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Who May Leave: A Review of Soviet Practice Restricting Emigration on Grounds of Knowledge of "State Secrets" in Comparison with Standards of International Law and the Policies of Other States

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WHO MAY LEAVE:
A REVIEW OF SOVIET PRACTICE
RESTRICTING EMIGRATION ON GROUNDS
OF KNOWLEDGE OF "STATE SECRETS" IN
COMPARISON WITH STANDARDS OF
INTERNATIONAL LAW AND THE POLICIES
OF OTHER STATES

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This article analyzes the law and practices of the Union of Soviet Socialist Republics with respect to the emigration of its citizens generally and, in particular, those persons deemed to possess "state secrets." It is the claim of the Soviet Union that its policy is in substantial accord with standards of international law and the practices of other major nations. We have found otherwise.

1. This article is based almost entirely upon a report prepared at the request of the New York Lawyers for the Public Interest, an organization co-ordinating the public service activities of the New York bar, for the Lawyers Committee to the National Conference on Soviet Jewry and the National Conference. The report was submitted to Secretary of State George P. Shultz in October 1987.
I. THE RIGHT TO EMIGRATE UNDER INTERNATIONAL LAW

A. Recognition of the Right to Emigrate

1. Background.—International law, in its narrowest sense, may be limited to the treaty obligations of sovereign states. International law also expresses, however, the consensus of what civilized nations regard as common ground. While municipal legal systems may vary, there exists a core of rules upon which all civilized nations agree.

The right to emigrate is a product of such a consensus, tracing its origins to the municipal laws and practices of individual states. Historically, as the right developed, spread and was generally accepted, it became an accepted norm of international law.

An early expression of the right to leave one’s birthplace appeared in the Crito, where Plato has Socrates proudly explain:

[W]e further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him.³

It was not, however, until the beginning of the modern era that the right to emigrate gained increasingly universal acceptance.⁴ The French Constitution of 1791, for example, declared freedom of movement as part of man’s natural rights (liberté d’aller et de venir).⁵

By the mid- to late-nineteenth century there was a growing consensus among the nations of the world recognizing the right to emi-

2. According to the Statute of the International Court of Justice the sources of international law include:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations; [and]
   d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations . . . .


5. See Jagerskiold, supra note 4, at 169.
and international legal scholars stated the right to emigrate as "an absolute right based on natural law and recognized by the law of nations." For example, the Swiss publicist Bluntschli observed:

As a free man is not bound to the soil a free citizen is not bound to the territory of his country.

... [T]he previous legal doctrine favored the theory, that no citizen may arbitrarily renounce his citizenship, [i.e.] leave his subordinated association with the state. ... Some state laws still require a leave from their nationality. But slowly the opinion is [emerging] that it is unworthy of a state to retain its citizens against their will as if they were its subjects, and that it is much more beneficial to today's civilization and to the exchange between nations to recognize the full freedom to emigrate.8

Significantly, as recognized by a Russian international lawyer, one of the few nations out-of-step with the emerging international consensus was tsarist Russia.

With the exception of Russia, all civilized modern states are imbued with the firm belief that the right to emigrate is one of the inalienable rights belonging to each citizen, and that each person is free to change nationality.

This modification took place above all due to the profound transformation of the old political order in this century. Freedom to emigrate is the direct consequence of the new social and political order which has at its foundation respect for human beings and the interests that concern them.9

Codification of the right to leave one's country under international law did not begin to occur until after World War II. Since then, a number of international agreements recognizing the right to emigrate as a fundamental human right have been signed.

2. The Universal Declaration of Human Rights.—On December 10, 1948, the General Assembly adopted the Universal Declaration of Human Rights.10 Among the individual rights recognized was

6. See id. at 169 & n.16 (citing examples of states recognizing the right to emigrate in their national constitutions).
7. Id. at 169.
8. O.C. BLUNTSCHLI, DAS MODERNE VOLKERRECHT DER CIVILISIERTEN STAATEN § 370 (2d ed. 1872).
9. 2 F. DE MARTENS, TRAITE DE DROIT INTERNATIONAL 247 (1886). On the same point, see Jagerskiold, supra note 4, at 169 n.18, citing other prominent international legal scholars.
the right to emigrate. Article 13 provides:

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.¹¹

When the Universal Declaration was debated in the General Assembly, the U.S.S.R. proposed an amendment to Article 13(2) that would have added after “to leave any country, including his own” the words “in accordance with the procedure laid down in the laws of that country.”¹² The U.S.S.R. and Eastern bloc delegates defended the amendment as an accurate statement of “existing realities,” as “movement within a given country or across its frontiers” was a matter of domestic law.

The Soviet amendment, however, was strongly opposed by many nations. For example, according to the Philippine representative:

The amendments proposed by the U.S.S.R. delegation, if adopted, would nullify the meaning of the article, because instead of establishing common standards to govern the movements of people in general, the Committee would be sanctioning the deplorable state of affairs which exists in the world.¹³

The United States summarized the stated views of other nations:

¹¹ Id. at 74. According to the Special Rapporteur on the Later International Covenant on Civil and Political Rights, Article 13 of the Universal Declaration may very well be regarded as the right of personal self-determination. A study of discrimination in respect of this right accordingly involves consideration of a number of related rights of the individual.

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


¹³ Id. at 86.
During the discussion on the other articles, it had been recognized that in certain circumstances individuals had to be guaranteed protection, even against their own government. The article under discussion seemed to impose such an obligation. . . . The amendment submitted by the U.S.S.R. delegation would render the article valueless. To state that freedom of movement should be granted only in accordance with the laws of each country would be equivalent to limiting the fundamental rights of the individual and increasing the powers of the State.14

The Soviet amendment was defeated, and the U.S.S.R. was subsequently one of the only nations to vote against the final wording of Article 13.16

3. The International Covenant on Civil and Political Rights: Recognition Of The Right To Emigrate In Article 12.—The most widely recognized and adopted statement of the right to emigrate appears in the International Covenant on Civil and Political Rights.16 Article 12 of the Covenant provides, in relevant part:

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.17

The U.S.S.R., a signatory to the Covenant, did not object during the drafting stage to the broad recognition of the right to emigrate in Article 12. In a recent interview in Izvestiya, First Deputy

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14. Id. at 86-87.
15. Id. at 87. Although the Universal Declaration "was not intended to be binding on states as part of positive international law," Humphrey, The International Bill of Rights: Scope and Implementation, 17 WM. & MARY L. REV. 527, 529 & n.10 (1976)(citing 3 U.N. GAOR 934, U.N. Doc. A/177 (1948)), it expresses the consensus of the member states. Almost thirty years later the Soviet Union signed the Helsinki Accords, Conference on Security and Cooperation in Europe: Final Act, August 1, 1975, reprinted in 14 I.L.M. 1292 (1975) [hereinafter Final Act], which specifically incorporate the Universal Declaration. See infra note 55 and accompanying text.
Minister of Justice I.S. Samoschenko stated that the Soviet Union regards its emigration policies as in accord with the Covenant.\textsuperscript{18}

The drafting history of Article 12 establishes the intent of the member states to recognize and protect the right to emigrate. As submitted to the General Assembly by the Commission on Human Rights, the right to emigrate, set out in Article 12, was preceded by a limiting paragraph:

1. Subject to any general law of the State concerned which provides for such reasonable restrictions as may be necessary to protect national security, public safety, health or morals or the rights and freedoms of others, consistent with the other rights recognized in this Covenant . . . .\textsuperscript{19}

Although the delegates generally agreed with the substance of the proposed Article 12, they also felt that the drafting needed revision to make the principles of freedom to emigrate clear and paramount. As noted by the Italian representative:

\textit{[T]here was one fundamental objection to the text of Article 12 as it stood: instead of first proclaiming the right concerned, it began by giving a long list of restrictions. That was, to say the least, an inauspicious opening.}\textsuperscript{20}

With this objection in mind, Argentina, Belgium, Iran, Italy and the Philippines proposed an amendment casting Article 12 in its current form.\textsuperscript{21} The "five-Power" amendment "changed the order of its [Article 12’s] provisions so as to stress the principle rather than the exceptions."\textsuperscript{22} The amendment was immediately supported by many delegations, and was especially praised for its revised form stressing the rights of the individual. Thus, the Yugoslavian delegate stated that the amendment’s "primary merit was that it listed restrictions only after stating the right."\textsuperscript{23} The Soviet delegate announced that the U.S.S.R. also supported Article 12 in its revised form:

\textit{[T]he efforts made by the various delegations to produce a com-}

\begin{itemize}
\item 19. J. INGLES, supra note 11, at 89 (citing U.N. Doc. E/2573, annex I B (1959)).
\end{itemize}
mon text had been successful. Perhaps in the eyes of some representatives the revised amendment of the five Powers could still be improved. But the task of the Third Committee was to work out progressive rules in a form which would be acceptable to most or all of its members. The five-Power text was satisfactory from that point of view and his delegation would support them.  

After agreeing on an acceptable form, the General Assembly focused on the specific terms of Article 12, especially on those terms that in some way limited the rights established. As originally drafted by the U.N. Commission on Human Rights, Article 12 contained a long list of limitations on the right to emigrate, including those that could be used during national emergency or epidemics, to control prostitution or migrant workers, and “on indigenous populations in certain circumstances for their own protection.” This formula was eventually rejected, in part, because the restrictions were “too broad and required further qualification [while providing] no real protection against the enactment of arbitrary legislation.” Similarly rejected as “too far-reaching” were limiting phrases like “general welfare,” “economic and social well-being,” “prevention of disorder or crime,” and “public order.” Concern was voiced that “[far-reaching restrictions could be justified under such a vague expression.”

The ultimate wording and structuring of the right to emigrate as set forth in Article 12 were regarded as consistent with the general principle of freedom of movement. The wording used in Article 12, according to the Philippine delegate, “had the advantage of making it clear that restrictions on freedom of movement were entirely exceptional.”

Article 12 was adopted overwhelmingly in its current form.

4. Other U.N. Agreements Recognizing the Right to Emigrate.—In addition to being recognized in the Universal Declaration and the Covenant, the right to emigrate has been recognized in other
U.N. sponsored international agreements. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination\(^3\) provides that:

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:

\[\text{(d)(ii)}\] The right to leave any country, including one's own, and to return to one's country.\(^\text{32}\)

In addition, numerous other agreements facilitating the right to emigrate or freedom of movement have been adopted by international organizations such as the International Labor Organization (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations High Commissioner for Refugees (UNHCR), and International Civil Aviation Organization.\(^\text{33}\)

5. Regional Accords Recognizing the Right to Emigrate.—Article VIII of the American Declaration of the Rights and Duties of Man\(^\text{34}\) states:

Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.\(^\text{35}\)

This agreement was followed in 1969 by the American Convention on Human Rights,\(^\text{36}\) which provides in Article 22 that:

(2) Every person has the right to leave any country freely, including his own.

\(^3\) International Convention on the Elimination of all Forms of Racial Discrimination, adopted Dec. 21, 1965, entered into force Jan. 4, 1969. 660 U.N.T.S. 194. As of January 1, 1985, 135 nations were parties including the U.S.S.R. President Carter signed the Convention on behalf of the United States and submitted it to the U.S. Senate, which has not yet acted upon it.

\(^\text{32}\) Id. at 220-22.

\(^\text{33}\) See J. Ingles, supra note 11, at 94-112 (listing provisions from various agreements).


\(^\text{35}\) Id. at 131.

(3) The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.\textsuperscript{37}

The Fourth Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms\textsuperscript{38} provides, in Article 2:

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

(3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of \textit{ordre public}, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\textsuperscript{39}

Finally, the African Charter on Human and Peoples' Rights\textsuperscript{40} provides in Article 12 that:

(2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality.\textsuperscript{41}

6. The 1975 Helsinki Accords.—On August 1, 1975, representatives from 35 nations, including the Soviet Union and the United States, signed the Final Act of the Conference on Security and Co-operation in Europe, the so-called “Helsinki Accords.”\textsuperscript{42} The Final Act was loosely divided into three “baskets,” addressing “Questions

\textsuperscript{37} O.A.S.T.S. No. 36, at 7, 9 I.L.M. at 107.


\textsuperscript{39} Id. at 979.


\textsuperscript{41} Id. at 61.

\textsuperscript{42} Final Act, supra note 15. In addition to the United States and the Soviet Union, the participants to the Conference were: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and Yugoslavia.
Relating to Security in Europe," "Co-operation in the Field of Economics, of Science and Technology and of the Environment," and "Co-operation in Humanitarian and Other Fields," respectively. The Helsinki Accords stand as the most recent recognition of the right to emigrate by the Soviet Union, and establish that "human rights" and the right to emigrate can be successfully integrated into the larger framework of East-West negotiations.

a. Legal Status of the Final Act.—The Final Act does not impose obligations on the participating states that are legally binding under international law. At the same time, however, the Final Act recites that the participants will abide by its terms. In the Preamble to the Principles Guiding Relations Between Participating States, the parties "[d]eclare their determination to respect and put into practice . . . the following principles, which are all of primary significance." Principle X, entitled "Fulfilment in good faith of obligations under international law," provides in part that in "exercising their sovereign rights, [the participating states will] pay due regard to and implement the provisions in the Final Act." Thus, the Final Act and its human rights guarantees should be read not as a mere proclamation, but as consistent with and as restating accepted principles of international law.

b. Emigration Provisions of the Final Act.—Although the right to leave one's country is not explicitly mentioned in the text of the Final Act, other provisions affect that right. Procedurally and substantively, the Accords protect the ability to emigrate by outlining measures regarding emigration for family reunification, and by incorporating previous human rights documents recognizing the right to emigrate.

44. Final Act, supra note 15, at 1293 (emphasis deleted).
45. Id. at 1296.
46. Because of its non-binding character and odd basket structure, the Final Act's status under international law is unique. "[M]any Eastern jurists have even claimed that the Final Act constitutes a special collection of sui generis legal norms." Note, supra note 43, at 123 (citing Vukadinovic, Europe Between Helsinki and Belgrade, 27 REV. INT'L AFF. 635 (1976)). See also Russell, The Helsinki Declaration: Brobdingnag or Lilliput?, 70 AM. J. INT'L L. 242, 248 (1976); Bastid, The Special Significance of the Helsinki Final Act, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD, supra note 43, at 11-19.
47. "The U.S.S.R. successfully resisted Western attempts to insert such direct language into the Final Act." Note, supra note 43, at 139.
c. Procedural Guarantees.—The most thorough presentation of emigration issues in the Final Act is found in the “Human Contacts” section of Basket III, where the participating States agree to a number of specific steps regarding the “Reunification of Families.”

Besides the general obligation to deal with exit visa applications “in a positive and humanitarian spirit,” the section calls for:

- processing emigration applications “as expeditiously as possible”;
- lowering fees related to applications to “a moderate level”;
- prompt consideration of renewed applications;
- the ability of emigrants to bring personal effects with them; and
- the preservation of the rights and obligations of the applicant after the request for emigration has been made.

These procedural guarantees are relevant only for emigration applications that are based on family reunification, and do not apply to the general right to emigrate. Nevertheless, the normative principles contained in the procedures established by the Final Act should be equally applicable to establishing proper procedural safeguards with respect to other aspects of emigration.

d. Substantive References to the Right to Emigrate.—Basket I of the Helsinki Final Act contains general references protecting the right to emigrate. Principle VII (“Respect for human rights and fundamental freedoms”) provides that the participating States will “act in conformity with” the U.N. Charter and the Universal Declaration of Human Rights. The signatories also pledge to fulfill their commitments in other human rights instruments, such as the Covenant, which recognizes the right to emigrate in Article 12. Principle VII of the Final Act also recognizes that human rights “derive from the inherent dignity of the human person.” This represents a consider-

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49. Id.
50. Id.
51. Id.
52. See id.
53. See id.
54. In Basket III 1(c), these guarantees also apply to exit visa applications for marriage between citizens of different states. Id. at 1314. A similar attitude towards entry and exit is found in the “Travel for Personal or Professional Reasons” provisions of 1(d). Id.
55. Id. at 1295.
56. Id.
57. Id.
able advance in terms of the Soviet interpretation of international law, in that it means that "such rights have content apart from the State [and] clearly implies the existence of natural rights in the Western sense."58

The reference in Principle VII to the Universal Declaration of Human Rights incorporates the guarantee in Article 13(2) of the Declaration that "everyone has the right to leave any country, including his own."59 As one U.S. negotiator at the Helsinki Conference has noted, "Article 13 of the Universal Declaration contains what is perhaps the strongest statement in an accepted international document of the right to emigrate."60

7. Conclusion.—International agreements signed by virtually every state have recognized the right to emigrate as a fundamental right on which limitations can be imposed only under exceptional circumstances. These agreements have woven the right to emigrate into the fabric of international law, elevating the right above the exclusive realm of domestic law, to a level where this individual right is recognized as a matter of international law, and as part of the accepted group of rights assured by civilized states.61

B. Limitations on the Right to Emigrate

The Covenant is the most widely accepted statement of the right to emigrate and the restrictions contained in the Covenant were the result of considered debate.62 We may properly look to the reso-

60. Russell, supra note 46, at 269.
61. Thus,
[t]oday the human rights idea is universal, accepted by virtually all states and societies regardless of historical, cultural, ideological, economic, or other differences.
It is international, the subject of international diplomacy, law and institutions ....
The universalization of human rights is a political fact. The Universal Declaration of Human Rights adopted by the General Assembly in 1948 has been accepted by virtually all of today's 150 states; even those, notably the European Communist states, which had abstained when the Declaration was approved, have now accepted it formally in the Final Act of the Conference on Security and Cooperation (Helsinki, 1975). Every state has adhered to at least one human rights agreement; and more than a third of the world's states have accepted the comprehensive agreements, the [Covenant], and the International Covenant on Economic, Social, and Cultural Rights, with more states joining every year.
62. See supra notes 16-30 and accompanying text.
olution reached in the Covenant between the individual's right to emigrate and the legitimate needs of the state as setting forth current international law. Article 12(3) lists the limitations that a state may impose: the right to emigrate

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.

Accepted standards of construction require that the restrictions allowed by Article 12(3) be construed so as to effectuate the overall purpose of the Covenant. The Covenant was intended "to promote universal respect for, and observance of, human rights and freedoms." Following this broad statement of purpose are twenty-seven Articles setting forth a host of basic human rights, including the right to emigrate. Article 12(3) also states that any restriction on

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63. Exceptions to the right to emigrate, including those based on national security or state secrets, are not discussed in the Final Act, although in the Travel for Personal or Professional Reasons provisions of Basket III (d) the parties agree to pay "due regard to security requirements [when moderating] regulations concerning movement of citizens from other participating States in their territory." Final Act, supra note 15, at 1314 (emphasis added).

64. The Covenant, supra note 16, at 176.

65. Article 31 of the Vienna Convention on the Law of Treaties, regarding the "general rule of interpretation" for international agreements, states:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.


67. See Henkin, supra note 61, at 24, stating:

The Covenant, then, is not to be read like a technical commercial instrument, but "as an instrument of constitutional dimension which elevates the protection of the individual to a fundamental principle of international public policy." Rights are to be read broadly, and limitations on rights should be read narrowly, to accord with that design.

Id. (footnotes omitted).
the right to emigrate must be “consistent with the other rights recognized in the present Covenant.” The drafting history establishes that this phrase was intended to require that any law limiting the right to emigrate was “just,” so that states could not “impose any limitations they wished.” Finally, Article 5(1) of the Covenant cautions:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

This provision was “intended to prevent any abuse by the states, or by their inhabitants, of any of the rights given in” the Covenant. Accordingly, it has been concluded that any “limitation clause [must be] strictly and narrowly construed.”

Having considered the text of the Covenant and its drafting history (travaux préparatoires), the texts of other relevant international agreements, and other relevant principles of international law and state practice, a group of distinguished legal scholars issued in 1984 the Siracusa Principles on the Limitation and Derogation Provisions in the Covenant. The Siracusa Conference concluded that

the object and purpose of the Covenant are to protect fundamental

68. The Covenant, supra note 16, at 176.
69. J. INGLES, supra note 11, at 88.
72. Henkin, supra note 61, at 26. See Kiss, Permissible Limitations on Rights, in The International Bill of Rights: The Covenant on Civil and Political Rights, supra note 61, at 290, 293-94, 308 & n.79. This principle has been applied by the European Court of Justice in interpreting EEC treaties. See, e.g., Rutili v. Minister of the Interior, [1976] 1 Common Mkt. L.R. 140, 145 (treaty exceptions are “limited” and “must be strictly interpreted”).
73. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, in Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 3 (1985) [hereinafter Siracusa Symposium]. The Siracusa Conference was a meeting of 31 international legal experts from Brazil, Canada, Chile, Egypt, France, Greece, Hungary, India, Ireland, Kuwait, the Netherlands, Norway, Poland, Switzerland, Turkey, the United Kingdom, the United States, the U.N. Centre for Human Rights, the International Labor Organization, and the sponsoring organizations. Id. See Kiss, Commentary by the Rapporteur on the Limitation Provisions, in Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 15-17 (explaining basis for Conference’s findings).
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rights and freedoms. Limitations on such rights and freedoms are clearly to be considered, when adopted, as motivated only by the need to face concrete legal or factual situations in different countries. Their exceptional character is also stressed by the cautious wording of the provisions that admit the possibility of adopting such limitations. 74

The exceptional and restricted nature of the limitations in Article 12 and the subordination of the limitations to the primacy of the right to emigrate is further clarified by the drafting history of Article 12. It will be recalled that the General Assembly rejected an earlier draft that began with the restrictions, and redrafted Article 12 so as to stress the right to emigrate over any exceptions. 75

The limitation most relevant to the “state secrets” limitation on emigration is “national security” as modified by the terms “provided by law,” and “necessary.” The effect of the restriction “public order (ordre public)” is also considered.

1. “Provided by Law.”—The U.N. General Assembly discussion of the term “provided by law” was not extensive. The debates, however, do indicate a common concern and understanding by the drafting nations regarding the kinds of restrictions that states lawfully could place on emigration.

   a. Curbing Administrative Discretion.—A number of delegates stressed that executive or administrative discretion in limiting the right to emigrate had to be curbed. Thus, emigration restrictions had to be subject to the rule of law or the principle of legality, under which a given limitation on the right to emigrate must have a basis in the limiting nation’s domestic law. 76 Discussing an earlier draft of

74. Kiss, supra note 73, at 15-16. See also id. at 17 (“the whole philosophy of the Covenant is that limitations of recognized rights are to be considered as exceptions so that their scope is to be restricted as much as possible”).


76. See Lockwood, supra note 71, at 44-48; Partsch, Freedom of Conscience and Expression, and Political Freedoms, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, supra note 61, at 209, 220; Kiss, supra note 72, at 305. See also Garibaldi, General Limitations on Human Rights: The Principle of Legality, 17 HARV.
Article 12, permitting only those emigration limitations imposed under "any general law," the Belgian delegate explained: "The rights recognized in article 12 were fundamental rights of the individual. Therefore, the individuals themselves and, consequently, the legislative power, should apply reasonable restrictions to those rights. Such restrictions should not be left to the discretion of the executive." No delegate took issue with this, and the principle of legality was included in Article 12 by the term "provided by law," which was adopted as part of the final version of Article 12(3) without comment. This clause "excludes bureaucratic caprice and administrative fiat, and other measures taken under executive authority, unless authorized by law and necessary for the execution of the law."

As further explained at the Siracusa Conference:

The objective is the prevention of arbitrary restrictions on human rights by requiring that all limitations be established by general rule. The legislature is singled out as the body to formulate the restrictions rather than the executive or the judiciary because of its function to create general norms and not specific laws aimed at certain cases.

b. Procedural Safeguards.—In his seminal 1963 study on the implementation of the Covenant’s statement of the right to emigrate (the study was unanimously adopted by the General Assembly) Judge Ingles, in order to give content to the drafters’ intent to prohibit arbitrary restrictions on emigration, required the following procedural safeguards to protect the right to emigrate:

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

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78. The Covenant, supra note 16, at 176.
79. Jagerskiold, supra note 4, at 172-73. The phrase “any general law,” previously referred to, was modified to “provided by law” because the delegates believed that any legislative enactment should, by definition, be general in nature. See 14 U.N. GAOR C.3 (955th mtg.) paras. 4, 5, 8, U.N. Doc. A/C.3/SR.955 (1959) (statements by delegates from United Kingdom and Italy).
80. Lockwood, supra note 71, at 45.
WHO MAY LEAVE

applicant require otherwise.

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

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

(d) In case of denial, withdrawal or cancellation of the required permission or travel document, the aggrieved individual shall have the right of appeal to an independent and impartial tribunal.\(^81\)

The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted these principles in large part into its Draft Principles on the right to emigrate.\(^82\)

These principles have been further developed by various gatherings of international legal scholars. The Uppsala Colloquium,\(^83\) an international conference organized by various non-governmental groups, mandated that any limitations on an individual's right to

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(a) The right to know the facts on the basis of which the administrative decision on his case was taken;

(b) The right to attend the proceedings and to ask questions;

(c) The right to require the administrative authority to state its reasons for the decision reached and, moreover, to do so in writing; and

(d) The right to appeal to a higher administrative authority.

Id. "This right to a reasoned decision and appeal also is supported by" the other rights recognized in the Covenant, as referenced in Article 12(3). H. Hannum, The Right To Leave and Return in International Law and Practice 26 (1987).


83. The Uppsala Colloquium was convened by the International Institute of Human Rights in Uppsala, Sweden in June 1972 to review the status of the right to leave and return on a country-by-country basis. The 57 legal experts attending included participants from Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, Finland, France, Greece, Ireland, Israel, Italy, Malaysia, Mexico, the Netherlands, Norway, Senegal, Singapore, Spain, Sweden, Switzerland, Uganda, the United States and Yugoslavia. Delegates from various U.N. committees were also present, including E.-I. Daes, author of the Daes Study. See Declaration on the Right to Leave and the Right to Return, reprinted in H. Hannum, supra note 81, at 150 [hereinafter Uppsala Declaration] (the Uppsala Colloquium's declaration).
leave any country including his own must, among other things, be “provided for by law, . . . clear and specific, [and] not subject to arbitrary application.” As with the Ingles Study, the Uppsala Colloquium’s Declaration of principles also required procedural safeguards relating to the right to emigrate, including the codification, in writing and available to citizens, of emigration procedures, and the right to a hearing before an “independent and impartial” tribunal.

The Siracusa Conference similarly stressed the need for “[a]dequate safeguards and effective remedies [to] be provided by law against illegal or abusive imposition or application of limitations on human rights.” Finally, the 1986 Strasbourg Conference Declaration on the Right to Leave and Return also contains detailed provisions designed to make any limitations on the right to emigrate accessible, predictable, and subject to independent review that could potentially curb the discretion of state officials.

These standards have further been followed in the rulings of the European Court of Human Rights, interpreting the European Convention on Human Rights. The European Court has required that, for a state’s limitation on a right to be provided by law, there must be, among other things, procedures in place safeguarding the individual’s right and limiting the discretion of governmental authorities.

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84. Uppsala Declaration, supra note 83, at 151 (art. 6).
85. Id. at 152-57 (arts. 15, 18, 19).
86. Siracusa Symposium, supra note 73, at 5. See Kiss, supra note 73, at 18-19.
87. The Strasbourg Conference was convened in November 1986 by the International Institute of Human Rights. The 31 legal experts attending included participants from Costa Rica, Egypt, the Federal Republic of Germany, France, Morocco, the Netherlands, Sweden, Switzerland, the United Kingdom, the United States and Zambia. In addition to addressing emigration issues arising under Article 12 of the Covenant, the Strasbourg Conference was to assist the Special Rapporteur of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. C.L.C. Mubanga-Chipoya, in drafting a declaration on the right to leave and return for the U.N. Commission on Human Rights. (Mr. Mubanga-Chipoya’s report on the right to leave and return was issued in August 1987. 39 U.N. ESCOR (Agenda Item 6) at 1, U.N. Doc. E/CN.4/Sub.2/1987/10 (1987)) See Hannum, Current Developments, 81 Am. J. Int’l L. 432 (1987); Strasbourg Declaration on the Right to Leave and Return, reprinted in H. Hannum, supra note 81, at 154 [hereinafter Strasbourg Declaration] (the Strasbourg Conference Declaration).
89. Although the European Convention, supra note 38, generally uses the term “prescribed by law,” this term is understood to have the same meaning as “provided by law” as used in the Covenant because the corresponding French language texts of the Covenant and the European Convention both use the phrase “pr6vu par la loi.” Kiss, supra note 72, at 304; Partsch, supra note 76, at 220. See also Lockwood, supra note 71, at 47.
90. Also, the limitation must have a basis in domestic law (this basis can be legislative enactment or pursuant to common law); the content of the state’s limitation must be accessible to the citizen; and the scope and meaning of the limitation must be clear enough so
2. "Necessary."—Article 12(3) of the Covenant provides that any limitation by a state on the right to emigrate must be "necessary."\footnote{91} Although there was no U.N. debate on this term, international judicial decisions and scholarly commentary indicate a consensus as to its meaning.

As summarized by the Siracusa Conference:

Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
(b) responds to a pressing public or social need,
(c) pursues a legitimate aim, and
(d) is proportionate to that aim. Any assessment as to the necessity of a limitation shall be made on objective considerations.\footnote{92}

Similarly, the Strasbourg Declaration states:

A restriction shall be considered "necessary" only if it responds to a pressing public and social need, pursues a legitimate aim and is proportionate to that aim.\footnote{93}

A similar concept of "necessary" has been universally adopted by international legal publicists,\footnote{94} and has been adopted and applied by the U.N. Human Rights Committee in cases arising out of human rights violations in Uruguay,\footnote{95} and in numerous cases arising under the European Convention for the Protection of Human Rights.\footnote{96}


\footnote{91. The Covenant, supra note 16, at 176 (art. 12(3)).}
\footnote{92. \textit{Siracusa Symposium}, supra note 73, at 4.}
\footnote{93. \textit{See Article 4(c), reprinted in H. Hannum, supra note 81, at 155.}}
\footnote{94. \textit{See O'Donnell, The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights, 4 Human Rts. Q. 474, 491 (1982) (necessity requires that a limitation be more than "reasonable," and that the limitation be in pursuit of a state's "legitimate aims"); Partsch, supra note 76, at 222 (limitations "must be necessary; they are permissible only for particular and specific public ends."); Higgins, Derogations Under Human Rights Treaties, 48 Brit. Y.B. Int'l L. 281, 311-12 (1977); Kiss, supra note 72, at 308.}}
3. "National Security."—The scope and meaning of the term "national security" was not defined by the delegates drafting the Covenant. The delegates, however, cautioned against broadly construing terms that limited rights. Judge Ingles, while recognizing that "nearly all" states applied national security restrictions to the right to emigrate, went on to state:

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

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

Responding to this concern, the Siracusa Conference adopted the following principles regarding "national security":

[i] National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

[ii] National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

[iii] National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

[iv] The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices.


97. See Lockwood, supra note 71, at 70 (citing 10 U.N. GAOR Annexes (Agenda Item 28) at 9, U.N. Doc. A/2929 (1955)).

against its population.\textsuperscript{99}

The principles adopted by the Siracusa Conference are consistent with writings by international legal scholars on national security. Many scholars have noted that the term "national" "is generally used to refer to that which concerns a country as a whole,"\textsuperscript{100} and that the term "security" refers to the protection of a nation's political independence or territorial integrity from the use, or threatened use, of force.\textsuperscript{101} The kinds of limitations considered permissible under this view of national security would include those necessary to prevent espionage, to protect military secrets, and to regulate the movement of members of the military.\textsuperscript{102}

International legal scholars have further advocated and enunciated a standard for national security limitations requiring some defined and reasonable apprehension of danger to the state. Judge Ingles first formulated this standard in terms of a "clear and present danger":

It would appear, therefore, that any restriction based upon national security may be legitimately imposed by Governments only within the framework of a general policy permitting everyone to leave the country, and for specific reasons presenting a real danger to the security of the State. A general policy of not permitting anyone to leave the country is never justifiable except in time of war or national emergency . . .

. . . .[T]he best safeguard against arbitrary denial of the right of any national to leave his country on any of these grounds would be to require a showing of clear and present danger to the national security or public order.\textsuperscript{103}

Article 6 of the Uppsala Colloquium Declaration applied this

\textsuperscript{99} Siracusa Symposium, supra note 73, at 6. The Siracusa Conference also recognized that national security could be used as a pretext for violating rights and warned that the observance of rights is inexorably linked to true national security. "[S]tates violating rights and freedoms have often exhibited a proclivity toward invoking 'national security' as a pretext for such violations. To the contrary, respect for fundamental rights and freedoms should be viewed as an important component of 'national security.'" Kiss, supra note 73, at 21.

\textsuperscript{100} Kiss, supra note 72, at 296.

\textsuperscript{101} Id. at 296-97; Lockwood, supra note 71, at 70-71. See H. Hannum, supra note 81, at 28. This definition would be in accord with the principles of Article 2(4) of the U.N. Charter, forbidding the use of force or the threat of force against the political independence or territorial integrity of another state.

\textsuperscript{102} Kiss, supra note 72, at 297. See Jagerskiold, supra note 4, at 172.

\textsuperscript{103} J. Ingles, supra note 11, at 40, 59.
formulation to the right to emigrate in terms similar to those urged by Judge Ingles:

A person's right to leave a country shall be subject only to such reasonable limitations as are necessary to prevent a clear and present danger to the national security or public order, or to comply with international health regulations; and only if such limitations are provided for by law, are clear and specific, are not subject to arbitrary application and do not destroy the substance of the rights.  

Similar restrictions on the use of national security limitations were adopted by the recent Strasbourg Conference:

A restriction based on “national security” may be invoked only in situations where the exercise of the right poses a clear, imminent and serious danger to the State.

The Conference then considered specific national security problems in the context of emigration. For example,

When this restriction is invoked on the ground that an individual acquired military secrets, the restriction shall be applicable only for a limited time, appropriate to the specific circumstances, which should not be more than five years after the individual acquired such secrets.

Although the precise words vary, each of the above formulations shares the common thrust of making it clear that national security cannot serve as a pretext or be based upon some vague general apprehension. There must be instead the threat of an objectively verifiable danger of a substantial nature. To require less would be to allow the unverifiable suspicions or fears of administrators to eliminate the individual right.

104. Uppsala Declaration, supra note 83, at 127. As discussed above, the Uppsala Colloquium also provided for procedural safeguards protecting the right to emigrate. See supra note 85 and accompanying text.

105. Strasbourg Declaration, supra note 87, at 156. As discussed above, the Strasbourg Conference also provided for procedural safeguards protecting the right to emigrate. See supra note 88 and accompanying text.

106. Strasbourg Declaration, supra note 87, at 155.

107. The Helsinki Accords provide that the “participating States will deal in a positive and humanitarian spirit” with emigration applications based on family reunification. Final Act, supra note 15, at 1313. Accordingly, the denial of an exit visa application, premised on an individual’s desire to be reunited with his family, on undefined and arbitrarily applied national security grounds is not in keeping with the terms of the Final Act. See Schacter, The Human Rights Provisions of the Helsinki Final Act—A Report on a Conference by the Committee on...
4. "Public Order (Ordre Public)."—Article 12(3) of the Covenant, as enacted, uses the term "public order (ordre public)."108 As submitted to the General Assembly in 1959, Article 12 of the draft Covenant permitted emigration restrictions, in part, "as may be necessary to protect . . . public safety."109 This term, however, was changed, without debate, to "public order (ordre public)" by the five-Power amendment that set Article 12 in its current form.110 This revised language became the subject of considerable scrutiny. It was explained that the use of both the English and French words in the text was compelled by concerns that the English term alone could be interpreted as setting too lax a standard and allowing greater latitude to the state than the delegates regarded as appropriate.111 Following extensive debate the term "public order (ordre public)" was included in Article 12(3) of the Covenant by a vote of fifty-eight to none.112

The term "ordre public," as the U.N. debates reveal, comes from French public law.113

[In its principal meaning, ordre public refers to the "police power" of the State broadly conceived (police administrative générale). This police power, however, must be exercised in a legal framework which includes fundamental human rights (libertés publiques), such as the security of persons, freedom of worship, freedom of expression, the right of association, etc.114

Professor Kiss also argues that "the private and public law uses of ordre public converge in a principle [known as ordre public international that includes certain] universal principles of civilization and justice" such as the fundamental human rights recognized in the


110. Id. para. 11. See supra note 21 and accompanying text.
114. Kiss, supra note 72, at 300-01.
This understanding of "public order (ordre public)" was adopted by the Siracusa Conference:

[i] The expression "public order (ordre public)" as used in the Covenant, may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

[ii] Public order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

[iii] State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.\(^{116}\)

As with national security, the Siracusa Conference treatment of public order (ordre public) incorporates elements of the necessity and rule of law requirements of Article 12(3) of the Covenant. Thus, any state limitation based on "public order (ordre public)" must be narrowly tailored, and in proportion with the right restricted.

5. Conclusion.—Although it is accepted that there may be restrictions imposed on the right to emigrate, these restrictions are of an exceptional character and must be strictly and narrowly construed. The right to emigrate is primary; the restrictions on that right are subordinate and may not be so construed as to destroy the right itself. The national security exception to the right to emigrate

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115. Id. at 301-02. According to Professor Kiss, the idea of private and public law "convergence" is supported by French court rulings. Thus, at private law, French courts "consider foreign legislative acts violating fundamental human rights as contrary to the French ordre public and refuse to apply them." Id. at 300. Similarly, at public law, the French Supreme Court has ruled that it is contrary to ordre public to fail to inform an accused person of all the relevant elements of the charges against him. Id. at 301 & n.44. Accord Lockwood, supra note 71, at 59 & nn. 133-34. Cf. Partsch, supra note 76, at 224-25; H. Hannum, supra note 81, at 29-32 & n. 71.

116. Siracusa Symposium, supra note 73, at 5. See Kiss, supra note 73, at 19-20. As a whole, it has been accepted that [ordre public] represents the expression of the general interest of the collectivity. As such, it also implies that human rights are respected within the society. The committee of experts came to the conclusion that each limitation on a particular right that is based on this ground is to be compatible with the requirements of public order in that particular case. It is justified only if the situation or the conduct of the persons concerned constitutes a sufficiently serious threat to public order. Hence, control by an independent organ, be it a political body (parliament), a judicial body (court), or any other organ is important. Id. (emphasis in original).
is recognized to apply only to extraordinary cases where it is necessary to protect the state from an actual danger. It follows, therefore, that knowledge of “state secrets” cannot be premised on the possession of information that is public, of a routine character, or stale. Also, procedural safeguards must exist requiring that any restrictions be of general application, in defined terms so that individuals can understand the nature of the restrictions, and that there be a means to review arbitrary administrative determinations.

II. THE LAW AND PRACTICE OF OTHER NATIONS

Since World War II, the right to emigrate has been codified and developed in international agreements and scholarly writings. Nevertheless, emigration remains a right almost completely regulated at the state level pursuant to municipal laws. The consensus among states is, therefore, an important factor in assessing the nature and extent of the right to emigrate under international law, as well as the parameters of acceptable state conduct.

The right to emigrate is generally recognized in most nations. Many states have formally recognized a right to leave one’s country in their national constitutions and many other states recognize the right as part of their fundamental law. After surveying state practices worldwide, one commentator recently concluded that “a majority of countries do respect the right in a meaningful way, [and the right to leave] is essentially unhindered (with only a few exceptions)” in Western Europe, the Western Hemisphere, most of Asia and the Pacific, and in many African states. Another author has found that only socialist bloc states and certain underdeveloped nations “as a matter of policy, carefully control all exit,” making legal exit a privilege rather than a right.

117. H. Hannum, supra note 81, at 139-41. See generally id. at 69-117 (for a comprehensive worldwide survey of current state practice).

118. Id. at 125. Hannum's survey was based, in part, on over 80 country reports submitted by signatories of the Covenant pursuant to Article 40, which requires signatory states periodically to submit reports on the measures they have adopted that give effect to the rights recognized in the Covenant. Id. at 136-38 (with U.N. document citations for available country reports).

119. A. Dowty, supra note 3, at 185-86 (1987). Based on a review of various sources including U.S. State Department reports, there are 21 of these “tight restriction” states: Afghanistan, Albania, Angola, Bulgaria, Burma, Cambodia (Kampuchea), Cuba, Czechoslovakia, Ethiopia, the German Democratic Republic, Iraq, North Korea, Laos, Mongolia, Mozambique, Romania, Sao Tome and Principe, Somalia, South Yemen, the U.S.S.R. and Vietnam. Id. at 186. Another group of states employs systematic but partial curbs on emigration, in that restrictions are generally directed at certain groups or persons but not the popula-
Because of the importance of the law and practices of other nations to establishing the standards of international behavior, and because the Soviet Union has asserted its practices to be in conformity with those of other major states, we have examined in more depth the law and policy of other nations concerning the right to emigrate and possible limitations on that right. The United States, the United Kingdom and the Federal Republic of Germany are, of course, leading western powers and, therefore, to the extent that the Soviet Union claims that its practice is in accord with that of its adversaries, the law and practice of these states is of direct importance. Further, the United States and the United Kingdom were chosen as representing the common law, and France, Switzerland and the Federal Republic of Germany as representing the Latin and Teutonic branches of the civil law. Although municipal idiosyncrasies exist, virtually all civilized countries have adopted some variant of one of these seminal systems of law. The municipal law of the major states and of the most juridically significant states is further a source of international law, particularly when, as here, there emerges a common ground that sets forth the accepted legal judgment of the community of nations. Finally, Israel was chosen because of its obvious interest in the question of Soviet emigration and because, as a nation in a state of war since its independence, its practices were thought useful to review.

A. The United States

1. Area Restrictions.—Historically, two types of international travel and emigration restrictions have applied to United States citizens. The so-called “area restrictions” forbid all Americans from traveling to certain specified countries. At the moment, Libya and Lebanon are the only countries on this list. The State Department puts countries on the “restricted areas” list for one of two reasons: either to deprive the country of tourists’ hard currency, as in the case of Libya, or because it fears it cannot protect United States citizens as a whole. There are 14 states in this group including China, Hungary and Poland. Id. Finally, 22 states employ only “occasional restrictions” against specific individuals on a case-by-case basis, but do not do so consistently or as part of a “predictable policy.” Id.

120. See supra note 18 and accompanying text.


zizens through the local country's legal system should they find themselves in trouble, as in the case of Lebanon.\textsuperscript{123}

The Supreme Court has held that the use of area restrictions is a valid exercise of the broad discretion granted the executive branch by the Passport Act of 1926.\textsuperscript{124} There are, however, no sanctions for violating area restrictions.\textsuperscript{125} The Supreme Court has held that a statute forbidding Americans from entering or leaving the United States without a valid passport does not, as a matter of statutory construction, apply to the use of a passport to enter a restricted area.\textsuperscript{126} A federal appeals court has ruled that another statute, forbidding the use of a passport in violation of its conditions or restrictions, did not forbid using the passport to enter or leave the United States.\textsuperscript{127} The court said that the State Department was allowed to seek the traveler's assurance that he would not use the passport to enter a restricted area, but could not forbid travel \textit{without} the passport to or in the restricted area.\textsuperscript{128} Today the State Department makes no effort at all to prevent or punish travel to or in restricted areas.\textsuperscript{129}

2. Revocation or Denial of Passports.—The second restriction on the ability of citizens to leave the United States has been the revocation or non-renewal of passports. The Executive has historically asserted the discretion to refuse to issue passports "in the interests of the national security and foreign policy of the United States."\textsuperscript{130} In recent years, however, Executive discretion has come under increasingly close judicial scrutiny, and has been limited to extreme situations.\textsuperscript{131}

As early as 1803, Congress passed a law prohibiting State Department employees abroad from issuing passports to aliens.\textsuperscript{132} A law passed in the midst of the War of 1812 prohibited travel to or

\textsuperscript{124} Zemel v. Rusk, 381 U.S. 1 (1965) (construing 22 U.S.C. § 211(a)(1926)).
\textsuperscript{126} United States v. Laub, 385 U.S. 475 (1967) (construing 8 U.S.C. § 1185(b) (1964)).
\textsuperscript{128} Id. at 947.
\textsuperscript{129} Telephone interview with James Lannon, Division of Counterintelligence, Bureau of Diplomatic Security, Department of State (June 17, 1987).
\textsuperscript{130} Haig v. Agee, 453 U.S. 280, 293 (1981); see also Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692 (1835).
\textsuperscript{131} See, e.g., Haig, 453 U.S. at 280.
\textsuperscript{132} 2 Stat. 205 (1803).
from "any provinces or territory belonging to the enemy" without a passport. The practice concerning passports was codified for the first time in the Passport Act of 1856. The Act provided that the Secretary of State "shall be authorized to grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States." The Supreme Court has emphasized that the 1856 Act did not grant the Secretary of State any power he did not already have; it merely codified and centralized the Executive branch's passport activities.

The Travel Control Act of 1918 prohibited Americans from entering or leaving the country in wartime without a passport. Congress later reenacted the relevant passages of the Passport Act of 1856 in the Passport Act of 1926. Executive Orders and regulations provided that passports could still be denied on national security grounds.

Throughout U.S. history, various instances have occurred in which the Executive has exercised his discretion to deny passports on grounds of national security. Secretary of State Seward denied passports during the Civil War to persons "on errands hostile and injurious to the peace of the country and dangerous to the Union." Attorney General Hoar upheld the practice of withholding passports for security reasons in an 1869 opinion, and Attorney General Knox did the same in a 1901 opinion. President Theodore Roosevelt promulgated a rule in 1903, further confirming the Secretary of State's discretion with regard to passports.

Pursuant to this policy, passports were denied to an American

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133. 3 Stat. 199 (1815).
134. 11 Stat. 60 (1856).
135. Id. The words "shall be authorized to" were changed to "may" in 1874.
139. See, e.g., Exec. Order Nos. 4800 (1928), 5860 (1932), 7856 (1938).
141. See e.g., Haig, 453 U.S. at 279.
142. Haig, 453 U.S. at 2953 (citing J. Moore, A Digest of International Law 920 (1905).
145. See Haig, 453 U.S. at 296. This rule can be found in Rules Governing the Granting and Issuing of Passports in the United States, Sept. 12, 1903 §16. Haig at 296 n.30.
146. See, e.g., Exec. Order Nos. 654 (1907), 2119-A (1915), 2362-A (1916), 2519-A (1917); Haig, 453 U.S. at 279 n.31.
whose promotion of gambling and prostitution in China in 1906 interfered with Sino-American relations, and to an American who was blackmailing officials in Cairo and otherwise interfering with relations with Egypt in 1907. In 1917, several socialists were denied passports because they intended to travel to Stockholm to take part in a quasi-official conference, contrary to American foreign policy and in alleged violation of the predecessor statute of the Logan Act, which prohibits American citizens from trying to influence foreign governments to the disadvantage of the United States.

From 1917 to 1931, passports were denied "to American Communists who desired to go abroad for indoctrination, instruction, etc." Later, at the height of the Cold War, passports were denied on national security grounds. A United States Congressman was denied a passport for less than a month in 1948 because of his intention to participate in a conference supporting a rebellion in Greece that the United States opposed. Paul Robeson was denied a passport in 1950 because of his involvement with Communism. A gunrunner was denied a passport for fifteen days in 1954, and two passport applications were denied in 1955 because "the applicants' participation in political affairs abroad had become an internal problem to the foreign governments involved." Ten passports were denied in 1956 because of activities regarded as illegal or prejudicial to the orderly conduct of U.S. foreign relations.

The Executive's discretion to restrict travel, however, has become increasingly limited. In Kent v. Dulles the Supreme Court held that the right to travel abroad "is ... included within the word

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148. Id.
149. Id.
152. Agee, 629 F.2d at 101 (MacKinnon, J., dissenting).
153. Id.
154. Id.
155. Id.
156. Id. See Haig, 453 U.S. at 292-301. See also Note, Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review, 61 YALE L.J. 171, 174-78 (1952). Passport records are maintained by name, not by disposition, so it is virtually impossible to compile definitive statistics on the number of denials on national security or foreign policy grounds.
As such, if that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. We hesitate to find in this [the State Department's power over passports] broad generalized power an authority to trench so heavily on the rights of the citizen. Thus, the Court held that the Passport Act of 1926 did not authorize the regulations prohibiting American Communists from furthering "the world Communist movement" by traveling on United States passports, and any Act of Congress explicitly authorizing the Secretary to withhold passports on the basis of "beliefs . . . associations [or] ideolog[y]" would present a grave constitutional question.

This grave constitutional question was squarely presented by the Subversive Activities Control Act of 1950, which required all "Communist organizations" to register with the Subversive Activities Control Board. After such registration, no member of the organization with knowledge or notice of its registration could apply for, renew, or use a United States passport, on pain of up to a $10,000 fine and five years' imprisonment. The Board issued a final order directing the Communist Party of the United States to register under the Act on October 20, 1961, and shortly thereafter the editor of the Party's "theoretical organ" and the Party's chairman had their passports revoked. The Supreme Court, however, held that these passport restrictions were too broad and "indiscriminately restrict[ed] the right to travel and thereby abridg[ed] the liberty guaranteed by the Fifth Amendment." While acknowledging the legitimacy of the stated purpose of the Subversive Activities Control Act, the "congressional desire to protect our national security,"
the Court held that there were less restrictive means by which to accomplish the end.\textsuperscript{168}

Four years after Aptheker, the Secretary of State promulgated a regulation granting the Secretary of State the discretion to refuse to issue a passport if he “determines that the national’s activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States.” \textsuperscript{169}

In the only case ever to interpret this regulation,\textsuperscript{170} the Secretary of State revoked the passport of Philip Agee, a former C.I.A. agent. Agee had for five years traveled around the world in connection with a “campaign to fight the C.I.A. wherever it is operating.”\textsuperscript{171} His stated purpose was “to expose C.I.A. officers and agents and to take the measures necessary to drive them out of the countries where they are operating.” Agee’s revelations of the identities of various C.I.A. operatives were often followed by violence against the exposed agents, including the assassination of the man Agee identified as the C.I.A. Chief of Station in Athens. When Agee suggested to the Iranians in 1979 that they release the American hostages they were holding in exchange for C.I.A. documents, which he would then help them to analyze, the Secretary of State revoked his passport, advised Agee of his right to an administrative hearing under the applicable regulations, and offered to hold such a hearing in West Germany, where Agee then was, on five days’ notice.\textsuperscript{172}

Agee at once sued the Secretary of State, conceding all factual allegations but asserting that the regulation went beyond what Congress had authorized in the Passport Act of 1926, that it was overbroad, that it violated his Fifth Amendment right to due process and his liberty interest in a right to travel, and his First Amendment right of free speech.\textsuperscript{173}

The Supreme Court held that the language of the Passport Act, providing that “[t]he Secretary of State may grant and issue pass-

\textsuperscript{168} Id. at 513-14
\textsuperscript{169} 22 C.F.R. § 51.70(b)(4) (1968). See also 22 C.F.R. § 51.71(a) (1968) (authorizing revocation, restriction, or limitation of passports for the same reason). The regulation also authorizes the Secretary of State to deny passports to fugitives, incompetents, and people who have defaulted on repatriation loans. Id.
\textsuperscript{171} Id. at 283.
\textsuperscript{172} Id. See 22 C.F.R. §§ 51.80-89 (1981) (setting forth administrative procedures applicable to Agee).
\textsuperscript{173} Haig, at 287.
ports," while not expressly granting the right to deny or revoke passports, was broad enough to encompass the authority exercised under the State Department's regulations. Consistent administrative practice and interpretation dating from the first use of the United States passport in the nineteenth century was further evidence of the breadth of the Secretary's discretion. The Court rejected Agee's constitutional claims, holding that Agee was not being punished for his ideas, as were Kent and Aptheker, but rather properly punished for his actions, so that his First Amendment claim was groundless. The Court also held that Agee's right to travel was indeed abridged, but in a reasonable fashion and for the most important of governmental interests, national security. "Restricting Agee's foreign travel, although perhaps not certain to prevent all of Agee's harmful activities, is the only avenue open to the government to limit these activities."

The regulations used against Agee have only been used one other time. In 1970 the passports of Charles McKissack, attorney for Mrs. Mary Sirhan, and his assistant were revoked as they were preparing to leave the United States to travel to the site of an airplane hijacking. The revocations were subsequently upheld. In addition to this seldom exercised discretion to refuse or revoke passports to individuals, the government has another relevant remedy. Employees in sensitive positions may be required as a condition of employment to agree by contract not to disclose information to which they become privy. These provisions do not, however, limit the ability of the employee to travel or emigrate per se, and entitle the government only to civil contract remedies.

175. Haig, 453 U.S. at 290-91 (citing Kent v. Dulles, 357 U.S. 116 (1958); Zemel v. Rusk, 381 U.S. 1 (1965)).
176. Id. at 308-09.
177. Id. at 308. Agee returned to the United States via Canada on June 7, 1987. He had traveled to Canada from Spain, where he now lives, on a Nicaraguan passport. He was not asked for a passport when he crossed the United States border. There is no arrest warrant outstanding against Agee, according to a spokesman for the Criminal Division of the Justice Department. Agee is said to have complied with a 1980 injunction prohibiting him from revealing the names of any more C.I.A. agents and from publishing any books or articles without approval from the C.I.A.'s Publications Review Board. Agee reportedly was denied a United States passport earlier this year on national security grounds. See N.Y. Times, June 15, 1987, at B7, col. 1.
178. See Agee v. Muskie, 629 F.2d at 86 n.6.
180. See id. at 514-16 (noting various remedies, particularly disgorgement).
3. Other Administrative Regulations.—The Foreign Affairs Manual of the State Department is said to contain rules concerning personal travel to Eastern Europe by Department employees. The rules, which are classified, apparently require employees to request permission of their current post and of the Department for non-official travel to certain areas, and to detail their itinerary and reasons for wanting to make the trip. Permission may be denied, though such denial is reported to be extremely rare. A denial may be appealed to the employee’s post or to the State Department in Washington, or to what a State Department spokesman called “higher authority,” on the grounds that it is arbitrary and capricious. Requests for permission are judged against standard criteria, and written decisions are required in the case of a denial. The purpose of the requirement is said to be to protect the employee by ensuring that the State Department knows of the employee's whereabouts in case he should visit unstable areas. Only secondarily, the State Department says, is it concerned with restricting tourism for national security purposes. Significantly, the rule does not require former State Department employees to request permission to travel, irrespective of any security clearance they might have had while with the Department.181

4. Conclusion.—Although the Executive branch has historically exercised power to restrict foreign travel where it has believed a threat to national security exists, the Supreme Court has in recent years severely curtailed Executive discretion, holding that there is a constitutional right to travel, and that this right may be limited only by compelling circumstances. Only the least restrictive means may be used to protect national security; if protection can be achieved through means other than limiting the right of the person, then the more restrictive means would be prohibited. Importantly, the Supreme Court has established that unpopular “ideas” or “beliefs” do not constitute such compelling circumstances, but that only conduct may be regarded as a threat to security. There is no record in American jurisprudence of anyone's being prevented from emigrating. Nor is there any record in American jurisprudence of anyone's being de-

181. Telephone interview with James Lannon, Division of Counterintelligence, Bureau of Diplomatic Security, Department of State (June 17, 1987).

Personnel of other departments are subject to similar procedures. See 28 C.F.R. § 17.144(c)(1986)(Department of Justice); 52 Fed. Regs. 11,219, 11,239 (1987)(to be codified at 32 C.F.R. § 154.61(d)(Department of Defense). There appear to be no cases where a government employee has been denied permission to travel abroad. The department’s only remedies for violations of these provisions appear to be civil or internal sanctions, such as dismissal or classification downgrading.
nied the right to leave the country solely on the grounds that the person possessed "state secrets."

B. The United Kingdom

1. The Right to Emigrate at Common Law.—It is generally accepted now that, at common law, British citizens enjoy the right to emigrate as an aspect of freedom of movement, and thus may legally depart the United Kingdom without a passport or any other form of governmental permission. The right to emigrate has been reinforced by its statutory articulation in the Immigration Act of 1971:

All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.

Freedom of movement has also been judicially endorsed: “[a] man’s liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the surest grounds.”

2. Limitations Affecting the Right to Emigrate.—The writ ne exeat regno is the only substantive obstacle that may be used to interfere with a British citizen’s common law right to depart the realm. The writ, issued at the request of the Crown, embodies the Royal prerogative to restrain any of the Sovereign’s subjects from foreign travel, if the interests of the State so require. It is questionable whether and for what purposes the writ still exists. Since

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182. This position is supported by, among others, Lord Diplock, Passports and Protection in International Law, 32 Grotius Soc. Trans. 42, 57 (1947); H. STREET, FREEDOM, THE INDIVIDUAL AND THE LAW 291-296 (5th ed. 1982); Justice (British Section of the Int’l Comm’n of Jurists), GOING ABROAD: A REPORT ON PASSPORTS 3-4 (1974) [hereinafter GOING ABROAD]; Williams, British Passports and the Right to Travel, 23 INT’L & COMP. L.Q. 642, 644 (1974); Bridge, The Case of the Rugby Football Team and the High Prerogative Writ, 88 L. Q. REV. 83, 83 (1972) (citing FITZHERBERT, NEW NATURE BREVIUM (8th ed. 1730); 1 W. BLACKSTONE, COMMENTARIES (15th ed. 1809)).


185. See Felton v. Callis, [1969] 1 Q.B. 200 (1968) (noting that the writ is now used only in creditor actions). Compare Diplock, supra note 182 at 44 (concluding that the prerogative power embodied by the writ ne exeat regno has lapsed through desuetude) with Bridge, supra note 182, at 86 (drawing the opposite conclusion). See also Parsons v. Burk, [1971]
Elizabethan times the writ has been used in the courts of Equity to prevent abscondment of debtors, and has not been issued by an English court since 1893.\textsuperscript{186} There appears to be, therefore, little substantive grounds for limiting a British citizen's right to emigrate.\textsuperscript{187}

3. Procedural Restraints on Emigration: Passport Controls.—Section One of the Immigration Act of 1971 purports to subject freedom of movement to limitations imposed by law. The Act empowers immigration officers to examine a person seeking to depart from the United Kingdom to determine whether that person is a British citizen, and if not, to learn the identity of the person.\textsuperscript{188} This power was used to justify prevention of departure in a test case set up by a reporter, who carried no passport but did have other identification (including a birth certificate).\textsuperscript{189} The legality of this conduct by the government, however, is doubtful, because the detention of persons seeking to depart does not appear to be authorized by the terms of the Act.\textsuperscript{190} As a practical matter, however, a passport may be necessary to the exercise of the right to emigrate, as one may be required by the receiving country, or as a precondition to boarding an airplane. In the United Kingdom, passports are issued pursuant to the Royal prerogative. They can be refused, impounded or revoked at the discretion of the Crown.\textsuperscript{191} The Crown need not state the reasons for its decision, nor is that decision subject to review by the courts or any formal administrative tribunal.\textsuperscript{192} The government has stated that, in practice, such action is taken in the case of:

(a) minors being taken out of the jurisdiction illegally;

\textsuperscript{186} See Felton v. Callis, [1969] 1 Q.B. at 210; \textit{Going Abroad}, supra note 197, at 3-4.
\textsuperscript{188} Immigration Act, 1971, ch. 77, § 1, sched. 2, § 3(1).
\textsuperscript{189} Williams, supra note 182, at 649-50.
\textsuperscript{191} See, e.g., R. v. Secretary of State, [1967] 3 All E.R. 831, 833 (C.A.) (Denning, J.); Williams, supra note 197, at 647-48.
\textsuperscript{192} Williams, supra note 182, at 648; H. Street, supra note 182, at 294. See 881 \textit{ Parl. Deb.}, H.C. (5th ser.) 265 (1974), where the government rejected a request by Mr. David Steel that it consider establishing “an open appeal procedure for those who are refused passports or whose passports are revoked.” \textit{Id.}
(b) subjects, a warrant for the arrest of whom has been issued;
(c) very rarely, subjects whose conduct "is so notoriously undesirable or dangerous" as to justify refusal or withdrawal;
(d) persons repatriated at the public expense, who have not refunded the cost of their repatriation;
(e) persons belonging to certain categories defined in the statement on "Review Procedure in Passport and Refusal of Entry Cases" in relation to the situation in Southern Rhodesia, circulated on 27th June 1968.\footnote{209 Parl. Deb., H.L. (5th ser.) 860 (1958); see 881 Parl. Deb., H.C. (5th ser.) 265 (1974).}

There have been other instances of political control over passports, including a group of British atomic scientists refused passports in the 1950's in order to prevent them from visiting Moscow.\footnote{Williams, supra note 187, at 648 n.50; H. STREET, supra note 187, at 294.} Street states that only about one passport a year is seized on political grounds,\footnote{H. STREET, supra note 187, at 295.} and between 1945 and 1974 apparently only 27 passports were denied on political grounds.\footnote{GOING ABROAD, supra note 187, at 11.}

4. Review of Passport Controls.—Historically, the issuance of passports has been a matter of unconstrained Royal prerogative. The Crown is under no obligation to state reasons for any action in respect of a passport,\footnote{H. STREET, supra note 187, at 294.} and there is no entitlement to an appeal or review by any court or formal administrative tribunal,\footnote{This reflects, in the specific context of passport cases, the classical position that the exercise of the Royal prerogative is never subject to judicial review. See, e.g., H. STREET, supra note 187, at 294 ("[t]he subject has no legal right to a passport, the Crown can refuse him one without giving any reasons, he is not entitled to a hearing in order to argue his case for the granting of one, there is no court to which he can appeal if he is refused one, and he is not entitled to compensation for any loss suffered because of the refusal"); Williams, supra note 187, at 648 ("These powers of refusal, impounding and revocation are regularly exercised. Like other prerogative acts, the exercise of these powers are not subject to review by the courts, or by any formal administrative tribunal . . . ").} although the Parliamentary Commissioner for Administration may examine all cases except those involving criminal investigations or security considerations.\footnote{881 Parl. Deb., H.C. (5th ser.) 265 (1974). Affected individuals could make representations to the government commission discussed supra note 197. It was empowered to make representations, id.}
It may be necessary, however, to revise this classical statement of the law in light of recent developments relating to judicial review of the Royal prerogative. In Council of Civil Service Unions v. Minister for the Civil Service (the "GCHQ" case), three of five judges in the House of Lords took the view that certain non-delegated prerogative powers are reviewable. The Lords set out no criteria guiding the determination of which powers are subject to review, except that reviewability depends on the nature and subject matter of the power at issue. The panel did hold, however, that decisions made and actions taken by the government in the interest of national security are unreviewable:

Notwithstanding all that has hitherto been said about the reviewability of the prerogative . . . , the House of Lords was unanimous that because the Prime Minister acted "in the interest of national security" in denying GCHQ employees the right to join a trade union, her decision was unreviewable. This national security "trump" appears to be a doctrine of general application and the only question for the court was one of evidence: had the Prime Minister established that this was in fact the reason for her acting without consultation.

Accordingly, assuming that the passport prerogative is by its nature and subject matter amenable to review, decisions to refuse, impound or revoke passports will be immune from judicial review only if the Crown establishes that the decisions were in fact based on reasons of national security. If this is not established, such decisions may be subject to review as illegal, irrational or procedurally non-binding recommendations to the responsible Minister. 767 PARL. DEB., H.C. (5th ser.) 126-30 (1968).

200. [1984] 3 All E.R. 935 (H.L.). This case involved a ministerial order banning union membership by staff members at Government Communications Headquarters ("GCHQ"), which is responsible for ensuring the security of U.K. military and official communications, and providing signals intelligence for the government. A series of walkouts by unionized staff had disrupted GCHQ activities. The union challenged the order; ultimately, the order was upheld by the House of Lords, after some clarification of the law governing judicial review of prerogative powers. Id.

201. Forsyth, Judicial Review, The Royal Prerogative and National Security, 36 N. IRELAND L. Q. 25, 29-30 (1985). It has been argued, however, that Royal prerogative is not as absolute as it once was, and that the Government may not violate basic civil liberties in the name of the Royal prerogative. See Markesinis, The Royal Prerogative Re-visited, 32 CAMBRIDGE L.J. 287, 297 (1973) (quoting Lord Denning in Conway v. Rimmer, [1967] 1 W.L.R. 1031, 1037 (C.A.): "Crown privilege [an evidentiary privilege often claimed by Government officials] is one of the prerogatives of the Crown. As such, it extends only so far as the common law permits. It is for the judges to define its ambit; and not for any government department, however powerful.").
improper.

5. Conclusion.—The basic rule is that British subjects have a substantive right to leave the country for any purpose, including emigration. Although there are some reported instances of passports being denied for political reasons, these instances are infrequent. There is no reported case or known example of anyone's being prevented from leaving the country on the basis of alleged knowledge of state secrets.

C. The Continental Systems

In France, the Federal Republic of Germany, and Switzerland, the continental European countries whose emigration laws we have chosen to study, citizens are free to move about as they please subject to a few rarely enforced laws. The right to travel is guaranteed in the German and Swiss constitutions, and by case law in France.

1. France.—a. Freedom of Movement.—Although not explicitly mentioned in the French Constitution of October 4, 1958, freedom of movement, including the right to emigrate, is considered in the case law as a fundamental right of the individual, and regarded as a civil liberty of constitutional dimension.202 This right has been reaffirmed in a number of recent cases that have broadened the scope of freedom of movement to include the right to leave French territory.203 An important judicial decision has held that “the fundamental right of movement is not limited to the national territory but also includes the right to leave it.”204

As the principle is not mentioned in the French constitution or statutes, the cases have based the holding that freedom of movement is a fundamental right upon different sources. Often cited are Article 12(2) of the International Covenant on Civil and Political Rights205 and Article 2(2) of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,206 which

provides that "everyone shall be free to leave any country including his own."\textsuperscript{207} The Tribunal des Conflits, the court that passes on questions of jurisdiction between administrative and judicial courts, has held that the freedom of movement is rooted in the 1789 French Declaration on Human Rights, though it is not expressly mentioned in its text.\textsuperscript{208} Finally, France belongs to the European Economic Community, whose members established in the Treaty of Rome\textsuperscript{209} that freedom of movement of persons, services, and assets among member states is a fundamental principle of European Community Law.

\textbf{b. Restrictions on Freedom of Movement.}—In order to be able to leave the country, it is usually necessary to obtain a passport (though not for travel between EEC countries and between France and certain non-EEC countries, mostly former French colonies). When passport legislation was first enacted in 1792, and for more than 150 years thereafter, the granting of passports was entirely subject to the discretionary power of the administrative authorities, which did not have to justify a refusal, and a denied applicant had no recourse to an administrative court. Today, the administrative courts have jurisdiction over the refusal of passports, and the law requires that a passport refusal be justified.\textsuperscript{210} The scope of review of the administrative courts, which was at first limited to errors of law, accuracy of facts and the like, has now been extended by the Conseil d'Etat (the Administrative Supreme Court) to include interpretations by the administrative authorities that are clearly erroneous.\textsuperscript{211} If a passport denial by the administrative authorities is "without the color of law," then the judiciary has jurisdiction over the matter. Exercising this authority,\textsuperscript{212} the judiciary has overturned denials

\begin{footnotes}
\textsuperscript{207} European Convention, supra note 38.
\textsuperscript{210} Law of July 11, 1979, No. 79-587, 1979 Dalloz-Sirey 562.
\textsuperscript{211} See Judgment of Feb. 19, 1975, Conseil d'Etat, 1975 D.S. Jur. 435, where a member of the Organization for the Liberation of Brittany was suspected of having committed violent acts and was refused a passport on the ground that French public security could be threatened by his departure to a foreign country. The Conseil d'Etat affirmed, finding the lower court decision refusing the passport not clearly erroneous.
\end{footnotes}
of passports by administrative authorities. In the *Judgments of November 28, 1984*,213 administrative authorities denied a passport on the grounds that the applicant owed the French Treasury money. The Cour de Cassation cited the European Convention on Human Rights in holding that such a denial was without the color of law and constituted a grave breach of the individual's freedom of movement. As French courts have narrowly construed the phrase "threat to national security," passport refusals on this ground are rare, and litigation of the issue still rarer. One recent case established that the fact that a passport applicant had been convicted of violating a narcotics law and was still suspected of being a drug addict did not constitute a sufficient "threat to the national security" to justify denying him a passport.214

**c. Possession of State Secrets.**—There is no definition in French law of state secrets. The French Criminal Code refers to secrets of national defense,215 but these are defined only tautologically in Article 72 as "information, objects, documents or processes which must be kept secret for the interest of the national defense."216 The Criminal Code makes illegal the disclosure of such secrets, gathering them with the object of disclosing them to a foreign state, and destroying them for a foreign state. These acts are treason, if committed by a French national, or espionage, if committed by a foreigner.217

It does not appear that the possession of such secrets alone has ever limited the right of an individual to emigrate or leave French territory.

2. Federal Republic of Germany.—Article 2, paragraph 1 of the German constitution grants German citizens the right to emigrate as part of the general freedom accorded to German citizens.218

A German citizen is obliged to have a passport in order to leave the country.219 The passport law grants every citizen the right to a passport, unless one of the grounds for denial or withdrawal applies.220 These grounds include attempting to leave to avoid criminal

215. CODE PENAL [C. PEN.] arts. 72, 73, 75.1, 76.
216. C. PEN art. 72.
217. C. PEN. art. 72, 73.
220. *Id. at §§ 7, 8.*
prosecution, taxes or obligations to support children or former spouses. Additional grounds include cases where the facts justify the assumption that the applicant or passport holder endangers the interior or exterior security or other substantial affairs of the Federal Republic of Germany or of a German state.\(^{221}\) This last provision was held to be constitutional by the German Constitutional Court in 1957. The German passport authority denied an application to extend the passport of a German citizen under Section 7(1)(a), apparently as a result of speeches he made abroad while participating in certain conferences. The Constitutional Court upheld the decision of the Federal Administrative Court confirming the passport authority’s denial of the application to extend the passport.\(^{222}\) The law appears to have been rarely used in the last 30 years, however.\(^{223}\)

There has been little litigation on the right of a German citizen to emigrate. In 1973, the Federal Administrative Court decided a case on the related right to travel,\(^{224}\) which is also based on Art. 2(1) of the German constitution. The court upheld the denial of a request by a soldier to visit a relative in East Germany. The soldier had security clearance of level II, the second highest level. The regulation concerning travel by soldiers to communist countries was pursuant to the Soldiers Law, and disallowed soldiers with a level II security clearance from travelling to these countries except in extraordinary cases. The court held that this restriction on travel by soldiers with such a high security clearance was not inconsistent with the constitutional right to travel, especially since the law allowed exceptions for certain cases.\(^{225}\)

3. Switzerland.—The Swiss constitution grants every Swiss citizen the right to reside anywhere in Switzerland.\(^{226}\) The right to emigrate flows from this right and is constitutionally protected, though it is not granted explicitly.\(^{227}\) The only exception the constitution contemplates to the right to emigrate is for those who have been

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\(^{221}\) Id. at § 7(1)(a)-(d)(as amended).

\(^{222}\) See Judgment of Jan. 16, 1957, Bundesverfassungsgericht, 6 BVerfGE 32.


\(^{225}\) Id.

\(^{226}\) CONSTITUTION FEDERALE [CST] art. 45.

\(^{227}\) J. F. Aubert, TRAITE DE DROIT CONSTITUTIONNEL SUISSE 389 (1967). See also Y. Hangartner, GRUNDEGE DES SCHWEIZERISCHEN STAATSRECHTS (Zurich 1982); Haefelin & Haller, SCHWEIZERISCHES BUNDESTAATSRECHT (Zurich 1984).
deprived of their civil rights by virtue of conviction by a criminal or military court. No reference is made to those possessing state secrets.\textsuperscript{228}

The Swiss passport law\textsuperscript{229} entitles every Swiss citizen to a passport unless one of the specific statutory justifications for denying a passport applies. These statutory exceptions to entitlement are limited to incompetents and to members of the military who are indicted, owe taxes, or lack the necessary leave. Also, under Swiss law a suspected criminal can be prevented from leaving Switzerland by the authorities until criminal charges have been settled.\textsuperscript{230}

There appear to be no cases concerning the constitutional right to emigrate or the right to a passport. The question seems rather to have been: Who may get into Switzerland, not who may get out.

4. Conclusion.—In each country examined the right to emigrate is provided for by the fundamental law of the state. Restrictions on the right to travel appear to be imposed only under rare circumstances. There are procedural safeguards available to review passport laws or administrative actions that may limit travel.

D. Israel

1. General Policy.—The general provisions regulating travel from Israel are stated in the Schedule to the Emergency Regulations (Foreign Travel) (Extension of Validity) Ordinance No. 7.\textsuperscript{231} These Regulations were, in their original version, issued in November, 1948, a few months after the establishment of the State, while Israel was fighting its War of Independence.

Regulation no. 1, entitled "Restrictions on Foreign Travel,"\textsuperscript{232} set forth the general policy established by the 1948 Foreign Travel Regulations. It provided:

No Person shall go abroad save under an exit permit from the

\begin{itemize}
\item\textsuperscript{228} Swiss regulation of those possessing state secrets is limited to requirements that the secrets not be disclosed and that they not be gathered for the benefit of a foreign state or otherwise to prejudice Switzerland. \textit{Code penal suisse} [\textit{Cp}] (Swiss Penal Code) arts. 272, 273, 274. The rightful possession of secrets is not an offense under Swiss law.
\item\textsuperscript{229} \textit{Verordnung über den Schweizerpass, Systematische Sammlung des Bundesrechts} [\textit{SR}] 143.2.
\item\textsuperscript{230} \textit{SR 312.0} (Federal Penal Procedure art. 44).
\item\textsuperscript{231} Emergency Regulations (Foreign Travel)(Extension of Validity) Ordinance No. 7 sched. 5709/1948 reprinted in \textit{Ition Rishmi} (Official Paper) no. 33 of the 17th Cheshvan, 5709 (November 19, 1948) (hereinafter Foreign Travel Regulations). Statutory provisions cited herein are taken from the official English translation of the Laws of Israel.
\item\textsuperscript{232} \textit{Id.} at reg. 1.
\end{itemize}
WHO MAY LEAVE

Minister of Immigration or a person appointed by him for the issue of exit permits.233

The Foreign Travel Regulations were amended in 1961 and Regulation no. 1 was substantially amended.234 The amended Regulation no. 1, now entitled "Departure by Passport Only," stated:

A person leaving for abroad shall, at the time of leaving, produce to a frontier control officer a valid passport or laissez-passer or any other document issued to him for that purpose by the Minister of the Interior.235

Thus, the generally restrictive policy of the 1948 Regulations was replaced by a more liberal one. The significance of the change is evident in the opening of Regulation no. 1: the 1948 prohibition of "[n]o person shall go abroad save under"236 was replaced in 1961 by "[a] person leaving for abroad shall,"237 which presumes that any person has the right to leave the country at his will.

The freedom to leave Israel also was established by the Supreme Court of Israel,238 in a 1953 decision:

The citizen's freedom of movement outside the country is a natural right, recognized, unquestionably, in every democracy — and our country is one of these and no special qualification is needed for a citizen in order to be entitled to this "privilege."239

2. Restrictions on Travel From Israel.—The basic requirement for leaving Israel is a valid passport. Section 2(a) of the Passports Law,240 states that a passport shall be given to an Israeli citizen following his application. Section 6 of the Passports Law grants the Minister of the Interior the discretion to:

(1) refuse to grant or extend the validity of a passport;

233. Id.
234. SEFER HA-CHUKKIM (The Book of Laws) no. 346, 7th Tammuz, 5721 (June 21, 1961) at 166.
235. Id.
236. Foreign Travel Regulations, supra note 231 (emphasis added).
237. SEFER HA-CHUKKIM (The Book of Laws) no. 346, 7th Tammuz, 5721 (June 21, 1961) at 166 (emphasis added).
238. The Supreme Court of Israel functions in three capacities: Court of Criminal Appeals, Court of Civil Appeals and High Court of Justice. Sitting in its latter capacity, the Supreme Court deals with petitions against the State's entities and authorities in respect of "acts of government" and exercises judicial review of administrative orders and decisions.
240. SEFER HA-CHUKKIM no. 102, 24th Tammuz, 5712 (July 17, 1952) at 260.
(2) attach conditions to the grant or the extension thereof;
(3) cancel or shorten the passport's period of validity or order
the surrender thereof; and
(4) limit the range of countries for which it is to be valid.1

No example — in the case law or otherwise — has been found of a
refusal to issue a passport to a potential emigrant. The restrictions
that have been allowed may be classified as follows:
(i) restrictions on leaving for enemy countries;
(ii) restrictions on persons serving in the military forces; and
(iii) restrictions aimed at preventing impairment of the security
of the state.

3. Leaving for Enemy Countries.—The power to control visits of
citizens to enemy countries was granted to the Minister of the Inter-
ior in Regulation no. 5 of the Foreign Travel Regulations.

A person shall not leave for any countries specified in section
2A of the Prevention of Infiltration (Offences and Jurisdiction)
Law, save with the permission of the Minister of the Interior, and
an Israeli national or Israeli resident shall not enter any of those
countries in any way save with permission as aforesaid.2

Section 2A of the Prevention of Infiltration (Offences and Jurisdic-
tion) Law, referred to by Regulation 5, lists Arab countries that
were considered to be in a state of war with Israel. The list has been
narrowed down to the countries surrounding Israel, plus Iraq and
South Yemen.3 Significantly, the list does not include other Arab

241. Id. at sec 6. Foreign Travel Regulations, supra note 231.
242. Id.
64.
244. Id. The Supreme Court has dealt with Regulation 5 in the context of Arab citizens
whose applications to travel through to Arab countries for purposes of a pilgrimage to Mecca
have been rejected. The Court has held that the law (Regulation 5) expressly declared that
Israelis, as a general rule, would not be allowed to visit the countries involved and as permis-
sion to visit those countries is, according to the law, an exception, the Court would be reluctant
to overrule the Minister of the Interior's discretion. See Bagatz 488/83, Baransi & others v.
The Minister of the Interior, 35(I) P.D. 249 (1981). However, the Court has also stated that
the percentage of the applications to make pilgrimage to Mecca that have been approved
(99.78% in 1980 and 98.74% in 1983) was a prima facie indication that the Minister had
exercised his discretion properly. Id. at 251. In Taha & others, Judge Ben-Porat stated:
In addition, a prima facie evidence to the [defendants'] good faith can be found in
the undeniable fact that out of the 4700 applications to make pilgrimage submitted
this year, only 10 have been rejected, including the seven petitioners'. This is a
substantial guarantee for a consideration on the merits. The conclusion of good faith
is further fortified by the departure permit that the Minister is ready to grant to one
countries, nor does it restrict Israelis from traveling to other countries that have not recognized Israel's existence or that do not maintain diplomatic relations with it.

4. Persons Serving in the Military.—Regulation no. 8 of the Foreign Travel Regulations\textsuperscript{246} prohibits a "person of military age" from leaving the country without a permit from the Minister of Defense or a certificate that he does not belong to the Reserve Forces. Section 31 of the Defense Service Law\textsuperscript{246} repeats the rules set forth in Regulation 8 of the Foreign Travel Regulations, but broadens its applicability to a "person designated for defense service."\textsuperscript{247} Such "person" is defined as an "Israel national, or a permanent resident, who has not yet reported for defense service and is" either a male 17-54, or a female 17-38 years old (with certain exceptions recognized by the Defense Service Law).\textsuperscript{248} It may be assumed that, if any restrictions on leaving the country were to be imposed on persons possessing "state secrets," those recently released from compulsory military service (now belonging to the reserve forces) would be the target of such restrictions. However, such a policy does not appear to have been adopted. Indeed, according to information furnished by attorneys with the Association for Civil Rights in Israel, there is no known instance of these provisions ever being invoked to prohibit anyone from leaving the country.\textsuperscript{249} It is quite common that many young Israelis travel abroad soon after completing their compulsory military service.\textsuperscript{250}

5. Restrictions to Prevent Impairment of the Security of the State.—Regulations 6 ("Prohibition of Departure for Security Reasons") and 7 ("Attachment of Conditions to Permission") of the Foreign Travel Regulations provide:

6. The Minister of the Interior may prohibit the departure of

\footnotesize
\textsuperscript{245} Foreign Travel Regulations, supra note 231.
\textsuperscript{246} Defense Service Law, 5719-1959 (Consolidated Version) reprinted in SEFER HA-CHUKKIM No. 296, 21st Elul, 5719 (Sept. 24, 1959) at 286. A later version of this statute, Defense Service Law, 5746-1986 (Consolidated Version), did not revoke the substance of any relevant provision of the former version. Section 31 of the 1959 version is numbered as section 43 of the 1986 Defense Service Law.
\textsuperscript{247} Defense Service Law, 5719-1959 (Consolidated Version) reprinted in SEFER HA-CHUKKIM No. 296, 21st Elul, 5719 (Sept. 24, 1959) at 286.
\textsuperscript{248} Id. § 1.
\textsuperscript{249} Conversations with Neta Goldman, an attorney in the legal department of the Association for Civil Rights in Israel (June 1987)[hereinafter Conversations].
\textsuperscript{250} Id.
any person from Israel if there is reason to apprehend that his de-
parture may impair the security of the State.\footnote{251}

7. Where the Minister of the Interior is authorized to grant
permission, or impose a prohibition, under regulations 4-6, he may
grant the permission, or revoke the prohibition, subject to such con-
ditions, restrictions and limitations as he may think fit.\footnote{252}

The wording of Regulation 6 is broad. The Regulation on its face
does not limit the discretion of the Minister of the Interior as to the
scope of the term “security of the State”; nor does it direct him as to
circumstances amounting to “apprehension” of impairment of the
state’s security.

According to the Association for Civil Rights in Israel, the
counterpart granted in Regulation 6 has rarely been exercised.\footnote{253} When
exercised, it has generally been applied to Arab citizens of Israel
who intended to leave the country to participate in meetings or con-
fferences of bodies acting against Israel (e.g., P.L.O. conferences).\footnote{254}

The exercise of Regulation 6 was recently reviewed by the Is-
raeli High Court of Justice in \textit{Daher v. Rabbi Yitzhak Peretz, Min-
ister of the Interior}.\footnote{255} The Court was requested to overrule an order
issued by the Minister of the Interior prohibiting Daher’s departure
from the country for one year. Daher conceded that he had met with
P.L.O. leaders on previous trips abroad, but claimed that his pro-
jected trip was for lawful fundraising. The Israeli Minister, however,
contended that Daher’s projected activities were connected to P.L.O.
activities in Israel.\footnote{256}

The opinions of the Court emphasized the importance of the
citizens’ freedom of movement. Drawing upon the “clear and present
danger” test of U.S. jurisprudence,\footnote{257} the Supreme Court adopted as
its test whether an “honest and serious apprehension to the security
of the state”\footnote{258} existed, and then reviewed the facts of the case in
light of this standard. Although each of the Judges agreed to reject
the petition and approve the Minister’s order, the opinions empha-

\begin{itemize}
  \item \footnote{251} Foreign Travel Regulations, \textit{supra} note 231.
  \item \footnote{252} \textit{Id.} Regulation 4 was repealed in 1978; Regulation 5 was cited above under the
  subsection “Restrictions on Leaving for Enemy Countries.”
  \item \footnote{253} Conversations, \textit{supra} note 275; Bagatz 448/75, Daher v. Rab. Yitzhak Peretz,
  \item \footnote{254} Conversations, \textit{supra} note 274.
  \item \footnote{255} Bagatz 448/75, 40(11) P.D. 701 (1986).
  \item \footnote{256} \textit{Id.} at 705.
  \item \footnote{257} \textit{Id.} at 709.
  \item \footnote{258} \textit{Id.} at 719.
\end{itemize}
sized that the Court’s approval of the Minister’s decisions would depend on the specific circumstances of each case.259

6. Conclusion.—The right of Israeli citizens to leave the country is recognized by statute and the Supreme Court of Israel. While that right is subject to restrictions, the restrictions are defined and limited and appear never to have been invoked to prevent emigration. The restriction on leaving for enemy countries is not, by its nature, a limitation on emigration. The power to restrict Israelis serving in the military forces from leaving the country has apparently never been used. The prohibition of departure for security reasons, the most directly relevant restriction, has never been used to prevent emigration from Israel, nor to impose restrictions for protecting “state secrets.”

Although Israel has been in a constant state of war since its independence, this has not been used as a pretext to limit Israelis (including Arab citizens) from leaving the country. There is no record that the state authorities have attempted to restrict individuals from leaving the country on the grounds that they possess state secrets. Finally, the power of the government to impose a restriction on the right to travel is subject to review by the Israeli Supreme Court, whose decisions appear to establish that any restriction must be limited to exceptional circumstances and facts, where the threatened conduct poses a reasonable basis for apprehending danger to the security of the state.

III. THE U.S.S.R.

Freedom of movement is not one of the rights guaranteed by the Soviet Constitution, and the ability of Soviet citizens to emigrate is regarded under Soviet jurisprudence as a state-granted privilege. Although some Soviet legal scholars acknowledge the existence of a right of Soviet citizens to initiate the process of emigration, all are careful to emphasize that the outcome of such initiative depends entirely on the will of the state.260 Soviet jurisprudence views human

259. Id. at 714.
260. Thus, one commentator wrote:

Of course, it should be kept in mind that the right to be a Soviet citizen or the right to renounce Soviet citizenship are subjective rights of a peculiar juridical nature. The realization of these rights depends eventually on the sovereign will of the state itself, expressed by its competent organs and regulated (in varying degrees of particularity) by legislation.

Vitruk, Grazhdanstvo kak pravovaia sviaz’ lichnosti s gosudarstvom, in PROBLEMY GOSUDARSTVA I PRAVA (Citizenship as a Legal Connection Between the Individual and the State, in THE ISSUES OF THE STATE AND THE LAW) 19 (1976). See also Polianskil, Printzipy
rights, such as the freedoms of speech, religion, association and movement, as privileges granted by the state, not as fundamental or "natural" rights possessed by a person regardless of the will of the state.\textsuperscript{681} Soviet emigration law is consistent with this view.

A. Statutory Provisions

Until 1986, the only Soviet decree concerning the issuance of exit visas and foreign passports was without any criteria for their grant or denial.\textsuperscript{682} The action to be taken on applications was entirely in the discretion of the governing Soviet administrative organs, the Ministry of Foreign Affairs and the Ministry of the Interior.\textsuperscript{683}

A new chapter was added to this decree, effective January 1, 1987, entitled "The Consideration of Requests to Enter or Leave the USSR on Private Business."\textsuperscript{684} In the seventy years of the Soviet regime, this is the first statute that sets forth the circumstances under which Soviet citizens may be permitted to leave the U.S.S.R. on "private business." The prime reason for being permitted to leave the U.S.S.R. under the 1987 decree is family reunification or other


Karl Marx and Friedrich Engels defined law as the will of the dominating class raised to the level of law, as determined by material conditions of life. Applied to human rights, this definition means that the state cannot guarantee the realization of the rights whose real ensurance is not prepared by the course of the economic development of a given society. Human rights mature deep inside the socio-economic structure of the state and are a product of its development. Their fundamental source is the material conditions of society's life.

\textit{id. See also Kudryavtsev, The Truth About Human Rights, 5 HUM. RIGHTS 193, 199 (1976) (human rights are opportunities "guaranteed by the state to enjoy the social benefits and values existing in a given society").}

\textsuperscript{262} Decree No. 660, SOBRANIE POSTANOVLENI I PRAVITELSTVA S.S.S.R. (Compilation of Decrees of the Council of Ministers of the U.S.S.R.) [SP SSSR] (1959) no. 13, item 80, \textit{as amended by Decree No. 801, SP SSSR (1970) no. 18, item 139. Article 18 of the 1970 decree, simply provided that "[t]he issuance of documents for exit from the USSR, residence abroad, and return to the USSR shall be in the established procedure upon the written applications of the ministries, departments, or organizations of the USSR concerned, as well as upon the applications of citizens who are going abroad for private business." Translated in, W.E. Butler, The Soviet Legal System: Selected Contemporary Legislation and Documents 556 (1978).}

\textsuperscript{263} Decree No. 801, SP SSSR (1970) no. 18, item 139, art. 7.

\textsuperscript{264} Decree No. 1064, SP SSSR (1986) no. 31, item 163, \textit{translated in Feldbrugge, The Soviet Law on Emigration, 17 SOVIET JEWISH AFF. 9, 21-23 (1987).}
family business.\textsuperscript{265} There is also a general provision of "other worthy reasons," but the meaning of that provision is ambiguous.\textsuperscript{266}

Similarly, for the first time in Soviet history, this new chapter sets forth under what circumstances Soviet citizens may not leave the country,\textsuperscript{267} and in what circumstances the permission to leave may be refused.\textsuperscript{268} Although, according to various Soviet and foreign

265. Article 21 of the new law provides, in relevant part:

Requests to enter or leave the USSR on private business (reunification with family members, meeting with close relatives, concluding a marriage, visiting seriously ill relatives, visiting burial places of close relatives, resolution of inheritance questions, and other worthy reasons) are filed, as the case may be, with diplomatic representations or consular agencies of the USSR or with internal affairs organs of the USSR according to the place of residence of the citizen or person without citizenship.

Translated in Feldbrugge, supra note 264, at 21-22. Article 24 provides, in relevant part:

A request to leave the USSR for reunification abroad with members of one's family will be considered on the basis of an invitation by a husband, a wife, a father, a mother, a son, a daughter, a brother, or a sister, certified by the competent authorities of the foreign state concerned, and [on the basis] of notarially certified statements of family members (including a former spouse, if there are minor children from the common marriage), to the effect that there are no unfulfilled obligations towards them as provided by the legislation of the USSR.

Id. The Soviet government is not the first to limit the allowable emigration principally to family reunification. In Fascist Italy, for example, beginning in 1928, "passports for permanent emigration were issued only upon receipt of a letter of invitation from a relative (later limited to immediate family)." A. DOWTY, supra note 3, at 78 (1987)(citing Oblath, Italian Emigration and Colonization Policy, 23 INT'L LAB. REV. at 809-10 (1931)).

266. Feldbrugge, supra note 264, at 9, 12.
267. Article 25 provides, in part:

Leaving the U.S.S.R. on private business is not allowed to a citizen of the Union of Soviet Socialist Republics:

a. if he is privy to state secrets or if there are other reasons involving state security - until the circumstances which prevent exit have become ineffective;

b. if this would affect significant rights and legitimate interests of other citizens of the U.S.S.R.;

c. if he has unfulfilled duties towards the state or financial obligations connected with material or legal interests of the state, co-operative or other social organizations - until these duties and obligations have been fulfilled;

d. if there are legitimate reasons to start criminal proceedings against him - until the end of the proceedings;

e. if he has been convicted of a crime - until he has served his penalty or has been released from punishment;

f. if it has been established that the inviting person is staying abroad in violation of the procedure for leaving the U.S.S.R. or staying abroad - until such circumstances have been regularized.

Translated in Feldbrugge, supra note 264, at 22 (emphasis added).

268. Id. Article 25 further provides:

Leaving the U.S.S.R. on private business may be refused to a citizen of the Union of Soviet Socialist Republics:

a. in the interests of safeguarding the protection of public order, health, or the
reports, these criteria have been in use for some time,\(^2\) they had never been codified.

Significantly enough, conditions under which exit visas will be denied under the new law are almost identical to the conditions contained in the Citizenship of the U.S.S.R. Act of 1978,\(^2\) reciting the circumstances under which Soviet citizens will not be allowed to renounce their citizenship.\(^2\) Thus, emigration and renunciation of Soviet citizenship seem to be inextricably connected by implication, if not by the express provisions of Soviet law.\(^2\)

This connection was more apparent in the so-called “opt” treaties, concluded by the U.S.S.R. in the first years of its existence. The

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morality of the population - until the circumstances which prevent exit have become ineffective;

b. if during a previous stay abroad he engaged in activities which violated the interests of the state, or if violations of customs or currency legislation by him have been established;

c. if he provided false information about himself when filing his request to leave.

*Id.* (emphasis added).


Renunciation of U.S.S.R. citizenship shall be sanctioned by the Presidium of the Supreme Soviet of the U.S.S.R.

Renunciation of U.S.S.R. citizenship may be refused if the applicant has not fulfilled his (her) obligations to the state or his (her) property commitments connected with the substantive interests either of citizens or of state, co-operative or other public organizations.

Renunciation of U.S.S.R. citizenship shall not be sanctioned if the applicant is under indictment or if there is a court judgment against him (her) liable to enforcement, or if the person’s renunciation of U.S.S.R. citizenship is against the interests of the national security of the U.S.S.R.”

*Id.* (emphasis supplied), translated in V. SHEVTSOV, CITIZENSHIP OF THE USSR: A LEGAL STUDY 275 (1980).

272. It is the regular practice of the Soviet emigration organs to require that a Soviet citizen renounce his citizenship upon issuance of an exit visa for permanent residence in a capitalist country. Although the practice is informal, it involves a sizeable fee of 500 rubles. *See Ginsburgs, Emigration and Immigration*, in *ENCYCLOPEDIA OF SOVIET LAW* 275 (F.J.M. Feldbrugge, G.P. Van Den Berg, W. Simons eds. 1985); G. GINSBURGS, THE CITIZENSHIP LAW OF THE U.S.S.R. 304 (1984); J. HAZARD, W. BUTLER & P. MAGGS, THE SOVIET LEGAL SYSTEM 104 (1977). *See also* 2 SOTSIALISTICHESKAIA ZAKONNOST (Socialist Jurisprudence) 86 (1971) (concerning an amendment to a 1942 edict, “On the rates for state fees,” providing that the fee for issuance of a foreign passport to a person departing abroad for private reasons is 1 ruble; the fee for certification of withdrawal from Soviet citizenship for residents of the U.S.S.R. Intending to depart to capitalist countries is 500 rubles).
treaties provided an option to renounce Soviet citizenship for people with political and family alliances to other countries who happened to be in the Soviet Union because of some extraneous events (e.g., annexation of parts of Poland and Germany or of the entire territories of Baltic states by the Soviet Union).\textsuperscript{273} Under these treaties, "[d]eparture from the country whose citizenship was being renounced [was] essential in renouncing one nationality and opting for another."\textsuperscript{274}

The concept of inseparability of renunciation of Soviet citizenship and emigration from the U.S.S.R. stems from the historical development of the Russian and Soviet laws, which have always regarded citizenship as a "belonging" to a particular state, rather than a bundle of mutual rights and obligations of the citizen and the state. Therefore, the opportunity to travel, internally and abroad, has always been a privilege that the state may grant or withhold at its discretion.\textsuperscript{275}

The decrees with respect to the issuance of exit visas and renunciation of citizenship approach the possibility of emigration as an exception from the general rule that the state may keep any of its citizens inside its borders. This approach is particularly apparent in the provisions concerning the right of the state to withhold permission to emigrate (or to renounce Soviet citizenship) where granting it might harm state interests, particularly those connected with "n-
tional security” or “state secrets.” Neither decree defines these terms, and the discretion retained by the state appears to be without limit.

The only definition in Soviet law of “state secrets” is contained in a 1956 decree pertaining to treason as a criminal offense. According to the decree, state secrets include, among other things, scientific work, both military and civil, until such time as its results are published. The decree also provides for a classification by the Council of Ministers of the U.S.S.R. of other matters constituting “state secrets.” Divulgence of state secrets by persons who learned the information because of their position or work, barring treason or espionage, is punishable by deprivation of freedom for a term of two to five years, or five to eight years if such divulgence produced serious consequences.

The new emigration law differs from the criminal law concerning state secrets in that it does not specify any definite period after which information ceases to be a “state secret.” Article 25(a) simply provides that exit visas shall be denied “until the circumstances which prevent exit have become ineffective.”

B. Practice

Accordingly, there is no provision for appointing a competent organ to determine what areas of work or what organizations may be subject to the secrecy restriction; there is nothing to ensure that people who embark upon a particular employment are apprised of the real or potential secrecy involved in the work; there are no affirmative criteria to enable a visa applicant to prove that he has not been “privy to state secrets.”

There have not been any regulations published under the new

276. See supra notes 265, 267, 270.


278. The decree does not specify what constitutes “publication” or its equivalent, however. See Case histories collected by authors, infra note 284 (on file at Hofstra Law Review) (for examples of engineers and scientists who were denied exit visas despite prior publications of their work). The 1956 decree replaced a 1947 decree, which contained similar language with respect to “state secrets,” except that it did not provide for any time limits on classification of scientific works as “state secrets.” P. Sov. Min. SSSR, June 8, 1947; UGOLOVNI KODEKS RSFSR (Criminal Code) [UK RSFSR] art. 586.

279. UK RSFSR art. 75.

280. See supra note 267.
WHO MAY LEAVE

emigration law. Further, there is not any official compilation of court cases or administrative decisions in which exit visas have been granted or refused. In the absence of any regulations or officially published case law, the only guidance in these matters is provided by public statements of Soviet officials and by accounts of Soviet emigrants and citizens whose exit visa applications have been denied for secrecy reasons.

The President of the U.S.S.R. Academy of Sciences, Mstislav Keldysh, stated in 1972 that scientists engaged in "secret" work would be prevented from emigrating for five years after the termination of their "secret" activities.\(^{281}\) It has also been asserted that men who had served in the Soviet army may not apply for exit visas until at least three years after the service.\(^{282}\) The head of the Soviet government, Mikhail Gorbachev, has stated on at least two occasions that the maximum period of secrecy limitation, even in the most serious cases, should not exceed ten years.\(^{283}\)

However, Soviet emigration practice contradicts these authoritative pronouncements. Because of the almost total absence of published official decisions, to determine Soviet practice we have had to examine the case histories of particular individuals refused permission to leave the Soviet Union on the grounds of access to or knowledge of "state secrets" as contained in files collected by various western organizations. While the available information is often sketchy and anecdotal, it is, in the absence of official reports, all that is available. The case histories reviewed by the authors\(^{284}\) establish that the

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283. In October 1985, Mr. Gorbachev gave interviews to L’Humanité and French television in which he stated that matters of family reunification cannot be solved when “there is a problem connected with . . . state secrets. [There are] those in our country who are unable to get a permit to leave for five to ten years, but where there is really a necessity to unite, eventually they get it and leave.” This statement was called a “mistake” by Gennadi Gerasimov, the Soviet Foreign Office spokesman, in his briefing of foreign press on February 19, 1987. Mr. Gerasimov said that some categories of state secrets could last for thirty years and possibly the lifetime of the persons privy to such secrets. \textit{See Soviet Jews Ponder Exit-Visa Denials}, N.Y. Times, Nov. 24, 1987, at A3, col 1. This statement contradicts not only Mr. Gorbachev’s interviews, but also the Soviet legal definition of “state secrets” as classified work that has not been published yet. Mr. Gerasimov seems to make no such distinction. However, Mr. Gorbachev reaffirmed the five to ten year term in his meeting with the delegation of U.S. Congressmen as recently as April 1987. \textit{See Keller, House Group in Soviet Hopeful on Arms}, N.Y. Times, Apr. 19, 1987, § 1, at 14, col 1; \textit{Scheuer Meets with Gorbachev and Other Top Soviets About Refuseniks}, Jewish Press, May 22, 1987.

284. Published cases, decisions, and regulations facilitate the examination of the right to
practice followed has been consistently to deny exit visas on grounds of "state secrets" to persons in ordinary walks of life and under circumstances where the claim of "state secrets" appears farfetched if not absurd.

Emigration applicants rarely receive written responses to their applications. Verbal responses are the rule, and detailed explanations, beyond the fact of alleged access to or possession of state secrets, are usually not given. The case histories show that the average Soviet applicant denied a visa on state secret grounds has been waiting for permission to leave for over ten years. Others denied visas have not been in the positions that allegedly gave them contact with or access to secret information for more than ten years. Others were denied the right to emigrate, even though employers or colleagues informed Soviet authorities that the individual had no contact with secret or classified information, or even though their allegedly secret work has been declassified through publication or pursuant to international agreements. Still other emigration applicants had no direct personal contact with or access to secret information, but were denied permission to emigrate because of a relative's alleged possession of state secrets.

Arbitrariness in administrative discretion is further evidenced by the inconsistency with which Soviet emigration authorities treat exit visa applicants whose work and family circumstances are almost identical. Thus, in some instances, the emigration authorities cause separation of families, in contradiction to the family reunification policy officially maintained by the Soviet government; in others the authorities insist that the whole family remain in the country because one of its members (even though dead or not in

emigrate under the municipal law of the six nations discussed in Part II. Understanding Soviet practices is severely complicated by the absence of such materials. As part of our review of Soviet emigration practices, information was gathered on over seventy individuals denied emigration on the grounds of some alleged contact with secret or classified information. For each individual we tried to discover information most relevant to this report, such as data concerning the individual's contact with secret or classified information and the presence of family members outside the U.S.S.R. Sometimes, however, such basic information as a person's age or employment history was unavailable. The case histories appeared in an appendix to the report and are on file and available at the offices of the Hofstra Law Review. The case histories were culled from the files of the National Conference on Soviet Jewry (U.S.A.), the Israel Public Council for Soviet Jewry, the National Council on Soviet Jewry (U.K), and the Committee of Concerned Scientists, among other organizations.

285. Id.
286. See supra notes 265 (Article 21 of the new emigration law); 283 (interview with M. Gorbachev); 269 (interviews with B. Shumilin, Deputy Minister of Internal Affairs and K. Zotov, head of the Department of Visas and Registrations (OVIR)).
close communication with the visa applicants) allegedly had had access to state secrets. This contradictory treatment of applicants in similar circumstances illustrates the apparently unrestrained latitude that is inherent in the Soviet bureaucracy.

This bureaucratic discretion appears to be virtually unchecked, as an independent appeal on matters of emigration is not available under the Soviet law. Article 4 of the Principles of Civil Procedure of the U.S.S.R. and the union republics, approved by the U.S.S.R. Supreme Soviet on December 8, 1961, provides that "the courts shall have jurisdiction over suits upon complaints concerning incorrect entries in electoral rolls, acts of administrative organs in connection with the imposition of fines and other cases arising out of administrative legal relations referred by the law to the jurisdiction of judicial organs."288

A commentary on this Article states that "this enumeration is not exhaustive. The Principles foresee that the law may also make the courts competent with respect to other matters arising out of administrative legal relations."289 So far, emigration matters have not been added to the list.290 Nor is there any provision in the new emigration decree for an extra-administrative review of cases where exit visas have been refused. Indeed, such review would be impossible because the law does not mandate a written response concerning the reasons for the refusal.291

288. Id.
290. G. Ginsburgs, supra note 272, at 330. Indeed, the courts refuse to consider any matters that may be even tangentially connected with the decision-making process of the emigration officials. According to one account, a group of Soviet scientists who had been refused exit visas on the grounds of secrecy petitioned various Moscow courts, in identical terms, to declare their security clearances invalid on a purely contractual basis (i.e., when applying for a secret job they were not apprised of the possible restriction on their right to emigrate as one of the consequences of their employment). The courts refused to consider these claims, each court setting forth a different substantiation for its decision. On appeal, the Moscow City court affirmed all the decisions and all the various grounds on which the decisions were based. See V. Chalidze, PRAVA CHELOVEKA I SOVETSKII SOVUZ (HUMAN RIGHTS AND THE SOVIET UNION) 117-18 (1974).
291. Article 28 of the statute provides:
- The outcome of the consideration of the request and, in case of a refusal, also the grounds for the latter, are brought to the notice of the applicant.
Decree No. 1064, SP SSSR (1986) no. 31, item 163, translated in Feldbrugge, supra note
C. Conclusion

Soviet emigration law today does not recognize the right of a citizen to emigrate. Broad administrative discretion to deny an exit visa on undefined and unexplained assertions of “national security” or possession of “state secrets” is vested in the administrative organs, and there is no independent review of administrative refusals. There is no discernable standard as to what constitutes a state secret. The breadth of discretion vested in the bureaucracy appears unlimited. The result is to deny to Soviet citizens effective means of leaving their country, if they so choose. The Soviet Union is the only major developed country in which there appear to be sizable numbers of citizens denied the right to emigrate on grounds of possession of state secrets.

IV. Final Conclusions

The law and practices of the U.S.S.R. with respect to the emigration of its citizens generally and, in particular, those persons deemed to possess “state secrets,” is in contrast with the consensus that has emerged under international law and the law and practices of other major developed states, which recognize the right of a citizen to emigrate. The Soviet Union stands alone among such nations in denying this general right to its citizens. To the extent Soviet law permits emigration, the ability to leave is expressly limited by law to exclude those in possession of “state secrets.” In practice, this exclusion appears to be so broadly interpreted as to bar ordinary persons in routine walks of life from leaving. The Soviet Union appears to preclude the emigration of its citizens on grounds of “national security” or possession of state secrets in circumstances that neither international law nor the law of any other major developed state would regard as sufficient cause to restrict emigration.

A. Standards of International Law

There is a general consensus under international law recognizing the fundamental right to leave one’s country. By the early twen-

264, at 23. Obviously, for persons who have held several jobs during their careers a mere notification that their exit visa applications were refused for security reasons does not provide sufficient information for an appeal, especially if such notification is oral. The same is true in the case of a family one of whose members allegedly had had access to state secrets: the reply does not have to specify what job caused the refusal, or even which member(s) of the family held an allegedly restricted job. See Case histories collected by authors (on file at Hofstra Law Review).
tieth century, based on the laws and practices of most nations, the right to emigrate was considered by leading scholars as a right recognized under international law. Since World War II, the right to emigrate has been codified in numerous international agreements, discussed above.

The most widely recognized and adopted statement of the right to emigrate is Article 12 of the International Covenant on Civil and Political Rights. To date, more than 85 nations, including the Soviet Union, are signatories to the Covenant. Article 12(2) provides in relevant part: “Everyone shall be free to leave any country, including his own.” In addition to the Covenant, other United Nations sponsored agreements and various regional accords covering the Western Hemisphere, Europe and Africa recognize the right to emigrate or facilitate freedom of movement.

The 1975 Helsinki Accords Final Act, signed by 35 nations including the United States and the Soviet Union, incorporates by reference previous human rights documents recognizing the right to emigrate. The Soviet Union thereby agreed to “act in conformity with” the Universal Declaration and to fulfill its commitments under the Covenant. Specifically in the area of emigration, the signatories agreed to policies designed to facilitate family reunification, and to apply these policies in a “positive and humanitarian spirit.”

Restrictions on the right to emigrate under international law are of a limited and exceptional nature. Article 12(3) of the Covenant provides that the right to emigrate is limited only by certain specific restrictions, including “those which are provided by law [and] are necessary to protect national security.” This “national security” restriction is the preferred justification for precluding emigration of persons deemed to possess state secrets.

The “national security” restriction on the right to emigrate must be read in light of the purposes of the Covenant and its signatories. The object and purpose of the Covenant are to protect fundamental rights and freedoms. The travaux préparatoires (drafting history) of the Covenant establishes that Article 12 was deliberately crafted so as to emphasize the general right to emigrate and to deemphasize the scope of any restriction of this right. The restric-
tions of Article 12(3) are, under accepted standards of construction, of an exceptional nature.

The consensus of contemporary scholars is that to be "provided by law," limitations on emigration must have a basis in domestic law, cannot be exclusively a matter of administrative or executive action, and, most importantly, must be accompanied by procedures limiting the discretion of government authorities and safeguarding the individual's right, including the right to appeal adverse decisions. For a limitation to be "necessary," it must respond to a pressing or immediate public need, pursue a legitimate aim and be proportionate to that aim.

The "national security" exception is thus narrowly construed and limited to extraordinary circumstances. International legal conferences attended by leading jurists from third-world, socialist and western countries have concluded that an emigration restriction based on "national security" can be invoked only where an individual's emigration poses a clear, imminent and serious danger to the state, or where restricting emigration would protect the state from force or the threat of force.

B. The Municipal Law of Other Nations: The United States, United Kingdom, France, Switzerland, Federal Republic of Germany and Israel

The right to emigrate is guaranteed by the fundamental public law of France, Switzerland, and the Federal Republic of Germany. In the United States, recent decisions of the Supreme Court have enunciated a constitutionally protected right to travel and have limited the circumstances under which the government may limit a citizen's ability to leave the country. In the United Kingdom, the right to leave the country is a right guaranteed by common law. Similarly, the Supreme Court of Israel has found the freedom to leave the country to be a "natural right" of its citizens. While obviously there are differences in approach among these countries, based on their different legal systems, each recognizes that an individual citizen is free to leave, and that this is a right, not a privilege. Thus, the law of each of these states is in accord on the fundamental issues.

The practice in each of these countries protects the legal right to emigrate. Only under rare circumstances is a citizen prevented from leaving the country. Substantial procedural safeguards protecting freedom of movement exist. Governmental actions regarded as arbitrary can most often be challenged before an independent judici-
ary. There are few known cases of a citizen being denied the right to leave his country on grounds of national security. The sole case found involving a restriction on travel based upon knowledge of state secrets involved a person on active duty in the armed forces. Unlike the Soviet experience, we cannot find examples of persons complaining of restrictions on travel based upon claims of national security or knowledge of "state secrets."

C. The Law and Practices of The Soviet Union

Both in theory and in practice the Soviet position stands in direct contrast to the consensus among international lawyers and the law of the other countries studied. Soviet law does not provide for the right of a citizen to leave the country, and in practice requests to emigrate are routinely denied.

Freedom of movement is not guaranteed by the Constitution of the Soviet Union, and emigration and foreign travel have historically been regarded under Soviet law as state granted privileges. Until 1986 the sole Soviet decree concerning the issuance of exit visas and foreign passports contained no criteria for their grant or denial. The action to be taken on applications was entirely in the discretion of Soviet administrative organs, the Ministry of Foreign Affairs and the Ministry of the Interior.

Effective January 1, 1987 a new Chapter added to that decree, "The Consideration of Requests to Enter or Leave the Soviet Union on Private Business," became the first Soviet law setting forth the circumstances under which Soviet citizens may be permitted to leave on "private business." The new statute does not provide a right to emigrate. The sole basis in the decree upon which a request to emigrate could be based appears to be family reunification, although there is an undefined general provision for "other worthy reasons."

The law proceeds, however, to list various circumstances under which leaving the Soviet Union is expressly prohibited, including where the citizen is privy to "state secrets" or for other reasons of state security. The new law does not define or set forth any criteria as to the restrictions based upon possession of state secrets or questions of national security. It is apparent, however, that in practice the Soviet Union applies the "national security" or possession of "state secrets" restrictions, not under exceptional circumstances, but

broadly.

As there are no published official Soviet decisions of courts or administrative organs dealing with emigration, we have had to examine the case histories of particular individuals refused permission to leave the Soviet Union on the grounds of access to or knowledge of "state secrets" as contained in files collected by various western organizations. These case histories show persons prevented from leaving the Soviet Union who on the known facts would not be so restricted by any other major developed nation. The Soviet Union is alone among major developed states in routinely concluding that ordinary citizens possess "state secrets" so as to justify preventing their leaving the country. Most of those denied emigration on state secrets grounds have not had access to the "secret" information upon which their denial was premised for more than 10 years. Others have been denied the right to leave on the grounds of a relative's alleged access to secrets, and still others are denied visas even though employers or colleagues attest to the absence of access to or knowledge of secret or classified information. In practice, the standards by which Soviet administrative organs make decisions with respect to particular individuals appear vague, undetermined and applied on an essentially ad hoc and arbitrary basis. Emigration applicants rarely receive written responses to their applications, and detailed explanations, beyond the fact of alleged access to or possession of state secrets, are seldom given. Thus, the Soviet Union regards the right to leave as a privilege that the state may grant or withhold; in practice the Soviet Union uses the rationale of "national security" and "possession of state secrets" to prevent the emigration of persons under circumstances where there does not appear to be any rational basis to support the administrative decision; the decisions of the administrative organs are not subject to any discernable legislative standards or judicial review.

We recognize that at the margins, the legal judgments of sovereign states will differ. The emigration law and practices of the Soviet Union, however, are outside what may be safely regarded as the common core on which civilized nations agree and the common ground that has emerged under international law.

298. Case histories collected by authors, supra note 284 (on file at Hofstra Law Review).
299. Id.