European Vessels, African Territorial Waters and ‘Illegal Emigrants’: The Right to Leave and the Principle of (Il)legality in a Global Regime of Mobility

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1. Introduction

Border control externalises. Current mechanisms of management and control of cross-border movement come into operation long before a migrant is present at or within the territorial borders of the receiving state, in some cases even before that person has left his or her country of origin. The aim of such practices is to stem migration flows at their source and ensure that migrants do not reach the territory of receiving states. A particular instance of police à distance that has received considerable attention recently is the way in which several European Member States have worked together at the sea, intercepting migrants that have departed or intend to depart from the coast of north west Africa. Efforts of Member States in this area are increasingly managed by Frontex, the agency that aims at co-ordination of operational activities concerning external border control by Member States.¹ Several European countries have participated in these operations, such as Spain, Germany, France, Italy, Luxembourg and Portugal. These are based upon bilateral agreements between one the one hand Spain, and on the other hand Mauritania, Cape Verde and Senegal, and implemented in co-operation with these latter states. Member States’ co-operation in the framework of Frontex entails providing material assistance such as ships, helicopters or planes and making available personnel.² During 2006 and 2007, as a result of these policies, thousands of migrants were intercepted in the territorial waters of Senegal and Mauritania, and have been diverted back to the coast of the territories that they attempted to leave.³

Analyses of the legal challenges posed by the interception of migrants, be it in the territorial waters of sending states or the high seas, have predominantly focussed on the rights of refugees and non-refoulement. This strong emphasis on refugee rights whenever externalisation is discussed may give the impression that the interception of mere – often

² For instance, within the framework of Frontex, Luxembourg made available a helicopter to Mauritania. This is based in Nouakchott and undertakes air patrols along the Mauritanian coast. Amnesty International (2008).
³ Id. See also Frontex Annual Report 2006, and documents that it makes available to the press on its website: www.frontex.europa.eu.
called ‘illegal’ migrants – does not raise fundamental questions. However, a focus on the
der wider implications of this specific form of externalisation and the international legal
framework in which it takes place is much called for. Not only does interception of
migrants at sea exemplify in the clearest terms possible that globalisation has caused
heightened mobility for some, while resulting in immobility for others.4 In addition, the
official discourse dealing with interception practices reflects a belief that such
categorisation of movement has a clear and unequivocal basis in the law. In Frontex’s
documents, such as its annual or general report, or the information that it makes available
to the press on its website, the notion of illegal migration seems to have pushed aside the
notion of illegal immigration. These documents raise the impression that its mission is not
merely to co-ordinate Member States efforts to fight illegal immigration in order to protect
the external border, but that the scope of its operations covers a far wider field of
managing and controlling human movement in general.5 However, the use of the term
illegality connotes the individual violation of a legal norm, and the assumption thus made
is that the individuals that attempt to leave the coast of north-west Africa have trespassed
a legal norm.

Therefore, in order to be able to place the current practices of externalisation in a
proper perspective and evaluate these in light of the very terminology of (il)legality, an
overview of the legal norms regulating international movement in general is much needed.
With this paper, I attempt to take a first step towards establishing such an overview by
focussing on the internationally guaranteed right to leave. I believe that an investigation
into the fundamental legal norm contained in Article 12 of the International Covenant for
the Protection of Civil and Political Rights (ICCPR) and Article 2 of the Fourth Protocol to
the European Convention on Human Rights (ECHR) provides an apt starting point for an
overview of the legal framework according to which the remarkable shift from illegal
immigration to illegal migration in European policies has to be evaluated. As such, this
paper is very much work in progress and forms part of ongoing research.

I will set the stage by presenting a short overview of the historical development of
perceptions on the issue of exit. We will see how a right to leave has become inextricably
bound up with modern conceptions of state power, perhaps even more so than other
fundamental rights. Thereafter, I will describe the precise legal obligations that the right to
leave imposes on state parties, with particular emphasis on the permitted restrictions on
the exercise of that right. As externalisation by definition concerns extraterritorial action
by the state, I will also investigate the extraterritorial applicability of the ICCPR and the
ECHR. In the conclusions to this paper, I will touch upon the ways in which some of these
obligations relate to current practices of intercepting migrants; and the (il)legality of
human mobility on the one hand and the (il)legality of its regulation by the state on the
other.

5 Similarly, if seen in this way, we may also question the legal bases (62(2)a and 66 EC) for the
establishment of Frontex, and widen the debate as regards legality by focussing on EC competence in
this field.
The right to leave one’s country is the ultimate form of self-determination. Not to be able to leave a country factually amounts to deprivation of liberty: imprisonment within imagined lines on the surface of the earth instead of incarceration by concrete walls. Centuries ago, the right to leave was already recognised in the Magna Carta of 1215:

In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short time, for the common benefit of the realm.⁶

Thus, the Magna Carta qualified the right to leave: it was made subject to the condition that allegiance to the Kingdom was guaranteed and it provided for restrictions on exit in times of war. The latter sort of limitation is still to be found in present formulations of the right to leave, which I will address below. For now, it is the qualification “preserving his allegiance to us” which deserves closer attention, for that clearly illustrates the changes that the feudal order was undergoing under the influence of the growing powers of European monarchs.

In medieval Europe, the extent of freedom of movement was determined by the feudal order. Many people were tied to territory because of their obligations to their feudal lord. The system of serfdom granted no individual freedom of movement whatsoever as serfs were not allowed to leave their place of employment.⁷ Nonetheless, movement was free for those whose status was free. National borders “were insignificant to the individual traveller, though state boundaries were of warlike concern to rulers.”⁸ In the restriction on the right to leave as formulated in the Magna Carta, only granted to free men, an early shift from feudalism to absolutism can be discerned. The doctrine of perpetual allegiance developed when everybody, in addition to their status in the feudal hierarchy, also became a subject of the King. Consequently, permanent emigration, as we know it now, was theoretically impossible, for it was assumed that a subject could always be recalled to his duties to his King.

The recognition of the qualified right to leave in the Magna Carta of 1215 was only short-lived. It is not to be found in later versions of that document, due to the assertion by later kings of their absolute powers to control exit. The situation was not different in other European countries. From the fifteenth century onwards, feudalism was no longer the defining hierarchical relationship. Henceforth, it would be the relationship between the sovereign and its subjects that determined the extent of actual freedom of movement. In the era stretching from the sixteenth to the eighteenth century, the relationship between people, territory and authority was determined by “mercantilism in the service of

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⁶ Chapter 42 of the Magna Carta of 1215.
⁷ However, serfdom in Europe was an economic relationship between lord and serf which implied that serfs could in theory and sometimes also in practice buy their freedom. See Dowty (1987), p. 25.
⁸ Dummet and Nicol (1990), p. 11.
absolutism⁹ and the right to leave was virtually non-existent. Population was considered a scarce economic and military resource, and rulers, in their efforts to maximise economic growth en military power, prohibited emigration almost entirely.

Nonetheless, in this era, the prohibition of emigration was mainly instrumental in securing a concrete state interest. Conceptions of freedom of movement had nothing to do yet with ideologies such as nationalism, alluding to a deeper, symbolic relationship between people and territory, or other ideological convictions, tying the notions of people and their state to each other in a more profound way. This was reflected by the fact that immigration was in most cases welcomed; European monarchs even attempted to acquire populations from what was for them the outside world.¹⁰

At the end of the seventeenth century, the absolute power of the sovereign came under attack by the idea of natural rights and changing ideas about the location of sovereignty. Whereas before emigration had been considered a matter entirely subject to the discretion of the sovereign, theorists of international law increasingly perceived the right to emigrate as a natural right.¹¹ This was only logical if the idea of political society as a voluntary contract was to be taken seriously. For if every individual must, by free choice, be able to determine whether he wants to be a member of that society, he should also be free at any time to break his ties and leave.¹²

Nonetheless, actual practice of the new regimes that were inspired by enlightenment ideals was not always consistent with the same ideals. In France, restrictions were imposed on freely leaving the country on grounds of national security soon after the Revolution, even though the revolutionary regime had abolished the passport, and in spite of the fact that the right to leave was recognised in the French Constitution of 1791.¹³

However, liberal ideals continued to penetrate governments so that at the end of the nineteenth century it had become possible to leave almost any European state.¹⁴ Very few countries required passports or other documents in order to exit their territories. Their liberal attitude in this regard was not only due to enlightenment ideals that had influenced daily political practice; also the fact that under-population was no longer a problem in these states made those states regard emigration without concern. All European and American states, except Russia, in practice regarded the right to leave as a basic right which was inalienable.¹⁵ When serfdom was finally entirely abolished throughout Europe in the nineteenth century, thousands of people left their homes to sail for the Americas, Australia or Asia. Nonetheless, freedom of movement was typically not granted to

¹⁵ Dowty (1987), pp. 54, 82.
inhabitants of the colonies. It was clearly in the interests of the imperial powers that these
citizens should not leave the colonies. As in many other instances, the rulers applied
liberalism at home, but in Africa and Asia they held on to medieval ideas.

The First World War signalled the end of the liberal era regarding freedom of
movement and caused passports to reappear on the international stage. During the
twentieth century, possession of these documents would develop into a requirement for
lawful exit.\footnote{Hofmann (1988), p. 3; and Torpey (2000), p. 21.} In the twenties and thirties, more and more European countries restricted
their citizens’ possibilities to leave.\footnote{Christie Tait (1927), p. 31} Various factors contributed towards this narrowing
down of the right to leave. Countries were no longer as open to immigration as they had
been, due to xenophobia and racism of their populations and their own nationalistic
aspirations; and the losses caused by the First World War combined with reduced birth
rates made population once again a scarce resource. The restrictions on freedom of
movement however, were not comparable to those in the mercantilist era.

The difference is found in altering conceptions of the relationship between people,
territory and state. Nationalism led to a perception of sovereignty as entailing an
unbreakable and self-evident link between territory, population and authority. National
identity became an instrument to distinguish between us and them. People were defined
by virtue of where they belonged, and cultural or ethnic homogeneity in a state was
something to be aspired. It was nationalism which, if not exactly gave birth to, at least
nourished "the intimate relationship between identities and borders"\footnote{Lapid (2001), p. 10.}. People were bound
to each other and their territory by their ethnicity. For the nationalistic mind a liberal
attitude to emigration is inconceivable: it cannot be possible to choose freely one’s
allegiance with a state or abandon it at will, if such allegiance is conceived as belonging to
a community of individuals bound to each other and ‘their’ land by common identity,
history and ‘blood’.

Moreover, the collectivist ethic proclaimed by many regimes after the First World
War also contributed to a restrictive view on the right to leave. Instead of the ethnic or
cultural homogeneity that the nationalists strive after, collectivism aims at social
homogeneity. Likewise, the collectivist state cannot regard emigration without suspicion.
Leaving the society will inevitably be an act of disloyalty, even treason.\footnote{Dowty (1987), p. 60; and Torpey (2000), p. 124-125.} In addition, it
becomes difficult to maintain that the interests of the citizens are the same as those of the
state when these citizens are leaving the country en masse. Finally, a regime sustained by
coercion or in which there is no room for dissent can presumably only survive by
restricting exit.\footnote{Dowty (1987), p. 60.}

After the Second World War, the idea of natural rights revived. Human rights, as
they were called now, were codified and one of them was the right to leave. Over time, the
right to leave was laid down in binding human rights treaties, as we will see below. The
codification of the right to leave in all major human rights instruments shows that it had become a right generally recognised in international law. However, perhaps the most immediate effect of this codification was that the practice of a substantial number of countries was only the more striking. The most obvious violators of the right to leave were the Communist countries: while the collectivist ethic inspired by the extreme right had not survived the Second World War, its counterpart on the other side of the political spectrum had expanded.

None of the countries united by the Warsaw Pact recognised the right to leave as a human or constitutional right. Instead, it was regarded by these countries as a favour, the granting of which fell wholly within the sovereign state’s discretion. This did not mean, however, that policies regarding exit permits were the same in all these countries; neither were they equally restrictive. The erection of the Berlin Wall in 1961 was the ultimate illustration of the Communist view on freedom of movement. In time it became easier for citizens of the East-Bloc countries to visit other countries of the ‘socialist world system’, but permission for this kind of travelling was by no means obtained as a matter of course. Moreover, although travel to the West increased over time, the right to leave was definitely not recognised as such for the purpose of visiting Western countries or for emigration. The German Democratic Republic was, according to its penal code, able to persecute those seeking official permission to emigrate for the crime of “incitement hostile to the state”. Its constitutional legal doctrine justified the lack of a basic right to emigrate by the socialist government’s concern for each of its citizens: Allowing a citizen to emigrate to the West “was tantamount to delivering him up to an imperialist, aggressive and anti-social system of exploitation”. In addition, East German policy of prohibiting its citizens to visit Western countries was defended on the grounds that the Federal Republic did not recognise the citizenship of the German Democratic Republic.

In Russia, the right to leave had never been recognised, not even before the Communist era. After serfdom was abolished in 1861 in Russia, the former serfs had lived in village communities, from which no-one could leave without communal permission. Communist ideology strengthened traditional restrictive notions concerning the right to leave to such an extent as to equal it with treason. For other East-Bloc countries,

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21 Brunner (1990), p. 204.
26 The Federal Republic maintained that an all German nationality still existed and accorded West German identity papers to all East-Germans who applied for such documents. See Turack (1979), p. 110-111.
27 Dowty (1987, p. 208) argues that Communist countries applying restrictive exit policies are copying from the Soviet Union policies that are not so much Communist as Russian. This would explain the relative absence of such strict policies in countries with related ideologies but less political links to the USSR if compared to those countries heavily under Soviet political influence, such as the countries of the Warsaw Pact.
restrictive views on the right to leave were a result both of their ideologies and economic considerations. These countries had an interest in population building in general, and having educated professionals at their service in particular. The fact that these countries were closely linked to Western Europe and had in the past been relatively open, would have made it easier for their population to cross borders in pursuit of more rewarding opportunities then it was for Soviet nationals. If these countries had permitted free immigration, presumably a large part of their population would have left for the West.

Despite the international obligation of countries to permit citizens and others to leave their territory as laid down in inter alia the ICCPR and the UDHR, the reality of East-Bloc practice was acknowledged in the Helsinki Accord. The Helsinki Accord proclaimed that the participating states should act in accordance with the purposes and principles of the UDHR, and that they should fulfil their obligations as set forth in international human rights instruments by which they are bound. It seems to be in direct contradiction with this statement that the Helsinki Accord then, instead of recognising a general right for citizens to leave their country permanently, requires the signatories solely “to facilitate freer movement on the basis of family ties, family reunification, proposed marriages and personal or professional travel.” Furthermore, the document merely enumerates certain ‘obligations’ for states to achieve this aim, which are not exactly far-reaching, and do certainly not reflect what contracting states committed themselves to under the ICCPR.

The Helsinki Accord could be described as realpolitik in view of the East-West relationship during the Cold War, seeking to improve practice of the Communist states in the area of human rights in a manner open to political compromise. Nevertheless, Western countries continued to express indignation over the denial of the right to leave in diplomatic relations. The United States did so by according most-favoured-nation treatment only to those non-market countries which did not deny or make impossible for their citizens the right or opportunity to emigrate.

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28 Dowty (1987), p. 116. Evidently, this was especially so with regard to emigration from East Germany to West Germany. See also Reinke (1986), p. 665.


30 Turack (1978), p. 44.

31 The legal status of the Helsinki Accord was unclear, as it was not a treaty, and could not be registered as such. See Schermers (1977), p. 801; and Martin (1989), p. 556.

32 Reinke (1986), p. 658; and Martin (1989), pp. 556-557, who argue that such a strategy of realpolitik was effective in securing increased protection of individual rights in this area.

33 Turack (1979), p. 104; and Lillich (1984a), pp. 149-150. The consequence for a country which denied its citizens the right or the opportunity to emigrate was not only that it was not eligible for most-favoured-nation treatment, but it could neither receive US credits, credit guarantees, investment guarantees, nor conclude a US commercial agreement. The legislation led to the end of the first period of détente between the US and the Soviet Union as the latter regarded it as an interference in its internal affairs (Gabor, 1991, p. 853-854), but at the same time it caused liberalisation of China’s emigration policies (Dowty, 1987, p. 234).
should be free on the western side of the border wall, i.e. possible without passport or customs control. Most people who managed to leave Communist countries were accepted as political refugees by the Western democracies, although many of them were also motivated by economic considerations instead of purely political reasons.

Other countries that breached their obligations with regard to the right to leave after the Second World War were developing countries and dictatorships. After decolonialisation, the former colonies embarked on a process of nation building, a process perceived as necessary in view of the fact that the territories of many of these countries were determined by boundaries which did not reflect cultural, linguistic or ethnic divisions. The policies of the ruling class to strengthen national unity often consisted in targeting these groups that did not fit in with their image of national unity. This inevitably caused conflict, internal struggle and civil war, which in turn produced refugees and displaced persons. Developing countries however, while on the one hand producing great numbers of refugees, were on the other hand not always happy to lose parts of their population, especially if these consisted of educated people seeking a better future in the developed world. Thus, in some of those countries, restrictions on exit were put into place and justified by invoking the problem of so-called brain-drain. Their policies of restricting exit – while at the same time carrying out forced expulsions – could be explained by the ruling elite’s wish to sustain their illegitimate rule, economic motivations and their ideas of nation-building. However, there are many developing countries that, although they have repeatedly expressed concerns over brain drain, do not resort to prohibiting emigration. Countries that deny the right to leave, such as for example Burma under military rule, and Iran under the Shah and the Ayatollahs appear to do so more as a result of their ideology and dictatorial practices.

The Cold War also influenced the exercise of the right to leave for numerous citizens of Western States. Since 1918 it had been illegal to leave the United States without a passport, the issuing of which fell under the competence of the State Department. In the 1950’s it was usual for the State Department to deny passports on the basis of individual political beliefs. Refusals were frequently not sufficiently motivated and the Internal Security Act of 1950 even prohibited the issuing of passports to members of the Communist Party. The State Department held that its decisions, being an exercise of governmental foreign policy powers, could not be reviewed by the judiciary. Consequently, during this period, the right to leave the United States lost its character as a

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34 Turack (1979), p. 113. This practice was defended by the view of France, Britain and the US that Berlin was under joint command of the Allies and should not be a divided territory. The GDR also insisted that East Germans were not required to have an passport in order to enter West Germany because the frontier between the two states was not an external border. See Torpey (2000), p. 147.

35 A famous example is Idi Amin’s expulsion of 40.000 Asians from Uganda in 1972.


fundamental right, and factually assumed the character of a favour, the granting of which fell wholly within the discretion of the State Department.

However, decisions of the State Department were regularly challenged in court, and the Supreme Court ruled in 1958 that the right of exit is a part of the “liberty” of which is a citizen cannot be deprived without due process of law under the Fifth Amendment.\(^{39}\) In 1964, that same Court ruled that political belief alone was not a sufficient reason for the denial of the right to leave and it held that the Section of the Internal Security Act which forbade the issuing of passports to members of the Communist Party was unconstitutional.\(^ {40}\) Nevertheless, the decision of the Secretary of State to revoke the passport of a former CIA agent who disclosed information concerning US intelligence activities was upheld by the Supreme Court, stating that national security and foreign policy considerations were superior to the freedom to travel abroad and that the latter right could therefore be made subject to reasonable government regulation.\(^ {41}\) Furthermore, the restriction of travel to certain areas by invalidating passports for travel to specific countries was not deemed illegitimate by the Supreme Court, if it was justified by considerations of national security or foreign policy.\(^ {42}\)

In 1989, a revolution, peaceful in character but nonetheless a revolution in view of the deep and abrupt transformations it brought about, changed the political landscape of Central and Eastern Europe. One of the first manifestations of these changes was the exercise of the right to leave.\(^ {43}\) Hungary was the first nation that demolished a part of the Iron Curtain on its Austrian border. When Hungary, in September 1989, allowed East Germans to leave to the West through that border, East Germans had for the first time since 1961 a real possibility to leave their country. Consequently, thousands of them reached West Germany through Hungary and Czechoslovakia, where the Iron Curtain had been dismantled as well. In view of this exodus, Honecker decided to ease travel restrictions in East Germany, hoping that if East Germans were openly given the possibility to emigrate, many might choose to stay.\(^ {44}\) However, East Germans continued to leave by the thousands and after Honecker’s resignation, the new leadership in East-Germany confirmed the right of free and unrestricted travel. As the Berlin wall had been “the foremost symbol of the denial of the basic human right of self-determination”,\(^ {45}\) its opening up on 9 November 1989 can be seen as symbolic of the reassertion of this right for the people living in the former East-bloc countries.\(^ {46}\)

Similar changes in the Soviet Union were not waited upon for a long time. Already under Gorbachev’s policy of glasnost, traditional Soviet views on emigration were


\(^{46}\) See Turack (1993, pp. 292-302) about the changes in the practice of these countries.
changing. Such altering views were most obviously expressed in the easing of travel restrictions for one group of Soviet citizens who had perhaps suffered most seriously under the denial of the right to leave, the Soviet Jews.47

Yeltsin brought about the collapse of communism in the Soviet Union and under his rule the Soviet Union dissolved into various republics. These new states formally recognise the right to leave. The Conference on Security and Co-operation in Europe, which organisation found its origins in the Helsinki process, has paid considerable attention to the right to leave, also after 1989, and the importance of freedom of movement was confirmed by the Charter of Paris for a New Europe.48 The revolutions of 1989 in East and Central Europe and the changes in the Soviet Union reasserted ideals that had been proclaimed as the Rights of Man in the past and that were now called human rights.

The preceding paragraphs have briefly recounted that, in the course of history, restrictions on exit have been justified by considerations about the nature of political authority, and later, more specifically by the interests of the sovereign state. From modernity onwards, views on a right to leave were grounded in secular ideologies, such as allegiance to the King, nationalism, and in the era after the Second World War, collectivism in the name of communism. Below, I will investigate how the contemporary regime of international human rights regulates the issue of exit.

3. International legal framework of the right to leave

The right to leave any country, including one's own, is laid down in the UDHR, the first international document in which human rights were codified after the Second World War. The right to leave was also codified in human rights instruments of a later date with binding force, such as the ICCPR; the Convention on the Elimination of Racial Discrimination;49 the ECHR; the African Charter of Human and People’s Rights; and the American Convention of Human Rights.50 In the following paragraphs, main emphasis will be on the legal framework of the right to leave as established by the ICCPR and the ECHR.

47 The Jews in the Soviet Union were not completely denied the possibility to leave at all times since the Second World War, but it was very difficult and at times impossible to get permission to emigrate to Israel. This policy seems not to have been motivated only by Soviet ideology, but also by the Soviet Union's wish to maintain good relations with the Arab states.


49 In this treaty the right to leave is not guaranteed as such, but Article 5 states that the right to leave should be enjoyed without discrimination on the grounds of race, colour, or national or ethnic origin.

50 There are more international binding documents which have a bearing on the right to leave, such as the 1951 Convention on Refugees, the 1961 UN Convention on the Elimination or Reduction of Statelessness. See Nanda (1971), pp. 112-113. Another example is the European Social Charter: in
Article 12(2) ICCPR and Article 2 of Protocol 4 ECHR guarantee the right to leave in identical terms. They read as follows:

Everybody shall be free to leave any country, including his own.

The right to leave should be protected for nationals and non-nationals alike. Furthermore, the right to leave puts obligations on both the state of residence and the state of nationality because in many states possession of a passport is a requirement for lawful exit. Accordingly, the state of nationality is under a positive obligation to provide a passport, whereas the state of residence is under the (mainly) negative obligation to permit exit.\(^{51}\)

Neither the ICCPR, nor the ECHR accord the individual an absolute right to leave. Certain circumstances may justify restrictions on the right to leave. However, according to the UN Human Rights Committee, these are exceptional circumstances, and restrictions may not impair the essence of the right.\(^{52}\) In a similar vein, the CSCE Declaration of the Copenhagen Meeting of 29 June 1990 states that restrictions on the right to leave must be very rare exceptions, only necessary if they respond to a specific public need, pursue a legitimate aim, are proportionate to that aim and are not abused or applied arbitrarily.\(^{53}\) The Strasbourg Declaration on the Right to Leave and Return emphasised that restrictions on the right to leave must be construed narrowly.\(^{54}\) Moreover, it declared that such

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restrictions should be subject to international scrutiny, in which the burden of justification lies with the state. Indeed, Article 13 ECHR and Article 2(3) ICCPR require an effective remedy whenever someone presents an arguable complaint that his or her right to leave has been violated.

When examining the permissible restrictions on the right to leave, it will become apparent that the scope of that right in particular relies heavily on the relationship between people, territory and authority. Whereas human rights in general can be described as claims of the individual concerning his or her relationship to authority, the right to leave has a very direct bearing on that relationship. After a person has left, the state is in most cases neither capable nor competent to exercise jurisdiction over that person. That specific characteristic of the right to leave, taken together with the fact that freedom of movement in general may have great impact on social and economic circumstances in a country, in many cases constitute the ratio behind possible restrictions.\textsuperscript{55}

Paragraph 3 of Article 12 ICCPR:

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 recognised in the present Covenant.

In Paragraph 4 of Article 2 of the Fourth Protocol ECHR, the limitation clause with regard to the right to leave is framed in a slightly different manner, similar to the way in which exceptions to fundamental rights are generally formulated by the ECHR:

No restrictions shall be placed on the exercise of these rights other than such are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of “ordre public”, for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

In spite of obvious differences in wording, it can be assumed that both limitation clauses have the same scope and effect.\textsuperscript{56} The denial or seizure of a passport or other necessary travel documents constitutes a direct interference with the right to leave and in order to be legitimate such interference needs to satisfy the requirements for the permissible restrictions.\textsuperscript{57} Also indirect limitations on the right to leave, such as restrictions

\textsuperscript{55} See Cassese (1975), p. 222.

\textsuperscript{56} Nowak (1993), p. 212.

on the export of foreign currency or high costs for obtaining the necessary documents need to satisfy the requirements of Article 12 ICCPR or Article 2 Protocol 4 ECHR.\textsuperscript{58}

Restrictions on the right to leave need to be in accordance with (ECHR), or provided for by (ICCPR) law: the source of the restriction should be a general rule.\textsuperscript{59} This requirement should be understood as to refer to substantive law. Instead of embodying a purely formal requirement it also calls for a certain qualitative standard of the laws in question, which should be accessible and foreseeable.\textsuperscript{60} The so-called legality requirement arises from the claims of a society based on the rule of law and serves to prevent arbitrary and discriminatory practices.\textsuperscript{61}

The prohibition of discrimination in general plays an important role with regard to freedom of movement, and there will clearly be a violation of Article 12 ICCPR or Article 4 Protocol 2 ECHR, if there is not an objective justification for differences in treatment between persons exercising their right to leave.\textsuperscript{62} It is not accidental that the Sub-Commission on Prevention of Discrimination and Protection of Minorities has paid considerable attention to the right of freedom of movement.\textsuperscript{63} The emphasis on discrimination in this area is understandable: contemporary history has shown time and again that the extent of the right to leave depends on sovereignty’s link with matters of identity.

The ECHR and the ICCPR allow only for exceptions on the right to leave that are necessary in a democratic society. The ICCPR does not use the words "democratic society", but it can be assumed that the word necessary refers to that concept.\textsuperscript{64} The most important component of the necessity-requirement is that restrictive measures must abide

\textsuperscript{58} But see ECommHR, S. v. Sweden, Decision of 6 May 1985, D&R 42, p. 224, in which it was decided that the right to take property out of a country is not embodied in the right to leave.


\textsuperscript{63} The first substantive study that was requested by the Sub-Commission focussed on discrimination with regard to freedom of movement. See Inglés (1963), fn 61. See also the Inglés, Draft Report of the Special Rapporteur: Study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country, Draft Report submitted by the Special Rapporteur J.D. Inglés, E/CN.4/Sub.2/L.234 (13 December 1961), hereinafter Inglés (1961).

\textsuperscript{64} Partsch (1975), p. 261. The requirement that restrictions on the right to leave are compatible with other rights guaranteed by the Covenant supports this assumption.
by the principle of proportionality: They must be appropriate to achieve the legitimate aims enumerated in the provisions; they must be the least intrusive measure available to achieve those aims; and they should not place a disproportionate burden on the individual concerned when compared with the aim to be achieved.\textsuperscript{65} The principle of proportionality in the human rights context means that restrictions can never be applied generally, but their legitimacy must be assessed on a case by case basis.

Proportionality should not only be guaranteed in the laws dealing with restrictions on the right to leave, but administrative and judicial authorities are also bound to respect this principle, which implies inter alia that proceedings relating to the exercise of the right are expeditious and that subsequent decisions are sufficiently motivated.\textsuperscript{66} Necessity has also been interpreted as to imply a pressing public and social need, for example by the Special Rapporteur in his Draft Declaration on the Right to Leave.\textsuperscript{67} It is not hard for a state to maintain that restrictions on the right to leave fall under one of the enumerated state interests, but the requirement of proportionality prevents a too extensive use of these state interest in order to justify interferences.\textsuperscript{68} In addition, in the ICCPR, the requirement that limitations on the right to leave must be in accordance with the other rights guaranteed in the ICCPR could well be adopted in order to avoid such extensive use of the permissible grounds for restriction that codification of the right to leave would in effect be rendered meaningless.

Problems of interpretation have played a role especially with regard to the concepts of national security and public order, while to a much lesser extent with regard to the protection of health and morals and the rights of others.\textsuperscript{69} It is argued that national security as a general ground for restricting exit should only be invoked in the case of a political or military threat to the entire nation.\textsuperscript{70} However, the drafters of the ICCPR seem to have been primarily concerned with the control over military personnel.\textsuperscript{71} Also other persons with access to “sensitive” information regarding the military or security of the


\textsuperscript{66} HRC, General Comment 27 (Sixty-seventh session 1999) at 15.

\textsuperscript{67} Article 7(c) of the The Draft Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, Mubanga-Chipoya (1988b), at fn 53.

\textsuperscript{68} The first draft of Article 12 ICCPR contained an exhaustive list of all grounds of restriction. Nowak (1993), p. 206; and Jagerskiold (1981), p. 171


state may be subjected to wider restrictions with regard to freedom of movement than ordinary citizens.\(^{72}\)

Furthermore, a person may be prevented from leaving the country with the purpose of ensuring security against the international spread of diseases, a restriction based on public health considerations, which must be temporary.\(^{73}\) It is difficult to think of permissible restrictions on exit based on morality,\(^{74}\) although public health and morality can be of significance with regard to internal freedom of movement, an issue that is also regulated by Article 12 ICCPR or Article 4 Protocol 2 ECHR. The rights and freedoms of others can also constitute a ground on which the right to leave can be restricted. Restrictions of this kind will be justifiable if someone is not willing to fulfil contractual obligations or trying to escape family maintenance obligations by leaving the country.\(^{75}\)

Public order or ‘ordre public’ is the most elusive of all the permissible grounds for restriction. It is a broad conception of public order which applies in Article 12 ICCPR and Article 2 Protocol 4 ECHR, entailing “all those universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based.”\(^{76}\) The grounds of public safety and the prevention of crime in the ECHR are included in the concept of public order as understood by the ICCPR. Someone who is suspected of or sentenced for committing a crime may be prevented from leaving the country,\(^{77}\) just as persons who are detained with a view of bringing them before the competent legal authority.\(^{78}\) However, in the case that those judicial proceedings are unduly delayed, restrictions on the right to leave cannot be said to serve public order.\(^{79}\) The lawful detention of persons for other reasons, for example in a labour institution, also constitutes a permissible ground for restricting the right to leave.\(^{80}\) The legality of restrictions on exit


\(^{74}\) Nowak (1993), p. 216. Prevention of traffic in persons for the purpose of prostitution is said to fall in this category. See Mubanga-Chipoya (1988a), at fn 62, p. 56; Jagerskiold (1981), p. 179; and Hofmann (1988), p. 312. However, it would make more sense to base such restrictions on more tangible grounds such as the prevention of crime, or the protection of the rights and freedoms of others, in this case.


on the grounds of outstanding public debts, such as taxes, is questioned by some authors.\textsuperscript{81} It is argued that, since imprisonment for inability to fulfil contractual obligations is not allowed in international human rights law, it can neither be a reason for prohibiting exit. However, this argument loses sight of the fact that the international legal protection of the right to personal liberty differs from the international legal protection of the right to freedom of movement. Furthermore, as the proportionality of restrictions on exit of this kind can be easily reviewed, I would not necessarily conclude that they are illegal.\textsuperscript{82}

Much more difficult to assess are restrictions based on considerations of a general character about the well-being of the state, such as economic considerations or grounds connected to migration and population policies.\textsuperscript{83} Restrictions on exit to prevent brain drain is one example of a broad application of the concept of public order. The fact that restrictions must always be justified on the grounds of proportionality and necessity in each individual case makes it difficult to maintain that far-reaching restrictions on such general grounds are permitted. Caution is particularly warranted in these cases, precisely because measures of this kind are only meaningful if they target a whole group, instead of one individual. We have seen that interferences with the right to leave must be narrowly interpreted exceptions to a general rule permitting exit and that discriminatory practices are forbidden. In addition, the outflow of professionals from developing countries often has to do with the lack of adequate possibilities for them in these countries. There is lack of effective demand for educated professionals in developing nations, although an almost unlimited need exists.\textsuperscript{84} Hence, it has been argued that restrictions on exit in such a situation do not seem to provide a solution to the problem of brain drain, and their necessity has been severely doubted.\textsuperscript{85}

\textsuperscript{82} Cf. the travaux preparatoires of Article 12 ICCPR; see Mubanga-Chipoya (1988a), at fn 62, p. 53, 54.
\textsuperscript{83} See Hofmann (1988), p. 43; and van Dijk en van Hoof (1998), p. 670. The majority of the Committee of Experts on Human Rights preparing the ECHR Protocol was against the inclusion of a provision permitting restrictions on the ground of economic welfare. See Explanatory Report, par. 15, 16 and 18. Similarly, grounds such as general welfare and economic and social well-being of the state were proposed by some representatives in the Commission of Human Rights when drafting Article 12, but they were rejected because they were considered to be too far-reaching. Inglés (1963), at fn 61, Annex IV, Development of Article 12 of the Draft Covenant on Civil and Political Rights, p. 2.
\textsuperscript{84} Mubanga-Chipoya (1988a), at fn 62, p. 84. See also the Recommendation of the Meeting of Experts on The Right to Leave and Return to One’s Country, Attached to the Strasbourg Declaration on the Right to Leave and to Return, International Institute of Human Rights (1987), at fn 54, p. 483-484.
\textsuperscript{85} Jagerskiold (1981), p. 178; and Higgins (1973), p. 354. According to Special Rapporteur Inglés, restrictions of this kind are only justified in times of war or national emergency, but not in normal times. Inglés (1961), at fn 63, p. 31.
4. Extraterritorial applicability of human rights instruments

Externalisation takes by definition place outside Member States’ territories. Both the ICCPR and the ECHR provide that the state is to ensure individual rights protection to anyone under its jurisdiction. In this section I will discuss the approach that the Strasbourg institutions have taken towards extra-territorial application of the Convention, as well as the way in which the Human Rights Committee has dealt with the question of extra-territoriality. Taking into account the object and purpose of human rights obligations of national states, there is no a priori reason why they should not be held responsible for violations attributable to them that occurred outside national territory. Both the European Commission for Human Rights and the ECtHR have repeatedly held that in certain instances the national state can be held responsible for actions of its authorities outside its national territory, as the term jurisdiction is not limited to the national territory of the contracting states. According to the Commission, “it is clear from the language [...] and the object of [Article 1] and the purpose of the Convention as a whole, that High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.”

Apart from the situation in which it has occupied foreign territory, a state can be held responsible for violations of the Convention rights and freedoms of persons who were in the territory of another state, but who were “found to be under the former state’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter state.” Before the Bankovic Case, the case law of both the Strasbourg Commission and the Court show that in order to engage a state’s liability under the ECHR, overall exercise of jurisdiction is not always required, and even a specific act committed abroad is capable of bringing a person within the jurisdiction of the state to which that act can be

86 Article 1 ECHR, Article 1 American Convention on Human Rights, Article 2 ICCPR.
88 ECtHR, Drozd and Janousek v. France and Spain, 26 June 1992, A-240; EcommHR, Hess. v. United Kingdom, Decision of 28 May 1975, D&R 2, p. 72. In particular, actions by a state’s consular and diplomatic representatives may involve the liability of a national state under the ECHR. See EcommHR, X. v. Germany, Decision of 25 September 1965, Yearbook of the European Convention on Human Rights 8, p. 158; and Lush (1993), p. 898. In Drozd and Janousek, the Court accepted that France had limited its jurisdiction ratione loci by a declaration under Article 63, but it concluded that it exercised jurisdiction ratione personae. Lush (1993) concludes that the Convention thus seems to be “hybrid, not without a measure of internal consistency.”
attributed. According to UN Human Rights Committee, the meaning of the term jurisdiction is not to be equated with territorial competence, but it should also cover extra-territorial acts by the state or its agents that violate the fundamental rights protected by the ICCPR outside national territory.

This broad interpretation of the term jurisdiction, taking as a starting point the “relationship between the person affected and the state concerned, not [...] the geographical location of the violation” may perhaps not reflect the ordinary meaning of jurisdiction in international law, but it is consistent with the object and purpose of international human rights documents. When the term jurisdiction is used in international law to discuss the relationship between states amongst each other, it is clear that its scope is limited by the sovereign (territorial) rights of other states. The concept of jurisdiction in human rights documents in contrast should be understood as having a direct relationship with the rules concerning state responsibility in international law, which determine that responsibility derives from control. This line of reasoning is confirmed by the Commission’s observations in Stocké:

“An arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not [...] only involve State responsibility vis-à-vis the other State, but [it] also affects that person’s individual right to security under Article 5(1) : The question whether or not the other State claims reparation for violation of its rights under international law is not relevant for the individual right under the Convention.”

Thus, although a state’s jurisdictional competence is primarily territorial, responsibility for violations of fundamental rights is not restricted to national territory. Case law of the Strasbourg organs and the HRC make clear that responsibility ratione personae for extra-territorial acts, although it may not be as straightforward to establish as responsibility ratione loci, is not exceptional.

However, in Bankovic, the ECtHR seemed to depart from some of the principles that were deemed established jurisprudence by both the Commission and the Court. The application originated in the 1999 NATO bombing of Radio Televizije Srbije in Belgrade and was lodged by one individual who had been injured by the bombing and five surviving

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94 Altiparmak (2004), p. 239.
relatives of those killed by it. They alleged that by bombing the Serbian Television Station, the respondent States had violated Articles 2, 10 and 13 of the Convention. The Court declared their application inadmissible as it was not satisfied that the applicants and their deceased relatives were within the jurisdiction of the respondent states on account of the extra-territorial act in question.\textsuperscript{96} Although it has been argued that the Court’s conclusion can be supported on the ground that the NATO did not at any moment assert authority or exercise control over the individuals,\textsuperscript{97} the decision of the Court was framed in much wider terms that departed from the stance that the Strasbourg bodies had previously taken towards the question of extra-territorial jurisdiction.

In the first place, the Court referred to the 1969 Vienna Convention in order to ascertain the “ordinary meaning” of the term jurisdiction. It went on to state that, from the perspective of international law, the jurisdictional competence of a state is primarily territorial. If extra-territorial jurisdiction is exercised, the suggested bases of such jurisdiction are, according to the Court, defined and limited by the sovereign territorial rights of other states.\textsuperscript{98} It concluded that “Article 1 of the Convention must be considered to reflect this ordinary and essential territorial notion of the term jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.”\textsuperscript{99}

In reaching this conclusion, the Court referred to its previous case law, which “demonstrates that the recognition of the exercise of extra-territorial jurisdiction is exceptional: [the Court] has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally ascribed to that government.”\textsuperscript{100} It is unfortunate that the Court did not refer to decisions of the ECommHR, such as the above cited \textit{Stocké Case}, where the question as to whether the extra-territorial act occurred with or without the consent of the state on whose territory it took place was deemed irrelevant for the interpretation of Article 1.

The Court’s adherence to the ordinary meaning in international law of the term jurisdiction in \textit{Bankovic}\textsuperscript{101} is problematic for a number of reasons, such as involving a danger “to embroil the Court in disputes as to whether a state has acted lawfully or unlawfully”.\textsuperscript{102} More fundamentally, it adheres to an understanding of the territorial sovereignty that thwarts international human rights law’s underlying principles.

\textsuperscript{96} \textit{Bankovic v. Belgium} (inadmissible), 12 December 2001, Reports 2001-XII, par. 82.
\textsuperscript{97} Happold (2003), p. 90 who calls it the right decision for the wrong reasons. The right decision as there was no structured relationship between the NATO and the victims of the bombing, who were rather unfortunate enough to be in a building targeted by NATO forces.
\textsuperscript{98} \textit{Bankovic v. Belgium}, 12 December 2001, par. 60.
\textsuperscript{99} Ibid. par. 61.
\textsuperscript{100} Ibid. par. 71.
\textsuperscript{102} Happold (2003), p. 83.
In the second place, the Court’s interpretation of previous cases that were decided or pending is problematic. It stated that in the admissibility decisions in the cases of Issa,103 Öcalan,104 and Xhavara,105 the Respondent States did not raise the jurisdiction issue.106 Apart from the fact that the absence of claims by the parties concerning admissibility has not impeded the Court from addressing the issue of admissibility, the circumstance that the respondent states refrained from raising admissibility objections that were related to the jurisdiction issue may also indicate that state practice shows altering views concerning the "ordinary meaning" of the term jurisdiction.

But it is the Court’s referral to its judgment in the Cyprus v. Turkey Case107 that is perhaps most unsettling. Its observation in the latter case that there was a need to avoid "a regrettable vacuum in the system of human rights protection" in Northern Cyprus was to be read in the territorial context of that case:

"[...] the inhabitants of Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey’s effective control of the territory and by the accompanying inability of the Cypriot government, as a contracting state, to fulfil the obligations it had undertaken under the Convention."108

It went on to state that the desirability of avoiding a vacuum in human rights protection has so far been relied on the Court in order to establish jurisdiction solely with regard to territories that would normally be covered by the Convention. Accordingly, the Court excluded the Federal Republic of Yugoslavia from the legal space in which contracting states have to ensure respect for the Convention, even in respect of their own conduct. This analysis has been criticised as turning an argument that was originally intended to expand the court’s jurisdiction into one that limits extra-territorial jurisdiction.109 However, when deciding on the merits of the Issa Case,110 the Court

103 ECtHR, Issa and others v. Turkey (Admissible), 30 March 2000, Appl. nr. 31821/96.
105 Xhavara and others v. Italy and Albania, 11 January 2001, Appl. No. 39473/98. In this case, a violation of the right to leave on account of pre-border controls was also asserted, but the Court did not consider that the right to leave was interfered with as the measures complained of did not deprive the applicants of the right to leave Albania, but were to prevent them from entering Italian territory.
106 Bankovic v. Belgium, 12 December 2001, par. 81. It also mentioned the admissibility decision in the case of Illascu. In the latter case, the Court stated that responsibility under the Convention may also arise when a state exercises effective control of an area outside its national territory as a consequence of military action. However, the Court did not draw any conclusion on the jurisdiction issue as it found it too closely bound up with the merits of the case that it would be inappropriate to determine them at the admissibility stage. See Illascu and Others v. Moldova and Russia (admissible), 4 June 2001, Reports 2004-VII.
107 Cyprus v. Turkey, 10 May 2001, Reports 2001-IV.
seemed to mitigate its restrictive interpretation of the term jurisdiction again. This time it
did refer to some of the cases decided by the HRC and former decisions of the ECommHR,
and it declared that a state may be held accountable for violation of Convention rights of
persons "who are in the territory of another state but who are found to be under the
authority and control of the former state through its agents operating – whether lawfully or
unlawfully – in the latter state."\footnote{\textit{Issa and others v. Turkey}, 16 November 2004, Appl. nr. 31821/9. Worth noting that the Turkish
Government submitted post-admissibility observations contending that in Bankovic the Court had
departed from its previous case law on the scope of interpretation of Article 1. See par. 52 of the
judgment} However, the Court concluded that the applicants came
not within the jurisdiction of Turkey as they could not prove that the Turkish armed forces
had conducted operations in the area were the alleged violations took place.\footnote{Ibid. par. 71.}

Also in its judgment on the merits in the \textit{Öcalan case}, the Court referred to the
ECommHR decision in \textit{Stocké}.\footnote{\textit{Öcalan v. Turkey}, 12 March 2003, Appl. No. 46221/99, par. 88.} According to the Court, the \textit{Öcalan case} was to be
distinguished from \textit{Bankovic} as the "applicant was physically forced to return to Turkey by
Turkish officials and was subject to their authority and control following his arrest and
return to Turkey."\footnote{Ibid. par. 93. See also \textit{ECtHR, Hussein v. Albania and others} (Inadmissible), 14 March 2006, Appl.
No. 23276/04, where the Court decided that the arrest of Saddam Hussein in Iraq did not fall within
the jurisdiction of the respondent European States as he had not substantiated any evidence of a
jurisdictional link between himself and those States.} When it decided on the merits in the \textit{Ilascu Case}, the Court again
stressed the ordinary meaning of the term jurisdiction in public international law and
referred to \textit{Banković} to stress the prevalence of the territorial principle in the application of
the Convention. However, it added that the concept of "jurisdiction" is not necessarily
restricted to the national territory of the contracting states.\footnote{\textit{Ilascu and others}, 8 July 2004, par. 310-314.}

\section{5. Conclusions: Fundamental rights and the regulation of human mobility}

In 2006, Spain and Senegal reached agreement over joint patrols commandeered
by two vessels of the Spanish Guardia Civil in Senegal’s territorial waters.\footnote{Source: Reuters, 22 August 2006} In August
2006, a Portuguese patrol vessel arrived at Cape Verde for a 45-day mission against
‘illegal’ migration.\footnote{Source: JeuneAfrique, 12 August 2006.} Since June 2006, several Spanish boats patrol Mauritanian territorial
waters, in order to prevent ‘clandestine emigrations’. These policies have the declared aim
of being a deterrent for people who want to leave: "L’objectif est dissuasif. Il faut que les
candidats à l’émigration réalisent que les pays Européens sont là, bien présents, et qu’ils
ne pourront pas partir." Much of this co-operation is increasingly managed by Frontex, which also provides technical assistance in these operations, in which several Member States participate, in close co-operation with local authorities. In the conclusions to this paper I want to indicate some intricate legal problems arising from these practices with regard to the right to leave that deserve further research.

Already in 1948, the British Delegation in the Human Rights Commission proposed that the right to emigrate may be restricted in order to help neighbouring states to fight illegal immigration. A first question to be answered in this respect is whether the concept of public order in both the ICCPR and the ECHR can be understood in such a way as to allow one state to restrict rights in order to protect such a general and ambiguous aspect of another state’s public order. But even if one wishes to understand the concept of public order in this context to encompass the economic and social well-being of other states, or groups of states, the problem with current practices is that these constitute “in reality an automatic, blanket measure of indefinite duration”. It is very difficult to evaluate these measures in the light of their proportionality vis-à-vis each individual, and by their sheer scale they turn the exception into the rule.

In addition, these practices seem ignore the more formal guarantees embodied in the right to leave. Restrictions on the right to leave, also if these take the form of interception of migrants leaving the country without proper documentation need to be provided by law, which should be accessible and sufficiently precise. However, the interception of migrants in the territorial waters of Mauritania, Senegal and Cape Verde is based upon bilateral agreements between these states and Spain, the content of which is kept secret. In addition, at least in the domestic legislation of Mauritania, there is no provision that prohibits leaving the country “irregularly” - that is without documentation.

The question of legality of the restrictions on the right to leave is compounded by the plurality of actors involved: African States, Member States and an EC-Agency. This raises the question as to which legal instruments are applicable. Mauritania and Senegal are state parties to the ICCPR and thus bound to act in accordance with the rights guaranteed therein when acting in their territorial waters, but what about the European Member States which assist them? In this respect, the case law of the ECtHR suggests that the delimitation of competences amongst these actors is of importance in order to establish responsibility, but that very delimitation is unclear, due to inaccessibility of the documents that contain the agreements between these actors.

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118 Eduardo Lobo, the Spanish coordinator of the project. Source: Le Monde (12 August 2006).
120 See ECtHR, Besenyei v. Hungary, 21 October 2008, appl. no. 37509/06, par. 23, in which case the Court used this phrase to indicate that
121 Which is the important difference with the case that restrictions on the right to leave based on public order are applied to persons who constitute a serious danger to the country to which they intend to travel. See Mubanga-Chipoya (1988a), at fn 62, p. 54.
122 Amnesty International, Mauritania: Nobody wants to have anything to do with us, Collective expulsions of migrants denied entry into Europe, 1 July 2008.
Few rights have been so widely proclaimed, and of few rights has their violation been regarded so plainly as a symptom of tyranny, as the right to leave one's country. Yet, it should be borne in mind that a right to leave is a relatively recent notion that is immediately linked with ideas on popular sovereignty and the nature of the sovereign territorial state. If in liberal theory the conceptual basis for the body politic is a voluntary contract, then a fundamental right to leave has to be recognised. In this light it is understandable that non-liberal governments, underpinned as they are by very different ideas on the nature of political authority, have consistently refused to recognise an individual right to leave. However, not only illiberal states have regarded the issue of exit as a favour, the granting of which was within their sovereign power alone. We have seen that even after the Second World War, when the right to leave was already codified in various international instruments, also Western governments have at times regarded the question of exit as a matter falling entirely under the discretionary power of the executive. With the advent of human rights law, although permitting interferences with the individual's right to leave, international law requires that interferences are provided by law and that there is a possibility of review by the judiciary. Maintaining that the right to leave is a matter solely up to the executive is expressly forbidden by the ECHR and the ICCPR.

Interception of migrants in the territorial waters from several north west African States, stems from executive action on the part of a number of states that is barely subject to democratic and judicial control, which is not in the least due to the fact that these measures do not have a clear and accessible legal basis. When it comes to what Frontex calls prevention of illegal migration, regulation and control seem to precede the law. However, as these measures interfere with fundamental rights, they should not precede the law, but be based upon it. The current practice of interception of migrants and its lack of legal and democratic control shows that as soon as an issue is framed in terms of immigration control, the meaning and function of human rights changes drastically, and the exercise of state power does no longer conform to judicial or legislative modes of exercise.  

123 By portraying these practices as measures that are necessary to protect the external borders of the Member States, the fact that they entail emigration control is conveniently obscured.  

124 Indeed, conceiving of these practices as necessary in protecting the territorial external border of the EU, leads to a situation in which it has become all too easy to ignore the individual interests that are at stake in practices of externalisation, let alone for them to be perceived as rights.


124 Indeed, in Xhavara and others v. Italy and Albania (11 January 2001, Appl. No. 39473/98), the ECtHR is very brief in dismissing the claim that the measures complained of interfered with the right to leave, as it considered that these measures were meant to prevent them from entering Albanian territory instead. The difference with the interception within the territorial waters in several African states is that, although there is some unclarity as regards the precise location where the measures complained of in Xhavara took place, they did not take place within the territorial waters of Albania.
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Amnesty International, Mauritania: Nobody wants to have anything to do with us, Collective expulsions of migrants denied entry into Europe, 1 July 2008.


