EXTERNALISATION OF MIGRATION AND THE IMPACT ON THE HUMAN RIGHTS OF MIGRANTS

Submission to the UN Special Rapporteur on the human rights of migrants

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1. Introduction

1. This submission is made to the Special Rapporteur on the human rights of migrants to inform his forthcoming report on the externalisation of migration and its impact on the human rights of migrants. I welcome the Special Rapporteur's decision to focus the report on this proliferating global phenomenon and the explicit recognition that externalisation practices can prevent departure and lead to violations of the right to leave, an often-overlooked right.

2. This submission examines the externalisation of migration control and its harmful impact on the human right to leave any country, including one's own, in international law, drawing on my doctoral research and related work.

3. I completed my Doctorate in Law at the University of Oxford on 'Protecting the Right to Leave in an Era of Externalised Migration Control'. A book of the same title is forthcoming with Hart Publishing. I recently published articles titled 'Challenging Externalisation Through the Lens of the Human Right to Leave' and 'Externalisation as a Breach of the Good Faith Principle'.[1]

4. In this submission, I explore the significance of the right to leave to externalisation and outline the policies and practices that prevent departure and systematically obstruct individuals' right to leave (including to seek asylum). I also briefly outline the legal framework governing the right to leave and address issues related to extraterritorial jurisdiction and international responsibility. The submission concludes with recommendations on protecting the right to leave and ensuring rights-based migration policies.

2. The Right to Leave Any Country

5. The right to leave is enshrined in almost all major human rights instruments. The right was first expressed post-World War II in Article 13(2) of the UDHR and later incorporated into Article 12(2) of the ICCPR.[2]

6. Article 12(2) provides that 'Everyone shall be free to leave any country, including [their] own'. Restrictions are permissible only when provided by law, as necessary to protect national

[1] E McDonnell, 'Challenging Externalisation through the Lens of the Human Right to Leave' (2024) 71 NILR 119; E McDonnell, 'Externalisation as a Breach of the Good Faith Principle' (Externalizing Asylum, 2024) <https://externalizingasylum.info/externalisation-as-a-breach-of-the-good-faith-principle/>.

[2] See ICERD, art 5(d)(ii); Apartheid Convention, art 2(c); CRC, art 10(2); ICRMW, art 8(1); CRPD, art 18(1)(c).

security, public order (*ordre public*), public health or morals, or the rights and freedoms of others, and must be consistent with other rights recognised in the Covenant (Article 12(3)).

7. Regionally, the right to leave is protected in Article 2(2) of Protocol 4 of the ECHR and in human rights instruments across Africa, the Americas, Asia, Eurasia, and the Middle East.[3] It is also widely recognised as a norm of customary international law.[4]

8. Yet, the right to leave remains poorly understood and underdeveloped. Nonetheless, some key parameters can be derived from the text of the right and the interpretive work of adjudicative bodies, including the Human Rights Committee (HRC), European Court of Human Rights (ECtHR) and the Inter-American Commission on Human Rights (IACHR). These include:

    - The right to leave protects everyone within a given territory, regardless of migration status. However, lawfulness of presence is relevant to assessing permissible limitations.[5]

    - The right imposes both negative and positive obligations on States of nationality, residence and departure. It includes the right to obtain necessary travel documents, particularly passports, which is normally incumbent on the State of nationality.[6]

    - States must secure the right to leave for their nationals abroad as well as people within their territory or jurisdiction, including when exercising extraterritorial jurisdiction.[7]

    - Blanket, indefinite, or automatic restrictions will not be deemed necessary or proportionate, nor should they impair the essence of the right.[8] The ECtHR has stated that it may, in 'compelling situations', accept that restrictions on the right to leave to prevent breaches of another State's immigration laws are justified.[9]

    - The freedom to leave must not be made dependent on any specific purpose or on the duration of time a person spends outside the country.[10]

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[3] ADHR, art VIII; ACHR, art 22(2); ACHPR, art 12(2); CIS Convention, art 22(2); Arab Charter on Human Rights, art 27; ASEAN Human Rights Declaration, art 15.
[4] See V Chetail, 'The Transnational Movement of Persons Under General International Law: Mapping the Customary Law Foundations of International Migration Law' in V Chetail and C Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014).
[5] See HRC, *Moses Solo Tarlue v Canada*, Comm No 1551/2007 (28 April 2009) CCPR/C/95/D/1551/2007 [7.7].
[6] HRC, 'General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) CCPR/C/21/Rev.1/Add.9 [9].
[7] See the 'Passport Cases': *Sophie Vidal Martins v Uruguay*, Comm No R13/57 (23 March 1982) A/37/40; *Carlos Varela Núñez v Uruguay*, Comm No 108/1981 (22 July 1983) CCPR/C/OP/2; *Mabel Pereira Montero v Uruguay*, Comm No 106/1981 (31 March 1983) CCPR/C/OP/2; *Samuel Lichtensztejn v Uruguay*, Comm No 77/1980 (31 March 1983) CCPR/C/OP/2. See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 268–269; V Moreno-Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 EJIL 315, 353–355; E Guild and V Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' in W Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia, NWV Verlag 2018) 375, 386.
[8] See *Stamose v Bulgaria*, App no 29713/05 (ECtHR, 27 November 2012); HRC (n 6) [13].
[9] *Stamose* (n 8) [36].
[10] HRC (n 6) [8].

- The legal guarantee includes an individual's right to determine their State of destination.[11] The right to leave is well-understood as distinct and independent from any right of entry to the destination State.[12]

- The right to leave is a precondition for exercising one's right to seek and secure asylum.[13]

3. Externalisation and Prevention of Departure

9. Externalisation is typically understood as a phenomenon that prevents migrants from entering State territory and accessing asylum, allowing States to avoid their protection obligations being triggered.[14] However, it also serves as a tool of containment, preventing departure from States of origin and transit, including for nationals seeking to leave their own country.

10. Externalisation is, thus, designed to impede movement from the beginning and throughout the migrant trajectory. Ultimately, it enables States to obstruct entry and exit simultaneously. Indeed, if States were successful in fully controlling exit, restrictions to prevent the entry of irregular and other undesirable migrants would be unnecessary.

11. A number of externalisation practices can interfere with and violate the right to leave. Visa requirements and carrier sanctions obstruct departure from the outset, keeping prospective migrants away from the border and pushing them into dangerous journeys. Destination States and the EU enlist States of origin and transit to curb irregular migration. Meanwhile, frontline States contain migrants in hotspots and islands, while 'safe countries' are required not only to readmit irregular migrants, but also to strengthen border controls.[15]

12. **Visa requirements for 'blacklisted' countries:** Visa requirements make departure contingent on obtaining permission to enter the destination State. Visa refusals force individuals to travel irregularly or not at all, as travel without permission becomes unlawful.

13. **Carrier sanctions and pre-entry controls:** The HRC has recognised that pre-entry controls may infringe the right to leave, having expressed concern about the effect of carrier sanctions and 'other pre-frontier arrangements' on the right.[16] Pre-clearance programmes and the posting of immigration officials at foreign ports can prevent asylum seekers from fleeing a country.[17]

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[11] Ibid; *Baumann v France*, App no 33592/96 (ECtHR, 22 May 2001) [61].
[12] See for discussion McDonnell, 'Challenging Externalisation' (n 1) 123–126.
[13] IACHR, 'IACHR Urges Honduras and Guatemala to Guarantee the Rights of People in the Migrant and Refugee Caravan' (Press Release 37/19, 19 February 2019) <https://www.oas.org/en/iachr/media_center/PReleases/2019/037.asp> accessed 10 June 2025; *The Haitian Centre for Human Rights et al v US*, IACHR Case 10.675, Report No 51/96 (13 March 1997) OEA/Ser.L/V/II.95 Doc 7 Rev at 550.
[14] See McDonnell, 'Challenging Externalisation' (n 1) pt 2.
[15] For deeper analysis, see McDonnell, 'Challenging Externalisation' (n 1) pts 4.4, 4.5.
[16] HRC (n 6) [10]; HRC, 'Concluding Observations of the Human Rights Committee: Austria' (19 November 1998) CCPR/C/79/Add.103 [11].
[17] R Boudjikanian, 'Hungarian Roma Regularly Prevented From Boarding Canada-Bound Flights' *CBC News* (5 October 2015) <https://www.cbc.ca/news/canada/montreal/hungarian-roma-refugee-claim-cbsa-air-transat-budapest-gabor-lukaçs-

14. **Access to travel documents:** The ECtHR has indicated that while exercising one's right to leave may be conditional upon obtaining necessary travel documents, such as a passport or visa, the possibility of obtaining them must be accessible in practice.[18] Otherwise, the right to leave would not be practical and effective.

15. **Pullbacks:** Pullbacks are a blatant interference with the right to leave.[19] They are 'designed to physically prevent migrants from leaving the territory of their State of origin or a transit State (retaining State), or to forcibly return them to that territory, before they can reach the jurisdiction of their destination State'.[20] A complaint has been filed with the HRC against Italy, Libya, and Malta on behalf of two individuals who allege that a pullback by the Libyan Coast Guard, carried out with the cooperation of Italian and Maltese authorities, violated their right to leave Libya.[21]

16. **Pushbacks:** Whether a pushback violates the right to leave arguably depends on whether it deprives the right of meaningful effect by obstructing a migrant's search for refuge and a State to admit them, thereby forcing them back to the country they fled. A former Council of Europe Commissioner for Human Rights concluded that, alongside visas, carrier sanctions and readmission agreements, pushbacks hinder the right to leave and urged EU Member States to end pushbacks which prevent people from leaving their country of origin, reaching the EU, and exercising their right to seek asylum.[22]

17. **Criminalisation of exit and detention:** Destination States are enlisting countries of origin and transit to stem migration, leading to the criminalisation of exit and detention. In 2022, a complaint was submitted to the ECOWAS Court of Justice challenging Niger Law No. 36/2015.[23] Enacted under EU pressure and in exchange for aid and capacity building, the law criminalises people smuggling, illegal entry and exit, and requires transport companies to verify travellers' documentation. The complaint argued that the law increased border controls and restricted the internal movement of ECOWAS citizens, thereby violating Article 12 of the African Charter and the ECOWAS free movement protocol.

18. Detention and geographical confinement are also being used to contain migrants and prevent onward movement. In frontline States, asylum seekers reside in camps on the Greek Islands and Italian hotspots. In States of origin and transit such as Libya, Indonesia and Turkey,

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1.3257661> accessed 10 June 2025; S McNeill et al, 'Australian Border Force Accused of Targeting Women Suspected of Fleeing Saudi Arabia' *ABC News* (4 February 2019) <https://www.abc.net.au/news/2019-02-04/border-force-accused-of-targeting-saudi-women-traveling-alone/10768036> accessed 10 June 2025.

[18] *LB v Lithuania*, App no 38121/20 (ECtHR, 14 June 2022) [59]–[62], [95]–[96].

[19] See Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (23 November 2018) A/HRC/37/50 [55]; Committee on Migrant Workers, 'Concluding Observations on the Initial Report of Libya' (8 May 2019) CMW/C/LBY/CO/1 [32]–[33].

[20] Human Rights Council (n 19) [54].

[21] ASGI and CIHRS, 'Complaint to the UN Human Rights Committee Over the Role of Italy, Malta, and Libya in Violating the Right to Leave Libya, Resulting in Denial of the Rights of Asylum Seekers' (24 July 2020) <https://www.statewatch.org/media/1267/un-asgi-cihrs-complaint-libya-pull-backs-pr-24-7-20.pdf> accessed 10 June 2025.

[22] E Guild, *The Right to Leave a Country* (Issue Paper, Council of Europe Commissioner for Human Rights 2013) 7–8, 53.

[23] ASGI, 'ECOWAS Court of Justice called to judge the legality of Niger Law No. 36/2015' (22 September 2022) <https://www.asgi.it/en/news/ecowas-court-of-justice-called-to-judge-the-legality-of-niger-law-no-36-2015/> accessed 10 June 2025. The law was repealed in November 2023 following the junta's military coup.

detention is employed as a form of 'territorial containment' to prevent emigration at the behest of Global North States. Asylum seekers may be transferred for offshore processing, such as on the small island of Nauru. Such practices effectively serve as a form of exit restriction.[24]

4. International Responsibility and Accountability

19. When externalisation practices violate the right to leave and other international obligations, States and international organisations may bear international responsibility, whether as the direct perpetrator or for aiding and assisting others.[25]

20. However, even when measures are clearly directed at containing migrants and obstructing departure, such as pullbacks and visa requirements, the right to leave is not necessarily invoked in litigation.[26] There may be valid and strategic reasons why the right has not been raised; however, this omission may hinder accountability.

5. Recommendations

21. The right to leave is a fundamental yet often overlooked right. While the right protects everyone, it is a practical and legal necessity for asylum seekers and refugees. The right holds great potential to remedy accountability gaps and mitigate the harms of externalisation.

22. States, international organisations, and other key entities should:

    a. Cease harmful externalisation and containment policies, and adopt rights-based policies that prioritise the safety and rights of migrants, uphold international law, and promote responsibility sharing.

    b. Limit operations to genuine rescues (as opposed to pushbacks and pullbacks), ensuring that the protection of life is paramount.

    c. Integrate the requirements of the right to leave into migration control policies and practices going forward.

    d. Organise migration and asylum laws and policies so that individuals can exercise their right to leave and seek asylum, ensuring protection from *refoulement*, discrimination, and other violations.

    e. Reduce the need for irregular and dangerous journeys by ensuring the availability and accessibility of safe and regular routes.

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[24] See Guild (n 22) 35–36; A Macklin, 'Exit Rights, Seamless Borders and the New Carceral State' (2024) 73 ICLQ 891, 924–926.
[25] See ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001); ILC Articles on Responsibility of International Organisations (2011).
[26] e.g., *MN v Belgium*, App no 3599/18 (ECtHR, 5 March 2020); *SS v Italy*, App no 21660/18 (ECtHR, 20 May 2025) (inadmissible). cf *SDG v Italy*, Communication to the HRC, 18 December 2019 <https://bordercollective.org/interventions/eu-externalisation-and-orchestration-in-the-central-med/sdg-italy-privatised-pushbacks/> accessed 10 June 2025 (inadmissible).