# EXTERNALISATION OF BORDERS

detention practices and denial of the right to asylum

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# The right to leave any country, including its own, in international law

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Please do not disseminate or mention this text, which is a summary version of the author's contribution "The impact of the Universal Declaration on the 'movement' rights of migrants: the right of everyone to leave each country, including their own, and the right to seek and enjoy asylum from persecution", in Sara Tonolo, Giuseppe Pascale (edited by), the Universal Declaration of Human Rights in contemporary international law, Japanese Publisher, Turin, 2020.

I want to thank the organizers of the Convention and I wish to congratulate with them for their warm welcome. My speech will be divided into two parts: in the first part, as highlighted in the title, I will focus on the right to leave each country, including its own, as an expression of a standard of international law recognized as an agreement between parties and s at customary level; in the second, I will examine the legitimacy of the measures to manage and control the flows undertaken by the countries of origin, in order to verify to what extent the right "of movement" of migrants is now effectively recognized and guaranteed.

## 1. The affirmation of the right to leave each country, including its own, as a rule of international law

The right to leave each country, including its own, has been recognized for the first time in Art. 13, par. of the Universal Declaration of Human Rights, which is, moreover, rather broad in terms. In fact, it has not been subject to particular limitations, except those deriving from Art. 29 (according to which they must be established by law to ensure the recognition and respect of the rights and freedoms of others and to meet the right demands of morality, public order and general well-being in a democratic society), applicable to the exercise of all rights and freedoms contained in the Universal Declaration.

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### 1.1. Follows: *the right to leave each country, including its own, as a rule of agreed international law*

The wording of Art. 13 of the Universal Declaration was subsequently resumed and specified by various international instruments having a binding nature. At the universal level, the essential reference point is represented by Art. 12 of the United Nations Agreement on Civil and Political Rights (the "Agreement"), which introduces an important novelty. It recognizes, in the presence of specific conditions, the possibility of submitting the right under consideration to certain limitations. In accordance with the provision of paragraph 3, the restrictions provided by the law are considered admissible in relation to the need to protect national security, public order, public health or morality, other people's rights and freedoms, consistent with other rights recognized by the Agreement.

Further elements, useful to specify the possibility of subjecting the right to leave any country to restrictions, can be derived from the interpretative activity of the Human Rights Committee, which is the body responsible for exercising international control over the application of the Agreement. In General Comment No. 27, relating to Art. 12 of the Agreement, for example, the Committee has set more stringent parameters, specifying that any limitation, cannot prejudice the essence of the law in question and must comply with the principles of proportionality and adequacy.

It is important to remember that the right to leave each country, including its own, is recognized to anyone – citizens of a particular state and not – and regardless of whether they are legally resident. This means that even irregular migrants in transit countries are entitled to this right.

The right to leave each country has also been reaffirmed in treaties concerning specific rights adopted at universal level (for example, the International Convention on the elimination of all forms of racial discrimination), in conventions which cover specific categories of individuals (for example, diplomatic and consular personnel, whose right to leave the territory of the accredited state is provided for by the Convention on diplomatic relations), in regional instruments for the protection of human rights (for example, the Fourth Additional Protocol to the ECHR, the American Convention on Human Rights and the African Charter of Human and Peoples' Rights), and through the case-law of the control mechanisms provided for by the latter.

The constant repetition of conventional clauses having the right to leave each country, including its own, leads to further reflection. Can this be seen as evidence of the existence of a customary rule of similar content?

### 1.2. Follows: *the right to leave each country, including its own, as a rule of customary international law*

On the basis of the assumption that the manifestations of international practice from which it is possible to induce the existence and content of general rules are many and extremely varied, I believe that it is possible to answer this question in the affirmative way on the basis of three arguments.

The first has to do with the fact that all United Nations Member States are parties to at least one Treaty – whether universal or regional – that confirms the right to leave each country, including its own.

The second concerns the reduced number of reservations placed by the different States to the multiple instruments of practice which provide for the right under consideration, which are often aimed at limiting its scope than at disregarding its existence or making its recognition subject to compliance with the rules of domestic law.

In addition to these events, there are a large number of resolutions and declarations, which recognize the right to leave each country, including its own, adopted in international organizations – I am referring primarily to the United Nations General Assembly – unanimously, by *consensus* or with significant majorities. Reference is made to the New York Declaration on Refugees and Migrants and to the Global Compact for a secure, orderly, and regular migration.

Finally, the general nature of the law in question is further confirmed by the broad recognition of individual national systems, especially at a constitutional level. As far as I am aware, at least 116 States have recognized the right to leave each country, including its own, in their respective constitutions.

Thus, by admitting the customary nature of the law under consideration, what are the legal consequences of this? In my opinion, the most important implication is the position of States in relation to the exit of migrants from the countries of departure and entry into the countries of destination, which, in the most recent times, it has been translated into a practice often aimed at denying the enjoyment of this right by means of measures of different content.

## 2. *The arrangements for regulating flows signed with the States of origin under proof of the right to leave each country, including its own*

Over the last decade, many target States have progressively involved the countries of departure in border control operations through the conclusion – both bilaterally and within the framework of international organizations, such as the European Union – of political agreements and arrangements aimed at intensifying the fight against irregular migration.

In principle, this practice is permissible, although it often has the "side effect" of effectively limiting the right of each individual to leave any country, including its own, which, as we have already said, is guaranteed at universal level by Art. 12 of the Agreement and is now considered part of customary international law. It is, therefore, in the light of the considerations made before we have to assess the legitimacy of this case-by-case practice.

If we look at control measures to prevent and suppress criminal cases related to the phenomenon of migration, such as trafficking in human beings and trafficking in migrants, it is quite clear that they have as their aim the protection of interests – for example, the protection of public order – which allow the right to leave each country, including its own, to be limited in accordance with Art. 12, par. 3, of the Agreement.

Equally legitimate, I believe, are actions to prevent migrants from leaving on board vessels of good fortune, even if the journey does not involve criminal organizations. The limitation is justified by the need to protect the life of the persons on board, as provided for in Art. 6 of the Agreement.

Much more debated, however, is the legitimacy of measures to limit outgoing flows to prevent possible violations of immigration legislation in the destination States. On the one hand, Art. 12, par. 3 of the Agreement seems to consider that only restrictions aimed at protecting the needs of individual

States of origin and not of the countries of destination are permissible. On the other hand, the case-law on this matter (see for example the judgment of the European Court of Human Rights in the case Stamose Vs Bulgaria) – although somewhat limited – it has not been favorably expressed.

In my opinion, the practice of indiscriminately preventing all migrants from leaving the territory of the country from which they transit should be considered completely illegitimate, in the absence of an individual assessment which takes account the need and proportionality of the measure with respect to the aim to be achieved. This view is confirmed in the legislation provided for in the Protocol against the traffic of migrants by land, sea and air additional to the United Nations Convention against transnational organized crime, with particular reference to the provisions of Art. 11. This provision provides for the states that are parties to the Convention to strengthen, as far as possible, the border controls necessary to prevent and detect the trafficking of migrants, without prejudice to international commitments in relation to the free movement of persons.

## 3. Conclusions

What can we say in conclusion? The first observation is that it is undeniable that the right to leave each country, including its own, is now under increased pressure because of the abundant migratory flows that have characterized the last decade. It is equally undeniable that, in order to deal with this phenomenon, States have often implemented containment policies that are contrary to legally binding obligations.

Nevertheless, I think it is quite complex to say that violations of the rights of "movement" of migrants are numerically greater than those of other customary rules, such as the prohibition of discrimination or the prohibition of torture and cruel, inhuman and degrading treatment. Furthermore, it is important to point out that the States accused of violating the right to leave any country, including their own, have tried to justify their conduct not through the denial of the existence of the same, but by asserting the possibility of a legitimate limitation.

These considerations highlight the need today to resist the temptation to attribute a purely theoretical value to this right. In fact, it plays a fundamental role in the international system for the protection of human rights, which could be usefully applied also to the attempts currently in place to develop an effective model for managing migratory flows. The biggest challenge that this phenomenon has posed – and still continues to pose – is to reconcile migrants' "movement" rights as expressions of the right to personal freedom. With the prerogative of the States to establish the conditions of access of foreigners to their territory.