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Expulsion and Expatriation in International Law: The Right to Leave, to Stay and to Return: A Panel

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found it a peculiar sort of rhetoric, nevertheless, because it seemed to
him that it is a mad world that spends 208 billion dollars a year on
armaments. We should, he suggested, work for a better system. A
presidential candidate who says he will cut back 20–30 billion dollars
a year on arms production may be more significant and important than
SALT will ever be in the long run. He expressed dismay at the transfer
of small arms to the Third World by the Big Powers. We need, he
urged, to engage our Third World counterparts in a serious discussion
on why it would not be more significant for them to have a security
arrangement of a peacekeeping nature through a centralized authority,
rather than continue building up their own armies.

The CHAIRMAN remarked that we all agree that it is a mad world,
but the right remedy for improving it is another matter.

ALAN GERSON
Reporter

EXPULSION AND EXPATRIATION IN INTERNATIONAL LAW:
THE RIGHT TO LEAVE, TO STAY, AND TO RETURN

The panel convened at 10:30 a.m. April 13, 1973, Rosalyn Higgins*
presiding.

The CHAIRMAN emphasized the profound importance and interdepen-
dence of the rights to leave, stay, and return. She cautioned that, although
the topic encompassed disparate cases—the exodus of Soviet Jewry, the
claims of Palestinians, and the question of amnesty for draft dodgers—
sterile debate on specific issues should be avoided. Rather a conceptual
framework linking these separate cases should be sought.

REMARKS BY YASH P. GHAI**: I propose to discuss the topic through an examination of the practice
in East Africa, especially as it relates to its Asian community. There
is considerable confusion in the rules of international law on this topic.
Few rules are above controversy and in many instances, the practice
goes against what are alleged to be the rules. The answer in several
instances depends on interrelated but separate issues, each of which
might be controversial. Lack of clear answers is partly due to the great
number of variables. Additionally, some of these variables are matters
properly governed by international law; others by domestic law.
Moreover, there is, generally speaking, a need for greater consensus
among states on the scope of the variables before the set of rules can
function effectively. Thus questions of nationality are central, but the

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jurisdiction over them is domestic; problems of statelessness are controversial; the right to leave a country may depend on the right to enter another; the possibility of expelling a person is contingent on the obligation or the willingness of another country to receive him.

At the independence of the East African countries of Kenya, Uganda, and Tanzania, a number of considerations affecting the right to stay and the right to leave came up for resolution. Most of them arose in relation to members of the Asian and European immigrant communities. A great deal of the discussion turned on the point of citizenship. Until independence most of the residents of East Africa were British citizens or British protected persons, the distinction turning on the status of the country. In the colony of Kenya the residents were British citizens and in the other two countries, a protectorate and a trusteeship, the residents were British protected persons. It was assumed that the indigenous inhabitants would become citizens of the independent countries. As far as others were concerned, those who were born in the country and one of whose parents was also born there would automatically become citizens; the rest would be eligible to become citizens if they so applied within two years of independence.

The implications of citizenship were reasonably clearly understood. It was clear, for example, that those who did not become citizens might at some stage be asked to leave East Africa (although the Kenya constitution at independence had guaranteed noncitizen residents against expulsion). It was also understood that those who did not become citizens of an East African country but retained British citizenship would have the right to enter Britain. The 1962 British legislation restricting the rights of entry into Britain of Commonwealth citizens did not apply to British passport holders and thus exempted the East African Asians. It was also understood that those who did become citizens of a country in East Africa would have the right to stay and work in that country. It was clear that those who did not become citizens could not expect not to suffer discrimination in employment policies. People who had options as regards nationality made decisions on the basis of these understandings. The concept of citizenship was crucial in the determination of the rights to stay and to enter. An attempt was made to move away from racial criteria that had so dominated British policy and practice in its administration in East Africa and to move to constitutional and technical criteria of citizenship. A large number of Asians opted to become citizens of an East African country but the majority, at least in Kenya and Uganda, did not.

It is clear from the practice in East Africa that a number of these expectations have been frustrated. Most countries have embarked on policies which in some sense go against understandings at the time of independence. The most glaring instance, of course, is the expulsion of the Asian community from Uganda by General Amin. The Asians expelled from Uganda fell into various categories. A great number were British passport holders and a few were Indian citizens. An early order of Amin's also required the expulsion of Asians who were Ugandan citi-
zens, but this order was subsequently withdrawn under pressure from some Ugandan Africans who felt that it was important to maintain the integrity of the concept of citizenship. Nevertheless, the Amin government proceeded to revoke the citizenship of a large number of Asians who had become Ugandan citizens. Having thus been declared stateless, they were liable to expulsion. Zanzibar, which is now a part of the Republic of Tanzania, imposed a number of restrictions on the right of Asians to leave that island. In certain instances the right to leave is completely prohibited, while in others the right to leave is conditional on the payment of large fees. Kenya has expelled a certain number of its citizens, generally by first revoking their citizenship.

There has emerged a growing class of stateless people within East Africa. A number of Asians who were citizens of Zanzibar but moved away from the island during certain periods of time were declared no longer citizens of Zanzibar and hence, now are not citizens of the United Republic of Tanzania. The fact of Kenya's deprivation of citizenship of its deported citizens also has made them stateless and we have already referred to the statelessness of groups within Uganda. There has also been a certain amount of forced movement of persons within East Africa. Thus in 1960, Uganda expelled 40,000 black Kenyans who had been gainfully employed and residents of Uganda for many years. All three governments in East Africa have formulated and are implementing policies of Africanization of the public services as well as the private sector. These policies have resulted in the gradual expulsion of large numbers of noncitizen Asians.

A number of comments may be made on these developments before proceeding to an analysis of their significance from the point of view of international law. First of all, the practice of expulsions or forced movements of persons within Africa is not a purely racial matter. Uganda expelled black Kenyans before it expelled the Asians, and the expulsion from countries in West Africa and Zaire has involved, in almost all cases, black Africans. Most countries in Africa are under great political and economic pressures, and have problems in establishing viable political and economic systems. Acute tensions arise from unemployment; the leaders of a country feel primary responsibility to its own citizens, which they feel can only be discharged by the expulsion of its noncitizens.

Secondly, the countries in Africa, particularly those in East Africa, were left a difficult legacy by the colonial masters. The groups of persons in relation to whom questions of expulsion have arisen most acutely are those who were brought to these countries by the colonial powers for the purposes of colonial administration. Some of the present tensions arise from the failure of the colonial powers to resolve these problems before the dissolution of the empire. The colonial society was a racially exploitative one, in which the Europeans and Asians enjoyed preference over Africans, and in which the economy was dominated by alien groups. A policy of fair distribution would of necessity imply some restrictions on Asians and Europeans.
Thirdly, in relation specifically to East Africa, it can be argued that a very heavy responsibility rests with the British Government. As already mentioned, Asians who decided to retain British nationality did so on the basis of a clear understanding, acquiesced in by the British Government, that there would be an unrestricted right to enter into Britain. However, in 1968, when the governments in East Africa began to implement the expected policy of Africanization resulting in the immigration to Britain of many Asians, Britain passed legislation to restrict the rights of entry into Britain of its Asian citizens. Thus the problems became aggravated. If Britain had not introduced the restrictive legislation, a number of the noncitizen Asians would gradually have been able to leave East Africa. As it was, they were not able to leave and this created enormous tensions within East Africa. This also made the position of the Asians who had become citizens of East African countries extremely difficult. It was not only in this respect that Britain failed to live up to its obligations to its Asian citizens; in other aspects of its decolonialization policy it had shown little regard for their fate. This is in contrast to the solicitude it showed for its white citizens in East Africa. All the white civil servants in East Africa were enabled to retire prematurely under a special scheme whereby they would make handsome financial gains. Proposals of a similar scheme for the Asian civil servants were rejected by the British Government.

Secondly, European farmers were enabled to sell their farms at high prices so that they could leave East Africa with the land being transferred to Africans. Proposals for a scheme to buy out Asian businesses were turned down by the British.

Thirdly, the British Government enacted special legislation as regarded citizenship which applied basically to white citizens only. This is the 1964 British Nationality Act (No. 2), which was meant to get around the East African laws prohibiting dual nationality. Under the British legislation, those who gave up British citizenship to become citizens of an East African country can at any time reclaim British nationality. Such persons then have superior rights to those Asian citizens who had always retained British nationality.

Many of the problems that have risen in East Africa can be regarded as those of decolonialization and they all stem from Britain’s unwillingness to discharge the obligations it incurred at the time of the establishment of the empire. Governments in East Africa have been saddled with problems that really belong to Britain. The fairness of holding these governments to rigid international standards of nonracial treatment in the face of Britain’s behavior may well be questioned.

As to the significance of East African practice for international law, first it is clear that East Africa does not accept the principle of a vested right of residence or rights to carry on a business or profession. Many of the Asians who have been expelled have been residents in East Africa for years, if not actually born there, and it has not been argued that this has vested in them any right to stay on. No foreign governments,
not even the governments of the nationals expelled, have questioned the right of the East African governments to expel them. Until the Uganda expulsions, however, there were no mass expulsions and it may be argued that mass expulsions pose a different set of problems from the expulsion of individuals. But there has been no real question of the wide powers to expel noncitizens.

Secondly, the rule that there is no right to expel citizens is generally accepted. In this respect it is significant that even Amin felt compelled to withdraw his order against the Uganda-Asian citizens, and that when Kenya, for example, has wished to deport a citizen it has first deprived him of his Kenyan citizenship.

Thirdly, in East Africa the principle of the right of entry of citizens is clearly recognized. As far as the British position is concerned, it can be stated that there is no automatic right of entry for its citizens. The British position is that, while there may be a right of entry, it can be subjected to various conditions. The most the British have accepted is that it may have an obligation to accept those citizens expelled by another country. For example, if a country expels a British citizen, the British would have to accept him. But British practice has made clear that this is not an obligation it owes to the citizens but to the other state. It is likely that Britain has used this interpretation to make deals with governments in East Africa whereby those governments do not expel British citizens, even though they are denied the right to work and are unemployed. Such persons cannot, therefore, claim the right to enter Britain. Britain has also sought to introduce factors additional to citizenship as entitling one to enter the country. The notion of a substantive link introduced through the concept of a patrial is a novel development. Although sometimes justified on the basis of the Nottebohm case, it is difficult to see how that case supports the British position.

Fourthly, the practice in East Africa has shown that there is no real protection against deprivation of citizenship and therefore the emergence of a class of stateless persons. The domestic legislation of these countries prohibits governments from depriving a citizen of citizenship acquired through birth. In relation to those who were registered or naturalized (a category which includes the bulk of the Asian community), however, the governments can take away such citizenship without giving any reasons and there appears to be no mechanism of review or appeal. There is no doubt that practice in East Africa goes against the Convention on the Elimination of Statelessness.

Finally, the British law in practice introduces a racially discriminating factor in immigration legislation. Even though the British legislation is not based explicitly on racial criteria, its effect nevertheless is to introduce the racial factor in practice. In this sense, the British legislation contravenes various UN declarations and conventions on racial discrimination. It was in fact the actions of the British Government which have for the first time introduced racial discrimination in legislation about citizenship and immigration and, if the laws and the practice in
East Africa have shown a similar tendency, they are in one sense a reaction to the British initiatives. In that sense, Britain has done a great disservice to the cause of the progressive development of international law.

REMARKS BY LUNG-CHU CHEN*

This discussion on “Expulsion and Expatriation in International Law” is very timely indeed. Today we are witnessing a new type of people “in orbit,” not astronauts but “refugees in orbit.” In a recent bulletin, the UN High Commissioner for Refugees vividly describes how a typical refugee in orbit wandered from country to country over the past half year in quest of some one country that might let him in and stay. What made the case dramatic was that during that long period the refugee was shuffled from airplane to airplane, and confined in airports. Compelled to leave the country of residence and lacking proper identity and travel documents, many people cannot disembark legally anywhere. In earlier times there was always the possibility of jumping ship. But today, under the closed national boundary system policed by more sophisticated entry and exit control, such unfortunate persons are condemned to a nightmarish cycle of enforced airplane journeys and periods of practical imprisonment in airport waiting rooms.

Although my focus will be on the right to return, it needs to be underlined that the right to return is closely related to the other two rights (the right to leave and to stay), and it is a major component of the overall problem of freedom of movement for people across national boundaries. Claims to “return” to a territorial community are, thus, part of a more general claim of access to a territorial community, either for temporary or permanent purposes, by both members and nonmembers of that community. “Return” implies that people seeking entry to a particular territorial community view that community as a “homeland,” as a “state of origin.” Hence the focus here is somewhat narrower than the general claims of access to territory. These people seek return to the territorial community of which they are still or were once members (nationals or long-term residents), or of which their ancestors were members. The people with whom we are concerned have some distinctive link in the sense of actual and significant ties with that community.

Claims for return to a territorial community are put forward either on an individual basis or as a group claim. Individual claims are relatively easy to handle. Group claims for return to a particular territory are more complex, for these claims are often intertwined with the legal doctrines concerning self-determination, state succession, and so on. Group claims for the right of return arise in a variety of circumstances. Here are some notable examples:

In Europe: Europeans displaced by World War II, particularly because of the delimitation of new national boundaries, seeking to return to their homelands.

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In Asia: Arab refugees seeking to return to Palestine; Jews in the Arab countries, the Soviet Union, and elsewhere seeking to return to Israel; Pakistanis seeking to return to Pakistan from Bangladesh; Bengalis in Pakistan seeking to return to Bangladesh; Chinese refugees in Hong Kong; Nationalist Chinese in Taiwan seeking to recover and return to Mainland China; Taiwanese abroad seeking to return to Taiwan; and the refugees on both sides of Vietnam and of Korea seeking to return to their homes.

In Africa: Sudanese refugees seeking to return to Sudan; expelled Asians in East Africa seeking entry into Great Britain, India, or Pakistan; Biafrans seeking to return to Nigeria; and freedom fighters seeking to return to Southern Africa and the Portuguese controlled territories.

In the Americas: U.S. draft dodgers and deserters seeking to return to the United States; Cuban refugees seeking to free Cuba and return to Cuba; and Haitians seeking to return to their own land.

Some of today's most pressing claims to return concern populations displaced by wars (external and internal), revolutions, political upheavals and oppression, conquest, decolonization, partition, or the change of status of a territory. Thus the 20th century has been called the century of homeless people, the century of refugees who seek freedom from violence and political persecution by moving from land to land.

Apart from these dramatic crisis situations, there are countless instances in which people move and claim to reenter their own homelands. They are impelled to move for many reasons having no relation to immediate crises. It is part of the ongoing process of transnational interaction in which people move across national boundaries to pursue values of all kinds in this world of ever-increasing interdependence and ever-increasing mobility.

While the nation-state is still the predominant participant in the world arena, other participants, particularly individual human beings, are becoming more assertive. In the name of human dignity and human rights, individuals demand maximum freedom of movement, both internally and transnationally. They demand in particular the freedom to return to the territorial community with which they believe they have significant ties, and to return under conditions of respect for human dignity and human rights. Assurance of personal safety and freedom are vital: they do not seek to return to their homeland only to be persecuted. In the face of the increasing assertiveness of the individual, nation-state elites strive to maintain and exercise their traditional competence to control and regulate the flow of people, in addition to controlling the flow of goods and ideas. The primary concern of nation-state elites is, of course, to control people in relation to resources as a base of national power. Hence the underlying question is how to harmonize the individual's freedom of movement with the necessity of the nation-state to regulate and control people because of its security, development, absorbing capacity, or other considerations, with due regard to the value consequences beyond the claimants immediately involved.
The policy which most of us as scholarly observers would recommend is progress toward a nonsegregated world of human dignity in which people, resources, and ideas can move freely so as to achieve optimum shaping and sharing of all values, and in which the present disparities in the distribution of people in relation to resources could eventually be redressed equitably around the globe. We favor the utmost freedom for the individual in the choice of place to live, work, enjoy, and retire. Hence, apart from general freedom of movement, a particularly strong presumption is for freedom to return to the territorial community with which one has significant ties. Every body politic should be perfectly willing to have people of different cultures and perspectives return. Indeed, given the present configuration of the world constitutive process, the community against which the individual can claim some significant ties should be made to bear primary responsibility for affording him the opportunities of life. But we repudiate coerced return. Freedom to return implies that an individual should not be made to return to his land without his consent, whether he is a refugee or not.

As policies, like legal doctrines, operate in pairs of complementarity, the presumption for freedom to return needs to be balanced by other public order considerations—the maintenance of security, health, morals, development, and so on for the particular community, taking into account also the impact on neighboring and other states, the regional community, and the world community.

In deference to contemporary emphasis upon human rights, when the individual’s claim to return is challenged by the state, the burden of proof should rest on the state seeking to establish the necessity for restrictions on return (in terms of security and other public order considerations) and the appropriateness of its measures by reference to the authorized legal procedure. Similarly, the measures taken by the state should be required to be temporary in nature (only to the extent necessary), and not to be contrary to contemporary peremptory norms (jus cogens). The state should not, further, be permitted to take arbitrary measures, such as denationalization (deprivation of nationality), complex reentry requirements or exactions of outrageous fees, to deny the individual’s freedom to return. Finally, the decision of the nation-state in restricting the individual’s freedom of return should be subject to review by inclusive decisionmakers of the world community.

In relating these recommended policies to alternative consequences of one choice or another, it is vital that all relevant factors in a given situation be appraised contextually, with the significance of each being made a function of its relation to all the others.

In earlier times when national boundaries were relatively open, transnational interaction was less frequent, and means of transportation and communication were relatively underdeveloped, the question concerning freedom of transnational movement was of minor consequence. Furthermore, as international law was regarded as concerned “exclusively” with nation-states, it was often indifferent to the fate of the
individual. The whole problem of movement for people was approached not from the perspective of the protection of human rights of the individual, but from the paramount consideration of protecting and consolidating the bases of power of states, control over people being a principal source of power bases. Hence customary international law recognized the exclusive competence of the nation-state to control and regulate people for entry into its territory, a manifestation of what was said to be "sovereignty" of the state.

The growing contemporary concern for the protection of human beings, as symbolized by global and regional human rights programs, is challenging the traditional exclusive competence of the nation-state to regiment people and to regulate their movement. As state power is deemphasized, people's power is stressed. Concern for the right of return is an expression of the increasing general concern for the protection and fulfillment of human rights. Thus specific new prescriptions have developed in regard to the right to return.

The Universal Declaration of Human Rights proclaims in its Article 13 (para. 2) that "Everyone has the right . . . to return to his country" (Art. 13, para. 2). The International Covenant on Civil and Political Rights puts it this way: "No one shall be arbitrarily deprived of the right to enter his own country" (Art. 12, para. 4). On the regional level, the European Convention on Human Rights states that: "No one shall be deprived of the right to enter the territory of the state of which he is a national" (4th Protocol, Art. 3, para. 2). The American Convention on Human Rights also affirms that no one may be deprived of the right to enter the territory of the state of which he is a national (Art. 22, para. 5). These provisions, although phrased in general terms, are unequivocal in affirming community expectations about the right of return insofar as nationals are concerned. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination further stresses nondiscrimination in the exercise of this right.

To highlight the basic unity of mankind in freedom of movement, the Uppsala colloquium was convened in June 1972 to formulate detailed principles for guiding and facilitating the liberal application of the freedom to leave and to return. Aside from reaffirming the general freedom of a national to return to his country, the Uppsala Declaration sought to fortify the right to return in these terms:

No person shall be deprived of his nationality for the purpose of divesting him of the right to return to his country (Art. 10).

No person shall be required as a condition of the exercise of the right to return to his country of nationality to pay exorbitant fees, special taxes or similar exactions (Art. 11).

The re-entry of long-term residents who are not nationals, including stateless persons, may be refused only in the most exceptional circumstances (Art. 12).

Under customary international law it is of course generally accepted that a body politic has the competence to set limitations on the admission
of aliens to its territory, either for temporary or permanent purposes. The actual exercise of this competence is restrained by treaty, comity, and the practical need of interactions with people of other communities. This continues to be the prevailing practice today, as evidenced by the omission of any stipulation of the right of access of non-nationals to a territorial community in any of the human rights conventions mentioned above. The prime exception is to allow long-term residents (non-nationals) to return to the land of domicile. (Some scholars have justified this on the theory of "acquired rights." acompanca.) On the other hand, it is equally well established that nationals shall not be denied the right of entry into their own country, as seen in customary international law and recent human rights prescriptions.

The general right of nationals to return to their own country, however, is hampered and frustrated by various practical limitations and pretexts:

1. Claimants are subjected to onerous burdens in proving their nationality;
2. Some nation-states use decrees of denationalization to deny the right of entry of their own nationals;
3. Cumbersome requirements for obtaining passports or reentry permits are made applicable to nationals;
4. Excessive fees for return are imposed;
5. Certain people are classified as a special category of nationals whose right to entry is curtailed;
6. Persecution or the threat of persecution is used to prevent and deter refugees from returning to their land of origin.

With regard to refugees, the principle of nonrefoulement has become well established in international law. According to the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees and other related instruments, refugees shall not be returned against their will to the land of origin where they are in danger of political persecution. Meanwhile, efforts have been made to establish the right of voluntary repatriation for refugees, as symbolized by Article 5 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969. This article reads in part as follows:

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.
2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations...
The present state of practice concerning the individual's freedom of movement and return leaves much to be desired. Pending the achievement of a world commonwealth of free men in which people can move freely from land to land as independent human beings, the right to return to a territorial community should be extended from nationals to all other persons who have significant ties with that particular community.

One way to check the arbitrary exercise of power of exclusion by the nation-state is to make it bear the primary burden in justifying its decision on exclusion and to subject its decisions to review by an international agency empowered with adequate authority and control. In the most ideal world, the international agency would further be empowered to make certain that the individual choosing to exercise his right of return could do so with security in the enjoyment of all human rights.

When freedom of movement becomes a reality, when people are free to reenter where they came from and to choose the place to live, work, enjoy, and retire, we may bid farewell to "the century of homeless people," and help usher in a century of human dignity.

REMARKS

BY VALERIE CHALIDZE*

"Everyone has the right to leave any country, including his own"—this can be considered the basic philosophical principle of social relations just because it asserts the right of everyone to leave the territory of any state and therefore to escape the jurisdiction of any state. Although conditions in the world must change substantially for this principle to be always practicable, the import of its proclamation is the recognition that state sovereignty over the individual can be limited in the future.

In the Universal Declaration of Human Rights this principle is affirmed without reference to limitations. The Covenant on Civil and Political Rights does contain reservations and thereby tries to reconcile the ideal principle with the real state of the world. But the restrictions imposed on this right in the Covenant can be interpreted as loosely as one pleases, and the legislation or practice of different states can limit still more the right to leave the country. Thus it is important to formulate principles concerning the minimum restrictions governing this right which are compatible with reality but which also emphasize that a state's right to restrict freedom to leave the country cannot be interpreted in certain cases as a right in practice to deny an individual this freedom.

The only question should be: Has any country agreed to admit the person concerned? In practical terms, this is a natural limitation on the freedom under discussion. However, unless under treaty obligation to provide lawful assistance to other states in this sphere, a state should not make a guarantee that a person will be admitted to the country of destination a prerequisite for permission to depart. (This requirement exists in the Soviet Union but is not based on statute.) Even if all states should agree to such mutual assistance, the right to leave a country should not depend on an entry visa to any country. It is important to recall in

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this connection the evident right of everyone to use of that space which is not under the jurisdiction of any country, and in particular to use of the open sea. In practical terms these questions are not now urgent, but that is no reason to consider them unimportant in principle.

The right of convicted persons and persons under investigation to leave a country: When I discussed aspects of this question in my report to the Uppsala Conference on the Right to Leave, I asserted that if criminal punishment is considered a means of social defense rather than revenge for an act committed, then the right of a convicted person to leave a country should be recognized, if that person does not want to live in the society whose interests are protected by the state which condemned him. Clearly emigration of persons who have committed actions considered criminal by generally accepted standards will not be encouraged by other states; recognition of the right of convicted persons to leave a country will, in practice, affect individuals who have committed acts not criminally punishable in all countries. Acknowledgment of this right, even if partial, can be important for the protection of persons against political persecution. Of course, special agreements or unilateral decisions can make provision for appropriate exceptions in case of misuse of this right or in case of its utilization in interstate conflicts, especially where international terrorism is involved.

Considered recognition of the right of convicted persons to leave a country would be in keeping with the general principle stated at the beginning of these remarks. This principle seems unrealistic in practical terms but perhaps it can be implemented in certain cases, namely in those instances when political persecution seriously damages the prestige of a country. With particular regard to the USSR, its leaders might seek to restore some Soviet prestige by offering the right of departure to at least some political prisoners (especially those convicted in connection with attempts to leave the USSR). From Soviet juridical practice to date, we know of only a few cases where the right of convicted foreigners to leave the country was recognized and one case where an exit permit for Israel was issued to an individual sentenced to correctional labor without deprivation of freedom (the Shapiro case). It is not known whether this exit permit was granted through a special procedure or through an oversight.

The right of those under investigation to leave a country evidently cannot be affirmed in general, as participation in judicial proceedings of reasonable duration may be regarded as one of the formalities necessary prior to receipt of permission for departure. In one case from Soviet practice, an application for an exit visa was refused to a person declared under suspicion by the procurator more than six months before (the Myuge case).

Although the principle under consideration seems quite unrealistic in general, in concrete cases this approach does not seem strange. For instance, Israel is ready to admit persons convicted in the USSR in connection with their desire to go to Israel; Leyden University invited Bukovsky after his conviction in the USSR to continue his studies in
the Netherlands; and the University of Leeds invited the mathematician Shikhanovich, who is under investigation, to deliver lectures in England.

The right of convicted persons and persons under investigation to remain in their country: I know of no violations of this right in Soviet practice. In theory, former Soviet criminal legislation did not recognize this right for persons convicted and sentenced to exile after having been proclaimed enemies of the workers, but it appears that such sentences were not imposed in practice. In those countries where exile exists as a measure of punishment, the right of a convicted person to remain in his country is not violated if the convicted person enjoys a free choice between exile and some other form of punishment.

The right of convicted persons and persons under investigation to return to their country: The meaning of the words "their country" as relevant to the problem of return is very uncertain. It is possible to maintain that the right of a Soviet citizen to return is guaranteed by the acknowledgment of the freedom to choose one's place of residence. In practice, the right to return is not ordinarily violated with respect to persons whom the authorities consider Soviet citizens. Other individuals who consider the USSR their country can experience serious difficulties in realizing the right to return. The right to return is not apparently violated with respect to Soviet citizens who are under investigation or who have been convicted, but a special problem exists in that these persons may not know that they are returning as suspects or convicted individuals. After the war this question affected thousands of persons liberated from German prison camps by allied armies. On their return to the USSR, they were usually sentenced to deprivation of freedom for surrendering to the Germans. (The average sentence given was ten years.) Now this uncertainty affects those who return after departure from the USSR in violation of officially established procedure or after an earlier refusal to return. Usually punishment under the articles of the criminal code on treason awaits such individuals, with the rare exceptions of those instances where the authorities conclude that the case has no political significance; then the person is held responsible only for illegal departure or flight from the USSR or is entirely freed from liability. For example, the physicist Sayasov remained abroad for personal reasons but soon returned. He was not tried, but public censure was so severe that he could not find work for several years. Punishment in some cases may be death, but the average penalty imposed is 10 years deprivation of liberty. There is no problem involving freedom to return to the USSR for such individuals if they surrender to the Soviet Union as criminals (for instance the case of Strolman who had sought asylum in Yugoslavia; the case of Kudirka who, after asking asylum in America, was returned to Soviet control by the United States). In cases of voluntary return such "defectors" as a rule suffer no limitation of their right to enter the USSR, but on arrival certainly those who have asked political asylum are punished. There are many such cases (for example, the case of the artist Nakashidze). The individuals involved do not know when they return if they are under investigation or have
been convicted since a criminal case is apparently always initiated, but the investigation may be suspended or a court may hear the case in their absence. (Proceedings in the absence of the defendant are permitted in such cases by Article 246 of the Criminal Procedural Code of the RSFSR.) So far as I know, neither the subject of investigation nor his representatives in the USSR are ordinarily informed about the beginning of an investigation or about court proceedings. On one occasion I did learn through documentary evidence that such a case had been initiated and then suspended (the case of Levin, now a resident of the United States). Even confirmation of the confiscation of property, which is sanctioned by the criminal code in cases involving treason, is not conclusive evidence of a court sentence, since the law also provides for administrative confiscation of property of persons “defecting” abroad for political reasons. (Summary Law on Requisition and Confiscation of Property, 1928).

I consider this question quite important not only because the possibility of exercising a right can be decisive for an individual but also because of the conditions governing his exercise of this right and the possible consequences of this action.

Since court proceedings in the absence of the defendant are possible in these cases, since the law sanctions capital punishment for treason, since no published Soviet law regulates the execution of death sentences, theoretically it is interesting to speculate on the likelihood of the execution of such in absentia death sentences outside Soviet territory. This topic has direct relevance to the right to return to one’s country. However, I shall refrain from discussing this question here since I lack reliable information.

Although plainly one cannot hope to secure freedom to leave a country for convicted citizens before this freedom is achieved for other citizens, discussion of this topic is important not only for the theoretical elaboration of the principle that everyone has the right to leave a country but, hopefully, also for possible realization of this right in specific individual cases.

Comments by Hussein A. Hassouna*

Mr. Ghai has put the problem of expulsion of the British nationals of Asian origin from Uganda in its right perspective: It must be looked at not as a sui generis but as an example of the policy of Africanization being carried out in the whole of Africa. That policy is in conformity with the many UN resolutions adopted by the General Assembly since 1962, on the right of states to permanent sovereignty over all their natural resources.

The measures of expulsion were in accordance with international law which allows each state to expel aliens from its territory. The Government of Uganda provided for compensation; and the expulsion

was carried out peacefully. Nor do these measures constitute any violation under the relevant provisions of the various international instruments of human rights: e.g., Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 2(3) of the International Covenant on Economic, Social and Cultural Rights; and Article 13 of the International Covenant on Civil and Political Rights.

The right to leave a country is certainly an important right but the importance attached to it is by no means universal. This reflects a basic difference of approach in which the Western countries emphasize political and civil rights, while the non-Western countries and all developing countries emphasize economic and social rights which, in their view, are essential for the exercise of political and civil rights. It follows from this basic difference of approach that whereas in Western opinion the right to leave should be absolute and unqualified, most developing countries see it subject to limitations and qualifications. Indeed, to open the door for unrestricted emigration would run counter to the vital interests of any developing society. With this consideration in mind, the General Assembly, in its recent resolution on the outflow of trained personnel from developing to developed countries, called for the drafting of guidelines for a program of action indicating viable measures that can be taken to deal with the problem, and, above all, practical and effective guidelines to be followed, mainly by the governments of industrial countries, to put an end to that process and reverse it.

Limitations on the right to leave may also be found in the various international instruments on human rights. In order to define the right to leave correctly and determine its scope, the relevant provisions of the international instruments must be read as a whole: Thus Article 13 of the Universal Declaration on Human Rights must be read in conjunction with Article 29 and Article 12(3) of the International Covenant on Civil and Political Rights.

Turning to Mr. Chalidze’s statement that a state should not be allowed to make permission for a person to depart dependent upon a guarantee that a person will be admitted to the country of destination, it seems to me that such a prerequisite by a state would be in conformity with its duty of protection over its citizens. Also, it would tend to prevent cases of statelessness.

Moreover the right to leave a country cannot be fully exercised unless there is a right of entry into another country. If there is an obligation upon a state to let everyone leave it, there must be a corresponding obligation on other states to let people enter it without discrimination. Barriers imposed by states on entry, such as quota systems or racial and religious requirements, must be lifted.

Mr. Chalidze further stated that the right of a convicted person to leave a country should be recognized, if that person does not want to live in the society whose interests are protected by the state which condemned him. It seems to me that this claim looks at criminal punishment as a means of social defense, but overlooks completely the essential deterrent effect of criminal punishment in a given society. Moreover,
it denies that an individual has not only rights but also duties and responsibilities, a major one being to abide by existing laws. Opposition to such laws should not be expressed by violating them but rather by either trying to change them or, failing this, moving to another country where different laws prevail.

With respect to the right to return, I agree that Mr. Chen has put the problem in the right perspective in referring to the closed national boundary system of today which impedes the freedom of movement of people in general. However, in referring to different group claims for the right of return, the speaker gave among his examples the Jews in the Arab countries, the Soviet Union, and elsewhere, seeking to return to Israel. To portray the problem of those Jews this way as seeking return to Israel is completely incorrect, since what they are really seeking is to settle in a country in which they were neither born nor ever lived.

As to the Arab refugees seeking to return to Palestine, I wish to emphasize that, since the establishment of the new international legal order following World War II, there has never been a more striking case where the right of return of a people has been, on the one hand, continuously upheld and reaffirmed by the international community, while on the other hand, consistently denied by a state.

International recognition of the right of return of the Palestinians, first expressed by the UN General Assembly in 1948, has been reaffirmed year after year in various resolutions. Although these resolutions may be considered, from a technical point of view, mere recommendations, their adoption over the past twenty-five years by an overwhelming majority of UN members, endows them with considerable authority and weight.

To conclude, all relevant international instruments on human rights refer to both the right to leave and the right to return. In my opinion, not only should the right of return be put on an equal footing with the right to leave, but the former should even take precedence and acquire priority over the latter. The reason for this being that the right of return, unlike the right to leave, is invoked in most cases by those who have been subject to two violations: violation of their right to stay in their country when they are illegally expelled therefrom, and violation of their right to go back to their country.

Comments by Sidney Liskofsky*

The proposals of Mr. Chalidze and Mr. Chen are intriguing, but I would characterize their innovations as on the “frontier” at this time. Mr. Chalidze proposed the option of exile, in effect, as an alternate form of punishment for both political and common crimes—though, he considered, in practical terms the option would be available only to persons convicted for political acts. Many questions come to mind regarding this proposal, such as the uncertainty of the distinction between

* American Jewish Committee.
political and common crimes, and whether governments might not use the option to impose increasingly severe penalties so as to drive political dissenters into exile. However, I think it more urgent for the present discussion to concentrate on the right to leave as it applies to the ordinary citizen who has not been prosecuted or convicted for illegal acts, political or other, but who wishes to begin his life anew in another country for whatever reason.

As to Mr. Chen's proposal, while it is surely an ideal worth striving for, I wonder how one could translate it into a workable norm of universal applicability. A proposal along similar lines was found impractical at last June's Uppsala Colloquium on the Right to Leave and Return. The farthest the experts at that Colloquium were able to go beyond the existing international law standard, which limits the right to return to nationals, was to extend it to non-nationals, including stateless persons, other than in the most exceptional circumstances. This corresponded to the standard suggested at a conference of legal experts on freedom of movement, sponsored by the International Commission of Jurists in 1968 in Bangalore, India.

I shall focus my remaining remarks on the right to leave, in respect to which it might be of interest to contrast the tenor and content of two recent international convocations—the nongovernmental Uppsala Colloquium and the intergovernmental UN Commission on Human Rights. The contrast provides a glimpse of how political reality measures up to the ideals which the panelists and other independent experts and civic groups espoused.

The participants at Uppsala elaborated on the draft principles in the 1963 Inglés study of Article 13(2) of the Universal Declaration, which principles the United Nations had "placed on ice" for a decade. The declaration adopted at Uppsala reaffirmed Article 13(2) and called on all states to recognize and implement it. It focused particularly on the various forms of coercion, official and unofficial, used by governments to inhibit the exercise of the right, including renunciation or direct revocation of nationality; penalties and harassment; special fees and taxes; burdensome documentation and other formalities; and unreasonable application of national security and other limitations on the right permitted in the Universal Declaration and Covenant on Civil and Political Rights. It proposed a clear and present danger qualification for the national security limitation and took a forthright libertarian view on the brain drain consideration (which presumably comes within the Universal Declaration's general welfare limitation). It emphasized the right of appeal and petition on both the national and international levels.

Article 13(2), as spelled out in the Inglés draft principles, came up at long last for discussion at the Human Rights Commission in Geneva several weeks ago. The comparison with Uppsala was less than inspiring. Though the resolution adopted by the Commission "affirmed the importance" of the right in the article, it merely drew the draft principles to the attention of governments and other institutions, carefully avoiding language suggestive of approval; in contrast the Commission expressed
its "hope" that states would "take into account" other sets of draft principles spelling out particular rights, adopted at the same session. The resolution also omitted any reference, express or implied, such as contained in the other resolutions, to the goal of an international instrument spelling out the right to leave and return. Most important, the Commission deleted from a prior draft of the resolution a routine closing paragraph retaining the subject on the agenda, despite a strong plea from the Italian and Austrian delegates to retain it. The Soviet delegate applauded this deletion as substantiating his government's view that the right to leave a country was not a fundamental right.

Fortunately, the negative impact of the Commission's resolution was partially reversed when, on May 11, it came up for review in the Social Committee of the Economic and Social Council. Italy, joined by Denmark, Sweden, and Trinidad-Tobago, offered an amendment to the Commission resolution by which it would retain the subject on its agenda. The amendment was approved by 20-4-10, with Hungary, Poland, the Ukraine, and the USSR voting against, and Algeria, Argentina, Chile, Madagascar, Niger, Pakistan, Peru, Venezuela, Yugoslavia, and Zaire, abstaining. The Soviet Union made a last minute, again unsuccessful, effort during the closing meeting of ECOSOC's plenary to reverse the Social Committee's decision, by requesting a re-vote. In a separate vote on the paragraph retaining the subject on the agenda, the count was 12-5-7.

I have my doubts as to the prospects of UN action in the near future in elucidation and furtherance of the right in Article 13(2), in view of the East European and Third World inclination to subordinate in the human rights work of the international organization the "classical" civil and political rights to the priority goals of eliminating colonialism, apartheid, and racial discrimination in Southern Africa, and promoting economic and social development in the less developed countries. It is regrettable that the pursuit of these important goals is being used to justify curtailment or even destruction of fundamental rights proclaimed in the Universal Declaration.

I would call your attention to a statement pertinent to this very situation by Wilfred Jenks, Director-General of ILO, himself an eminent jurist, in the introduction to his 1968 report to the International Labour Conference. Mr. Jenks observed that, although ILO was particularly concerned with freedom of association, forced labor, and economic rights generally, all the other fundamental civic rights, such as freedom of opinion, expression, and information, the right of people to express their will in honest election, etc. "are, in a general way, such as to assist in creating the conditions needed if individuals are to want to improve their lot and to be able to do so . . . ." While the economic and social rights are ends in themselves, and also help, "sometimes decisively—to realize fundamental aspirations to freedom and equality," those rights "cannot be achieved without promoting fundamental human rights and freedoms." In the introduction to his 1970 report, he reiterated his view that "freedom of association is meaningless without freedom from
arbitrary arrest and detention, freedom of opinion and expression, freedom of assembly, the right to a fair trial,” and that trade union rights “rest essentially on civil liberties.”

What Mr. Jenks said applies no less to the right to freedom of movement, including that aspect of it which is guaranteed in Article 13(2) of the Universal Declaration. No social goals, whatever their priority—whether decolonization, combating racism, safeguarding national security, controlling brain drain, or promoting economic development—can justify negation or unreasonable restriction of this right.

CLOSING REMARKS BY MR. CHEN:

Dr. Hassouna questioned the appropriateness of my inclusion of the claims of Jews to return to Israel on the ground that they want to settle there, not to return. This question illustrates the complexity of the group claims for return and the need for clarification. Return implies a certain subjectivity and identification on the part of claimants in relation to the area to which they wish to go. Many Jews outside Israel do believe they have significant ties with Israel and identify it as their homeland. In this sense, claims of Jews to return to Israel were included in the examples of group claims. It was meant to be descriptive, not preferential.

A gentleman suggested that there was a potential danger in the policy favoring freedom of movement which I had recommended. Our strong presumption for freedom of return is a presumption: it is neither absolute nor unqualified. Under some conditions freedom of return must, like other freedoms, give way to the appropriate policy of public order. Policies here, as in all law, are complementary. The presumption in favor of freedom of return needs to be balanced by public order considerations—the maintenance of security, health, development, absorbing capacity, and so on for the particular community, having regard also for the impact on other states, the regional community, and the world community. These factors need to be evaluated contextually. To extend the right of return from nationals to all other persons who have significant ties with a particular community would be an important interim step toward a world community honoring freedom of movement.

CLOSING REMARKS BY MR. CHALIDZE

The right to leave is not just a right to travel, a right to return to one’s historic homeland, a right to contact with scientists. The right is the ultimate defense, the last legal means of defense from persecution and also exploitation of one’s talent. And this right of defense is in every case more important than the brain-drain problem. The experience of the Jews in Germany in the 1930’s evidences that the right of departure can indeed mean the difference between life and death.

Arthur Silverstein
Reporter