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The Right to Leave and Return in International Law and Practice

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THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE. By Hurst Hannum. Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1987. Pp. xiii, 189. U.S. \$57.50

Reviewed by Daniel C. Turack*

This is the fortieth year since the United Nations General Assembly's approval of the Universal Declaration of Human Rights¹ and the Ninth International Conference of American States' adoption of the American Declaration on the Rights and Duties of Man,² in which the basic right of personal self-determination was proclaimed broadly in the former³ and more conservatively in the latter.⁴ Since 1948, those expressions of consensus have ripened into universal⁵ and regional⁶ treaty law commitments, as well as averred

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1. *Universal Declaration of Human Rights*, G.A. Res. 217 A, 3 U.N. GAOR at 1, U.N. Doc. A/810 (1948), reprinted in A. BLAUSTEIN, R. CLARK & J. SIGLER, *HUMAN RIGHTS SOURCEBOOK* 15 (1st ed. 1987) [hereinafter *SOURCEBOOK*]. The *Universal Declaration of Human Rights* [hereinafter *Universal Declaration*], was adopted and proclaimed by General Assembly Resolution on Dec. 10, 1948.

2. *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, OAS/Ser. L/V/I.4 Rev. (1965), reprinted in *SOURCEBOOK*, at 545. The *American Declaration of the Rights and Duties of Man*, [hereinafter *American Declaration*], was adopted by the Ninth International Conference of American States.

3. *Universal Declaration*, *supra* note 1, at 17. Article 13 of the *Universal Declaration* provides, "1. Everyone has the right to the 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." *Id.*

4. *American Declaration*, *supra* note 2, at 547. Article 13 of the *American Declaration* states, "Every person has the right to fix his residence within the territory of the state of which he is a national, to move freely within such territory, and not to leave it except by his own will." *Id.*

5. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106 A (XX), 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965).

6. See *Fourth Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Europ. T.S. No. 46, at 2 (1963); *American Convention on Human Rights*, O.A.S. T.S. No. 36, OEA/Ser.K/XVI/1.1, Doc 65, Rev. 1, Corr. 1; *African Charter on Human and Peoples' Rights*, O.A.U. Doc CAB/LEG/67/3 Rev. 5, reprinted in 21 INTL LEG. MAT. 58 (1982).

political goals.⁷

The mobility rights encompassed by the *right to leave* and return are broad enough to include travel for purposes of emigration, marriage, family reunification, business, education, professional reasons, and leisure. In 1963, the subject received special attention from the United Nations in the form of Dr. Jose Ingles' report⁸ to the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Human Rights Commission. Almost twenty years later, the Sub-Commission has again turned its attention to the investigation of current trends in respect of international mobility rights under Special Rapporteur C.L.C. Mubanga-Cipoya, Esq. of Zambia. While Mr. Mubanga-Chipoya's study was pending,⁹ Hurst Hannum, the executive director of the Procedural Aspects of International Law Institute, undertook his study of the subject.¹⁰ For the most part, the author does not delve into the historical and philosophical aspects of this right, but rather devotes his analysis to the contemporary content of the right. Nevertheless, there are a few historical glimpses, such as the history of the Ingles report,¹¹ some background for the 1986 Strasbourg Declaration on the Right to Leave and Return¹² (included as an appendix), and some preliminary reasons about why the right cannot

7. *Conference on Security and Co-operation in Europe: Final Act*, 73 DEPT STATE BULL. 323, reprinted in 14 INTL LEG. MAT. 1292 (1975).

8. J. 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.2/229/Rev.1, U.N. Sales No. 64.XIV.2 (1963).

9. U.N. ECONOMIC & SOCIAL COUNSEL COMM'N ON HUMAN RIGHTS, QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING POLICIES OF RACIAL DISCRIMINATION AND SEGREGATION AND OF APARTHEID, IN ALL COUNTRIES, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDANT COUNTRIES AND TERRITORIES: REPORT OF THE SUB-COMMISSION UNDER COMMISSION ON HUMAN RIGHTS RESOLUTION 8 (XXIII), U.N. Doc. E/CN.4/Sub.2/1985/9, U.N. Sales No. GE.85-12374 (1985).

10. H. HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE (1987).

11. *Id.* at 13-14.

12. *Id.* at 15, 154.

be unlimited.¹³ As Hannum puts it, "the fundamental question addressed in the present study is the procedural and normative manner in which a balance should be struck between respect for the fundamental rights of the individual and the legitimate concerns of the larger community in which he or she lives."¹⁴

Contemporary content and meaning of the right is measured by the author against that espoused in Article 12 of the International Covenant.¹⁵ His yardstick for guidance and interpretation is the Vienna Convention on the Law of Treaties.¹⁶ How does the right work or how should it work is his thrust. There are evaluations of relevant phrases such as "provide by law,"¹⁷ "necessary,"¹⁸ "national security,"¹⁹ "public order (ordre public),"²⁰

13. *Id.* at 4. Hannum suggests that the restrictions on the right to leave and return may be legitimate if imposed for a limited purpose such as the fulfillment of certain contractual obligations, national security concerns, or in the prevention of the spread of contagious diseases. See also Nelson, *International Travel Restrictions and The AIDS Epidemic*, 81 AM. J. INT'L L. 230 (1987).

14. H. HANNUM, *supra* note 10, at 5.

15. *International Covenant on Civil and Political Rights*, G.A. Res. 2200 A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966).

16. *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF 39/27 (1969), reprinted in 8 INT'L LEG. MAT. 679 (1969).

17. H. HANNUM, *supra* note 10, at 24-25. The requirement that limitations on the right to leave be provided by law ensures against an arbitrary or discriminatory application of such a limitation. Some requirements of "provided by law" include accessibility to the law, clear legislative directives, adequate notice, and provision for an avenue for appeal. *Id.*

18. *Id.* at 26-27. The qualification that a limitation on the right to leave be necessary permits an objective determination on the permissibility of a state's restriction on the right. *Id.* at 26. The author stresses that "necessity is the test," from which it is implied that a "pressing social need" must exist. *Id.* at 27.

19. *Id.* at 27-29. The furtherance of national security is an acceptable goal of a limitation on the right to leave. *Id.* at 27. However, an interpretation of this term which allows vague assertions of national security interests is not sufficient to impose arbitrary restrictions on the right to leave or return. *Id.* at 29.

20. *Id.* at 29-41. Societal interests will govern the restrictiveness or expansiveness of a nations policy on the right to leave. *Id.* at 30-31. The author discusses in detail three theories regarding the effect societal interests may have on the right to leave: the socialist/communist restrictive concept of the state as the ultimate guarantor of all rights; limitations on the right to leave based on economic considerations; and migration and population policies.

"public health or morals,"²¹ "rights and freedoms of others,"²² and "arbitrary."²³ Attention is also given to other pertinent factors impacting on the right such as citizenship,²⁴ population policy,²⁵ economic considerations like brain drain,²⁶ the refugee issue,²⁷ and asylum, exile, and expulsion.²⁸ Herein, the author makes use of the jurisprudence of the European Committee, the opinions of individual legal experts, and the results of international conferences of experts.

A large segment of the book contains a survey of state practices regarding the enjoyment of the right or obstacles restricting it. The section dealing with country policy and practice is arranged for the most part by geographical regions or political differentiation, namely: Asia and the Pacific; Australia, Canada, New Zealand and

21. *Id.* at 41-42. Public health and the prevention of the spread of contagious diseases is a consideration in the restriction of movement. However, the author acknowledges that due to the diversity in morality between countries, a uniform concept of morality is difficult to define. *Id.* at 42.

22. *Id.* at 42-43. The author suggests that protection of the rights of others may only be offered as a justification for not allowing a person to exercise their right to leave, if there is a "clear showing of how the rights of others would be adversely affected by the departure". *Id.*

23. *Id.* at 44-46.

24. *Id.* at 60-63. The author describes the conflict between a country's sovereign right to determine a person's citizenship, therefore allowing state control of expulsion and re-entry, with that country's international obligations such as non-discrimination principles and treaties as well as individual human rights.

25. *Id.* at 40-41. The author discusses the results of the United Nation's Fifth Population Inquiry in 1982 as it relates to emigration and notes that the overwhelming majority of states discourage emigration. *Id.*

26. *Id.* at 34-40. The conflict between a country's economic right to retain its wealth in the form of human capital, and an individual's right to leave dictates that "legitimate restrictions on the right to leave for the purpose of preventing 'brain drain' or other serious economic harm to a country must conform to the principles of necessity and proportionality discussed above." *Id.* at 40.

27. *Id.* at 66-67. The author stresses two courses of action to facilitate re-entry of refugees: removal of the cause of flight, usually " . . . persecution or events seriously disturbing public order . . ." and a clear communication to the refugees that they will not be penalized upon their return. *Id.* at 66.

28. *Id.* at 63-65. The author notes that Judge Ingles' prediction of eventual complete prohibition of exile has not occurred and illustrates the way some countries continue to use expulsion and exile through creative legal maneuvers. For instance, South Africa granted certain tribal groups independence, thereby stripping them of their citizenship and all rights to which it pertained. *Id.* at 65.

the U.S.A.; Latin America and the Caribbean; Western Europe; Eastern Europe and the U.S.S.R.; the Middle East and North Africa; Africa. The author's footnotes in this section reflect a diversity of primary and secondary source materials in order to give as accurate a picture as possible.

In his conclusions and recommendations, the author points to the same concerns that reach back to the 1963 Ingles report,²⁹ the procedural safeguards for implementing the right -- criteria governing the issuance of passports and some form of review or appeal for the applicant on denial. Similar concerns for procedural safeguards were voiced at the Strasbourg international meeting on this right in 1986.³⁰ The author acknowledges that a disturbing number of states attempt to control the movement of their citizens,³¹ but the overall tenor of his conclusion is positive. His recommendations call for nongovernmental organizations to continue their vital role, for national governments to formally recognize the right by constitutional provision or statute with entrenched procedural guarantees. At the level of multinational international organizations, he advocates a series of positive measures that will give primacy to the right.³²

An individual's international mobility is part of the common core on which civilized nations have agreed. It remains to be fully recognized. This well-thought out and researched book by Mr. Hannum is the latest in the publisher's topical series of International Studies in Human Rights.³³

29. *Id.* at 121; J. INGLES, *supra* note 8.

30. See Hannum, *The Strasbourg Declaration on the Right to Leave and Return*, 81 AM. J. INT'L L. 432 (1987); Hoffman, *The Right to leave and Return to One's Own Country: The Strasbourg Declaration on the Right to Leave and to Return: Results of the Meeting of Experts Held in Strasbourg in November 1986*, 8 HUM. RTS. J. 478 (1987).

31. H. HANNUM, *supra* note 10, at 121.

32. *Id.* at 130. The author advocates greater consultation among international bodies and monitoring of existing agreements which protect and individual's right to leave and return.

33. See H. HANNUM, *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE*, (1st ed. 1983, 2d. ed. 1984, 3d. ed. 1986); H. HANNUM, *LINKAGES BETWEEN INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW* (1985); H. HANNUM, *NEW DIRECTIONS IN HUMAN RIGHTS* (1989); H. HANNUM, *THE THEORY AND PRACTICE OF GOVERNMENTAL AUTONOMY: FINAL REPORT* (1980).

