AN INTELLECTUAL HISTORY OF FREEDOM OF MOVEMENT IN INTERNATIONAL LAW: THE RIGHT TO LEAVE AS A PERSONAL LIBERTY

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The history of freedom of movement has been framed most commonly as a narrative about the rights of individuals to enter another country or, viewed the other way around, as a story of immigration restriction. Yet, recent research into the legal regulation of movement reveals that it is as much a history of emigration restriction — curtailment of the rights of nationals to leave their own country — as it is one of migration controls by other countries. The right to enter a country is only half the story; indeed, it does not even come into play if the antecedent right to leave one's country is not respected.

This article examines the philosophical underpinnings of the right to freedom of movement in modern international human rights law. It provides the 'back story' to its inclusion in the first universal human rights instrument, the 1948 Universal Declaration of Human Rights*, (and subsequently the 1966* International Covenant on Civil and Political Rights*, which was being negotiated at the same time). Though the immediate impetus for the inclusion of the right was the Nazi regime's curtailment of free movement during World War II, it arose from a much longer intellectual lineage linked to the concept of 'liberty'. The present article traces its development as an idea from classical times through to its inclusion in the* Universal Declaration of Human Rights *to explore its changing character over time. It finds that while there is considerable formal support for the right to freedom of movement, including the right to leave one's country, there remain practical as well as legal impediments to its full realisation. This represents a continuum, rather than a break with past practice.*

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I INTRODUCTION

The history of freedom of movement has been framed most commonly as a narrative about the rights of individuals to enter another country, or, viewed the other way around, as a story of immigration restriction.[1] Yet, recent research into the legal regulation of movement reveals that it is as much a history of *emigration* restriction — curtailment of the rights of nationals to leave their own country — as it is one of migration controls by other countries.[2] The right to enter a country is only half the story; indeed, it does not even come into play if the antecedent right to leave one's country is not respected.

The right to leave is recognised in a number of human rights instruments, most notably, the *Universal Declaration of Human Rights* ('*UDHR*') and the *International Covenant of Civil and Political Rights* ('*ICCPR*').[3] However, it is an incomplete right, since it is not matched by a state duty of admission.[4] While modern international human rights treaties reflect the right to seek asylum and

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[1] See, eg, Satvinder S Juss, 'Free Movement and the World Order' (2004) 16 *International Journal of Refugee Law* 289; James A R Nafziger, 'The General Admission of Aliens under International Law' (1983) 77 *American Journal of International Law* 804.

[2] See, eg, Sunil S Amrith, 'Tamil Diasporas across the Bay of Bengal' (2009) 114 *American Historical Review* 547 on 'diasporic histories' and 'circulation'; Sunil S Amrith, *Migration and Diaspora in Modern Asia* (Cambridge University Press, 2011). See also Adam M McKeown, *Melancholy Order: Asian Migration and the Globalization of Borders* (Columbia University Press, 2008); Nancy L Green and François Weil (eds), *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation* (University of Illinois Press, 2007).

[3] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 13(1) ('*UDHR*'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(1) ('*ICCPR*'). Although Robert Jennings and Arthur Watts maintain that emigration is 'in principle entirely a matter of internal legislation of the different States', later in the same paragraph they acknowledge that a right of emigration has been recognised in a number of general international instruments: Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9th ed, 1992) [381]. The first statement has been carried through from the very first edition of Oppenheim in 1905, although at that time 'in principle' read 'in fact': Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co, 1905) vol 1, 351 [296].

[4] See generally Jennings and Watts, above n 3, [381], [400]. Although it is generally accepted that states are obliged to admit their own nationals, at least as a corollary of expulsion, it is complicated even to elucidate a universal rule on this. First, *ICCPR* art 12(4) indicates that the right to enter one's country cannot be 'arbitrarily' deprived, suggesting that there may be legitimate grounds for refusing entry to a national. Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Clarendon Press, 1978) 20, notes that states 'quite frequently establish intermediate classes of "non-citizen nationals"', concluding that

> [w]hile international law is concerned with nationality for the purposes of diplomatic protection, and also in the matter of the reception of those expelled from the territory of other States, it leaves to States a much wider discretion in the regulation of the incidents of nationality, and in the creation of privileged classes, whether of aliens or citizens'.

Goodwin-Gill further notes that any right of entry under *UDHR* art 13 can be traced to 'municipal law, as an incident of citizenship', 'treaties, which may create specific rights in favour of certain classes of aliens, including refugees and stateless persons', 'general international law, in so far as this affirms the duty of a State to receive back its nationals expelled from other States or, possibly, in so far as it recognizes the human rights aspect and the right of entry as belonging to the individual citizen': at 21. See also *Van Duyn v Home Office* (C-41/74) [1974] ECR 1337. See Richard Plender, *International Migration Law* (Martinus Nijhoff, 1988) 133 for a discussion of the particular quality of the obligation of states to admit nationals, which is beyond the scope of this article.

the principle of *non-refoulement* (non-return to persecution and other serious human rights violations), these are relatively limited incursions into states' otherwise unfettered sovereign power to determine who crosses their borders and may remain within them. How and why, then, were rights to free movement codified in modern human rights treaties and what, substantively, do they mean?

This article examines the philosophical underpinnings of the right to freedom of movement in modern international human rights law. It provides the 'back story' to its inclusion in the first universal human rights instrument, the *UDHR* (and subsequently the *ICCPR*, which was being negotiated at the same time). Though the immediate impetus was the Nazi regime's curtailment of free movement during World War II,[5] it derived from a much longer intellectual lineage linked to the concept of 'liberty'. The present article traces its development as an idea from classical times through to its inclusion in the *UDHR* to explore its changing character over time. It charts a story which has not previously been told in this way, providing a fascinating backdrop to national histories of immigration restriction and admission.

The article's analysis is restricted to freedom of movement as a civil and political right, rather than as an economic one. This is because the extent to which states permitted emigration was typically regarded as a test of their liberalism towards personal political freedom.[6] The *UDHR* also reflected the idea of free movement as an expression of individual civic liberty. Of course, in practical terms, emigration was at times an economic necessity for states and was seen as a means of expanding national wealth through trade and remittances.[7] Population was manpower and this often 'represented the most valuable asset of any sovereign'.[8] The focus, however, was less on free movement as an aspect of *personal* economic freedom and development — a more recent concept — and rather as a means of increasing national wealth. For this reason, analysis of freedom of movement as an economic right falls outside the scope of the present

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5 Drafting Committee, Commission on Human Rights, *Summary Record of the Thirty-Sixth Meeting*, UN ESCOR, 2nd sess, 36th mtg, UN Doc E/CN.4/AC.1/SR.36 (28 May 1948); *Hundred and Twentieth Meeting*, UN GAOR, 3rd Comm, 3rd sess, 120th mtg, UN Doc A/C.3/SR.120 (2 November 1948) ('*Summary Record of the 120th Meeting*'); *Ninetieth Meeting*, 3rd Comm, 3rd sess, 90th mtg, UN Doc A/C.3/SR.90 (1 October 1948).

6 John Torpey, 'Leaving: A Comparative View' in Nancy L Green and François Weil (eds), *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation* (University of Illinois Press, 2007) 13: 'the freedom to move about internally or to emigrate beyond the borders of one's country has remained a matter of the greatest significance in political struggles down to our day'.

7 John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 2000) 108. See also Donna R Gabaccia, Dirk Hoerder and Adam Walaszek, 'Emigration and Nation Building during the Mass Migrations from Europe' in Nancy L Green and François Weil (eds), *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation* (University of Illinois Press, 2007) 63; and Corrie van Eijl and Leo Lucassen, 'Holland beyond the Borders: Emigration and the Dutch State, 1850–1940' in Nancy L Green and François Weil (eds), *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation* (University of Illinois Press, 2007) 156.

8 Aristide R Zolberg, 'The Exit Revolution' in Nancy L Green and François Weil (eds), *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation* (University of Illinois Press, 2007) 33. See also Hugh J M Johnston, *British Emigration Policy 1815–1830: 'Shovelling out Paupers'* (Clarendon Press, Oxford, 1972) 2: 'Men still equated population with power and wealth and saw each industrious emigrant as a further loss of national strength'.

article, which instead seeks to understand why the right to free movement came to be reflected in modern human rights law at all.

What is striking is that despite the longstanding ideal of free movement in Western political and philosophical thought, it has in practice always been subject to state restrictions. As international lawyer Paul Fauchille wrote in 1924, 'the liberty of the individual must be reconciled with a [state-based] system of regulation and emigration'.[9] The right to leave one's country has therefore 'never been considered an absolute right'.[10] It has always been subject to limitations of various sorts, including being denied to convicted criminals, some minors, those seeking to evade prosecution and those who are mentally incapacitated or have a dangerous disease. Although the particular restrictions imposed by states vary, 'the very breadth of actual practice is strong evidence against the emergence of a general principle of free movement'.[11] Thus, Fauchille concludes that:

> Notwithstanding almost universal formal support for the principle of freedom of movement, including the right to leave one's country, the scope of permissible restrictions and the nature and extent of State practice show clearly why the right in question has scarcely emerged from the context of domestic, constitutional norms to the level of internationally enforceable claim.[12]

II THE RIGHT TO FREEDOM OF MOVEMENT

The right to freedom of movement appears in three manifestations in the *UDHR* and the *ICCPR*.[13] First, it encompasses the right to move freely *within* a country and to choose one's place of residence there.[14] Secondly, it includes the right to cross an *international* border, expressed as the right to leave any country, including one's own.[15] Thirdly, it extends to the right to return to one's

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9 Paul Fauchille, 'The Rights of Emigration and Immigration' (1924) 9 *International Labour Review* 317, 320.

10 Guy S Goodwin-Gill, 'The Right to Leave, the Right to Return and the Question of the Right to Remain' in Vera Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues: Papers Presented at the Colloquium Organized by the Graduate Institute of International Studies in Collaboration with the Office of the United Nations High Commissioner for Refugees, Geneva, 26 and 27 May, 1994* (Martinus Nijhoff, 1995) 93, 96.

11 Ibid.

12 Ibid 97.

13 Unless I expressly refer to internal movement, I use the expressions 'right to free movement' and 'right to freedom of movement', as generic terms encompassing both internal and external movement. It has this broad sense in many of the writings under discussion.

14 *UDHR* art 13(2); *ICCPR* art 12(2). See also McKeown, above n 2, 9, who suggests that the right of internal movement played an important role justifying white settler colonies' exclusionary migration policies in the 19th century, since 'free mobility in the interior of nations and equal access to law were [asserted as] features that distinguished the civilized states from barbaric and despotic ones'. Migrants who were 'ignorant of republican virtues' could be cast as a threat to the colonies' 'liberal institutions of self-rule'.

15 *UDHR* art 13(2); *ICCPR* art 12(2).

country.[16] This is coupled with the right to seek and enjoy, in other countries, asylum from persecution.[17]

The present article is primarily concerned with the second of these, although, in order to understand the philosophical underpinnings of free movement as a personal liberty (or, in contemporary discourse, a human right), it necessarily examines the first as well. Indeed, as will be shown, the regulation of *international* movement paralleled controls on internal movement and the development of the passport as a document for international travel was an extension of instruments that monitored movement *within* states.

Part II traces the intellectual history of free movement as a philosophical, political and legal concept. While it attempts to do so chronologically, it also picks up on the theme of 'liberty' in classical, Enlightenment and liberal consciousness as a linking and consistent ideal, encapsulated in contemporary thought by the framework of human rights law.[18] However, just as there are numerous contemporary examples of state practice that curtail the right to free movement and the right to leave one's country, as expressed in various international and regional human rights instruments,[19] so a similar disconnect can be seen historically between the theory of free movement, on the one hand, and its exercise in practice, on the other. Indeed, there are virtually no historical examples of unlimited freedom of movement across borders, even in the

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16 *UDHR* art 13(2); *ICCPR* art 12(4).

17 *UDHR* art 14(1). See also *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*') art 33; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*') art 3; *ICCPR* arts 6, 7. See generally Symposium, 'Asylum and the *Universal Declaration of Human Rights*' (2008) 27(3) *Refugee Survey Quarterly* on the right to seek asylum.

18 In 1988, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities noted that '[f]reedom of movement is a constituent element of personal liberty … and it is a part of the right of "personal" self-determination': Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*, UN ESCOR, 40th sess, Agenda Item 15(e), UN Doc E/CN.4/SUB.2/1988/35 (20 June 1988) [30].

19 See, eg, *UDHR* art 13; *ICCPR* art 12; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) art 2 ('*European Convention on Human Rights*'); *American Declaration of the Rights and Duties of Man*, signed 2 May 1948, UN Doc E/CN.4/122, art 26; *Convention Relating to the Status of Refugees*, signed 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 26; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, signed 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003) art 39 ('*Migrant Workers Convention*'); *African Charter on Human and Peoples' Rights*, signed 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 12; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(d)(ii); *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*, GA Res 40/144, UN GAOR, 3rd Comm, 40th sess, 116th plen mtg, Agenda Item 12, Supp No 3, UN Doc A/RES/40/144 (13 December 1985) annex, art 5; *American Convention on Human Rights*, signed 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 22.

restricted context of the right to leave and return.[20] This remains true of state practice today, despite 'almost universal formal support for the principle of freedom of movement' in international law.[21]

A *The Right to Leave One's Country in Classical Thought*

The right to freedom of movement — including the right to leave and return to one's own country — has its origins in ancient philosophy and natural law. Articulating the vision of Socrates, Plato wrote:

> we further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him. None of us laws will forbid him or interfere with him. Any one who does not like us and the city, and who wants to emigrate to a colony or to any other city, may go where he likes, retaining his property.[22]

The classical conception of freedom of movement was regarded as integral to personal liberty, which was limited to certain adult males. This is reflected in the classical writings of Epictetus, who described 'freedom' as meaning: 'I go wherever I wish; I come from whence I wish'.[23] Indeed, the etymology of the Greek term he used is 'to go where one wills',[24] and it was understood at the time to mean the opposite of bondage. In the classical period, Greek citizens travelled freely, such that 'the whole world around the Mediterranean became a melting pot as a consequence of migration and the intermingling of the many nations living there'.[25] Similarly, at the time of the Roman Empire, people of foreign extraction comprised around 90 per cent of the population of Rome,[26] and the term *libertas* — 'freedom' — meant the opposite of slavery, since slaves and bondsmen were not free to move.[27]

B *The Right to Leave One's Country in Modern International Law*

In the modern period, some of the first to write about the right to free movement were lawyers setting out the principles of the 'law of nations'

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[20] See Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff, 1987) 4:

> All commentators agree that some restrictions on such movement are legitimate if imposed for limited purposes in a fair and non-discriminatory manner, eg, on grounds of securing commpliance [sic] with valid judicial or administrative decrees; preventing the spread of contagious diseases; ensuring fulfillment [sic] of certain contractual obligations; and, in time of war, regulating movements that may directly affect legitimate national security concerns.

[21] Goodwin-Gill, above n 10, 97.

[22] Crito 51d–e, quoted in Sharon M Meagher, *Philosophy and the City* (State University of New York Press, 2008) 22.

[23] Quoted in Maurice Cranston, 'The Political and Philosophical Aspects of the Right to Leave and to Return' in Karel Vasak and Sidney Liskofsky (eds), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19–20 June 1972* (The American Jewish Committee, 1976) 21.

[24] Etymol Magnum 329.44, quoted in ibid 21.

[25] Julius Isaac, *Economics of Migration* (Oxford University Press, 1947) 8, cited in Cranston, above n 23, 29. On classical thought, see also Nafziger, above n 1, 808–10.

[26] Cranston, above n 23, 29.

[27] Ibid.

(international law). The writings of Spaniard, Francisco de Vitoria (1492–1546) and Dutchman, Hugo Grotius (1583–1645)[28] had enormous influence on the development of international law. To be properly understood, however, they must be read against the historical backdrop of imperial trade expansion, since many of the legal 'principles' they espoused helped to bolster the actions of their respective states.[29] Grotius expressly acknowledged that his intention was 'to demonstrate briefly and clearly that the Dutch … have the right to sail to the East Indies, as they are now doing, and to engage in trade with the people there';[30] de Vitoria's argument that '[i]t was permissible from the beginning of the world for anyone to set forth and travel wheresoever he would' justified the travel of Spaniards to the New World.[31] Their ideas were developed in the 18th century by scholars such as Vattel and Blackstone.

1 *De Vitoria*

De Vitoria's work set out a series of 'propositions' and 'proofs'. Fourteen related to the right to freedom of movement. Although his focus was on the right to *enter* another country, it is a necessary corollary of his argument that people have the right to leave their country. Contemporary international law does not reflect his view on entry but it does recognise the right to leave.

The purpose of de Vitoria's writing was to demonstrate why '[t]he Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them'.[32] In his view, this derived from the law of nations (*jus gentium*), 'which either is natural law or is derived from natural law'[33] (that which 'natural reason has established among all nations').[34] It was, accordingly, 'natural' to permit foreigners to *enter* a territory. One can easily see the utility of making this argument in the light of Spanish interests in the New World: not only did it provide a basis for travel

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28 Grotius is known as the 'father of the law of nations': Oppenheim, above n 3, [43]: 'the book of Grotius obtained such a world-wide influence that he is correctly styled the "Father of the Law of Nations"'. See also Hamilton Vreeland, *Hugo Grotius: The Father of the Modern Science of International Law* (Oxford University Press, 1917).

29 Writing in 1924, international law scholar Paul Fauchille wrote: 'One of the rights of states is to carry on international trade, and such trade necessarily implies for the nationals of states the power to pass to and from the territories of other states': Fauchille, above n 9, 318. For an analysis of the liberal sensibility in international law from the late 19th century, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001). For a clear overview of 'migration in the law of nations', see McKeown, above n 2, 22–8.

30 Hugo Grotius, *The Freedom of the Seas* (Ralph van Deman Magoffin trans, Oxford University Press, 1916) 7 [trans of: *Mare Liberum* (first published 1609)].

31 Francisco de Vitoria, *On the Indians Lately Discovered* (John Pawley Bate trans, Lawbook Exchange, 2000) sect III, 386 [trans of: *De Indis Noviter Inventis* (first published 1532)]; José D Inglés, *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country* (United Nations, 1967).

32 de Vitoria, above n 31, 386. This view was supported by Samuel von Pufendorf, *Of the Law of Nature and Nations* (William Percivale trans, Oxford, 1710) [trans of: *De Jure Naturae et Gentium* first published 1672)].

33 de Vitoria, above n 31, xxxvi.

34 Ibid, referring to Justinian, *The Institutes* I.ii.I.

from Spain to the Americas, but it also implied a duty on the indigenous Americans to respect their right to do so (provided they were not harmed).[35]

In de Vitoria's second 'proof', he argued that common ownership of property meant that 'from the beginning of the world' anyone had been free to travel and settle 'wheresoever he would' and this right had not been lost even as property began to be divided up. Drawing on a passage from Justinian's *Institutes* — 'by natural law running water and the sea are common to all, so are rivers and harbours, and by the law of nations ships from all parts may be moored there'[36] — he maintained that such public things could not be possessed by any single entity. Accordingly, 'the aborigines would be doing a wrong to the Spaniards, if they were to keep them from their territories'.[37]

This linked to his third proof: everything is lawful that is not prohibited or harmful to others.[38] Assuming, as he did, that Spanish travel to the Americas would not be harmful to its inhabitants, 'it is lawful'.[39] In a somewhat circular argument, de Vitoria wrote that to deny the Spanish entry would be unlawful, since expelling a foreigner would amount to banishment — a capital form of punishment for a crime — and no crime had been committed. Indeed, to suggest a foreigner was unwelcome might imply he was an enemy and refusal of admission, or expulsion, could be seen as an act of war. Thus, 'it is not lawful for them [the American Indians] to keep the Spaniards away from their territory'.[40]

De Vitoria also turned to 'divine law' to bolster his claim that natural law encompassed the right to enter another country.[41] He relied on St Matthew — 'I was a stranger and ye took me not in'[42] — to suggest that refusing a stranger is aberrant behaviour, drew on the parable of the Good Samaritan and the directive in Matthew to love thy neighbour as oneself as evidence that the people of one country cannot keep away the people of another without cause,[43] and used the statement in Ecclesiasticus that '[e]very animal loveth its kind' to suggest that it is 'against nature to shun the society of harmless folk'.[44]

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35 Ibid: 'It would not be lawful for the French to prevent the Spanish from travelling or even from living in France, or vice versa, provided this in no way enured to their hurt and the visitors did no injury. Therefore it is not lawful for the Indians'. By 'harm', de Vitoria seems to imply physical harm, rather than harm to culture or social life. Furthermore, he states that all nations regard it as 'inhumane to treat visitors and foreigners badly without some special cause', such as their misbehaving.

36 Justinian, *The Institutes* II.i. See James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Clarendon Press, 1934) 141, referring to (but not directly quoting) de Vitoria, above n 31, xxxvi [proof 10].

37 de Vitoria, above n 31, xxxvii.

38 Ibid xxxvi.

39 Ibid xxxvi [proof 4]: 'it would not be lawful for the French to prevent the Spanish from travelling or even from living in France, or vice versa, provided this in no way enured to their hurt and the visitors did no injury. Therefore it is not lawful for the Indians'.

40 Ibid xxxvi [proofs 5 and 6]. In proof 7, de Vitoria refers to Virgil's *Aeneid* bk I, lines 539–40: 'What race of men is this? or what country is barbarous enough to allow this usage? We are driven off from the hospitality of its shore'.

41 Ibid xxxvii [proofs 8, 9 and 14].

42 Ibid xxxvii [proof 9], referring to St Matthew, ch 25.

43 Ibid xxxvii [proof 14], referring to St Luke, ch 10; St Matthew, ch 22.

44 Ibid xxxvii [proof 8], referring to Ecclesiasticus, ch 17. He also drew from this the implication that it is 'humane and correct to treat visitors well', and that a foreigner ought to be treated as a native, provided he commits no wrong: at xxxvi.

In de Vitoria's view, if travel abroad were unlawful, natural law, divine law or human law would forbid it. Since 'it is certainly lawful by natural and by divine law', if any human law 'without any cause took away rights conferred by natural and divine law, it would be inhumane and unreasonable and consequently would not have the force of law'.[45] In other words, it would be inconsistent with the nature and dignity of being human.

2 *Grotius*

Grotius declared the principle that '[e]very nation is free to travel to every other nation' to be a 'most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable'.[46]

Summarising and endorsing de Vitoria's conclusions, his 1609 work, *The Freedom of the Seas*,[47] argued that the safeguard of free passage over land and waters was required by law for those

> who, for legitimate reasons, have need to cross over them; as, for instance, if a people has been forced to leave its own territories and is seeking unoccupied lands or desires to carry on commerce with a distant people, or is even seeking to recover by just war what belongs to it.[48]

Reflecting de Vitoria's 'no harm' idea, he argued that 'it is altogether possible that ownership was introduced with the reservation of such a use, which is of advantage to the one people, and involves no detriment to the other'.[49]

In *De Jure Belli* (1625), he wrote of the right of a person to temporarily sojourn in a foreign country 'for the sake of health, or for any other good reason; for this also finds place among the advantages which involve no detriment',[50] stating that this necessarily included the right to construct 'a temporary hut', even if the land on which it was built was already possessed by others.[51] Foreigners who had been expelled from their homes and were seeking refuge should not be denied permanent residence, provided they submitted themselves to the established government 'and observe[d] any regulations which [were] necessary in order to avoid strifes'.[52]

Citing Cicero's description of 'the foundation of liberty' as being the right to retain or abandon one's country and his commendation of a law that said 'no one

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45 Ibid xxxvii.

46 Grotius, *The Freedom of the Seas*, above n 30, xxxi.

47 Ibid, where de Vitoria is mentioned as the author of the 'specific and unimpeachable axiom of the Law of Nations'.

48 Hugo Grotius, *On the Law of War and Peace* (Francis W Kelsey trans, Clarendon Press, 1925) vol 2, 196–7 [trans of: *De Jure Belli ac Pacis Libri Tres* (first published 1625)].

49 Ibid 197. At 199–200, he refers to Libanius: 'God did not bestow all products upon all parts of the earth, but distributed His gifts over different regions, to the end that men might cultivate a social relationship because one would have need of the help of another'.

50 Ibid 201.

51 Ibid.

52 Ibid 201–2.

is forced to remain in a state against his will',[53] Grotius also argued that people not only had a right to physically leave their own country but also to withdraw from its political constituency.[54] Though accepting that 'nationals of a state cannot depart in large bodies',[55] since this would end up destroying the political community itself, he considered the withdrawal of individuals to be 'a different matter'.[56]

Nevertheless, Grotius recognised that the right to expatriate oneself was not absolute and that restrictions on expatriation might legitimately be imposed. For example, a national should not be permitted to withdraw if he or she had contracted a heavy debt which had not been paid, or in cases of war where numbers were needed, 'unless the national [were] prepared to furnish an equally capable substitute to defend the state'.[57] This line of thinking has pervaded state practice from the early modern period through to the present day.[58]

3 *Vattel*

Swiss lawyer Emmerich de Vattel (1714–67) agreed that people 'may quit a society which seems to have dissolved itself in order to unite again under another form; they have the right to retire elsewhere, to sell their lands, and take with them all their effects'.[59] In the *Law of Nations*, he concluded that 'a person may quit his country' because

> every man is born free; and the son of a citizen, when come to the years of discretion, may examine whether it be convenient for him to join the society for which he was destined by his birth. If he does not find it advantageous to remain in it, he is at liberty to quit it on making it a compensation for what it has done in his favour, and preserving, as far as his new engagements will allow him, the sentiments of love and gratitude he owes it.[60]

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53 Ibid 254. Historically, the notion of citizenship was as a permanent bond and the idea of multiple nationalities was an anomaly. In Roman law, Servius had written that it was an ancient custom that 'the man who was passing over into a family or nation first withdrew from the one in which he had been, and under such a condition was received by the other', suggesting that one could only belong to a single nation at any one time — but also that one could change one's allegiance, cited in Grotius, *The Freedom of the Seas*, above n 30, 253 n 2. Roman law provided that while a man could move, he remained subject to the burdens of his native town. Grotius notes that this only applied to those who moved *within* the Roman Empire, and was on account of tax.

54 Grotius, *The Freedom of the Seas*, above n 30, 254.

55 Ibid 253.

56 Ibid.

57 Ibid 254.

58 See Jennings and Watts, above n 3, [382]. Writing in 1924, Fauchille observed that while wholesale emigration should not be prohibited per se, since the right to leave was a natural right, because it could destroy a country's population, 'it should be very strictly supervised and may even be forbidden if it reaches excessive proportions or assumes the character of a kind of organised revolt against the constitution and the authorities' in Fauchille, above n 9, 321.

59 Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature* (G G and J Robinson, revised ed, 1797) bk I, ch III [33] [trans of: *Le Droit des Gens ou Principes de la Loi Naturelle* (first published 1758)].

60 Ibid bk I, ch XIX [220]: a footnote explains that taxes levied on people quitting a country are an example of 'compensation'. See also John Locke, *Two Treatises of Government* (Awnsham Churchill, 1689) [99].

Swiss philosopher Jean-Jacques Rousseau (1712–78) inserted a caveat to this presumption. He thought that a person could only renounce allegiance to the state if 'he does not leave to escape his obligations and avoid having to serve his country in the hour of need. Flight in such a case would be criminal and punishable, and would be, not withdrawal, but desertion'.[61] Pierre Vergniaud, a politician in the French Legislative Assembly, similarly drew a distinction in 1792 between those Frenchmen who wanted to 'leave the realm' and those who wanted to 'abandon the *patrie*'.[62] His argument was premised not on the need to restrict emigration per se but rather to enable ideological distinctions to be made among people leaving France.

Similar ideas formed part of liberalism's emerging discourse on the 'rights of man', which was central to the notion of individual freedom in relation to the state.[63] For example, in his writings on the social compact between the state and its citizens, John Locke (1632–1704) regarded leaving one's country as the means by which one could refuse consent to be part of a political community (since, in his view, governance required such consent).[64] In Locke's view, the right to expatriate oneself was a manifestation of self-governance and individual self-determination.[65] This idea of natural rights became unfashionable during the 19th century but was revived in the 20th century through the language of human rights, which sought to translate them into a positive system of law.[66]

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61 Jean-Jacques Rousseau, *The Social Contract* (George Douglas Howard Cole trans, Cosimo Classics, 2008) 101 n 33 [trans of: *Du Contrat social* (first published 1762)]. See also *UDHR* art 29; *ICCPR* art 12(3).

62 Torpey, *The Invention of the Passport*, above n 7, 41. Such control mechanisms can be seen to this day with exit visa requirements in some countries, and attempts during the Cold War by Eastern states to severely curtail the movement of their citizens, often by permitting only one family member to travel at a time (except to other Communist countries) in case they were tempted to claim political asylum.

63 Stig A F Jagerskiold, 'Historical Aspects of the Right to Leave and to Return' in Karel Vasak and Sidney Liskofsky (eds), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19–20 June 1972* (The American Jewish Committee, 1976) 1, 3.

64 See Locke, above n 60, [121]:

> [S]ince the Government has a direct jurisdiction only over the Land, and reaches the Possessor of it, (before he has actually incorporated himself in the Society) only as he dwells upon, and enjoys that: *The Obligation* any one is under, by Virtue of such Enjoyment, *to submit to the Government, begins and ends with the Enjoyment*; so that whenever the Owner, who has given nothing but such a *tacit Consent* to the Government, will, by Donation, Sale, or otherwise, quit the said Possession, he is at liberty to go and incorporate himself into any other Commonwealth, or to agree with others to begin a new one, *in vacuis locis*, in any part of the World, they can find free and unpossessed: Whereas he, that has once, by actual Agreement, and any *express* Declaration, given his *Consent* to be of any Commonwealth, is perpetually and indispensably obliged to be and remain unalterably a Subject to it, and can never be again in the liberty of the state of Nature; unless by any Calamity, the Government, he was under, comes to be dissolved; or else by some publick Act cuts him off from being any longer a Member of it. (emphasis in original)

65 Inglés, above n 31, 9, suggests that *UDHR* art 13(2) 'may very well be regarded as the right of personal self-determination'. He notes that other articles of the *UDHR* have a direct and important bearing upon the subject, including those protecting the right to liberty and freedom of association.

66 Cranston, above n 23, 23.

III MOVEMENT AS PERSONAL LIBERTY

During the French Revolution, the notion of freedom of movement and the right to leave was construed as part of the broader right to *liberty*.[67] In the litany of complaints against royal government and the privileges of the aristocracy, art 2 of the *cahiers* of the parish of Neuilly-sur-Marne drew on divine law to plead:

> As every man is equal before God and every sojourner in this life must be left undisturbed in his legitimate possessions, especially in his natural and political life, it is the wish of his assembly that individual liberty be guaranteed to all the French, and that therefore that each must be free to move about or to come, within and outside the Kingdom, without permissions, passports, or other formalities that tend to hamper the liberty of its citizens.[68]

Although none of the 17 articles of the 1789 *Declaration of the Rights of Man and Citizen*[69] expressly provided for freedom of movement or a right to leave one's country (since it was presumably thought to be encompassed in the broader 'right to liberty' in art 4), the *French Constitution of September 1791* guaranteed as its very first natural and civil right 'the freedom of everyone to go, to stay, or to leave, without being halted or arrested in accordance with procedures established by the Constitution'.[70]

Writing in 1775, English lawyer William Blackstone (1723–80) characterised the right to leave as part of the common law right to personal liberty. Though continuing to advocate the common law doctrine of perpetual allegiance to the Crown, he nonetheless observed that every Englishman under the common law had an absolute right, derived from 'the immutable laws of nature',[71] to exercise 'the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law'.[72] Consequently, one could 'go out of the realm for whatever cause he pleaseth, without obtaining the king's leave; provided he is under no injunction of staying at home', such as through fealty and obligations to the king's writ of *ne exeat regno*.[73]

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67 See generally, Torpey, *The Invention of the Passport*, above n 7, 21–51.

68 Ibid 22, quoting *Cahiers des Etats Generaux* (Libraire Administrative de Paul Dupont, 1868) vol 4, 759.

69 *Declaration des droits de l'homme et du citoyen* [Declaration of the Rights of Man and Citizen] (26 August 1789).

70 *La Constitution du 3 Septembre 1791* [French Constitution of 3 September 1791] title 1.

71 William Blackstone, *Commentaries of the Laws of England* (Oxford Clarendon Press, 6th ed, 1775) vol I, bk I, ch I, s II, 124.

72 Ibid 134: the right of locomotion is an aspect of the right of liberty (which is an absolute right). However, the common law retained the doctrine of inalienability of allegiance until 1870, see *Naturalisation Act of 1870* (UK).

73 Blackstone, above n 71, vol I, bk I, ch VII, s II, 265: the right to leave the Kingdom without the King's leave is the *starting position*, but the King's prerogative is to issue a writ or an injunction preventing this (originally for reason of position).

The 'perfect liberty of locomotion' was described as 'one of the dearest rights of citizens' in the Victorian colonial Parliament in 1888, when, in the face of draft legislation to ban Chinese migrants from entering Australia, William Shiels pleaded for continued recognition of the right of Chinese residents already in Victoria to travel between the colonies.[74]

This notion also inspired American revolutionaries like Thomas Jefferson (who opposed the doctrine of perpetual allegiance) to expound the right to free movement.[75] Jefferson drew on Blackstone's thinking when he described emigration and independence as a natural right, bolstering American claims to the right to expatriation, which would enable a severance of links to the British Crown:

> [O]ur ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right, which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as, to them, shall seem most likely to promote public happiness.[76]

Further, he stated:

> I hold the right of expatriation to be inherent in every man by the laws of nature, and incapable of being rightfully taken from him even by the united will of every other person in the nation. If the laws have provided no particular mode by which the right of expatriation may be exercised, the individual may do it by any effectual and unequivocal act or declaration.[77]

The right was a contested one, however. Founding Father Alexander Hamilton (1755–1804) argued that it was impossible to acknowledge a right to free movement and expatriation because individual renunciation of allegiance to the state was contrary to the nature of the social unit and an 'altogether of new invention unknown and inadmissible in law'.[78] This debate continued in American scholarship for the next century. Certain state constitutions included

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74 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 1888, 2357, quoted in Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men's Countries and the Question of Racial Equality* (Melbourne University Press, 2008) 43.

75 See, eg, Rising Lake Morrow, 'The Early American Attitude Towards the Doctrine of Expatriation' (1932) 26 *American Journal of International Law* 552; Robert Stevens Fraser, 'Expatriation as Practised in Great Britain' (1931) 16 *Transactions of the Grotius Society* 73.

76 Thomas Jefferson, 'A Summary View of the Rights of British America' (1774) in Jon L Wakelyn (ed), *America's Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance* (Greenwood Publishing Group, 2006) 581.

77 Letter from Thomas Jefferson to the Secretary of the Treasury Albert Gallatin, 26 June 1806 in Paul L Ford (ed), *The Works of Thomas Jefferson: Correspondence and Papers 18-3-1807* (Cosimo Classics, 2010) vol 10, 273.

78 Henry Cabot Lodge (ed), *The Works of Alexander Hamilton* (G P Putnam's Sons, 1904) vol IV, 256.

the right,[79] but in places where the right to expatriation remained uncodified, the common law position — which denied the right until 1870 — prevailed.[80]

Stig Jagerskiold argues that by the mid-19th century, mass immigration to the United States necessitated its acceptance of the right of free movement and expatriation. In the 1859 case of Christian Ernst, a native of Hanover who emigrated to the US in 1851, the Attorney-General described the right to free movement as 'the natural right of every free person who owes no debts and is not guilty of crime to leave the country of his birth in good faith and for an honest purpose'.[81] Nine years later, Congress announced the right of voluntary expatriation, which protected immigrants from claims by their home state for military service:

> Whereas 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; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; …[82]

Jagerskiold suggests that despite legal debates about whether the right of free movement existed, and its boundaries, in practice there was a generally liberal trend until the outbreak of WWI.[83] The period from 1850 to 1930 has been described as the most intensive period of migration in history, with over 50 million Chinese, another 50 million Europeans and around 30 million Indians leaving for new lands.[84] The expansion of economic liberalism saw a number of countries negotiate bilateral treaties in which commercial and movement rights were linked.[85]

However, even though the 19th century saw relatively free movement across Europe (with Britain, for example, not legislating entry restrictions until

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79 See, eg, *Constitution of the Commonwealth of Virginia* art XV ('all men have a natural and inherent right to emigrate from one State or another that will receive them'), echoed in *Constitution of the State of Vermont* art XVII. The *Virginia Law Code* of 1779 provided:

> And in order to preserve to the citizens of this Commonwealth that natural right which all men have of relinquishing the country in which birth or other accident may have thrown them, and seeking subsistence and happiness wheresoever they may be able, or may hope to find them.

See also (regarding the *Virginia Law Code*), William Waller Hening, *The Statutes at Large: Being a Collection of All the Laws of Virginia from the First Session of the Legislature, in the Year 1619* (Samuel Pleasants, 2nd ed, 1819–23) vol X, 129.

80 Contrast the cases of *Murray v McCarty*, 2 Munf 397 (Va, 1811), where the right of expatriation was described as 'one of paramount authority, bestowed upon us by the God of all nature', and *Ainslee v Martin*, 9 Mass 454 (Mass, 1813), which rejected its existence. The common law doctrine of inalienability of allegiance was abandoned in the *Naturalisation Act 1870* (UK).

81 Judge Black (4 July 1859), cited in John Bassett Moore, *American Diplomacy: Its Spirit and Achievements* (Harper and Brothers Publishers, 1905) 179. In the much later case of *Apthekar v The Secretary of State*, 378 US 500 (Goldberg J) (1964) [21], the US Supreme Court said that 'freedom of travel is a constitutional liberty closely related to the rights of free speech and association'.

82 Rev Stat § 1999 (1875), 8 USC § 800 (1952), cited in Jagerskiold, above n 63, 5.

83 Jagerskiold, above n 63, 6.

84 Patrick Manning, *Migration in World History* (Routledge, 2005) 149.

85 See, eg, Lake and Reynolds, above n 74, 24: pursuant to the *Treaty of Nanking*, the British could hire any Chinese person whose movement was not to be obstructed by Chinese officials.

the introduction of the *Aliens Act 1905*),[86] 'liberty of locomotion' was not universal.[87] It was predominantly a privilege of Europeans and even then, only of certain groups. Movement was particularly difficult for the lower classes, not only in respect of leaving but also in staying: governments sometimes sought to remove people to get rid of undesirables.[88] The abolition of slavery created demand for alternative cheap labour sources, which Indians (and Chinese), in particular, fulfilled as 'the global working class of the British Empire'.[89] While the *Treaty of Nanking* enabled the British to hire any Chinese person and prohibited Chinese officials from obstructing any such person's movement out of China, this reflects less the notion of 'free movement' in accordance with concepts of personal 'liberty' and more the importation of indentured foreign labour.[90]

Nevertheless, the 1868 *Burlinghame Treaty* between the US and China acknowledged

> the inherent and inalienable right of man to change his home and allegiance and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from one country to the other for purposes of curiosity, of trade or as permanent residents.[91]

Other bilateral treaties guaranteed reciprocal guarantees of freedom of movement and protection of persons and property in each other's empires.[92]

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86 Alison Bashford and Catie M Gilchrist, 'The Colonial History of the 1905 *Aliens Act*' (forthcoming).

87 Ann Curthoys, 'Liberalism and Exclusionism: A Prehistory of the White Australia Policy' in Laksiri Jayasuriya, David Walker and Jan Gothard (eds), *Legacies of White Australia: Race, Culture and Nation* (University of Western Australia Press, 2003); Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago University Press, 1999).

88 Jane Caplan and John Torpey, 'Introduction' in Jane Caplan and John Torpey (eds), *Documenting Individual Identity: The Development of State Practices in the Modern World* (Princeton University Press, 2001) 10.

89 Lake and Reynolds, above n 74, 23. See also McKeown, above n 2, 10–12, on 'free' migration.

90 As Bashford notes, 'Indian emigration was tied to the abolition of slavery in the British Empire in 1834, a system of indenture that lasted until 1917 suspension, and 1920 abolition': Alison Bashford, 'Geopolitics and the World Population Problem' (forthcoming). See also McKeown, above n 2. For the protection of migrant workers today, see *Migrant Workers Convention*. See also the International Labour Organization-constituted International Emigration Commission, which published a report in 1921, referred to in Lassa Oppenheim, *International Law: A Treatise* (Arnold Duncan McNair ed, 4th ed, 1928) vol 1 [296].

91 Lake and Reynolds, above n 74, 26.

92 See, eg, *Convention of Friendship*, Britain–China, 11 *Hertslet's Commercial Treaties* 112 (signed and entered into force 24 October 1860); *Convention of Establishment*, Belgium–Siam, signed 5 November 1937, 4414 LNTS 163 (entered into force 17 June 1938) art 1:

> Nationals of each of the High Contracting Parties shall have the right to enter the territory of the other Party, to establish themselves, move about and select a place of residence therein, and to leave the territory, provided they observe the laws and regulations in force in the country, particularly as regards immigration and the police supervision of foreigners.

See also *Treaty of Friendship*, Egypt–Turkey, 4437 LNTS 91 (signed and entered into force 7 April 1937) art 1.

However, there were considerable tensions surrounding Chinese immigration to California (and Australia).[93] According to Marilyn Lake and Henry Reynolds, this represented a collision between international law doctrines on freedom of movement and 'the ascendant democratic power of white manhood'.[94] White settlers framed their concerns in 'a republican discourse on the rights of the sovereign male subject to insist on their democratic right to determine who could join their self-governing communities'.[95] By contrast, the Chinese relied on Vattel to assert the equality of all nations and hence their right to equal treatment.[96]

One of the key authorities on international law, *Oppenheim's International Law*, has consistently asserted that the right of expatriation is not part of general state practice, despite the US' insistence on it since 1868 and Britain's since 1870.[97] Hersch Lauterpacht, who edited *Oppenheim's* from 1937 to 1955, described the denial of this right as 'offensive' to individual freedom and stated that there was no sufficiently important state interest that warranted not recognising it, at least during peacetime.[98]

IV EMIGRATION AS THE 'HIGHEST FORM' OF FREEDOM OF MOVEMENT

If freedom of movement encompasses the right to leave one's country and expatriation is the right to renounce one's nationality, then emigration describes the act of leaving one's country to reside in another. Having the opportunity to 'vote with one's feet' is perhaps the ultimate means of expressing personal liberty.[99]

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93 See, eg, Lake and Reynolds, above n 74, 26: following the 1860 *Convention of Peking* between China and Britain, Britain pressured the Australian colonies to repeal their own discriminatory legislation (in Victoria in 1865 and NSW in 1867).

94 Lake and Reynolds, above n 74, 27.

95 Ibid 26. See also McKeown, above n 2, 7: 'Tellingly, the controls were created by white settler nations around the Pacific that saw themselves as the forefront of the liberal freedoms of the nineteenth century. … Ideals and practices of self-rule were also the foundation of exclusionary policies'.

96 John Fitzgerald, 'Introduction' in Sechin Y S Chien and John Fitzgerald (eds), *The Dignity of Nations: Equality, Competition and Honour in East Asian Nationalism* (Hong Kong University Press, 2006).

97 See 6th to 9th eds: Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht ed, Longmans, 6th ed, 1947) vol 1, 591 [296a]; Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht ed, Longmans, 7th ed, 1948) vol 1, 591 [296a]; Lassa Oppenheim, *International Law: A Treatise*, (Hersch Lauterpacht ed, Longmans, 8th ed, 1955) vol 1, 648 [296a]; Jennings and Watts, above n 3, [382], referring to *Immigration and Nationality Act 1952* (UK) ss 349(6)–(7), 351; *Naturalisation Act 1870* (UK). See now *British Nationality Act 1981* (UK) s 12.

98 Oppenheim (6th ed), above n 97, 591 [296a]. This was also included in the 7th and 8th eds.

99 Hannum, above n 20, 4:

> There is no doubt that the right to 'vote with one's feet' — whether to escape persecution, seek a better life, or for purely personal motives having nothing to do with larger political or economic issues — may be the ultimate means through which the individual may express his or her personal liberty.

However, state practice over time is replete with examples of restrictions on particular groups' right to leave. Restrictions during war time, or on account of military service, national security, the fulfilment of contractual obligations and so on, have featured commonly ever since the right to move was proclaimed. For example, the 13th century *Magna Carta* guaranteed to both local and foreign merchants the right to 'go away from England, come to England, stay and go through England',

> except in the common interest of the realm for a brief period during wartime, and excepting [always] men imprisoned or outlawed according to the law of the kingdom and people from a land at war with us and merchants, who are to be treated as aforesaid.[100]

Aside from military and feudal service, another motivation for controlling movement appears to have been to confine religious and political enemies to the realm.[101]

For example, during the reigns of Edward I (1239–1307) and Edward III (1312–77), certain persons

> were under a perpetual prohibition of going abroad without licence obtained; among which were reckoned all peers, on account of their being counsellors of the Crown; all knights, who were bound to defend the kingdom from invasions; all ecclesiastics, who were expressly confined by cap 4 of the constitutions of Clarendon, on account of their attachment in the times of popery to the fee of Rome; all archers and other artificers, left they should instruct foreigners to rival us in their several trades and manufactures.[102]

A subsequent Act of Parliament reversed this position. Instead of *precluding* persons of higher station (peers, knights, ecclesiastics, archers and other artificers) from travelling without permission, 'only the lords and other great

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The most extensive treatment of the issue is in US scholarship, specifically in relation to the constitutional right to travel. The US Supreme Court has upheld the constitutional right of free movement *within* the US (see, eg, *Crandall v Nevada*, 73 US (6 Wall) 35 (1867); *Williams v Fears*, 179 US 270 (1900); *Edwards v California*, 314 US 160 (1941)). In 1952, a statutory court in the District of Columbia stated that it was 'difficult to see where in principle, freedom to travel outside the United States is any less an attribute of personal liberty', *Bauer v Acheson*, 106 F Supp 445, 451 (DDC 1952), cited in Louis B Boudin, 'The Constitutional Right to Travel' (1956) 56 *Columbia Law Review* 47, 49. The Court of Appeals for the District of Columbia affirmed this as 'a natural right subject to the rights of others and to reasonable regulation under law'. Any limitation on the right must conform with the Fifth Amendment that liberty shall not be deprived 'without due process of law', *Schactman v Dulles*, 225 Fd 938 (DC Cir 1955), cited in Boudin, 49.

100 *Magna Carta 1297* (UK) 25 Edw 1, c 42 ('*Magna Carta*'). The idea expressed here was subsquently encompassed in the common law writ *ne exeat regno*. See also *Magna Carta* c 41:

> And if such persons are found in our land at the beginning of a war, they shall be arrested without injury to their bodies or goods until we or our chief justice can ascertain how the merchants of our land who may then be found in the land at war with us are to be treated. And if our men are to be safe, the others shall be safe in our land.

This embodies the notion of reciprocity and led to concepts such as 'most favoured nation' status, which has a bearing on the treatment of nationals from those nations when in another country.

101 Torpey, *The Invention of the Passport*, above n 7, 18.

102 Blackstone, above n 71, 256.

men of the realm; and true and notable merchants; and the king's soldiers'[103] were granted the freedom to travel, while all other subjects required a licence. This had historical precedents, although it is unclear whether they would have been known to the legislators: Julius Caesar had prohibited all persons of senatorial rank from emigrating from Italy; in Spiers in 1765, 'persons of good conduct, good workmen, and of sufficient means, were forbidden to emigrate'.[104] The statute was repealed during the Jacobean period,[105] such that when Blackstone was writing in the late 18th century, 'every body has, or at least assumes, the liberty of going abroad when he pleases', subject to the writ of the King.[106]

Most medieval cities had strict controls on newcomers entering and settling but not on people leaving.[107] Subsequently, mercantilist and military interests led many states to regard their populations as 'valuable commodities to be kept rather than permitted to increase the prosperity of other states'.[108] This encouraged a shift from immigration control to emigration control: whereas it was originally thought that promoting immigration would jeopardise locals' jobs, during the period of mercantilism immigration was favoured because the more workers there were, the richer the community would be.[109] This theory simultaneously supported restrictions on the right to leave introduced in France and England in the early modern period, until the economic theory of mercantilism was superseded by Adam Smith's views, which regarded any restrictions on movement as harmful to the economy.[110]

For example, by 1819 in Britain, emigration was being promoted to the unemployed through state-supported colonisation. The government regarded emigration as a means of building greater national wealth through trade and remittances, so the 'desire to regulate a labor market conceived in national terms … increasingly determined British policies concerning departure from the realm'.[111] An interesting comparison is provided by the way in which Fascist Italy, though ideologically averse to the 'evil' of free movement and association generally, sought to accommodate it as an economic necessity.[112] From the 1920s into the immediate post-WWII period, emigration from Italy was needed

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103 Ibid.

104 E J James, 'Emigration and Immigration' in John Joseph Lalor (ed), *Cyclopaedia of Political Science, Political Economy, and of the Political History of the United States by the Best American and European Writers* (Melbert B Cary and Company, 1883) vol II, 85, 91.

105 *Statute of Westminster 1607*, 4 Jac 1, c 1.

106 Blackstone, above n 71, 256.

107 Cranston, above n 23, 29.

108 Hannum, above n 20, 4.

109 Cranston, above n 23, 32. Sir William Petty wrote: 'fewness of people is real poverty': William Petty, *A Treatise of Taxes and Contributions* (N Brooke, 1662) vol I, 34.

110 Cranston, above n 23, 32. Furthermore, English migrants to the New World had in fact contributed to English prosperity. See, eg, Gary Magee and Andrew Thompson, *Empire and Globalization: Networks of People, Goods and Capital in the British World, c 1850–1914* (Cambridge University Press, 2010) on remittances.

111 Torpey, *The Invention of the Passport*, above n 7, 68.

112 Dino Grandi, 'Bollettino dell'Emigrazione' (Speech delivered in the Chamber of Deputies, Rome, 31 March 1927) quoted in Attilio Oblath, 'Italian Emigration and Colonisation Policy' (1931) 23 *International Labour Review* 805, 808: 'We as Fascists must have the courage to declare that emigration is an "evil" when, as at present, it is directed towards countries under foreign sovereignty'.

to cope with the country's high levels of unemployment. Temporary emigration — 'towards Italian countries and possessions' — was seen as the means of achieving this, while still protecting the country's moral and political unity.[113]

In 1881, Lalor's Encyclopaedia described emigration as the 'highest form' of freedom of movement:

> The free man is as little bound to the state as to the soil. It is not worthy of the state to hold him as if he were a serf, if he wishes to leave his home and hopes to find in another state better conditions for his advancement. But it was a long time before freedom of emigration was acknowledged. It is not acknowledged everywhere even to-day. But the state certainly has a right in this matter, viz, that the emigrant shall beforehand fulfil his indispensable duties toward his native country, and shall not, apparently to evade or mock the law of the land, simply step out of his previous allegiance to one government into allegiance to another.[114]

The ability to emigrate was also suggested as a means to avoid violent revolution.[115]

In 1897, the Institute of International Law adopted a 'draft convention on emigration' that incorporated the 'general principle of liberty of emigration' but noted that this principle could be 'restricted by social and political necessities'.[116]

By 1924, Fauchille observed that while emigration was 'an extended application of the liberty of the individual',[117] and most states recognised freedom of emigration 'in principle', the right to leave was nowhere absolute.[118] It was limited by the state's 'right of self-preservation', which involved the state maintaining 'the unity and integrity of its constituent elements, among the foremost of which is its population … within the limits necessary for its existence and prosperity'.[119] Drawing on state practice, restrictions on the right included: not leaving the country unless compulsory military service had been carried out (eg Spain, Sweden, Switzerland, Serb-Croat-Slovene Kingdom); minors only being permitted to leave with the consent of parents or guardians (eg Spain, Greece, Hungary, Norway, Portugal, Switzerland); married women only being permitted to leave with consent of their husbands (eg Greece, Spain); prohibiting emigration of people who would not be admitted in the state to which they wished to travel (eg Hungary, Switzerland, Czechoslovakia, the Serb-Croat-Slovene Kingdom), or the emigration of sick, infirm or aged people (eg Belgium, China, Spain, Italy, Norway, the Netherlands, Portugal); and

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113 Ibid.

114 J C Bluntschli, 'Freedom, and Rights of Freedom' in Lalor, *Cyclopaedia of Political Science, Political Economy, and of the Political History of the United States by the Best American and European Writers* (Melbert B Cary and Company, 1883) vol II, 281, 282–3.

115 Lalor's Encyclopaedia suggested that '[t]he immense German emigration, of the last thirty years, though perhaps injurious in some respects to Germany, has in all probability prevented violent revolutions in that country': James, above n 104, 91.

116 Fauchille, above n 9, 321, citing *Annuaire de l'Institut de droit international*, vol XVI, 262–6.

117 Ibid 319.

118 Ibid 326.

119 Ibid 319.

preventing emigration to certain places in the interests of public order, the physical/moral security of the emigrant, or in the general interests of the community (eg China, Spain, Greece, Hungary, Italy, Japan, Norway, Portugal, Czechoslovakia, the Serb-Croat-Slovene Kingdom).[120]

Oppenheim's International Law has consistently espoused the view since 1905 that 'it must be specially emphasised that the Law of Nations does not and cannot grant a right of emigration to every individual, although it is frequently maintained that it is a "natural" right of every individual to emigrate from his own State'.[121] It notes, however, that many American scholars held such a view. The third, fourth and fifth editions of *Oppenheim's* add: 'What would be possible, and desirable, is that by a general international treaty concerning the acquisition and loss of citizenship the several states should agree to grant to every individual by the Municipal Laws the right to emigrate.'[122] Such a treaty has never been concluded. The sixth, seventh and eighth editions assert that emigration 'is a moral right which would fittingly find a place in any international recognition of the Rights of Man'.[123] This reflects the discussions that were occurring in the context of the drafting of the *UDHR*, as the right to move was again conceived in terms of personal liberty and an emerging human rights discourse.

By the ninth edition of *Oppenheim's* in 1992 (which appeared 37 years after the eighth edition), the authors observed that although 'a right of emigration has been recognized in a number of general international instruments' (referring generally to the *UDHR* and the *ICCPR*), '[c]ustomary international law does not, as yet, require a right of emigration to be granted to every individual'.[124] In other words, there is insufficient state practice and *opinio juris* to argue that all states must grant individuals the right of emigration. Furthermore, the scope of the

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120 Ibid 326–7. For a list of restrictions various states sought to impose in the drafting of the *International Bill of Rights*, see Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UN ESCOR, 2nd sess, UN Doc E/CN.4/95 (21 May 1948).

121 Oppenheim (1st ed), above n 3, [296]. It has been expressed in various formulations in successive editions. The reference to 'cannot' was removed in the fifth edition: Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht ed, Longmans, 5th ed, 1937) vol 1, 591 [296]. The view that emigration was a right was especially held by American writers: see, eg, Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (Banks Law Publishing, 1915) 674–706 [315]–[331]. See also Paul Pradier-Fodéré, *Traité de Droit international public européen et américain* (Pedone-Lauriel, 1885–1906), who 'elevated the principle of the liberty of the individual almost to the rank of an absolute right, maintaining that free exit from a territory can only be limited in abnormal circumstances, in time of war, civil war, or revolution': Fauchille, above n 9, 320.

122 Lassa Oppenheim, *International Law: A Treatise* (Ronald F Roxburgh ed, Longmans, 3rd ed, 1920) vol 1, 591 [296]; Oppenheim (4th ed), above n 90, [296]; Oppenheim (5th ed), above n 121, [296]. The text refers in this context to the treaty between Greece and Bulgaria providing that subjects of each party who belonged to racial, religious and linguistic minorities could freely emigrate to the other's territory: see *Convention between Greece and Bulgaria respecting Reciprocal Emigration*, 1 LNTS 67 (signed and entered into force 27 November 1919); *Exchange of Greek and Turkish Populations (Advisory Opinion)* [1925] PCIJ (ser B) No 10.

123 Oppenheim (6th ed), above n 97, [296]; Oppenheim (7th ed), above n 97, [296]; Oppenheim (8th ed), above n 97, [296].

124 Jennings and Watts, above n 3, [381].

right in treaty law 'does not necessarily carry with it any right to enter another state's territory'.[125]

V THE DRAFTING OF THE *UDHR*

A *The Impetus for a Right to Freedom of Movement*

While the right to freedom of movement underpinned Enlightenment philosophy and some political theory, its footing in *international law* remained tenuous. In part, this is because the right to leave a country is not paralleled by a concomitant right to enter any country other than one's own. Thus, immigration remains within the sovereign domain of states, limited only by the principle of *non-refoulement* in refugee and human rights law, which prevents states from returning people to places where they would be at risk of persecution or other serious human rights violations,[126] or where there is no other state that will admit them, such as where a person is stateless.

Whereas a right to free movement was not consistently included in the rights declarations proposed during WWII and the immediate post-war period,[127] by 1948, the notion of a right to leave and to return to one's country was expressed as a fundamental human right worthy of recognition in the world's first universal human rights instrument.

Why was this? Jagerskiold suggests that it was necessary to include a right to free movement because without it a person

> may be unable to associate with his kith and kin, to obtain employment which is not available in his country, and to achieve a better standard of living. He may be prevented from studying or from marrying and raising a family. He may even be prosecuted in the country where he is forced to stay. Such a policy would evidently be contrary to the other principles embodied in the *Declaration on Human Rights*.[128]

While the drafting records on this provision (and its parallel in the *ICCPR*, which was initially drafted during the same period) are generally silent on the contextual background to the inclusion of the right, the Belgian delegate

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125 Ibid.

126 See also Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 285–354; Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007).

127 See A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001) 187, 191, 197–8, 213–19, who notes that: an official US Draft, the State Department's 1942 *Declaration of Rights*, did not include the right to freedom of movement; the US National Resources Planning Board's draft *Bill of Rights* (January 1943) included '[t]he right to come and go, to speak or be silent, free from the spying of secret political police' (art 6); an expert meeting organised by the World Citizens Association in April 1941 did not include the right to emigrate within its six basic rights (although this was mooted); the American Law Institute's February 1944 *Statement of Essential Human Rights* did not mention freedom of movement; and the charters of rights that emerged from occupied Europe made no mention of emigration.

128 Jagerskiold, above n 63, 11. For similar arguments, see Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Working Paper on the Right to Freedom of Movement and Related Issues Prepared by Mr Volodymyr Boutkevitch in Implementation of Decision 1996/109 of the Sub-Commission*, UN ESCOR, 49th sess, Agenda Item 10, UN Doc E/CN.4/Sub.2/1997/22 (29 July 1997).

explained that it was 'of vital importance'[129] because 'the principles of freedom of movement and freedom of residence had to be stressed at that moment when the war and the resulting upheavals had demonstrated to what point that principle could be trodden underfoot'.[130] In his view, '[t]he ideal would be a return to the time when man could travel 'round the world armed with nothing but a visiting card'.[131] The American Federation of Labor pointed out that 'the declaration had been inspired by Nazi persecutions',[132] and the Costa Rican delegate similarly invoked the Declaration as 'a weapon with which to oppose and combat' Nazi actions during the war that elevated the interests of the state above those of its people.[133] Interestingly, many of the drafters of the *UDHR* were themselves émigrés.[134]

Freedom of movement was described by various delegations as 'a fundamental human right',[135] 'the sacred right of every human being … necessary to progress and to civilization',[136] and a principle 'recognized before national states had reached their present age of development'.[137] The Haitian delegate reminded the Drafting Committee that 'in 1789 the French Republic had not awaited the agreement of other countries to promulgate its great *Declaration of the Rights of Man and of the Citizen*, the principles of which echoed the aspirations of the people of that time'.[138] The *UDHR*'s principles 'should not be political but educational, social and humane, and should remain faithful to the great *Declaration of Human Rights* of 1789'.[139]

The USSR's view that 'every sovereign State should have the right to establish whatever rules it considered necessary to regulate movement on its territory and across its borders', based on 'the principle of national sovereignty embodied in the United Nations Charter',[140] was resoundingly rejected by the

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129 *Summary Record of the 120th Meeting*, UN Doc A/C.3/SR.120, 322. See also the remarks of the representative of Chile, 314.

130 Ibid.

131 Ibid.

132 Drafting Committee, Commission on Human Rights, *Summary Record of the Thirty-Sixth Meeting*, UN ESCOR, 2nd sess, 36th mtg, UN Doc E/CN.4/AC.1/SR.36 (28 May 1948) 14.

133 *Ninetieth Meeting*, 3rd Comm, 3rd sess, 90th mtg, UN Doc A/C.3/SR.90 (1 October 1948) 43.

134 See Simpson, above n 127, 205–7.

135 Commission on Human Rights, *Summary Record of the Fifty-Fifth Meeting*, UN ESCOR, 3rd sess, 55th mtg, UN Doc E/CN.4/SR.55 (15 June 1948) 6 (Indian delegate).

136 *Summary Record of the 120th Meeting*, UN Doc A/C.3/SR.120, 316 (Chilean delegate).

137 Ibid 318. *Draft International Declaration of Human Rights: Report of the Third Committee*, UN GAOR, 3rd Comm, 3rd sess, UN Doc A/777 (7 December 1948) (Haitian delegate).

138 Ibid.

139 Ibid.

140 Commission on Human Rights, *Summary Record of the Fifty-Fifth Meeting*, UN ESCOR, 3rd sess, 55th mtg, UN Doc E/CN.4/SR.55 (15 June 1948) 7. See also the supportive views of the Byelorussian Soviet Socialist Republic, 10.

majority of delegations on the ground that it nullified the right.[141]

B *The Text*

The initial draft International Bill of Rights submitted by the Secretariat of the UN Commission on Human Rights included two provisions relating to freedom of movement.[142] Article 9 provided that '[s]ubject to any general law adopted in the interest of national welfare or security, there shall be liberty of movement and free choice of residence within the borders of each State' and art 10 stipulated that '[t]he right of emigration and expatriation shall not be denied'.[143] The first was therefore about internal movement in a country, while the second dealt with cross-border movement.

A number of other draft texts were put to the Committee. Of these, the right to freedom of movement, including the right to leave one's country, was included as a freestanding right in two of them,[144] and as part of the 'right to personal

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141 The proposal was rejected by 24 votes, with 13 abstentions and seven votes in favour: *Summary Record of the 120th Meeting*, UN Doc A/C.3/SR.120. Article 27 of the *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) subsequently codified the principle of international law that domestic law cannot be relied upon to justify non-performance of an international obligation. See especially *Summary Record of the 120th Meeting*, UN Doc A/C.3/SR.120, 316–17 (Chilean delegate). This caused tension between Communist countries and others, who felt history was being used selectively. The Byelorussian Soviet Socialist Republic representative protested against the 'partiality displayed by the [US] Chairman in the conduct of the debates': at 324.

142 Drafting Committee, Commission on Human Rights, *Draft Outline of International Bill of Rights*, UN ESCOR, UN Doc E/CN.4/AC.1/3 (4 June 1947). In addition, art 5 provided that '[e]veryone has the right to personal liberty', but this was connected to ideas elaborated in arts 6–8 relating to freedom from arbitrary deprivation of liberty, slavery, and the right to a fair trial in relation to detention. The United Kingdom delegate noted that the provisions on movement 'might be considered particular applications of the principle that the liberty of the individual shall be protected': Drafting Committee, Commission on Human Rights, *Summary Record of the Eighth Meeting*, 1st sess, 8th mtg, UN Doc E/CN.4/AC.1/SR.8 (20 June 1947). The 'international draft bill of rights' was comprised of three parts: a declaration, a convention and measures for implementation. Three Working Groups were established to oversee each aspect.

143 Drafting Committee, Commission on Human Rights, *Draft Outline of International Bill of Rights*, UN ESCOR, UN Doc E/CN.4/AC.1/3 (4 June 1947).

144 Commission on Human Rights, *American Declaration on the Rights and Duties of Man (Adopted by the Ninth Conference of American States)*, UN ESCOR, 3rd sess, UN Doc E/CN.4/122 (10 June 1948) art VIII: 'Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory and not to leave it except by his own will'; Drafting Committee, Commission on Human Rights, *Text of Letter from Lord Dukeston the United Kingdom Representative on the Human Rights Commission, to the Secretary-General of the United Nations*, UN ESCOR, UN Doc E/CN.4/AC.1/4 (5 June 1947) art 11: 'Every person who is not subject to any lawful deprivation of liberty or to any outstanding obligations with regard to national service shall be free to leave any country including his own' (other obligations were stated to include such things as taxation or the maintenance of dependents); Commission on Human Rights, *Proposal for a Declaration of Human Rights, Submitted by the Representative of the United States*, UN ESCOR, UN Doc E/CN.4/36 (26 November 1947) art 4: 'There shall be liberty to move freely from place to place within the State, to emigrate, and to seek asylum from persecution'.

liberty' in three.[145] By way of background, at the time of drafting, a version of the right to leave one's country was contained in at least nine national constitutions.[146] At least 14 contained a provision relating to freedom of movement internally or the right to choose one's abode, but did not contain anything about travel abroad.[147]

With the various proposals before it, the Drafting Committee requested that the French delegation redraft the text. It did so, and suggested that the three provisions be collapsed into a single article:

> Subject to any general law adopted in the interest of national welfare and security, there shall be liberty of movement and free choice of residence within the borders of each State; individuals may also freely emigrate or expatriate themselves.[148]

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145 Commission on Human Rights, *Draft Declaration of the International Rights and Duties of Man Formulated by the Inter-American Juridical Committee*, UN ESCOR, UN Doc E/CN.4/2 (8 January 1947) art II:

> Every person has the right to personal liberty. The right to personal liberty includes the right to freedom of movement from one part of the territory of the state to another, and the right to leave the state itself. It includes also freedom to establish a residence in any part of the territory, subject only to the restrictions that may be imposed by general laws looking to the public order and security of the state.

Commission on Human Rights, *Draft Charter of International Human Rights and Duties*, UN ESCOR, 2nd sess, UN Doc E/CN.4/32 (12 November 1947) (proposed by the delegation of Ecuador) art I, §2:

> The right to personal liberty includes the right to freedom of movement from one part of the national territory to another, and the right to leave that territory upon presentation of a pass issued by the member states. It also includes freedom to reside in any part of the territory, subject only to the restrictions that may be imposed by general laws for the maintenance of public order and national security.

146 Argentina, Bolivia, Costa Rica (provided 'he is free of all responsibility'), Cuba, El Salvador, Honduras, Mexico, Nicaragua, Turkey (unclear whether 'right to travel' relates to internal or international movement). See Drafting Committee, Commission on Human Rights, *International Bill of Rights*, UN ESCOR, 1st sess, UN Doc E/CN.4/AC.1/3/Add.1 (11 June 1947).

147 Recognising a right to internal movement only (or at least a prohibition on requiring people to reside in a certain place): Chile, China, Czechoslovakia, Dominican Republic ('freedom of transit'), Ecuador, Egypt, Ethiopia, Guatemala, Iran, Panama, Peru, Philippines, Poland, Syria. See Drafting Committee, Commission on Human Rights, *International Bill of Rights*, UN ESCOR, 1st sess, UN Doc E/CN.4/AC.1/3/Add.1 (11 June 1947). The absence of such a provision, however, does not mean the right does not exist: countries where the right is recognised as part of the common law, such as the UK and Australia, are a testament to that.

148 Drafting Committee, Commission on Human Rights, *International Bill of Rights: Revised Suggestions Submitted by the Representative of France for Articles of the International Declaration of Rights*, UN ESCOR, 1st sess, UN Doc E/CN.4/AC.1/W.2/Rev.2 (20 June 1947) art 13. The US similarly suggested that a single provision entitled 'Liberty of movement within the borders of a State' would adequately encapsulate the idea:

> All persons shall equally enjoy the right to freedom of movement from one part of the territory of the state to another, and to free choice of residence in any part of the territory. Every person shall, subject to equitable immigration and deportation laws, be free to enter, travel through or over, and remain temporarily in the territory of another state, provided always that he observes local laws and police regulations.

Drafting Committee, Commission on Human Rights, *International Bill of Rights: United States Revised Suggestions for Redrafts of Certain Articles in the Draft Outline*, UN ESCOR, 1st sess, UN Doc E/CN.4/AC.1/8/Rev.1 (19 June 1947); see also first US draft in Drafting Committee, Commission on Human Rights, *International Bill of Rights*, UN ESCOR, 1st sess, UN Doc E/CN.4/AC.1/3/Add.1 (11 June 1947) art 9.

By the end of its first session in 1947, the Drafting Committee adopted the following draft text:

> There shall be liberty of movement and free choice of residence within the borders of each State. This freedom may be regulated by a general law adopted in the interest of national welfare and security. Individuals may freely emigrate or renounce their nationality.[149]

This was put to the Sub-Commission on Prevention of Discrimination and Protection of Minorities for consideration. A key issue was whether the right to freedom of movement — both internally and internationally — should be subject to an express limitation, or whether a general provision permitting restrictions in certain circumstances would suffice. The Belgian, Australian and Chinese delegates proposed that the provision open with the words: 'Subject to any general law not contrary to the principles of the United Nations Charter and adopted for specific and explicit reasons of security or in the general interest'.[150]

The Sub-Commission was concerned about the way in which the exception for 'national welfare and security' might be interpreted, especially in light of Nazi persecution.[151] To address this, it was proposed that the following caveat be inserted:

> Subject to any general law not contrary to the purposes and principles of the United Nations Charter and adopted for specific reasons of security and in the general interest there shall be liberty of movement and free choice of residence within the borders of each state. Individuals shall have the right to leave their own country and to change their nationality to that of any country willing to accept them.[152]

This was adopted by the Working Group on the *UDHR*, although some delegates were concerned that the UN reference appeared only to govern movement *within* a country.[153] It was endorsed by the Commission on Human Rights in December 1947, which replaced the last part of the second paragraph with 'to acquire the nationality of any country willing to grant it'.[154]

In subsequent discussions, the Netherlands set out specific grounds on which the right to leave a country might be limited, such as 'outstanding obligations

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149 Drafting Committee, Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UN ESCOR, 1st sess, UN Doc E/CN.4/21 (1 July 1947) annex 1 ('*International Bill of Human Rights*') art 13.

150 Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Report Submitted to the Commission on Human Rights*, UN ESCOR, 1st sess, UN Doc E/CN.4/52 (24 November – 6 December 1947).

151 Johannes Morsink, *The Universal Declaration of Human Rights* (University of Pennsylvania Press, 1999) 73, citing Sub-Commission on Prevention of Discrimination and the Protection of Minorities, UN Doc E/CN.4/Sub.2/SR.8, 19 (UK delegate).

152 Cited in Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right of Everyone to Leave Any Country, Including His Own and to Return to His Country*, UN Doc E/CN.4/SUB.2/1988/35, [38].

153 See, eg, comments by the Government of Belgium in Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Report Submitted to the Commission on Human Rights*, UN ESCOR, 1st sess, UN Doc E/CN.4/52 (24 November – 6 December 1947) 7.

154 Cited in Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right of Everyone to Leave Any Country, Including His Own and to Return to His Country*, UN Doc E/CN.4/SUB.2/1988/35, [39].

with regard to national service, tax liabilities or voluntarily contracted obligations binding the individual to the Government'.[155] In addition, it queried whether, as a matter of 'urgent national necessity', a state should not be permitted to 'retain within the borders … persons exercising a special profession'.[156] This was reminiscent of old English laws which sought to restrict at various times the departure of people employed in particular professions.[157]

However, a number of delegations cited the aspirational nature of the Declaration as a reason why restrictions on individual rights should be limited.[158] By contrast to the Covenant — 'a legally binding instrument [that] will have to be ratified or accepted in a formal way by the States'[159] — the Declaration was 'not intended to be a legislative document in any sense'.[160] Thus, '[w]hereas the covenant was to take into account the practices and political considerations peculiar to each country, the declaration was a statement of universally applicable moral principles'.[161]

The Declaration was described as 'a guide and inspiration to individuals and groups throughout the world in their efforts to promote respect for and observance of human rights'.[162] Belgium described its 'main purpose' as being 'to make a public declaration of what the conscience of the world was thinking'.[163] By proclaiming 'solemn' principles, 'States would be morally

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155 Commission on Human Rights, *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation*, UN ESCOR, 3rd sess, Agenda Item 5, UN Doc E/CN.4/82 (16 April 1948). The UK also listed these obligations in Commission on Human Rights, *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation*, UN ESCOR, 3rd sess, Agenda Item 5, UN Doc E/CN.4/82/Add.4 (27 April 1948); see also New Zealand (national service or taxation) in Commission on Human Rights, *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation: Communication Received from New Zealand*, UN ESCOR, 3rd sess, Agenda Item 5, UN Doc E/CN.4/82/Add.12 (3 June 1948). France also suggested including cases where a person 'has been lawfully detained, or criminal proceedings are pending against him, or his departure must be prohibited in order to prevent the imminent commission of a crime or offence' in Commission on Human Rights, *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation: Communication Received from the French Government*, UN ESCOR, 3rd sess, Agenda Item 5, UN Doc E/CN.4/82/Add.8 (6 May 1948).

156 Commission on Human Rights, *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation*, UN ESCOR, 3rd sess, Agenda Item 5, UN Doc E/CN.4/82 (16 April 1948) 17.

157 See Blackstone, above n 71 and accompanying text.

158 *Summary Record of the 120th Meeting*, UN Doc A/C.3/SR.120, 318 (Haitian delegate), 323 (UK delegate).

159 Commission on Human Rights, *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation*, UN ESCOR, 3rd sess, UN Doc E/CN.4/82 (16 April 1948) 13 (The Netherlands government).

160 Ibid 7 (US government).

161 *Summary Record of the 120th Meeting*, UN Doc A/C.3/SR.120, 317–18 (Haitian delegate).

162 Commission on Human Rights, *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation*, UN ESCOR, 3rd sess, UN Doc E/CN.4/82 (16 April 1948) 7 (US government).

163 *Summary Record of the 120th Meeting*, UN Doc A/C.3/SR.120, 322 (Belgian delegate).

obliged to subscribe to them and to amend their respective constitutional laws in accordance with them'.[164] The United Kingdom representative described the Declaration as expressing an ideal, which should not be constrained in any way.[165] The Australian delegate stated: 'Freedom of movement was unquestionably one of the fundamental rights of man, and it should form the subject of a statement of principle. To subject it to reservations would be to deprive the Declaration of all its force.'[166] The Indian delegate wanted to avoid any limitations because the article 'aimed at establishing the principle of freedom of movement, which like freedom of speech, freedom of meeting, etc, was a fundamental human right'.[167] Similarly, the Chilean representative stated that 'freedom of movement was the sacred right of every human being',[168] and including limitations in the *UDHR* itself 'would imply the renunciation of the inherent rights of mankind. A document drawn up in that sense would be a declaration of the absolute rights of the state and not a declaration of human rights'.[169]

Eventually, at the suggestion of the UK and US, it was decided to remove *all* limitations in the text on the basis that the general limitation clause in art 29 would suffice.[170] The following text was referred to the Commission on Human Rights, having been agreed by 12 votes in favour, none against and four abstentions:[171]

> 1 Everyone is entitled to freedom of movement and residence within the borders of each State.
>
> 2 Everyone has the right to leave any country including his own.[172]

The only substantive change that was ultimately made to this definition in the final text of the *UDHR* was the inclusion at the end of para 2 of the words 'and to return to his country'.[173] This was proposed by the Lebanese delegate, who noted

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164 Ibid 317 (Chilean delegate).

165 Ibid 323 (UK delegate).

166 Drafting Committee, Commission on Human Rights, *Summary Record of the Fifty-Fifth Meeting*, UN ESCOR, 3rd sess, 55th mtg, UN Doc E/CN.4/SR.55 (15 June 1948) 11 (Indian delegate): the Australian representative 'fully concurred' with the remarks of Chile.

167 Ibid 6 (Indian delegate).

168 *Summary Record of the 120th Meeting*, UN Doc A/C.3/SR.120, 316 (Chilean delegate). He noted, however, that 'there was no question of free immigration but only of freedom of movement within a State'.

169 Ibid.

170 *UDHR* art 29. See, eg, discussions in Drafting Committee, Commission on Human Rights, *Summary Record of the Fifty-Fifth Meeting*, UN ESCOR, 3rd sess, 55th mtg, UN Doc E/CN.4/SR.55 (15 June 1948) (Indian delegate).

171 Drafting Committee, Commission on Human Rights, *Report of the Drafting Committee to the Commission on Human Rights*, UN ESCOR, 2nd sess, Agenda Item 5, UN Doc E/CN.4/95 (21 May 1948) Annex A 7.

172 The switch from emigration to a right to leave responded to a concern raised by the Lebanese delegate that 'emigration' did not necessarily cover 'mere travel', which ought to be included. See Drafting Committee, Commission on Human Rights, *Summary Record of the Thirteenth Meeting*, UN ESCOR, 1st sess, 13th mtg, UN Doc E/CN.4/AC.1/SR.13 (20 June 1947) 8–9. The Chilean delegate suggested that the words be changed to 'the right to leave the territory'; the UK delegate suggested that the words of the UK draft text be adopted: 'be free to leave any country including his own'.

173 *Summary Record of the 120th Meeting*, UN Doc A/C.3/SR.120, 325. For consistency, [1] was altered to read 'Everyone has the right' rather than 'Everyone is entitled'.

that, while the 'ideal would be that any person should be able to enter any country he might choose', account needed to be taken of 'actual facts'.[174] It had earlier been observed that implementation of the right to emigrate would be difficult given that there was no corresponding right to enter another country,[175] and measures restricting immigration 'were well known and generally accepted'.[176] As such, the minimum duty on states was to permit nationals to return to their country, which would strengthen the right to leave a country already contained in the text. This amendment was accepted without opposition.

The new text, which ultimately became art 13 of the *UDHR*, was adopted with 37 votes in favour and three abstentions by the Third Committee of the General Assembly,[177] and by the General Assembly as a whole with 44 votes in favour, six against and two abstentions.[178]

Subsequently, when the *ICCPR* was adopted in 1966, it contained a parallel provision: art 12. This provision limits freedom of movement within a country to those 'lawfully' present,[179] but the right to leave a country is proclaimed as universal.[180] The right is subject to restrictions similar to those included in the *UDHR*.[181] In contrast to the non-binding character of the *UDHR*, the *ICCPR* is a binding human rights treaty. The UN Human Rights Committee, which interprets the *ICCPR*, has stated that any restrictions on the right to leave must be necessary, reasonable and proportionate; provided by law; justified and shown to be reasonable in each individual case; and consistent with other rights in the *ICCPR*.[182] States must ensure that restrictions do 'not impair the essence of the

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174 Ibid 316 (Lebanese delegate).

175 See Drafting Committee, Commission on Human Rights, *Summary Record of the Fourth Meeting*, UN ESCOR, 1st sess, 4th mtg, UN Doc E/CN.4/AC.1/SR.4 (13 June 1947) 4. See also the commentary in Commission on Human Rights, *Report of the Working Group on the Declaration of Human Rights*, UN ESCOR, 2nd sess, Agenda Item 5, UN Doc E/CN.4/57 (10 December 1947) 9:

> It was recognized that the right of emigration, affirmed above, would not be effective without facilities for immigration into and transit through other countries. The Working Group recommends that these corollaries be treated as a matter of international concern and that members of the United Nations co-operate in providing such facilities.

176 *Summary Record of the 120th Meeting*, UN Doc A/C.3/SR.120, 319 (US delegate).

177 Ibid 326. The USSR delegate subsequently stated that he had misinterpreted the nature of the vote, and would have voted against it: at 327.

178 *Draft International Declaration of Human Rights*, UN GAOR, 3rd Comm, 3rd sess, UN Doc A/777 (7 December 1948). See also *Report of the Third Session of the Commission on Human Rights*, UN ESCOR, 3rd sess, 36th plen mtg, UN Doc E/800 (28 June 1948).

179 *ICCPR* art 12(1).

180 Ibid art 12(2).

181 Ibid art 12(3): '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*'.

182 See, eg, Human Rights Committee, *General Comment No 27: Freedom of Movement (Article 12)*, UN GAOR, 67th sess, 1783rd mtg, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [2], [14], [15]. See also Human Rights Committee, *Views: Communication No 492/1992*, 51st sess, UN Doc CCPR/C/51/D/492/1992 (29 July 1994) ('*Peltonen v Finland*'); Human Rights Committee, *Views: Communication No 456/1991*, 51st sess, UN Doc CCPR/C/51/D/456/1991 (2 August 1994) ('*Celepli v Sweden*'), [9.2], [10]; Human Rights Committee, *Views: Communication No 833/1998*, 70th sess, UN Doc CCPR/C/70/D/833/1998 (30 October 2000) ('*Salah Karker v France*').

right'.[183] This is because freedom of movement is 'an indispensable condition for the free development of a person'.[184]

VI CONCLUSION

This article has examined why the right to freedom of movement came to be embodied in the *UDHR* and, by extension, in subsequent universal human rights instruments. As the foregoing discussion has illustrated, the notion of freedom of movement has a long intellectual pedigree. As with the *UDHR* in general, the abuse of rights perpetuated by the Nazis during the war, in particular the practice of forced relocations and restrictions on movement,[185] was an immediate trigger,[186] but certainly did not initiate the concept. Its lineage can be traced to the long-standing political ideal of free movement as a fundamental element of personal liberty. For this reason, it was perhaps regarded as having a natural place in the world's first universal human rights treaty.[187]

The right to leave any country is not only a freestanding right but is reinforced by, and gives meaning to, other human rights.[188] The UN Commission on Human Rights has explained that it is a constituent element of personal liberty,[189] and is necessarily inherent in the prohibition on arbitrary arrest, detention or exile,[190] the right to seek asylum[191] and the prohibition on arbitrary deprivation of nationality.[192] The right to freedom of thought and expression,[193] especially 'the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers',[194] also depends on the right to free movement for its full realisation.[195]

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183 Human Rights Committee, *General Comment No 27: Freedom of Movement (Article 12)*, UN GAOR, 67th sess, 1783rd mtg, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [13].

184 Ibid [1].

185 See further Simpson, above n 127.

186 Ibid 192–3. According to Simpson, Jewish and Zionist organisations agitated during the 1940s as reports of atrocities and the Nazi policy of mass murder began to circulate. In 1945, the American Jewish Committee's Committee on Peace Problems published a report under the title 'To the Counsellors of Peace', which dealt with rights relating to migration, statelessness and repatriation of exiles. The Jewish experience in WWII put these issues on the agenda.

187 Jagerskiold, above n 63, 10:

> It is evident that this Article did not, at any time, correspond to any universally accepted principle. If the main treatises on international law from the years preceding 1948 or published shortly afterwards are consulted, it will be found that such a human right is not considered to have been established.

188 See Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right of Everyone to Leave Any Country, Including His Own and to Return to His Country*, UN Doc E/CN.4/SUB.2/1988/35, [30]–[31].

189 *UDHR* art 3; *ICCPR* art 9.

190 *UDHR* art 9.

191 Ibid art 14.

192 Ibid art 15.

193 *ICCPR* arts 18, 19.

194 Ibid art 19.

195 See Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right of Everyone to Leave Any Country, Including His Own and to Return to His Country*, UN Doc E/CN.4/SUB.2/1988/35, [31].

Despite this, the right to leave remains impeded by both practical and legal measures.[196] Although the present article has been necessarily selective in the examples drawn upon to illustrate the normative developments in the history of freedom of movement as a legal principle, it has revealed a surprising consistency over time in the gap between legal and philosophical principle, on the one hand, and state practice, on the other.[197] Though the right to leave a country is now a fundamental principle of human rights treaty law, it is not an absolute right and cannot be equated with a right to permanently migrate. At a bare minimum, it must permit movement on a temporary basis and enable the rights with which it is connected to be fulfilled. Reconciling the individual right, as an expression of personal liberty, with the interests of states has been — and remains — the challenge.

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196 Aside from legal carve-outs from the general principle of free movement and the right to leave any country, one practical way in which restrictions on movement have been imposed is by limiting access to travel documents, such as passports and exit visas: see Torpey, *The Invention of the Passport*, above n 7; Caplan and Torpey, above n 88; Daniel C Turack, *The Passport in International Law* (Lexington Books, 1972); Daniel C Turack, 'Freedom of Movement and the International Regime of Passports' (1968) 6 *Osgoode Hall Law Journal* 230. According to the Human Rights Committee, exit visas violate art 12 of the *ICCPR* — whether imposed on nationals or on foreigners resident in a country: see, eg, 'Belarus' in *Report of the Human Rights Committee*, UN GAOR, 47th sess, UN Doc A/47/40(Supp) (9 October 1992) 124, 134 [561]; 'Ukraine' in *Report of the Human Rights Committee*, UN GAOR, 50th sess, UN Doc A/50/40 (3 October 1995) 57, 60 [320]; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Uzbekistan*, 71st sess, UN Doc CCPR/CO/71/UZB (26 April 2005); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Gabon*, 70th sess, UN Doc CCPR/CO/70/GAB (10 November 2000) 4 [16]; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, 71st sess, UN Doc CCPR/CO/71/SYR (24 April 2001) 5 [21]; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea*, 72nd sess, UN Doc CCPR/CO/72/PRK (27 August 2001) 5 [20]. 'Morocco' in *Report of the Human Rights Committee: Volume I*, UN GAOR, 60th sess, Supp No 40, UN Doc A/60/40 (Vol.1) (2005) 38 [18]; 'Gambia' in *Report of the Human Rights Committee: Volume I*, UN GAOR, 59th sess, Supp No 40, UN Doc A/59/40 (Vol.1) (2004) 77 [15]. These Concluding Observations are cited in Colin Harvey and Robert Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19 *International Journal of Refugee Law* 1, 17.

197 There is, of course, no overarching, universal historical narrative, and one may find exceptions to the general rule: see, eg, Torpey, *The Invention of the Passport*, above n 7, ch 3, on a 19th century trend towards freer movement. See also Torpey, 'Leaving: A Comparative View', above n 6.