The right to leave one's own country under international law

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"Liberty of movement is an indispensable condition for the free development of a person."[1]

Executive summary

This paper starts from a rights-based premise: freedom of movement is an established human right recognised in a range of international instruments. The right to leave one's own country is one aspect of this general concern with free movement. The paper addresses the status of this right under international law. The right is enshrined in several different international instruments and has attracted considerable attention. This paper explores how the Human Rights Committee, the only United Nations human rights treaty body that has examined the right to leave in significant detail, has interpreted the right in light of state practice. This paper considers whether international law requires, or allows, states to prevent their nationals from leaving their own states by unauthorized or irregular means and whether such prevention could be construed as a violation of the right to leave. The paper also examines whether states can legitimately prosecute migrants when they leave their own states with documents that they know to be fraudulent. The legitimacy of exit visas and regulations related to holders of state secrets is also explored. Finally, this paper presents policy recommendations regarding the right to leave.

I. Introduction

1.1. If "[l]iberty of movement is an indispensable condition for the free development of a person," then what is an "indispensable" human right is increasingly seen by developed states as an "inconvenient" human right.[2] Freedom of movement is the norm in human history,[3] and the right to free movement, as recognised in international human rights instruments, can be usefully connected to notions of individual self-determination. But this individual right confronts a state-based international community where there is sharpened concern about selected types of human migration. The existence of a right to leave does not entail an automatic right to enter other states.[4] The focus in the international community has shifted to the enhanced regulation of migration, with free movement rights being strictly delimited and an intense concern with irregular movement.[5] The right to leave has attracted considerable attention. For example, during

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[1] General Comment No. 27, para. 1 (1999), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument.

[2] *See* Satvinder S. Juss, *Free Movement and the World Order,* 16(3) INT'L J. REFUGEE L. 289, 291 (2004) (stating that "throughout the twentieth century, despite the rising 'claim' to the exercise of free movement rights, the 'right' to free movement in law has if anything, been subject to ever more restrictions in the developed world."). *See also* Catherine Dauvergne, *Sovereignty, Migration and the Rule of Law in Global Times,* 67(4) MOD. L. REV. 588, 612 (2004) (asserting that "entry [to states] itself remains largely beyond human rights protection, and the prosperous nations are doing all they can to make it harder and harder.").

[3] *See* Juss, *supra* note 2, at 292.

[4] *See ibid.* at 294.

[5] *See* Dauvergne, *supra* note 2, at 599 (stating that "[w]hat is certain, is that concern about illegal migration is increasing even more rapidly than the phenomenon itself. Illegal migration feeds on the communication and transportation technologies of globalisation. People smuggling and human trafficking operations which

the life of the Soviet Union the right to leave was a particular concern of the then Conference on Security and Cooperation in Europe. While the political context may have altered, the right remains significant. Developments in Europe come to mind, with the spectre of the regular and irregular movement of migrants of all types specifically frontier workers, seasonal workers, seafarers, workers on offshore installations, itinerant workers, project-tied workers, specified-employment workers, and self-employed workers[6] being tightly controlled: "[t]he prosperous West is under siege, this popular refrain tells us; the hordes are ascending."[7] The result is that pressure is exerted on third countries to control the irregular movement of their own citizens. The focus shifts to how the person reached her destination and whether this was through regular or irregular channels. The danger in the current international debate is that the rights-based approach, which starts from the premise that free movement ought to be a significant human right, is downgraded.[8] Ironically, because of competition for highly skilled migrant workers, developed states are not seeking to end migration.[9] The emphasis is on channelling free movement into its legally permissible forms and thus ensuring that states are able to retain a sufficient measure of control over who is permitted to enter their territory. If a person wishes to leave their state of origin, this must be through legally permissible routes, even if such lawful entry may be very difficult in practice and focused narrowly on highly qualified workers.

1.2. Several different international instruments express the aspect of freedom of movement known as the right to leave.[10] The right applies to everyone and is a right to leave any country including one's own. In this context, one notes, for example:

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are part of illegal migration use these technologies to, for example, present people in China's Fujian province or in a Pakistani refugee camp, with destination options. 'Delivering' them to the borders of the United States, Australia or Fortress Europe.").

[6] *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW), adopted by G.A. Res. 45/158 of 18 Dec. 1990, art. 2, *available at* http://www.ohchr.org/english/law/cmw.htm (defining types of migrant workers).

[7] Dauvergne, *supra* note 2, at 588.

[8] *See generally* Juss, *supra* note 2. This article is a sustained attempt to stress the normality of human migration in opposition to nativist or communitarian perspectives which stress the right of communities to shape themselves.

[9] *See* Dauvergne, *supra* note 2, at 602-03.

[10] These provisions are also reflected in regional human rights instruments. This paper focuses on the international context, as opposed to the regional context, related to the right to leave. For various aspects related to the right to leave, see Vincent Chetail, *Freedom of Movement and Transnational Migrations: A Human Rights Perspective, in* MIGRATION AND INTERNATIONAL LEGAL NORMS 47 (T. Alexander Aleinikoff et al. eds., 2003) (providing an overview of regional instruments that express the right to leave). *See also* Stig Jagerskiold, *The Freedom of Movement, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 166 (Louis Henkin ed., 1981) (discussing freedom of movement in light of international and regional instruments, as well as state constitutions); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 198-200 (1993) (examining freedom of movement generally under international and regional instruments); Rona Aybay, *The Right to Leave and the Right to Return: The International Aspect of Freedom of Movement,* 1 COMP. L. YRBK. 121 (1977) (providing historical background and explaining the international and regional instruments related to freedom of movement).

- Article 12 of the International Covenant on Civil and Political Rights (ICCPR);[11]
- Article 8 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW);[12]
- Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination;[13]
- Article 10 of the Convention on the Rights of the Child;[14]
- Article 13 of the Universal Declaration of Human Rights;[15]
- Article 5 of the General Assembly's Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live.[16]

1.3. Of the international treaty bodies established under the respective treaty regimes, only the Human Rights Committee (HRC) has substantively examined the right to leave in the context of the ICCPR.[17] The Committee on Migrant Workers, the Committee on the Elimination of Racial Discrimination, and the Committee on the Rights of the Child have not examined the right to leave in significant detail. Therefore, this paper focuses on the work of the HRC in assessing this human right.

1.4. This paper explores the current position of the right to leave in international law. After examining the HRC's activity in recent decades as it relates to this right, it considers whether international law requires, or allows, states to prevent their nationals from leaving their own states by unauthorized or irregular means and examines whether such prevention could be construed as a violation of the right to leave. This paper continues by exploring whether migrants can be legitimately prosecuted for leaving their own states with documents that they know to be fraudulent. The legitimacy under

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[11] International Covenant on Civil and Political Rights (ICCPR), adopted and opened for signature, ratification and accession by G.A. Res. 2200A (XXI) of 16 Dec. 1966, entered into force 23 March 1976, in accordance with Article 49, art. 12, *available at* http://www.ohchr.org/english/law/ccpr.htm.
[12] ICPMW, *supra* note 6, at art. 8.
[13] International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by G.A. Res. 2106 (XX) of 21 Dec. 1965, entered into force 4 Jan. 1969, in accordance with Article 19, art. 5, *available at* http://www.ohchr.org/english/law/cerd.htm.
[14] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by G.A. Res. 44/25 of 20 Nov. 1989, entered into force 2 Sept. 1990, in accordance with article 49, art. 10, *available at* http://www.ohchr.org/english/law/crc.htm.
[15] Universal Declaration of Human Rights, adopted and proclaimed by G.A. Res. 217 A (III) of 10 Dec. 1948, art. 13, *available at* http://www.unhchr.ch/udhr/langleng.htm. For a discussion of article 13 of the Universal Declaration of Human Rights in light of international and regional instruments dealing with freedom of movement, see Richard B. Lillich, *Civil Rights, in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 149-52 (Thomas Meron ed., 1984) (1983).
[16] G.A. Res. 40/144, Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live, adopted by G.A. Res. 40/144 of 13 Dec. 1985, art. 5, *available at* http://www.ohchr.org/english/law/individual.htm.
[17] It is interesting to note that the Executive Committee of the Office of the United Nations High Commissioner for Refugees has also reaffirmed the "right of everyone to leave any country, including his or her own, and to return to his or her own country as well as the obligation of States to receive back their own nationals, including the facilitation thereof." U.N.H.C.R., Executive Committee, Conclusion on the Return of Persons Found Not to Be in Need of International Protection, Doc. No. 96 (LIV), a (2003), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=EXCOM&id=3f93b1ca4.

international law of exit visas and regulations related to holders of state secrets, which are both mechanisms of state control of the departure of nationals, is also examined. Finally, this paper presents some policy recommendations.

II. The Human Rights Committee and the right to leave

2.1. Since articles 12(2) and 12(3) of the ICCPR do not exist in a vacuum, one must examine the HRC's activity in recent decades to understand fully the status of the right to leave. In this context, the HRC's General Comments and Communications are important because they form the basis for understanding this right. General Comments contain abstract principles that provide guidance in applying the right in practice. Communications demonstrate how the right has been interpreted when states have allegedly breached their legal obligations under the ICCPR.

A. General comments

2.2. Although the HRC published a General Comment in 1986 on the position of aliens under the ICCPR,[18] it was not until the adoption of General Comment No. 27 in 1999 that it provided detailed principles to guide states in securing the freedom of movement generally.[19] The guidance provided in General Comment No. 27 highlights the negative nature of civil and political rights under the ICCPR, or freedom from state interference. The right to leave exists independently of the length of time that the individual chooses to reside outside her state of current residence and the purpose of the leave.[20] The issuance of a passport to facilitate the crossing of international borders is required as a matter of course to facilitate, in practical terms, the right to leave.[21]

2.3. Article 12 is not one of the non-derogable rights in the ICCPR.[22] Article 12(3) permits states to restrict the right in exceptional circumstances. As a result of the generality often inherent in international treaties, it does not include extensive details on the nature of these limitations. Restrictions on the right to leave must be "provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant."[23] In addition to

[18] General Comment No. 15 (1986), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument.
[19] General Comment No. 27, *supra* note 1.
[20] *See ibid.* at para. 8.
[21] *See ibid.* at para. 9. *See also* Jagerskiold, *supra* note 10, at 179-80 (stating that, "[g]enerally, travel documents such as a passport may be required for individuals to leave a country. If documents are required, a state must make them available at a reasonable cost and within a reasonable time. The refusal to issue travel documents is permissible only in those special circumstances in which the individuals right to travel may be restricted.").
[22] On derogation from the rights in the ICCPR, see ICCPR, *supra* note 11, at art. 4.
[23] General Comment No. 27, *supra* note 1, at para. 11 (referring to para. 18). According to Nowak, "[t]he text of Art. 12(3) ultimately enacted thus provides that restrictions on the freedom of internal movement, residency, travel abroad and emigration are only permissible when they – are *provided by law,* - are

these limitations, General Comment No. 27 requires restrictions on the right to leave to be proportionate, appropriate under the circumstances, and the "least intrusive instrument amongst those which might achieve the desired result."[24] The restrictive measures must not "swallow the rule".[25] "The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality."[26]

B. Communications

I. Article 12(2): The right to leave

2.4. There are a number of Communications which are relevant to this paper. The aim here is to highlight some of the more significant examples. In *Loubna El Ghar v. Socialist People's Libyan Arab Jamahiriya* (*Loubna El Ghar*), the author, a resident of Morocco with Libyan nationality, had applied for a Libyan passport at the Libyan Consulate.[27] There is some dispute as to when the author made an official passport application. She argued, for example, that the appropriate date was 25 February 1999[28] while Libya argued that its Passport and Nationality Department had confirmed that no application had been received as of 1 September 1999.[29] Rather than delve into the exact date that the author's application was received, the HRC concluded that the application, by Libya's own admission, must have been made at least as early as 1 September 1999.[30] Over three years after this accepted date of application, Libyan authorities informed the author, without explanation, that she could only be given a travel document, a *laissez-passer*, to return to Libya.[31] As of the date of the decision, 29 March 2004, the author had yet to have in her possession a Libyan passport.[32]

2.5. The HRC found a violation of article 12(2) because Libya denied the author a passport "without any valid justification and subjected [her] to an unreasonable delay,

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consistent with the other rights recognized in the Covenant, - serve one of the purposes for interference listed in the provision, and – are *necessary* for achieving this purpose." NOWAK, *supra* note 10, at 207.

[24] General Comment No. 27, *supra* note 1, at para. 14.

[25] *See ibid.* at para. 13 (asserting that, "[i]n adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. art. 5, para. 1); the relation between right and restriction, between norm and exception, must not be reversed.").

[26] *Ibid.* at para. 16.

[27] *See* Communication No. 1107/2002, *Loubna El Ghar v. Socialist People's Libyan Arab Jamahiriya* (*Loubna El Ghar*), para. 2.1, *available at* http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/ac824e16154a0621c1256d3d003321f6/ffce2398f82b3ab0c1256f6b00318419?OpenDocument.

[28] *See ibid.* at para. 5.1.

[29] *See ibid.* at para. 4.1.

[30] *See ibid.* at para. 7.2.

[31] *See ibid.*

[32] *See ibid.*

and as a result [. . .] prevented [her] from travelling abroad to continue her studies."[33] Furthermore, there was no issue of the author's negligence.[34] While it is unlikely that the nature of the author's decision to travel abroad factored into the HRC's decision, the HRC's reasoning could be extrapolated more generally to find a violation of the right to leave whenever a state unreasonably and without valid justification delays an official passport application and when the issue of the author's negligence does not arise.

2.6. Although the HRC had in previous Communications noted that *ad hoc* travel documents, issued either by the state concerned or a third state, cannot substitute for passports,[35] *Loubna El Ghar* highlights the importance of passports *per se* as vehicles for ensuring the satisfaction and exercise of the right to leave. The "laissez-passer," according to the HRC, "cannot be considered a satisfactory substitute for a valid Libyan passport that would enable the author to travel abroad."[36] Passports are the *sine qua non* of the right to leave.

2.7. The HRC has been particularly concerned with alleged violations of the right to leave in the context of political dissidents. Many of the relevant Communications in the late-1970s and early-1980s concerned the military government of Uruguay. For example, the author in *Samuel Lichtensztejn v. Uruguay* was a Uruguayan national who had formerly been director and Dean of the Faculty of Economic Sciences and Administration and Rector of the University of the Republic of Uruguay but who at the time of the Communication lived in Mexico.[37] Because of a crackdown by the Uruguayan military on his professional and private life, the author fled to Mexico.[38] As an outspoken political dissident in Mexico, he criticized the lack of academic autonomy and independence in, and the human rights record of, Uruguay.[39] Uruguayan authorities in Mexico refused to renew his passport, giving no explanation for this refusal.[40]

2.8. Although the HRC found that Uruguay had violated article 12 because the author had been "refused the issuance of a passport without any justification, thus preventing him from fully enjoying the rights under article 12 of the Covenant,"[41] it refused to reach a decision on the alleged violation of article 19, which deals with freedom of expression, because the author's allegations "are couched in such general terms that it makes no

[33] *Ibid.* at para. 8.
[34] *See ibid.* at para. 7.3.
[35] *See, e.g.,* Communication No. 77/1980, *Samuel Lichtensztejn v. Uruguay* (*Samuel Lichtensztejn*), para. 8.3, *available at* http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/ac824e16154a0621c1256d3d003321f6/1e456e455499a65341256d42004d36e7?OpenDocument; Communication No. 108/1981, *Carlos Varela Nunez v. Uruguay* (*Carlos Varela Nunez*), para. 9.3, *available at* http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/ac824e16154a0621c1256d3d003321f6/90d95a0bab7e2e9241256d440035e7b2?OpenDocument .
[36] *Loubna El Ghar, supra* note 27, at para. 7.2.
[37] *See Samuel Lichtensztejn, supra* note 35, at para. 1.1.
[38] *See ibid.* at para. 2.1.
[39] *See ibid.* at para. 2.2.
[40] *See ibid.* at para. 8.2.
[41] *Ibid.* at para. 9.

findings in regard to them."[42] The author had alleged that Uruguayan authorities had manipulated the passport renewal procedure to punish him for his politically subversive views.[43]

2.9. Despite the fact that the HRC refused to reach a decision on the alleged violation of article 19, it would be a mistake to conclude that the author's anti-Uruguayan political activity in Mexico played no part in the HRC decision. Rather than isolating *Lichtensztejn,* it is important to contextualize it and remember that, while the HRC reached this decision on 31 March 1983, a number of other Communications based on alleged violations of article 12 by Uruguay against political dissidents were brought to the HRC's attention or decided by it immediately before and after *Lichtensztejn.*

2.10. In *Carlos Varela Nunez v. Uruguay,* for example, the author alleged that Uruguay had revoked his passport without justification or notice as a punitive measure because of his harsh criticism of the Uruguayan government.[44] One can also recall that the HRC decided *Sophie Vidal Martins v. Uruguay* (*Sophie Vidal Martins*) a little over a year prior to *Lichtensztejn.*[45] In *Sophie Vidal Martins,* the author, a Uruguay national living in Mexico at the time of decision, had applied to confirm the validity of her passport and for a new passport over a period of several years in the late-1970s.[46] Uruguay declined the author's applications.[47] She alleged that this refusal stemmed from the fact that she used to work for a Uruguayan newspaper that was banned in Uruguay.[48]

2.11. Thus, even though the HRC refused to reach a decision on the alleged violation of article 19 in *Lichtensztejn,* the perspective of context suggests that the HRC took this into account in finding that Uruguay had violated article 12. When other ICCPR rights have at least arguably been violated by the state concerned, the HRC will, it seems, assess more critically the state's behaviour with regard to the right to leave.[49]

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[42] *Ibid.* at para. 8.4.
[43] *See ibid.* at para. 1.2.
[44] *See Carlos Varela Nunez, supra* note 35, at para. 1.2. A decision was not reached on this Communication until 22 July 1983.
[45] Communication No. 57/1979, *Sophie Vidal Martins v. Uruguay, available at* http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/ac824e16154a0621c1256d3d003321f6/d29bfc1b592d6747c1256d4100302d53?OpenDocument.
[46] *See ibid.* at para. 6.2.
[47] *See ibid.*
[48] *See ibid.* at para. 2.2.
[49] *But cf.* Communication No. 414/1990, *Primo José Essono Mika Miha v. Equatorial Guinea* (*Primo José Essono Mika Miha*), *available at* http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/d4377485d675055541256d64004c9283?OpenDocument. In *Primo José Essono Mika Miha,* the author, a political dissident, alleged violations of articles 3; 6(3); 7; 9(1)-(2), (4)-(5); 10(1); 12(1)-(2); 14(1), (3)(b), (5); 16; 17(1)-(2); 19(1)-(2); 21; and 22(1)-(3). *See ibid.* at para. 1. The HRC did not find a violation of article 12 on the facts. *See ibid.* at para. 6.6.

Ii. Article 12(3): Restrictions on the right to leave

2.12. Although article 12(2) establishes a right to leave, article 12(3) imposes restrictions on the right to leave.[50] The HRC has explored the nature of these restrictions in a number of Communications. In *Lauri Peltonen v. Finland,* the author alleged that Finland had violated his right to leave because it refused to issue him a passport because of his failure to complete his compulsory military service.[51] According to Finnish law, "delivery of a passport 'may be denied' to persons aged 17 to 30 if they are unable to demonstrate that the performance of military service is not an obstacle to the issuance of a passport."[52] The author was in his early twenties when he applied for his passport[53] and argued that Finland could not use its Passport Act as "a legal basis for a de facto punishment lasting for more than 10 years."[54] Essentially, then, the author asserted that the terms of the Passport Act and their practical effect in denying him a passport amounted to a violation by Finland of its international legal obligations under article 12.

2.13. The HRC examined the *travaux préparatoires* to the restrictions on the right to leave in article 12(3) and concluded that they showed the drafters' intent that the right to leave could not be used as a shield to avoid one's national service obligations.[55] Pursuant to the requirements of article 12(3), states could "impose reasonable restrictions on the rights of individuals who have not yet performed such [mandatory national] service to leave the country until service is completed."[56] Thus, state national service obligation laws that "reasonably restrict" the right to leave will not be held to violate article 12.[57] At the same time, national service obligation laws that undermine the essence of the right to leave, or exceptions that violate the rule, will violate article 12.

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[50] For a helpful overview of article 12(3), see NOWAK, *supra* note 10, at 206-17 (explaining the historical background, requirement of a legal basis, compatibility with the other rights in the ICCPR, necessity, and permitted grounds for interference).

[51] *See* Communication No. 492/1992, *Lauri Peltonen v. Finland,* paras. 1-2, *available at* http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/ac36a9d584f4356241256d64004263dd?OpenDocument.

[52] *Ibid.* at para. 2.1.

[53] *See ibid.* at paras. 1-2.

[54] *Ibid.* at para. 7.3.

[55] *See ibid.* at para. 8.3 (referring to E/CN.4/SR.106, p. 4; E/CN.4/SR.150, para. 41; E/CN.4/SR.151, para. 4 and E/CN.4/SR.315, p. 12).

[56] *Ibid.*

[57] *See* Jagerskiold, *supra* note 10, at 178 (stating that, "if there is a mandatory national service requirement, individuals who have not yet served may be prohibited from leaving until service is completed."). *But see* NOWAK, *supra* note 10, at 212 (asserting that "[o]nly in special cases may persons who have not fulfilled their military service be prohibited from leaving the country."); *cf.* Concluding Observations, Russian Federation, ICCPR, A/50/40 vol. I (1995) 65, para. 381, *available at* http://www.bayefsky.com/themes/leave_concluding-observations.php (stating that "[i]t is further regretted that all individuals who have not yet performed their national service are excluded in principle from enjoying their right to leave the country.").

2.14. In *Ismet Celepli v. Sweden,* the HRC examined restrictions on the right to leave within a different context.[58] The author, a Kurd from Turkey, had applied for political refugee status in Sweden, but his application was denied.[59] Although the Swedish authorities initially allowed him to stay, the author was ordered expelled because of his suspected terrorist activities.[60] This expulsion order was not carried out, however, because of the *non-refoulement* principle.[61] The Swedish authorities opted instead to control strictly the author's movements and place of residence.[62] Specifically, "the author was confined to his home municipality (Västerhaninge, a town of 10,000 inhabitants 25 kilometres south of Stockholm) and had to report to the police three times a week; he could not leave or change his town of residence nor change employment without prior permission from the police."[63] Over subsequent years, the confinement and reporting orders were lessened, until they, along with the expulsion order, were eventually lifted.[64] The author denied all suspected terrorist activities.[65]

2.15. Sweden argued that although a right to leave exists, the restrictions on the right were justified as they were "provided by law and necessary for the protection of national security and public order."[66] The HRC agreed that the national security restrictions placed on the author's freedom of movement under article 12 by Sweden did not violate the ICCPR.[67] The HRC did not expressly engage in a balancing test between the importance of the author's freedom of movement and Sweden's national security concerns. This perhaps indicates that article 12(3) must be interpreted in a way that defers to states' concerns if at least arguably justified and sufficient.

2.16. Similar restrictions on freedom of movement within the context of suspected terrorist activities were involved in *Mrs Samira Karker, on Behalf of Her Husband, Mr. Salah Karker v. France.*[68] Although France granted political refugee status to Salah Karker, the French Minister of the Interior issued an expulsion order against Salah Karker based on Salah Karker's alleged support of terrorist activities.[69] According to the Administrative Tribunal of Paris, to which Salah Karker appealed, Salah Karker "maintained close links with Islamic organisations which use violent methods, and that in the light of the situation in France the Minister could have concluded legally that Mr.

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[58] Communication No. 456/1991, *Ismet Celepli v. Sweden, available at* http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/8e0ba5a929249a7041256d640047085e?OpenDocument.
[59] *See ibid.* at para. 2.1.
[60] *See ibid.*
[61] *See ibid.*
[62] *See ibid.* at paras. 2.1-2.2.
[63] *Ibid.* at para. 2.2.
[64] *See ibid.* at para. 2.3.
[65] *See ibid.* at para. 3.1.
[66] *Ibid.* at para. 4.7.
[67] *See ibid.* at paras. 9.2, 10.
[68] Communication No. 833/1998, *Mrs Samira Karker, on Behalf of Her Husband, Mr. Salah Karker v. France, available at* http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/ac824e16154a0621c1256d3d003321f6/4b6169efee0c670341256d5900449f9b?OpenDocument.
[69] *See ibid.* at para. 2.1.

Karker's expulsion was imperative for reasons of public security."[70] French authorities did not enforce the expulsion order because of Salah Karker's political refugee status, although, crucial to this Communication, they did force him to take up residence in the French department of Finistère.[71]

2.17. The HRC addressed whether the restrictions imposed by France on Salah Karker's freedom of movement were consistent with the ICCPR. France argued that its restrictions fulfilled the requirements of article 12(3) because they were necessary to protect public order and were provided by law.[72] In finding that the French restrictions did not violate article 12(3), the HRC noted that France had presented evidence of Salah Karker's involvement in terrorist activities to its domestic courts, that domestic courts had reviewed his case, and that the compulsory residence order "allowed him to reside in a comparatively wide area."[73]

2.18. Decisions of the HRC that uphold as valid restrictions on the right to leave under article 12(3) side with states at the expense of individuals. However, what this analysis demonstrates is that the right to leave is a significant one in international human rights law and that departures from it must be justified within the terms of article 12(3). Restrictions on the right must also be consistent with other rights in the ICCPR.

III. The prevention of unauthorized or irregular migration

3.1. The decisions of the HRC bring some clarity to the meaning of the right to leave. Based on the approach of the HRC thus far, one can consider whether international law requires, or allows, states to prevent their nationals from leaving their own states by unauthorized or irregular means and whether such prevention could be construed as a violation of the right to leave. The Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (Protocol Against the Smuggling of Migrants)[74] is the most relevant international instrument in this context. Human smuggling and trafficking lead to severe human rights violations. As United Nations Secretary General Kofi Annan has noted:

> The gravest violations come at the hands of smugglers and traffickers. Smuggling occurs with the complicity of migrants, usually because they can see no legal route to migrate. Trafficking is a modern form of slavery in which migrants are coerced and exploited. All too often, people who initially collaborate with smugglers later find themselves in the hands of traffickers.[75]

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[70] *Ibid.*
[71] *See ibid.*
[72] *See ibid.* at para. 4.5.
[73] *Ibid.* at para. 9.2.
[74] Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime (Protocol Against the Smuggling of Migrants), G.A. Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force 28 Jan. 2004, *available at* http://www.ohchr.org/english/law/organizedcrime.htm.
[75] U.N. Secretary General, Kofi Annan, Emma Lazarus Lecture, Columbia University, 21 Nov. 2003.

3.2. The Protocol Against the Smuggling of Migrants aims to "prevent and combat the smuggling of migrants,"[76] which article 3(a) defines as the "procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."[77] Article 6 requires states to take necessary measures within their domestic legal systems to criminalize the behaviour of parties involved in the smuggling of migrants and sets out aggravating circumstances for crimes under the Protocol Against the Smuggling of Migrants.[78]

3.3. Importantly, article 5 expressly excludes from criminal liability migrants "for the fact of having been the object of conduct set forth in article 6 of this Protocol."[79] The Protocol Against the Smuggling of Migrants notes throughout the centrality of upholding the rights of migrants: the prevention and combating of the smuggling of migrants must be done "while protecting the rights of smuggled migrants";[80] the Protocol Against the Smuggling of Migrants applies "to the protection of the rights of persons who have been the object of such offences";[81] and when taking measures against migrant smuggling by sea, states must "[e]nsure the safety and humane treatment of the persons on board."[82] Other articles also stress the importance of upholding the rights of migrants under the treaty regime.[83] Finally, the Protocol Against the Smuggling of Migrants also contains an important saving clause at article 19 to maintain the "other rights, obligations and responsibilities of States and individuals under international law."[84]

3.4. The Protocol Against the Smuggling of Migrants, in addition to noting throughout its articles the centrality of upholding the rights of migrants, imposes significant legal obligations on states with regard to the smuggling of migrants. It stresses that states must

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[76] Protocol Against the Smuggling of Migrants, *supra* note 74, at art. 2. The smuggling of migrants should be contrasted with the trafficking in persons, which the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Palermo Protocol) defines in article 3(a). *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force 9 Sept. 2003, *available at* http://www1.umn.edu/humanrts/instree/trafficking.html. According to the *travaux préparatoires* to the Palermo Protocol, the "victims of trafficking in persons may enter a State legally only to face subsequent exploitation, whereas in cases of smuggling of migrants, illegal means of entry are more generally used." GAOR, *Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on the Work of its First to Eleventh Sessions,* 55th Sess., Addendum, *Interpretative Notes for the Official Records* (Travaux Préparatoires) *of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (Travaux Préparatoires), U.N. Doc. A/55/383/Add.1, at 14, para. 79 (2000), *available at* http://www.undoc/org/pdf/crime/final_instruments/383a1e.pdf.

[77] Protocol Against the Smuggling of Migrants, *supra* note 74, at art. 3(a).

[78] *See ibid.* at art. 6.

[79] *Ibid.* at art. 5.

[80] *Ibid.* at art. 2.

[81] *Ibid.* at art. 4.

[82] *Ibid.* at art. 9(1)(a).

[83] *See, e.g., ibid.* at arts. 14(1)-(2) and 16.

[84] *Ibid.* at art. 19(1).

cooperate "to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea";[85] empowers states to board and search vessels they reasonably believe to be involved in the smuggling of migrants;[86] obliges states parties to exchange with other states parties various types of information related to the smuggling of migrants;[87] and imposes demanding obligations on states with regard to border measures, the control and security of, as well as the validity and legitimacy of, travel or identity documents.[88] As regards training and technical cooperation, states must provide training aimed at, for example, "(a) Improving the security and quality of travel documents; (b) Recognizing and detecting fraudulent travel or identity documents; (c) Gathering criminal intelligence [. . .] ; [and] (d) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit."[89]

3.5. Given the Protocol's imposition of significant legal obligations on states with regard to the smuggling of migrants, international law seems to allow, if not require, states to prevent their nationals from leaving their own states by unauthorized or irregular means. It is true that article 5 expressly excludes from criminal liability migrants "for the fact of having been the object of conduct set forth in article 6 of this Protocol."[90] This does not mean, however, that international law empowers migrants to leave their own states by any means of their choosing.

3.6. Even after the Protocol Against the Smuggling of Migrants, the right to leave one's state must be seen within the context of article 12 of the ICCPR, that is, the right to leave one's state is a limited right, not an absolute right. The right to leave is limited by article 12(3) of the ICCPR. Essentially, the Protocol Against the Smuggling of Migrants establishes a treaty framework by which states can control the departure of migrants. It is a framework which refers also to the rights of the smuggled person. It is important to stress that the right to leave one's own country is a fundamental human right, and this remains the case notwithstanding a migrant's attempt to be smuggled. Restrictions on the movement of the smuggled person will have to be justified within the terms of article 12(3). The state must demonstrate that these restrictions meet the tests of 'legality' and necessity, are consistent with the other provisions of the Covenant, and come under one of the listed grounds. A state may be in a position to argue that any direct or indirect restrictions are for the purpose of tackling the pressing problem of smuggling and trafficking. However, any restrictions must not be so general and severe as to reverse the relationship between norm and exception.

3.7. The spectre of intensified state control over the movement of persons, of course, raises human rights questions. The treatment of these migrants in other states remains a major concern. Non-governmental organizations have highlighted many of these issues.

[85] *Ibid.* at art. 7.
[86] *See ibid.* at art. 8.
[87] *See ibid.* at art. 10.
[88] *See ibid.* at arts. 11-13.
[89] *Ibid.* at arts. 14(2)(a)-(d).
[90] *Ibid.* at art. 5.

On 18 December 2004, International Migrants' Day, Amnesty International, for example, asserted that many unauthorized or irregular migrants are "treated as less than human. States threaten to arbitrarily expel them from their territory [. . .] Vulnerable groups of 'irregular' migrants, such as children, are too often detained, beaten and subjected to sexual abuse, in contravention of the most fundamental norms of international human rights law."[91] There is a danger in some of the measures adopted that the limitations to the right to free movement effectively "swallow the rule" and this is not permissible under the ICCPR.

IV. The question of legitimate prosecution of migrants who leave their own states with documents that they know to be fraudulent

4.1. A question related to whether international law requires or allows states to prevent their nationals from leaving their own states by unauthorized or irregular means is whether states can legitimately prosecute migrants when they leave their own states with documents that they know to be fraudulent.

4.2. The Protocol Against the Smuggling of Migrants is the relevant international instrument, although it must be viewed within the context of existing international human rights standards. As stated above, although article 6 requires states to take necessary measures within their domestic legal systems to criminalize the behaviour of parties involved in the smuggling of migrants and sets out aggravating circumstances for crimes under the Protocol Against the Smuggling of Migrants,[92] article 5 expressly excludes from criminal liability migrants "for the fact of having been the object of conduct set forth in article 6 of this Protocol."[93] Thus, states cannot legitimately prosecute migrants when they leave their own states with documents that they know to be fraudulent assuming that the facts and circumstances would position the migrants to be otherwise prosecuted.

4.3. According to the *travaux préparatoires*, furthermore, article 6(1)(b) "was adopted on the understanding that subparagraph (ii) would only apply when the possession in question was for the purpose of smuggling migrants as set forth in subparagraph (a). Thus, a migrant who possessed a fraudulent document to enable his or her own smuggling would not be included."[94] That states cannot legitimately prosecute migrants when they leave their own states with documents that they know to be fraudulent is a position supported by the *travaux préparatoires.*

[91] Amnesty International, *International Migrants' Day: Migrants Are Human Beings,* 18 Dec. 2004, *available at* http://web.amnesty.org/library/print/ENGPOL300392004.
[92] *See* Protocol Against the Smuggling of Migrants, *supra* note 74, at art. 6.
[93] *Ibid.* at art. 5.
[94] Travaux Préparatoires, *supra* note 76, at 17, para. 93.

V. The legitimacy of exit visas and regulations related to holders of state secrets

5.1. The HRC has spoken to the legitimacy under international law of exit visas and regulations related to holders of state secrets in Concluding Observations. In Concluding Observations related to Belarus and Ukraine, the HRC has categorically stated that exit visas violate article 12 of the ICCPR.[95] It has also said that requiring foreign workers to secure exit visas contravenes the same article.[96] The HRC has criticized the Syrian Arab Republic's requirement of exit visas for certain categories of its nationals, recommending that the state "eliminate the exit visa requirement as a general rule and require it only in individual cases that can be justified in relation to the Covenant."[97] Similar sentiments have been expressed in relation to the Democratic People's Republic of Korea.[98] Given the HRC's earlier categorical statements that exit visas violate article 12 of the ICCPR, it is likely that the requirement of exit visas "in individual cases that can be justified in relation to the Covenant" will be interpreted so strictly by the HRC as to make the exit visa requirement incompatible with the ICCPR on virtually any facts and circumstances that could present themselves.

5.2. The HRC has also used Concluding Observations to examine the legitimacy under international law of regulations related to holders of state secrets. Within the Hungarian context of regulations related to holders of state secrets, the HRC has expressed concerns, as it has in the Ukrainian, Russian, and Lithuanian contexts.[99] The HRC has noted in General Comment No. 27 that restrictions on the right to leave under article 12(3) of the ICCPR "must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality"[100] and, in this context, has stated that "[t]hese conditions

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[95] *See* Concluding Observations, Belarus, ICCPR, A/47/40 (1992) 124, para. 561, *available at* http://www.bayefsky.com/themes/leave_concluding-observations.php (stating that "[e]xisting provisions limiting or restricting freedom of movement, including the requirement for exit visas and the clause relating to holders of State secrets, should be eliminated from pending legislation to bring it fully into conformity with article 12, paragraph 3, of the Covenant."); Concluding Observations, Ukraine, ICCPR, A/50/40 vol. I (1995) 57, para. 320, *available at* http://www.bayefsky.com/themes/leave_concluding-observations.php (asserting that "[t]he requirement of exit visas and the persistence of the internal passport are unacceptable and incompatible with article 12 of the Covenant.").

[96] *See* Concluding Observations, Gabon, ICCPR, A/56/40 vol. I (2001) 41, para. 75(16), *available at* http://www.bayefsky.com/themes/leave_concluding-observations.php.

[97] Concluding Observations, Syrian Arab Republic, ICCPR, A/56/40 vol. I (2001) 70, para. 81(21), *available at* http://www.bayefsky.com/themes/leave_concluding-observations.php.

[98] *See* Concluding Observations, Democratic People's Republic of Korea, ICCPR, A/56/40 vol. I (2001) 98, para. 86(20), *available at* http://www.bayefsky.com/themes/leave_concluding-observations.php (noting that "[t]he requirement under the Immigration Law of administrative permission to travel abroad, and the requirement for foreigners to obtain exit visas to leave the country are incompatible with the provisions of article 12, paragraph 2 of the Covenant. The State party should eliminate the requirement of administrative permission and exit visa as a general rule and require them only in individual cases that can be justified in the light of the Covenant.").

[99] *See* Concluding Observations, Hungary, ICCPR, A/48/40 vol. I (1993) 128, para. 662, *available at* http://www.bayefsky.com/themes/leave_concluding-observations.php; Concluding Observations, Ukraine, *supra* note 95; Concluding Observations, Russian Federation, *supra* note 57; Concluding Observations, Lithuania, ICCPR, A/53/40 vol. I (1998) 30, para. 172, *available at* http://www.bayefsky.com/themes/leave_concluding-observations.php.

[100] General Comment No. 27, *supra* note 1, at para. 16.

would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of 'State secrets.'"[101]

VI. Policy recommendations

6.1. In light of the above, it is possible to make a number of policy recommendations regarding the right to leave. The meaning of the right to leave can be usefully examined within the context of article 12 of the ICCPR. Because it is limited by article 12(3), the right to leave is not an absolute right. According to General Comment No. 27, "the relation between right and restriction, between norm and exception, must not be reversed."[102] Put differently, exceptions to the rule, or restrictions on the right to leave, must not swallow the rule. Restrictions must be necessary, provided by law, consistent with the other rights in the Covenant and justified fully within the terms of article 12(3). Blanket restrictions, requirements which do not meet the test of "legality", or restrictions which are inconsistent with other rights in the Covenant (such as the anti-discrimination guarantee in article 26) are not permissible under article 12.

6.2. Based on state practice, the HRC has presented an inclusive list of practices and rules that frustrate the right to leave:

> lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the State of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; refusal to issue a passport because the applicant is said to harm the good name of the country.[103]

6.3. In light of the importance of the right to leave, it is unfortunate that so few states have ratified the ICPMW, and the failure to ratify by major destination states is particularly disconcerting.[104] Those states that have not done so should take affirmative

[101] *Ibid. See* Jagerskiold, *supra* note 10, at 178 (stating that "[t]here must be a clear threat to a vital state interest in order to justify restricting this right. States have asserted the right under this article to prohibit individuals who have had access to classified information from leaving the country. It is questionable whether the security limitation contemplates this type of prohibition. For a state to impose such a restriction permanently would severely curtail this fundamental right.").
[102] General Comment No. 27, *supra* note 1, at para. 13.
[103] *Ibid.* at para. 17.
[104] *See* Susan Martin, *The Legal and Normative Framework of International Migration,* 14.

steps as a matter of urgency to ratify the ICPMW.[105] As Prasad Kariyawasam, Chairperson of the Committee on Migrant Workers, urged in late-December 2004, this requires action from both developed states and developing states.[106]

6.4. States must streamline the bureaucratic and administrative burdens faced by those who wish to avail themselves of the right to leave. Furthermore, those states that have not already done so should repeal laws that impose exit visas and regulations related to holders of state secrets.

6.5. Arguing for a "well-regulated and more comprehensive legal framework for managing international migration,"[107] Martin proposes an international regime that addresses a number of issues, such as the prevention and prosecution of human trafficking and human smuggling operations, greater access for migrants seeking work abroad, attention to refugee issues, and greater protection of migrant rights and the rights of migrants' families.[108] This last issue ties in with the above recommendation that those states that have not done so should take affirmative steps as a matter of urgency to ratify the ICPMW because the ICPMW does much to provide greater protection for the rights of migrants and their families.

6.6. There is an obvious disjuncture with respect to the right to leave in the fact that there is no corresponding general right to enter another state, which presumably would be a state of the migrant's choosing. While some migrants might be able to obtain legal entry to another state, those migrants that are, or would be, denied legal entry, may, as frequently occurs, attempt illegal entry. Juss argues in favour of "some form of a legalisation of free movement rights in the interests of world order in the twenty-first century, if only in the context of a right to work and then settle."[109] Such legalisation would, according to Juss, assist developed and developing states, benefit voluntary migrants and involuntary refugees, and end waste.[110] However, in an increasingly interconnected world, in which states generally support the free movement of goods, services, and capital, there is an unfortunate lack of consensus on the part of states to liberalize their policies on the free movement of migrants.[111] The right to leave still must confront the fact that there is no general right to enter other states for most of the world's migrants. An individual may be able to demonstrate that her right to leave has been

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[105] *See* Stefanie Grant, *International Migration and Human Rights,* 30 (2005) (asserting a "pressing need for more states to ratify all human rights treaties, including the CMW, and the ILO labour standards, so that migrants enjoy the same near universal level of protection as do children, through the CRC.").

[106] *See* U.N., *Press Release: No Excuses for Lack of Realization of Rights of Migrants, Chair of Expert Panel Says* (2004), *available at* http://www.unhchr.ch/huricane/huricane.nsf/view01/1E6BE5FACD941B68C1256F6D00516A39?opendocument.

[107] Martin, *supra* note 104, at 51.

[108] *See ibid.*

[109] Juss, *supra* note 2, at 292.

[110] *See ibid.* According to Juss, the current dispensation for developed states is exceedingly costly and increasingly fails at restricting migrants. *See ibid.* at 309.

[111] *See* Martin, *supra* note 104, at 48. *See also* Grant, *supra* note 105, at 1 (noting that "[t]his has produced a discordance between the number of individuals who migrate and the legal opportunities for them to do so.").

violated in international law. However, this will not guarantee her a right to enter another state. The temptation is therefore to dismiss the right to leave as of theoretical value only. In this paper we suggest that this would be a mistake: the right to leave one's own country remains significant in international human rights law.

VII. Conclusion

7.1. This paper has addressed a number of issues related to the right to leave. First, in the context of articles 12(2)-(3) of the ICCPR, the HRC has substantively examined the right to leave, as well as restrictions on the right to leave, for example, in the context of compulsory military service and suspected terrorist activities. Second, this paper has concluded that the Protocol Against the Smuggling of Migrants, while seeming to allow, if not require, states to prevent their nationals from leaving their own states by unauthorized or irregular means, precludes states from legitimately prosecuting migrants when they leave their own states with documents that they know to be fraudulent. Third, the HRC has reached clear conclusions regarding the legitimacy under international law of exit visas and regulations related to holders of state secrets. Finally, this paper has presented some policy recommendations. The implementation of these policy recommendations, which lie at the interface between law and politics, are necessary to make real the rights and obligations under international law.

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Annex

Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 Nov. 1989, entered into force 2 Sept. 1990, in accordance with article 49

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the 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 the present Convention.

International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by G.A. Res. 2106 (XX), of 21 Dec. 1965, entered into force 4 Jan. 1969, in accordance with Article 19

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
(a) The right to equal treatment before the tribunals and all other organs administering justice;
(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;
(ii) The right to leave any country, including one's own, and to return to one's country;
(iii) The right to nationality;
(iv) The right to marriage and choice of spouse;
(v) The right to own property alone as well as in association with others;
(vi) The right to inherit;
(vii) The right to freedom of thought, conscience and religion;
(viii) The right to freedom of opinion and expression;
(ix) The right to freedom of peaceful assembly and association;
(e) Economic, social and cultural rights, in particular:
(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
(ii) The right to form and join trade unions;
(iii) The right to housing;
(iv) The right to public health, medical care, social security and social services;
(v) The right to education and training;
(vi) The right to equal participation in cultural activities;
(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by G.A. Res. 45/158 of 18 Dec. 1990

Part III: Human Rights of All Migrant Workers and Members of their Families

Article 8

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that 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 the present part of the Convention.

2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by G.A. Res. 2200A (XXI) of 16 Dec. 1966, entered into force 23 March 1976, in accordance with Article 49

Article 12

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 the present Covenant.

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

Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, G.A. Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force 28 Jan. 2004

Preamble

The States Parties to this Protocol ,

Declaring that effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels,

Recalling General Assembly resolution 54/212 of 22 December 1999, in which the Assembly urged Member States and the United Nations system to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty, and to maximize the benefits of international migration to those concerned, and encouraged, where relevant, interregional, regional and subregional mechanisms to continue to address the question of migration and development,

Convinced of the need to provide migrants with humane treatment and full protection of their rights,

Taking into account the fact that, despite work undertaken in other international forums, there is no universal instrument that addresses all aspects of smuggling of migrants and other related issues,

Concerned at the significant increase in the activities of organized criminal groups in smuggling of migrants and other related criminal activities set forth in this Protocol, which bring great harm to the States concerned,

Also concerned that the smuggling of migrants can endanger the lives or security of the migrants involved,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for

the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing illegal trafficking in and transporting of migrants, including by sea,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument against the smuggling of migrants by land, sea and air will be useful in preventing and combating that crime,

Have agreed as follows :

I. General provisions

Article 1

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 6 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

Statement of purpose

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

Article 3

Use of terms

For the purposes of this Protocol:

(a) “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

(b) “Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

(c) “Fraudulent travel or identity document” shall mean any travel or identity document:

(i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or

(ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

(iii) That is being used by a person other than the rightful holder;

(d) “Vessel” shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

Article 5

Criminal liability of migrants

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

Article 6

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document;

(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 (a), (b) (i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (b) (ii) of this article;

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

(a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

(b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

II. Smuggling of migrants by sea

Article 7

Cooperation

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

Article 8

Measures against the smuggling of migrants by sea

1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

(a) To board the vessel;

(b) To search the vessel; and

(c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

5. A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel

without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

Article 9

Safeguard clauses

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

(a) Ensure the safety and humane treatment of the persons on board;

(b) Take due account of the need not to endanger the security of the vessel or its cargo;

(c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;

(d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

(a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or

(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

III. Prevention, cooperation and other measures

Article 10

Information

1. Without prejudice to articles 27 and 28 of the Convention, States Parties, in particular those with common borders or located on routes along which migrants are smuggled, shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:

(a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organized criminal group engaged in conduct set forth in article 6 of this Protocol;

(b) The identity and methods of organizations or organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol;

(c) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;

(d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents used in conduct set forth in article 6 of this Protocol and ways of detecting them;

(e) Legislative experiences and practices and measures to prevent and combat the conduct set forth in article 6 of this Protocol; and

(f) Scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the conduct set forth in article 6 of this Protocol and to prosecute those involved.

2. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11

Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12

Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13

Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for purposes of conduct set forth in article 6 of this Protocol.

Article 14

Training and technical cooperation

1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the

humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol.

2. States Parties shall cooperate with each other and with competent international organizations, non-governmental organizations, other relevant organizations and other elements of civil society as appropriate to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the conduct set forth in article 6 of this Protocol and to protect the rights of migrants who have been the object of such conduct. Such training shall include:

(a) Improving the security and quality of travel documents;

(b) Recognizing and detecting fraudulent travel or identity documents;

(c) Gathering criminal intelligence, relating in particular to the identification of organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol, the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of conduct set forth in article 6 and the means of concealment used in the smuggling of migrants;

(d) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and

(e) The humane treatment of migrants and the protection of their rights as set forth in this Protocol.

3. States Parties with relevant expertise shall consider providing technical assistance to States that are frequently countries of origin or transit for persons who have been the object of conduct set forth in article 6 of this Protocol. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the conduct set forth in article 6.

Article 15

Other prevention measures

1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.

2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

Article 16

Protection and assistance measures

1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.

5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

Article 17

Agreements and arrangements

States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at:

(a) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or

(b) Enhancing the provisions of this Protocol among themselves.

Article 18

Return of smuggled migrants

1. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.

2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.

3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.

4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.

6. States Parties may cooperate with relevant international organizations in the implementation of this article.

7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.

IV. Final provisions

Article 19

Saving clause

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 20

Settlement of disputes

l. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 21

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 22

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 23

Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of

considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 24

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 25

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

In witness whereof, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force 9 Sept. 2003

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

I. General provisions

Article 1

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

Statement of purpose

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) To promote cooperation among States Parties in order to meet those objectives.

Article 3

Use of terms

For the purposes of this Protocol:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

Article 5

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

II. Protection of victims of trafficking in persons

Article 6

Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) Medical, psychological and material assistance; and

(d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7

Status of victims of trafficking in persons
in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8

Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III. Prevention, cooperation and other measures

Article 9

Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Article 10

Information exchange and training

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11

Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12

Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13

Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

IV. Final provisions

Article 14

Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 15

Settlement of disputes

l. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 16

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 17

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 18

Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 19

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 20

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

Universal Declaration of Human Rights

Adopted and proclaimed by G.A. Res. 217 A (III) of 10 Dec. 1948

Article 13

(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.

Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live, adopted by G.A. Res. 40/144 of 13 Dec. 1985

Article 5
1. Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present, in particular the following rights:
(a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law;
(b) The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence;
(c) The right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and , when prescribed by law, other proceedings;
(d) The right to choose a spouse, to marry, to found a family;
(e) The right to freedom of thought, opinion, conscience and religion; the right to manifest their religion or beliefs, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others;
(f) The right to retain their own language, culture and tradition;

(g) The right to transfer abroad earnings, savings or other personal monetary assets, subject to domestic currency regulations.

2. Subject to such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others, and which are consistent with the other rights recognized in the relevant international instruments and those set forth in this Declaration, aliens shall enjoy the following rights:

(a) The right to leave the country;

(b) The right to freedom of expression;

(c) The right to peaceful assembly;

(d) The right to own property alone as well as in association with others, subject to domestic law.

3. Subject to the provisions referred to in paragraph 2, aliens lawfully in the territory of a State shall enjoy the right to liberty of movement and freedom to choose their residence within the borders of the State.

4. Subject to national legislation and due authorization, the spouse and minor or dependent children of an alien lawfully residing in the territory of a State shall be admitted to accompany, join and stay with the alien.