

EMIGRATION: A POLICY ORIENTED INQUIRY

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Human beings live, perforce, in communities. Often the objectives of the individual and his community coincide; at other times they conflict. Freud phrased the tension as follows:

What makes itself felt in a human community as a desire for freedom may be their revolt against some existing injustice, and so may prove favourable to a further development of civilization; it may remain compatible with civilization A good part of the struggles of mankind centre round the simple task of finding an expedient accommodation — one, that is, that will bring happiness — between this claim of the individual and the cultural claims of the group.¹

One manifestation of this struggle is an individual's desire to emigrate and the community's or its leaders' denial or imposition of restrictions, allegedly made because of some larger community purpose. Restrictions mean that without the community's action, the individual would be able to emigrate. Some impediments take the form of demanding payment of exit taxes, requiring production of documents, or granting permission to only part of a family; others are more subtle, though in context no less effective.

This inquiry will treat restrictions on the desire to emigrate in a conceptual manner so as to provide criteria and procedures for decision-making. First, a framework will be constructed to assist decision-makers—be they heads of state, diplomats, legislators, bureaucrats, or simply citizens—in evaluating the competing claims involved when an individual seeks to exercise the right to emigrate. Then, an analysis of the emigration policies of Austria, India, the Soviet Union, the United Kingdom, and the United States will be presented as illustrative of the world community's approach toward emigration showing its general expectations about appropriate controls on emigration. Finally, the creation of international machinery will be proposed to implement the recommendations made.

The objective is to provide criteria and a procedure for decision-making. A means for evaluating the conflicting interests in each case on a contextual level is sought. Decision-makers should have a method of locating events in a broader scheme in order properly to appreciate the conditions, goals, alternatives, and strategies relevant to the specific

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1. S. FREUD, *CIVILIZATION AND DISCONTENT* 43 (J. Strachey ed. transl. 1962).

problem. Ironically, arithmetical formulations would be the least precise. Since law must operate in a complex social process, the approach should be a contextual one, *i.e.*, all relevant aspects of the social process should be borne in mind in reviewing the manifold events and facts. The framework employed is modeled after the "New Haven approach"² as articulated by Professors McDougal, Lasswell, and associates.³ Discussion is limited to the case of a citizen, as others would not have the same degree of obligation to the government, and might require a different analysis.

The framework of policy-oriented jurisprudence which will be employed in this inquiry of emigration consists of the following steps:⁴

First, the problem must be delineated with attention directed towards the process of value deprivations of the individual, the process of claim, and the process of authoritative decision, *i.e.*, "[W]e are interested in more than rules. We are interested in decisions, what's done, the consequences of the making and application of rules for human beings [W]e think of law as a process, a process of authoritative decision."⁵

Second, the community goals necessary for the protection and promotion of individual human values must be clarified. Both the values to be defended and the procedures and processes which will be employed to that end must be considered.

Third, a survey of past trends of decisions must be conducted which assesses the degree to which the recommended policies approximate the past trends, and which notes the possible factors that conditioned past decisions.

Fourth, alternative structures and strategies designed to achieve a public order of freedom and human dignity must be recommended.

I. THE INDIVIDUAL'S RIGHT TO EMIGRATE

Vladimir V. Levick, 45 years of age, chemist, scholar, and corresponding member of the prestigious Academy of Science, requests permission to emigrate from the Soviet Union. He wants to be reunited with his sister and her family by returning to what he perceives to be his

2. This label originated in R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 342 (1970). See Falk, Myres S. McDougal: *Pioneer for the Year 2010*, 1 DEN. J. INT'L L. & POL. 13 (1971); Gottlieb, *The Conceptual World of the Yale International Law*, WORLD POLITICS 108 (1968) (characterizes it as "the Yale approach").

3. For the basic expositions of this approach, see McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253 (1967); McDougal, Lasswell, & Chen, *Human Rights and World Public Order: A Framework for Policy Oriented Inquiry*, 63 AM. J. INT'L L. 237 (1969).

4. For further elaboration see McDougal, Lasswell, & Chen, *supra* note 3, at 240-41.

5. McDougal, *Jurisprudence for a Free Society*, 1 GEO. L. REV. 1, 2 (1966).

historic homeland—Israel—where he hopes to practice his religion in freedom.

The Soviet Ministry of Internal Affairs explains its basis for denying Vladimir's application as one of foreign relations and security: A state of war still exists between the Arab countries and Israel, and Dr. Levick would be in a position to make scientific contributions to Israel's cause. Also, eight years ago Dr. Levick was a consultant on a research project classified as sensitive. Dr. Levick is fortunate in that many applicants and their families are often persecuted and harassed.⁶

The above hypothetical helps illustrate that the tension between the individual and the nation/state involves certain loyalties which demand stricter obedience than even the rules and regulations set forth by the nation/state. Though the power of compulsion of family, religion, or shared ethnic experience is not as evident, these subgroups or functional identities must be noted, as they often exert an even stronger influence than the community upon an individual's choice process.⁷ Reasons for desiring to emigrate and the intensity of that desire are affected by these considerations which transcend political relationships. Both the country imposing restrictions and the world community seeking solutions to the conflict must be aware of the undercurrent of influences distinct from residual nationalism if the individual's dilemma is to be truly appreciated and evaluated.

When a community deprives a segment of its members of their human rights it is properly a matter of international concern.⁸ Restrictions on the desire to emigrate are of significance throughout the global community. Physical boundaries of the country involved do not confine the consequences of events within that country. First, local matters have impact on outlying regions and the entire world community.⁹ Second, deprivation of human rights anywhere must be reprehensible to all mankind: *delicta juris gentium*.¹⁰

There appears to be increasing international recognition of an indi-

6. Senators and Congressmen have frequently revealed details of the plight of those seeking to emigrate from the Soviet Union. See, e.g., 118 CONG. REC. 21,340-41 (1972) (no explanation for rejection); 118 CONG. REC. 16,169 (1972)(loss of job); 118 CONG. REC. 16,170 (1972)(induction into armed forces); 118 CONG. REC. E4280 (daily ed. April 25, 1972)(severe discrimination and persecution).

7. See D. TRUMAN, THE GOVERNMENTAL PROCESS 14-44 (1951).

8. Cf. R. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 177-89 (1962)(discussing crimes against humanity).

9. See M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 384-94 (1961).

10. See Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 DEN. J. INT'L L. & POL. 29, 39-40 (1971) [hereinafter cited as Reisman, *Responses to Crimes*].

vidual's right to emigrate.¹¹ During preparation of the Universal Declaration of Human Rights of the United Nations, debate ensued concerning an individual's right to emigrate.¹² The representative of the U.S.S.R. claimed that: "All movement within a given country or across its frontiers had to take place in accordance with the laws of that country."¹³ On the other hand, most countries agreed with the representative of Haiti's position:

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

The world belongs to all mankind.¹⁴

On December 10, 1948, the Universal Declaration of Human Rights was adopted. Article 13(2) declares: "Everyone has the right to leave any country including his own, and return to his country."¹⁵ In 1952, the Sub.-Commission of the U.N. Commission on Human Rights on Prevention of Discrimination and Protection of Minorities initiated a study of discrimination in respect to Article 13(2). The study, conducted between 1960-63 and known as the Ingles Report,¹⁶ has not yet been considered by the U.N. Commission on Human Rights.¹⁷ In 1963, a U.N. Conference on International Travel and Tourism convened in Rome and affirmed the principle "that everyone has the right to freedom of move-

11. For a review of the work of international agencies, see generally Nanda, *The Right to Movement and Travel Abroad: Some Observations on the U.N. Deliberations*, 1 DEN. J. INT'L L. & POL. 109 (1971). Of course the right to leave is only one manifestation of a broader international principle: the maximum freedom of an individual to determine his identity and the affiliation to which he will give primacy. There are a complex of different claims regarding movement and nationality, e.g., expatriation, that are all manifested in this general notion of freedom of choice. Emigration is just one segment and this study is incomplete in that regard.

12. Drafting Committee of the Commission on Human Rights, First Sess., U.N. Doc. E/CN. 4/21 (1947); Sub.-Commission on Prevention of Discrimination and the Protection of Minorities, First Sess., U.N. Doc. E/CN. 4/52 (1947); Drafting Committee of the Commission on Human Rights, Third Sess., U.N. Doc. E/CN. 4/95 (1948).

13. Ingles, *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to his Country*, U.N. Doc. E/CN. 4 Sub. 2/220/Rev. 1 (1963) at 85 [hereinafter cited as Ingles Report].

14. *Id.* at 86.

15. G.A. Res. 217, U.N. Doc. A/811 at 3 (1948).

16. See Ingles Report, *supra* note 13.

17. Although the reasons for this procrastination are unclear, postponement has become the predictable action of the Commission. See, e.g., 50 U.N. ECOSOC, Supp. 4, at 68, U.N. Doc. E/CN. 4/1068 (1971); Note by the Secretary-General, U.N. Doc. E/CN. 4/1042 (1970) at 2-3.

ment, including freedom of transit."¹⁸ The Conference also took note of the report by the Commission on Human Rights, Sub.-Commission on Prevention of Discrimination and Protection of Minorities, concerning the right of everyone to enter and leave any country, including his own.

The International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol adopted by the General Assembly on December 16, 1966¹⁹ affirmed the right to travel as an enforceable international obligation.²⁰ Article 5 of the 1967 International Convention on the Elimination of All Forms of Racial Discrimination²¹ forbade discrimination on the basis of race, color, or ethnic origin in the application of the right to leave or enter any country.

Although the principles set forth in the Universal Declaration were arguably unenforceable, the General Assembly's adoption of the two International Covenants and Optional Protocol clearly transformed these principles into enforceable international obligations. Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination which went into effect March 31, 1969 sets up implementive machinery.²² However, the significance of all these instruments is not the degree of their enforceability since pieces of paper alone do not determine the compulsive consequences.²³ Rather, these documents represent the increasing existence of a recognized international right of an individual to emigrate.

Claims to exercise this right as in the case of Vladimir Levick and the Jews in the Soviet Union²⁴ are only one part of a problem which

18. U.N. Conference on International Travel and Tourism (Rome, Aug. 21—Sept. 5, 1963) (Recommendations on International Travel and Tourism, U.N. Doc. E/Conf. 47/18 at 29 (1964)).

19. 21 U.N. GAOR Supp. 16, at 54, U.N. Doc. A/PV 1496 at 6 (1966). Article 12, § 3 of the Covenant on Civil and Political Rights, 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1966), does allow the following exceptions:

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.

20. See Falk, *On the Quasi Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966).

21. G.A. Res. 2106, 20 U.N. GAOR Supp. 14, at 47, U.N. Doc. A/6181 (1965). The Convention came into force on March 13, 1969. 6 U.N. MONTHLY CHRON. NO. 4 at 81 (1969).

22. See Reisman, *Responses to Crimes*, *supra* note 10, at 43-62, for a discussion of the history, substantive provisions, and jurisdictional possibilities of the Convention.

23. See Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1 (1969).

24. See generally Korey, *The 'Right to Leave' for Soviet Jews: Legal and Moral Aspects*, 1 INSTITUTE OF JEWISH AFF. 5 (1971); Schroeter, *Soviet Jews and Israeli Citizen-*

encompasses the Chinese in Asia and all dislocations in the Middle East as well.²⁵ This problem will now be analyzed conceptually on the basis of this author's premises and goals which will be articulated in the form of guidelines. Naturally other premises and goals (and therefore guidelines) can and may have to be substituted to accommodate preferences of particular countries or decision-makers.

II. FRAMEWORK FOR DECISION-MAKERS

A. Goals

The following inquiry will be premised on the view that in a community the individual should be afforded as much freedom as possible, while continuity of community process is safeguarded.²⁶ As opposed to totalitarian perspectives, emphasis will be on preserving the essence of freedom—spontaneity of human conduct and the absence of coercion.²⁷

Human beings tend to form strong identifications which are expressions of the self and should therefore be protected by a community decision process predicated on the preservation of human dignity. Denial of expression of these identifications can result in anxiety, tension, and uneasiness in the individual. Restrictions on emigration constitute a ban to self-expression and cause unpleasant feelings in the individual.²⁸

In light of our concern for human dignity and minimization of anxiety, the following guidelines concerning claims for emigration which reflect our premises and goals are proposed as the optimum accommodation of the two sometimes contradictory preferences—viability of community and realization of individual freedoms.

B. Guidelines

1. Every person has the right to leave his country, whether to sever his ties permanently or not.

ship: *The Nationality Amendment Law of 1971*, 2 SOVIET JEWISH AFF. 25 (1971); Comment, *Aliyah of Soviet Jews: Protection of the Right of Emigration under International Law*, 14 HARV. INT'L L.J. 89 (1973); Resnicow, *No Exit: Emigration and Travel from the Soviet Union* (unpublished manuscript on file with the *Syracuse Journal of International Law and Commerce*).

25. See Panel Discussion on *Expulsion and Expatriation in International Law: The Right to Leave, to Stay, and to Return*, 67 PROCEED. AM. SOC. INT'L L. 122 (1973).

26. See Torovsky, *Freedom of Movement: Right of Exit*, 47 J. INT'L COMM. OF JUR. 63, 67 (1962).

27. J. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* (1951).

28. The Ingles Report, *supra* note 13, at 17, suggests that the denial of the right of everyone to leave a country can have "a spiralling psychological effect" causing those people ordinarily content to stay in their country to want to leave—"a sort of collective claustrophobia."

2. Certain crises may justify temporary suspension of that right.
3. The community elite bear the burden of proof.
4. If the role of the individual is not considered critical to some national program, emigration should be allowed.
5. Travel restrictions based on irrelevant²⁹ criteria should never be permitted.
6. Debts should provide no bar to emigration and similarly, contractual obligations should not bar emigration, unless perhaps intimate family relationships are involved, *e.g.*, marriages or adoption.
7. Emigration to an "enemy" country during the cold war should not be included in security. Military obligations in the absence of crisis should not justify refusing emigration.
8. A return to one's group of primary identity should warrant paramount consideration.
9. It would be unrealistic to ask a government to weigh its need on a case by case basis for each individual applying for exit, and to ignore the apparent trend of similar requests from others with similar skills. Almost any individual is expendable; it is when large masses of people leave that the country may feel the drain on its human resources. Therefore, in deciding whether to permit the emigration of an individual, the country may take into account the effect of emigration of all applicants similarly situated.
10. Procedural fairness should characterize every phase. For example: Temporary restrictions not specifying a time of termination should be impermissible as they increase anxiety; having no date to look forward to and hope for is most depressing. Also, restrictions lacking deadlines tend to linger longer than necessary because, *inter alia*, they require a positive act of abrogation. A country should give a specific time for automatic revocation of the emigration restriction subject to an even earlier termination.

C. Procedure

In evaluating claims the decision-maker should aspire to be aware of the total scope of the problem. He must ascertain all the entities potentially or actually involved, comprehend all the factors which have or can affect the actions or positions of the entities, and consider all the possible consequences and results in light of all possible future developments. This information can be sought by investigating the following considerations: The apparent and actual *participants* involved; the *perspectives* of the participants (their identifications, demands, and expectations); the *situations* in which the claims are lodged, *i.e.*, the

29. The term "irrelevant" is used in the same sense that the 14th amendment has been construed to prohibit discrimination on the basis of irrelevant criteria.

context of the participants' interaction in terms of territorial characteristics, degree of organization, crisis level, etc.; the *bases of power* at the disposal of the participants with which to satisfy their own demands or demands made of them; and the different *strategies* (whether economic, diplomatic, ideological or military) which may be deployed to secure certain outcomes.

The procedural technique employed consists of asking a series of questions to highlight the pertinent issues under the variegated headings. With regard to emigration the following breakdown of considerations would appear appropriate for further inquiry: (1) Putative Emigre: participants, perspectives, situations, bases of power, and strategies; (2) Community: participants, perspectives, situations, bases of power, and strategies;³⁰ (3) Consequences of denying exit; (4) Consequences of allowing exit; and (5) Alternatives to denial.

A number of questions which must be explored are raised under each division.

1. EMIGRE

a. *Participants*

Who are the participants? What are their ages? How many of them are making a claim? What is their percentage representation in the host country? In the present community?

b. *Perspectives*

(Identifications: with whom participants are identified)

Does the emigre have any transnational identifications which stimulate demands on the self? To whom or to what is this identification attached? To what extent does the individual identify with a particular class, race, or ethnic group? Such membership often transmutes a denial of emigration to an individual into a denial of total self-expression.

(Demands: the value-demands participants are pursuing by seeking exit)

Are the claimants really desirous of emigrating or merely fostering a cause? Is the claimant expressing views held by others in a particular group as well? Does the country to which the person will emigrate have any equitable claims to the person's release?

A more systematic appraisal of the motives for emigrating (demands) would involve a consideration of the nature and extent of these motives which would no doubt encompass claims for:

30. The decision-maker should perform a similar analysis concerning the community to which the individual emigrates.

power (participation) *e.g.*, claims of suffrage;
 respect (recognition and honor) *e.g.*, claims to freedom from caste;
 enlightenment (the gathering, processing, and dissemination of information) *e.g.*, claims to freedom from censorship;
 well-being (safety, health and comfort) *e.g.*, claims to right of abortion;
 wealth (control of resources) *e.g.*, claims to guaranteed income;
 skill (opportunity to acquire and exercise capability in vocations, professions, and the arts) *e.g.*, claims to education necessary for literacy;
 affection (intimacy, friendship and loyalty) *e.g.*, claims to adoption or legitimacy;
 rectitude (participation in forming and applying norms of responsible conduct) *e.g.*, claims for freedom to choose religious justifications for one's conduct.

(Expectations: the expectations with which participants pursue demands)

What expectations do the claimants have? Do they accept the inevitability of the situation as dictated by forces beyond their control? To what do they attribute the position taken by the community?

c. Bases of Power

What resources *e.g.*, power, enlightenment, etc. can claimants draw on for effectuation of their goals? Will another country intervene? Are bases available to claimants of which they are presently unaware?

d. Strategies

What means will the claimants use to achieve their goals? Are coercive or non-coercive means any more likely to be utilized? Does precedent or religious or cultural background suggest how they will manipulate values to effect their ends? The outcomes of denial can be examined in terms of:

Power: To what extent is participation in decision-making denied—simply office-holding, or voting as well? Does such denial apply to all citizens? Is a particular status a prerequisite to participation? Do the decisions made without the person's participation directly affect him? Is he particularly upset with the decision made?

Respect: Is the person recognized as a human being? Are groups accorded respect, *e.g.*, minority protection? Does coercion play an unnecessary role? Is privacy protected?

Enlightenment: What levels of education are denied? Is literacy considered a minimum obligation of the community? Is the denial selective? Is community or private conditioning being attempted? What are the person's motives for wanting to receive more education? Will the

person use knowledge gained abroad in his country of origin? Does community demand a *quid pro quo* for the education it has provided?

Well-being: Is the individual denied life, medical care, food, or shelter? Is the emigre's emotional well-being in jeopardy: will denial increase anxiety? Is a group's survival or development threatened? Does freedom to reject well-being exist? Is the individual sick, old or dying?

Wealth: To what extent are benefits from a wealth process denied? Are the denials arbitrary? Are the community's impositions coercive, discriminatory, or unexplained?

Skill: What are the motives of the individual in wanting to learn or apply his capabilities? Is the individual in need of particular assistance? Is a specific group being denied skills?

Affection: Is the immediate family unity protected? What about relationships between relatives or friends? Does freedom to marry according to one's own choice exist? Is there freedom of association?

2. COMMUNITY

The same procedure used to evaluate the individual is appropriate for the community as well.

a. Participants

Who are the decision-makers—government officials or some other source? Are the elites of the community aware of the emigration policies? Do the majority of the people in the country support the government's attitude? Are the restrictions a community response or simply acts effectuating the purposes of a selfish elite? Are any other countries pressuring or influencing the community's posture on emigration? Is any internal entity influencing the community?

b. Perspectives

(Identifications: with whom community is identified)

Does the community identify with any other territorial community? Is there an attachment to any internal community identity? Is the community identified with any particular philosophy or approach? Is the community affected by world opinion?

(Demands: the value demands community is pursuing by denying exit)

The justifications the nation/state employs in impeding travel can be analyzed in light of the eight categories (power, respect, enlightenment, etc.) described for individual interests. It is helpful to bear in mind two separate components which are involved: the government's alleged purpose and its intended purpose. The former can be a rationalization of the latter, a cloak used to conceal the true motivations. As such

it is often difficult to discern and more difficult to prove. Of course, at times the two purposes may coincide.

In all cases the question must be asked whether the crisis which the community elite advances to bar exit is proportionate to the emigration restrictions imposed. Also, we must determine whether the community has warned the individual of the possible restrictions. New demands for past services supplied by the country without stipulations are unjust. As Adam Smith phrased it:

To say that by staying in a country a man agrees to a contract of obedience to a government is just the same with carrying a man into a ship and after he is at a distance from land to tell him that by being in the ship he has contracted to obey the master.³¹

(Expectations: the expectations with which the community pursues demands)

What is the community's view concerning the possibility of social change? Is it a dynamic world view which readily concedes temporary evils?

c. Situations

The situations in which a nation/state may perceive a crisis³² can be categorized according to the values affected, such as security (*e.g.*, war), rectitude (*e.g.*, religious conflicts), well-being (*e.g.*, epidemics), wealth (*e.g.*, inflation), affection (*e.g.*, mass dislocations). The crises can differ in degree of imminency, intensity, danger, probable duration, and impact. The crisis may prevent the operation of the nation/state's

31. A. SMITH, *LECTURES ON POLICY, JUSTICE, REVENUE AND ARMS* 12 (E. Cannan ed. 1896).

32. A crisis can be defined as

an intense confrontation in which the various participants believe that there is going to be an important turning point in history; thus the participants also believe or feel there is an important degree of threat, warning, or promise that will emerge or be fulfilled as soon as the events take their course. The outcome is thought to be to some degree indeterminate; since if it is determined, there is no crisis action to be taken. Finally, there are usually important points of decision or crucial times . . . crises frequently have the following characteristics: 1. Events often converge to cause a high degree of complexity. 2. Time pressures increase. 3. Adequacy of information seems to decrease. 4. Uncertainties seem to increase. 5. Instrumental control is decreased. 6. Decision-makers act under extreme personal stress. 7. Internal decision and bargaining relations change. 8. Alliance decision and bargaining relations change.

Wiener & Kahn, *Crises and Arms Control* 7-16, cited in H. KAHN, *ON ESCALATION* 62 (1968). Lasswell has defined crisis as "a situation in which persons are excitedly oriented toward a common focus of attention," H. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* 83 (1935), and as "a conflict situation of extreme intensity," H. LASSWELL, *POWER AND SOCIETY* 242 (1950).

administrative procedures necessary for emigration. Alternatively, the effect the individual's exit might have on the crisis may prevent his emigration. Or perhaps the government may deny exit because of the possible future need for the prospective emigre's services or presence. Preventing the revelation of a crisis may motivate a denial of an exit request as well. Whatever the nexus of the crisis to the emigre, it needs to be evaluated together with all the other relevant considerations.

d. Bases of Power

What resources or power does the state possess to satiate demands of individuals? What resources are not being deployed which could minimize crisis and allow emigration? What kind of support will the populace give the decisions of the nation/state's elite?

e. Strategies

What form do the restrictions take? Are they highly coercive or persuasive? Are the elites causing the restriction, or is it the result of social situations?

3. CONSEQUENCES OF DENYING EXIT

Any institution or source of power seeking to restrict the previously permissible should bear the burden of justifying its intervention.³³ A sovereign country innovating changes faces the risk of non-persuasion with respect to the world community and public opinion.³⁴ Since there is no formal trial, it should be required of the accused to prove its innocence. Furthermore, the relationship of a community to its inhabitants provides no equal grounds for fair bargaining and negotiation; to compensate for the unequal distribution of power, the burden of proof should rest on the community.

Even if the community carries its burden of proof in a particular case and the individual is forced to live in his present community, human dignity must be provided in that community. Therefore, attention must be focused upon the conditions under which a person requesting permission to emigrate lives. If such conditions constitute a per se deprivation of human dignity, the community would almost always be required to either rectify the situation or allow the person to leave the community. One of the difficulties will be a factual determination of whether human dignity is being deprived.

33. Analogies to the American legal system where the burden of proof is placed upon the intervening institution are numerous, e.g., deportation proceedings. *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276 (1966).

34. This coincides with the traditional doctrine that when the facts in an issue peculiarly lie within the knowledge of one party, that party has the burden of proving the issue. *Allstate Finance Corp. v. Zimmerman*, 330 F.2d 740, 744 (5th Cir. 1964).

Some questions would be raised: How quickly would denials of human dignity be rectified? When did similar happenings last occur? Will denials be prevented in the future? Do repeated denials appear to be an attempt at harassment of the emigre by the community?

4. CONSEQUENCES OF ALLOWING EXIT

How will a crisis claimed by an original community be affected by the emigre's departure? Is the emigre's country of destination in need of the emigre? Can the relative needs of the two countries be compared? Will the emigre be allowed to return to the original community? Will minimum public order be threatened or enhanced by activities of the emigre? Will permission encourage others to make the same claim?

5. ALTERNATIVES TO DENIAL

Can a person's reasons for desiring to emigrate be satisfied within his community, *e.g.*, reunite the family in the community denying emigration; improve educational facilities; reallocate distribution of resources; allow greater freedoms; provide milieu for development? Can temporary permission to leave be granted if the community to which an individual emigrates promises his return within a specified time? Furthermore, emigres might accept denials or restrictions more readily if attempts were made to increase communication to individuals about the community's needs and reasons for restrictions.

The various considerations must be explored and decision-makers must assess each individual case bearing in mind the dynamic social process focused on above. Such a contextual approach forces the decision-maker to consider a wider range of alternatives and factors relevant to the participants and their demands.

III. TREND STUDY

The legislative and administrative practices of five countries—Austria, India, Union of Soviet Socialist Republics, United Kingdom, United States—will be presented as representative of the world community's approach toward emigration. A determination of the threshold of elite restraint, *i.e.*, the level at which restrictions are imposed upon emigration, will reflect not only the different community expectations of the tolerable lawful level of restraint, but also the extent to which the actual law enforced varies from the goals and guidelines previously outlined, thus illustrating the need for the framework proposed. The quintessence of the trend study is the determination of restrictions imposed and freedoms afforded emigres common to all of the five countries. In other words, a common denominator is derived from which one can gauge the feasibility and realistic viability of proposed methods of adjudicating claims of citizens to emigrate.

A. *Conditioning Factors*

Prior to examining the practices of the five countries, various factors affecting their world views should be clarified. An understanding of such factors as ideology, level of population, and degree of economic development can be instructive with regard to the reasons for and origins of the particular approach toward restraints on movement and human rights generally. However to specifically relate these conditioning factors to actual practices within each country is beyond the scope of this work. One should simply be aware of the potential contribution of various conditioning factors to the formulation of policies and world views of a given country.

A cognizance of a country's ideology is important in that it encourages analysis within the terms of relevance used by the decision-makers of the countries. Some countries emphasize individual liberty, while the conception of a totalitarian democracy is more monolithic, *i.e.*, the individual's interests are subservient to the aggregate community's interests. The former's preference is for the widest latitude in personal self-determination. In the latter, however, individual rights have meaning only within the context of the development of the community—which is allegedly an extension of the will of the people and the progressive product of economic and social forces. Even where a country encourages individual liberty, the decision-makers may rapidly attenuate that policy in times of crisis.

The population level of a community can be manipulated by its emigration policies. Consequently, an overpopulated country can help alleviate the problem of an excess of human resources by encouraging emigration. A country which is sensitive about its level of population as an indicator of the country's success and achievement would seek to discourage exit.

Political and civil rights are the primary concern of economically advanced countries, while social and economic rights are considered by developing countries to be prerequisites to civil rights. The "brain drain" from developing countries is a phenomenon which often prompts counter-measures to restrict this flow.³⁵

B. *Austria*

The Austrian Federal Constitution guarantees citizens the right to leave: "Freedom to emigrate shall be restricted by the State only on the grounds of liability to military service."³⁶ The Supreme Constitutional

35. See generally Watanabe, *The Brain Drain from Developing to Developed Countries*, 99 INT'L LAB. REV. 401 (1969) (assessing the magnitude of the brain drain through available data, and discussing the causes of the phenomenon and possible countermeasures).

36. State Fundamental Law, art. 4(3) (Dec. 21, 1867), RGBl No. 142. This guarantee

Court added to the military obligation restriction by declaring confinement or internment of a person because of the existence of a "legally established obligation," as grounds for barring emigration as well.³⁷ In 1963, Austria signed Protocol No. 4 to the European Convention for the Protection of Human Rights,³⁸ which guaranteed freedom of exit but also listed as legitimate restrictions:³⁹ (1) interests of national security or public safety; (2) maintenance of *ordre public*; (3) prevention of crime; (4) protection of health or morals; and (5) protection of the rights and freedoms of others.

Passports are required when leaving the country,⁴⁰ except for travel to Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, Norway, Netherlands, Sweden, Switzerland, and Turkey.⁴¹ Issuance of a passport will be denied if the applicant fails to prove his identity properly or if it is reasonable to believe the passport will be utilized either to avoid criminal proceedings or execution of a penalty for a crime pending against him in Austria, or to violate or evade custom regulations.⁴² A provision which refused a passport to an applicant intending to evade payment of taxes was held unconstitutional.⁴³ Exit will be restricted if the applicant would endanger the external or internal security of Austria or on the grounds of other legal provisions, *e.g.*, supervising the education of minors, preventing infectious disease, controlling insane persons, alcoholics, and drug addicts.⁴⁴

Passport applications must be acted upon within three months.⁴⁵ Thereafter upon refusal or inaction, the applicant may appeal to the Security Department, and then to the Ministry of Interior, and if necessary to the Supreme Administrative Court and the Federal Constitutional Court.⁴⁶ Exit without a passport is punishable by a maximum fine of 10,000 shillings or maximum imprisonment of three months, or both.⁴⁷

is incorporated into the constitution by Art. 149 of the Austrian Federal Constitutional Law.

37. Slg. 1818 (1949); Slg. 2550 (1953).

38. 6 Y.B. OF THE CONVENTION ON HUMAN RIGHTS 14 (1963) (text of Protocol No. 4); European Treaty Series No. 46.

39. Protocol No. 4, art. 2, §§ 2, 3 in 6 Y.B. OF THE CONVENTION ON HUMAN RIGHTS 14 (1963).

40. Passports Act of Jan. 9, 1951, BGBl No. 57, *as amended*, Federal Act of Feb. 24, 1954, BGBl No. 61 [hereinafter cited as Passports Act].

41. Tourism in O.E.C.D. Member Countries, Report of the Tourism Committee, July 1964, Table V, at 47. An identity card is sufficient for travel to all these countries and for some an expired passport will suffice.

42. Passports Act, *supra* note 40, art. 7.

43. Slg. 2550 (1953).

44. Summary of Information Relating to Austria, Conference Room Paper No. 31, at 4 (1962), *cited in* Ingles Report, *supra* note 13.

45. Passports Act, *supra* note 40, art. 6(2).

46. *Supra* note 44.

Austria probably has deeper commitments to freedom of travel than most countries, although it is relatively underpopulated. Historically it has been a nation of traders and thus compelled to maintain free borders and ready access. Also, the experience of the dual monarchy of Austria-Hungary (1867-1918) no doubt influenced the country with regard to travel across territorial borders. More recently, as a permanently neutral state (October 26, 1955), it has a strong interest in cultivating good relations with all other countries.

C. India

The Constitution of India contains no references to a right of exit.⁴⁸ In 1967, the Supreme Court of India⁴⁹ held that in the absence of any law regulating the issuance of passports, the government was compelled to issue passports to all persons who so request, thus prompting the passage of the Passport Act of 1967.⁵⁰ No person can leave India without a valid passport,⁵¹ violation of this provision being punishable with imprisonment or fine or both.⁵² Passports can be refused, thus barring emigration, only on the following grounds: (1) the applicant is not a citizen of India; (2) he has been convicted by a court in India within the five years immediately preceding the date of his application, for an offense involving moral turpitude and sentenced in respect thereof to not less than two years imprisonment; (3) criminal proceedings are pending against him before an Indian court; or (4) a warrant or summons for the appearance or arrest of the applicant has been issued.⁵³ The issuance of the passport can be refused or restricted from use in certain countries if the presence of the applicant in such country is: (1) prejudicial to the sovereignty and integrity of India; (2) detrimental to the security of India; (3) prejudicial to the friendly relations of India with any country; or (4) in the opinion of the Central Government, not in the public interest.⁵⁴

47. Passports Act, *supra* note 40, art. 24(1).

48. See, e.g., V.G. Row v. State of Madras, All India Rptr. (41) 1954 Madras 240. See generally Gaouse, *The Vicissitudes of Freedom of Exit in India*, 17 AM. J. COMP. L. 559 (1969).

49. Satwant Singh Sawney v. D. Ramarathnam, Assistant Passport Officer, All India Rptr. (54) 1967 Supreme Court 1836. See generally Editorial Comment, *The Right to a Passport*, 7 INDIAN J. INT'L L. 526 (1967).

50. The object of the Act was "to provide for the issue of passports and travel documents to regulate the departure from India of citizens of India and other persons for matters incidental or ancillary thereto." Indian Parliamentary Act No. 15 of June 24, 1967, The Passports Act, Preamble, in 1967 CURRENT INDIAN STATUTES, pt. II, at 146 *et seq.*

51. *Id.* § 3.

52. *Id.* § 12.

53. *Id.* § 6.

54. *Id.*

An applicant refused a passport will receive on request a written statement of the reasons for such action. Reasons will be withheld where the passport authority determines revelation would not be "in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public."⁵⁵ The applicant is afforded the right to appeal the decision.⁵⁶ India has traditionally been overpopulated and emigration does not seem to be a problem.

D. U.S.S.R.

The 1936 Constitution of the U.S.S.R. makes no mention of freedom of movement or the right to emigrate.⁵⁷ However, in 1969 the Soviet Union recognized the existence of the right without discrimination to leave the country by ratifying the International Convention on the Elimination of All Forms of Racial Discrimination.⁵⁸ On September 28, 1973, the Soviet Union ratified the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights which allow, *inter alia*, restrictions on emigration for reasons of national security, public order, health and morals.⁵⁹ Soviet legislation provides that one may be denied exit if he has been charged with any offense and, on that account, forbidden to leave his place of residence pending the delivery of judgment in his case, if he has been convicted and is serving a sentence, or if he has not discharged his obligation of service.⁶⁰ No restrictions on exit are imposed for nonpayment of taxes or on the grounds of membership in a particular racial, linguistic, political or religious group.⁶¹

"Foreign travel documents and exit visas are issued in accordance with specified procedure on application by the Ministries."⁶² Instructions posted in the waiting room of the Moscow Department for Visas

55. *Id.* § 5(3).

56. *Id.* § 11(4).

57. G.Z. ANASHKIN & BABIN, *FREEDOM OF THE INDIVIDUAL IN THE USSR* (1961).

58. International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(ii), G.A. Res. 2106, 20 U.N. GAOR Supp. 14, at 48, U.N. Doc. A/6181 (1965) (opening the Convention for ratification); 6 U.N. MONTHLY CHRON. No. 3, at 44 (1969) (ratified Convention).

59. N.Y. Times, Sept. 29, 1973, at 1, cols. 2, 3. The ratification of the two covenants was allegedly designed to justify Russia's curbs on emigration and to serve as a "counter offensive against the West on issues of human rights, travel and contacts." *Id.* at 10, cols. 1, 2.

60. Summary of Information Relating to the Union of Soviet Socialist Republics, Conference Room Paper No. 85/Rev. 1, at 2 (1963), cited in Ingles Report, *supra* note 13.

61. Discrimination with respect to any right is forbidden by Articles 122 and 123 of the U.S.S.R. Constitution. Cf. Aslanyan, *Action to Ensure that Soviet Citizens Enjoy Equal Rights and Opportunities*, 100 INT'L LAB. REV. 551, 564-65 (1969).

62. *Supra* note 60.

and Registrations of the Ministry of Internal Affairs reveal some of the procedures employed.⁶³ Soviet citizens must present the following documents as a prerequisite to departure: (1) an invitation from relatives living abroad; (2) an approved form-statement answering all the questions including the names of all close relatives living in the U.S.S.R. or abroad, whether a relative has ever lived on Soviet territory, when he left it, and under what circumstances; (3) a reference from one's place of residence; and (4) a *kharakteristika* (detailed reference) from one's place of work or study, in which it must be stated that the *kharakteristika* has been given in connection with departure from the country. The reference must be certified by Party officials and ratified by the Party organization. In addition, a Soviet citizen applying for a visa must present a detailed autobiography and a statement certifying the consent of one's spouse and of one's parents remaining in the U.S.S.R. concerning their attitude to the departure of the applicant abroad. Ten percent of the required exit fee must be paid upon application and it is considered a state tax that is not refundable upon receipt of a negative answer.

Soviet citizens must obtain passports and exit visas before leaving the country,⁶⁴ which are issued by the Ministry of Foreign Affairs of the U.S.S.R. or of the Union Republics, by diplomatic agencies of the Ministry of Foreign Affairs of the U.S.S.R., or by the Ministries of Internal Affairs of the Union and Autonomous Republics and their organs, depending on the citizen's place of work, the category of passport he holds, and his place of residence on the receipt of the visa.⁶⁵ The cost of an exit visa in 1969 of about \$48 has been raised to \$480 and an additional sum of \$600 (formerly \$60) is charged for the privilege of renouncing Soviet citizenship.⁶⁶ In August 1972, legislation was enacted which assesses emigres by a system of graduated fees as a monetary *quid pro quo* for the education they have received at the expense of the country.⁶⁷ For

63. EXODUS 1 (Samizdat publication), reprinted in BACKGROUND PAPER NO. 20 (Institute of Jewish Affairs, London, 1971).

64. H. McCLOSKEY & J. TURNER. THE SOVIET DICTATORSHIP 468 ff. (1960).

65. *Supra* note 60.

66. Report on the Executive Session of the Inter-governmental Committee for European Migration, 118 CONG. REC. 23,458 (1972). See G. GINSBURG, SOVIET CITIZENSHIP LAW 38-40 (1968) regarding the lack of standards for determining whether to allow a person to renounce his citizenship.

67. Katin, *Soviet Jewry: A Just and Justified Measure*, N.Y. Times, Sept. 16, 1972, at 29, col. 2. The Soviet assertion that the fees represent an accurate reflection of the costs of the education are credible. A study completed in 1957 estimated the total costs of completing primary, secondary and university education to be \$21,120 per student in the United States, \$30,269 in Venezuela, and \$13,485 in Israel. T.W. SCHULTZ, THE ECONOMIC VALUE OF EDUCATION 29 (1963). In Great Britain in 1967 the education costs for a B.Sc. in science is £6,000 and a Ph.D. £16,000. REPORT OF THE WORKING GROUP ON EMIGRATION,

ordinary university graduates the exit fee is \$14,400 and for those with a candidate's degree (equivalent to a Ph.D) it is \$26,400.⁶⁸ The Soviet Criminal Code makes any illegal attempt to leave Russia a State crime punishable by deprivation of freedom for up to three years.⁶⁹ If the attempt to leave is held to be of "detriment to the national independence, territorial inviolability, or military power of the U.S.S.R.," the sentence can be up to 15 years imprisonment with a maximum sentence of death.⁷⁰

The Soviet official position only reveals one side of the situation. In fact, potential emigrants are subjected to vindictive punishments—ostracized by their countrymen, fired from their jobs, harassed by the KGB, drafted into the Soviet Army, or committed to institutions.⁷¹ Furthermore, the sums of money demanded make emigration nearly impossible unless funds are contributed from abroad.⁷²

E. United Kingdom

Most fundamental rights in the British legal system are not guaranteed by their inclusion in any constitution or code, but by the fact that restrictions may only be based on common law or statute. Until 1963, freedom of exit was such a basic right.⁷³ In that year the right was guaranteed and grounds for permissible restriction outlined, as the United Kingdom became a signatory of the Fourth Protocol of the European Convention for the Protection of Human Rights.⁷⁴ A person will be denied exit if he is known to be the subject of a warrant of arrest for a crime or if he committed certain serious crimes for which an arrest can be effected without a warrant.⁷⁵

Passports are issued at the discretion of the Secretary of State for Foreign Affairs.⁷⁶ Although a British subject is entitled to leave, with or

COMMITTEE ON MANPOWER RESOURCES FOR SCIENCE AND TECHNOLOGY, *THE BRAIN DRAIN* 16 (1967).

68. Laws 572, 573 adopted Aug. 3, 1972, by Presidium of Supreme Soviet and Council of Ministries (effective Aug. 14, 1972). See *N.Y. Times*, Aug. 20, 1972, § 4, at 4, col. 1.

69. R.S.F.S.R. 1970 UGOLOVNIY KODEKS (CRIMINAL CODE) art. 83, cited in H. BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE* 156 (2d ed. 1972).

70. *Id.* art. 64, quoted at 152.

71. 118 CONG. REC. 19,213 (1972); 118 CONG. REC. 21,235 (1972).

72. *Brain Drain: tighter emigration policies for educated Jews*, *NEWSWEEK*, Aug. 28, 1972, at 36. See also *New Soviet Move Against Jews: exorbitant exit fees*, 89 *CHR. CENT.* 842 (Aug. 30, 1972).

73. Torovsky, *Freedom of Movement: Right of Exit*, 47 *J. INT'L COMM. OF JURISTS* 63, 80 (1962).

74. See text accompanying notes 38 & 39 *supra*.

75. Summary of Information Relating to the United Kingdom of Great Britain and Northern Ireland, Conference Room Paper No. 38, at 3 (1962), cited in Ingles Report, *supra* note 13.

76. See Turack, *Regional Developments Toward Freedom of Movement, The O.E.C.D.*, 5 *BEL. REV. INT'L L.* 516, 530-33 (1969) (regarding British Visitor Passports)

without a passport, he may be denied a passport with the intention of impeding his exit if he is deemed "notoriously dangerous to national security," or he is a suspected criminal who might try to leave the country, or he is a minor whose legal guardian opposes his departure.⁷⁷ Since no citizen has any legal right to a passport in the United Kingdom, there is no judicial or administrative recourse available to those denied the facility of a travel document.⁷⁸ However, the United Kingdom represents a very open society and there thus appears to be no instances of exit denials.

F. United States

Although the Constitution makes no mention of the right to leave the country, the Supreme Court has reaffirmed this right on numerous occasions.⁷⁹ Moreover, a law of 1868 which has never been repealed states that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness."⁸⁰ Until 1918 there was an unlimited right of travel abroad. Between 1918 and 1921, and from 1942 to the present, the passport has been a legal prerequisite to travel abroad.⁸¹

The power to refuse to issue or to issue passports has been granted to the Secretary of State in his capacity of chief officer for the conduct of foreign policy.⁸² Justice Douglas has written in dissent that "absent war, I see no way to keep a citizen from travel within or without the country unless there is cause to detain him."⁸³ In 1957, the Department of State enumerated the following criteria utilized as "cause" to restrict travel: (1) fugitives from justice and persons under court restraining orders; (2) persons likely to become public charges; (3) criminals with long records and recent offenses; (4) participants in political affairs abroad whose activities were deemed harmful to good relations and persons whose previous conduct abroad has been such as to bring discredit on the United States and cause difficulty for other Americans; (5)

77. *Supra* note 75.

78. *Id.* The passports of some businessmen attempting to "bust sanctions" against Rhodesia were impounded without due process or judicial review. *THE ECONOMIST*, May 18, 1968, at 26.

79. *See, e.g.*, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

80. 8 U.S.C. § 800 (1970), Rev. Stat. § 1099 (1875).

81. Passports are not required if one's destination is within the Western Hemisphere (excluding Cuba). 26 Fed. Reg. 482 (1961).

82. Foreign Relations and Intercourse, 22 U.S.C. § 212 (1970); 22 U.S.C. § 213 (1970); 22 U.S.C. § 211(a) (Supp. 1974). War and National Defense, 50 U.S.C. § 785 (1970); Exec. Order No. 7856, 22 C.F.R. §§ 51.75, 51.77 (1973); Presidential Proclamation No. 3004, 18 Fed. Reg. 489 (1953); Exec. Order No. 11295, 31 Fed. Reg. 10603 (1966).

83. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (Douglas, J. dissenting).

fraudulent applications; and (6) persons adjudged to be mentally ill.⁸⁴ In 1961, the United States listed only three grounds for denial of a passport: (1) criminality (as in the case of fugitives from justice or persons under court restraining orders); (2) non-compliance with laws imposing certain duties (such as the duty to serve in the armed forces or to pay taxes); and (3) a citizen's activities abroad would violate laws of the United States or be prejudicial to the orderly conduct of foreign affairs or otherwise be prejudicial to the interests of the United States.⁸⁵ A number of court decisions have intervened in the State Department's decision-making process regarding restraint of travel.⁸⁶ Thus the following grounds do not suffice to restrain travel: being a communist;⁸⁷ or refusing to sign an affidavit denying communist affiliation.⁸⁸ The Secretary of State can declare a passport invalid for travel to certain areas,⁸⁹ but a violator cannot be prosecuted.⁹⁰

The requirement of a passport, however, does not prevent any American from exercising the right to emigrate. Only upon return to the United States will one be subject to prosecution.⁹¹ Restrictions on travel may be imposed by the President during wartime or any national emergency proclaimed by the President.⁹²

G. Conclusions

Three types of restrictions on emigration are imposed by countries in the trend study: refusal of exit request, denial of a passport, or preconditions to the granting of exit or a passport. Categorical refusals to allow one to emigrate are the type of restrictions to which Article 13(2) of the Universal Declaration of Human Rights spoke; no country seems to impose arbitrary restrictions.

Although denial of a passport can have a chilling effect on emigra-

84. *Hearings Before the Senate Foreign Relations Committee on Department of State Passport Policies*, 85th Cong., 1st Sess. 38, 39 (1957).

85. Summary of Information Relating to the United States of America, Conference Room Paper No. 22, at 5 (1961), cited in Ingles Report, *supra* note 13.

86. See Hurwitz, *Judicial Control Over Passport Policy*, 20 CLEV. ST. L. REV. 271 (1971).

87. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

88. *Kent v. Dulles*, 357 U.S. 116 (1958).

89. *Zemel v. Rusk*, 381 U.S. 1 (1965); *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir.), cert. denied, 361 U.S. 918 (1959). Passports are invalid for travel to a country or area when the Secretary of State has determined that such country or area (a) is at war with the U.S., (b) is one in which armed hostilities are taking place, (c) is one to which travel would "seriously impair the conduct of U.S. foreign affairs." 22 C.F.R. § 51.72 (1973). See generally Note, *Passport and Travel, Towards a Rational Policy of Area Restriction Enforcement*, 8 HARV. J. LEGIS. 518 (1971).

90. *United States v. Laub*, 385 U.S. 475 (1967).

91. Immigration and Nationality Act of 1952, 8 U.S.C. § 1185(b) (1970).

92. Immigration and Nationality Act of 1952, 8 U.S.C. § 1185(a) (1970).

tion, it is not tantamount to a ban on emigration (with some exceptions). Passports are considered to be of considerable value to the holder in establishing his identity, his nationality, helping him when traveling abroad, and in enabling him to turn to his consular or diplomatic representative for assistance.⁹³ However, it is possible for a person to emigrate to another country without a passport, by prior arrangements with that country. When this is not a viable possibility, or when a passport is required for exit from a country, denial of a passport is to be included in the same category as denials of exit. Our criteria and process for decision-making are not only applicable to refusals of exit requests, but also to pre-conditions to the granting of exit. Both can effectively confine the individual to the community which he seeks to leave.

The trend study's results can be categorized as follows: Strategies, Claims of Community Elite, and Claims of Individuals.

1. STRATEGIES

Only a narrow range of strategies are invoked to restrict travel; other techniques not discovered in this trend study may be in use as well. Countries employ power by simply denying passports or refusing to allow emigration. Wealth is a more indirect and subtle strategy used to ban or to discourage exit. Travel documents are usually available at a nominal cost, but some countries set exorbitant exit fees, exact payment for renouncing citizenship, or charge taxes commensurate with education received by the applicant. The amount of money that can be taken out of a country is often limited. In one country, evasion of income tax justifies barring exit. Thus fiscal and monetary restraints are mildly coercive with the exception of the education taxes.

2. CLAIMS OF COMMUNITY ELITE

The claims made by the state elites of the countries surveyed to restrict exit are generally mundane, with the exception of the Union of Soviet Socialist Republics. These vague headings invoking state interest provide an easy justification of unwarranted restrictions. Developing countries and highly industrialized ones make no attempt at characterizing their particular economic situation.

Wealth: Evasions of customs regulations are considered by one country to be sufficient reason to ban exit. The education taxes of the U.S.S.R. are designed to repay the country for the costs of public education.

Affection: Requiring permission to emigrate from one's parents or spouse may be a legitimate restriction when it is intended to further

93. U.N. ECOSOC Conference on Passports and Frontier Formalities, April 15, 1947, U.N. Doc. E/Conf./PC/SR/3 at 3.

familial harmony and not simply to save a community the costs of a welfare system. However, such permission may be designed to place another difficulty in the path of the applicant.

Skill: Presumably the departure of skilled persons could be prevented under the heading of "not in the public interest." Similarly those working on sensitive projects, or aware of military or State secrets would be denied exit on the basis of national security. Professionals and experts desiring to emigrate to a particular country might be barred because of the possible effects on the conduct of foreign relations or again because of security.

Security: None of the countries attempt to describe or distinguish the degrees of crisis denominated as national emergency. A determination that an applicant's exit would be a threat to security can be made in time of war or peace. Appellate processes can provide little solace if they are subordinate to the elite entity responsible for the denial, or if the administrative or judicial machinery cannot be told all the facts or is not empowered to make a determination of the extent of the crisis.

Criminal Process: All of the countries agree that a person who has committed or is accused of committing a crime of a particular nature must be denied exit until trial and sentence has been served. The gravity of the crime necessary to bar exit is not specified. It is not clear whether the rationale is prevention of crime, or retribution, or both.⁹⁴ One country forbids a person who has committed a crime of moral turpitude and served a sentence of two or more years to leave the country for five years from the date of his conviction.

Military: Some of the countries demand that one's military obligations be met, with no distinctions recognized regarding military needs or possible exceptions. Apparently, the notion is not one of supplying the country's military needs, but rather one of the individual fulfilling his obligations.

Health and Legal Incapacity: Minors, the insane, addicts, and the diseased are all restricted in their exit presumably to protect these individuals and the world community, as well as to avoid state responsibility for their acts abroad. The definition of insanity, however, can be an abused one and used as a pretext to deny exit. Furthermore, if another country offers to accept an individual or individuals under this heading, what reasons can a country have for denying emigration?

94. *But see* Chalidze, *The Right of A Convicted Citizen to Leave His Country*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1973) who argues that a "state should not have the right to punish, to reform or to reeducate a person who has committed a crime if that person does not want to live in the society whose interests that State is defending." *Id.* at 3. *See also* Berman, *The Right of a Convicted Citizen to Emigrate: A Comment on the Essay by V.N. Chalidze*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 15 (1973).

3. CLAIMS OF INDIVIDUAL

The denial of an individual's claim to emigrate is apparently not a problem in most countries at this time. Nevertheless countries outline the grounds for restricting exit, yet take no cognizance of varying claims of individuals for desiring to emigrate. These claims have been previously discussed,⁹⁵ and with the exception of affection, countries mistakenly treat them all as equally compelling reasons for seeking exit.

Affection is the most critical value of which a community can deprive an individual because of the anxiety it generates within the individuals affected by the deprivation. Outwardly all the countries permit or even encourage people to join their groups of primary identity and allow families to reunite. Functionally, however, such reunions can be barred by wealth and other restrictions.

To summarize, elite restraint is not unlimited. One may generalize and conclude that there is a common denominator, an international standard: An individual has the right to emigrate unless the country has a compelling reason to deny the exercise of that right. This standard should be applied through the framework outlined above, with the goals we have set out delineating the parameters of compelling reasons. The conflicting claims of the individual and the community must be evaluated contextually in each case. All the information elicited from our scheme of questions must play a role in the decision-making process, as the community's interests in restricting exit and the individual's reasons for desiring to emigrate involve various levels of priority, some more compelling than others. When both entities have equally compelling claims, then the individual should be given priority.

IV. IMPLEMENTATION

There are numerous arenas and means which could be used to implement the guidelines and framework for an emigration policy. Internal agitation,⁹⁶ civic initiatives,⁹⁷ public opinion,⁹⁸ United Nations or other international machinery,⁹⁹ trade boycotts¹⁰⁰ and diplomacy¹⁰¹ ex-

95. See § II (c)(1)(b) *supra*.

96. See note 15 *supra*.

97. *E.g.*, the founding of the Moscow Human Rights Committee by three Soviet physicists. See *Dokumenty Komiteta Prav Cheloveka: Proceedings of the Moscow Human Rights Committee 1970-1972* (published by International League for the Rights of Man, London, 1972).

98. *E.g.*, public opinion helped influence Norway to permit Jesuits to enter its country. Greenberg & Shalit, *New Horizons for Human Rights: The European Convention, Court and Commission of Human Rights*, 63 COLUM. L. REV. 1384, 1400-01 (1963). See generally Gormley, *The Use of Public Opinion and Reporting Devices to Achieve World Law: Adoption of ILO Practices by the U.N.*, 32 ALBANY L. REV. 273 (1968).

99. See *Measures Taken Within the United Nations in the field of Human Rights*, U.N. Doc. A/C 32/5 (1967); *id.* Add. 1 (1968); Capotorti, *The International Measures of*

emply some of the pressures which could be put to bear by the claimants in forms internal and external to the country in question.¹⁰² However, it would be more effective if there were an international body that could examine a situation from a neutral perspective and publicize the facts to the world community. Proposals have been made for the creation of a United Nations High Commissioner for Human Rights,¹⁰³ a worldwide habeas corpus,¹⁰⁴ a World Court of Man,¹⁰⁵ etc. Bearing in mind that the proliferation of transnational agencies is no solution to the problem of deprivation of human rights and that no particular modality is uniquely indispensable, one effective approach would be the ombudsperson: *ex-officio* detached experts in an administrative setting. Publicity would be kept to a minimum until and unless necessary. The complaint would be investigated and conciliation would be attempted. If a violation of emigration guidelines was to be determined, an amicable solution would be negotiated, and, failing that, the country would be told to rectify the problem or else the situation would be exposed and enforcement devices employed. The machinery for the

Implementation Included in the Covenants on Human Rights, in A. EIDE & A. SCHOU, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 131 (1968).

100. *E.g.*, Senator Henry Jackson and Representative Charles Vanik introduced bills in the 92d Congress which predicated trade agreements on the foreign country's emigration policies. S. 2620, 92d Cong., 2d Sess. (1972); H.R. 17000, 92d Cong., 2d Sess. (1972). The proposal included an amendment to the East-West Trade Relations Act:

East-West Trade and Fundamental Human Rights, Sec. 10(a).

To assure the continued dedication of the United States to fundamental human rights, and notwithstanding any other provision of this Act or any other law, after October 15, 1972, no nonmarket economy country shall be eligible to receive most-favored-nation treatment or to participate in any program of the Government of the United States which extends credits or credit guarantees of investment guarantees, directly or indirectly, during the period beginning with the date on which the President of the United States determines that such country—

- (1) denies its citizens the right or opportunity to emigrate; or
- (2) imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; or
- (3) imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice.

118 CONG. REC. 33,658-59, 33,799 (1972).

101. *E.g.*, on September 17, 1973, the United States Senate passed an amendment urging the Soviet Union to permit free emigration. N.Y. Times, Sept. 18, 1973, at 11, col. 1.

102. See M. McDUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 173-229 (1960).

103. R. CLARK, A UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (1972).

104. This proposal was particularly supported by Arthur Goldberg. 53 A.B.A.J. 586 (1967).

105. Gottlieb, *The Court of Man*, CENTER MAGAZINE, Jan., 1969, at 20.

above proposal presently exists; its jurisdiction need only be extended to encompass our emigration framework.

In 1966 the United Nations General Assembly approved two covenants¹⁰⁶ which, when they become effective, will create international ombudsmen: the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. Individuals claiming violations of the Civil and Political Rights Covenant¹⁰⁷ "may submit a written communication to the Committee for consideration." The Committee can then (1) "bring any (such) communications . . . to the attention of the State . . . alleged to be violating," (2) "consider communications in the light of all written information made available to it by the individual and by the State," (3) "forward its views to the State . . . and to the individual," and (4) "include in its annual report . . . a summary of its activities."

The Committee can consider a complaint¹⁰⁸ only if the right alleged to be violated is stipulated in the Covenant, and the accused country has ratified the Covenant and Protocol. The appellant must be subject to the jurisdiction of the accused government and must first exhaust all domestic remedies. A complaint under investigation by some other international organ will not be considered by the Committee.

The Covenant also provides a mechanism for state versus state complaints. If the problem is not resolved to the satisfaction of the parties concerned, with prior consent of the parties, the Human Rights Committee may designate an ad hoc Conciliation Commission of five persons acceptable to all parties concerned. If the parties are unable to agree, the Human Rights Committee can fill the Commission by electing the necessary number of members from among its own ranks by a two-third's vote. If a solution is not reached, the Commission reports its findings of facts, conclusions, and recommendations.

The Committee consists of eighteen "persons of high moral character and recognized competence in the field of human rights," elected by participating countries, to serve four-year terms. Only one national from each state may be elected, although persons are elected to serve "in their personal capacity" and receive remuneration from United Nations resources. Recommendations require a majority vote. Governments charged with violations are allowed six months to submit exceptions.¹⁰⁹

106. (1) The International Covenant on Economic, Social, and Cultural Rights, and (2) the International Covenant on Civil and Political Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. No. A/RES/2200 (XXI) (1967); U.N. Doc. No. A/6546 at 4-8, 52-55 (1966).

107. No remedy is afforded for violations of the Economic, Social, and Cultural Rights Covenant. However, the Civil and Political Rights Covenant is quite broad.

108. Claims must be in writing and cannot be anonymous.

109. The Committee on the Elimination of Racial Discrimination is essentially the same, except for minor variations.

The ombudsmen's major enforcement mechanism is moral force, *i.e.*, exposing and publicizing the situation so as to compel a country to react to public opinion. Also, sitting in private, conciliation is encouraged between the country and the claimant. If the emigration guidelines are to be a binding legal instrument, however, the powers of the ombudsmen must be extended. Voluntary compliance cannot be relied on. The effectiveness of international public opinion pressuring changes is not always sufficient. If international persuasion, criticism, and condemnation prove ineffective other pressures ultimately ought to be made available and employed; *e.g.*, suspension from international organizations,¹¹⁰ international inducements,¹¹¹ and denial of economic aid.¹¹²

The Committee must be provided with broad investigatory and fact-finding powers as well. The evidence offered by the state and the individual are clearly insufficient. Access must be allowed to the Committee to all non-sensitive government documents. Holding hearings and taking testimony within the country must be permitted as well as the posting of observers in the country. The Committee would thus serve as a promoter of the world community's standards and would contribute to their enforcement.

Collective expressions of nations in regional and international organizations, and the individual regulation and attitude of countries indicate that the right of emigration is considered to be fundamental and worthy of protection and promotion. The framework outlined above is suggested as a means for decision-makers effectively to appraise and accommodate the demands of the individual seeking to emigrate and the community denying or restricting such exit. It is hoped that this approach will result in a wider distribution of all the basic values and will contribute to a world public order of human dignity.

110. See Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381 (1964).

111. *E.g.*, the Nazis offer of Jews for trucks which the Allies rejected.

112. See, *e.g.*, U.N. Doc. A/AC. 109/L.388, para. 40 (1967).