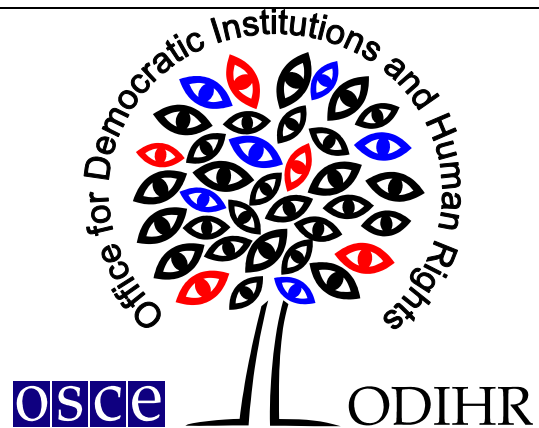


Warsaw, 22 February, 2007

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(MASz) rev<sup>1</sup>.

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## **Comments on the Law on Migration of Turkmenistan**

**based on an unofficial English translation of the draft  
provided by the OSCE Centre in Ashgabat**

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<sup>1</sup> This comment is a revised version of Opinion-Nr.: MIG-TUR/055/2006 (MASz).

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## **1. INTRODUCTION**

1. *The OSCE Office in Ashgabat made a request to the OSCE ODIHR to review and provide its opinion on the Law on Migration of Turkmenistan (hereinafter referred to as “the Law”) which was adopted on 7 December, 2005.*
2. *The following comment is a response to the above mentioned request. The comment will be distributed to a limited extent for the purposes of providing technical support to the authorities in order to bring the Law into compliance with international commitments.*

## **2. SCOPE OF REVIEW**

3. These comments do not equate to a full and comprehensive review, rather they have been drafted to serve as considerations which should be taken into account in light of international standards to which Turkmenistan has committed or may seek to commit.
4. In this regard, the OSCE ODIHR would like to make mention that the comments contained herein are without prejudice to any recommendations and comments that the OSCE ODIHR may wish to make on the Law in the future.

## **3. EXECUTIVE SUMMARY**

5. In summation, it is recommended that;
  - A. the Law is reviewed for its compliance with Article 12 of the International Covenant on Civil and Political Rights, 1966 [par. 7 and 8];
  - B. the restrictions and limitation of freedom of movement established by the Law are reviewed for their compliance with the allowable restrictions under Article 12(3) of the International Covenant on Civil and Political Rights, 1966 [par. 9];
  - C. the limitation and restrictions satisfy the test of proportionality, as established in international public law [par. 11];
  - D. the requirement of registration stipulated in Article 6-2 of the Law is removed, or its scope is significantly curtailed [par.14];
  - E. the restriction on residence and issuance of visa established by Article 15(5) is amended in order to apply only to residence permits and not issuance of visas for short term stay in Turkmenistan [par. 18 and 19 ];
  - F. personal data compiled under Article 15(5) is protected by law in accordance with the right to privacy stipulated in Article 17 of the International Covenant on Civil and Political Rights, 1966 [par.20];
  - G. the terms “terrorist”, “anti-state”, “extremist” and “affiliated” are clearly defined and/or deleted as appropriate [par.22];

- H. the expulsion procedure provided in Article 18 should not be applicable to victims of trafficking in human beings, which victims should received a reflection period and possibility for short or long term residence [par.24];
- I. the liability and penalties for natural and legal persons established by Article 23 are specified [par.25];
- J. the exact procedure for travel of citizens (exit) of Turkmenistan is laid down in the Law [par.27];
- K. the procedure of issuance of passports and exit from Turkmenistan is separated and not mutually dependant, nor even found in the same article, so as to avoid confusion [par.28.];
- L. a clear process for issuance of passports in established by the Law [par.29];
- M. the court should be the appropriate authority to rule on the interpretation of the limitations on freedom of movement [par.30 & 31];
- N. the definition of “State secret” should be clear [par.32];
- O. Article 32-1(4) should be clarified and interpreted by the courts [par.33];
- P. Article 32-1(5) should be clarified or removed [par.34];
- Q. Article 32-1(6) should be removed [par.35];
- R. Article 32-1(7) should be removed [par.36];
- S. Article 32-1(9) should be removed and alternative preventative measures to combat trafficking are suggested to be introduced [par.37];
- T. Article 32-1(10) should be removed [par.38 and 39];
- U. Article 32-1(11) should be made more precise and the interpretation of “national security” and ruling on a restriction of exit, should be made by the courts of law [par.40];
- V. Article 32-2 should be amended to read that the authorities of Turkmenistan may merely inform citizens wishing to travel to States in which there is a state of emergency, of the dangers of such travel. No restrictions should otherwise be made [par.41];
- W. Article 33-2 is removed from the Law [par.42];
- X. the restrictions on travel for study abroad stipulated in Article 34-2 are removed [par. 45];
- Y. the restrictions on travel for the purposes of labour stipulated in Article 34-3 are removed [par.46];
- Z. secondary legislation clarifying procedures and implementation of provisions in the Law is introduced as soon as possible [par.47].

#### **4. ANALYSIS AND RECOMMENDATIONS:**

6. It should be noted that it will be possible to better assess many provisions of the Law only after a reasonable period of time of implementation has elapsed. However, following over fourteen months of implementation of the Law, certain observations may already be made, and have been outlined below. With this in mind, the comments that may be raised at this junction are as follows:

##### **4.1 General Comments - Migration and the Freedom of Movement**

7. Migration is based on the freedom of movement. The freedom of movement is secured by Article 24 of the Constitution of Turkmenistan, last amended on 26 December, 2006 (hereinafter, “the Constitution”), which speaks of the right of citizens to move freely and choose their place of residence **within the territory of the State.**

Article 24 of the Constitution also states that, “restricted access to and movement in some territories and restricted free movement for individuals may be imposed only on the basis of the law.” It therefore transpires that the Constitution does not expressly secure the freedom of entry and exit to the territory of Turkmenistan. However, Article 6 of the Constitution, which speaks of the precedence of rules of international law,<sup>2</sup> and Article 3(1)<sup>3</sup> of the Law, may be used to secure this right which is encapsulated in Article 12 of the International Covenant on Civil and Political Rights, 1966 (hereinafter “ICCPR”).<sup>4</sup> The ICCPR recognises that the liberty of movement is an indispensable condition to the free development of each human being. The Law itself and its implementation by the executive authorities, administrative authorities and the courts of Turkmenistan must therefore be interpreted in accordance with Article 12 of the ICCPR. Moreover in the OSCE commitments expressed in the Madrid document on “Questions Relating to Security in Europe,” adopted in 1983, the participating States were called upon to act in conformity with the ICCPR, amongst others.<sup>5</sup>

8. Further to the above, the right to freely enter and exit Turkmenistan by citizens of Turkmenistan is established by Article 1 of the Law on the Procedure of Exit from and Entry to Turkmenistan by the Citizens of Turkmenistan of 15 June 1995, as amended on 22 April 2002 and 14 June 2003, which states that “Citizens of Turkmenistan shall have the right of exit from Turkmenistan and entry into Turkmenistan. Citizens of Turkmenistan may not be arbitrarily deprived of the right of exit from Turkmenistan and entry into Turkmenistan.” Furthermore, Article 26(1) of the Law restates this right.<sup>6</sup>

9. In connection with the above, the freedom expressed in Article 12 of the ICCPR, may be subject to certain limitations, based on the principle stipulated in

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<sup>2</sup> Also, in accordance with United Nations General Assembly Resolution on “Permanent Neutrality of Turkmenistan” adopted at the 90<sup>th</sup> plenary meeting on 12 December, 1995 A/RES/50/80, which states “Recognising that the adoption by Turkmenistan of the status of permanent neutrality does not affect the fulfilment of its obligations under the Charter and will contribute to the achievement of the purposes of the United Nations”.

<sup>3</sup> Article 3(1) states that: “Migration processes shall be regulated by the Constitution of Turkmenistan, this Law and other normative legal acts of Turkmenistan and international treaties of Turkmenistan.”

<sup>4</sup> Article 12, of the ICCPR (1966), acceded to by Turkmenistan on 1 August 1997, states that:

(1) everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(2) everyone shall be free to leave any country, including his own.

(3). The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

(4) No one shall be arbitrarily deprived of the right to enter his own country

<sup>5</sup> Paragraph 19, Concluding Document of Madrid – the Second Follow-up Meeting, „Questions relating to Security in Europe”, 6 September 1983, states “[the participating States] reaffirm the particular significance of (...) the International Covenants on Human Rights and other relevant international instruments of their joint and separate efforts to stimulate and develop universal respect for human rights and fundamental freedoms; they call on all participating States to act in conformity with those international instruments and on those participating States, which have not yet done so, to consider the possibility of acceding to the covenants”

<sup>6</sup> Article 26(1) of the Law states that: “Every citizen of Turkmenistan shall enjoy the right of exit from Turkmenistan and entry into Turkmenistan. A citizen may not be deprived of his/her right of exit from Turkmenistan and entry into Turkmenistan. The right of exit from Turkmenistan may be temporarily limited in accordance with Article 32 of this Law.”

Article 12(3) of the ICCPR. However, these limitations, **may not nullify** the freedom of movement itself.<sup>7</sup> This means that the State, upon introducing, on justified grounds, any measures that may restrict the freedom is obliged to ensure that the essence of the freedom of movement is not disrupted.

10. The restrictions to freedom of movement permitted by Article 12(3) of the ICCPR, are in the name of national security, public order, public health or morals or the rights and freedoms of others, and must be consistent with the other rights established in the ICCPR. What needs to be borne in mind is that in imposing such restrictions, the State should ensure that the relationship between right and restriction, between norm and exception, are not reversed. The laws authorizing the application of restrictions should stipulate precise criteria and may not confer unfettered<sup>8</sup> discretion on the person or entities charged with their institution.

11. Any restriction placed on freedoms must pass the **test of proportionality**, which is well developed in public international law. This means the restrictions on freedom of movement which are imposed must be **proportionate**, that is appropriate for achieving their objective of protecting the lives, health, freedom and other constitutional rights of the citizens of Turkmenistan. Furthermore, it is not sufficient for the restrictions in the Law to merely serve the permissible purposes (like, protection of public health or national security), the restrictions in the Law must also be necessary to protect them.<sup>9</sup> In the case of the *Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura*<sup>10</sup> the United Nations International Criminal Tribunal for the Former Yugoslavia stated that “[a] measure<sup>11</sup> in public international law is **proportional** only when [it is] (1) suitable (2) necessary and (3) when its degree and scope remain in a reasonable relationship to the envisaged target.” The Trial Chamber also stressed that “[p]rocedural measures should never be capricious or excessive” and that “[i]f it is sufficient to use a more lenient measure, it must be applied.” In practice, the principle of proportionality must be respected not only by the Law itself but also by the administrative and judicial authorities implementing and interpreting the provisions.

12. The ensuing recommendations are based on the commitments of the OSCE and the above outlined interpretation of Article 12 of the ICCPR.

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<sup>7</sup> Human Rights Committee, General Comment 27, Freedom of Movement (Art.12) U.N. Doc CCPR/C/Rev.1/Add.9 (1999).

<sup>8</sup> *synonym*: unlimited

<sup>9</sup> Human Rights Committee, General Comment 27, Freedom of Movement (Art.12) U.N. Doc CCPR/C/Rev.1/Add.9 (1999).

<sup>10</sup> *The Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura* - Case No. IT-01-47-PT "Decisions granting Provisional Release to Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura" 19 December 2001, Trial Chamber II (Judges Wolfgang Schomburg [Presiding], Florence Mumba and Carmel A. Agius) United Nations International Criminal Tribunal for the Former Yugoslavia .

<sup>11</sup> Otherwise, “restriction”.

#### **4.2 Entry, Stay and Exit from Turkmenistan of Foreign Citizens and Stateless Persons.**

13. In the Helsinki Final Act, the founding document of the OSCE,<sup>12</sup> the participating States committed to gradually making procedures for entry and exit simpler and administer them more flexibly. The participating States also committed to easing regulations for travel of citizens from other participating States into their territory. In subsequent years, the OSCE reiterated and built upon the commitments of the Helsinki Final Act in the Vienna<sup>13</sup>, Copenhagen<sup>14</sup> and Moscow<sup>15</sup> documents.

14. Further to the above, and in light of Article 12 of the ICCPR, it is contended that the registration procedure which is required in addition to the requirement of obtaining a visa, as stipulated in Article 6-2 and further developed in Articles 10, 11, 12 and 13 is a burdensome and dispensable practice. Although the presumed intention may be in good faith, in practice, it is more likely to prove a practical constraint to the freedom of movement, and not achieve its aim of controlling the place of stay of foreigners and stateless persons. It is therefore possible, that the restrictive nature of the measure (in particular, even on tourists entering the country) is not appropriate to achieving the goal the aim of, for example public order (the aim of the measure has not been outlined in the Law). Therefore, based on Article 12 of the ICCPR, the measure featured in the Law in the form of a registration requirement, may not satisfy the test of proportionality, and thus be considered unduly restrictive on the freedom of movement. It is therefore recommended to be removed, or at least its scope and requirements should be eased.

#### **4.3 Residence Permits**

15. The Law, while establishing a requirement for obtaining residence permits for residence in Turkmenistan, and general principles thereof, leaves the specific rules and procedure for this action (for instance, application process) to be established by the acts of the President (Article 14-3 and Article 14-8) and therefore, it is only from that moment that the rights and obligations of the requirement of obtaining a visa will be clarified in practice.

16. Article 15 of the Law stipulates the grounds for denial of visas and residence permits. For the purposes of consistency of the Law, this Article should be cross-referenced to the Articles pertaining to the obtaining of a visa.

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<sup>12</sup> Paragraph (d) of the Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975 states that: "The participating States intend to facilitate wider travel by their citizens for personal and professional reasons and to this end they intend in particular: - gradually to simplify and to administer flexibly the procedures for exit and entry; - to ease regulations concerning movement of citizens from the other participating States in their territory and with due regard to security requirements. They will endeavor gradually to lower, where necessary, the fees for visas and official travel documents."

<sup>13</sup> Concluding Document of Vienna- the Third Follow-up Meeting, 15 January, 1989.

<sup>14</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990.

<sup>15</sup> Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 3 October 1991.

17. Article 15 contains a number of ambiguous criteria for refusal of visa or residence permits, which may lend themselves to at least inaccurate, or at worst, arbitrary application. In particular, this concerns paragraph 5 of the Article and paragraph 10. These are recommended to be clarified and reconsidered.

18. Regarding Article 15 paragraph 5, the restriction on entry of persons with HIV/AIDS and other diseases or addictions, in order to protect the health of the population of Turkmenistan, ought to be weighed against the fact that persons with disease and disability should also be able to exercise their human rights and freedoms, based on the principle of non-discrimination, as contained in Article 26 of the ICCPR. Therefore, the freedom of movement may be restricted only in so far as it is proportional to the aim for which the restriction is introduced (in this case preservation of public health). In addition, the United Nations Declaration of Commitment to HIV/AIDS<sup>16</sup> states the commitment made by Member States of the United Nations, to ensure the enjoyment of all human rights and elimination of discrimination in this regard by all people suffering from HIV/AIDS<sup>17</sup>.

19. Additionally, the term “drug additions”, should receive a precise definition. The procedure for establishing whether or not someone is addicted to drugs should also be clear in the Law or secondary legislation. Just as with the restriction of entry of persons suffering from HIV/AIDS, if such clarifications are not made, and exceptions are not introduced, the limitation may be considered excessive.

20. In addition to the above recommendation regarding Article 15 (5) it must be ensured that in line with the right to privacy established by Article 17 of the ICCPR, any information gathered on applicants for visa or residence permits, whether on computers, data banks, and other devices by public authorities (or others) must be regulated by law and effective measures must be taken to ensure that any such information, which clearly concerns and applicants private life is not used, transmitted or processed in an inappropriate manner, or by unauthorized persons, for unauthorized purposes. Furthermore, every person should have the possibility to ascertain what data has been stored about them and where such files contain incorrect data every individual must have the right to request a correction of the information or its deletion.<sup>18</sup> It is thus recommended for such regulations to be enforced in relation to the data collected, otherwise, if legislation on data protection already exists, it should be applicable and cross-referenced to this provision.

21. Regarding Article 15 (10) it is unclear how the terms “terrorist”, “anti-state”, “extremist” or “affiliated” are defined. In the case that such definitions exist in other

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<sup>16</sup> Declaration of Commitment on HIV/AIDS , Adopted by the United Nations General Assembly Resolution S-26/2 of 27 June 2001

<sup>17</sup> Paragraph 58 states that : “ By 2003, enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups, in particular to ensure their access to, inter alia, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic.”

<sup>18</sup> United Nations Human Rights Commission, General Comment No 16: The Right to Respect for Privacy, Family, Home and Correspondence and Protection of Honor and Reputation (Art 17): 08/04/88CCPR.



laws or regulations, they should be made applicable and cross-referenced; otherwise such terms ought to be deleted or precisely defined in the Law. This is particularly the case for the term “extremist”, the definition of which is unclear in the legislation of many OSCE States. This is recommended in order to avoid inconsistency in application and inaccurate or arbitrary interpretation of the said provision.

22. The comments contained and recommendations in paragraph 23 above, are applicable also to Article 16(4) of the Law

23. The comments and recommendations contained in paragraph 19 above, are also applicable to Article 16 (6) as appropriate.

24. Referring to Article 18 of the Law, the article is recommended to, at the very least, make exception from the expulsion of foreign citizens, who are victims of trafficking in human beings. Ideally, victims of trafficking should not only be exempted from expulsion, but should also be given a reflection and recovery period, appropriate assistance during this time, and the possibility of applying for and obtaining a short or long term residence permit in Turkmenistan.<sup>19</sup>

25. Article 23 of the Law and the corresponding Article 51 and 52 of the Law make natural and legal entities who invite foreign citizens and stateless persons responsible for ensuring the legality of the invited persons stay and activity in Turkmenistan and liable for any violation of the Law. It is recommended that the Law stipulates the exact penalties applicable, or the other acts in which such penalties and punishment may be found.

#### **4.4 Exit From and Entry to Turkmenistan by Citizens of Turkmenistan**

26. The Articles of the Law causing a great amount of concern and which have allegedly already been applied by the authorities<sup>20</sup> are those relating to the exit by the citizens of Turkmenistan from the territory of Turkmenistan. In particular, these are Articles 32, 33 and 34 of the Law.

27. A general recommendation for almost the entire Article 32 is for it to be made more precise and supplemented by secondary regulations which would reduce the ambiguity and also reduce the possibility for authorities who are responsible to apply the Law to apply the Law in an inconsistent or arbitrary manner. At present the exact procedure for travel of citizens (exiting and entering the country) is completely unclear.

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<sup>19</sup> Article 7(1) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Convention on Transnational Organised Crime (2000), states that: “...each State party shall consider adopting legislative or other appropriate measures that permit victims of trafficking to remain in its territory, temporarily or permanently in appropriate cases.” See also Point 8/ChV on Provision of a reflection delay and temporary or permanent residence permit, in the OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003.

<sup>20</sup> Information on application of this Article is based on *heresay* for the time being, and should be confirmed if cases are submitted to the courts on its basis.

28. Regarding the above comment, the first recommendation which can be made is that the procedure of issuance of passports and the procedure for departure (travel) and restriction thereof, be made separate and not mutually dependant.

29. Therefore, the procedure for issuing passports is strongly recommended to be found in a different, separate and clear article which would spell out the process through which passports are issued. Especially since, a passport is a document which every citizen has the right to possess, which should in no way be conditioned on or connected to travel. To be sure, a citizen may apply for a passport, without any immediate or future plans to travel at all.

30. Although in accordance with the letter of the law, it the freedom of movement may be limited to some extent, the practice in many OSCE participating States has shown that refusal of exist from the territory of a State should ordinarily only be ruled by a court of law, based on the permitted grounds found in legislation. In the case of Article 32-1 it is unclear which authority would be responsible for application of the said restrictions (that is, is this left to the discretion of border guards? passport authorities?). Regarding the limitations on exit from the country in general, as provided in Article 32-1 paragraphs (1) to (11) it can be said that they are excessive and ambiguous to the extent that would permit at least inaccurate application and at most, arbitrary implementation and thus arbitrary deprivation of the freedom to exit the territory of Turkmenistan. An analysis and recommendations in this regard shall follow.

31. Following from the above, it is all the more so necessary for a court to rule on the restriction of issuance of passport and exit from Turkmenistan, since it is unclear what is meant by “temporary restriction”. Lack of definition of the length of such restriction (except in those paragraphs where restrictions are applicable until certain legal obligations have been discharged) provides room for arbitrary decisions on the length of time for which restrictions are placed (see also reported cases described in footnote 24).

32. It is recommended to clarify in Article 32-1 (1) what constitutes a “State secret” or reference to the exact legislation, if already in existence, which defines a “State secret”, should be made.<sup>21</sup>

33. Article 32-1 (4) may be considered an excessive restriction on the freedom of movement, by way of both refusal of issuance of a passport and right to exit the country simultaneously. Evading the discharge of obligations by a citizen may amount to no more than simply the inability to pay alimony, or accumulated parking fines. For this reason, any decision to restrict the freedom of movement on this basis should only be made by a court of law, which would weigh up the pending obligation against the restriction over a fundamental right such as freedom of movement.

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<sup>21</sup> Reportedly a case has been lodged in the court of first instance regarding a woman who was visiting her family in Turkmenistan, being prevented from leaving Turkmenistan to resume her studies in China. The court of first instance, however, has refused the appeal based on merits (assumingly, Article 33 of the Law) which does not permit appeal of refusal of exit of Turkmenistan which are based on the limitation set out in Article 32-1 (1).

34. It is recommended that Article 32-1(5) be clarified. At present it is unclear what kind of ‘false information’, a person might give, and to whom, which would justify the refusal to issue that person with a passport and leave the country. This limitation is recommended to either be made more precise or removed in its entirety.

35. If understood correctly, paragraph (6) of Article 32-1 will preclude the exit from Turkmenistan of any person who is within the age group eligible for military service. This means, that the mere fact of eligibility shall suffice to preclude exit and issuance of a passport. It also means that persons between approximately 18-29 years of age will be unable to leave Turkmenistan (unless for purposes of permanent residence) regardless of when they will in fact be taken into military service. This paragraph is recommended to be deleted

36. The restriction stipulated in Article 32-1 (7) is recommended to be removed, or very well specified. The operation and implementation of this article would mean that it would be possible to preclude travel out of Turkmenistan of persons who are for instance, in the process of divorce, or even registration of real estate in the Title Register (which is also a civil proceeding).

37. Furthermore, Article 32-1(9), does not stipulate which authority and on what basis may conclude that “a reasonable apprehension”<sup>22</sup> exists, upon which a person would not be permitted to exit Turkmenistan for some time. This displays a lack of clarity in the Law and renders the law open to arbitrary application.<sup>23</sup> While introducing measures to prevent trafficking in human beings is commendable, and required in accordance with international commitments of Turkmenistan, at the same time it should be ensured that the measures adopted for the purpose of preventing and combating trafficking in persons do not have adverse impact on the rights and dignity of person, including their freedom of movement.<sup>24</sup> A simple banning of someone from leaving the country does not prevent trafficking of persons, it can however, lead to the situation where freedom of movement is severely restricted and the level of clandestine movement of persons (trafficking, smuggling) may increase, as well as any corruption that may be connected to it, and indeed the measure may have the reverse effect. Refusing exit from the State is also not the most proportional or appropriate measure possible. An alternative and less oppressive measure, which would secure the intended result (preventing trafficking), would be to invest in awareness raising campaigns about the dangers of trafficking and exploitation. Also, all individuals exiting the country may receive information from border authorities on what their rights are and where they can seek help (embassy, hotline, and police) in case they do end up in a situation of trafficking and exploitation. In addition, far more effort should be placed in addressing the root causes of trafficking, in order to break its cycle.

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<sup>22</sup> It is probable that the translation should read “suspicion” and not “apprehension”.

<sup>23</sup> Again, best practices suggest that such formulations should not only be specific in law, but that they should be applied and interpreted by the courts, and only on the basis of a ruling of the court may exit from a State be restricted.

<sup>24</sup> Point 5.2 Ch IV OSCE Action Plan to Combat Trafficking In Human Beings, PC.DEC/557 24 July 2003

38. It seems that in accordance with Article 32-1 paragraph (10), persons who violate legislation of another State may be precluded from exiting Turkmenistan. The term “legislation” in this case is very broad and may therefore include violation of road traffic laws by, for instance, exceeding the speed limit or incurring a parking fine. Indeed, it is in the best interests and within the discretion of the States concerned (destination States) to permit or not, those persons who have violated their legislation from entering. The destination State may opt to prevent entry to its territory of a person who has violated certain provisions of legislation (such as the example of violation of road traffic laws).<sup>25</sup> For this reason, there is no apparent justification for such a limitation to be imposed by the authorities of Turkmenistan.

39. Further to the above, it is recommended to remove this paragraph from the Article and the Law altogether. Not only is it not the concern of Turkmenistan to preclude exit of persons on such ambiguous grounds, but the application of this Article 32-1(10) may result in a violation of the rule against double jeopardy. The rule against double jeopardy means that no person can be liable for an offence for which he or she has already been convicted, acquitted or punished.<sup>26</sup> Therefore, if a citizen of Turkmenistan has already been punished for an offence in another State and has for instance, paid the speeding fine, he or she cannot be punished again by way of a restriction on their right to own a passport and right of exit from Turkmenistan, for the very same offence.

40. Article 32-1 paragraph (11), on refusal of exit based on reasons of national security can also lend itself to arbitrary application, in view of its lack of definition and ambiguous nature. Recalling that Article 12 of the ICCPR must be applied not only in the actual legislation but also appropriately implemented by the administrative, executive and judicial authorities, this paragraph is recommended to be made more precise and the rules for its application clearly set out and uniform, as what one administrative official may believe to be a threat to national security, may not be considered so by another.<sup>27</sup> It is noteworthy that the justification of restriction

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<sup>25</sup> Reportedly, there have already been two cases of women who were precluded exit from Turkmenistan based on this paragraph. One was precluded exit for 5 years and the other for 3 years. The authorities allegedly did not refer to the appropriate provisions or secondary laws which would set the criteria for the extent of time for which such exit may be precluded.

<sup>26</sup> In particular, Article 14(7) of the ICCPR states that “No one shall be liable to be tried or punished again for an offence for which he [or she] has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

<sup>27</sup> Reportedly, there has been a case of a woman visiting her family in Turkmenistan being prevented from exiting the country to resume her studies in China, as she posed a security threat. It is not clear what type of security threat she posed and details will be requested during the court hearing.

of freedom of movement for reasons of ‘national security’ can only be invoked where the measures protect the very existence of Turkmenistan, its territorial integrity or political independence, the justification of ‘national security’ cannot be invoked in order to prevent merely local or relatively isolated threats to law and order. National security cannot serve as a pretext for imposing vague or arbitrary limitations on the freedom of movement and the systematic violation of human rights undermines true national security and may jeopardize international peace and security.<sup>28</sup>

41. Although the intention behind Article 32-2 is visible, it is usually the case that citizens travel at their own risk and may only be warned that it is unsafe to travel to certain States. Furthermore, it is again unclear what “emergency in another State” might mean and how long “temporary” would be. Furthermore, there are absolutely no exceptions, for instance in cases where a Turkmen citizen must visit the State in which “an emergency” is declared for work purposes (ie., journalist) or to visit sick and needy relatives, etc. This provision may be amended to state that the authorities of Turkmenistan have the obligation to warn their citizens of the dangers of travel to a particular State.

#### **4.5 The Right to Appeal**

42. It is recommended to remove the restriction on the right to appeal articulated in Article 33-2 of the Law. This Article states that persons may not appeal the decision to refuse issuance of a passport or departure from Turkmenistan, where such decisions are based on the restrictions specified in Article 32-1 paragraph (2), (3) and (4) as well as, paragraphs (7) and (8). In the case that such decisions are administrative decisions, they should be subject to appeal to a court of law, and in the case that they are decisions of a court of first instance; they should be subject to appeal to a court of higher instance.<sup>29</sup> The right of appeal, although expressed in relation to criminal cases in international law,<sup>30</sup> based on the practice of developed democracies, should be extended also to civil and administrative matters. The right of appeal is a fundamental element of the right to a fair trial, which itself is a cornerstone of democracy.<sup>31</sup>

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<sup>28</sup> Please see: Section, vi on “National Security” principles 29 -32 of the United Nations **Siracusa Principles** on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985), which state that: “vi. “national security” 29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force. 30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. 31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse. 32. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

<sup>29</sup> See also Footnote No. 20 above.

<sup>30</sup> Article 14(5) of the ICCPR and Article 2 of Protocol No.7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1984)

<sup>31</sup> See also: Recommendation No. R(95) 5 concerning the Introduction and Improvement of the Functioning of the Appeal System and Procedures In Civil and Commercial Cases of the Council of

**4.6 Migration from Turkmenistan (Emigration) for Labour, Education or Other Purposes**

43. Migration from Turkmenistan to another State (emigration) should be regulated by the State of destination and not Turkmenistan. It is therefore recommended to review the Law with this principle in mind and remove any obstacles which would preclude or overly burden citizens of Turkmenistan who wish to migrate, whether that be for the purposes of labour, education or permanent residence.

44. Article 34 requires further consideration. In particular, since there is a great possibility that its application would be a violation of the freedom of movement. It is thus recommended to review paragraph (2) and (3) of the Article as well as the concluding paragraph (and not paragraph 1).

45. The justification for the above recommendation is that in the case of Article 34-2, it is not clear how this provision would work in light of those citizens who go abroad, and choose to commence studies, after having arrived, or stayed some time in the country of destination. Further, this provision is almost stand alone- as no other provision in the Law mentions what an “appropriate invitation or confirmation” means. This Provision is recommended to be removed or significantly amended to remove the barriers, which in practice are neither the obligation of Turkmenistan, nor indeed possible to meet by ordinary citizens. It may suffice to for the Ministry of Education to make available to students wishing to study abroad, a list of credible institutions for the purposes of their information only.

46. Following from the above argumentation relating to study abroad, the need to revise Article 34-3 is even more justified, this is because frequently, persons who seek work overseas do not receive “an invitation” or a contract, before they have left the country. Such a requirement is excessively burdensome. It is also highly unrealistic, except for a few exceptional cases, for instance cases of inter-company transfers etc. However, for ordinary persons wishing to gain both financial benefit and experience by working overseas, this requirement creates an almost insurmountable barrier. Further, any persons who obtain work once already overseas, will of course, never be able to meet the requirement of this article and possibly be in violation of the Law from the outset. It is recommended to remove the restriction.

**4.6 Secondary Legislation and Regulations – Implementing the Law**

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Europe. In his Recommendation, the Committee of Ministers, agree that procedures for appeal should be available not only in criminal matters, but should also extend to civil and commercial cases.

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47. Article 8 (2), amongst others speaks of the necessity to introduce implementing legislation by a decree of the President of Turkmenistan. It is highly recommended that in order to prevent the Law from being implemented inconsistently or arbitrarily, such secondary regulations are introduced, in particular, with the pivotal Articles of concern which are the subject of this comment.

*[END OF TEXT]*