-compliance with obligations towards the State, or towards another person, shall be allowed to make reasonable arrangements for satisfying those obligations.

(h) Any national who wishes to leave his country permanently is entitled to sell his property and to take the proceeds thereof as well as his personal effects with him either at the time of his departure or within a reasonable period thereafter, subject only to the satisfaction of his local obligations.

## II. *The right of a national to return to his country*

(a) Everyone is entitled, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to return to his country.

(b) No one shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country.

(c) The right of everyone to return to his country shall not be subject to any arbitrary restrictions.

## III. *The right of a foreigner to leave the country*

(a) Every foreigner, 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, has the right to leave the country of his sojourn.

(b) Every foreigner, legally within the territory of a country shall not be accorded lesser rights than a national in the exercise of his right to leave that country.

(c) The right of every foreigner to leave the country of his sojourn shall not be subject to any arbitrary restrictions.

(d) No foreigner shall be prevented from seeking the diplomatic assistance of his own country in order to ensure the enjoyment of his right to leave the country of his sojourn.

## IV. *Travel documents*

(a) Every national of a country is entitled, 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, to apply for and receive such travel documents as passport, identity card, visa or other certificate as he may require to leave his country or to return to his country.

(b) The formalities for the issuance of any travel document, including the grounds for its denial, withdrawal or cancellation, shall be provided by law. Regulations implementing the law shall also be published or communicated to the applicant.

(c) The issuance of any travel document shall not be subject to unreasonable costs or taxes.



## V. *Fair hearing and recourse to independent tribunals*

(a) Everyone denied a travel document or permission to leave the country or to return to his country is entitled to a fair hearing. In particular, he shall have the possibility of presenting evidence on his own behalf, of disputing evidence against him and of having witnesses examined. The hearing shall be public except when compelling reasons of national security or the personal interests of the applicant require otherwise.

(b) The decision of the competent authorities to grant, deny, withdraw or cancel the required permission or travel document shall be made and communicated to the individual concerned within a reasonable and specified period of time.

(c) If the required travel document or permission is denied, withdrawn or cancelled, the reasons for the decision shall be clearly stated to the individual concerned.

(d) In case of denial, withdrawal or cancellation of the required permission or travel document, the aggrieved individual shall have the right of appeal to an independent and impartial tribunal.

## VI. *Application of principles*

These principles shall apply to all independent countries as well as to trust, non-self-governing or other countries under any limitation of sovereignty.

## NATIONAL ACTION

The following proposals might be examined by the Sub-Commission with a view to the formulation of recommendations for national action:

- I. Governments which have not yet done so, should recognize in their national law (a) the right of every national to leave his own country, (b) the right of every foreigner to leave the country of his sojourn, and (c) the right of every national to enter his own country. These rights can best be guaranteed by embodiment in the Constitution or other fundamental law not subject to repeal or alteration by ordinary legislation procedure.
- II. Governments should never allow any measures to destroy, either directly or indirectly, any of these rights or to deprive any individual of the opportunity to enjoy them on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; or the status of the country or territory to which he belongs. Discrimination on any of the foregoing grounds is never justifiable, even in time of war or national emergency.

- III. Governments should examine their laws and regulations with a view to rescinding or modifying those which tend to encourage or sanction, directly or indirectly, discrimination or arbitrary action in respect of these rights.
- IV. Governments should prohibit and penalize arbitrary or discriminatory practices by government officials in respect of these rights and discourage their commission by all other means, including educational and administrative measures.
- V. Governments which have not yet done so should abolish exile as a punishment for crime or prohibit it as a political measure.
- VI. With regard to travel documents, Governments should adopt the following measures:
  - 1. The tendency to abolish passports and visas and their replacement by a national identification card or other certificate of identity should be encouraged by the promotion of appropriate regional or bilateral agreements.
  - 2. Formalities for the issuance of passports should be simplified to the maximum and should particularly not involve the submission of a certificate of good conduct, or proof of financial status.
  - 3. The period of validity of a passport should be not less than five years from the time of the initial issue. During its period of validity, a passport should be valid for an unlimited number of journeys. A passport should be valid for all countries, exceptions being justified only in case of war or national emergency.
  - 4. The period of validity of a visa should not be less than one year and should be valid for an unlimited number of journeys during the period of its validity.
  - 5. The fee charged for the issuance of a passport or visa should be kept at a necessary minimum and in particular should not constitute a source of revenue for the State.
  - 6. Excessive taxes should not be imposed on travel or indirectly on travel documents and transportation tickets.
  - 7. Entry and exit visas for nationals should be abolished.
  - 8. Exit visas for foreigners should be abolished. [The requirement of such visas may be justified only in case of war or national emergency].
- VII. With regard to the right of a national to leave the country, Governments should adopt the following measures:
  - 1. As far as possible, nationals should be allowed to purchase an adequate amount of foreign currency at least once a year, to enable travel abroad. In this connexion, due consideration

should be given to the family, health and educational needs of the applicant.

2. Due regard should be given to facilitate the reunion of families.

VIII. With regard to the right of a national to return to his country, Governments should adopt the following measures:

1. Where the law provides for loss of nationality in certain specified cases, a national who is outside the territory of his country, should not be deprived of his nationality if such deprivation would render him stateless.
2. Conflicts of law arising from double nationality, where they are not resolved by international agreements, should not be permitted to lead to denial of one's right to return to the country of his previous residence.

IX. Governments should consider the possibility of activating national advisory committees on human rights in their respective countries as recommended by the Commission on Human Rights and the Economic and Social Council with a view to their undertaking, among others, the preparatory work necessary to carry out the foregoing recommendations.

X. Governments should be guided by the Principles adopted by the Sub-Commission in the enactment of legislation and procedures to insure freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country.

## INTERNATIONAL ACTION

### *Dissemination of the study*

Believing that the most effective way of combating discrimination lies in sustained educational efforts on an international scale, the Sub-Commission has decided, in respect of the previous studies in this series, that they should be printed for the use of Governments, specialized agencies, research centres, non-governmental organizations and interested persons and otherwise given wide circulation. The Sub-Commission may wish to express its views on the dissemination of the information contained in this report.

### *Preparation of draft principles*

The Sub-Commission may consider the desirability of reviewing the draft principles set out at the beginning of this chapter with a view to formulating a series of principles on freedom and non-discrimination in the matter of the right of everyone to leave any country, including his own, and to return to his country, which could be sent forward to superior bodies of the United Nations for adoption.

Such draft principles might elaborate and interpret the non-discrimination and provisions of the Charter and the Universal Declaration of Human Rights as applied in particular to the right set out in article 13 (2) of the Declaration. Indeed, they might be somewhat similar in scope to the principles on freedom and non-discrimination in education, in the matter of religious rights and practices, and in respect of political rights, which the Sub-Commission prepared at its ninth, twelfth and fourteenth sessions, respectively.

### *International Conference on Travel and Tourism*

As indicated elsewhere in this report,<sup>1</sup> the Economic and Social Council at its thirty-third session decided to call an international technical conference to be held in Rome in the fall 1963 to make recommendations to Governments on various aspects of international travel and tourism. A group of experts appointed by the Council prepared a draft provisional agenda for the conference and provided explanatory comments for the various items of the agenda (E/3590). The comments of the group on the facilitation of government formalities regarding travel, as far as they touch upon the subject matter of this report, are reproduced in annex V.

The Sub-Commission may wish to express its views on these recommendations, which could appropriately supplement the draft principles prepared by the Sub-Commission. The Special Rapporteur has made similar recommendations on the subject in his proposals for national action.

The Sub-Commission may also wish to forward the draft principles which it may adopt to the International Conference. These draft principles may contribute to the co-ordination of views of the two international bodies and perhaps provide guidance for additional recommendations by the conference on some aspects of the problem under consideration.<sup>2</sup>

### *Preparation of international or regional instruments*

A further question arises as to whether the draft principles should be included in some form of international instrument for the purpose of eradicating discrimination in the matter of human rights in this field.

It cannot be doubted that the final adoption of the draft covenants on human rights by the General Assembly will represent an important step forward in the fight against discrimination in respect of the right

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<sup>1</sup> See page 6, and annex V, section on "International Travel and Tourism".

<sup>2</sup> This study, together with the draft principles on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country (see annex VI), was circulated to those attending the Conference on International Travel and Tourism (E/CONF.47/L.1) at the suggestion of the Commission on Human Rights.

of everyone to leave any country, including his own, and to return to his country. The covenants would impose the obligation on the contracting parties to ensure the enjoyment of this right, among others, and would establish international machinery to guarantee the carrying out of this obligation. Nevertheless it is quite clear that a number of years will probably pass before the covenants can be completed and put into force. The work of the International Conference mentioned above should also be borne in mind, although it covers only certain limited aspects of the problem. If the draft principles are compared with the corresponding provisions of the draft covenants, it will be seen that the principles—based on a study of the *de facto* as well as the *de jure* situation—are somewhat more comprehensive. Certain ideas expressed in the principles do not appear in the covenants—and rightly so because they deal not only with the free exercise of the right in question, but also with the prevention and eradication of discrimination in respect of that right.

It is possible that an instrument dealing specifically and exclusively with freedom and non-discrimination in respect of the right set out in article 13 (2) of the Universal Declaration of Human Rights could be completed more rapidly and could enter into force at an earlier date than the covenants. This instrument could take the form of an international convention, a declaration of general principles, or a recommendation adopted by the Economic and Social Council or the General Assembly.

Of course, it would be somewhat premature to decide the form of the instrument before determining whether or not agreement could be reached on principles. If however there can be a meeting of minds on the standards to be applied, then serious consideration might be given to whether their incorporation into a convention would be the best way to promote enjoyment of these rights by all without discrimination, or whether a simple declaration or resolution setting forth the principles would be adequate.

A great deal has been done in recent years to facilitate and promote travel, in particular for tourists and other short-term visitors. Attention has been drawn in this report to a number of bilateral and multilateral agreements which have been concluded and successfully implemented in various parts of the world.<sup>3</sup> As has been seen, the most successful agreements in this respect were those concluded on a regional basis between countries which have common interests.

The Sub-Commission may therefore encourage groups of countries in various regions of the world to conclude regional instruments designed not only to prevent and eradicate discrimination but also to promote the free exercise of the right under consideration. Regional instruments of this type not only protect the inhabitants of the areas covered, but

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<sup>3</sup> See annex V, section on activities "Outside the framework of the United Nations".

also serve as an example for other regions, leading them to make similar efforts. In addition, such efforts provide a stimulus towards widening further the scope of these arrangements and may well lead to the abolition of discrimination in respect of the right on a world-wide scale.

Even if a whole series of regional texts were to be prepared, there would still be room for an international instrument on the subject, if only as aid to greater uniformity. Indeed, such actions on a regional basis could be preparatory to broader action by the United Nations.

### *Reports to the Commission on Human Rights*

It is possible that the triennial reporting procedure of the Commission on Human Rights could provide a suitable framework within which Governments could indicate their progress towards combating discrimination in this field. Consideration could also be given to the possibility of collecting additional material from non-governmental organizations in consultative status. In any event, all the materials collected by the Secretary-General could be submitted to the appropriate organs of the United Nations at regular intervals for examination, comment and recommendation for further action.

### *Regional seminars*

Regional seminars held under the programme of advisory services in the field of human rights have proved to be especially useful; they have been well organized and their impact has been felt in a number of ways. The programme is making a significant contribution to the promotion of human rights.

The attention of the Sub-Commission is particularly drawn to the seminars held in various parts of the world on the judicial and other remedies against abuse of administrative authority. The participants from each of the countries represented at the seminars reviewed the methods by which control of illegal exercise or abuse of administrative authority in their respective countries is achieved and discussed the varying techniques which may be adopted for the effective solution of the problem. At the seminar held in Peradeniya (Kandy), Ceylon, in 1959, the abuse of administrative power in connexion with the granting of permission to leave the country was discussed at some length although by no means exhaustively.

No doubt seminars dealing exclusively with the right proclaimed in article 13 (2) of the Universal Declaration of Human Rights would greatly contribute to a better understanding of the problems usually encountered in ensuring freedom and non-discrimination in the enjoyment of this right. Seminars of this kind might also make it possible to obtain a true and up-to-date picture of the situation in various countries and regions, and to consider how difficulties—particularly

those of an administrative character—could be overcome. Such seminars could be organized by the Secretary-General at the request of a host Government.

### *Expert services*

Under the same programme of advisory services, United Nations experts are also available to assist Member Governments, at their request, in the field of public administration. Not only new nations, but older countries as well, may benefit from international experience and techniques of overcoming discrimination, as well as from advice on legislative, executive, administrative and judicial procedures for ensuring freedom and non-discrimination in the enjoyment by everyone of the right to leave any country, including his own, and to return to his country.

## ANNEXES

### *Annex I*

#### HOW THE STUDY WAS PREPARED\*

At its twelfth session the Sub-Commission, in resolution 5 (XII), decided to initiate a study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country, as provided in article 13, paragraph 2, of the Universal Declaration of Human Rights, and appointed Mr. José D. Ingles as Special Rapporteur to carry out this study.

The Sub-Commission's decision to make the study was taken in the light of a preliminary investigation of the scope of such a study begun in 1952. At its fifth session, held that year, the Sub-Commission established a work programme, later approved by the Commission on Human Rights, and the Economic and Social Council, which provided that among the measures to combat discrimination which the Sub-Commission would study would be those in the field of immigration and travel.

At its sixth (1954) session the Sub-Commission decided that the study should cover not only immigration and travel but also emigration. At that time it appointed Mr. Ingles, in his personal capacity, "to deal with discrimination in respect of emigration, immigration and travel", and requested him to prepare, in consultation with the Secretary-General, proposals concerning the procedure to be followed in such a study.

The Commission on Human Rights at its tenth (1954) session drew the Sub-Commission's attention to the observations made upon a proposal (subsequently withdrawn) under which, *inter alia*, the words "immigration and travel" in the Sub-Commission's decision would have been replaced by the words, "the right to return to one's country as provided in paragraph 2 of article 13 of the Universal Declaration of Human Rights". Before the Sub-Commission could consider this question further, the Council, in resolution 545 D (XVIII) of 29 July 1954, requested the Sub-Commission "to take as the objective of its study in this field paragraph 2 of article 13 of the Universal Declaration of Human Rights".

At the request of the Sub-Commission, the Commission at its eleventh (1955) session expressed the view that the study of discrimination in immigration "is of fundamental importance" and recommended that the Council should decide "that the Sub-Commission is not precluded from undertaking a study on the question of discrimination in immigration". The Council, however, reaffirmed at its twentieth session the decision set forth in resolution 545 D (XVIII), and pointed out that this decision "implicitly excluded immigration from the scope of this study".

At the Sub-Commission's eleventh (1959) session, several members expressed the view that the Council's decisions did not in any way prevent the Sub-Commission from studying the right set forth in paragraph 1, as well as paragraph 2, of article 13; and that any separation of the two paragraphs of the article was an artificial one. These views were drawn to the attention of the

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\* Note by the Secretariat.



Commission on Human Rights and the Economic and Social Council. However, further discussion of this question in the Council's Social Committee at the twenty-eighth session in 1959 (A/AC.7/SR.396, pp. 5-6) indicated that the Council was not prepared to broaden the scope of the study.

A preliminary study on discrimination in the matter of emigration, immigration and travel (E/CN.4/Sub.2/167) was examined by the Sub-Commission at its seventh (1955) session. A preliminary report on the study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country, as provided in paragraph 2 of article 13 of the Universal Declaration of Human Rights (E/CN.4/Sub.2/L.146), was examined by the Sub-Commission at its eleventh (1959) session. At that time the Sub-Commission recognized that, in view of the limitations of the Secretariat staff and its prior commitments, a full study of the subject could not be undertaken before 1960, and requested Mr. Ingles, still in his personal capacity, "to continue such preparatory work on the subject as he may find useful and feasible . . . including the preparation of a proposed questionnaire or list of topics which may serve as an outline or framework for the study".

At its twelfth (1960) session the Sub-Commission examined a memorandum (E/CN.4/Sub.2/L.157), describing the scope of the study as finally determined by the Economic and Social Council. The memorandum also presented and explained a proposed outline intended to serve in the first instance as a guide for the collection of information to be used in the study. The Sub-Commission decided at that time to initiate "a study of discrimination in the matter of the right of everyone to leave any country, including his own, and to return to his country, as provided in article 13, paragraph 2, of the Universal Declaration of Human Rights", approved the proposed outline, appointed Mr. Ingles as its Special Rapporteur to carry out the study, and requested him "to follow the standard directives relating to the preparation of studies and recommendations for action set out in resolution B of the Sub-Commission, adopted at its sixth session, as amended by the Commission on Human Rights at its tenth session". These directives (E/CN.4/703, para. 97) may be summarized as follows:

(i) The report should be undertaken on a global basis and with respect to all the grounds of discrimination condemned by the Universal Declaration of Human Rights, but special attention should be given to instances of discrimination that are typical of general tendencies and instances where discrimination has been successfully overcome.

(ii) The report should be factual and objective and should deal with the *de facto* as well as the *de jure* situation . . .

(iii) The report should point out the general trend and development of legislation and practices with regard to discrimination . . . stating whether their tendency is toward an appreciable elimination or reduction of discrimination, whether they are static, or whether they are retrogressive.

(iv) The report should also indicate the factors which in each instance have led to the discriminatory practices, pointing out those which are economic, social, political, or historic in character and those resulting from a policy evidently intended to originate, maintain or aggravate such practices.

(v) The report should be drawn up not only to serve as a basis for the Sub-Commission's recommendation, but also with a view to educating world opinion.

(vi) In drawing up the report full advantage should be taken of the conclusions already reached with respect to discrimination by other bodies of the United Nations or by the specialized agencies.

(vii) In addition to the material and information which he is able to collect and which he shall embody in his report in the form of an analysis, the Special Rapporteur shall include such conclusions and proposals as he may judge proper

to enable the Sub-Commission to make recommendations for action to the Commission on Human Rights.

The procedure for preparing the study, as laid down by the Sub-Commission at its sixth session and approved by the Commission at its tenth session (E/2573, para. 418) called for the work to be carried on in three successive stages: (a) the collection, analysis and verification of material, (b) the preparation of a report and (c) the formulation of recommendations for action. The main sources of material were listed as (a) Governments, (b) the Secretary-General, (c) specialized agencies, (d) non-governmental organizations, and (e) the writings of recognized scholars and scientists; however, the collection of material was not limited to these sources. The Special Rapporteur was directed to prepare summaries of material dealing with each country, and to forward those summaries to the Governments concerned for comment and supplementary data.

At its twelfth (1956) session the Commission on Human Rights decided (E/2844, resolution IX) "that the materials and studies in the field of discrimination should relate to States Members of the United Nations and of the specialized agencies, and that such recommendations as may be made should be of an objective and general character, in accordance with the Charter of the United Nations".

At the request of the Special Rapporteur and in accordance with the Commission's decision, the Secretary-General addressed a circular letter to the Governments of States Members of the United Nations and members of the specialized agencies on 5 April 1960, transmitting to them resolution 5 (XII), whereby the Sub-Commission had initiated the study, together with a copy of the standard directives referred to therein and a copy of the outline approved by the Sub-Commission to serve as a framework for the collection of information.<sup>a</sup> The Secretary-General indicated that he would be grateful for any help that the respective Governments could give the Special Rapporteur in the preparation of the study, and added that the Special Rapporteur would appreciate having any relevant material, including the text of laws, administrative arrangements, judicial decisions and statistical data, as well as information on each of the particular points mentioned in the outline. In addition, the Secretary-General addressed similar circular letters to the Governments of the States admitted to membership in the United Nations after 5 April 1960.

On 22 May 1961 a second circular letter was forwarded to all Governments which had not responded to the first. A third circular letter was sent on 6 March 1962 to all Governments which had not responded to either of the earlier ones.

In addition, a circular letter was addressed to 117 selected non-governmental organizations in consultative status on 4 April 1960 by the Director of the Division of Human Rights, inviting them to place at the disposal of the Special Rapporteur any information which they considered to be relevant to the study, including information on any particular points mentioned in the outline. A second circular letter, along the same lines, was sent on 21 March 1962 to those organizations which had not responded to the first. In reply to these letters, substantive data were received from the following fifteen organizations:

#### CATEGORY A

World Federation of Trade Unions

#### CATEGORY B

All-India Women's Conference

The Anti-Slavery Society (London)

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<sup>a</sup> The Outline used in the collection of information and in the preparation of Conference Room Papers is reproduced as annex II.

# CATEGORY B (continued)

Coordinating Board of Jewish Organizations  
 International Alliance of Women  
 International Catholic Migration Commission  
 International Council of Women  
 International Criminal Police Organization  
 International League for the Rights of Man  
 International Union of Official Travel Organizations  
*Pax Romana*  
 The Salvation Army  
 World Assembly of Youth  
 World Confederation of Organization of the Teaching Profession

## REGISTER

### International Association of University Professors and Lecturers

No information for the study was furnished by any of the specialized agencies. As concerns Trust and Non-Self-Governing Territories, the Special Rapporteur made use of published materials of the United Nations, made available to him by the Secretary-General.

Using all the available information, and supplementing it where necessary by material obtained from other designated sources, including the writings of recognized scholars and scientists, the Special Rapporteur prepared, with the assistance of the Secretariat, draft monographs summarizing the situation in the countries listed below. Each draft monograph was forwarded to the Government concerned with a request that comments or supplementary data should be supplied within a two-month period. When such comments or data were forthcoming within the stated period, the drafts were revised as necessary and circulated to members of the Sub-Commission as Conference Room Papers. When no comments or supplementary data were received, the drafts were not revised. All monographs, whether or not revised, were then circulated to Governments and to members of the Sub-Commission. In addition, they were made available on request to bodies and persons interested in the study. However, in accordance with a decision of the Economic and Social Council (resolution 664 (XXIV)), they were not issued as United Nations documents.

The Conference Room Papers prepared in this manner contain material relating to discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country, in the following countries:

<i>Country</i>	<i>Conference Room Paper No.</i>	<i>Country</i>	<i>Conference Room Paper No.</i>
Afghanistan .....	51	Central African Rep.....	88
Albania .....	52	Ceylon .....	19
Argentina .....	48	Chad .....	39/Rev.1
Australia .....	53	Chile .....	4
Austria .....	31	Colombia .....	55
Belgium .....	50	Congo (Brazzaville) .....	44
Brazil .....	54	Congo (Leopoldville) .....	56
Bulgaria .....	47/Rev.1	Costa Rica .....	57
Cambodia .....	45	Cyprus .....	58
Cameroon .....	27	Czechoslovakia .....	59
Canada .....	20	Dahomey .....	60

<i>Country</i>	<i>Conference Room Paper No.</i>	<i>Country</i>	<i>Conference Room Paper No.</i>
Denmark .....	32	Netherlands .....	21
Dominican Republic ..	61	New Zealand .....	16
Ecuador .....	62	Nicaragua .....	76
El Salvador .....	63	Niger .....	77
Ethiopia .....	64	Nigeria .....	78
Federation of Malaya	12	Norway .....	11
Finland .....	1	Pakistan .....	33
France .....	24	Panama .....	79
Gabon .....	65	Peru .....	80
Ghana .....	17	Philippines .....	43
Greece .....	66	Poland .....	9/Rev.1
Guatemala .....	7	Romania .....	29
Guinea .....	67	Somalia .....	81
Haiti .....	68	South Africa .....	82
Honduras .....	69	Spain .....	14
Hungary .....	49	Sudan .....	37
India .....	23	Sweden .....	2
Iran .....	34	Thailand .....	83
Iraq .....	3	Tunisia .....	26
Israel .....	46	Turkey .....	84
Italy .....	35	USSR .....	85
Ivory Coast .....	5	United Arab Republic	18
Japan .....	41	United Kingdom ....	38
Jordan .....	70	United States .....	22
Laos .....	71	Upper Volta .....	86
Lebanon .....	13 and Add.1	Uruguay .....	87
Liberia .....	72	Venezuela .....	15
Luxembourg .....	25	Yugoslavia .....	10
Madagascar .....	40	Germany (Fed. Rep.)	30 and Add.1, 2
Mali .....	73	Korea (Rep. of) ....	89
Mauritania .....	42	Monaco .....	90
Mexico .....	74	San Marino .....	36
Morocco .....	28	Switzerland .....	6
Nepal .....	75	Viet-Nam .....	8

The Special Rapporteur prepared this report on the basis of the material available to him in the papers listed above, for examination by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its fifteenth (1963) session. The Special Rapporteur also referred to the information available to him relating to twenty-two countries, on which Conference Room Papers are in preparation, as follows: Bolivia, Burundi, Burma, China, Cuba, Iceland, Indonesia, Ireland, Jamaica, Libya, Mongolia, Paraguay, Portugal, Ruanda, Saudi Arabia, Senegal, Sierra Leone, Syria, Tanganyika, Togo, Trinidad and Tobago, and Yemen. Papers were not prepared for the Byelorussian SSR or the Ukrainian SSR, as all matters relating to entering or leaving the Union of Soviet Socialist Republics are within the exclusive province of the authorities of the Union.

## *Annex II*

### **OUTLINE USED IN THE COLLECTION OF INFORMATION AND IN THE PREPARATION OF CONFERENCE ROOM PAPERS**

#### **I. THE RIGHT OF A NATIONAL TO LEAVE THE COUNTRY OR TO RETURN THERETO**

##### *General principles*

Is the right of a national to leave the country, or to return thereto, recognized by law? If not, what general principle is applied? In either case, cite the relevant texts (e.g., constitutional provisions, statutes, regulations, judicial decisions, etc.).

#### **THE RIGHT OF A NATIONAL TO LEAVE THE COUNTRY**

##### *Procedures and formalities*

(a) Is a special travel document (such as a passport, *laissez-passer*, exit visa or tourist card) required of a national who wishes to leave the country? Cite any cases in which the travel document may be dispensed with (as when a birth certificate, identity card, or other simple identification is sufficient, or when no identification is required).

(b) Describe the procedures by which a national is granted or denied permission to leave the country, and indicate any time limits which may be laid down.

##### *Grounds for refusing to permit certain nationals to leave the country*

(a) Grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(b) Personal status, such as the requirement of authorization by the spouse in the case of married persons, by the parent or guardian in the case of minors, or by the competent official in the case of persons under legal disability.

(c) Grounds such as the political, jurisdictional or international status of the country or territory to which the person belongs, whether it be independent, trust, non-self-governing, or under any other limitation of sovereignty.

(d) Other grounds (for example, if the national is likely, by leaving, to become a fugitive from justice; if he is under a court restraining order; if he is involved in civil litigation, or is liable for the performance of certain obligations such as support or maintenance; if he has not paid his taxes; if he is liable to be called for military duty; if there is reason to believe that his activities abroad would be prejudicial to the interest of his country; if it is considered that his travel abroad would endanger the internal or external security of the State; if it is considered that his activities abroad would be prejudicial to the orderly conduct of the State's foreign affairs; if it is believed that he intends to use his passport for improper purposes; if his intention is to enter, without authorization, the military service of a foreign country; if he has knowledge of a trade or profession considered to be of national importance or interest, etc.).

##### *Other factors or conditions affecting the right of certain nationals to leave the country*

(a) Economic factors, such as regulations governing the use of currency, cost of travel documents or taxes on travel abroad, deposit or other security to

be furnished, or the possibility that the applicant may become a public charge abroad.

(b) Health or sanitary regulations.

*Restrictions upon the travel abroad of a national*

If there are area restrictions (invalidity of documents for travel in specified areas), time or trip restrictions (one month, single trip, etc.), or other restrictions, indicate whether they are applied to all nationals without distinction. If not, indicate the categories of nationals affected by such restrictions.

*Recourses*

Describe the recourses (administrative, judicial or other) available in the case of denial or inaction by the competent authority. State whether, in the procedure or the recourse, the aggrieved person has the right to be informed of the reason for denial, to be heard, and to examine and dispute the evidence on which the denial is based.

*Sanctions*

(a) What sanctions (penal or other) may be applied in the case of a national who leaves, or attempts to leave, the country without complying with the required formalities?

(b) What other effects may occur when a national leaves, or attempts to leave the country without complying with the required formalities (e.g., does he risk the loss of certain rights, such as the right to nationality or citizenship, the right to domicile, the right to own property, the right to work, the right to social security, the right to sue in court, the right to obtain a travel document at a later date, the right to take part in the government of his country, or any rights under family law, such as guardianship of children, etc.)?

THE RIGHT OF A NATIONAL TO RETURN TO THE COUNTRY

*Procedures and formalities*

(a) Is a special travel document (such as passport, *laissez-passer*, entrance visa or tourist card) required of a national who wishes to return to his country? Cite any cases in which the special travel document may be dispensed with (as when a birth certificate, identity card, or other simple identification is sufficient, or when no identification is required).

(b) Describe the procedures by which a national is granted or denied permission to return to the country.

*Grounds for refusing to permit certain nationals to return to the country*

(a) Ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(b) Grounds such as the political, jurisdictional or international status of the country or territory to which the person belongs, whether it is independent, trust, non-self-governing, or under any other limitation of sovereignty.

(c) Other grounds of restrictions.

*Other factors or conditions affecting the right of certain nationals to return to the country*

(a) Disregard of conditions (for example, area or time restrictions) under which permission to leave the country was granted.

- (b) Extended residence abroad.
- (c) Disloyal conduct abroad.

### *Recourses*

Describe the recourses (administrative, judicial or other) available in the case of denial or inaction by the competent authority. State whether, in the procedure or the recourse, the aggrieved person has the right to be informed of the reason for denial, to be heard, and to examine and dispute the evidence on which the denial is based.

### *Sanctions*

(a) What sanctions (penal or other) may be applied in the case of a national who returns, or attempts to return, to the country without complying with the required formalities?

(b) What other effects may occur when a national returns, or attempts to return, to the country without complying with the required formalities (e.g., the loss of certain other rights)?

## II. THE RIGHT OF A FOREIGNER TO LEAVE THE COUNTRY

### *General principles*

Is the right of a foreigner to leave the country restricted by law? If not, what general principle is applied? In either case, cite the relevant texts (e.g., constitutional provisions, statutes, regulations, judicial decisions, etc.).

### *Procedures and formalities*

(a) Is a special travel document required of a foreigner who wishes to leave the country (such as a passport or other valid travel document issued by the country of which he is a national, a *laissez-passer*, an exit visa, a tax clearance form, or other document issued by the country of his sojourn)? Cite any cases in which the special travel document may be dispensed with.

(b) Describe the procedures by which a foreigner is granted or denied permission to leave the country.

### *Annex III*

#### **DEVELOPMENT OF ARTICLE 13 (2) OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

When the Universal Declaration of Human Rights was being prepared, the right of everyone to leave any country, including his own, and to return to his country, was discussed, successively, in the Drafting Committee of the Commission on Human Rights (first and second sessions); in the Sub-Commission (first session); in the Commission on Human Rights (second and third sessions); and in the Third Committee of the General Assembly (third session).

##### *(a) Drafting Committee of the Commission on Human Rights, First Session (June 1947) (E/CN.4/21)*

The Committee examined, among other things, a "draft Outline of an International Bill of Human Rights", prepared by the Secretariat, and a draft submitted by the Government of the United Kingdom. The draft Outline contained the following text relevant to the present study:

"The right of emigration and expatriation shall not be denied."

The United Kingdom draft contained the following text:

"Every person who is not subject to any lawful deprivation of liberty or to any outstanding obligations with regard to national service shall be free to leave any country, including his own."

At the request of the Committee, the representative of France redrafted the relevant texts to read as follows:

"Subject to any general law adopted in the interest of national welfare and security, there shall be liberty of movement and free choice of residence within the borders of each State; individuals may also freely emigrate or expatriate themselves."

During the discussion of this text, the question arose whether the words "Subject to any general law adopted in the interest of national welfare and security" were necessary. The author of the text expressed the view that:

"Texts which proclaimed unconditional liberties might be dangerous to certain States . . . He thought it would be wise to transfer the reservation to the end of the article . . . to the effect that it was subject to any general law which might regulate the freedom of movement."

The representative of Chile suggested that the words "emigrate or expatriate themselves" be changed to "leave the territory".

The representative of the United Kingdom referred to his Government's suggestion to use the wording, "leave any country, including his own". He observed, at the same time, that the right to freedom of movement was:

"... a matter which should be considered by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, since the main implication was the prevention of discrimination, on the ground of race or colour, where people might live, and how they might move from place to place."

The Drafting Committee adopted the following text:



"There shall be liberty of movement and free choice of residence within the borders of each State. This freedom may be regulated by a general law adopted in the interest of national welfare and security. Individuals may freely emigrate or renounce their nationality."

The Committee decided to consult the Sub-Commission on Prevention of Discrimination and Protection of Minorities on this article.

(b) *Sub-Commission on Prevention of Discrimination and Protection of Minorities, First Session (November-December 1947) (E/CN.4/52)*

The Sub-Commission, at its first session, considered first a proposal submitted jointly by Mr. Nisot (Belgium), Mr. McNamara (Australia) and Mr. Wu (China) to redraft the Committee's text as follows:

"Subject to any general law not contrary to the principles of the United Nations Charter and adopted for specific and explicit reasons of security or in the general interest, there shall be liberty of movement and free choice of residence within the territory of each State. Subject to the same reservation, each individual shall be free to emigrate and renounce nationality."

Miss Monroe (United Kingdom) expressed the view that the reservations formulated in the first sentence of this text should not apply to the right to emigrate.

Mr. Masani (India) expressed the view that the desire to emigrate should not be taken as evidence of disloyalty. Criminals and traitors would be subject to some law preventing their emigration, and it was only the rights of honest citizens which were under discussion. He felt that there should be no reservation to the right to emigrate.

Mr. Spanien (France) thought that no reservations should be applied either to the right to emigrate or to the right to renounce nationality. He proposed to redraft the second sentence as follows:

"Each individual shall have liberty of movement outside the territory of each State and shall be free to emigrate and renounce his nationality".

Mr. Borisov (USSR) pointed out that the right to emigrate without any restrictions would encourage people to renounce their nationality.

The article, as amended and proposed by the Sub-Commission by 8 votes in favour and 2 against, with 1 abstention, read as follows:

"Subject to any general law not contrary to the purposes and principles of the United Nations Charter and adopted for specific reasons of security or in general interest, there shall be liberty of movement and free choice of residence within the borders of each State.

"Individuals shall have the right to leave their own country and to change their nationality to that of any country willing to accept them."

Mr. Nisot inserted the following remarks in the report of the Sub-Commission to the Commission:

"I was unable to agree to [the above text] because of the absolute bearing of its second sentence, which is not subject to the reservation (concerning laws in conformity with the Charter) by which the first sentence is governed. In the absence of such a reservation, the possibility for individuals to leave their country or relinquish their nationality is made dependent, in principle, on their sole will, without the State being able, even for reasons of general interest or national security, to limit this possibility, in particular by making it contingent on authorization. Such a radical provision cannot, in my view, but diminish the probabilities of the Declaration being, on this point, accepted or observed by Governments."

(c) *Commission on Human Rights, Second Session (December 1947) (E/600)*

In the Commission, the representative of the Ukrainian SSR proposed that the second paragraph of the article adopted by the Sub-Commission should be deleted, as it would encourage emigration. The proposal was rejected by 4 votes in favour and 11 against, with 3 abstentions.

The Commission adopted by 12 votes in favour and 4 against, with 1 abstention, the text proposed by the Sub-Commission after having replaced, in its second paragraph, the words "to change their nationality to that of any country willing to accept them" by the words "to acquire the nationality of any country willing to grant it".

(d) *Commission on Human Rights, Third Session (May-June 1948) (E/800) and Drafting Committee, Second Session (May 1948) (E/CN.4/95)*

The Commission, at its third session, had before it comments on the draft article, and particularly on the text dealing with the right to leave a country, from the Governments of the Netherlands, the Union of South Africa and Mexico.

The Netherlands Government suggested to insert, in paragraph 2, after the word "individuals", the words:

"... who are not subject to any lawful deprivation of liberty or to any outstanding obligations with regard to national service, tax liabilities or voluntarily contracted obligations binding the individual to the government."

This suggestion was explained as follows:

"An unrestricted right to emigrate is inadvisable. The question may be raised whether a government, in view of urgent national necessity, may not retain within the borders of the country persons exercising a special profession. Anyhow the freedom to emigrate should not be given to persons who have undertaken special obligations to the government, which commitments have not yet been fulfilled. Finally, it goes without saying that people who are lawfully imprisoned should not be free to leave the country."

The Government of the Union of South Africa pointed out that the draft provisions, dealing, *inter alia*, with the right to leave one's own country, would seem to go much beyond the scope of what could legitimately be regarded as rights and freedoms so fundamental as to call for international protection by the society of nations.

The Government of Mexico suggested that the words "temporarily and permanently" should be inserted in paragraph 2 of the draft article, so that it would read:

"Individuals shall have the right to leave their own country temporarily and permanently, and if they so desire, to acquire the nationality of any country willing to grant it."

The Commission had also before it the report of the second session of the Drafting Committee which, in conformity with suggestions made by the representatives of the United Kingdom and the United States, had decided to delete the limitation clause from the Sub-Commission's text. The French representative, who at the first session of the Drafting Committee had favoured such a clause, had at the second session accepted the view that the Declaration's general article on restrictions (article 29) would afford adequate safeguards for the general prerogatives of the community and of the State, even if the article on freedom of movement and residence contained no specific reservation to that effect.

The text proposed by the Drafting Committee read:

"1. Everyone is entitled to freedom of movement and residence within the borders of each State.

"2. Everyone has the right to leave any country including his own."

The Commission adopted this text by 12 votes in favour and none against, with 4 abstentions. The text of the draft Declaration was transmitted through the Economic and Social Council to the General Assembly.

*(e) Third Committee of the General Assembly, Third Session  
(September-December 1948) (A/777)*

The Third Committee, at the third session of the General Assembly, examined several amendments to the draft article, including texts submitted by the Government of the USSR relating to the right to leave a country, and by the Government of Lebanon relating to the right of everyone to return to his country.

The USSR amendment was to add, after "to leave any country, including his own" the words "in accordance with the procedure laid down in the laws of that country."

In explaining this amendment, the representative of the USSR stated that:

"All movement within a given country or across its frontiers had to take place in accordance with the laws of that country. His delegation considered that its proposal to add to paragraphs 1 and 2 of the article direct reference to national legislation should be generally acceptable, since that proposal corresponded to a reality and did not run counter to any principles which were universally established and applied. The USSR representative expressed the opinion that the other amendments submitted would be of no value if the USSR's amendments to the article were not accepted.

"... The USSR amendment in no way modified the basic text of the article; it did not suggest eliminating anything: it simply proposed to add a reference to the laws of the country concerned.

"... The USSR amendment took due account of existing realities; it was impossible for the time being to ask Member States to abolish measures regulating entries and exits from their respective territories and to cancel their emigration and immigration laws. The adoption of the text of the article would, however, have just that result and would therefore be in flagrant contradiction with the provision of Article 2, paragraph 7 of the Charter. In the Soviet Union... no law prevented persons from leaving the country, but anyone desiring to do so had, of course, to go through the legally prescribed formalities."

These views were supported by the representative of the Ukrainian SSR, who pointed out that:

"They were based on reality, and only reflected conditions which existed in the majority of countries... All that the USSR was proposing in connexion with a freedom, the principle of which was generally accepted, was to safeguard the sovereignty of States and prevent interference in affairs which were essentially an internal matter. A provision of that kind was in conformity with the Charter."

The representative of Poland remarked that:

"All the countries in the world had certain laws restricting freedom of movement and the right to leave the country. It was simply a matter of avoiding arbitrary restrictions."

The representative of Saudi Arabia also was in favour of the USSR amendment, which, he considered, "in no way undermined the principles set out in the article".

Other representatives, however, held a different view.

The representative of the Philippines stated that :

"The amendments proposed by the USSR delegation, if adopted, would nullify the meaning of the article, because instead of establishing common standards to govern the movements of people in general, the Committee would be sanctioning the deplorable state of affairs which exists in the world."

The representative of Chile stated that :

"The Chilean delegation considered the question to be of vital importance. Freedom of movement was the sacred right of every human being. That principle should be defended and maintained as an element necessary to progress and to civilization.

"Admittedly a State was entitled to decide how the principle was to be applied; but to include such interpretations in a Declaration of Human Rights would imply the renunciation of the inherent rights of mankind. A declaration drawn up in that sense would be a declaration of the absolute rights of the State and not a Declaration of Human Rights."

The representative of Haiti recalled that :

"The principle of the individual's right to move freely about the world had been recognized before national States had reached their present stage of development. The various barriers erected by those States failed to take account of the importance of the human element, the ties of family and friendship, which were often stronger than the ties which attached the individual to the sometimes unstable Government of his country.

"The world belongs to all mankind. Government restrictions ran counter to the aspirations of the universal conscience; they might be tolerated as a temporary necessity, but there could be no question of including them in the Declaration, which was intended primarily to educate the masses . . ."

The representative of Belgium stated that :

"The Declaration comprises a set of principles; there was no question of a convention, or of a code of special laws, but the Declaration, which had to be concise and definite. . . . The article was of vital importance: the principles of freedom of movement and freedom of residence had to be stressed at that moment when the war and the resulting upheaval demonstrated to what point that principle could be trodden under-foot. The ideal would be a return to the time when man could travel round the world armed with nothing but a visiting card. The principle of freedom of movement did not prevent States from promulgating laws to cope with questions of public order and public health; but all such reservations were provided for in Article 29. The Belgian delegation could, in no case, subscribe to the reservations implied in the USSR amendments."

The United Kingdom representative said that his delegation :

". . . would oppose any amendment tending to restrict the scope of the article in the same way as it was opposed, in general, to any measure likely to weaken the force of the Declaration of Human Rights. The Committee should not be content with the laws promulgated by the various States, but should endeavour to get the States to agree to make their laws conform to the spirit of the Declaration. That Declaration should express an ideal, and should not, therefore, be limited in any way."

The representative of the United States of America reminded the Committee that :

"During the discussion on the other articles, it had been recognized that in certain circumstances individuals had to be guaranteed protection, even against their own government. The article under discussion seemed to impose

such an obligation... The amendment submitted by the USSR delegation would render the article valueless. To state that freedom of movement should be granted only in accordance with the laws of each country would be equivalent to limiting the fundamental rights of the individual and increasing the powers of the State."

The representative of Greece, speaking on the USSR amendment:

"... pointed out that it was natural for Governments to take legal measures to regulate the principles of freedom enunciated in the article, since the application of any principle of freedom necessarily entails the appropriate legislation, but the legislation should not permit violation of the very spirit of freedom it was intended to safeguard. If the USSR amendment aimed at restricting freedom of movement and residence, the Greek delegation could not subscribe to it."

The representative of Lebanon felt that:

"The words 'in accordance with the laws of that State' should not be added. The principle enunciated in the article should not be weakened by any reservations. On the contrary, States should be prevented from passing the laws arbitrarily restricting freedom of movement and residence."

The USSR amendment was rejected by 7 votes in favour and 24 against, with 13 abstentions.

The representative of Uruguay explained that his delegation had voted against the USSR amendment because of the existence of article 29. If the limitations desired by the USSR delegation came within the framework of article 29, they were superfluous; if they did not, they were not desirable.

The Lebanese amendment was to add, at the end of paragraph 2, the words "and to return to his country".

In submitting his amendment, the representative of Lebanon pointed out that the text under discussion:

"... was intended to cover all movements inside and outside of a given State. According to that article, any person had the right to leave any country, including his own. The ideal would be that any person should be able to enter any country he might choose, but account had to be taken of actual facts. The minimum requirement was that any person should be able to return to his country. If that right were recognized, the right to leave a country, already sanctioned in the article, would be strengthened by the assurance of the right to return. Such was the object of his amendment."

There was no opposition to the amendment. The representative of the USSR expressed the view that it "would add a patriotic note to the article". The amendment was adopted by 33 votes in favour and none against, with 8 abstentions.

Article 13, as amended, was adopted by 37 votes in favour and none against, with 3 abstentions.

The representative of the USSR said that:

"... on account of an interpretation mistake he had not understood that the last vote was on article 13 as a whole. His delegation would certainly have voted against the adoption of an article which violated the provisions of paragraph 7 of Article 2 of the United Nations Charter and which deliberately ignored the right of each State to regulate as it desired freedom of movement in and departures from its territory at its own frontiers."

The text prepared by the Third Committee was subsequently adopted by the General Assembly by 44 votes in favour and 6 against, with 2 abstentions, and appears as article 13 of the Universal Declaration of Human Rights.

## *Annex IV*

### **DEVELOPMENT OF ARTICLE 12 OF THE DRAFT COVENANT ON CIVIL AND POLITICAL RIGHTS**

#### **CONSIDERATION OF THE ARTICLE BY THE COMMISSION ON HUMAN RIGHTS**

The first drafts of article 12 dealt only with the right of the individual to leave any country, including his own, subject to certain restrictions. Provisions on freedom of movement and free choice of residence were added later, and most of the discussions of the article, which arose from this addition, was concerned with the nature of the limitations clause to be inserted. There was some exchange of views also on the provisions of paragraph 2, under which arbitrary exile is prohibited and the right to enter one's country affirmed.

#### *Limitations clause*

It was recognized that freedom of movement and free choice of residence were subject to certain legitimate restrictions. Opinions differed on the scope of permissible limitations. Long lists of exceptions to the exercise of this right were included in the earlier drafts of the article but later a more general formula was sought, which aimed at giving protection to the individual while safeguarding the interests of States.

One view regarding this article was that, since it was not possible to include an exhaustive list of all the restrictions applicable in different States, and since any general wording might be so broad as to render the article of little practical value, the best course would be to delete it from the covenant. Freedom of movement was not a fundamental, but rather a secondary, right. Against this it was argued that freedom of movement constituted an important human right and one which was an essential part of the right to personal liberty. It had been included in the Universal Declaration of Human Rights and should find its place in the covenant. Moreover, the fact that it had been denied in recent times made its inclusion all the more important.

Among the restrictions which various representatives mentioned as being legitimate or necessary were those which might be imposed in a national emergency, in epidemics, for the control of prostitution, on immigrants as a temporary measure, on migrant workers in certain cases, and on indigenous populations in certain circumstances for their own protection. The limitations might vary greatly from State to State. It was agreed that the right to leave the country could not be claimed in order to escape legal proceedings or to avoid such obligations as national service, and the payment of fines, taxes or maintenance allowances.

Restrictions on freedom of movement should be provided by the law of the State concerned. The majority agreed that the article should specify that such law must be just, otherwise it could be interpreted as authorizing States to impose any limitations they wished. To meet this point, it was suggested that the article should state that the law must be in accordance with the principles of the Charter and the Universal Declaration of Human Rights. A proposal that it should be "consistent with the other rights recognized in the Covenant" was, however, preferred. In this connexion attention was drawn to the importance of the provisions on non-discrimination as applied to this article.

Some considered such a general formula unsatisfactory, although others were of the opinion that it provided sufficient restriction of the right. One view was that it was too broad and required further qualification, another that it provided no real protection against the enactment of arbitrary legislation. It was pointed out also that the limitations clause in this article should be in line with other similar clauses in articles 18, 19, 20 and 21.

Some accepted the view that the right might be curtailed by domestic law "consistent with the other rights recognized in the covenant" in order to protect "national security, public safety, health, morals, or the rights and freedoms of others", although there was objection that such phrases, and especially the latter, could lead to abuse. The addition of such words as "general welfare", "economic and social well-being", "prevention of disorder or crime" and "public order" was also proposed but not adopted. They were considered to be too far-reaching.

In discussing the application of the limitations clause, some were of the view that it should cover the provisions of both paragraphs of the article. The majority, however, thought that paragraph 2 and, in particular, the right to enter one's country should not be subject to restriction.

### *Prohibition of exile*

The proposal that this article should include a provision prohibiting arbitrary exile, based on article 9 of the Universal Declaration of Human Rights, was criticized on the grounds that a liberal and democratic society should not permit exile and, therefore, no such provision should appear in the covenant. If it were inserted, it should prohibit exile completely. The question was also linked with the right of asylum.

In support of the proposal it was explained that, while in most countries exile no longer existed as a penalty, in some circumstances it might be more humane to exile a person than to inflict on him more severe punishment, such as detention in a concentration camp or complete deprivation of liberty. Some doubt was expressed regarding the use of the word "arbitrary", but it was thought that if a provision on exile were inserted in the covenant at all it should deal only with arbitrary exile.

### *Right to enter one's country*

Difficulties arose in connexion with this provision concerning the right to enter one's country for States in which the right to return to one's country was governed, not by rules of nationality or citizenship, but by the idea of a permanent home. The early drafts dealt only with the right of nationals to "enter" their country. It was intended to cover cases such as those of persons born abroad who had never been to the country of their nationality. Such a formula was not satisfactory for a State which granted the right of "return" to persons who were not nationals but who had established their home in the country. A compromise was reached, based on article 13, paragraph 2, of the Universal Declaration of Human Rights, by replacing the reference to "country of which he is a national" by the words "his own country". The right to "enter" the country was retained.

### CONSIDERATION OF THE ARTICLE BY THE GENERAL ASSEMBLY

Article 12 of the draft Covenant on Civil and Political Rights, as submitted to the General Assembly by the Commission on Human Rights (E/2573, annex I, B), read as follows:

"1. Subject to any general law of the State concerned which provides for such reasonable restrictions as may be necessary to protect national security, public safety, health or morals or the rights and freedoms of others, consistent with the other rights recognized in this Covenant:

"(a) Everyone legally within the territory of a State shall, within that territory, have the right to (i) liberty of movement and (ii) freedom to choose his residence;

"(b) Everyone shall be free to leave any country, including his own.

"2. (a) No one shall be subjected to arbitrary exile;

"(b) Subject to the preceding sub-paragraph, anyone shall be free to enter his own country."

The Committee discussed this article at its 954th to 959th meetings.

#### *Amendments submitted*

Amendments were submitted by Denmark (A/C.3/L.784), Israel (A/C.3/L.789), the Netherlands (A/C.3/L.796), Canada (A/C.3/L.802), Argentina (A/C.3/L.804) and Argentina, Belgium, Iran, Italy and the Philippines (A/C.3/L.812 and A/C.3/L.812/Rev.1-2). A sub-amendment to the revised five-Power amendment (A/C.3/L.812/Rev.2) was submitted by Ireland (A/C.3/L.813).

The amendment of Denmark (A/C.3/L.784) called for the replacement of the clause "Subject to any general law of the State concerned which provides for such reasonable restrictions . . ." by the following: "Subject to such lawful and reasonable restrictions of the State concerned . . .". At the 955th meeting, the representative of Denmark withdrew the amendment.

The amendments of Israel (A/C.3/L.789) were as follows:

"(a) Replace paragraph 1 (b) by the following:

"Everyone shall be free to leave any country, including his own, and to return to his country.

"(b) Delete paragraph 2 (a), and insert a new article 13 reading as follows:

"No one shall be compulsorily exiled from his own country.

"(c) Delete paragraph 2 (b)".

The Chairman announced at the 954th meeting that the amendments had been withdrawn by the representative of Israel.

The amendment of the Netherlands (A/C.3/L.796) consisted in replacing the text of paragraph 1 by the following:

"1. Subject to any general law of the State concerned which provides for such reasonable restrictions as may be necessary to protect national security, public safety, health or morals or the rights and freedoms of others, consistent with the other rights recognized in this Covenant, everyone legally within the territory of a State shall, within that territory, have the right to: (a) liberty of movement and (b) freedom to choose his residence;

"2. Everyone shall be free to leave any country, including his own, subject to the restrictions mentioned in the preceding paragraph and to any outstanding obligations with regard to national service, tax liabilities or voluntarily contracted obligations binding the individual to the Government."

Paragraph 2 would be renumbered as paragraph 3. At the 958th meeting, the representative of the Netherlands withdrew the amendment.

The amendment of Canada (A/C.3/L.802) consisted in replacing the text of paragraph 2 (b) by the following:

"Unless lawfully exiled, anyone shall be free to enter the country of which he is a citizen."

The amendment was withdrawn at the 957th meeting.



The amendment of Argentina (A/C.3/L.804) consisted in replacing paragraph 1 by the following:

"Subject to the laws of the State concerned which provide for restrictions, consistent with the other rights recognized in this Covenant, to protect national security, public safety, morals and health."

It would also delete the number 2 and designate the relevant sub-paragraphs as (c) and (d), instead of (a) and (b). At the 955th meeting, the second paragraph of the amendment was withdrawn by the representative of Argentina. At the 956th meeting, he announced that the Argentine amendment was to be considered as replaced by the five-Power amendment (A/C.3/L.812).

The amendment of Argentina, Belgium, Iran, Italy and the Philippines, in its revised form (A/C.3/L.812/Rev.2), would replace the text of article 12 by the following:

"1. Everyone legally within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

"2. Everyone shall be free to leave any country, including his own.

"3. The above-mentioned rights shall not be subjected to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Covenant.

"4. No one shall be arbitrarily deprived of the right to enter his own country."

The sub-amendment of Ireland (A/C.3/L.813) to the five-Power revised amendments would replace paragraph 4 by the following:

"Everyone shall be free to enter his own country, unless lawfully exiled."

At the 959th meeting the representative of Ireland, after a procedural discussion, agreed not to press the sub-amendment to the vote.

#### *Issues discussed*

While in agreement with the substance of the article as proposed by the Commission on Human Rights, some members felt that its drafting could be improved. It was suggested that the article should begin with a statement of the rights to be enunciated, rather than with a list of permissible restrictions. This idea found general support and was reflected in the amendment proposed by Argentina, Belgium, Iran, Italy and the Philippines (A/C.3/L.812 and A/C.3/L.812/Rev.1-2).

The words "any general law" and "reasonable restrictions", which appeared in the Commission's draft, gave rise to some discussion. Various members raised doubts regarding the meaning of the expression "any general law". The deletion of the word "general" was suggested, since laws were necessarily of a general nature. Objections were also raised to the use of the expression "reasonable" to qualify the word "restrictions", since restrictions prescribed by law must be presumed to be reasonable. With regard to the limitations clause—as redrafted in the joint amendment (A/C.3/L.812/Rev.2)—some members pointed out that the term "law" was too broad: enough to cover not only constitutional and statutory provisions, but also measures taken by the executive branch pursuant to powers conferred upon it by the constitution or laws of the country.

There was considerable discussion on the inclusion of the expression *ordre public* in the limitations clause. The difficulty of including the concept in the

English text was manifold. The English expression "public order" was not thought to be equivalent to the French expression *ordre public* or the Spanish words *orden público*. The expression *ordre public*, as used in some civil law countries, denoted a legal concept used as a basis for negating or restricting private agreements, for exercising police power or for voiding the application of foreign law. The Spanish term *orden público* referred (as some members explained) to the whole body of political, economic and moral principles considered essential to the maintenance of a given social structure. In common law countries, the term "public order" was ordinarily understood as indicating the absence of disorder. As far as common law was concerned, the counterpart of *ordre public* was "public policy", although some members disputed this fact. It was finally agreed to use the expression "public order" (*ordre public*) in the English text.

Some members of the Committee objected to the inclusion of the concept of "public order" (*ordre public*) among the grounds justifying a State in imposing restrictions on freedom of movement and residence. Far-reaching restrictions could be justified under such a vague expression. Some members preferred the term "public safety", which had been used in the text prepared by the Commission on Human Rights; this term would make it clear that the right could be limited only if its exercise involved danger to the safety of persons. A majority of the members, however, favoured the use of the expression "public order" (*ordre public*), believing that this expression was broad and included the idea of "public safety".

The clause relating to the right of the individual to enter his own country was also extensively debated. Some members were of the view that this right should not be subjected to any restrictions whatsoever. The general consensus was, however, that, while the right was not absolute, it should not be made subject to the same kind of restrictions as the other rights defined in paragraphs 1 and 2 of the same article. It was thought inconceivable, for example, that a State should prohibit one of its nationals from entering its territory for reasons of health or morality. It was pointed out that in the draft prepared by the Commission on Human Rights exile was the only permissible restriction recognized. Several members, however, were opposed to mentioning "exile" in the Covenant, as the laws of their countries either prohibited or did not recognize exile. Some question was raised regarding the meaning of the phrase "his own country". The view was expressed that "his own country" should be taken to mean the country of which the individual concerned was a national or a citizen; the necessity of being able to submit ample proof of the fact was also emphasized.

#### *Voting on article 12*

At the 959th meeting, the Committee voted as follows :

(a) By 57 votes to 1, with 12 abstentions, the Committee decided to vote first on the revised five-Power amendment (A/C.3/L.812/Rev.2).

(b) Paragraph 1 was adopted by 71 votes to none, with 2 abstentions.

(c) Paragraph 2 was adopted by 70 votes to none, with 3 abstentions.

(d) At the request of the representative of Iraq, a separate vote was taken on the words "public order" (*ordre public*) in paragraph 3. These words were adopted by 58 votes to none, with 15 abstentions.

(e) Paragraph 3 as a whole was adopted by 67 votes to 1, with 3 abstentions.

(f) At the request of the representatives of Guatemala, Iraq and Panama, the word "arbitrarily" in paragraph 4 was voted on separately. It was adopted by 29 votes to 20, with 20 abstentions.

(g) Paragraph 4 as a whole was adopted by 44 votes to 6, with 22 abstentions.

(h) Article 12 as a whole was adopted by 58 votes to 1, with 11 abstentions.

TEXT AS ADOPTED

Article 12, as adopted by the Committee and incorporating the drafting changes suggested by the Rapporteur, reads as follows :

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

"2. Everyone shall be free to leave any country, including his own.

"3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Covenant.

"4. No one shall be arbitrarily deprived of the right to enter his own country."

## *Annex V*

### **INTERNATIONAL CONSIDERATION OF RELATED PROBLEMS**

#### **A. WITHIN THE FRAMEWORK OF THE UNITED NATIONS**

A number of problems closely related to the right of everyone to leave any country, including his own, and to return to his country—among them the problems of migration, of refugees, of stateless persons, the problems arising out of asylum, and the question of facilitating international travel and tourism—have been dealt with by various bodies within the framework of the United Nations.

#### *Migration*

The international programme in this field is directed towards promoting such migratory movements as are necessary for the social—including demographic—and economic development of emigration and immigration countries, and for assuring adequate standards of living, both to the migrants and the local populations of countries of resettlement; establishing standards of treatment for immigrants in order to protect their legitimate interests; and promoting social and cultural integration and adjustment of immigrants to their new environment. The United Nations deals with the social, economic and demographic aspects of migration, the International Labour Organisation (ILO) with migratory movements in connexion with its man-power programme; Food and Agriculture Organization (FAO) with land settlement as an important aspect of migration; and World Health Organization (WHO) and United Nations Educational, Scientific and Cultural Organization (UNESCO) with those aspects falling within their respective competencies. The Office of the United Nations High Commissioner for Refugees has an interest in the question, inasmuch as it is closely connected with his mandate of protection of refugees and the solution of their problems.

Within the United Nations the Economic and Social Council has, in resolution 156 (VII), allocated responsibilities in the field of migration between the Population and the Social Commissions. In that resolution the Council recalled that "all the other functional commissions of the Council may have to deal with aspects of migration which fall within their respective assignments . . .".

The over-all co-ordination of responsibilities in the field of migration is achieved through a Technical Working Group on Migration established under the auspices of the Administrative Committee on Co-ordination, now convened and serviced by the International Labour Organisation, which assumes, under the Administrative Committee on Co-ordination, the responsibility at the inter-secretariat level for promoting co-operation and co-ordination in this field.

Non-governmental organizations have also contributed to the study of migration, particularly by their participation in six sessions of the Conference of Non-Governmental Organizations Interested in Migration, convened jointly by the United Nations and the ILO.

#### *Refugees*

The problem of the refugees created by the violent dislocations due to events connected with the Second World War as dealt with from 1943 to 1949 by the United Nations Relief and Rehabilitation Agency (UNRRA), and up to

1951 by the International Refugee Organization (IRO). The Office of the High Commissioner for Refugees was established on 1 January 1951, originally for a period of three years; subsequently the High Commissioner's mandate has been extended twice, and now expires on 31 December 1963.

The basic task of the Office is to provide international protection to refugees, defined as persons who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of persecution by reason of race, religion, nationality, membership of a particular social group or political opinion, are outside their country of nationality and are unable—or, owing to such fear, are unwilling—to avail themselves of the protection of that country; or who, not having a nationality and being outside their former habitual residence, as a result of such events, are unable or, owing to such fear, are unwilling to return to it. The Office seeks permanent solutions of the problems of such refugees through facilitating their voluntary repatriation or their assimilation within new national communities. Its competence does not, however, normally extend to refugees receiving protection or assistance from other organs of the United Nations, such as the refugees from Palestine who are the concern of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA); or to refugees who are recognized by the Governments concerned as having the rights and obligations which are attached to the possession of the nationality of the country of asylum, such as the refugees in India and Pakistan or the German expellees and refugees in the Federal Republic of Germany. Although Chinese refugees in Hong Kong are not under the High Commissioner's mandate, the General Assembly in 1957 recognized their problem as being of concern to the international community and requested the High Commissioner to use his good offices to encourage arrangements for contribution to alleviate their distress.

Basically, the function of the High Commissioner is to provide international protection for refugees who have neither acquired the nationality of the country granting them asylum, nor have reavailed themselves of the protection of their country of origin through voluntary repatriation. Legal protection is effected by promoting the conclusion and ratification of international conventions, by supervising their application, and by promoting national measures to improve the situation of refugees. The most important international instrument in this field is the 1951 Convention Relating to the Status of Refugees,<sup>a</sup> which sets out the minimum rights of such persons. Article 28 of the Convention reads as follows:

*"Travel documents*

"(1) The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

"(2) Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting Parties in the same way as if they had been issued pursuant to this article."

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<sup>a</sup> Final Act and Convention Relating to the Status of Refugees (A/CONF.2/108), Palais des Nations, Geneva, 1951.

The Convention also provides (article 11) for the issue of travel documents to refugee seamen who, owing to a lack of documents permitting them to return to any country, have not been able to set foot on shore legally. Paragraph 13 of the Schedule to the Convention provides that the holders of travel documents issued to refugees should, save in exceptional cases, be readmitted to the territory of the issuing State at any time during the period of the document's validity.

In the functions briefly outlined above, the Office of the High Commissioner for Refugees works closely with the Inter-Governmental Committee for European Migration (ICEM), the members of the Standing Conference of Voluntary Agencies Working for Refugees, and the Conference of Non-Governmental Organizations Interested in Migration.

### *Stateless persons*

Under the Convention Relating to the Status of Stateless Persons, adopted by a Conference of Plenipotentiaries in September 1954,<sup>b</sup> Contracting Parties undertake to grant to stateless persons almost the same standards of treatment as those granted refugees in the Convention on the Status of Refugees. A stateless person is defined as "a person who is not considered as a national by any State under the operation of its law". Contracting States agree to facilitate the assimilation and naturalization of stateless persons. Article 28 of the Convention reads as follows:

#### *"Travel documents*

"The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other stateless person in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence."

Paragraph 13 of the Schedule to the Convention provides that a travel document issued in accordance with article 28, unless it contains a statement to the contrary, entitles the holder to re-enter the territory of the issuing State at any time during the period of its validity.

The United Nations Conference on the Elimination or Reduction of Future Statelessness reconvened<sup>c</sup> at the United Nations Headquarters in New York on 15 August 1961, prepared a Convention on the Reduction of Statelessness (A/CONF.9/L.92), and opened it for signature from 30 August 1961 until 31 May 1962. The relevant portions of this Convention read as follows:

#### *"Article 7*

"1. (a) If the law of a Contracting State permits renunciation of nationality, such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality.

"(b) The provisions of sub-paragraph (a) of this paragraph shall not apply where their application would be inconsistent with the principles stated in articles 13 and 14 of the Universal Declaration of Human Rights

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<sup>b</sup> Final Act and Convention Relating to the Status of Stateless Persons (E/CONF.17/5/Rev.1), United Nations, 1954.

<sup>c</sup> The first session of the Conference was held in Geneva from 24 March to 18 April 1959.

approved on 10 December 1948 by the General Assembly of the United Nations.

"2. A national of a Contracting State who seeks naturalization in a foreign country shall not lose his nationality unless he acquires or has been accorded assurance of acquiring the nationality of that foreign country.

"3. Subject to the provisions of paragraphs 4 and 5 of this article, a national of a Contracting State shall not lose his nationality, so as to become stateless, on the ground of departure, residence abroad, failure to register or on any similar ground.

"4. A naturalized person may lose his nationality on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality.

"5. In the case of a national of a Contracting State, born outside its territory, the law of that State may make the retention of its nationality after the expiry of one year from his attaining his majority conditional upon residence at that time in the territory of the State or registration with the appropriate authority.

"6. Except in the circumstances mentioned in this article, a person shall not lose the nationality of a Contracting State, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.

#### *"Article 8*

"1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.

"2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State:

"(a) In the circumstances in which, under paragraphs 4 and 5 of article 7, it is permissible that a person should lose his nationality;

"(b) Where the nationality has been obtained by misrepresentation or fraud.

"3. Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

"(a) That, inconsistently with his duty of loyalty to the Contracting State, the person,

"(i) Has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to or received or continued to receive emoluments from, another State, or

"(ii) Has conducted himself in a manner seriously prejudicial to the vital interests of the State;

"(b) That the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.

"4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

## "Article 9

"A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds."

### *Right of freedom from arbitrary arrest, detention and exile*

This right, set forth in article 9 of the Universal Declaration of Human Rights and in article 9 of the draft Covenant on Civil and Political Rights as adopted by the Third Committee of the General Assembly,<sup>d</sup> is the subject of a global study undertaken by the Commission on Human Rights. The Commission appointed a committee consisting of four of its members to make the study. The Committee submitted its report<sup>e</sup> to the seventeenth session of the Commission in 1961.

The Committee studied, *inter alia*, the problem of exile, which was understood to encompass: "(a) the expulsion or exclusion of a person from the country of which he is a national and (b) the banishment of a person within the country by way of forceable removal from the place of his habitual residence." The Committee noted that exile has virtually disappeared.<sup>f</sup>

At its seventeenth session, the Commission on Human Rights, in resolution 2 (XII), decided to transmit the report to the Governments of States Members of the United Nations and members of the specialized agencies for their comments, and requested the Committee to revise its report in the light of Governments' comments and of any additional information, especially information concerning new Member States. The Committee was further requested to include in its revised report draft principles on the right of everyone to be free from arbitrary arrest, detention and exile.

The Committee's report was accordingly revised (E/CN.4/826 and Corr.1 and 2) in the light of comments received from nineteen Governments and of additional information. Part VI of the report contained draft principles on the right of everyone to be free from arbitrary arrest and detention. The question of exile was not dealt with since, the Committee felt, this institution was in the process of disappearing. Also, the Committee had refrained from coming out categorically for the complete abolition of exile since, in certain cases at least, exile might constitute a relatively humane substitute for incarceration.

The Commission on Human Rights at its eighteenth session did not consider the revised report in detail. It decided, in resolution 2 (XVIII) to transmit the draft principles to States Members of the United Nations and its specialized agencies for their comments and to consider the draft principles at its next session in the light of the comments of Governments.<sup>g</sup>

In accordance with a resolution adopted by the Commission on Human Rights on 12 April 1955, statements furnished by Governments concerning the application and, so far as necessary, the evolution of the right of freedom from arbitrary arrest, detention and exile were published in a supplementary volume of the Yearbook on Human Rights in 1959.<sup>h</sup>

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<sup>d</sup> Official Records of the General Assembly, Thirteenth Session, Annexes, agenda item 32 (A/3824), para. 67.

<sup>e</sup> Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile (E/CN.4/813 and Corr.1).

<sup>f</sup> *Ibid.*, paras. 20, 815.

<sup>g</sup> Official Records of the Thirty-fourth Session of the Economic and Social Council, Supplement No. 8 (E/3616/Rev.1, para. 54).

<sup>h</sup> "Freedom from arbitrary arrest, detention and exile", *Yearbook on Human Rights*, first supplementary volume, United Nations, New York, 1959.



### *Right of asylum*

A draft Declaration on the right of asylum is under consideration by the General Assembly. The draft declaration, prepared by the Commission on Human Rights at its sixteenth session,<sup>1</sup> contains, *inter alia*, the following provisions:

#### *"Article 1*

Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, shall be respected by all other States.

#### *"Article 2*

"The situation of persons who are forced to leave their own or another country because of persecution or well-founded fear of persecution is, without prejudice to the sovereignty of States and the purposes and principles of the United Nations, of concern to the international community...

#### *"Article 3*

"No one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights should, except for over-riding reasons of national security or safeguarding of the population, be subject to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is well-founded fear of persecution endangering his life, physical integrity or liberty in that territory...

#### *"Article 5*

"Nothing in this Declaration shall be interpreted to prejudice the right of everyone to return to his country as stated in article 13, paragraph 2, of the Universal Declaration of Human Rights."

In resolution 1682 (XVI), the General Assembly at its sixteenth session decided to take up the item "Draft Declaration on the Right of Asylum" as soon as possible at its seventeenth session.

### *International Civil Aviation Organization*

The Convention on the International Civil Aviation adopted in 1944 provides, *inter alia*:

#### *"Article 13. Entry and clearance regulations*

"The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State"...

#### *"Article 22. Facilitation of formalities*

"Each contracting State agrees to adopt all practicable measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation by aircraft between the territories of contracting States, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance"...

<sup>1</sup> Official Records of the Thirtieth Session of the Economic and Social Council, Supplement No. 8 (E/3335, para. 147).

<sup>2</sup> International Legislation, edited by Manley O. Hudson, vol. IX, 1942-1945, pp. 174, 177, 184 and 185.

*"Article 37. Adoption of international standards and procedures*

"The International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

"... Customs and immigration procedures".

In 1949 the Organization adopted "International Standards and Recommended practices—Facilitation" designated as annex 9 to the Convention, which has secured much simplification of government regulations relating to border crossings e.g. passport, visa, customs, immigration and public health requirements in international air transport.

In 1958 the ICAO approved "Aims and Objectives of ICAO in the Field of Facilitation", a study of measures facilitating the passage of passengers and goods across national borders.

The present amended edition of annex 9 which became effective on 1 November 1960\* provides in part as follows:

"3.4 Contracting States shall not require from tourists and other temporary visitors travelling by air any other document of identity than a valid passport.

"*Note.* Existing official documents of identity such as expired passports, national registration cards and alien resident permits may be accepted in lieu of a valid passport.

"3.4.1 Recommended Practice—

"Each Contracting State should make arrangements whereby the identity document of a tourist or other temporary visitor need be inspected by only one official at times of entry and departure.

"3.4.2 Recommended Practice—

"Contracting States should provide facilities which would enable their nationals to obtain passports without delay, at nominal expense and valid for at least five years"...

"3.5 Recommended Practice—

"Contracting States should extend to the maximum number of countries the practice of abolishing through bilateral arrangements or unilateral action, entrance visas for tourists and other temporary visitors.

"*Note.* A number of Contracting States have already eliminated entrance visas in respect of nationals from twenty-five or more other Contracting States.

"3.6 In cases where a Contracting State continues to require entrance visas from tourists and other temporary visitors, it shall adopt the practice of normally making such visas valid for at least twelve months from the date of issue, regardless of the number of entries into such State and with the understanding that the duration of each stay may be limited. However, the State concerned may require that the length of validity of the visa does not exceed the length of validity of the passport or identity document in which such visa is inserted."...

"3.7 Recommended Practice—

"Contracting States should not require either from tourists and other temporary visitors travelling by air, or from operators on their behalf, any

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\* ICAO, *International Standards and Recommended Practices, Facilitation*, annex 9, fourth edition, November 1960, pp. 7, 11, 12, 17, 18.

information in writing supplementary to or repeating that already presented in their identity documents."

"3.11 Contracting States shall accept an oral passenger baggage declaration."...

"3.18 Recommended Practice—

"Contracting States should not require exit visas from their own nationals or residents wishing to tour abroad nor from tourists and other temporary visitors at the end of their stay.

"3.19 Recommended Practice—

"Contracting States should not normally require inspection of baggage of passengers departing from their territory."...

"3.21 Contracting States shall not require tax clearance certificates from tourists or other temporary visitors."...

"5.2 Contracting States shall not require any documents or visas in respect of traffic continuing its journey on the same through-flight, except in special circumstances determined by the public authorities concerned.

"*Note.* It is the intent of this provision, *inter alia*, that Contracting States shall neither (a) temporarily deprive passengers of their passports nor (b) require the operator to do so."

"... ..

"5.4 Contracting States shall not require any documents or visas in respect of traffic being transferred to another flight at the same airport, except in special circumstances determined by the public authorities concerned."...

"5.7 Recommended Practice

"Each Contracting State should make provision, by means of direct transit arrangements or otherwise, whereby traffic which passes directly through the State and, in the course of such passage, transfers from one international airport to another international airport, may proceed without undergoing examination, except in special circumstances determined by the public authorities concerned.

"5.8 Recommended Practice

"With respect to the traffic referred to in 5.7, Contracting States should not require any documents or visas for passengers and their baggage, and if documents are required for cargo, unaccompanied baggage and stores, documents as simplified as possible should be used."...

"6.1 If the pilot-in-command finds it necessary to land elsewhere than at an international airport, the following provisions shall apply:

"6.1.2 The public authorities concerned shall:

"(a) Permit passengers and crew to secure suitable accommodation pending completion of the necessary formalities unless such formalities can be completed immediately;"...

Annex 9 also defines a "tourist" as the term is applied in civil aviation as "Any person, without distinction as to race, sex, language or religion, who enters the territory of a Contracting State other than that in which that person normally resides and remains there for not less than twenty-four hours and not more than six months in the course of any twelve-month period, for legitimate non-immigrant purposes, such as touring, recreation, sports, health, family reasons, study, religious pilgrimages, or business".

### *International travel and tourism*

On 28 March 1947 the Economic and Social Council, in resolution 35 (IV), entrusted to the Transport and Communications Commission the task of advising on travel matters. On 31 March 1955 the Council, in resolution 563 (XIX), recognized the importance of international travel in promoting international understanding and cultural relationships, in fostering international trade, in furthering economic development and in contributing towards the improvement of balances of payment. At that time the Council invited States, *inter alia*, "to simplify wherever practicable the entry and exit procedures and formalities applicable to tourists, and to co-operate in the development of international travel arrangements designed to facilitate tourism".

One of the aspects of international travel and tourism in which the United Nations has been interested since its inception is that of the reduction of passport and frontier formalities. As early as 1947 the United Nations Meeting of Experts to prepare for a World Conference on Passports and Frontier Formalities, convened in Geneva and following a tradition established by the League of Nations,<sup>1</sup> prepared a number of recommendations on this subject. In particular it suggested use of a universally accepted type of passport and the simplification of visa requirements and of frontier formalities. In a memorandum on passports and frontier formalities prepared by the Secretary-General and submitted to the Transport and Communications Commission at its fourth session which opened on 27 March 1950 (E/CN.2/71), sixty-three bilateral agreements concluded in the post-war period up to 8 January 1950 with the purpose of reciprocally abolishing entrance visa requirements were listed.

In resolution 147 G (VII) of 28 August 1948, the Economic and Social Council instructed the Secretary-General to bring to the attention of all member Governments the Council's view that it is desirable to reduce, simplify and unify passport and frontier formalities to the extent consistent with national security; and to report to the Transport and Communications Commission as to the progress made in this respect. The Council and the Commission have subsequently received further memoranda from the Secretary-General on this question, the latest being the report to the Commission's ninth session which opened on 4 May 1959 (E/CN.2/190).

At its ninth session, the Transport and Communications Commission was informed by the Secretary-General that the International Union of Official Travel Organizations, a non-governmental organization in consultative status, had proposed that an international diplomatic conference should be convened on the subject of facilitating international travel and removing or reducing travel barriers. In the light of this proposal the Economic and Social Council, upon a recommendation by the Commission, requested the Secretary-General in resolution 724 B (XXVIII):

"(a) To bring up to date and pursue further the technical studies in the field of international travel and tourism; and

"(b) As soon as possible, and not later than at the thirty-first session of the Council... to make recommendations for the development of international travel and tourism, including the desirability of convening an international conference on those subjects."

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<sup>1</sup>The League of Nations Passport Conference of 1926 observed that the suggestion of the 1920 Passport Conference concerning the abolition of exit visas "having been accepted by a large number of states, the Conference is of the opinion that the total abolition of exit visas both for nationals and for foreigners might be taken into consideration at the present time".

The Secretary-General accordingly submitted to the Council at its thirty-first session a report on the development of International Trade and Tourism (E/3438 and Add.1 and 2). The memorandum included information regarding (a) governmental formalities relating to international travel and tourism of *bona fide* non-immigrant temporary visitors; (b) national activities in behalf of the development of tourism, and (c) the desirability of an international conference. On the basis of the Secretary-General's report the Economic and Social Council on 27 April 1961 unanimously adopted resolution 813 (XXXI) requesting the Secretary-General to call a world-wide conference on international travel and tourism as soon as possible, but not later than autumn of 1963.

The Council further requested the Secretary-General, "in consultation if necessary, with a group of not more than seven experts, to prepare recommendations to consider the nature, scope and location of the conference on international trade and tourism, including a provisional agenda for consideration of the Council at its thirty-third session".

Pursuant to the resolution, the Secretary-General constituted a group of seven experts on international travel and tourism and convened a session of the group which met at the European Office of the United Nations, Geneva, from 29 January to 9 February 1962. He also invited the specialized agencies and certain non-governmental organizations in consultative status to be represented at the session.

The report to the Secretary-General by the group (GEITT/1/Rev.2) was transmitted by the Secretary-General to the Council (E/3590).

After consideration of the report, the Council, in resolution 870 (XXXIII), confirmed its decision to call an international technical conference to make recommendations on international travel and tourism and decided that the conference should be held in Rome in August-September 1963. It requested the Secretary-General to invite (a) all States Members of the United Nations or members of the specialized agencies to participate in the conference; (b) the specialized agencies and interested inter-governmental organizations to participate without vote in the deliberations of the conference; and (c) the interested non-governmental organizations having consultative status with the Council to take part without vote in the conference. The Council further decided that the provisional agenda for the conference should be based on the draft provisional agenda prepared by the group of experts and requested the Secretary-General to submit the report on the conference to the Council for consideration at its thirty-seventh session.

It was the view of the group that the conference should be a technical conference from which would result recommendations to governments. It was also agreed that the conference should not be limited to facilitation of governmental formalities and procedures but should embrace other subjects. For general headings of subjects to be discussed by the conference the following outline was suggested:

- I. Definition of "tourist" or "temporary visitor"
- II. Facilitation of governmental formalities regarding travel
- III. Other governmental measures
- IV. Technical co-operation

The group of experts prepared a draft provisional agenda for the conference and provided some explanatory comments for the various items of the agenda, in order to qualify and expedite their consideration by the conference. Among the comments submitted by the group of experts were the following:

## FACILITATION OF GOVERNMENTAL FORMALITIES REGARDING TRAVEL

### *A. Passports (individual, collective and children)*

#### 1. *Abolition*

(a) The tendency to abolish passports and their replacement by a national identity card or other identity document, such as an expired passport, should be encouraged by bilateral or multilateral agreements.

(b) Consideration should also be given by the conference to the advantages and disadvantages of the use for international travel purposes of such documents as the tourist card or the "standard travel document".

#### 2. *Issuance*

##### *(a) Individual*

Decentralization in the issuance of passports by the administrative authorities—regional, provincial or local—is recommended.

Formalities for the issuance of passports should be simplified to the maximum and should particularly not involve the submission of a certificate of good conduct, proof of financial status, security or any other guarantee for the repatriation of the person concerned, except for justified and special reasons.

##### *(b) Collective*

The practice of issuing a collective passport to persons travelling in groups should be extended as much as possible.

Collective passports should be issued within the shortest possible time, with the minimum of formalities, with a reasonable period of validity and for a fee not exceeding the cost of an individual passport, in view of the fact that it is a document of collective utilization and for short duration.

More flexible measures need to be recommended for collective passports having a validity not exceeding twenty-four hours (excursionists), with the object of inducing tourists to travel abroad.

##### *(c) Children*

It would be desirable to fix a uniform age limit, e.g. sixteen years below which no country would require a separate passport for children entering its territory with an accompanying parent. All countries should be satisfied with the inclusion of names and photographs of such children in the passport of the accompanying parent.

#### 3. *Recognition—Acceptance*

##### *Collective*

A collective passport should be recognized as a temporary travel document either on a unilateral basis or by means of bilateral or multilateral agreements.

#### 4. *Validity*

The period of validity of a passport should be not less than five years at the time of the initial issue. Already twenty countries have reported that they grant this period of validity (E/3438 and Add.1 and 2).

During its period of validity, a passport should be valid for an unlimited number of journeys.

A passport should be valid for all countries, and in case of justified exceptions, only the prohibited countries should be listed.

## 5. *Renewal*

Renewal of a passport should not involve the submission of documents required at the time of the first application, so that expeditious renewal is assured.

The period of validity of a renewed passport should normally be the same as the initial period of validity.

The number of renewals of a passport should be unlimited.

## 6. *Withdrawal*

During the period of its validity, a passport should remain in the possession of its holder and the obligation to surrender it upon return from a journey abroad should be abolished, where this practice exists. Furthermore, the authorities of any country visited should not require that the passport be taken away.

## 7. *Cost*

### (a) *Original issue*

A passport should be issued without charge, but if any fees are charged they should not constitute a source of revenue for the State and should not exceed the expenditure involved in its preparation and issuance.

### (b) *Renewal*

The cost of renewal of a passport should be fixed within the limits of the expenditure involved in this operation.

## 8. *Standard format*

Where passports cannot be abolished, adoption of the "international type" recommended by the 1920 and 1926 conferences, or an improved type, should be recommended. The items of information, space for visas, etc., should conform to standard format and uniform order.

## B. *Visas*

The visa requirement should be abolished either by unilateral decision or by means of bilateral or multilateral agreements.

...

## C. *Other controls and formalities*

## 7. *Income tax clearance*

The country visited should exempt foreign visitors from producing an income-tax clearance certificate at the time of departure.

...

## E. *Currency and exchange procedures*

As travel and tourism constitute a substantial factor in the national economies, both domestically and in the international exchange of goods and services, they are entitled to full consideration in the determination of national currency policies. Therefore it is recommended that:

Each country should grant its nationals and residents an adequate allowance of foreign currency at least once a year, without any discrimination, to enable travel abroad. (For example, western European countries have agreed on \$US 275 per year per person minimum.) Written currency declaration should be abolished.

In case restrictions are necessary because of exceptional conditions or circumstances, solutions could be sought by means of bilateral or multilateral agreements.

## *Diplomatic and consular relations*

The Vienna Convention on Diplomatic Relations, adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on 18 April 1961 at Vienna contains the following provision:<sup>m</sup>

### *"Article 44*

"Right to leave the territory of the receiving State and facilitation of departure

"The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property."

The draft articles on consular relations, adopted by the International Law Commission at its thirteenth session in 1961 contain an identical provision in article 26.<sup>n</sup>

In resolution 1685 (XVI) on 18 December 1961, after consideration of the report of the Commission, the General Assembly decided that an international conference be convened to consider the question of consular relations and to embody the results of its work in an international convention and such other instruments as it may deem appropriate.

## B. OUTSIDE THE FRAMEWORK OF THE UNITED NATIONS

### *League of Nations*

The restrictions which may be placed on a foreigner to prevent his departure from his country of sojourn have been discussed at various international and regional meetings. The following draft provision for inclusion in a convention was prepared by the International Conference on Treatment of Foreigners, held under the auspices of the League of Nations in Geneva in 1929:

"The [foreigners] shall have the right to leave the territory without let or hindrance unless individually prevented by a competent authority, in conformity with the laws of the country and with international laws.<sup>o</sup>

The draft provision mentioned in the preceding paragraph was adopted in preference to another text which had provided that:

"Foreigners shall have the right to leave the territory without let or hindrance unless prevented for reasons of public order or owing to contractual obligations."<sup>p</sup>

This formulation was opposed because it "was recognized that it would be dangerous to allow a restriction upon the right on the ground of 'contractual obligations'", and because "it appeared desirable, in order to prevent possible abuses, to define more accurately the conditions in which the right to leave the country might be withheld for reasons of public order by stating, in the first place, that such refusal of permission might not apply to foreigners in general but only to any individual foreigner concerned in a given case and, further, such refusal of permission must be validated by decision of a competent authority given in conformity with the laws of the country and the

<sup>m</sup> United Nations Conference on Diplomatic Intercourse and Immunities, Vienna Convention on Diplomatic Relations (A/CONF.20/13).

<sup>n</sup> *Official Records of the General Assembly, Sixteenth Session, Supplement No. 9 (A/4843)*, chapter II.

<sup>o</sup> League of Nations document C.97.M.23.II, p. 421.

<sup>p</sup> *Ibid.*, p. 420.



provisions of international law".<sup>q</sup> There was also a strong feeling expressed at the Conference for limiting the restrictions on the right of a foreigner to leave the country of his sojourn to those based on judicial reasons and decisions.

### *Organisation for European Economic Co-operation*

The Tourism Committee of the Organisation for European Economic Co-operation (OEEC), since its creation in 1949, has continuously examined what action the Government could take to remove obstacles to international tourism and trade. In 1950, the Council of the OEEC addressed a recommendation to member countries. To facilitate implementation of a recommendation calling for the abolition of passports and replacement by an identity card or other document, the Council adopted (16 April 1957) a decision recommending the establishment of a standard identity card in member countries. The efforts of the Council in this respect have been successful, since the majority of the member countries in which an identity card exists accept this as an identity document for foreign travel.<sup>r</sup>

### *Council of Europe*

As a result of protracted study of the problem of simplification of passports and frontier formalities, the Committee of Ministers of the Council of Europe at its tenth session recommended that member Governments should, as soon as circumstances permit, conclude bilateral agreements for this purpose.<sup>s</sup> By January 1956 visas were effectively abolished for nationals of all member States.<sup>t</sup>

The European Agreement on the regulations governing the movement of persons between member States was signed at Paris on 13 December 1957 by the representatives of seven member countries. This Agreement was primarily designed to permit nationals of the Contracting Parties to enter or leave the territory of another Party. This facility applies only to visits not exceeding three months. The European Convention of Establishment was signed by the Ministers of the Council of Europe on behalf of their respective Governments on 13 December 1955 at Paris. This Convention requires each Contracting Party to facilitate the entry into its territory of nationals of the other parties for the purpose of temporary visits.

### *European Economic Community*

The Treaty establishing the EEC signed at Rome on 25 March 1957 includes the following provisions:<sup>u</sup>

#### **PART ONE**

##### **Principles**

##### *Article 1*

By the present Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN ECONOMIC COMMUNITY.

...

##### *Article 3*

...the activities of the Community shall include, under the conditions and with the timing provided for in this Treaty :

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<sup>q</sup> *Ibid.*, p. 421.

<sup>r</sup> *Tourism in Europe*, published by the Organisation for European Economic Co-operation, Paris, September 1961, pp. 15-17.

<sup>s</sup> *Council of Europe Consultative Assembly* Fourth Ordinary Session (26-30 May 1952), Documents, 1952, Doc. 2, para. 93.

<sup>t</sup> Council of Europe News, January 1956, p. 3.

<sup>u</sup> Council of Europe, *European Yearbook*, vol. IV, Marinus Nijhoff, The Hague, 1958, documentary section, chapter XII.

(c) The abolition, as between member States, of the obstacles to the free movement of persons, services and capital;

...

#### *Article 5*

Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall facilitate the achievement of the Community's aims.

They shall abstain from any measures likely to jeopardize the attainment of the objectives of this Treaty.

...

#### *Article 7*

Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited.

The Council may, acting by means of a qualified majority vote on a proposal of the Commission and after the Assembly has been consulted, lay down rules in regard to the prohibition of any such discrimination.

#### *Article 8*

1. The Common Market shall be progressively established in the course of a transitional period of twelve years.

...

## **PART TWO**

### **Bases of the community**

#### ***Title III***

The free movement of persons, services and capital

#### **CHAPTER I**

##### **WORKERS**

#### *Article 48*

1. The free movement of workers shall be ensured within the Community not later than at the date of the expiry of the transitional period.

2. This shall involve the abolition of any discrimination based on nationality between workers of the member States as regards employment, remuneration and other working conditions.

3. It shall include the right, subject to limitations justified by reasons of public order, public safety and public health;

(a) To accept offers of employment actually made;

(b) To move about freely for this purpose within the territory of member States;

(c) To stay in any member State in order to carry on an employment in conformity with the legislation and administrative provisions governing the employment of the workers of that State; and

(d) To live, on conditions which shall be the subject of implementing regulations to be laid down by the Commission, in the territory of a member State after having been employed there.

4. The provisions of this article shall not apply to employment in the public administration.

#### *Article 49*

Upon the entry into force of this Treaty, the Council, acting on a proposal of the Commission and after the Economic and Social Committee has been consulted, shall, by means of directives or regulations, lay down the measures necessary to effect progressively the free movement of workers, as defined in the preceding article, in particular:

(a) By ensuring close collaboration between national labour administrations;

(b) By progressively abolishing according to a plan any such administrative procedures and practices and also any such time-limits in respect of eligibility for available employment as are applied as a result either of municipal law or of agreements previously concluded between member States and the maintenance of which would be an obstacle to the freeing of the movement of workers;

(c) By progressively abolishing according to a plan all such time limits and other restrictions provided for either under municipal law or under agreements previously concluded between member States as imposed on workers of other member States conditions for the free choice of employment different from those imposed on workers of the State concerned; and

(d) By setting up appropriate machinery for connecting offers of employment and requests for employment, with a view to equilibrating them in such a way as to avoid serious threats to the standard of living and employment in the various regions and industries.

#### *Article 50*

Member States shall, under a common programme, encourage the exchange of young workers.

#### *Article 51*

The Council, acting by means of a unanimous vote on a proposal of the Commission, shall, in the field of social security, adopt the measures necessary to effect the free movement of workers, in particular, by introducing a system which permits an assurance to be given to migrant workers and their beneficiaries;

(a) That, for the purposes of qualifying for and retaining the right to benefits and of the calculation of these benefits, all periods taken into consideration by the respective municipal law of the countries concerned, shall be added together; and

(b) That these benefits will be paid to persons resident in the territories of member States.

### CHAPTER 2

#### THE RIGHT OF ESTABLISHMENT

#### *Article 52*

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a member State in the territory of another member State shall be progressively abolished in the course of the transitional period. Such progressive abolition shall also extend to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any member State established in the territory of any member State.

Freedom of establishment shall include the right to engage in and carry on wage-earning activities, and also to set up and manage enterprises and, in particular, companies within the meaning of article 58, second paragraph, under the conditions laid down by the law of the country of

establishment for its own nationals, subject to the provisions of the chapter relating to capital.

#### *Article 53*

Member States shall not, subject to the provisions of this Treaty, introduce any new restrictions on the establishment in their territories of nationals of other member States.

#### *Article 56*

1. The provisions of this chapter and the measures taken in pursuance thereof shall not prejudice the applicability of legislative and administrative provisions which lay down special treatment for foreign nations and which are justified by reasons of public order, public safety and public health.

2. Before the expiry of the transitional period, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall issue directives for the co-ordination of the above-mentioned legislative and administrative provisions. After the end of the second stage, however, the Council, acting by means of a qualified majority vote on a proposal of the Commission, shall issue directives for co-ordinating such provisions as, in each member State, fall within the administrative field.

### CHAPTER 3

#### SERVICE

#### *Article 59*

Within the framework of the provisions set out below, restrictions on the free supply of services within the Community shall be progressively abolished in the course of the transitional period in respect of nationals of member States who are established in a State of the Community other than that of the person to whom the services are supplied.

The Council, acting by means of a unanimous vote on a proposal of the Commission, may extend the benefit of the provisions of this chapter to cover services supplied by nationals of any third country who are established within the Community.

#### *Article 60*

Services within the meaning of this Treaty shall be deemed to be services normally supplied for remuneration, to the extent that they are not governed by the provisions relating to the free movement of goods, capital and persons.

Services shall include in particular :

- (a) Activities of an industrial character ;
- (b) Activities of a commercial character ;
- (c) Artisan activities ; and
- (d) Activities of the liberal professions.

Without prejudice to the provisions of the chapter relating to the right of establishment, a person supplying a service may, in order to carry out that service, temporarily exercise his activity in the State where the service is supplied, under the same conditions as are imposed by that State on its own nationals.

#### *Article 61*

1. The free movement of services in respect of transport shall be governed by the provisions of the Title relating to transport.

2. The liberalization of banking and insurance services connected with movements of capital shall be effected in harmony with the progressive liberalization of the movement of capital.

#### *Article 62*

Except where otherwise provided for in this Treaty, member States shall not introduce any new restrictions on the freedom which has been in fact achieved, in regard to the supply of services, at the date of the entry into force of this Treaty.

#### *Organization for the Collaboration of Railways*

The conference of Ministers of Transport of the socialist countries, which met in July 1956, established the Organization for the Collaboration of Railways with the aim of developing international co-operation in the sphere of railway traffic.<sup>v</sup> The Organization adopted a number of decisions facilitating and promoting, *inter alia*, travel of nationals of these countries by rail and automobile within the area of the socialist countries.<sup>w</sup>

#### *Asian-African Legal Consultative Committee*

A more recent discussion of the subject took place at the fourth session of the Asian-African Legal Consultative Committee, held at Tokyo in February 1961. The observer for the International Law Commission reported to that Commission in 1961 that the Committee was preparing Principles Concerning Admission and Treatment of Aliens. Article 15 of the Principles as drafted at the 1961 meeting of the Committee reads as follows (A/CN.4/139, Annex I):

"(1) A State shall have the right in accordance with its local laws, regulations and orders to impose such restrictions as it may deem necessary on an alien leaving its territory.

"(2) Such restrictions on an alien leaving the State may include any exit visa or tax clearance certificate to be procured by the alien from the authorities concerned.

"(3) Subject to the local laws, regulations and orders a State shall permit an alien leaving its territory to take his personal effects with him.

"*Note:* (i) The Delegate of Pakistan reserved his position on clause (3).

"(ii) The Delegates of Ceylon and the U.A.R. wished the following clause to be retained in this article:

"'An alien who has fulfilled all his local obligations in the State of residence, shall not be prevented from departing from the State of residence.'"

#### *Union Africaine et Malgache*

Article 2 of the General Convention relating to the position of persons and to the conditions of residence signed at Tananarive on 12 September 1961 by the Chiefs of State or of Government of the Union Africaine et Malgache contains the following provisions:

"Nationals of the Contracting States may freely enter the territory of any one of the other Parties, travel in that territory, establish residence there, and depart at any time within the framework of the laws and regulations applicable to nationals of that territory without prejudice to the laws concerning public order and safety. A protocol relating to the movement of persons between the territories of the Contracting States will determine

<sup>v</sup> *Yearbook of International Organizations, 1958-59*, published by the Union of International Associations, Brussels, pp. 197-198.

<sup>w</sup> *Yezhegodnik BSE*, (Yearbook of the USSR Encyclopedia), 1961, p. 397.

the nature of the documents permitting entry into and exit from the territories of the signatory countries, as well as the procedure for the preparation and delivery of such documents."

The Convention, supplemented by the Protocol of 27 March 1962, provides that nationals of the States Parties may freely enter the territory of any of the other Parties, travel in that territory, reside there temporarily, and depart upon presentation of a valid national passport or one that has lapsed less than five years, in the absence of which they must comply with any previous formalities, such as the requirement of an entry or exit visa.

#### *Association of Southeast Asian States*

At the special session of Foreign Ministers of the Association of Southeast Asian States (ASA) on April 6, 1962:

"The Foreign Ministers agreed to take immediate action to facilitate and encourage the flow of nationals among member countries and, to this end, decided to abolish visa requirements for officials and to waive visa fees for nationals visiting each other's country. Exchange of notes through normal diplomatic channels for the implementation of this decision will be effected immediately."\*

The exchange of notes took effect on August 1, 1962.

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\* Report of the Special Session of Foreign Ministers of ASA, Kuala Lumpur/Cameron Highlands, Federation of Malaya, April 1962, p. 11, para. 21.

## *Annex VI*

### **DRAFT PRINCIPLES ON FREEDOM AND NON-DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY<sup>a</sup>**

#### **PREAMBLE**

*Whereas* the peoples of the United Nations have in the Charter solemnly reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and expressed their determination to promote social progress and better standards of life in larger freedom;

*Whereas* the Charter declares that it is one of the purposes of the United Nations to promote and encourage universal respect and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion:

*Whereas* the Universal Declaration of Human Rights, further elaborating the principle of non-discrimination, proclaims that everyone is entitled to all the rights and freedoms set forth therein without distinction of any kind, and irrespective of the political, jurisdictional or international status of the country or territory to which one belongs;

*Whereas* the right of everyone to leave any country, including his own, and to return to his country, enshrined in the Declaration, is essential for the protection of the full enjoyment by all of other civil, political, economic, social and cultural rights;

*Whereas* the free and untrammelled exercise of this right, including the right to seek, receive and impart information and ideas through any media and regardless of frontiers, is an essential condition for promoting mutual understanding and co-operation among the peoples of the world so that they may live together in peace as good neighbours;

*Whereas* this right can only be effectively guaranteed when formally acknowledged in national law consistent with the principles of the Charter of the United Nations and the Universal Declaration of Human Rights:

*Whereas* national efforts to protect this right would be a useful contribution to peaceful co-operation among nations aimed at creating an international and social order in which human rights and fundamental freedoms may be fully realized;

*Now therefore*, the following principles are hereby proclaimed as of universal application to ensure recognition and enjoyment of the right of everyone to leave any country, including his own, and to return to his country, and other related rights, and to prevent discrimination in respect of these rights:

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<sup>a</sup> The Sub-Commission on Prevention of Discrimination and Protection of Minorities formulated these draft principles on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country at its fifteenth (1963) session, after examining the draft principles submitted by the Special Rapporteur (see chapter VI of this report). The Sub-Commission transmitted the general principles to the Commission on Human Rights for further consideration and adoption.

## I. THE RIGHT OF A NATIONAL TO LEAVE HIS COUNTRY

(a) Every national of a country is entitled, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage or other status, to leave his country, temporarily or permanently. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

(b) No one shall be forced to renounce his nationality as a condition for the exercise of the right to leave his country; nor shall anyone be denied the right to leave his country because he wishes to renounce his nationality; nor shall he be deprived of his nationality solely as a consequence of his leaving the country.

(c) The conditions prescribed by law or administrative regulations for the exercise of this right shall be the same for all nationals of a country.

(d) The right of every national to leave his country shall in no case be exercised contrary to the purposes and principles of the United Nations. This right shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of national security, public order, health or morals and the general welfare in a democratic society. Any limitation which may be imposed shall not be aimed at destroying the right and shall be consistent with the purposes and principles of the United Nations.

(e) No deposit or other guarantee, financial or otherwise, shall be required to ensure the repatriation or return of any national.

(f) Economic controls or currency restrictions imposed with a view to safeguarding the national economy shall not be abused to deny any national the right to leave his country.

(g) No national shall be prevented from temporarily leaving his country because of pending obligations towards the State or another person, provided he gives reasonable guarantees for satisfying those obligations.

(h) Subject only to the satisfaction of his local obligations, any national who wishes to leave his country permanently is entitled to take with him his property or the proceeds thereof within the limits allowed by national laws governing the disposition of property and the export of currency.

## II. THE RIGHT OF A NATIONAL TO RETURN TO HIS COUNTRY

(a) Everyone is entitled, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage or other status, to return to his country.

(b) No one shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country.

(c) No one shall be arbitrarily deprived of the right to enter his own country.

(d) No one shall be denied the right to return to his own country on the ground that he has no passport or other travel document.

## III. THE RIGHT OF A FOREIGNER (WHICH TERM INCLUDES STATELESS PERSON) TO LEAVE THE COUNTRY

(a) Every foreigner, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth, marriage or other status, has the right to leave the country of his sojourn.



(b) Every foreigner legally within the territory of a country shall have at least the same rights and guarantees, under the same conditions as a national, in the exercise of the right to leave the country.

(c) The exercise of the right of every foreigner to leave the country of his sojourn shall not be subject to any arbitrary restrictions.

(d) No foreigner shall be prevented from seeking the assistance and protection of his own country in order to ensure the enjoyment of his right to leave the country of his sojourn.

(e) Nothing in these principles shall be deemed to derogate from the right of a protected person to leave the territory of a belligerent power under the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in time of War of 12 August 1949.

#### IV. TRAVEL DOCUMENTS

(a) No one shall be arbitrarily denied such travel documents as may be required for him to leave the country or to return to his country, which documents shall not be subject to unreasonable costs or taxes.

(b) The formalities for the issuance of any travel document, including the conditions for its denial, withdrawal or cancellation, shall be provided by law or regulations which shall be made public.

#### V. FAIR HEARING AND ADMINISTRATIVE AND JUDICIAL RECOURSE

(a) Anyone who applies for a travel document, or permission to leave the country or to return to his country, shall be informed of the decision within a reasonable and specified period of time.

(b) Where the document or permission is denied, or is withdrawn or cancelled, he shall be entitled:

(i) To be given the reasons for the decision;

(ii) To a fair hearing by an independent and impartial tribunal or body which shall examine all relevant evidence and decide the case expeditiously.

#### VI. SANCTIONS

No sanction, penalty, punishment or reprisal shall attach to any person for exercising or attempting to exercise the right to leave any country, including his own, or to return to his country, as proclaimed in these principles.

#### VII. APPLICATION OF PRINCIPLES

These principles shall apply to all independent countries as well as to Trust, Non-Self-Governing and other countries under any limitation of sovereignty.

#### VIII. CONDITIONS FAVOURING THE FREE AND INCREASED MOVEMENT OF PERSONS FROM ONE COUNTRY TO ANOTHER

(a) The full and complete enjoyment of the right of everyone to leave any country, including his own, depends in many instances on the general well-being of each society as a whole and on the existence of a vigorous economy within a just social and international order conducive to friendly relations between peoples.

(b) It is necessary, therefore, through national efforts and through dynamic international co-operation, to create conditions permitting free and increased movement of persons from country to country, which is affected, in practice, by international tensions and by the continued existence of conditions of economic and social under-development which make it difficult for this right to be exercised by all, including the common man.