

# YOU CAN CHECK OUT ANY TIME YOU LIKE, BUT WE MIGHT NOT LET YOU LEAVE: CUBA'S TRAVEL POLICY IN THE WAKE OF SIGNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

## INTRODUCTION

Yoani Sánchez had been here before.<sup>1</sup> The Cuban blogger and honoree in the “Heroes and Pioneers” section of *Time* Magazine’s 2008 edition of its annual list of the world’s 100 most influential people<sup>2</sup> had been awarded the Maria Moors Cabot Prize for Outstanding Reporting on Latin America and the Caribbean,<sup>3</sup> and was standing at the front of the line at the Office of Immigration, trying to talk to someone who could at least explain to her why she could not leave to collect her award.<sup>4</sup> In response, the clerk at the Office of Immigration told her only that “you are still not authorized to travel.”<sup>5</sup> From Havana, Sánchez posted a video accepting an award that was played at the ceremony, telling the audience that regrettably, she “has grown accustomed to the idea of being unable to leave [her] country.”<sup>6</sup>

Events had previously unfolded in the same manner when Sánchez had received the Ortega y Gasset prize, one of Spain’s most prestigious journalism awards and attempted to go collect it.<sup>7</sup> After receiving notification of the honor in early April 2008, Sánchez began making the necessary preparations to travel to Madrid to collect the award in person the following month.<sup>8</sup> These preparations, Sánchez noted in her blog, were to include the collection of her

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<sup>1</sup> Sánchez blogs about daily Cuban life from Havana. Generación Y, <http://desdecuba.com/generaciony/> (last visited Oct. 12, 2009).

<sup>2</sup> Oscar Hijuelos, *Time 100: Yoani Sánchez*, TIME, May 12, 2008, at 68.

<sup>3</sup> The Journalism School, Columbia University, <http://www.journalism.columbia.edu/cs/ContentServer/jm/1212610546105/page/1175295288387/JRNSimplePage2.htm> (last visited Nov. 4, 2009).

<sup>4</sup> Yoani Sánchez, *Speaking My Mind*, Generación Y, <http://www.desdecuba.com/generaciony/?p=1058> (Oct. 17, 2009).

<sup>5</sup> *Id.*

<sup>6</sup> Mensaje de Yoani Sánchez a ceremonia de premios “María Moors Cabot” en la Universidad de Columbia (Oct. 14, 2009), [http://www.youtube.com/watch?v=2fqV5f\\_nd1w](http://www.youtube.com/watch?v=2fqV5f_nd1w) (translation by author).

<sup>7</sup> Rosa Tania Valdes, *Cuban Blogger Wins Spanish Digital Journalism Prize*, REUTERS, Apr. 4, 2008, <http://www.reuters.com/article/internetNews/idUSN2432888520080404>.

<sup>8</sup> Yoani Sánchez, *Exit or Travel*, Generación Y, <http://www.desdecuba.com/generaciony/?p=110> (Apr. 14, 2008).

personal documents, documents related to her travel, and proofs of payment of all relevant fees, and would require hours standing in line to deposit the documents, pay the fees, and speak with government officials.<sup>9</sup> The ultimate goal for Sánchez and for thousands of Cubans like her each year was an exit permit, commonly referred to as the “*tarjeta blanca*,” which would allow her to leave the island to travel abroad.<sup>10</sup> Noting the insularity of the island and the difficulty Cubans had in leaving the island, Sánchez noted that “‘to travel’ is too small a word . . . and [the exit permit] carries with it the sound of locks that open.”<sup>11</sup>

During the weeks Sánchez was preparing for her trip in 2008, media reports emerged that the Cuban government was in the process of drastically simplifying its travel procedures and loosening the restrictions on Cubans going abroad.<sup>12</sup> This announcement came during a span of weeks in which Raúl Castro, having formally been elected to succeed his brother, Fidel, as President of Cuba on February 24, 2008,<sup>13</sup> had announced a series of progressive domestic moves that seemed to be in keeping with the liberalizations that had come since the regime change<sup>14</sup> and the signing of two major international Covenants: The International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).<sup>15</sup> Among other steps, the reported reforms would purportedly eliminate the *tarjeta blanca*.<sup>16</sup> Buoyed by this news, Sánchez went to fill out an application to travel directly at the local

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Mauricio Vicent, *Cuba rebaja las restricciones para viajar*, EL PAÍS (Madrid), Apr. 18, 2008, [http://www.elpais.com/articulo/internacional/Cuba/rebaja/restricciones/viajar/elpepiint/20080418elpepiint\\_1/Tes](http://www.elpais.com/articulo/internacional/Cuba/rebaja/restricciones/viajar/elpepiint/20080418elpepiint_1/Tes). This article reported that Cuban authorities had, or were days from, overhauling and simplifying their travel policies. *Id.* Those changes have not come. Yoani Sánchez, *How Fast the News Comes*, Generación Y, <http://www.desdecuba.com/generaciony/?p=104> (Apr. 20, 2008).

<sup>13</sup> Rosa Tania Valdes, *Cuba Cuts Red Tape in Prescription Drug Sales*, REUTERS, Mar. 25, 2008, available at <http://www.alertnet.org/thenews/newsdesk/N25335117.htm>.

<sup>14</sup> See, e.g., Mauricio Vicent, *Los cubanos podrán tener movil*, EL PAÍS (Madrid), Mar. 28, 2008, [http://www.elpais.com/articulo/internacional/cubanos/podran/tener/movil/elpepuint/20080328elpepuint\\_7/Tes](http://www.elpais.com/articulo/internacional/cubanos/podran/tener/movil/elpepuint/20080328elpepuint_7/Tes) (describing Cuba lifting ban on mobile phones) [hereinafter Vicent, *Los cubanos podrán tener movil*]; see also Mauricio Vicent, *Los cubanos podrán alojarse en los hoteles*, EL PAÍS (Madrid), Mar. 15, 2008, [http://www.elpais.com/articulo/internacional/cubanos/podran/alojarse/hoteles/elpepuint/20080314elpepuint\\_17/Tes](http://www.elpais.com/articulo/internacional/cubanos/podran/alojarse/hoteles/elpepuint/20080314elpepuint_17/Tes) (reporting how Cuban nationals can stay in Cuban hotels that had previously been open only to foreigners) [hereinafter Vicent, *Los cubanos podrán alojarse en los hoteles*].

<sup>15</sup> James C. McKinley, Jr., *Cuba Signs 2 Human Rights Treaties*, N.Y. TIMES, Mar. 1, 2008, at A6.

<sup>16</sup> Vicent, *supra* note 12.

Legal Advisor office—where an immigration officer informed her that the reports were untrue.<sup>17</sup>

Sánchez completed the necessary paperwork and had a flight to Madrid scheduled for Saturday, May 3, pending her application for permission.<sup>18</sup> At the last minute, Cuban authorities informed Sánchez that her permission to fly had been “detained,” and they provided her with no further explanation.<sup>19</sup>

On May 14, over a month after she began the application process and one week after the event which was the impetus of her travel, Sánchez’s application for permission to leave the country was denied by the Cuban authorities.<sup>20</sup> She received a form letter from the Office of Immigration and Foreign Travel of the Ministry of the Interior, signed by the local section chief, to alert her to the rejection.<sup>21</sup> The letter noted that she could not travel “for the moment,” and as a result, the Ministry was returning the checks she had used to pay the various fees necessary for her application.<sup>22</sup>

Living under a closed, Marxist society, Cuban citizens have been heavily restricted from coming and going freely from the island for decades,<sup>23</sup> and the difficulties Yoani Sánchez faced in trying to leave Cuba, even for a short-time, are representative of the endemic problem facing the average Cuban citizen in attempting to leave the country. As one of his first acts upon formally ascending to the presidency, Raúl Castro signed the ICESCR and the ICCPR,<sup>24</sup> which his brother, Fidel, had opposed for decades.<sup>25</sup> The timing of Cuba’s signatures made sense from a political perspective. By signing only days after formally accepting power, Raúl Castro demonstrated that he—not his brother—was running the country.<sup>26</sup> Changes within the United Nations human rights mechanism also opened up a window for Cuba to sign the treaties

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<sup>17</sup> Sánchez, *supra* note 12.

<sup>18</sup> Yoani Sánchez, Nursing Babies with Pacifiers, *Generación Y*, <http://www.desdecuba.com/generaciony/?p=148> (May 3, 2008).

<sup>19</sup> *Id.*; see also *Cuban Authorities Block Yoani Sánchez Trip to Spain*, EL PAÍS (Madrid), May 5, 2008, [http://www.elpais.com/articulo/internacional/Cuban/authorities/block/Yoani/Sanchez/trip/to/Spain/elpeuint/20080506elpeuint\\_14/Tes](http://www.elpais.com/articulo/internacional/Cuban/authorities/block/Yoani/Sanchez/trip/to/Spain/elpeuint/20080506elpeuint_14/Tes).

<sup>20</sup> Yoani Sánchez, No, “for the Moment,” *Generación Y*, <http://www.desdecuba.com/generaciony/?p=157> (May 30, 2008).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Vicent, *supra* note 12.

<sup>24</sup> McKinley, *supra* note 15, at A6.

<sup>25</sup> See Fidel Castro, la historia dirá quién tiene la razón, *Diario Granma Online*, available at <http://www.granma.cubaweb.cu/2007/12/14/nacional/artic04.html> (Dec. 17, 2007).

<sup>26</sup> See McKinley, *supra* note 15, at A6.

with the political winds at its back.<sup>27</sup> In 2006, the Commission on Human Rights (“Commission”), which had been the body responsible for overseeing all other treaty-based human rights bodies within the U.N., was replaced by the Human Rights Council (“Council”)—and a Cuban was chosen to serve as one of its original members.<sup>28</sup> In 2007, the Council dropped Cuba from a list of countries whose record in human rights warranted investigation and ended the mandate of the Personal Representative of the High Commissioner for Human Rights in Cuba.<sup>29</sup> Cuba used the Council’s decision as an opportunity to announce its plans to sign the treaties and to declare a victory over the United States in the international community.<sup>30</sup>

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<sup>27</sup> See Ved P. Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm “Responsibility to Protect” Make a Difference?*, 35 DENV. J. INT’L L. & POL’Y 353, 357 (2007); McKinley, *supra* note 15, at A6.

<sup>28</sup> Under Article 62 of the U.N. Charter, the Economic and Social Council (“ECOSOC”) was charged with promoting respect for and observance of human rights. U.N. Charter art. 62, ¶ 2. The U.N. then created the Commission on Human Rights (“Commission”) under the umbrella of ECOSOC. Nanda, *supra* note 27, at 355. Led by the United States, who in 2001 was left off the Commission for the first time, critics of the Commission began lobbying for reform. Morton H. Halperin & Diane F. Orentlicher, *The New UN Human Rights Council*, HUM. RTS., BRIEF Spring 2006, at 3. One of the major criticisms of the Commission was the increasingly politicized nature of its proceedings. See Nanda, *supra* note 27, at 358. Then-Secretary General Kofi Annan had lamented that the Commission’s “capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism.” *Id.* In 2006, the Human Rights Council (“Council”) replaced the Commission. *Id.* at 357. The Council has a smaller membership body than the Commission, with forty-seven members, compared to its predecessor’s fifty-three. *Id.* at 359. The Council was also elevated in stature and now reports directly to the General Assembly, not ECOSOC. *Id.* Despite leading the call for the replacement of the Commission, the United States voted against the formation of the Council and only recently sought and secured a seat on the Council. Judy Aita, *United States Will Not Seek Human Rights Council Seat*, AMERICA.GOV, Apr. 6, 2006, <http://www.america.gov/st/washfile-english/2006/April/20060406192952jatia0.3928034.html>; Esther Brimmer, Assistant Sec’y, Bureau of Int’l Org. Affairs, U.S. Assumes Seat on the UN Human Rights Council, Remarks Before the High-Level Session of the Human Rights Council (Sept. 14, 2009), *available at* <http://www.state.gov/p/io/rls/rm/2009/129168.htm>. Cuba has had a leadership role on the Council since its inception. Halperin & Orentlicher, *supra*, at 54; *New U.N. Human Rights Body Appoints Cuban Chairman*, REUTERS, Aug. 4, 2008, <http://www.reuters.com/article/globalNews/idUSL444042220080804>.

<sup>29</sup> U.N. Human Rights Council, Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1—Cuba*, ¶ 131, U.N. Doc. A/HRC/WG.6/4/CUB/1 (Nov. 4, 2008) [hereinafter *Cuban National Report*]; Brett D. Schaefer, U.N. Further Weakens Human Rights Council, The Heritage Foundation, <http://www.heritage.org/research/Internationalorganizations/wm1707.cfm>; see also McKinley, *supra* note 15, at A6.

<sup>30</sup> Felipe Peréz Roque, Minister of Foreign Affairs, Republic of Cuba, Statement to the Local and Foreign Media at the Ministry of Foreign Affairs (Dec. 10, 2007), *available at* [http://america.cubaminrex.cu/English/Speeches/FPR/2007/FPR\\_101207.htm](http://america.cubaminrex.cu/English/Speeches/FPR/2007/FPR_101207.htm) (translated transcript). Perez Roque stepped down from his post in March 2009. *Cuban Shakeup Claims Key Figures*, BBC NEWS, Mar. 3, 2009, <http://news.bbc.co.uk/2/hi/americas/7920047.stm>. Perez Roque, forty-three, was a Fidel Castro loyalist and was believed to have been in line for the Cuban presidency. *Id.*

Although Cuba has not yet ratified the Covenants and has concerns about some provisions which will likely result in the entrance of reservations,<sup>31</sup> these signatures served to notify the international community of the willingness on the part of Cuba to enter into a dialogue and behave more along the lines of the accepted international standards concerning human rights.<sup>32</sup> For example, Cuba has taken a leadership role in the U.N. Human Rights Council, which replaced the Commission on Human Rights in 2006.<sup>33</sup> In February 2009, it underwent the Council's Universal Periodic Review Process, under which the Council examines the human rights record of member states.<sup>34</sup> During its Universal Periodic Review, Cuba indicated that it would consider other nations' recommendations that it ratify the ICCPR and that it accelerate the ratification.<sup>35</sup> Cuba also promised to consider the suggestion to repeal the system of exit permits required to leave the country and to delete the crime of illegal exit from the criminal code in an effort to bring its travel laws within the mandates of Article 12 of the ICCPR.<sup>36</sup> While Cuba was not particularly receptive to the harshest criticisms provided by its colleagues, the fact that Cuba underwent the process is indicative that, in the international community, Cuba has said and done some of the right things in order to project the image that it intends to bring reform.<sup>37</sup>

On a domestic level, the signatures signaled to the Cuban citizenry that tangible reforms and liberalizations of Cuban policy would be forthcoming. In an early speech, Raúl Castro pledged to eliminate what he called the "excessive regulations" that dominated much of Cuban life.<sup>38</sup> As of the time of writing, the promised reforms have been slow in coming.<sup>39</sup> Many of the

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<sup>31</sup> McKinley, *supra* note 15, at A6; see United Nations Treaty Collection, Status of Treaties, International Covenant on Civil and Political Rights, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Jan. 31, 2009).

<sup>32</sup> McKinley, *supra* note 15, at A6.

<sup>33</sup> See *supra* note 28 for discussion of the Human Rights Council and the Commission on Human Rights.

<sup>34</sup> See U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Cuba*, U.N. Doc. A/HRC/11/22 (Mar. 3, 2009), available at <http://www.unhcr.org/refworld/docid/49f964ee0.html> [hereinafter *Universal Periodic Review—Cuba*]. During the Universal Periodic Review, member states offer praises, criticisms, and, most importantly, recommendations to the state being reviewed. See *id.*

<sup>35</sup> *Id.* ¶ 131(1).

<sup>36</sup> *Id.* ¶ 131(17).

<sup>37</sup> Cuba did not respond warmly to recommendations that it stop prosecutions or repression based on expression or belief; that it release prisoners of conscience; or repeal broadly defined criminal provisions that restrict freedom of belief, expression, or assembly. See *id.* ¶¶ 53(b)–(c), 64(a), 79(c)–(d), 105(b), 106(a), 109(b)–(c), 110(b)–(c), 132.

<sup>38</sup> Valdes, *supra* note 13.

<sup>39</sup> For example, shortly after taking power, Raúl Castro promised there would be a party congress which would define "the economic model that will guide the life of the nation." *Cuba's Penurious Revolution: When*

tangible reforms that have come, such as the freedom to procure and use the previously banned cellular telephone or the right to stay in hotels formerly accessible only to foreigners,<sup>40</sup> have been derided as “cosmetic.”<sup>41</sup> However, Cuba has made some meaningful progress. Recently, the state commuted the death sentences for political prisoners and most of the inmates on its death row.<sup>42</sup> Additionally, the Vice-Minister for Labor announced that Cuba was abolishing its system of equal pay for all.<sup>43</sup> The Vice-Minister said that “it’s harmful to give a worker less than he deserves, [and] it’s also harmful to give him more than he deserves,” providing grounds for cautious optimism.<sup>44</sup> Recently, Castro has opened up the debate to Cuban citizens regarding the food rationing program and has attempted to start a dialogue with the aim of “rethink[ing] Cuban socialism.”<sup>45</sup> Beyond these exceptions, however, needed tangible reform has not yet come to Cuba under Raúl Castro.

In the immediate future, the issue of reform will be thrust to the forefront for reasons beyond the Cuban government’s control. In December 2008, Spain

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*Two Plus Two Equals Three*, ECONOMIST, Aug. 8, 2009, at 31. The Congress was supposed to take place before the end of 2009. *Cuba Delays Rare Party Congress*, BBC NEWS, Aug. 1, 2009, <http://news.bbc.co.uk/2/hi/8179376.stm>. However, Castro has repeatedly delayed the conference, and it remains indefinitely suspended. *Id.* Internationally, Cuba has similarly advanced along a “two-step forward, one step back” path to reform. For example, in 2009, the Organization of American States (“OAS”) lifted its suspension of Cuba’s membership in the organization—a suspension that had been in place since 1962. Arthur Brice, *OAS Lifts 47-year Old Suspension of Cuba*, CNN, June 3, 2009, <http://www.cnn.com/2009/WORLD/americas/06/03/cuba.oas/index.html>. Cuba, however, announced it would not be joining the OAS, citing the United States’s call for greater political and personal freedoms on the island as an unacceptable precondition. *Cuba Rejects OAS Membership, Official Says*, CNN, June 4, 2009, <http://www.cnn.com/2009/WORLD/americas/06/04/cuba.oas/index.html>.

<sup>40</sup> See Vicent, *Los cubanos podrán tener móvil*, *supra* note 14; Vicent, *Los cubanos podrán alojarse en los hoteles*, *supra* note 14.

<sup>41</sup> *EE UU tacha de “cosméticas” las medidas liberalizadoras de Raul Castro*, EL PAÍS (Madrid), Apr. 18, 2008, [http://www.elpais.com/articulo/internacional/EE/UU/tacha/cosmeticas/medidas/liberalizadoras/Raul/Castro/elpepuint/20080418elpepuint\\_10/Tes](http://www.elpais.com/articulo/internacional/EE/UU/tacha/cosmeticas/medidas/liberalizadoras/Raul/Castro/elpepuint/20080418elpepuint_10/Tes).

<sup>42</sup> See *Cuban National Report*, *supra* note 29, ¶ 39; Comisión Cubana De Derechos Humanos Y Reconciliación Nacional, *Untitled Report* (Aug. 12, 2008), available at [http://www.miamiherald.typepad.com/cuban\\_colada/files/cuba\\_human\\_rights\\_report\\_08.12.08%20CCDHRN](http://www.miamiherald.typepad.com/cuban_colada/files/cuba_human_rights_report_08.12.08%20CCDHRN); see also *Cuba to Commute Death Sentences*, BBC NEWS, Apr. 29, 2008, <http://news.bbc.co.uk/2/hi/7372590.stm>. While the penalty remains on the books, Cuba has promised it would only be applied in “highly exceptional cases.” *Cuban National Report*, *supra* note 29, ¶ 39. Cuba also lowered the restrictions placed on many citizens in accessing prescription medication. Valdes, *supra* note 13.

<sup>43</sup> *Cuba to Abolish Salary Equality*, BBC NEWS, June 18, 2008, <http://news.bbc.co.uk/2/hi/americas/7449776.stm>.

<sup>44</sup> *Id.*

<sup>45</sup> Marc Frank, *Raul Castro Pushes Cubans to Rethink Socialism*, REUTERS, Sept. 22, 2009, <http://www.reuters.com/article/worldNews/idUSTRE58L3QF20090922>.

amended its 2007 “Law of Historical Memory.”<sup>46</sup> The amendment provides that anyone who can prove that their grandparents went into exile during the Spanish Civil War or the decade that followed, 1936 to 1955, can apply for and receive Spanish citizenship—and with it, a Spanish passport.<sup>47</sup> When citizens in Havana heard of the reform, they began lining up outside the Spanish embassy, and many spent Christmas night in line.<sup>48</sup> The Spanish government has estimated that up to 1 million people are eligible to apply for citizenship—200,000 of them from Cuba.<sup>49</sup>

The Spanish law will undoubtedly have a major impact in the migration and travel patterns of Cuban nationals. Ultimately, it may provide the Cuban government with the final push to convince it to begin the process of overhauling its travel policy. In the first month of the program, the Spanish Consulate in Havana received over 25,000 applications from Cuban citizens, and Spain began issuing passports to Cuban nationals in February 2009.<sup>50</sup> In the worst case scenario from Cuba’s perspective, the law could result in a mass exodus of people on par in numbers with the Balsero Crisis of 1994.<sup>51</sup> In

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<sup>46</sup> Lisa Abend, *500,000 New Citizens for Spain?*, TIME, Dec. 29, 2008, available at <http://www.time.com/time/world/article/0,8599,1868934,00.html>.

<sup>47</sup> *Id.* The window to apply for Spanish citizenship will be for a period of two years—through December 2010. *Id.* Applicants are not required to renounce their current citizenship in order to obtain Spanish citizenship and a Spanish passport. *Id.* Under the law, Cuba is second only to Argentina as far as numbers of people who would qualify for Spanish citizenship. Esteban Israel, *Spain Issues Cuba’s First “Grandchildren” Passport*, REUTERS, Feb. 5, 2009, <http://www.reuters.com/article/internalReutersGenNews/idUSTRE51502U20090206>. Among the number of potential qualifiers are Fidel and Raúl Castro, whose father left Spain in the early part of the twentieth century. *Id.*

<sup>48</sup> Abend, *supra* note 46.

<sup>49</sup> Israel, *supra* note 47.

<sup>50</sup> *Id.*

<sup>51</sup> After the collapse of the Soviet Union in the early 1990s, the Cuban economy began spiraling into a crisis. Matias F. Travieso-Diaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 BERKELEY J. INT’L L. 234, 243–44 (1998). This crisis reached its peak in 1994. *Id.* On August 5, 1994, Fidel Castro announced that the government would not take any efforts to prevent people from leaving through these means. *Id.* Cubans began flocking to the United States on the sea to escape in small boats or homemade rafts. *Id.* Then-President Bill Clinton responded on August 19, 2004, by ending the U.S. policy of automatically granting asylum to all Cubans who arrived in the United States. *Id.* The United States Coast Guard began detaining all Cubans found at sea at the military base in Guantánamo Bay and other U.S. refugee camps. *Id.* at 245. One reason that Cubans were not returned directly to the Castro government was the fear of their prosecution for criminal offenses under illegal exit. *See id.* at 250 n.78. Nonetheless, these actions failed to curb the migration flow. *Id.* at 245. On September 9, 1994, Cuba and the United States entered into the Cuban Migration Agreement. *Id.* at 244. In this agreement, both nations agreed that at least 20,000 Cubans would be admitted into the United States through formal legal processes, including a visa lottery. *Id.* at 248. The United States also agreed that it would repatriate all Cubans found at sea. *Id.* at 247. However, those Cubans that safely reached American soil would be granted asylum. *Id.* This agreement came to be known as the United States’s “Wet-Foot, Dry-Foot” Policy. Javier Talamo, Comment, *The Cuban Adjustment Act: A Law Under*

addition to a very public humiliation for the government, these defections would undercut one of Cuba's primary justifications for its current travel policies—prevention of a “brain drain” and a mass exodus.<sup>52</sup> More likely, but only slightly more tolerable, is the possibility that Spain's legislation will create a tiered travel regime among ordinary Cuban citizens.<sup>53</sup> In this scenario, the newly minted dual citizens who remain on the island would be able to use the Spanish passport to come and go with only nominal government interference,<sup>54</sup> while those traveling on a Cuban passport would be subject to the existing restrictions. In either scenario, Cuba's travel laws would come under heightened international scrutiny, and Havana would lose any political capital it gained when it signed the international covenants and announced progressive reforms.

This Comment will focus on the freedoms and human rights Cuba has at least implicitly promised to its citizenry by attaching its signature to the ICCPR. Specifically, this Comment will explore the interplay between the freedom of movement guaranteed by Article 12 of the ICCPR and the Cuban laws on migration.<sup>55</sup> If the Cuban government really intends to honor the ICCPR, it must completely revamp its travel system by making the visa-application process transparent and accessible, eliminating much of the bureaucracy that a Cuban citizen must confront in order to obtain a visa, and

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*Siege?*, 8 ILSA J. INT'L & COMP. L. 707, 717 (2002). As part of the agreement, Cuba agreed not to prosecute any repatriated nationals for the crime of illegal exit. *Id.* at 712. Almost all of the nearly 30,000 Cubans who had been detained at Guantánamo Bay were eventually admitted into the United States. Travieso-Diaz, *supra*, at 248.

<sup>52</sup> The fear of losing talented minds, particularly medical doctors, to defection has been an acute problem for the Cuban government. See *infra* notes 135–41 and accompanying text.

<sup>53</sup> Cuba already has five types of passports—Diplomatic, Official, Service, Marine, and Ordinary. Ley de Migración [Law of Migration], No. 1312, art. 1 (Sept. 20, 1976) (Cuba) [hereinafter Law No. 1312]. See also *infra*, note 57.

<sup>54</sup> See Israel, *supra* note 47.

<sup>55</sup> In addition to the laws regulating the ability to exit the country, Cuban law also has extensive regulations impacting the ability for people, including Cuban citizens, to enter the country. See Reglamento de la Ley de Migración [Regulation of the Law of Migration], Consejo de Ministros [Council of Ministers] Decreto [Decree] No. 26, ch. II (July 19, 1978) (Cuba) [hereinafter Decree 26]. Cuban citizens traveling on an Ordinary passport must have entrance permits to come into the country. *Id.* art. 47. If the citizens are permanent residents traveling abroad temporarily, the entrance permit will be issued simultaneously with the exit permit. *Id.* art. 57. Under the ICCPR, the right to enter one's own country is announced in Article 12(4), which provides that “[n]o one shall be arbitrarily deprived of the right to enter his own country.” International Covenant on Civil and Political Rights art. 12, ¶ 4, Dec. 16, 1966, Sen. Exec. Doc. E, 95-2 (1979), 999 U.N.T.S. 171 [hereinafter ICCPR]. However, while the entrance permits are in many respects very similar to the exit permits, and the right to enter one's own country raises many issues similar to the right to leave one's own country, the issue of Cuban law and the Article 12(4) right to enter one's own country is beyond the scope of this Comment.

eventually replacing the Migration Code and the laws surrounding it. In Part I, this Comment will explain the bureaucracy that a Cuban citizen, like Yoani Sánchez, must navigate in order to obtain the *tarjeta blanca*, which is not a certainty even for one who properly reaches all application checkpoints. Part II of this Comment will address the particulars of freedom of movement norms in international law guaranteed by Article 12 of the ICCPR and subsequent relevant interpretations and declarations. Part III will analyze the friction points between the Cuban travel regime and the ICCPR norms. Finally, Part IV will make suggestions as to how Cuba should reform its travel policy to demonstrate that it is serious about human rights reforms and bringing its system in line with the guarantees promised by the ICCPR.

## I. CUBAN TRAVEL LAWS

Throughout much of its Marxist regime, Cuba has been harshly criticized from the outside for its practices and human rights abuses.<sup>56</sup> More recently, these criticisms have intensified their focus on Cuba's travel laws and the impact these laws have on Cuba's citizenry.<sup>57</sup> These reports have shed important light on the hardships faced by many of Cuba's people, but they have struggled to explain the details of the technical workings of the Cuban system, both as prescribed by statute and as exists on the ground. A major reason for this is that the Cuban bureaucracy is particularly complex, and at times nearly impenetrable.

The foundation for Cuban travel law is contained in Law No. 1312, the *Ley de Migración* of 1976 ("Migration Act")<sup>58</sup> and the decree concerning the regulation of that law, *Reglamento de la Ley de Migración* of 1978 ("Migration Regulation").<sup>59</sup> These acts cover both the procedures that a Cuban citizen must follow in order to travel abroad and the procedures for foreign nationals to enter Cuba.<sup>60</sup>

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<sup>56</sup> See, e.g., SARAH A. DECOSSE, HUMAN RIGHTS WATCH, CUBA'S REPRESSIVE MACHINERY: HUMAN RIGHTS FORTY YEARS AFTER THE REVOLUTION (1999).

<sup>57</sup> See HUMAN RIGHTS WATCH, FAMILIES TORN APART: THE HIGH COST OF U.S. AND CUBAN TRAVEL RESTRICTIONS (Oct. 2005), in 17 Reports, No. 5(B) (2005) [hereinafter FAMILIES TORN APART].

<sup>58</sup> Law No. 1312, *supra* note 53.

<sup>59</sup> Decree 26, *supra* note 55.

<sup>60</sup> *Id.*; Law No. 1312, *supra* note 53.

### A. *Cuba's Passport Laws*

For Cubans traveling abroad, the Migration Act provides that citizens must have a passport issued in their name in order to exit or enter Cuban territory.<sup>61</sup> The Migration Act provides for five distinct types of passports: Diplomatic, Service, Official, Marine, and Ordinary.<sup>62</sup> The Ministry of Foreign Relations issues Diplomatic and Service passports,<sup>63</sup> while the Ministry of the Interior issues the Official, Marine, and Ordinary passports.<sup>64</sup> The Diplomatic, Service, Official, and Marine passports are issued to small, defined groups within the government.<sup>65</sup> The bulk of the Cuban citizenry travels on the Ordinary passport when it travels outside the country for “particular matters.”<sup>66</sup> The Ordinary passport can be issued to individuals, entire families, or groups.<sup>67</sup>

There are numerous explicit and implicit roadblocks when traveling with an Ordinary passport, the most regulated and restricted of the five.<sup>68</sup> The Migration Act provides that the “Ministry of the Interior will regulate the form, creation, processing, and validity” of the Ordinary passport.<sup>69</sup> While State bodies handle the application for Diplomatic, Service, Marine, and Official passports and the appropriate exit or entrance permits that go with them,<sup>70</sup> Cubans outside of the government wishing to travel abroad must handle their own applications for a passport and the corresponding entry and exit permits.<sup>71</sup>

These can be daunting—and expensive—propositions. For a Cuban citizen to obtain a passport for the first time, he or she must provide the Department of

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<sup>61</sup> Law No. 1312, *supra* note 53, art. 1.

<sup>62</sup> *Id.* Indeed, a bulk of nations have regular passports used by the majority of that nations' citizens as well as separate categories of passports used by government functionaries, such as diplomats. WARREN FREEDMAN, *THE INTERNATIONAL RIGHT TO TRAVEL, TRADE, AND COMMERCE* 14 (1993).

<sup>63</sup> Law No. 1312, *supra* note 53, art. 4.

<sup>64</sup> *Id.*

<sup>65</sup> The act enumerates which segment of the population should use which passport. Diplomatic passports are issued to Leaders and Functionaries of the Cuban Communist Party and Cuban Government, Diplomats, Consuls, Government Advisors, members of the military, and their families. *Id.* art. 5. Service passports are issued to the administrative, technical, and auxiliary staff serving Cuban embassies, consulates, or missions abroad. *Id.* art. 6. Official passports are issued to citizens or government officials who are traveling abroad on official state business but who are not covered by the Diplomatic or Service passports. *Id.* art. 8. Marine passports are issued to members of the Cuban Navy who travel abroad. *Id.* art. 10.

<sup>66</sup> *Id.* art. 9. Cuban citizens who reside permanently outside the country also travel on the Ordinary passport. *Id.*

<sup>67</sup> Decree 26, *supra* note 55, art. 8.

<sup>68</sup> See Law No. 1312, *supra* note 53, arts. 4, 9, 12.

<sup>69</sup> *Id.* art. 12.

<sup>70</sup> *Id.* art. 13.

<sup>71</sup> *Id.* art. 14.

the Interior with a birth certificate issued within the last two years, pay the corresponding fee, and comply with other standard ministerial practices.<sup>72</sup> According to one Cuban Consulate, the corresponding fee associated with obtaining a passport can be as high as €180 (approximately \$250).<sup>73</sup>

A Cuban passport is valid for two years from its date of issuance.<sup>74</sup> A Cuban passport can be extended twice, with each extension coming for a period of two years.<sup>75</sup> To apply for an extension, a Cuban citizen must submit the current passport at least ninety days before its expiration date and pay another fee.<sup>76</sup> The fee for the extension is equal to half of the fee for the original passport.<sup>77</sup> Cubans cannot hold on to expired passports and renew them only when they have a foreign trip planned or in mind, because, including possible extensions, the Cuban passport is valid for a total of six years “from the date of issue.”<sup>78</sup> Given that most Cubans make only \$15 per month,<sup>79</sup> these procedures are effectively cost prohibitive.

### B. *The Exit Visa, or Tarjeta Blanca*

For those Cubans with a current Ordinary passport wishing to travel abroad, the next step is obtaining an exit permit, known colloquially as the *tarjeta blanca*, and referred to by the Cuban government as either a “*permiso de salida*”<sup>80</sup> [exit permit] or “*Permiso de Viajar al Exterior*”<sup>81</sup> [Permit to Travel Overseas], authorized by the Ministry of the Interior.<sup>82</sup> An exit permit

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<sup>72</sup> Embassy of the Republic of Cuba in Barbados, Cuban Passport, <http://embacu.cubaminrex.cu/Default.aspx?tabid=7386> (last visited Oct. 18, 2009) [hereinafter Cuban Passport]. For instance, the embassy dictates that, in the photograph sent along with the application, men are required to wear a collared shirt. Embassy of Cuba in Finland and the Baltic States, Consular Services, <http://www.cuba.fi/forms.htm#CUSTOMS%20REGULATIONS> (last visited Oct. 18, 2009) [hereinafter Consular Services].

<sup>73</sup> *Id.* The announcement on this website seems to relate specifically to Cubans served by this Embassy. However, this fee is high throughout, though it varies somewhat. See, e.g., Embassy of the Republic of Cuba in Suriname, Consular Affairs, <http://embacu.cubaminrex.cu/default.aspx?tabid=8869> (last visited Nov. 2, 2009).

<sup>74</sup> Decree 26, *supra* note 55, art. 23; see also Cuban Passport, *supra* note 72.

<sup>75</sup> Decree 26, *supra* note 55, art. 23.

<sup>76</sup> *Id.* art. 24.

<sup>77</sup> Consular Services, *supra* note 72.

<sup>78</sup> Cuban Passport, *supra* note 72.

<sup>79</sup> *Castro's Brother Faces Big Challenges in Cuba*, CNN Feb. 26, 2008, <http://www.cnn.com/2008/WORLD/americas/02/26/raul.castro.challenges/index.html>.

<sup>80</sup> Law No. 1312, *supra* note 53, art. 1.

<sup>81</sup> See, e.g., Embassy of the Republic of Cuba in Barbados, Letter of Invitation, <http://embacu.cubaminrex.cu/Default.aspx?tabid=7391> (last visited Oct. 18, 2009).

<sup>82</sup> Law No. 1312, *supra* note 53, art. 1; see also Decree 26, *supra* note 55, art. 124(b).

is only required for Cubans with an Ordinary passport.<sup>83</sup> The Migration Act gives the Ministry of the Interior the power to set the procedure for those Cubans with an Ordinary passport to obtain visas and entrance and exit permits.<sup>84</sup> Additionally, under the Migration Regulation, the Migration Act authorizes both the Ministry of the Interior and the Ministry of Foreign Relations to “issue Resolutions and other provisions directed at the best interpretation and observance of” the travel regulations that fall under the ambit of the respective Ministry’s power.<sup>85</sup>

Cuban citizens must provide the Ministry of the Interior with background documentation along with their completed applications.<sup>86</sup> As a part of the application, the Cuban national must pay a fee of 150 Cuban Convertible Pesos (equal to \$150).<sup>87</sup> An applicant must include a letter from his or her workplace or school superior describing the applicant’s characteristics as a worker or student.<sup>88</sup> Each applicant must also provide the government with a criminal history certificate detailing any infractions committed since the age of twelve.<sup>89</sup> Those traveling with children under the age of eighteen must provide either (1) proof that they are the children’s legal guardians<sup>90</sup> or (2) a consent form from the child’s legal guardians.<sup>91</sup>

If the travel is for the purpose of visiting friends or family, applicants must also provide an Invitation Letter formulated by said friends or family before a public notary.<sup>92</sup> This invitation must contain the information and address of the invitor, and it must have been “legalized through consular channels.”<sup>93</sup> In 2007, the Ministry of Foreign Relations, under the broad authority granted to it

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<sup>83</sup> Law No. 1312, *supra* note 53, art 1. For those traveling on Diplomatic, Service, Official, or Marine passports, the issuance of the passport constitutes the exit permit. Decree 26, *supra* note 55, art. 126.

<sup>84</sup> Law No. 1312, *supra* note 53, art. 15. Visas are documents issued by a nation to regulate the flow of foreign nationals entering the country. Exit permits, like the ones required by Cuban law, are issued by the domestic government to regulate the flow of its own nationals exiting the country.

<sup>85</sup> Decree 26, *supra* note 55, Final Dispositions, ¶ 1. The Ministry of Foreign Affairs cited this language in 2007 in the preamble to Res. 87. See Ministerio de Justicia [Ministry of Justice] Res. No. 87, ¶ 1 (Apr. 23, 2007) (Cuba).

<sup>86</sup> Decree 26, *supra* note 55, arts. 131–32.

<sup>87</sup> See Vicent, *supra* note 12. The Cuban Convertible Peso is tied in value to the U.S. dollar. Banco Central de Cuba, Convertible Peso Bills, [http://www.bc.gov.cu/English/convertible\\_bills.asp](http://www.bc.gov.cu/English/convertible_bills.asp) (last visited Oct. 18, 2009).

<sup>88</sup> Decree 26, *supra* note 55, art. 132(a).

<sup>89</sup> *Id.* art. 132(b).

<sup>90</sup> *Id.* art. 132(c).

<sup>91</sup> *Id.* art. 132(ch).

<sup>92</sup> *Id.* art. 132(d).

<sup>93</sup> *Id.*

by the Migration Regulation, passed Resolution 87, which governs the Invitation Letter and makes it more difficult for Cubans to travel abroad.<sup>94</sup> Under Resolution 87, for a Cuban to travel abroad, the invitor must appear in person at the Cuban Consulate in the host nation with the legally notarized invitation document.<sup>95</sup> The invitor must also promise to be economically and legally responsible for the invitee while the invitee is in the foreign country.<sup>96</sup> The economic expenses can include roundtrip airfare, medical expenses, accommodations, and any fees associated with the Cuban national's attempts to extend his or her visa.<sup>97</sup> The application fee required to invite Cubans to visit is very costly; for instance, British subjects wishing to invite Cuban nationals to visit must pay £115 to the Cuban Consulate as part of the application for an Invitation Letter,<sup>98</sup> and Mexican citizens must pay 2240 pesos.<sup>99</sup> In the case of British subjects, the invitor must also prove financial solvency to the Cuban government.<sup>100</sup> Invitation Letters are valid for one year from their date of issuance.<sup>101</sup> Once the Consul receives the notarized document, it has the power to make an Official Certificate that will "be presented to the Cuban Migration Authorities as a record of what was provided for" in Article 132(d) of the Migration Regulation.<sup>102</sup>

In addition to the personal information of the invitor and invitee, the Invitation Letter must also provide the reason for the visit.<sup>103</sup> At first glance, this final requirement seems redundant, as the language of the Migration Regulation requires an Invitation Letter only when the travel is for the purpose of visiting friends and family, and the 2007 Resolution contains similar language.<sup>104</sup> Since the laws specify that only personal travel requires an Invitation Letter, it would be logical to conclude that Cubans traveling on an Ordinary passport for *business* purposes would be exempt from this requirement. However, as illustrated by the case of Yoani Sánchez, who had

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<sup>94</sup> Ministerio de Justicia [Ministry of Justice] Res. No. 87, ¶ 1 (Apr. 23, 2007) (Cuba).

<sup>95</sup> *Id.* ¶ 1.

<sup>96</sup> *Id.*; *see, e.g.*, Cuba: Official Embassy Site in Barbados, Procedure to Invite a Cuban to Visit Barbados (2005), <http://embacu.cubaminrex.cu/Default.aspx?tabid=7391>.

<sup>97</sup> *Id.*

<sup>98</sup> Ministry of Foreign Affairs: Embassy of Cuba in the United Kingdom, Invitation Letter, <http://embacu.cubaminrex.cu/Default.aspx?tabid=16380> (last visited Oct. 15, 2009).

<sup>99</sup> Embajada de Cuba en Mexico, Cartas de Invitación, <http://www.embacuba.com.mx/consulado/invitacion.php> (last visited Oct. 15, 2009).

<sup>100</sup> Ministry of Foreign Affairs: Embassy of Cuba in the United Kingdom, *supra* note 98.

<sup>101</sup> Ministerio de Justicia [Ministry of Justice] Res. No. 87, ¶ 6 (Apr. 23, 2007) (Cuba).

<sup>102</sup> *Id.* ¶ 3.

<sup>103</sup> *Id.* ¶ 2.

<sup>104</sup> Decree 26, *supra* note 55, art. 132(d); Ministerio de Justicia [Ministry of Justice] Res. No. 87, ¶ 1.

applied to travel in order to accept an award from a Spanish newspaper, all Cubans with Ordinary passports are expected to produce an Invitation Letter to complete their exit permit application.<sup>105</sup>

Resolution 87 expands the power of the consulate.<sup>106</sup> Under Resolution 87, Consuls have the power, as a notary, to formalize the Invitation Letter when there are two degrees of familial relationship or less between the invitor and invitee.<sup>107</sup> Significantly, the Consul is empowered to reject invitations “when factors concur that would advise the Consul to do so.”<sup>108</sup> Likewise, the Director of the Office of Consular Affairs and Cubans Residing Abroad has the power to “pronounce the instructions that are required for the best application of what is established by the present law.”<sup>109</sup>

After they have all their documentation in order, Cubans take their completed applications to the local ministry offices to apply for the *tarjeta blanca*. Lines to the local ministry offices can be exceedingly long, especially in times when word spreads that the Ministry of the Interior is granting applications with more regularity.<sup>110</sup> After the applications are out of the hands of the individual applicants, the Cuban bureaucracy is at its least transparent. The Ministry of the Interior can often take weeks—if not months—to process permit applications.<sup>111</sup> Extended delays are common, and applicants who check in on their status have been told simply “[y]our paper has not come in time.”<sup>112</sup> Even those who weather the delays, pay all relevant fees, and provide all required information are not guaranteed that their applications for the permit will be approved.<sup>113</sup> Outside of word of mouth, Cuban citizens have no real way of understanding when or how a decision will be reached regarding their application—or how to maximize their chances of receiving an affirmative response. The law provides no refuge, as the Ministry of the Interior has the power to appoint the officials empowered to resolve exit permit applications, and these officials are instructed to “grant or deny [the

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<sup>105</sup> See Sánchez, *supra* note 8.

<sup>106</sup> Ministerio de Justicia [Ministry of Justice] Res. No. 87, ¶ 1.

<sup>107</sup> *Id.* ¶ 4.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* ¶ 9.

<sup>110</sup> See *Fotografía: Decenas de cubanos hacen cola para conseguir un visado*, EL PAÍS (Madrid), Apr. 18, 2008, [http://www.elpais.com/fotografia/Decenas/cubanos/hacen/cola/conseguir/visado/elpdiaint/20080418elpapiint\\_1/les/](http://www.elpais.com/fotografia/Decenas/cubanos/hacen/cola/conseguir/visado/elpdiaint/20080418elpapiint_1/les/).

<sup>111</sup> Vicent, *supra* note 12.

<sup>112</sup> Sánchez, *supra* note 8.

<sup>113</sup> Vicent, *supra* note 12.

applications] according to the policy in effect as agreed upon by the Government.”<sup>114</sup> Many applicants will simply receive a form informing them that their request to travel has been denied “for the moment.”<sup>115</sup> Sometimes, as was the case with Yoani Sánchez, applicants may not receive an answer one way or another until after their request date of travel has already passed.<sup>116</sup> In those cases, the answer is almost certainly “No.”<sup>117</sup>

### *C. Selective Application of Travel Restriction to Certain Segments of the Population*

According to reports, Cuba selectively applies these provisions even more stringently to certain segments of the population.<sup>118</sup> In its migration policy, Cuba employs numerous strategies that serve as safeguards aimed at curbing—if not entirely stopping—defections and emigrations, particularly defections or emigrations of citizens deemed valuable by the government.

Primary among such policies is the Cuban practice of denying, or at least seriously restricting, the ability for doctors, medical personnel, and other highly educated persons the ability to leave the country, even more so than for the average citizen.<sup>119</sup> This restriction is governed by Resolution 54, which was issued by the Cuban Ministry of Public Health in 1999.<sup>120</sup> According to government officials, Resolution 54 establishes a waiting period for doctors of three to five years from the time of application for an exit permit before that application can be granted.<sup>121</sup> Cuba lists public policy concerns—some more legitimate than others—as justifications for the restriction.<sup>122</sup> Among the strongest is the need to ensure that recent graduates, almost all of whom have their educational costs covered by the state, perform a period of work for the state as a way of repaying their country.<sup>123</sup> This service can include work at hospitals domestically, or Cuba can provide its doctors for a temporary period

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<sup>114</sup> Decree 26, *supra* note 55, art. 136.

<sup>115</sup> Yoani Sánchez, Permit Denial Letter, Generación Y, [http://desdecuba.com/generaciony/wp-content/uploads/2008/05/negativa\\_viaje.pdf](http://desdecuba.com/generaciony/wp-content/uploads/2008/05/negativa_viaje.pdf) (May 14, 2008).

<sup>116</sup> See *id.*

<sup>117</sup> Sánchez, *supra* note 20.

<sup>118</sup> FAMILIES TORN APART, *supra* note 57, at 9, 20.

<sup>119</sup> See Joaquin Rivery, *Contundente respuesta a la nota del Departamento de Estado*, DIARIO GRANMA, <http://www.granma.cubaweb.cu/temas7/articulo82.html> (last visited Nov. 20, 2009); see also Ministerio de Salud Pública [Ministry of Public Health] Res. No. 54 (July 2, 1999) (Cuba).

<sup>120</sup> Ministerio de Salud Pública [Ministry of Public Health] Res. No. 54; Rivery, *supra* note 119.

<sup>121</sup> Rivery, *supra* note 119.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

to friendly nations with a need for medical help as a sort of loan (a program that is a product of pride in Cuba's medical system).<sup>124</sup> For instance, South Africa has imported 600 Cuban doctors to work in the rural areas outside of the cities.<sup>125</sup> This service of sending doctors abroad has come to be known as Castro's "doctor diplomacy."<sup>126</sup> Doctors involved in this diplomatic corps are paid considerably more than their colleagues at home: The Cuban government pays doctors in foreign countries \$150 to \$375 a month, while their colleagues in Cuba are paid only \$25 a month.<sup>127</sup>

Unfortunately for Cuban medical personnel, none of these restrictions are laid down in the text of Resolution 54. The Resolution provides simply that:

Any professional or technician of the National System of Health who applies for his or her transfer to companies, economic, administrative or service associations, or associations of any other type, will present his or her well-founded request to the Provincial Director, who will present [the request] with his opinions to the person who will resolve it, who will be the exclusive authority authorized to approve such a request.<sup>128</sup>

If the applicant comes from a nationally subordinated unit of the Ministry of Health, the vice-minister who attends to that unit or to the company where the applicant professional works will be "the person who will resolve [the request]."<sup>129</sup> The same procedure will be followed when the companies are applicants in the provision of professional or technical service.<sup>130</sup>

Obviously, the power of the "person who will resolve" the request presents particular problems to medical personnel seeking a transfer.<sup>131</sup> Under the Resolution, that person has unimpeachable power, and can presumably reject even a "well-founded request."<sup>132</sup> Presumably, a "well-founded request" will

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<sup>124</sup> *Id.*; see also Mirta Ojito, *Cuba Reaps Goodwill from Doctor Diplomacy*, MIAMI HERALD, Aug. 17, 2008, at A1, 22A.

<sup>125</sup> *Cuban Doctors in SA Rejoice as Castro Quits*, MAIL & GUARDIAN ONLINE, Feb. 23, 2008, <http://www.mg.co.za/article/2008-02-23-cuban-doctors-in-sa-rejoice-as-castro-quits>; Michelle Lang, 'We Need Our Doctors,' *South Africans Plead*, CALGARY HERALD, May 4, 2009, available at <http://www.calgaryherald.com/health/need+doctors+South+Africans+plead/1082989/story.html>.

<sup>126</sup> See Ojito, *supra* note 124; see also Virgilio Beato-Nunez et al., *Castro's "Doctor Diplomacy,"* 5 MEDICAL SENTINEL 163 (2000), available at <http://www.haciendapub.com/article47.html>.

<sup>127</sup> Ojito, *supra* note 124, at 22A.

<sup>128</sup> Ministerio de Salud Pública [Ministry of Public Health] Res. No. 54 (July 2, 1999) (Cuba).

<sup>129</sup> *Id.* ¶¶ 3-4.

<sup>130</sup> *Id.* ¶ 2.

<sup>131</sup> *Id.* ¶ 4.

<sup>132</sup> *Id.* ¶ 1.

only come from a person who has completed the mandatory three-to-five year waiting period, but that requirement is not specified in the Resolution.<sup>133</sup> “Well-founded request” is an undefined term, and the requirements of what would make a request “well-founded”—or grantable—are not listed.<sup>134</sup>

Cuba justifies Resolution 54 by placing it in the context of U.S.-Cuban animosity.<sup>135</sup> Indeed, the political feelings of a reciprocal hostility with the United States have driven much of Cuban policy over the past fifty years.<sup>136</sup> The official Cuban press organ tells the story of two Cuban doctors who, having gone to Zimbabwe on official state business, defected and were given offers by the United States to participate in the U.S. visa lottery,<sup>137</sup> which grants permanent visas to a minimum of 20,000 Cubans annually.<sup>138</sup> The article concludes that Washington is looking to undermine the Cuban health system and sabotage its collaboration with friendly Third World countries and that Resolution 54 is an “act of legitimate defense against harassment.”<sup>139</sup> Former President Fidel Castro has argued that the measures are necessary to stop a “brain drain” from the country, and he has accused the United States of “depriving our country [Cuba] of medical doctors, engineers, architects and other university graduates who have been educated here, absolutely free of charge.”<sup>140</sup> Less persuasively, the government argues that the waiting period is often required so that substitutes may be found for the doctors leaving.<sup>141</sup>

In truth, Castro’s accusations with regard to doctors are not unfounded. In August 2006, the U.S. Department of Homeland Security announced the establishment of the Cuban Medical Professional Parole Program.<sup>142</sup> Under the program, the U.S. government extends permission to legally enter the country to Cuban health care professionals currently working in a foreign

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<sup>133</sup> See Rivery, *supra* note 119.

<sup>134</sup> *Id.*; see Ministerio de Salud Pública [Ministry of Public Health] Res No. 54.

<sup>135</sup> See Rivery, *supra* note 119.

<sup>136</sup> See *Cuban National Report*, *supra* note 29, ¶¶ 107, 115–24.

<sup>137</sup> Rivery, *supra* note 119.

<sup>138</sup> See Pablo Bachelet, *U.S.-Cuba Flap Swells Tension*, MIAMI HERALD, July 18, 2007, available at <http://www.cubanet.org/CNews/y07/jul07/17e1.htm>.

<sup>139</sup> Rivery, *supra* note 119.

<sup>140</sup> FAMILIES TORN APART, *supra* note 57, at 20; Fidel Castro Ruz, President of the Republic of Cuba, Key Address at a Mass Rally in the “José Martí” Anti-Imperialist Square (Nov. 27, 2001), available at <http://www.cuba.cu/gobierno/discursos/2001/ing/f271101i.html>. Because of this “brain drain,” Castro told his audience that “Cuba has been forced to set a number of restrictions as to the time of departure of people in some technical categories in order to avoid the damage caused to important services.” *Id.*

<sup>141</sup> Rivery, *supra* note 119.

<sup>142</sup> U.S. Dep’t of State, Cuban Medical Professional Parole Program, Jan. 26, 2009, <http://www.state.gov/p/wha/rls/fs/2009/115414.htm>.

nation as part of Cuba's "Doctor Diplomacy."<sup>143</sup> The workers covered include, but are not limited to, doctors.<sup>144</sup> The United States lists Resolution 54 as a reason for the policy.<sup>145</sup> While the U.S. policy is indicative of the hostilities between the two nations, Cuba's reliance on U.S. actions to justify Resolution 54 is disingenuous, as Resolution 54 took effect seven years before the United States policy.<sup>146</sup>

Cuba's travel policy also includes other mechanisms that seek to safeguard against defection. While not explicit policies, two practices fit this mold: (1) the practices of denying families the ability to leave the country at the same time and (2) the practice of denying the families of previous defectors the opportunity to leave the country.<sup>147</sup> In the former instance, family members who apply for exit permits will generally have the applications of one or more denied, while those of the others are accepted.<sup>148</sup> By making them leave a loved one behind, Cuba gains some leverage in ensuring the emigrants will return. In the latter instance, Cuba has identified people likely to defect and has taken measures to limit their opportunity to do so.<sup>149</sup>

These policies and procedural safeguards are rooted in the Migration Regulation, which provides that the government officials designated by the Ministry of the Interior will "grant or deny applications for exit permits according to the policy in effect that has been agreed upon by the Government."<sup>150</sup> This provision effectively gives the Ministry of the Interior absolute power with regard to the issuance of exit visas for Cuban citizens traveling under the ordinary passport, as the Ministry's power under the clause is only limited by the "conditions established by the [r]egulations of the [Migration Act]."<sup>151</sup> The Migration Act has no provisions detailing oversight or transparency of the Ministry of the Interior or Ministry of Foreign Affairs.<sup>152</sup>

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<sup>143</sup> U.S. Citizenship and Immigration Services, Fact Sheet, Parole for Cuban Medical Personnel in Third Countries (Sept. 19, 2006), available at <http://www.uscis.gov/files/pressrelease/CubanMedPrf091906.pdf>.

<sup>144</sup> *Id.* In addition to doctors, nurses, paramedics, physical therapists, lab technicians, and sports trainers are inclusively listed as job categories that would qualify. *Id.*

<sup>145</sup> U.S. Dep't of State, Cuban Medical Professional Parole Program, *supra* note 142.

<sup>146</sup> Resolution 54 took effect on July 2, 1999, whereas the U.S. policy was announced August 11, 2006. Ministerio de Salud Pública [Ministry of Public Health] Res No. 54; U.S. Dep't of State, Cuban Medical Professional Parole Program, *supra* note 142.

<sup>147</sup> FAMILIES TORN APART, *supra* note 57, at 21.

<sup>148</sup> *Id.*

<sup>149</sup> *See, e.g., id.* at 24.

<sup>150</sup> Decree 26, *supra* note 55, art. 136.

<sup>151</sup> Law No. 1312, *supra* note 53, art. 15.

<sup>152</sup> Decree 26, *supra* note 55.

As a result, there is no transparency, and the Ministry of the Interior has *carte blanche* to deny any application it wishes, without having to provide a reason.<sup>153</sup>

#### *D. Sanctions and Criminal Measures for Violation of Travel Laws*

Should a Cuban citizen (or any person in Cuba) attempt to bypass any of these procedures, the person faces potentially draconian consequences. The Migration Act provides that “anyone who infringes any of the provisions of this Law and its Rules, will be imposed an administrative fine of up to 100 pesos, without prejudice to the other penalties they may have incurred.”<sup>154</sup> That “penal responsibility” is codified in Articles 216 and 217 of the Cuban Penal Code.<sup>155</sup> The Cuban Penal Code provides, in relevant part, that anyone who, “without completing the legal formalities, leaves or completes acts designed to leave national territory, will incur a punishment of deprivation of liberty of one to three years or a fine of 300 to 1000 cuotas [convertible pesos].”<sup>156</sup> That incarceration time increases to three to eight years if violence, intimidation, or force is used in the commission of the escape.<sup>157</sup> The Code also provides that the crime of illegal exit will be “punished independently from those committed in the execution or at the time of the crime.”<sup>158</sup> Article 216.3 of the Penal Code thus establishes that those whose acts lead them to be convicted of illegal exit will serve consecutive sentences for any tangential or related crimes, setting up the possibility of exceedingly lengthy terms.<sup>159</sup> Because many of the crimes contained in the Cuban Penal Code have very vague definitions, this possibility is very real.<sup>160</sup> In the same vein, those who “organize, promote or incite an illegal exit” will be incarcerated for two to five years.<sup>161</sup> Those who give material, information, or help of any kind to those

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<sup>153</sup> See *id.* art. 136.

<sup>154</sup> Law No. 1312, *supra* note 53, art. 21.

<sup>155</sup> Código Penal [Penal Code] Ley [Law] 62, arts. 216, 217 [hereinafter Law No. 62].

<sup>156</sup> *Id.* art. 216.1.

<sup>157</sup> *Id.* art. 216.2.

<sup>158</sup> *Id.* art. 216.3.

<sup>159</sup> *Id.*; see also Comisión Cubana de Derechos Humanos Y Reconciliación Nacional, *supra* note 42 (documenting persons currently incarcerated for crimes including illegal exit).

<sup>160</sup> For a thorough discussion of the Cuban Penal Code, see Erik Luna, *Cuban Criminal Justice and the Ideal of Good Governance*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 529, 560–70 (2004) (analyzing the Cuban Criminal Code for ordinary crime and political crime under both a Liberal and Marxist viewpoint).

<sup>161</sup> Law No. 62, *supra* note 155, art. 217.1.

who leave the country illegally will be incarcerated for one to three years or pay a fine between 300 and 1000 pesos.<sup>162</sup>

Currently, there are over a dozen people jailed in Cuba for illegal exit or related crimes.<sup>163</sup> For some, the sentence is longer than provided for in the Penal Code.<sup>164</sup> Illegal exit is one of many political crimes aimed at clamping down on those who are “deemed a threat to the state” by the Cuban government.<sup>165</sup> As one commentator has pointed out: “[T]he punishment on political criminals tends to be grossly disproportionate to the alleged offenses.”<sup>166</sup> The crime of illegal exit is overwhelmingly aimed at curbing defections,<sup>167</sup> but one cannot help but see the burden the “illegal exit” provision places on ordinary Cubans seeking to leave the country on a temporary basis, especially when coupled with the complicated bureaucratic process that one must navigate in order to obtain an exit permit. With the omnipresent potential of government crackdown on defectors and dissidents, ordinary Cubans cannot escape the shadow of the criminal system, and “the rule of law as a restraint on despotic governance is nowhere to be found when the prevailing regime deploys the Cuban legal system against its perceived enemies.”<sup>168</sup>

## II. THE OBLIGATIONS CONCERNING FREEDOM OF MOVEMENT CONTAINED WITHIN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

### A. *General Obligations Regarding Freedom of Movement*

With its signature affixed to the ICCPR, Cuba has undertaken a duty to respect certain obligations regarding the freedom of movement, and these obligations will become even more pronounced when and if Cuba ratifies the Covenant, which it has expressed an interest in doing.<sup>169</sup> In becoming a full states party to a treaty—at ratification, not signing—a nation incurs two

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<sup>162</sup> *Id.* art. 217.2.

<sup>163</sup> Comision Cubana de Derechos Humanos Y Reconciliacion Nacional, *supra* note 42.

<sup>164</sup> *Id.* For example, Luis Mariano Delís Utria was detained on May 1, 1999, on charges of intent to commit illegal exit and was sentenced to thirteen years on the charge. *Id.*

<sup>165</sup> Luna, *supra* note 160, at 561–65.

<sup>166</sup> *Id.* at 608.

<sup>167</sup> Defections to the United States have long been a problem for the Cuban government. See Travieso-Diaz, *supra* note 51, at 242–52. Since the 1980s, the largest factor in driving Cubans to make the decision to emigrate has been “economic necessity.” *Id.*

<sup>168</sup> Luna, *supra* note 160, at 606.

<sup>169</sup> See McKinley, *supra* note 15.

distinct but interrelated obligations.<sup>170</sup> The first is what is commonly referred to as “the obligation of results.”<sup>171</sup> In the context of the ICCPR, the obligation of results obliges a states party to “guarantee the treaty’s provisions in practice.”<sup>172</sup> This obligation stems from Article 2, Paragraph 1 of the Covenant, which provides that the state “respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”<sup>173</sup> The Covenant also provides for an “obligation of means.”<sup>174</sup> This obligation imposes on the states party a duty to adopt measures within the legal system—legislative or otherwise—that would help the state carry out its duty to “respect and ensure” the rights advocated in the Covenant.<sup>175</sup> Effectively, states parties must create “domestic laws in conform[ance] with their treaty obligations.”<sup>176</sup> These obligations have been interpreted as providing a mechanism to afford remedy for the violation of the right and to take measures to prevent or avoid violations of the same.<sup>177</sup>

Freedom of movement is a positive right under Article 12 of the ICCPR. Article 12(2) provides that “[e]veryone shall be free to leave any country, including his own.”<sup>178</sup> This language establishes a strong presumption in favor of liberty of movement.<sup>179</sup> In General Comment No. 27 (the document issued to clarify the proper interpretation of Article 12), the Human Rights Committee (“Committee”) (“a body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its States Parties”<sup>180</sup>) noted the permissible limitations which might be imposed on the rights encompassed in Article 12 “*must not nullify the principle of liberty of movement.*”<sup>181</sup> An individual’s freedom to leave his own country “may not be

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<sup>170</sup> Fred W. Reinke, *Treaty and Non-Treaty Agreements: A Case Study of Freedom of Movement in East Germany*, 24 COLUM. J. TRANSNAT’L L. 647, 650 (1985–1986).

<sup>171</sup> *Id.* at 650.

<sup>172</sup> *Id.* at 661.

<sup>173</sup> ICCPR, *supra* note 55, art. 2(1).

<sup>174</sup> Reinke, *supra* note 170, at 650; *see also* ICCPR, *supra* note 55, art. 2(3).

<sup>175</sup> Oscar Schacter, *The Obligation to Implement the Covenant in Domestic Law*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 311, 311 (Louis Henkin ed., 1981).

<sup>176</sup> Reinke, *supra* note 170, at 661.

<sup>177</sup> Schacter, *supra* note 175, at 319–20.

<sup>178</sup> ICCPR, *supra* note 55, art. 12(2).

<sup>179</sup> HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 21 (1987).

<sup>180</sup> Office of the United Nations High Commissioner for Human Rights, Human Rights Committee: Monitoring Civil and Political Rights, <http://www2.ohchr.org/english/bodies/hrc/index.htm> (last visited Oct. 18, 2009).

<sup>181</sup> U.N. Human Rights Comm., Addendum: General Comment No. 27(67): Freedom of Movement, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Feb. 11, 1999) (emphasis added) [hereinafter General Comment 27].

made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country.”<sup>182</sup> Hence, a person is as free to travel temporarily as she is to permanently emigrate, and the state cannot restrict movement based upon the individual’s destination.<sup>183</sup>

### *B. The Obligation to Provide Passports and Travel Documents*

The Committee has placed a distinct emphasis on the ability to obtain a passport in its Article 12 jurisprudence. In General Comment 27, it announced that “the right to leave a country must include the right to obtain the necessary travel documents.”<sup>184</sup> Primarily, this means that individuals are entitled to passports from their nation of citizenship, and “[t]he refusal by a State to issue a passport . . . may deprive this person of the right to leave the country of residence and to travel elsewhere.”<sup>185</sup> In *Vidal Martins v. Uruguay*, the Committee first announced the special importance of a passport.<sup>186</sup> While living abroad, the author desired to return to Uruguay temporarily, but was refused a passport.<sup>187</sup> As a substitute, she was offered travel documents that would have allowed her to enter Uruguay but not exit again, which she refused.<sup>188</sup> The Committee decided that Uruguay’s refusal to issue Vidal Martins a passport “without any justification” constituted a violation of her Article 12 rights because she was “prevent[ed] . . . from leaving any country including her own.”<sup>189</sup>

Likewise, the Committee has ruled that deliberate actions by the state against an individual’s freedom of movement in an acute setting constitute a violation of this right.<sup>190</sup> In *Oló Bahamonde v. Equatorial Guinea*, the

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<sup>182</sup> *Id.* ¶ 8.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* ¶ 9. Not all international bodies place as much importance on the right to a passport or the right to travel as the Human Rights Committee (“Committee”). See FREEDMAN, *supra* note 61, at 130–31.

<sup>185</sup> General Comment 27, *supra* note 181, ¶ 9.

<sup>186</sup> *Sophie Vidal Martins v. Uruguay*, in *Report of the Human Rights Committee* 157–60, U.N. GAOR, 37th Sess., Supp. No. 40, U.N. Doc. A/37/40 (Sept. 22, 1982), available at <http://www1.umn.edu/humanrts/undocs/session37/13-57.htm>.

<sup>187</sup> *Id.* ¶ 2.1.

<sup>188</sup> *Id.* Although the author had been living abroad, the Committee determined that, because the issuance of a passport was “clearly a matter within the jurisdiction of the Uruguayan authorities,” the author was subject to Uruguay’s jurisdiction for that purpose. *Id.* ¶ 7.

<sup>189</sup> *Id.* ¶ 9.

<sup>190</sup> See generally *Oló Bahamonde v. Equatorial Guinea*, in *2 Report of the Human Rights Committee* 183–88, U.N. GAOR, 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (Sept. 21, 1994), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36>. Although Human Rights Committee jurisprudence is binding only on the parties to the case and does not serve as *stare decisis*, there is valuable persuasive authority in these

Committee held that the confiscation of the author's passport, which the state took without explanation, was a violation of the individual's rights under Article 12, Paragraphs 1 and 2.<sup>191</sup> The author in *Oló Bahomonde* was a former civil servant in Equatorial Guinea,<sup>192</sup> and his complaint alleged that his passport was confiscated on March 4, 1986, in his home country and again on March 26, 1986, in Gabon, on orders of the President of Equatorial Guinea.<sup>193</sup> The Committee held that the confiscation of his passport on both occasions and the denial of travel from Equatorial Guinea in March 1986 violated Paragraphs 1 and 2 of Article 12.<sup>194</sup> This emphasis on the importance of access to the physical passport was recently reaffirmed when the Committee noted its concern that the government of The Gambia "ha[d] withdrawn the passports of several members of the political opposition to prevent them from leaving the country."<sup>195</sup> Similarly, the Committee criticized Iraq because of the high administrative costs required for the issuance of a passport.<sup>196</sup> The Committee charged Iraq with a breach of Article 12 and called on Iraq to ensure that "administrative costs for the issue of passports be reduced."<sup>197</sup>

At times, the Committee has perhaps overemphasized the importance of passports to the exclusion of other factors. In *Mika Miha v. Equatorial Guinea*, the author, a former ambassador, fled in 1982 and returned in 1988 to support the opposition party.<sup>198</sup> That year, he was detained and held until March 1990, when he was released and again left the country.<sup>199</sup> The Committee found that the author's Article 9 rights of freedom from arbitrary

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cases. ALEX CONTE, SCOTT DAVIDSON & RICHARD BURCHILL, *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 6 (2004).

<sup>191</sup> *Oló Bahomonde v. Equatorial Guinea*, in *2 Report of the Human Rights Committee* 183–88, ¶ 9.3, U.N. GAOR, 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (Sept. 21, 1994), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36>.

<sup>192</sup> *Id.* ¶ 1.

<sup>193</sup> *Id.* ¶ 2.1.

<sup>194</sup> *Id.* ¶ 9.3.

<sup>195</sup> U.N. Human Rights Comm., *Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: The Gambia*, ¶ 15, U.N. Doc. CCPR/CO/75/GMB (Aug. 12, 2004).

<sup>196</sup> SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 355 (2d ed. 2004).

<sup>197</sup> U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Iraq*, ¶ 14, U.N. Doc. CCPR/C/79/Add.84 (Nov. 19, 1997).

<sup>198</sup> *Mika Miha v. Equatorial Guinea*, in *2 Report of the Human Rights Committee* 96–100, ¶¶ 2.1–2.3, U.N. GAOR, 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (Sept. 21, 1994), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36>.

<sup>199</sup> *Id.* ¶¶ 2.4–2.6. During the initial weeks of his detention, Mika Miha was tortured. *Id.* ¶ 2.4.

arrest had been violated, but it determined his Article 12 rights had not.<sup>200</sup> In denying his Article 12 claim, the Committee listed three infractions that had not occurred: (1) Mika Miha had not been deprived of a passport or other travel documents, (2) his freedom of movement had not been restricted, and (3) he was not denied the right to leave the country.<sup>201</sup> In reaching this conclusion, the Committee ignored the time the author spent in unlawful detention (noting that he left the country freely in 1982 and again in 1990) and determined that no restrictions were placed on his movement “prior to his arrest.”<sup>202</sup>

### C. *The Application of Legal Limitations to Article 12 Guarantees*

Because circumstances could arise under which it would be permissible to limit the freedom of movement, Article 12(3) provides that

[t]he above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.<sup>203</sup>

The two key provisions governing restrictions are thus “provided by law” and “necessary.”

First, Article 12(3) invokes the principle of legality, as all limitations must “be provided by law.” The term “provided by law” as it relates to the ICCPR was announced definitively by the Commission (now replaced by the Council)<sup>204</sup> in the 1985 “Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights” (“Siracusa Principles”).<sup>205</sup> For a limitation to be valid, it must be provided for in a generally applied national law that “is consistent with the Covenant and is in force at the time the limitation is applied.”<sup>206</sup> These laws must not be

<sup>200</sup> *Id.* ¶¶ 6.5–6.6.

<sup>201</sup> *Id.* ¶ 6.6.

<sup>202</sup> *Id.*

<sup>203</sup> ICCPR, *supra* note 55, art. 12(3). Public order as understood by the Committee is represented by the French idea of *ordre public*. *Id.*

<sup>204</sup> *See supra* note 28 for discussion.

<sup>205</sup> U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, ¶ 15, U.N. Doc E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter *Siracusa Principles*] (using the analogous language of “prescribed by law”). The Siracusa Principles were developed by a group of thirty-one experts in the summer of 1984. *Id.* ¶ (i). The Principles were subsequently adopted by the Commission. *Id.*

<sup>206</sup> *Id.* ¶ 15.

“arbitrary” or “unreasonable,” and any laws that limit human rights “shall be clear and accessible to everyone.”<sup>207</sup> Legality requires “adequate safeguards and effective remedies” to protect against “illegal or abusive imposition or application of limitations on human rights.”<sup>208</sup> Some scholars have interpreted these safeguards to mean that the state must provide a justification and that the individual has the right to challenge the ruling against him.<sup>209</sup> Applying these principles to the freedom of movement context, the Committee has required that laws restricting the liberty of movement “should use precise criteria and may not confer unfettered discretion on those charged with their execution.”<sup>210</sup>

Perhaps most importantly, Article 12(3) mandates that limitations on the freedom of movement must be “necessary.”<sup>211</sup> The term “necessary” was also defined in the Siracusa Principles. The Siracusa Principles mandate that the term “necessary” “implies that the limitation: (a) [i]s based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, (b) [r]esponds to a pressing public or social need, (c) [p]ursues a legitimate aim, and (d) [i]s proportionate to that aim.”<sup>212</sup> The Siracusa Principles further note that determinations of necessity will be made objectively.<sup>213</sup>

These limitations on movement are to be interpreted narrowly.<sup>214</sup> Reinforcing the presumption on freedom of movement, the Committee required that “restrictions should use precise criteria” and cautioned that “the relation between right and restriction, between norm and exception, must not be reversed.”<sup>215</sup> In the Article 12 context, “necessity” means that

it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the

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<sup>207</sup> *Id.* ¶¶ 16–17

<sup>208</sup> *Id.* ¶ 18.

<sup>209</sup> HANNUM, *supra* note 179, at 24–26; *see also* Alexandre Charles Kiss, *Permissible Limitations on Rights*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 290, 308 (Louis Henkin ed., 1981).

<sup>210</sup> General Comment 27, *supra* note 181, ¶ 13.

<sup>211</sup> ICCPR, *supra* note 55, art. 12(3).

<sup>212</sup> *Siracusa Principles*, *supra* note 205, ¶ 10.

<sup>213</sup> *Id.*

<sup>214</sup> JOSEPH ET AL., *supra* note 196, at 376.

<sup>215</sup> General Comment 27, *supra* note 181, ¶ 13.

desired result; and they must be proportionate to the interest to be protected.<sup>216</sup>

Finally, the application of restrictions must be consistent with all other ICCPR rights “and with the fundamental principles of equality and non-discrimination.”<sup>217</sup> Under General Comment 27, it would be a “clear violation” if Article 12 rights “were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>218</sup> The Committee has been vague in its definition of “other status.” In *Vos v. Netherlands*, two members of the Committee opined that a provision will not be deemed to be discriminatory if it applies differential treatment only to individuals, not groups.<sup>219</sup> In *Van Oord v. Netherlands*, the Committee employed a “relevant distinction” test for determining discrimination on other status.<sup>220</sup> Neither the “group” nor the “relevant distinction” tests are further defined, and the Committee has preferred to determine issues of discrimination on a case-by-case basis.<sup>221</sup> To date, it has not extended “other status” protection to education level or professional rank.<sup>222</sup> This would leave doctors and health care professionals uncovered.

The Committee has permitted limitations in narrowly described circumstances. In *Peltonen v. Finland*, the Committee found in favor of the state party where the author was denied a passport because he had not fulfilled his compulsory military service.<sup>223</sup> In *Peltonen*, the author, a conscript to the Finnish military who had avoided reporting for duty, applied for a passport at the Finnish Embassy in Stockholm, Sweden<sup>224</sup> and was rejected under the

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<sup>216</sup> *Id.* ¶ 14.

<sup>217</sup> *Id.* ¶ 18.

<sup>218</sup> *Id.*

<sup>219</sup> *Vos v. Netherlands*, in 2 *Report of the Human Rights Committee* 271–75, ¶ 1, U.N. GAOR, 54th Sess., Supp. No. 40, U.N. Doc. A/54/40 (July 26, 1999), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36>.

<sup>220</sup> JOSEPH ET AL., *supra* note 196, at 690; see *Van Oord v. Netherlands*, in 2 *Report of the Human Rights Committee* 311–16, U.N. GAOR, 52d Sess., Supp. No. 40, U.N. Doc. A/52/40 (May 31, 1999), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36>.

<sup>221</sup> JOSEPH ET AL., *supra* note 196, at 689.

<sup>222</sup> See *id.* at 690–91.

<sup>223</sup> *Peltonen v. Finland*, in 2 *Report of the Human Rights Committee* 238–43, ¶¶ 2.1, 8.4, U.N. GAOR, 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (Sept. 21, 1994), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36>.

<sup>224</sup> *Id.* ¶ 2.1. The Author had been living in Stockholm for some time without a valid Finnish passport. *Id.* ¶¶ 1, 2.1. Agreements between the Nordic Nations (Norway, Sweden, Finland) had removed any requirement of a passport for citizens of one nation to move freely between all three nations. *Id.* ¶ 6.1.

Passport Act of 1986 (“Passport Act”), which provided in relevant part that “delivery of a passport ‘may be denied’ to persons aged 17 to 30 if they are unable to demonstrate that the performance of military service is not an obstacle to the issuance of a passport.”<sup>225</sup> Under Finland’s Military Act, Finnish citizens are not allowed to travel while serving their compulsory military duty, which lasts between eight and eleven months.<sup>226</sup> Peltonen was called up to military service in 1987 but ignored that and subsequent call-ups.<sup>227</sup> In his complaint, Peltonen alleged that the denial of the passport was a de facto punishment for ignoring his military service, and he argued that if he did not report for duty, he would be under this punishment for over a decade, until he was thirty.<sup>228</sup> Finland responded that the restriction on travel of military conscripts was necessary to protect public order.<sup>229</sup>

The Committee in *Peltonen* agreed with the state party that the denial of a passport in this circumstance was necessary to protect public order.<sup>230</sup> The Committee looked to the *travaux préparatoires*<sup>231</sup> to Article 12(3) to determine that “the right to leave the country could not be claimed, inter alia, in order to avoid such obligations as national service.”<sup>232</sup> The Committee reasoned that states whose laws institute a system of mandatory national service “may impose reasonable restrictions on the rights of individuals, who have not yet performed such service, to leave the country until service is completed, provided that all the conditions laid down in Article 12, Paragraph 3, are complied with.”<sup>233</sup>

A few points of the *Peltonen* decision are immediately relevant. First, the Committee announced that individuals may not invoke freedom of movement

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<sup>225</sup> *Id.* ¶ 2.1.

<sup>226</sup> *Id.* ¶ 2.3.

<sup>227</sup> *Id.* ¶ 6.5.

<sup>228</sup> *Id.* ¶ 2.4.

<sup>229</sup> *Id.* ¶ 6.8.

<sup>230</sup> *Id.* ¶ 8.4.

<sup>231</sup> *Travaux préparatoires* are the papers and documents generated during the negotiating stages of a treaty. See DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 36 (2d ed. 2006). They are used to help clarify the meaning of a provision when the language of the provision is “ambiguous or obscure.” *Id.* (quoting Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331). *Travaux préparatoires* occupy a secondary role in treaty interpretation. *Id.*

<sup>232</sup> *Peltonen v. Finland*, in *2 Report of the Human Rights Committee* 238–43, ¶ 8.3, U.N. GAOR, 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (Sept. 21, 1994), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36> (emphasis omitted).

<sup>233</sup> *Id.* For more commentary on *Peltonen* and similar cases, see Colin Harvey and Robert P. Barnidge, Jr., *Human Rights, Free Movement, and the Right to Leave in International Law*, 19 INT’L J. REFUGEE L. 1, 9–11 (2007).

as a way to avoid “national service.”<sup>234</sup> The Committee concluded that if the Passport Act had not restricted the travel of conscripts who had not completed their “national service,” public order was likely to be negatively impacted in the future.<sup>235</sup> Although this case dealt with compulsory military service, by couching its decision in terms of “national service,” the decision seems to indicate that a type of service broader than military service, as long as it is provided by law and “respond[ed] to a pressing public or social need,” could potentially be deemed necessary for the protection of public order.<sup>236</sup> Once the Committee determined that the limitation was necessary for the protection of public order, it had no choice but to implicitly reject Peltonen’s contention that the limitation was a de facto punishment.<sup>237</sup> This is because a restriction that is triggered by past conduct cannot be “necessary” to protect public order, as it does not respond to or attempt to remedy any “pressing public or social need.”<sup>238</sup> It seems apparent that, had the Committee ruled that the Passport Act was a de facto punishment, it would not have sided with the states party.

The policy rationales of “national service” have been under debate. One major concern has been that the state could always invent a debt the individual owed to the state in order to restrict the individual from crossing the state’s borders.<sup>239</sup> An example of such an invented debt is the simple costs the state has “invested” in educating the individual.<sup>240</sup> Once these obligations become legitimate means of restrictions, as one commentator argued prior to the *Peltonen* decision, “the floodgates are opened to wide abuse and to the complete undermining of this right.”<sup>241</sup> In rejecting Peltonen’s contention that the provisions of the Passport Act amounted to a de facto punishment, the Committee somewhat tempered this argument, by showing it would narrowly define these obligations. Subsequent to the *Peltonen* decision, the relationship between national service and freedom of movement has not been applied

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<sup>234</sup> *Peltonen v. Finland*, in 2 *Report of the Human Rights Committee* 238–43, ¶ 8.3, U.N. GAOR, 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (Sept. 21, 1994), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36>.

<sup>235</sup> *See id.* ¶ 8.4.

<sup>236</sup> *Siracusa Principles*, *supra* note 205, ¶ 10(b).

<sup>237</sup> *See Peltonen v. Finland*, in 2 *Report of the Human Rights Committee* 238–43, ¶¶ 2.4, 8.4, U.N. GAOR, 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (Sept. 21, 1994), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36>.

<sup>238</sup> *Siracusa Principles*, *supra* note 205, ¶ 10(b).

<sup>239</sup> MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 214 (1993).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

consistently.<sup>242</sup> For instance, in its concluding observations on the Russian Federation, the Committee stated its regret “that all individuals not having yet performed their national service are excluded in principle from enjoying their right to leave the country.”<sup>243</sup>

The notion of public order has been interpreted broadly.<sup>244</sup> In the *Siracusa Principles*, it is defined as the “sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.”<sup>245</sup> Respect for human rights is necessarily part of this definition.<sup>246</sup> In an analysis of limitations, public order will be defined in light of the purpose of the right the State Party seeks to limit.<sup>247</sup> In the context of freedom of movement, there has been considerable debate over the propriety of restrictions of freedom of movement to combat the problem of a “brain drain” from underdeveloped nations.<sup>248</sup> One scholar has argued that states may impose reasonable restrictions on the movement of skilled persons in narrow circumstances to counter acute and demonstrable instances of “brain drain,” where the loss of these skilled workers would materially and negatively impact the state’s efforts at development.<sup>249</sup> This formulation is generally consistent with the Committee’s jurisprudence,<sup>250</sup> although the Committee will strictly scrutinize whether the limitation satisfies the “necessity” test and its “proportionality” prong.<sup>251</sup>

For example, South Africa has a statute mandating the prior domestic service of doctors as a prerequisite to exit the country.<sup>252</sup> Essentially, this law

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<sup>242</sup> JOSEPH ET AL., *supra* note 196, at 361.

<sup>243</sup> U.N. Human Rights Comm., *Concluding Observations on the Russian Federation*, ¶ 20, U.N. Doc. CCPR/C/79/Add.54 (July 26, 1995).

<sup>244</sup> *Cf.* HANNUM, *supra* note 179, at 29–31 (explaining that the notion of the public order is open to various interpretations that may lead to a more restrictive or expansive interpretation depending on the circumstances).

<sup>245</sup> *Siracusa Principles*, *supra* note 205, ¶ 22.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* ¶ 23.

<sup>248</sup> *See* HANNUM, *supra* note 179, at 34–40. The major forces in an analysis of the issue are the individual’s interests in liberties versus the state’s interest in maximizing its development or addressing some deficiency. *See id.* at 37. Committee jurisprudence generally supports this approach. *See* General Comment 27, *supra* note 181, ¶ 16.

<sup>249</sup> HANNUM, *supra* note 179, at 37.

<sup>250</sup> *See* General Comment 27, *supra* note 181, ¶¶ 11–16. However, in applying the “necessity” requirement, particularly the “proportionality” element, it is likely that the Committee would be highly critical of any serious limitation. *Id.*

<sup>251</sup> *See id.*

<sup>252</sup> *See* Health Professions Act 56 of 1974 § 24A, *amended by* the Health Professions Amendment Act of 2007 (JSRSA); Health Professions Amendment Act 29 of 2007 § 24.

requires that newly graduated medical students serve the country for one year prior to beginning their own practice,<sup>253</sup> and South Africa has used this law to send medical workers to rural areas.<sup>254</sup> Despite having an exceptionally strong medical school curriculum, there is a drastic shortage of qualified doctors in South Africa, and this shortage is particularly pronounced in rural areas.<sup>255</sup> To combat this problem, South Africa has to import doctors to send to these rural areas.<sup>256</sup> Facing the complex circumstances, including the rising cost of government sponsored medical education, it would seem that these one year requirements are proportional and “appropriate to achieve their protective function.”<sup>257</sup>

#### *D. State Practices That Act as Functional Limitations to Article 12 Guarantees*

The Committee has looked with disfavor upon state policies that establish practical burdens on the right to leave one’s country.<sup>258</sup> Partly, this is due to the fact that this right to leave any country, including one’s own, is considered “one of the most important aspects of the freedom of movement.”<sup>259</sup> The Committee has shown an acute concern for “the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights” to leave a country.<sup>260</sup> In addition to legal rules obstructing travel, the Committee announced an inclusive list of state practices that presented serious challenges to nationals trying to leave the country.<sup>261</sup> These frowned upon practices include, but are not limited to:

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<sup>253</sup> *Id.*

<sup>254</sup> See Lang, *supra* note 125.

<sup>255</sup> *Id.*; see also Rajendra Kale, *South Africa’s Health: New South Africa’s Doctors: A State of Flux*, 310 BRIT. MED. J. 1307, 1307–08 (1995) (explaining that South Africa is an active participant in the “medical carousel”). This problem is continually compounded by the fact that, after their year of service, most doctors choose not to remain in the rural areas, and many of them leave for higher salaries in other countries. See Lang, *supra* note 125.

<sup>256</sup> Lang, *supra* note 125. One of South Africa’s main sources for doctors is Cuba. *Id.*

<sup>257</sup> General Comment 27, *supra* note 181, ¶ 14.

<sup>258</sup> *Id.* ¶ 17.

<sup>259</sup> Stig Jagerskiold, *Freedom of Movement*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 209, at 166, 177–78.

<sup>260</sup> General Comment 27, *supra* note 181, ¶ 17. In order to better inform itself and determine the compatibility of these rules and administrative measures, the Committee requests that states parties to the ICCPR “report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners.” *Id.* ¶ 10.

<sup>261</sup> *Id.* ¶ 17.

lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; . . . issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members traveling together; . . . requirement of an invitation from the State of destination or from people living there.<sup>262</sup>

For instance, the Committee has strongly criticized Syria for requiring many nationals to obtain exit visas.<sup>263</sup> In 1999, Syria passed an ordinance drastically loosening travel restriction.<sup>264</sup> Prior to that year, Syrian nationals had to obtain an exit visa each time they wished to leave the country, and their passports were valid for only two years.<sup>265</sup> Under the new regulation, exit visas are valid “for one year and for a number of journeys.”<sup>266</sup> Syria defended its position as necessary “to ensure that criminals do not flee the country and that persons with financial or administrative obligations do not evade the fulfillment of those obligations.”<sup>267</sup> While the Committee noted that the new regulation significantly facilitated the mobility of the citizenry, it still concluded that the fact that many nationals still had to obtain exit visas to travel violated Article 12(2).<sup>268</sup> The Committee called on Syria to end the general requirement of exit visas and, rather, only require them in individual cases that serve a demonstrable purpose that can be justified in light of the ICCPR.<sup>269</sup> Underlying this decision is the presumption of allowing travel and

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<sup>262</sup> *Id.*

<sup>263</sup> U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, ¶ 21, U.N. Doc. CCPR/CO/71/SYR (Apr. 24, 2001) [hereinafter *Syrian Consideration*].

<sup>264</sup> See U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report of States Parties Due in 1984: Syrian Arab Republic*, ¶ 180, U.N. Doc. CCPR/C/SYR/2000/2 (Aug. 25, 2000).

<sup>265</sup> *Id.* ¶ 179.

<sup>266</sup> *Id.* ¶ 180. Syria also reported that the requirement to obtain an exit visa had been eliminated for many groups, including (1) persons over fifty, (2) persons who have “performed military service or paid a fee in lieu thereof,” (3) women older than eighteen, excluding women between eighteen and thirty-five who are traveling to certain countries, (4) people with passports issued within the last three months, (5) citizens living outside the country with valid foreign residence permits, and (6) people leaving to perform the *hajj* who have appropriate documentation. *Id.*

<sup>267</sup> *Comments by the Government of the Syrian Arab Republic on the Concluding Observations of the Human Rights Committee*, ¶ 41, U.N. Doc. CCPR/C/SYR/Add.1 (May 28, 2002).

<sup>268</sup> *Syrian Consideration*, *supra* note 263, ¶ 21.

<sup>269</sup> *Id.*

the mandate that “the relation between right and restriction, between norm and exception, must not be reversed.”<sup>270</sup>

Indeed, it is difficult to overstate the contempt the Committee has for the institution of the exit permit.<sup>271</sup> While restrictions on movement can be applied to certain classes of narrowly defined people, like those who have not provided national service as in *Peltonen*, it is unlikely that a state will be able to successfully argue necessity for requiring exit permits on any large scale.<sup>272</sup> The Committee has definitively said that broadly applied exit visas are “in contravention of Article 12 of the Covenant” and has continually mandated that states parties eliminate exit visas.<sup>273</sup> Though the Committee has not fully fleshed out its requirements in this regard, it seems that a nation would have a difficult time justifying an extension of exit permits beyond criminals or those it considers personally dangerous, such as terrorism suspects.<sup>274</sup>

Finally, like the restrictions themselves, the Committee requires that reservations to Article 12 be made equally narrow.<sup>275</sup> For example, the Committee recently criticized Botswana’s reservation to Article 12.<sup>276</sup> Botswana entered a reservation to Article 12, Paragraph 3 of the Covenant “to the extent that the provisions are incompatible with Section 14 of the

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<sup>270</sup> General Comment 27, *supra* note 181, ¶ 13.

<sup>271</sup> See, e.g., U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Uzbekistan*, ¶ 19, U.N. Doc. CCPR/CO/83/UZB (Apr. 26, 2005).

<sup>272</sup> For instance, Gabon required exit visas only for foreign workers working within the state. U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Gabon*, ¶ 16, U.N. Doc. CCPR/CO/70/GAB (Nov. 10, 2000). The Committee still decided that the class was exceptionally broad and that the requirement violated Article 12. *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> See, e.g., González del Río v. Peru, in *Report of the Human Rights Committee* 17–21, U.N. Doc. A/48/40(Part II) (Nov. 1, 1993). In this case, the Committee conceded that “pending judicial proceedings may justify restrictions on an individual’s rights to leave his country.” *Id.* at 20–21. However, the Committee held that, because an arrest warrant was pending and had been pending for seven years, there had been an “undue delay” that violated González del Río’s Article 12 rights. See generally Celepli v. Sweden, in *2 Report of the Human Rights Committee* 165–70, U.N. GAOR, 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (Sept. 21, 1994); Karker v. France, in *2 Report of the Human Rights Committee* 144–52, U.N. GAOR, 56th Sess., Supp. No. 40, U.N. Doc. A/56/40 (Nov. 11, 2001), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36>.

<sup>275</sup> U.N. Human Rights Comm., General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994).

<sup>276</sup> U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Botswana*, ¶ 14, U.N. Doc. CCPR/C/BWA/CO/1 (Apr. 4, 2008) [hereinafter *Botswana Consideration*].

Constitution of the Republic of Botswana relating to the imposition of restrictions reasonably required in certain exceptional circumstances.”<sup>277</sup> In its report, the Committee voiced its concern over Botswana’s vague and extremely broad reservation.<sup>278</sup> The Committee called on Botswana to withdraw its reservation to Article 12.<sup>279</sup>

### III. ANALYSIS OF THE FRICTIONS BETWEEN CUBAN LAW AND THE NORMS REQUIRED BY ARTICLE 12 OF THE ICCPR

As they currently stand, Cuba’s current travel laws begin and end in the wrong place. In Cuba, approval by the state to leave, even for a short time, is exceptional, despite the fact that international law as expressed through the ICCPR and subsequent jurisprudence support and demand a presumption in favor of the ability to travel. If Cuba does in fact intend to bring about reform and institute a regime compatible with Article 12, it will be necessary to make many changes to its current travel policy. In the 2007 report, *Situation of Human Rights in Cuba*, the Personal Representative of the High Commissioner for Human Rights recommended that Cuba “[r]eview the regulations relating to travel into and out of Cuba in order to guarantee freedom of movement as defined in Article 13 of the Universal Declaration of Human Rights.”<sup>280</sup>

To begin, Cuba’s passport policy is not likely to pass scrutiny by the Committee. The physical ability to maintain and possess a valid passport is a central tenet of Article 12 jurisprudence.<sup>281</sup> While the letter of Cuban law regarding passport issuance might seem relatively benign, its application almost certainly will draw the Committee’s displeasure. For instance, the “corresponding fee” that Cubans have to pay for a passport with a validity of

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<sup>277</sup> United Nations Treaty Collection, Status of Treaties, International Covenant on Civil and Political Rights, Botswana Reservation, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Oct. 18, 2009); *Botswana Consideration*, *supra* note 276.

<sup>278</sup> *Botswana Consideration*, *supra* note 276.

<sup>279</sup> *Id.*

<sup>280</sup> The Personal Representative of the High Comm’r for Human Rights, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, Situation of Human Rights in Cuba*, U.N. Doc A/HRC/4/12 (Jan. 26, 2007). Article 13 of the Universal Declaration of Human Rights (“UDHR”) provides: “(1) Everyone has the right to freedom of movement and residence within the borders of each State. (2) Everyone has the right to leave any country, including his own, and to return to his country.” Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). The report couches its recommendations in terms of the UDHR, rather than the ICCPR, because Cuba had not yet signed the ICCPR. It did not sign the ICCPR until February 2008. ICCPR, *supra* note 55, art 1.

<sup>281</sup> See discussion *supra* Part I.B.

two years is close to the sum that an average Cuban will make in one year.<sup>282</sup> This practice falls under the umbrella of “issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration,” one of the “bureaucratic barriers” that the Committee has frowned upon.<sup>283</sup>

Cuba’s obtuse bureaucratic travel structure, which does not spell out the rules one must follow to gain permission to leave, is incompatible with Article 12 and the Committee’s jurisprudence. Indeed, the list of “bureaucratic barriers” that are a “source of concern” to the Committee could be confused with a general description of the requirements one must follow when trying to leave Cuba.<sup>284</sup> In Cuba, applications may take months to process and, as was the case with Yoani Sánchez, may not be definitively decided until after the scheduled departure date; this exemplifies the Committee’s concern with “unreasonable delays in the issuance of travel documents.”<sup>285</sup> Cubans require an Invitation Letter from their host in a foreign state;<sup>286</sup> the Committee has criticized the “requirement of an invitation from the State of destination.”<sup>287</sup> Often, Cubans must leave family members behind when taking even short vacations,<sup>288</sup> and the Committee has condemned all “restrictions on family members travelling together.”<sup>289</sup> As demonstrated by Sánchez’s experience, many Cubans lack any knowledge on how to successfully get permission to travel, violating the Committee’s condemnation of “lack of access for applicants to the competent authorities and lack of information regarding requirements.”<sup>290</sup> Indeed, the “rich[] array of obstacles making it more difficult to leave the country”<sup>291</sup> probably looks very familiar to any Cuban who has tried to leave the country for any period of time.

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<sup>282</sup> The average Cuban makes roughly \$15 a month, which translates to \$180 a year. *Castro’s Brother Faces Big Challenges in Cuba*, *supra* note 79. The cost for a passport can be as high as €180 (roughly \$250). See Consular Services, *supra* note 73.

<sup>283</sup> General Comment 27, *supra* note 181, ¶ 17.

<sup>284</sup> *See id.*

<sup>285</sup> *See id.*

<sup>286</sup> *See* Decree 26, *supra* note 55, art. 132 (d); Ministerio de Justicia [Ministry of Justice] Res. No. 87 (Apr. 23, 2007) (Cuba).

<sup>287</sup> General Comment 27, *supra* note 181, ¶ 17.

<sup>288</sup> *See* FAMILIES TORN APART, *supra* note 57, at 10.

<sup>289</sup> General Comment 27, *supra* note 181, ¶ 17.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

By their plain language, Cuba's laws are incompatible with the principle of legality set forth in ICCPR jurisprudence.<sup>292</sup> Specifically, each Cuban law gives broad discretionary power to the government official who will ultimately make the final decision regarding an individual's travel.<sup>293</sup> For example, Resolution 87 allows the Consulate to reject any application for an Invitation Letter when factors concur that would advise the Consul to do so.<sup>294</sup> Likewise, the unknown "decider" in Resolution 54 who will be the exclusive authority authorized to approve such a request has similarly unfettered powers.<sup>295</sup> These provisions contrast sharply with the provisions laid out by the Committee, which prohibits granting "unfettered discretion on those charged with the[] execution" of the laws.<sup>296</sup>

Further, the restrictions do not comply with the requirement of "necessity." Under the Siracusa Principles, the limitation must "(a) [be] based on one of the grounds justifying limitations recognized by the relevant article of the Covenant, (b) [r]espond[] to a pressing public or social need, (c) [p]ursue[] a legitimate aim, and (d) [be] proportionate to that aim."<sup>297</sup> Regarding the restrictions as a whole, it is very unlikely that Cuba could base their limitation on one of the justified grounds. Though not explicitly stated, it seems likely that one of Cuba's policy rationales behind its restrictive travel policies is the overriding fear of losing its citizenry, particularly its most highly educated, to defection.<sup>298</sup> This fear of a "brain drain" is especially pronounced because of the close interrelation between temporary and permanent travel, especially in the eyes of the original nation.<sup>299</sup>

Although Cuba could, and likely will, attempt a public order defense, it would not withstand scrutiny. Upholding broad restrictions, such as the ones that exist in Cuba on the grounds of public order, would effectively cripple Article 12 protection. Committee jurisprudence has made it clear that

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<sup>292</sup> See *Siracusa Principles*, *supra* note 205, ¶¶ 15–17.

<sup>293</sup> See *id.* ¶¶ 19–21.

<sup>294</sup> Ministerio de Justicia [Ministry of Justice] Res. No. 87, ¶ 6 (Apr. 23, 2007) (Cuba).

<sup>295</sup> Ministerio de Salud Pública [Ministry of Public Health] Res. No. 54, ¶ 1 (July 2, 1999) (Cuba).

<sup>296</sup> General Comment 27, *supra* note 181, ¶ 13.

<sup>297</sup> *Siracusa Principles*, *supra* note 205, ¶ 10.

<sup>298</sup> See *Necesidad de poner fin al bloqueo económico, comercial y financiero de los Estados Unidos contra Cuba*, DIGITAL GRANMA INTERNACIONAL (Cuba), <http://www.granma.cu/documento/espanol01/026-e.html> (last visited Oct. 18, 2009). In this article, Cuba's official press organ accuses the U.S. government of, among other things, the "theft of minds" in the medical sector. *Id.*

<sup>299</sup> See Jagerskiold, *supra* note 259, at 179.

limitations to Article 12 rights must be applied narrowly and only in “exceptional circumstances.”<sup>300</sup>

Cuba’s restrictions are not narrow. Indeed, the “exceptional circumstances” occur in Cuba where citizens do leave freely, not where their rights are restricted.<sup>301</sup> Cuba has not offered any justification as to how the restrictions placed upon its entire populace are “necessary” to protect the public order. Certainly, Cuba’s broad restrictions stretch far beyond the boundaries of necessity the Committee permitted in *Peltonen*: individuals of a certain age who had not completed legally required national service.<sup>302</sup> Rather, Cuba has put into practice a system that does what the Committee warned against: It has reversed “the relation between right and restriction, between norm and exception.”<sup>303</sup> In the context of temporary travel, what applies to permanent migration must apply equally, if not more so, in favor of the traveler.<sup>304</sup> Hence, if a state lacks a legitimate rationale for preventing an individual from leaving the country permanently, “it cannot restrict his right to travel temporarily merely from fear that he may not return.”<sup>305</sup>

The restrictions placed on doctors, however, is in theory a much closer issue. As written, Resolution 54 fails because of its clear inadequacies regarding its legality. Resolution 54 is vague and provides unchecked power to the person charged with interpreting it, which directly contradicts the provisions of the Siracusa Principles.<sup>306</sup> Additionally, the text of the resolution does not contain the three-to-five-year service mandate<sup>307</sup> that the Cuban government often cites it for.<sup>308</sup> Under different circumstances, however, Resolution 54 very well could have satisfied the principle of necessity. If the restrictions of Resolution 54 were implemented in response to a situation like that in South Africa, where doctor shortages are crippling the health care system, their implementation could likely have been necessary for the

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<sup>300</sup> See General Comment 27, *supra* note 181, ¶¶ 11–15.

<sup>301</sup> See discussion *supra* Parts I.B & C.

<sup>302</sup> *Peltonen v Finland*, in 2 *Report of the Human Rights Committee* 238–43, ¶¶ 2.1–2.4, U.N. GAOR, 49th Sess., Supp. No. 40, U.N. Doc A/49/40 (Sept. 21, 1994), available at <http://tb.ohchr.org/default.aspx?ConvType=12&docType=36> (follow “2” hyperlink in lower right corner, then find A/49/40(VOL.II)(SUPP) in table; then follow “E” hyperlink for report in English).

<sup>303</sup> General Comment 27, *supra* note 181, ¶ 13.

<sup>304</sup> Jagerskiold, *supra* note 259, at 179.

<sup>305</sup> *Id.*

<sup>306</sup> See *Siracusa Principles*, *supra* note 205, ¶¶ 1–38.

<sup>307</sup> Ministerio de Salud Pública [Ministry of Public Health] Res. No. 54 (July 2, 1999) (Cuba).

<sup>308</sup> See Rivery, *supra* note 119.

protection of public health.<sup>309</sup> However, Cuba is on the complete opposite spectrum as far as doctor staffing goes.<sup>310</sup> Not only does Cuba consistently trumpet its medical advances and the capabilities of its doctors, but it often “loans” its doctors to less medically advanced countries.<sup>311</sup> Medical diplomacy is the most profitable industry in Cuba, earning the country \$2.3 billion in 2008—more than Cuba made in tourism.<sup>312</sup> Therefore, Cuba, with its surplus of doctors, cannot invoke a public health rationale for its special restrictions on the travel of medical personnel.

Even if public health would be positively impacted by this restriction, that impact would still not be enough to justify the restriction. As the Committee clarified, “it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them.”<sup>313</sup> Likewise, Cuba could not invoke a threat to the public order because Cuba has such a large surplus of doctors that even if a sizable group of them did defect, it would not materially affect the state’s development.<sup>314</sup> Thus, Cuba’s restrictions on travel of medical personnel and its restrictions on the travels of its populace as a whole are not compatible with Article 12 of the ICCPR.<sup>315</sup>

#### IV. RECOMMENDATIONS FOR CUBA

In the past year, Cuba has indicated to the international community that it is serious about reform.<sup>316</sup> Talk of reform, however, will only last for so long, and the time for Cuba to make progress on its proposal is fast approaching. If Cuba actually intends to enter a new chapter in its history and is serious about changing its course regarding human rights, the first thing it must do is to ratify the ICCPR with as few reservations as possible—something many nations advocated during Cuba’s Universal Periodic Review.<sup>317</sup> Any reservations it does make should be as narrow as possible, as the Committee has condemned overly broad reservations.<sup>318</sup> Additionally, Cuba should ratify the first

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<sup>309</sup> See Lang, *supra* note 125.

<sup>310</sup> See Ojito, *supra* note 124, at 22A.

<sup>311</sup> See *id.*

<sup>312</sup> *Id.*

<sup>313</sup> General Comment 27, *supra* note 181, ¶ 14.

<sup>314</sup> See Ojito, *supra* note 124, at 22A; see also HANNUM, *supra* note 179, at 37 (discussing state justification to prevent “brain drain”).

<sup>315</sup> ICCPR, *supra* note 55, art. 12.

<sup>316</sup> See generally *Universal Periodic Review—Cuba*, *supra* note 34, ¶¶ 51–111.

<sup>317</sup> *Id.* ¶ 131(1).

<sup>318</sup> See, e.g., *Botswana Consideration*, *supra* note 276, ¶ 14.

Optional Protocol to the ICCPR, which allows for an individual complaint procedure to the Committee.<sup>319</sup> These steps would help Cuba bring its human rights regime up to international legal standards and to ensure that it provides both the “obligation of means” and “obligation of results” to its citizens.<sup>320</sup>

Regarding freedom of movement, Cuba should begin work on providing these dual obligations right away. Because of the particular issues relating to Cuban law, these efforts should be established in two phases. This Comment now proposes short-term and long-term solutions to best implement these obligations.

#### A. *Short-Term Solutions*

In the short-term, Cuba must change the administrative procedures that its citizens must go through to obtain a passport and an exit permit.<sup>321</sup> Somewhat ironically, the legal mechanisms that are so troubling for the long-term protection of these rights—the broad and unchecked power granted to the various ministries, consulates, and other government offices regarding travel policy<sup>322</sup>—can be used in the short-term to provide immediate relief to the Cuban citizenry. Because these offices enjoy so much power over these procedures, they can change them with little resistance from the outside. Although the ministries—and the centralized government as a whole—will be loathe to curtail their own ability to decide, they must do so if Cuba’s international commitments are to be taken seriously.

The government can make public a ministerial decree announcing the rules one must go by in order to obtain an exit permit. In this decree, Cuba should simplify its travel procedures as much as possible, so that Cubans can know what is required before they begin the process. In addition to leading to a more informed citizenry, doing this would greatly increase the transparency in this area, which would in turn go a long way in restoring confidence with the public.<sup>323</sup> Importantly, the Ministry should include a timetable providing

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<sup>319</sup> SCOTT N. CARLSON & GREGORY GISVOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 9 (2003). Over 100 countries have signed and ratified the first Optional Protocol. *Id.* The Committee cannot hear individual complaints if a country has not ratified the first Optional Protocol. *Id.*

<sup>320</sup> See Schacter, *supra* note 175, at 311, 322.

<sup>321</sup> See *supra* Parts I.B & C.

<sup>322</sup> See *id.*

<sup>323</sup> Currently, Cubans are frustrated with the system on the island. See Reuters, *Ojalá pudiéramos viajar y ver el mundo real*, EL PAÍS (Madrid), Feb. 8, 2008, <http://www.elpais.com/articulo/internacional/Ojala/>

guidance on how long the entire procedure will take, and it must make every effort to implement mechanisms so that the published timetable is reached. In the short-term phase, an exit permit will still be necessary, as it is provided for by Cuban law.<sup>324</sup>

The requirements of the Invitation Letter are of particular concern.<sup>325</sup> Under General Comment 27, it is clear that requiring Invitation Letters violates the ICCPR.<sup>326</sup> Because Resolution 87 is a Ministerial Resolution,<sup>327</sup> it could easily be repealed by announcement and publication through the Ministry of Foreign Affairs, as this act would fall well within the broad powers granted to the Ministry by the Migration Act.<sup>328</sup> However, the repeal of Resolution 87 would not eliminate the Invitation Letter requirement; it would only eliminate the added restrictions imposed in 2007 because the necessity of Invitation Letters was announced in the Migration Regulation.<sup>329</sup> Because they are statutorily provided for in the Migration Regulation,<sup>330</sup> the problems that arise from the Invitation Letters cannot be completely dealt with in the short term. Although the Invitation Letters requirement would not disappear with the repeal of Resolution 87, its repeal would have important consequences, including the removal of the unfettered discretion the Consuls have in rejecting Invitation Letters.<sup>331</sup>

For the same reasons present with regards to Resolution 87, Resolution 54 should be similarly abandoned. Cuba's medical personnel are particularly valuable to the state, and the state will not likely abandon regulations completely.<sup>332</sup> However, if Cuba is to provide special restrictions for the movement of its medical personnel, it must positively enumerate what the restrictions are rather than granting broad power on a government official to make determinations. While any restriction in Cuba's case would not likely withstand scrutiny, enumerating the requirements would at least be a positive step in the right direction.

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pudieramos/viajar/ver/mundo/real/elpepuint/20080208elpepuint\_14/Tes (providing an example of Cubans' growing frustrations with their travel restrictions).

<sup>324</sup> See Law No. 1312, *supra* note 53, art. 1.

<sup>325</sup> Ministerio de Justicia [Ministry of Justice] Res. No. 87 (Apr. 23, 2007) (Cuba).

<sup>326</sup> See General Comment 27, *supra* note 181, ¶ 17.

<sup>327</sup> Ministerio de Justicia [Ministry of Justice] Res. No. 87.

<sup>328</sup> See Law No. 1312, *supra* note 53, art. 15.

<sup>329</sup> Decree 26, *supra* note 55, art. 132(d).

<sup>330</sup> See *id.*

<sup>331</sup> Ministerio de Justicia [Ministry of Justice] Res. No. 87, ¶ 5.

<sup>332</sup> Ojito, *supra* note 124, at 22A.

Additionally, the Ministry of Foreign Affairs should drop the cost of such an application to a fraction of what it is now.<sup>333</sup> While this is only a small step, it would be an effort at minimizing the negative effects of the Invitation Letter requirement without disturbing the law. Even though the requirements of an Invitation Letter should eventually be stricken, it is important for a nation attempting to establish the principle of legality and a transparent domestic legal system to respect the rule of law in the short term.

### *B. Long-Term Recommendations*

In the long term, the Cuban legislature needs to act. Most obviously, the segments in the Cuban Penal Code that provide for lengthy incarcerations for “illegal exit” should be repealed.<sup>334</sup> Indeed, there is growing pressure on Cuba to repeal these laws in the international community.<sup>335</sup> While the concern of losing top Cuban minds is real, the correct answer is not trapping them on the island, but introducing reforms that provide them with a positive incentive to stay. Cuba has begun to make an effort at providing these incentives by breaking with the system of equal pay for all and allowing for more productive or skilled workers to earn more money<sup>336</sup>—and the repeal of this criminal law would be a further step in the proper direction.

Further, in the not-so-distant future, Cuba needs to replace its current migration code and the laws surrounding it. In the new code, Cuba should accomplish three things. First, it should eliminate the exit permit requirement for ordinary citizens.<sup>337</sup> The exit permit requirement serves no permissible state interest and has been repeatedly used as an excuse for governmental crackdowns.<sup>338</sup> Swept up in the abolition of the exit permit should be the Invitation Letter. Legally requiring an Invitation Letter violates the principles of international law set forth in the Committee’s jurisprudence.<sup>339</sup> Practically, as a requirement for a document that is no longer used, the Invitation Letter would serve no purpose. Second, Cuba should positively enumerate the exact duties of each government office and officer. The current system allows officials to change the administrative procedures at a moment’s notice and

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<sup>333</sup> See *supra* Part I.B.

<sup>334</sup> Law No. 62, *supra* note 155, art. 216.1.

<sup>335</sup> *Universal Periodic Review—Cuba*, *supra* note 34, ¶ 131(17).

<sup>336</sup> *Cuba to Abolish Salary Equality*, *supra* note 43.

<sup>337</sup> See Decree 26, *supra* note 55, art. 124.

<sup>338</sup> See Luna, *supra* note 160, at 564–65.

<sup>339</sup> General Comment 27, *supra* note 181, ¶ 17.

decide applications on little more than a whim, which greatly obscures the transparency of the departments and the consistent application of the law.<sup>340</sup> This type of absolute power results in situations like those Yoani Sánchez has endured—denials of the right to leave the country without explanation.<sup>341</sup>

Finally, the new law should substantially revise existing passport law, and it should fully codify the steps necessary to obtain a passport. These steps should include the time of validity, the cost, and the rights that go along with that passport. While some of these elements are listed in the Migration Regulation, the Regulation does not provide enough guidance to a Cuban seeking to obtain a passport; importantly, the law does not announce the cost.<sup>342</sup> Cuba must take steps to provide for a longer passport validity time. The two-year validity time, coupled with the high costs of obtaining and renewing a passport, contributes greatly to making foreign travel cost-prohibitive for most Cubans.<sup>343</sup> A longer validity period would lower the burden borne by many Cubans. Additionally, it would greatly decrease the burden on the Ministry of the Interior in processing the applications and renewals of passports. In the same way as enumerating the powers of the government officers, it would restore confidence to the Cuban populace and help streamline the process by which Cubans obtain the documents necessary to travel. By taking these extra steps to ensure that all reforms are codified in the law, Cuba will safeguard against arbitrary applications of or changes to the legal framework.

All of these suggestions necessarily assume good faith on the part of Cuba, and over the past year, Cuba has acted in a way suggestive of good faith.<sup>344</sup> Realistically, both short-term and long-term solutions may be years away. When describing the Russian Federation shortly after the collapse of communism in the former Soviet Union, the Committee made observations that can equally be applied to the situation Cuba faces now, regarding the freedom of movement narrowly and human rights more broadly:

[I]t is necessary to overcome vestiges of the totalitarian past and . . . much remains to be done to strengthen democratic institutions and respect for the rule of law. This has created a legal vacuum in certain areas, in which the principles set forth in the

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<sup>340</sup> See *supra* Part I.C.

<sup>341</sup> See Sánchez, *supra* note 18.

<sup>342</sup> See Decree 26, *supra* note 55, arts. 43–46.

<sup>343</sup> *Id.* art. 23.

<sup>344</sup> See *Universal Periodic Review—Cuba*, *supra* note 34, ¶¶ 130(37), 130(42), 130(49), 130(59).

Constitution are not implemented by corresponding laws and regulations. The Committee notes that the enactment of new laws is being undertaken by the Government but their consideration by [the legislature] is generally a slow process.<sup>345</sup>

A patient perspective is often necessary in attempting to establish a human rights-compatible regime where none existed previously,<sup>346</sup> and it would be naïve to hope that Cuba will have revamped its legal system and reversed decades of history in a matter of months. However, when it signed the ICCPR, the Cuban government signaled to its populace and signaled to the world that things were changing on the island.<sup>347</sup> By beginning the process outlined above, Cuba can begin to bring real change to its system, however small it may be at first. Over time, these changes become more meaningful, and at that stage, Cuba can begin bringing meaningful reform. Then, Cuba can fulfill its obligations under the International Covenant on Civil and Political Rights.

ERIC RETTER\*

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<sup>345</sup> U.N. Human Rights Comm., *Concluding Observations on the Russian Federation*, ¶3, U.N. Doc. CCPR/C/79/Add.54 (July 26, 1995).

<sup>346</sup> See Henry Steiner, *International Protection of Human Rights*, in HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 676 (3d ed. 2008).

<sup>347</sup> See McKinley, *supra* note 15.

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