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ARTICLE

Externalisation of Migration Control: Impunity or Accountability for Human Rights Violations?

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Abstract

Externalisation and the human rights violations it entails have received much attention in recent years from both advocates and academics. Since a key aspect of externalisation consists in people on the move staying in the Global South, the locus of litigation has broadened from externalising states in the Global North to also include accountability mechanisms in the Global South. Therefore, this article seeks to answer the following question: to what extent do the international and regional human rights regimes provide accountability mechanisms for violations of the human rights of people on the move in the context of externalisation? It does so through a comparison of externalisation policies in three different regions: the Mediterranean, North America and the Pacific. In each region, the analysis focuses on cooperation between an externalising state in the Global North and a neighbouring state in the Global South to illustrate the differences and similarities between the various contexts: Australia and Indonesia, the United States and Mexico, and Italy and Libya. For each context, the analysis examines the policies implemented by externalising states and their effect on the human rights of people on the move as well as states' substantive and procedural human rights commitments under the applicable international and regional human rights regimes. While there is no 'one size fits all', it shows that there are only limited accountability mechanisms available to people on the move affected by the externalisation of migration control.

Keywords Externalisation · Migration control · Human rights · Accountability · People on the move

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1 Introduction

Externalisation is 'the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory'.[1] In the migration and refugee context, externalisation generally refers to the shifting of migration control and asylum processing from so-called destination states to so-called transit states or even countries of origin. While externalisation has a long history, especially in the Global North, there is an expanding body of laws, policies and practices that externalise aspects of the migration and asylum functions of states.[2] Externalisation is thus a contemporary phenomenon that often occurs, albeit not exclusively, along the fault lines between the Global North and the Global South, whereby states in the Global North seek to contain or transfer people on the move to neighbouring countries in the Global South. Examples include European externalisation policies in the Mediterranean, such as the 2016 European Union-Turkey Statement,[3] the 'Remain in Mexico' policy implemented by the Trump administration, as well as Australia's Operation Sovereign Borders and offshore regional processing centres in Nauru and Papua New Guinea.

The externalisation of migration control and the human rights violations it entails have received much attention in recent years, both from advocates and academics. This has resulted in widespread legal mobilisation to address these issues, as well as an academic analysis of these developments.[4] Since a key aspect of externalisation consists of people on the move staying in the Global South, the locus of litigation has likewise broadened from externalising states in the Global North to include accountability mechanisms in the Global South. A key example is the closing of the regional processing centre on Manus Island following a judgment of the Supreme Court of Papua New Guinea.[5] In the Central Mediterranean, however, multiple legal actions across legal regimes have not yet succeeded in putting an end to European externalisation policies and their severe human rights consequences.[6] It thus remains unclear to what extent and under which circumstances broadening legal mobilisation strategies to include partner states in the Global South can increase access to accountability mechanisms.

Therefore, this article seeks to answer the following question: to what extent do the international and regional human rights regimes provide accountability mechanisms for violations of the human rights of people on the move in the context of externalisation? It does so through a comparison of externalisation policies in three different regions: the Pacific, North America and the Mediterranean. Indeed, the examples above illustrate the prevalence of externalisation policies in these three

[1] Refugee Law Initiative (2022), p. 114.
[2] Cantor et al. (2022), pp. 120–121.
[3] Consilium, 'EU–Turkey Statement, 18 March 2016', Press Release 144/16, available at https://perma.cc/5QYM-LCRR.
[4] See for instance Costello and Mann (2020); Tan and Gammeltoft-Hansen (2020).
[5] Tan (2018).
[6] Pijnenburg and Van der Pas (2022).

regions. In each region, the analysis focuses on cooperation between an externalising state in the Global North and a neighbouring state in the Global South to illustrate the differences and similarities between the various contexts. More specifically, the analysis addresses cooperation between Australia and Indonesia, between the United States of America (USA) and Mexico, and between Italy and Libya. As contemporary externalisation policies increasingly adopt a 'hands-off' approach on the part of the externalising state—which often limits itself to providing funding, training and equipment, without 'boots on the ground'—the article focuses on remote containment policies rather than expulsion and pushback practices.

In international law, accountability can be defined as 'a process in which an actor explains conduct and gives information to others, in which a judgment or assessment of that conduct is rendered on the basis of prior established rules or principles and in which it may be possible for some form of sanction (formal or informal) to be imposed on the actor'.[7] Hence, when comparing accountability for human rights violations across regions, three dimensions are relevant. First, a preliminary question concerns states' substantive human rights commitments: by which norms are states bound? To a large extent, this depends on what treaties a state is party to. As a rule of thumb, the more human rights treaties a state ratifies, the more extensive human rights obligations it has. There is also a lowest common denominator, as all the states examined here are bound by customary human rights norms, and have ratified treaties like the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Moreover, the extent to which regional regimes protect the human rights of people on the move varies. As the analysis will show, while norms such as the right to life and the prohibition of torture always apply, human rights regimes do not always protect economic, social and cultural rights to the same extent as civil and political rights. Likewise, some human rights instruments limit states' obligations towards non-nationals as regards economic, social and cultural rights.[8] Another crucial aspect in the context of externalisation concerns the geographical scope of externalising states' human rights obligations. Since externalising states seek to contain or transfer people on the move outside their territory, the question arises to what extent these states have obligations towards them. Indeed, in international human rights law territory and jurisdiction play a crucial role in determining the scope of states' obligations. Therefore, the present article examines these aspects of states' human rights obligations, as they are a prerequisite for accountability: if states do not have substantive human rights obligations that they can breach, neither can they be held accountable for such breaches.

In terms of the second—procedural—dimension, the question arises to what extent accountability mechanisms are available when states fail to comply with their human rights obligations towards people on the move in the context of externalisation. This is the main focus of the present analysis. The article adopts a narrow

[7] Curtin and Nollkaemper (2007), p. 8. See also Grant and Keohane (2005).

[8] See for instance Art. 34 ASEAN Human Rights Declaration; Arts. 34(1), 36, 39(1), 41(2) Arab Charter on Human Rights.

understanding of accountability, as it focuses on judicial and quasi-judicial mechanisms to which people on the move themselves have access. This does not mean, however, that other mechanisms, such as the United Nations (UN) Human Rights Council's Universal Periodic Review or its Special Procedures, cannot contribute to achieving such accountability. Moreover, the analysis examines what mechanisms are available under the applicable international and regional human rights regimes. While domestic remedies may prove effective in the externalisation context, in light of the limited scope of this study and its comparative approach, the analysis focuses on international and regional human rights regimes. Likewise, it does not include other regional mechanisms that can engage with human rights issues, like African regional economic courts and the Court of Justice of the European Union. Accordingly, the analysis covers two levels. At the *international* level, it examines to what extent people on the move affected by externalisation policies can submit an individual communication to the treaty bodies that supervise the nine core UN human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the CAT, the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the Convention on the Rights of Persons with Disabilities (CRPD) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED).[9] At the *regional* level, the analysis examines what accountability mechanisms are available under the (various) regional human rights regime(s) and whether they apply to the states examined here.[10]

Finally, the third dimension concerns the effectiveness of existing accountability mechanisms: in practice, to what extent do they successfully prevent and remedy human rights violations suffered by people on the move in the context of externalisation? While recognising the importance of this dimension, in light of its limited scope, the present analysis does not address issues of admissibility, remedies and implementation in detail. Neither does it speculate what the outcome of a complaint would be in a particular case. In other words, this article seeks to clarify the first two dimensions by charting an overview of states' human rights commitments and the international and regional accountability mechanisms to which people on the move could turn. It thereby lays the foundation for further research regarding their effectiveness. Nevertheless, where relevant, the following overview also includes some

[9] All the data concerning states' accession to the core UN human rights treaties and their protocols, including declarations made upon accession, is available at https://indicators.ohchr.org/.

[10] As Italy is a Member State of the European Union (EU), the EU's Charter of Fundamental Rights applies when it implements EU law (Art. 51(1) Charter of Fundamental Rights), and people on the move in Libya could seek access to the Court of Justice of the European Union (Arts. 263, 267, 268 and 340 Treaty on the Functioning of the EU). Yet these mechanisms address the EU rather than Italy, and it is difficult to argue that Italy's externalisation practices are exclusively an implementation of EU law (see Sect. 4.1 below). Therefore, this article focuses on accountability mechanisms available under the Council of Europe rather than the EU.

indications as to the effectiveness of a particular accountability mechanism, for instance depending on whether it is binding or not.

The analysis proceeds as follows. The first three sections focus on each region in turn: the Pacific (Sect. 2), North America (Sect. 3) and the Mediterranean (Sect. 4). Each section proceeds in three steps. It first describes the policies implemented by externalising states and their effect on the human rights of people on the move, before charting what substantive human rights obligations each state has towards people on the move under international and any applicable regional human rights instruments. Finally, it examines what regional and international complaint procedures are available to people on the move. Section 5, in turn, offers an overview of states' substantive and procedural human rights commitments in each context and reflects on the similarities and differences between the three regions. Finally, Sect. 6 concludes that the international and regional human rights regimes provide only limited accountability mechanisms to people on the move in the context of externalisation.

2 The Pacific: Cooperation Between Australia and Indonesia

Australia has the most developed externalisation regime in the world, as it cooperates with various Pacific and South Asian countries to prevent the arrival of people on the move by sea.[11] It thus cooperates with Sri Lanka, Indonesia and Malaysia to prevent departures, and has transferred people on the move to Papua New Guinea, Nauru and Cambodia.[12] Strategic litigation efforts under multiple legal regimes sought to put an end to the regional processing centre on Papua New Guinea's Manus Island, which eventually closed following a judgment of the Supreme Court of Papua New Guinea.[13] However, no such litigation has taken place regarding Australia's cooperation with Indonesia, a difference which may be due to the more remote forms of cooperation between Australia and Indonesia than between Australia and Papua New Guinea, as well as the greater difficulties in accessing complaint mechanisms in the case of Indonesia.

2.1 Externalisation Policies and Their Consequences in the Asia–Pacific

Since the late 1990s, people on the move from Iraq, Iran, Afghanistan, Pakistan and Sri Lanka, and more recently Somalia and Myanmar, have travelled to Indonesia, which they considered as a transit country on their way to Australia.[14] During the same period, Australia has supported Indonesia in strengthening its border control capacity through funding, infrastructure, equipment, and technical assistance

[11] Tan (2019), p. 46.
[12] Tan (2017).
[13] Tan (2018).
[14] Missbach (2023), pp. 159–160.

and training.[15] In 2000, Indonesia, Australia and the International Organization for Migration (IOM) concluded the Regional Cooperation Agreement. Under this agreement, Indonesia intercepts people on the move suspected of travelling irregularly to Australia.[16] The Australian police have also worked closely together with their Indonesian counterparts in order to survey, disrupt and intercept asylum seekers attempting to travel to Australia through Indonesia.[17] In 2013, Australia launched Operation Sovereign Borders, resulting in the return of intercepted people on the move to Indonesia.[18] Combined with dwindling opportunities for resettlement elsewhere, Indonesia has thus de facto become a destination state for many people on the move, although it still sees itself as a transit state.[19]

Until 2018, people on the move in Indonesia either lived in immigration detention centres financed by the IOM, lived independently in self-funded accommodation, or were accommodated in community shelters supervised and financed by the IOM.[20] However, in 2018 Australia cut its funding for the IOM in an attempt to discourage people on the move from travelling to Indonesia.[21] As a result, the IOM ceased its financial support for Indonesian immigration detention centres, and limited the number of beneficiaries of its migrant care programme to 9000 in total. This in turn resulted in more than 5000 people on the move being left without proper care.[22] The conditions in detention centres were notoriously poor, including insufficient and poor-quality food, unhygienic conditions, and inadequate health care.[23] The quality of community shelters varies widely and very much depends on local government authorities and their regulations.[24] Those who live in local communities often live in cramped conditions in overpriced accommodation of poor quality.[25] Indonesian authorities did not step in to fill the gap created by Australia's funding cut: they reject any financial responsibility for the care of people on the move, arguing that they lack the capacity and domestic support to do more than provide temporary shelter.[26]

The human rights of people on the move in Indonesia, especially those who fall outside the care of the IOM, are further jeopardised by the fact that Indonesian law prohibits them from working and that there are very limited work options, including in the informal economy.[27] Protracted precariousness, including a lack of access to

[15] Hirsch (2017), p. 74; Mussi and Tan (2017), p. 99; Dastyari and Hirsch (2019), pp. 441–442.
[16] Dastyari and Hirsch (2019), p. 440.
[17] Ibid., p. 441.
[18] Missbach and Hoffstaedter (2020), p. 70.
[19] Ibid., p. 75; Harvey (2019), p. 9.
[20] Missbach (2023), p. 161.
[21] Harvey (2019), p. 10.
[22] Missbach (2023), p. 163.
[23] Ibid., p. 161.
[24] Ibid., p. 162.
[25] Missbach (2015), pp. 92–93; Brown and Missbach (2017).
[26] Missbach and Hoffstaedter (2020), p. 68.
[27] Missbach (2015), pp. 99–100.

work, housing, education and health care, leads to psychological health problems.[28] People on the move in Indonesia thus often suffer from psychological problems, notably because of the hopelessness they feel at remaining in limbo.[29] Access to education for children on the move remains problematic and varies from region to region, although school attendance levels are generally very low.[30] Furthermore, people on the move in Indonesia are prevented from leaving Indonesia, and some are coerced to return to situations of harm, while those in immigration detention were held arbitrarily and for prolonged periods in conditions that amounted to inhuman treatment.[31] The human rights violations suffered by people on the move in Indonesia thus include the rights to an adequate standard of living, health, education, and protection from arbitrary detention and inhuman treatment. Having established that Australia's externalisation policies entail multiple human rights violations, the next section examines what human rights obligations Indonesia and Australia have towards people on the move confined in Indonesia.

2.2 Human Rights Obligations of Indonesia and Australia

At the international level, Indonesia has ratified all the core UN human rights treaties, except the ICPED. It has thus extensive obligations, covering civil and political rights as well as economic, social and cultural rights, and including specific groups such as women, children, persons with disabilities and migrant workers. At the regional level, Indonesia is a member of the Association of Southeast Asian Nations (ASEAN), which adopted the ASEAN Human Rights Declaration (AHRD) in 2012.[32] This non-binding instrument includes civil and political rights, such as the right to life, the right to personal liberty and security, and the prohibition of torture,[33] as well as economic, social and cultural rights, including the rights to work, an adequate standard of living, health, social security and education.[34] However, the AHRD has been criticised for offering insufficient human rights protection.[35] In particular, Article 34 provides that 'ASEAN Member States may determine the extent to which they would guarantee the economic and social rights found in this Declaration to non-nationals, with due regard to human rights and the organisation and resources of their respective national economies'. Thus, the non-binding AHRD only offers very limited protection to people on the move in Indonesia, especially as regards their economic, social and cultural rights. Likewise, under the ICESCR, developing countries 'may determine to what extent they would guarantee the economic rights

[28] Ibid., p. 113.

[29] Susetyo (2020); I. Morse, '"Open prison": the growing despair of refugees stuck in Indonesia', Al Jazeera, 4 March 2019, available at https://www.aljazeera.com/news/2019/3/4/open-prison-the-growing-despair-of-refugees-stuck-in-indonesia.

[30] Missbach (2015) and Tan (2016), p. 375.

[31] Hirsch (2022), chapter 4.

[32] Langlois (2021), p. 151.

[33] Arts. 10–25 AHRD.

[34] Arts. 26–34 AHRD.

[35] Çali (2022), p. 435.

recognized in the present Covenant to non-nationals'.[36] However, this provision should be interpreted narrowly and does not allow host states like Indonesia to deny people on the move the enjoyment of economic rights entirely.[37] Overall, however, it follows from Indonesia's ratification of most core UN human rights treaties that it has wide-ranging obligations towards people on the move.

Furthermore, as there is no regional human rights regime in Oceania, Australia does not have any obligations towards people on the move under regional human rights instruments. At the international level, Australia's profile is very similar to Indonesia's, as it has ratified the same UN human rights treaties as Indonesia, except for the ICRMW. A key question that arises with regard to Australia is therefore to what extent its obligations under the UN core human rights treaties apply extraterritorially. In other words: does Australia exercise jurisdiction over people on the move in Indonesia? Indeed, many human rights treaties limit the scope of state obligations to persons within a state's jurisdiction.[38] While it is clear that states can exercise jurisdiction outside their territory,[39] it remains unclear which circumstances can trigger a state's extraterritorial jurisdiction, and what the scope of its human rights obligations are in that situation. With regard to another Australian externalisation policy, various treaty monitoring bodies have found that Australia exercised extraterritorial jurisdiction over the regional processing centres on Nauru and Manus Island.[40] This suggests that it could also incur human rights obligations towards people on the move in Indonesia, although this remains uncertain, as in the latter context Australia's involvement is more remote, and the link between Australia's conduct and people on the move in Indonesia may be too tenuous to trigger any human rights obligations towards them.[41] Nevertheless, recent output from several UN treaty bodies points towards a more extensive interpretation of states' extraterritorial obligations, whereby the latter can be triggered if a state's conduct contributes to human rights violations abroad that are reasonably foreseeable.[42] Following

[36] Art. 2(3) ICESCR.

[37] Committee on Economic, Social and Cultural Rights (2017), Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2017/1, para. 8. For a detailed discussion see Saul et al. (2014), pp. 214–217; Pijnenburg (2021), p. 99.

[38] See for instance Art. 2(1) ICCPR, Art. 2(1) CAT, Arts. 3 and 6 ICERD, Art. 2(1) CRC.

[39] See, among many other examples, Human Rights Committee, *López Burgos v. Uruguay*, Comm. No. 52/1979, 29 July 1981; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 9 July 2004, ICJ Reports 2004, paras. 107–113.

[40] Committee against Torture (2014), Concluding observations on the combined fourth and fifth periodic reports of Australia, UN Doc. CAT/C/AUS/CO/4–5, para. 17; Human Rights Committee (2017), Concluding observations on the sixth periodic report of Australia, UN Doc. CCPR/C/AUS/CO/6, para. 35; Committee on Economic, Social and Cultural Rights (2017), Concluding observations on the fifth periodic report of Australia, UN Doc. E/C.12/AUS/CO/5, para. 18.

[41] Hirsch (2022), p. 137.

[42] See for instance Committee on Economic, Social and Cultural Rights (2017), General comment no. 24 on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, paras. 25–37; Human Rights Committee (2019), General comment no. 36—Article 6: right to life, UN Doc. CCPR/C/GC/36, para. 63; Human Rights Committee, *AS and others v. Italy*, UN Doc. CCPR/C/130/D/3042/2017, 28 April 2021, paras.

this approach, Australia's cooperation with Indonesia could trigger its human rights obligations, since it contributes to reasonably foreseeable human rights violations of people on the move confined in Indonesia.[43] Moreover, as regards economic, social and cultural rights, an argument can be made that references to international assistance and cooperation in human rights treaties[44] can trigger Australia's obligations towards people on the move in Indonesia.[45] Yet, as the following shows, even if both Indonesia and Australia have human rights obligations towards people on the move in Indonesia, this does not necessarily signify that they can be held accountable for failing to comply with these obligations.

2.3 Available Accountability Mechanisms in the Pacific

In light of the human rights violations suffered by people on the move in Indonesia in the context of externalisation, the question arises what accountability mechanisms are available to them to seek remedies. The lack of a regional human rights mechanism applicable to Australia means that there are no regional complaint procedures available against Australia. Yet people on the move in Indonesia could bring a complaint against Australia before the following UN treaty monitoring bodies, as Australia has recognised their competence to receive individual communications: the Committee on the Elimination of Racial Discrimination, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of Persons with Disabilities. However, in order to be declared admissible, such a communication would have to demonstrate that people on the move in Indonesia fall under Australia's jurisdiction,[46] which, as indicated above, remains unclear.

Although extraterritoriality is not an issue as regards Indonesia, the latter does not grant access to any UN treaty monitoring body, notwithstanding the fact that it has acceded to almost all core UN human rights treaties. In other words, its substantive human rights commitments are not matched by its willingness to grant access to complaint procedures. At the regional level, in 2009 ASEAN established the

Footnote 42 (continued)
7.8 and 8.3; Committee on the Rights of the Child, *Sacchi and others v. Argentina*, UN Doc. CRC/C/88/D/104/2019, 11 November 2021, para. 10.7; Committee on the Rights of the Child (2023), General comment no. 26 on children's rights and the environment, with a special focus on climate change, UN Doc. CRC/C/GC/26, paras. 69, 84, 88 and 108.

[43] For a detailed discussion of (Australia's) extraterritorial obligations in the context of externalisation see for instance Gammeltoft-Hansen and Hathaway (2015), pp. 257–272; Tan (2019), pp. 145–154; Pijnenburg (2021), pp. 158–164; Hirsch (2022), pp. 125–137.

[44] See for instance Art. 2(1) ICESCR, Art. 4(2) CRPD, Arts. 4, 23(4), 24(4) and 28(3) CRC.

[45] Taylor (2010); Pijnenburg (2021), pp. 169–173. See also the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), Neth Q Hum Rights 29(4):578–590, https://doi.org/10.1177/016934411102900411, Principle 33.

[46] While the CEDAW and CRPD themselves do not include a jurisdiction clause, their optional protocols require that the individuals who submit a communication to the respective treaty body must be within the jurisdiction of the state party. See Art. 2 Optional Protocol to the CEDAW and Art. 1(1) Optional Protocol to the CRPD.

ASEAN Intergovernmental Commission on Human Rights. Yet this body, which consists of state representatives, is not independent, and its mandate does not allow it to investigate country-specific situations nor individual complaints, although since 2019 letters of complaint sent to it are forwarded to the country representative concerned.[47] Therefore, ASEAN does not offer an actionable accountability mechanism either.

In sum, in the Pacific access to international and regional accountability mechanisms for people on the move is restricted and further curtailed by externalisation practices. At the international level, while Australia grants access to various UN human rights treaty bodies, Indonesia does not. The key question is whether Australia has human rights obligations towards people on the move in Indonesia. Indeed, if it does not, there are no individual complaint mechanisms available at the UN. At the regional level, the picture is even bleaker: while no regional human rights regime applies to Australia, ASEAN does not offer an actionable mechanism to hold Indonesia accountable. This also illustrates the discrepancy between substance and procedure: while Indonesia has committed itself to more human rights norms than Australia, victims cannot hold it accountable for breaching those norms. However, as the following section shows, the situation is different for people on the move in Mexico.

3 North America: Containment in Mexico

In the Americas, the USA has cooperated with Mexico since the 1990s and with Central American governments since the 2000s to prevent people on the move from reaching its southern border. Such cooperation includes diplomatic pressure, conditioning financial aid, and funding.[48] Unlike the Pacific and the Central Mediterranean, a land border rather than a sea separates the USA and Mexico. Yet, as demonstrated below, the externalisation policies implemented by the USA, which involve transferring resources such as funding and equipment as well as training, resemble the Australian cooperation with Indonesia, and the human rights consequences for people on the move are also similar. However, from a legal perspective, people on the move in Mexico enjoy more human rights protections than those in Indonesia, both substantively and procedurally.

3.1 Externalisation Policies and Their Consequences in the Americas

Consecutive US administrations have cooperated with Mexico to prevent the arrival of Central American people on the move at the US border.[49] Between 2008 and 2021, the USA assisted Mexico under the Mérida Initiative security partnership, which was replaced in 2021 by the US-Mexico Bicentennial Framework for

[47] Wahyuningrum (2021), p. 163.
[48] FitzGerald (2019), chapter 7.
[49] Ibid.

Security, Public Health, and Safe Communities, which facilitates cooperation to secure borders and ports as well as to reduce migrant smuggling.[50] Between 2015 and 2022, the USA spent more than 58.5 million dollars in funding to support Mexico's immigration control and border security efforts, for instance to provide non-intrusive inspection equipment, mobile kiosks, canine teams, vehicles, and training for more than 1,000 officials.[51]

Against this background, cooperation between the USA and Mexico on migration control has increased in recent years. Notably, between 2019 and 2022, under the Migrant Protection Protocols, also known as the 'Remain in Mexico' policy, asylum seekers had to wait in Mexico while US immigration courts processed their cases.[52] At the start of the Covid pandemic in the spring of 2020, the Trump administration implemented Title 42, an emergency public health measure that has been used to prevent asylum seekers from applying for asylum in the United States and to return them to Mexico.[53] Since May 2023, the USA implements a new regulation under which people on the move are barred from applying for asylum if they have travelled through a country that is deemed safe or have failed to use legal pathways to enter the USA. This contentious regulation is subject to an appeal.[54] The USA also provides funding to improve access to asylum in Mexico. Thus, since 2018, it has provided more than 163 million dollars to the Office of the UN High Commissioner for Refugees, the Mexican Commission for the Aid of Refugees and humanitarian organisations working with migrants in Mexico.[55]

As a result of these externalisation policies, both apprehensions of people on the move and asylum requests increased in Mexico.[56] In 2021, Mexico thus recorded over 130,000 asylum requests, more than 100 times the number received in 2013.[57] In the same year it also detained over 300,000 people on the move; its immigration detention centres are notoriously overcrowded and unsanitary.[58] People on the move in Mexico suffer numerous human rights violations, including extortion and kidnapping, assaults, robberies, rape and enforced disappearances.[59] Externalisation

[50] Ribando Seelke (2022); Ribando Seelke and Miro (2023).

[51] Ribando Seelke and Miro (2023).

[52] N. Miroff, 'DHS to end "Remain in Mexico", allow asylum seekers to enter US', Washington Post, 8 August 2022, available at https://www.washingtonpost.com/national-security/2022/08/08/mpp-biden-asylum-mexico/?mc_cid=fb172ca2e3&mc_eid=00102aa667; Human Rights Watch, '"Remain in Mexico": overview and resources', 7 February 2022, available at https://www.hrw.org/news/2022/02/07/remain-mexico-overview-and-resources.

[53] Collins (2023); Ribando Seelke and Miro (2023).

[54] Müller (2023); 'Biden's asylum curbs at US-Mexico border can stay for now, court rules', Al Jazeera, 4 August 2023, available at https://www.aljazeera.com/news/2023/8/4/bidens-asylum-curbs-at-us-mexico-border-can-stay-for-now-court-rules?mc_cid=1e7df56de6&mc_eid=97d8f06634; T. Hesson, 'Biden asylum restrictions at Mexico border can stay in place for now, appeals court says', Reuters, 4 August 2023, available at https://www.reuters.com/legal/us-appeals-court-says-biden-asylum-restrictions-border-can-stay-place-now-2023-08-04/?mc_cid=1e7df56de6&mc_eid=97d8f06634.

[55] Ribando Seelke and Miro (2023).

[56] Ribando Seelke and Klein (2022), p. 22.

[57] Brewer et al. (2022), p. 6.

[58] Human Rights Watch (2023).

[59] Meyer and Isacson (2019), p. 28; Bello et al. (2020).

policies also lead to tens of thousands of people on the move living in Mexican border cities, sometimes in precarious conditions.[60] Indeed, with increasing returns from the USA to Mexico, growing numbers of people on the move live in makeshift camps and overstrained shelters in communities along the US-Mexico border, where many struggle to access basic services.[61] Likewise, thousands of people on the move camp in poor conditions elsewhere in Mexico.[62] In light of the above, the question arises what human rights obligations Mexico and the USA have towards people on the move in Mexico.

3.2 Human Rights Obligations of Mexico and the USA

At the international level, Mexico has ratified all the core UN human rights treaties. It thus has extensive human rights obligations towards people on the move on its territory, including both civil and political and economic, social and cultural rights. The USA, however, is only a party to the ICERD, ICCPR, and CAT, although it has also signed the ICESCR, CEDAW, CRC and CRPD. Therefore, the USA has much more limited human rights obligations. Furthermore, just as for Australia, the question arises to what extent the USA has extraterritorial obligations towards people on the move confined in Mexico. While the same considerations apply as for Australia, in addition the USA explicitly contests the extraterritorial applicability of human rights treaties.[63] Nevertheless, as human rights treaty bodies, notably the Human Rights Committee, have confirmed that human rights treaties like the ICCPR apply extraterritorially, it can be argued that the USA also incurs extraterritorial human rights obligations towards persons outside its territory but within its jurisdiction. So, just as for Australia, the key question is whether people on the move in Mexico fall under its jurisdiction. In light of the reasonable foreseeability approach recently articulated by the Human Rights Committee,[64] it could be argued that the USA has human rights obligations towards people on the move in Mexico, since its externalisation policies contribute to reasonably foreseeable violations of their human rights.

Unlike in the Pacific region, where a weak human rights regime only applicable to Indonesia complements the international regime, in the Americas regional human rights protection mechanisms are stronger. Both the USA and Mexico are members of the Organization of American States (OAS), which has a well-developed human rights regime. Thus, Mexico is a party to multiple OAS human rights treaties, including the American Convention on Human Rights (ACHR), the Inter-American

[60] Ribando Seelke and Klein (2022), p. 23.

[61] Ruiz Soto (2020), p. 2.

[62] 'Mexico detains more than 16,000 foreign migrants in four days', Reuters, 22 November 2022, available at https://www.reuters.com/world/americas/mexico-detains-more-than-16000-foreign-migrants-four-days-2022-11-22/?mc_cid=4453797c60&mc_eid=00102aa667.

[63] Van Schaack (2014). See for instance US Department of State, 'Observations of the United States of America On the Human Rights Committee's Draft General Comment No. 36 On Article 6—Right to Life', 6 October 2017, available at https://www.state.gov/wp-content/uploads/2019/05/U.S.-observations-on-Draft-General-Comment-No.-36-on-Article-6-Right-to-Life-.pdf.

[64] See Sect. 2.2 above.

Convention to Prevent and Punish Torture, the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) and the Inter-American Convention on the Forced Disappearance of Persons.[65] In other words, Mexico has extensive human rights obligations under both regional and international human rights law.

The USA, for its part, has signed many binding regional human rights instruments, but it has not ratified any regional human rights treaty.[66] Nevertheless, the USA is bound by the human rights obligations stated in the Charter of the OAS and the American Declaration of the Rights and Duties of Man (ADRDM), which protects civil and political as well as economic, social and cultural rights. In the Inter-American system, the Inter-American Commission on Human Rights (IAComHR) has the mandate 'to promote the observance and protection of human rights',[67] which includes interpreting the ADRDM. The IAComHR and the Inter-American Court of Human Rights (IACtHR) have found that the ADRDM has legal effect in light of the legally binding human rights obligations in the Charter of the OAS,[68] although the USA has repeatedly protested against this interpretation.[69] The ADRDM applies to 'every person' and hence does not explicitly exclude non-nationals from its scope. Likewise, there are no references to jurisdiction or territory that *prima facie* bar its application in extraterritorial contexts, including externalisation. Moreover, the IAComHR has repeatedly found that the USA has human rights obligations under the ADRDM towards individuals outside its territory.[70]

Thus, Mexico has extensive substantive human rights obligations towards people on the move on its territory, both under the international and Inter-American human rights regimes. The USA, however, has only acceded to three human rights treaties

[65] The other regional human rights treaties to which Mexico is a party are the Protocol to the ACHR to Abolish the Death Penalty and the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities. See https://www.oas.org/DIL/treaties_signatories_ratifications_member_states_mexico.htm.

[66] The USA has signed the following regional human rights treaties: the ACHR, the Protocol to the ACHR to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Protocol of San Salvador, the Inter-American Convention on the Forced Disappearance of Persons, the Convention of Belém do Pará, the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities, the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, and the Inter-American Convention on Protecting the Human Rights of Older Persons. See https://www.oas.org/DIL/treaties_signatories_ratifications_member_states_united_states_of_america.htm.

[67] Art. 106 Charter of the OAS.

[68] IAComHR, *Roach v. USA*, Case 9647, Report No. 3/87, 22 September 1987; IACtHR, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Art. 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 14 July 1989.

[69] Cerna (2009).

[70] See for instance IAComHR, *Haitian Centre For Human Rights and others v. USA*, Case 10.675, Report No. 51/96, 13 March 1997; IAComHR, *Coard and others v. USA*, Case 10.951, Report No. 109/99, 29 September 1999; IAComHR, *Khaled El-Masri v. USA*, Petition 419-08, Report No. 21/16, 15 April 2016.

(the ICERD, ICCPR, and CAT), resulting in limited human rights obligations. Notably, it has not acceded to any instrument that guarantees economic, social and cultural rights. Overall, then, the North American externalisation context is characterised by a stark contrast between an externalising state that contests the findings of human rights treaty monitoring bodies, and a host state that has extensive human rights obligations towards people on the move on its territory. This discrepancy also applies to the question of access to complaint procedures.

3.3 Available Accountability Mechanisms in North America

The patterns highlighted above in terms of substantive obligations are further strengthened as regards access to accountability mechanisms. On the one hand, Mexico has extensive human rights obligations towards people on the move, and likewise grants them access to multiple complaint procedures. At the international level, Mexico has recognised the competence of all the UN human rights treaty bodies to receive individual communications except for the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights. At the regional level, Mexico has not only ratified the ACHR but also recognised the jurisdiction of the IACtHR. Accordingly, if a person on the move in Mexico submits a complaint to the IAComHR, the latter applies the ACHR as well as the ADRDM.[71] Moreover, individual complaints against Mexico can be referred to the IACtHR, which can issue binding judgments. People on the move in Mexico thus have access to a judicial mechanism that issues binding decisions.

The ACHR primarily protects civil and political rights, but also contains a chapter with a single article—Article 26—on the progressive development of economic, social and cultural rights.[72] The Protocol of San Salvador, in turn, includes a catalogue of economic, social and cultural rights, yet only violations of the right to education and trade union rights can be adjudicated by the IACtHR.[73] In other words, the Protocol of San Salvador limits accountability mechanisms for economic, social and cultural rights.[74] However, this imbalance in the protection of civil and political rights, on the one hand, and economic, social and cultural rights, on the other, is somewhat compensated by the fact that the Inter-American human rights system has also developed the protection of economic, social and cultural rights through an expansive interpretation of the rights guaranteed by the ACHR.[75] Thus, while the IACtHR only found a violation of Article 26 ACHR for the first time in 2017, it has long recognised that it could adjudicate violations of this provision through the

[71] Cerna (2009).

[72] Art. 26 ACHR states that 'The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.'

[73] Art. 19(6) Protocol of San Salvador.

[74] Krsticevic (2020), p. 70.

[75] Ibid., p. 84.

interdependence and indivisibility of civil and political rights and economic, social and cultural rights.[76] In addition, the IAComHR and IACtHR have jurisdiction over Article 7 of the Convention of Belém do Pará, which requires states parties to prevent, punish and eradicate violence against women.[77]

On the other hand, as regards the USA, there is also almost no accountability procedure to which people on the move can complain. Indeed, the USA does not recognise the competence of any UN human rights treaty body to receive individual communications. Moreover, as the USA has not ratified the ACHR, it has not recognised the jurisdiction of the IACtHR either. Nevertheless, in the Inter-American system, the IAComHR's mandate includes the processing of individual cases.[78] Thus, although the USA has not ratified the ACHR, the IAComHR can receive individual complaints against this state. Therefore, people on the move in Mexico could submit a petition against the USA to the IAComHR, alleging a breach of the ADRDM.

In conclusion, in the Americas the externalisation of migration control increases the accountability mechanisms available to people on the move. The principal reason for this is that Mexico engages actively with the international and regional human rights regimes, whereas the USA is unwilling to accede to human rights treaties and submit itself to international supervision.[79] More specifically, the USA does not grant access to any complaint procedure except the IAComHR, contests that the ADRDM is legally binding, and rejects the idea that human rights treaties apply extraterritorially. Mexico, however, grants access to almost all UN human rights treaty bodies as well as the IACtHR, which can adjudicate on issues concerning civil and political as well as economic, social and cultural rights. Thus, the picture that emerges in the Americas differs from the Pacific. Finally, as the next section shows, people on the move in Libya have access to several international and regional accountability mechanisms.

4 The Mediterranean: Italian Support for Libya

Like Australia and the USA, the European Union (EU) and its Member States design and implement externalisation policies in order to prevent the arrival of 'unwanted' people on the move. Various EU policy documents thus reflect the increasing importance of the external dimension of the EU's migration and asylum policy.[80] Notable examples of externalisation include the 2016 EU-Turkey Statement and the 2017 Memorandum of Understanding (MOU) between Italy and Libya, which is discussed below. As this section will show, the externalisation policies in the Mediterranean

[76] Ibid., pp. 84–85; IACtHR, *Lagos del Campo v. Perú (Preliminary Objections, Merits, Reparations and Costs)*, 31 August 2017, Series C No. 340, para. 154.

[77] Art. 12 Convention of Belém do Pará.

[78] Arts. 19(a) and 20(b) Statute of the Inter-American Commission on Human Rights.

[79] Henkin (1995).

[80] See for instance European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a new pact on migration and asylum', COM(2020) 609 final, pp. 17–24.

resemble those in the Pacific and North America both as regards the forms of cooperation—which include the provision of funding, training and equipment by the externalising state to a neighbouring state—and their effects on the human rights of people on the move. Yet the legal picture differs again from the other two contexts, in terms of substantive as well as procedural protection.

4.1 Externalisation Policies and their Consequences in the Central Mediterranean

In the Central Mediterranean, the European Court of Human Rights' (ECtHR) 2012 judgment in the case of *Hirsi Jamaa and others v. Italy*, which condemned Italy for the return to Libya of asylum seekers intercepted by Italian vessels on the high seas,[81] provides the backdrop for Italy's current externalisation policies. The latter seek to prevent 'unwanted' arrivals without triggering Italy's jurisdiction and hence human rights obligations.[82] Italian policies thus shifted from pushbacks carried out by Italy to pullbacks operated by Libya with Italian and European support.[83] Indeed, in 2017, Italy and Libya signed a Memorandum of Understanding on Cooperation on Development, Combating Illegal Immigration, Human Trafficking and Smuggling, and on Strengthening Border Security,[84] which was renewed in 2020.[85] The MOU inter alia requires Italy to support the Libyan institutions in charge of acting against illegal immigration.[86] Italy thus provides Libya with funding and equipment, as well as operational support to carry out 'pullback' interceptions.[87] Under the MOU, Italy also provides financial assistance to people on the move detained in Libyan detention centres.[88] Since 2015, Italy has committed to spend almost one billion euros to reduce migration along the Central Mediterranean route.[89]

Since 2017, the EU has also adopted various documents and implemented policies to reduce irregular arrivals through the Central Mediterranean route.[90] It has spent hundreds of millions of euros to support Libya, including by training coastguards, protecting and assisting people on the move, and improving border management.[91] Moreover, since 2017 Italy and other EU Member States have increasingly shifted their search and rescue responsibilities to Libya, obstructed the work of

[81] ECtHR, *Hirsi Jamaa and others v. Italy*, Appl. No. 27765/09, 23 February 2012.

[82] Mann (2013), pp. 366–367; Moreno-Lax (2020).

[83] Pijnenburg (2018).

[84] Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017, available at http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf (unofficial translation).

[85] Maccanico (2020).

[86] Art. 1(c) MOU.

[87] Moreno-Lax (2020), pp. 390–396.

[88] Art. 2 MOU; Human Rights Watch (2019), p. 27.

[89] L. Bagnoli and F. Papetti, 'How Italy built Libya's maritime forces', IRPI media, 22 December 2022, available at https://irpimedia.irpi.eu/en-how-italy-built-libyas-maritime-forces/.

[90] Consilium, 'Migration flows on the Central Mediterranean route', available at https://www.consilium.europa.eu/en/policies/eu-migration-policy/central-mediterranean-route/.

[91] Ibid.

rescue non-governmental organisations (NGOs), and increased their aerial surveillance to avoid triggering their search and rescue obligations and ensure migrants are intercepted by the Libyan coastguard and returned to Libya.[92] Although in the context of the Central Mediterranean the EU and other EU Member States also play a role in terms of externalisation, for the sake of comparability, the analysis here focuses on the accountability of Italy.

As a result of the externalisation policies implemented by Italy, in 2022 the Libyan authorities returned more than 24,000 people on the move to Libya.[93] People on the move often refer to Libya as 'hell on earth'.[94] Indeed, since the fall of the Gaddafi regime political elites and many quasi-authorities compete for legitimacy and control of territory, leading to pervasive human rights violations by armed groups and militias.[95] The plight of people on the move in Libya is well documented, especially for those who are detained. According to the Prosecutor of the International Criminal Court and the UN Independent Fact-Finding Mission on Libya, it is probable that people on the move in Libya are victims of crimes against humanity, including arbitrary detention, murder, torture, sexual and gender-based violence, and enforced disappearance.[96] Detention conditions are inhumane, as they are characterised by a lack of mattresses and sleeping accommodation, overcrowding, a severe shortage of lavatories, the continued presence of crawling insects such as lice, inadequate quantities and quality of food and water leading to starvation, and lack of medical care.[97] People on the move in Libya thus face numerous and severe human rights violations. Hence, the externalisation practices and their consequences for the rights of people on the move on the Central Mediterranean route show similarities with the Pacific and North American contexts. Yet, as the following two sections demonstrate, the legal picture is again different, as both Italy and Libya engage more actively with the UN human rights monitoring mechanisms, and different regional regimes apply.

[92] Council of Europe Commissioner for Human Rights (2021); J. Sunderland and L. Pezzani, 'Airborne complicity: Frontex aerial surveillance enables abuse', Human Rights Watch and Border Forensics, 8 December 2022, available at https://www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse; EU Agency for Fundamental Rights, 'June 2022 update—search and rescue (SAR) operations in the Mediterranean and fundamental rights', available at https://fra.europa.eu/en/publication/2022/june-2022-update-ngo-ships-sar-activities.

[93] UNHCR, 'Libya Update 03 January 2023', available at https://data.unhcr.org/en/documents/details/97911.

[94] See for instance Leghtas (2017); Human Rights Watch (2019).

[95] Human Rights Watch (2024).

[96] UN Human Rights Council (2023), Report of the independent fact-finding mission on Libya, UN Doc. A/HRC/52/83, para. 2; International Criminal Court, 'Statement of ICC Prosecutor, Karim AA Khan QC: Office of the Prosecutor joins national authorities in Joint Team on crimes against migrants in Libya', 7 September 2022, available at https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint-0.

[97] UN Human Rights Council (2023), Report of the independent fact-finding mission on Libya, UN Doc. A/HRC/52/83, para. 53.

4.2 Human Rights Obligations of Libya and Italy

Libya is a member of the League of Arab States and has ratified the Arab Charter on Human Rights (Arab Charter), which protects civil and political rights as well as economic, social and cultural rights. However, the Arab Charter grants some economic, social and cultural rights, including the rights to work, to social security, to free basic healthcare, and to free primary and basic education, only to citizens.[98] Libya is also a member of the African Union. It has acceded to the African Charter on Human and Peoples' Rights (ACHPR), the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[99] The ACHPR protects economic, social and cultural rights as well as civil and political rights. It thus protects inter alia the rights to work, health, and education,[100] and the African Commission on Human and Peoples' Rights (AComHPR) has read the rights to housing and food into the ACHPR.[101] Unlike the Arab Charter, it does not exclude non-citizens from the scope of its provisions on economic, social and cultural rights. Moreover, at the international level, Libya has ratified all the core UN human rights treaties except the ICPED. Therefore, Libya has extensive obligations towards people on the move, especially under the African and UN regimes.

Likewise, Italy has extensive human rights obligations under international and regional human rights law. At the international level, it is a party to all the core UN human rights treaties, except the ICRMW. The key issue, as for other externalising states, concerns the extent to which Italy's obligations apply extraterritorially. In light of the reasonable foreseeability approach recently articulated by various UN treaty bodies, it could be argued that Italy has human rights obligations towards people on the move in Libya, since its externalisation policies contribute to reasonably foreseeable violations of their human rights.[102]

At the regional level, Italy has ratified numerous human rights instruments of the Council of Europe (CoE), including the European Convention on Human Rights (ECHR) and most of its protocols, the European Social Charter (revised), and the European Convention on the Legal Status of Migrant Workers.[103] As membership of the CoE requires accession to the ECHR, which in turn entails acceptance of the ECtHR's jurisdiction to receive individual complaints,[104] the ECHR is the most

[98] See for instance Arts. 34(1), 36, 39(1), 41(2) Arab Charter.

[99] Available through https://au.int/en/treaties.

[100] Arts. 15–17 ACHPR.

[101] AComHPR, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Comm. No. 155/96, 13–27 October 2001.

[102] See Sect. 2.2 above.

[103] For a full list see https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=treaties-full-list-signature&CodePays=ITA&CodeSignatureEnum=&DateStatus=09-27-2023&CodeMatieres=.

[104] Art. 34 ECHR.

important human rights instrument of the CoE. Yet, as for the UN human rights treaties, in the context of externalisation, a key question concerns its extraterritorial applicability. While the ECtHR has recognised that the ECHR can apply extraterritorially, including in the context of migration control,[105] it remains unclear whether it applies to contemporary externalisation policies in the Mediterranean. While recent output from the UN treaty bodies signals a willingness to adopt a more extensive interpretation of states' extraterritorial obligations, the ECtHR's recent jurisprudence seems to be more reluctant to do so.[106] Nevertheless, while the ECtHR has long held that extraterritorial jurisdiction under the ECHR can only be triggered if a state exercises effective control over a person or territory abroad, it has recently also accepted that the procedural obligation to investigate under the right to life can create a jurisdictional link between a state party and an individual outside its territory.[107] In other words, the Court's case law seems to move towards a more expansive and refined understanding of jurisdiction.[108] Thus, while it is less likely that the ECHR applies to externalisation policies than UN human rights treaties, it cannot be excluded. Currently pending litigation concerning externalisation in the Central Mediterranean will shed further light on this issue.[109]

Furthermore, while the ECHR protects civil and political rights, Italy has also ratified the CoE's main instrument that protects economic, social and cultural rights: the European Social Charter (revised).[110] However, Article L of this instrument provides that '[t]his Charter shall apply to the metropolitan territory of each Party'. Therefore, Italy has no obligations under the European Social Charter (revised) towards people on the move in Libya. Likewise, the European Convention on the Legal Status of Migrant Workers only applies to nationals of contracting parties who have been authorised by another contracting party to reside in its territory to take up paid employment.[111] People on the move in Libya are therefore excluded from its scope.

In sum, then, notwithstanding the fact that Italy is a party to numerous regional and international human rights instruments, it remains unclear to what extent it has human rights obligations towards people on the move in Libya because of the

[105] See for instance ECtHR, *Hirsi Jamaa and others v. Italy*, Appl. No. 27765/09, 23 February 2012.

[106] See for instance ECtHR, *MN and others v. Belgium*, Appl. No. 3599/18, 5 May 2020; ECtHR, *Georgia v. Russia (II)*, Appl. No. 38263/08, 21 January 2021.

[107] ECtHR, *Güzelyurtlu and others v. Cyprus and Turkey*, Appl. No. 36925/07, 29 January 2019; ECtHR, *Hanan v. Germany*, Appl. No. 4871/16, 16 February 2021; ECtHR, *Carter v. Russia*, Appl. No. 20914/07, 21 September 2021; ECtHR, *Ukraine and the Netherlands v Russia*, Appl. Nos 8019/16, 43800/14 and 28525/20, 25 January 2023.

[108] Pijnenburg (2023).

[109] ECtHR, *SS and others v. Italy*, Appl. No. 21660/18, communicated 26 June 2019. See also Moreno-Lax (2020).

[110] States parties do not have to guarantee all the rights listed in the European Social Charter (revised) (see Part III, Art. A European Social Charter (revised)). Italy has thus declared that it does not consider itself bound by Art. 25 (the right of workers to the protection of their claims in the event of the insolvency of their employer). See https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=declarations-by-treaty&numSte=163&codeNature=0.

[111] Art. 1 European Convention on the Legal Status of Migrant Workers.

extraterritorial nature of externalisation policies. While it is possible that it incurs obligations under various UN instruments, at the regional level only the ECHR could apply to people on the move in Libya. The latter, however, has extensive obligations towards people on the move on its territory, especially under the African and UN regimes. Thus, in the Mediterranean, the substantive obligations of the externalising and host state differ from the Pacific and North American contexts. This is also true for access to accountability procedures.

4.3 Available Accountability Mechanisms in the Mediterranean

The plight of people on the move who seek to cross the Mediterranean Sea from Libya to Italy has received much attention. Lawyers and human rights advocates have initiated multiple legal actions, addressing multiple legal regimes at the domestic, regional and international level.[112] As the following will show, people on the move in Libya only have limited access to accountability mechanisms, notwithstanding the applicability of multiple regional human rights regimes.

At the international level, while Libya has ratified all the core UN human rights treaties except the ICPED, it has only recognised the competence of the Human Rights Committee and the Committee on the Elimination of Discrimination against Women to receive individual communications. At the regional level, on the one hand, there is no access to a judicial accountability mechanism under the Arab human rights regime, since the Arab Court of Human Rights has not yet been established.[113] There is currently only a mixed model of supervision, including an intergovernmental organ (the Arab Permanent Committee on Human Rights) and an expert body (the Arab Human Rights Committee) which monitors compliance with the Arab Charter through the scrutiny of periodic state reports.[114] On the other hand, under the African human rights regime, states parties to the ACHPR recognise the competence of the AComHPR to receive communications from individuals and NGOs.[115] Moreover, the AComHPR can refer cases against Libya to the African Court on Human and Peoples' Rights (ACtHPR) because it has ratified the Protocol on the African Court on Human and Peoples' Rights. However, as Libya has not made a declaration under Article 34(6) of that Protocol, it does not accept the competence of the ACtHPR to directly receive cases from NGOs or individuals. Thus, although people on the move in Libya cannot bring a case directly to the ACtHPR, they can lodge a complaint with the AComHPR, which in turn can refer the case to the ACtHPR.[116] In 2019 and 2022, NGOs requested the AComHPR to probe into atrocities against migrants in Libya.[117] In addition, under Article 44 of the African

[112] Pijnenburg and Van der Pas (2022).
[113] Çali (2022), p. 437.
[114] Ibid., pp. 436–437.
[115] Art. 55 ACHPR.
[116] ACtHPR, *AfrComHPR v. State of Libya*, Application 002/2013, 3 June 2016, para. 51.
[117] Cairo Institute for Human Rights Studies and ASGI, 'NGO coalition request to African Commission on Human Rights to probe atrocities against migrants in Libya', 29 October 2022, available at https://

Charter on the Rights and Welfare of the Child, individuals can submit a communication to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

Italy, for its part, has recognised the competence of all UN treaty monitoring bodies to receive individual communications except under the ICRMW and the ICPED.[118] As discussed above, a key question concerns the extent to which Italy incurs human rights obligations towards people on the move in Libya: can externalisation policies trigger Italy's jurisdiction? Since the ICESCR does not contain a jurisdiction clause, Italy's substantive obligations under that instrument are not per se limited to persons within its jurisdiction, and it may even have extraterritorial obligations of international assistance and cooperation.[119] Yet, at the procedural level, Article 2 of the Optional Protocol to the ICESCR requires that communications 'be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party'. In other words, the jurisdiction requirement must be met for a complaint to be admissible. The same applies for the CEDAW and CRPD.[120]

Under the CoE regime, there are less accountability mechanisms available against Italy to people on the move confined in Libya. As noted above, since Italy is a party to the ECHR, it recognises the competence of the ECtHR to receive individual complaints. People on the move can therefore lodge an application with the ECtHR, alleging that Italy has breached its obligations under the ECHR. However, given the ECtHR's rather restrictive approach to extraterritorial jurisdiction, it is far from certain that such a complaint would be declared admissible. Moreover, as the ECHR only protects civil and political rights, it is ill-equipped to address violations of economic, social and cultural rights. Yet, as the European Social Charter (revised) does not apply to people on the move in Libya, the European Committee of Social Rights, which supervises its implementation, cannot examine collective complaints concerning people on the move in Libya. Furthermore, other CoE human rights instruments do not provide for an accountability mechanism that is accessible to individuals.[121]

To conclude, in the Mediterranean there is a discrepancy between states' commitment to human rights regimes and people on the move's access to accountability mechanisms. Indeed, although Libya has extensive substantive obligations towards people on the move on its territory, especially under the African and UN regimes, the only complaint procedures available to people on the move against Libya are the AComHPR and ACERWC. As regards Italy, a distinction must be made between the

Footnote 117 (continued)
sciabacaoruka.asgi.it/wp-content/uploads/2022/11/NGOs-to-African-Commission-to-probe-atrocities-against-migrants-in-Libya-3.pdf.

[118] Italy has not ratified the ICRMW and has not made a declaration under Art. 31 ICPED.

[119] Compare the wording of Art. 2(1) ICESCR and Art. 2(1) ICCPR. See also Sect. 2.2 above.

[120] See n. 46.

[121] For instance, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment establishes a committee which carries out visits to states parties to examine the treatment of persons deprived of their liberty within their jurisdiction (Arts. 1 and 2 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment).

regional and international levels. On the one hand, it grants access to seven out of nine UN treaty monitoring bodies, and it cannot be ruled out that these bodies would consider a complaint from a person on the move confined in Libya to be admissible in light of their rather expansive approach to jurisdiction. On the other hand, under the CoE regime, the only available remedy is an application to the ECtHR, which has adopted a more restrictive approach to extraterritorial jurisdiction. Thus, the picture that arises in the Mediterranean differs from the Pacific and North American contexts, as discussed further below.

5 Overview and Comparative Analysis: No 'One Size Fits All'

The previous sections examined three examples of contemporary externalisation practices in the Pacific, North America and the Mediterranean. They revealed similarities in terms of the policies implemented as well as their consequences on the human rights of people on the move. Australia, the USA and Italy all provide funding, training and equipment to neighbouring states in the Global South, which results in the containment of people on the move in the latter. Thus, a key aspect of contemporary externalisation policies is the fact that the externalising state's involvement is remote.[122] Indeed, none of the policies examined here involve 'boots on the ground' on the part of the externalising state. The consequences of externalisation policies are also similar, as they all lead to violations of the human rights of people on the move confined in neighbouring states. The latter include violations of civil and political rights, such as the right to life and the prohibition of inhuman and degrading treatment, but also economic, social and cultural rights, such as the rights to an adequate standard of living, health and education.

In light of these empirical similarities, the question that this article seeks to answer is to what extent the international and regional human rights regimes offer accountability mechanisms to address these violations. Table 1 recalls what substantive obligations each state has and what complaint procedures are available to people on the move in each context. It shows that in terms of both substantive obligations and complaint procedures, there are significant differences between the three regions examined, and that it is not possible to provide a single, overarching answer to the above question. Nevertheless, some commonalities also emerge. Accordingly, this section discusses the differences and similarities between the three contexts examined in this article in order to answer the above question.

Table 1 shows that the UN human rights regime applies to all states examined. It thus serves as the lowest common denominator, especially as regards states' substantive obligations. Indeed, all states have at least ratified the ICERD, the ICCPR and the CAT. It is therefore clear that the human rights norms protected by these instruments apply to people on the move in all three contexts.[123] Yet Table 1 also

[122] Pijnenburg et al. (2018), p. 367.

[123] This also holds true for customary international human rights norms. However, to the extent that there is agreement as to the customary status of specific human rights norms, those that have achieved this status overlap with these treaties: the right to life, the prohibition of torture, and the prohibition of

Table 1 Substantive human rights obligations and available complaint procedures

State	Substantive international human rights obligations	International complaint procedure(s)	Applicable regional human rights regime(s)	Substantive regional human rights obligations	Regional complaint procedure(s)
Indonesia	All core UN human rights treaties except ICPED	x	ASEAN	AHRD	x
Australia	All core UN human rights treaties except ICPED and ICRMW	Treaty bodies that monitor ICERD, ICCPR, CEDAW, CAT and CRPD	x	x	x
Mexico	All core UN human rights treaties	All UN treaty bodies except those monitoring CESCR and CRC	OAS	ADRDM, ACHR, Protocol of San Salvador + others	IAComHR and IACtHR
USA	ICERD, ICCPR, CAT	x	OAS	ADRDM	IAComHR
Libya	All core UN human rights treaties except ICPED	Treaty bodies monitoring ICCPR and CEDAW	League of Arab States	Arab Charter	x
			African Union	ACHPR + others	AComHPR, ACtHPR and ACERWC
Italy	All core UN human rights treaties except ICRMW	All UN treaty bodies except those that monitor ICRMW and ICPED	CoE	ECHR and Protocols, European Social Charter (revised) + others	ECtHR

shows that there are stark contrasts in terms of the applicable regional human rights regimes. In the Pacific, there is only a regional human rights regime that is applicable to Indonesia (and none to Australia); in North America both the USA and Mexico are members of the OAS; and in the Mediterranean Italy is a member of the CoE, while both the Arab and African human rights regimes apply to Libya. From the perspective of state participation in regional human rights regimes, one would thus expect that people on the move in the Mediterranean have access to most accountability mechanisms, and those in the Pacific to the least. This is the case, although the existence of a human rights regime does not necessarily mean that people on the move affected by externalisation policies have access to a complaint mechanism.

Indeed, the existence of a human rights regime is not the only relevant aspect. Rather, another crucial element is the extent to which a regime offers human rights protection, both in terms of substantive obligations and accountability procedures. For example, as regards substantive human rights protection, the AHRD and the Arab Charter limit states' obligations towards people on the move as regards economic, social and cultural rights. Likewise, neither of these two human rights instruments grants access to an actionable accountability mechanism. This stands in stark contrast with the Inter-American and African human rights systems, which offer better protection for economic, social and cultural rights and whose complaint mechanisms include a human rights commission as well as a court. Furthermore, ASEAN is the only regime that does not include a binding human rights instrument; and while most regimes only have non-binding accountability mechanisms, such as the complaint procedures of the UN treaty monitoring bodies, in the Americas, Europe and Africa the victims of human rights violations can also have access to a regional court that issues binding judgments. In other words, the substantive and procedural strength of a particular human rights regime also affects the extent to which people on the move can hold states accountable.

Yet there are also similarities across the three regions, notably as regards the different levels of protection enjoyed by civil and political rights, on the one hand, and economic, social and cultural rights, on the other. As noted above, some instruments limit states' obligations in the field of economic, social and cultural rights towards non-nationals. Moreover, states' obligations regarding economic, social and cultural rights are often subject to provisions on available resources and progressive realisation.[124] This somewhat limits the scope of their obligations, especially for Global South countries that host people on the move in the context of externalisation. Nevertheless, the Committee on Economic, Social and Cultural Rights has clarified what these obligations entail.[125] Insofar as many violations of the economic, social and

Footnote 123 (continued)
discrimination on the grounds of race, sex and religion. Moreover, there is no actionable accountability mechanism inherent in customary law that people on the move could turn to.

[124] See for instance Art. 2(1) ICESCR, Arts. 4, 24(4) and 28 CRC, Art. 4(2) CRPD, Art. 26 ACHR.

[125] See notably Committee on Economic, Social and Cultural Rights (1990), General comment no. 3: the nature of states parties' obligations (Art. 2, para. 1, of the Covenant), UN Doc. E/1991/23.

cultural rights of people on the move concern states' core obligations, it is unlikely that host states fully comply with their obligations as regards economic, social and cultural rights.[126]

The foregoing analysis also illustrated that various regional regimes protect economic, social and cultural rights to a lesser extent than civil and political rights. The CoE grants less substantive and procedural protection for economic, social and cultural rights than for civil and political rights. The Inter-American system limits access to the IACtHR for violations of economic, social and cultural rights, although the Court has also developed their protection through an expansive interpretation of the civil and political rights guaranteed by the ACHR. The ACHPR, however, forms a notable exception, as it offers equal protection to civil and political rights and economic, social and cultural rights. In this sense, as socio-economic rights are better protected in Mexico than in the USA and in the African rather than in the European human rights system, externalisation could be considered beneficial to the protection of economic, social and cultural rights of people on the move in the Americas and the Mediterranean. At the international level, there is also a stark contrast between states' substantive obligations and their willingness to recognise the competence of the UN treaty bodies to receive individual communications. Notably, while the USA is the only state examined here that has not acceded to the ICESCR, Italy is the only one that has ratified the Optional Protocol to the ICESCR. This reflects states' unwillingness to submit to a quasi-judicial monitoring mechanism as regards economic, social and cultural rights. Indeed, only 26 states are parties to the Optional Protocol to the ICESCR, and the vast majority of the communications submitted to the Committee on Economic, Social and Cultural Rights concern the right to housing in Spain.[127] In sum, then, it is considerably more difficult for people on the move to challenge violations of their economic, social and cultural rights as a result of externalisation than violations of their civil and political rights. This reflects a wider discrepancy in international human rights law.[128]

Another crucial aspect of access to accountability mechanisms for human rights violations in the context of externalisation concerns the extent to which each state engages with existing regimes, both substantively and procedurally. This is particularly evident in the North American context, where both the USA and Mexico participate in the same human rights regimes (of the UN and OAS), yet Mexico has accepted considerably more substantive human rights obligations than the USA and grants access to many more complaint procedures. Likewise, in the Pacific, although Indonesia has more substantive human rights obligations than Australia, unlike the latter, it does not grant access to any accountability mechanism. More generally, although the international human rights regime applies to all states examined here, no two states have acceded to the same UN core human rights treaties and their protocols, resulting in different substantive obligations and access to complaint

[126] For a detailed discussion see Pijnenburg (2021), pp. 113–140.
[127] Coomans and Díaz-Reixa (2021).
[128] For a detailed discussion see for instance Langford (2008); Young (2019); Dugard et al. (2020).

procedures for each state.[129] The extent to which each state engages with the available international and regional human rights regimes is thus a key factor in determining people on the move's access to accountability mechanisms.

Furthermore, the analysis in this article suggests that externalisation policies can contribute to successfully insulating externalising states from accountability. As territory and jurisdiction play a crucial role in determining the scope of states' human rights obligations, externalising states design and implement externalisation policies to avoid triggering obligations towards people on the move.[130] Italy's shift in policies from pushbacks to pullbacks in response to the ECtHR's *Hirsi Jamaa* ruling illustrates this clearly. While the extent to which externalisation successfully insulates externalising states from accountability varies, it complicates people on the move's access to complaint procedures. In the Pacific, the lack of clarity regarding the applicability of UN human rights treaties to Australia's cooperation with Indonesia is the main obstacle for people on the move to hold Australia accountable. Likewise, under the CoE regime, neither the European Social Charter (revised) nor the European Convention on the Legal Status of Migrant Workers applies extraterritorially, and the ECtHR tends to adopt a more restrictive approach to extraterritorial jurisdiction than the UN treaty bodies. A crucial aspect in this regard is the fact that contemporary externalisation policies adopt a 'hands-off' approach on the part of the externalising state—which often limits itself to providing funding, training and equipment, without 'boots on the ground'—which makes it more difficult to argue that it has obligations towards people on the move in neighbouring states.

Finally, in light of the challenges in demonstrating that externalising states have obligations towards people on the move in neighbouring states, the question arises whether host states offer better access to complaint procedures than externalising states—and hence whether externalisation could be beneficial in terms of access to accountability mechanisms. Table 1 shows that there is no consistent answer to this question. In the Pacific, externalisation is arguably detrimental in this regard, as Indonesia does not provide access to any accountability mechanism, unlike Australia. In North America, on the other hand, people on the move have access to more and stronger accountability mechanisms against Mexico than the USA. In the Mediterranean, externalisation primarily means that people on the move have access to the African instead of the European human rights regime. Unsurprisingly, while no externalising state has ratified the ICRMW, all host states have acceded to this convention. This reflects broader patterns of support for this convention among migrant 'sending' countries, and opposition to it among 'receiving' countries.[131] Yet of the three host states examined in the present analysis, only Mexico has made a declaration under Article 77 ICRMW by which it recognises the competence of the Committee on the Protection of the Rights of All Migrant Workers and Members of

[129] Indonesia and Libya have the same substantive obligations but grant different access to complaint mechanisms; both Indonesia and the USA do not grant access to any complaint mechanism, yet they have different substantive obligations.

[130] Gammeltoft-Hansen (2018), p. 379.

[131] For a more detailed discussion see Desmond (2017).

Their Families to receive individual communications. Thus, the shifting of the locus of migration control from the Global North to the Global South that externalisation entails is neither beneficial nor detrimental per se to people on the move's access to accountability mechanisms.

In conclusion, on the one hand, there are empirical similarities between the three contexts examined as regards the type of externalisation policies implemented by Australia, the USA and Italy as well as the resulting human rights violations suffered by people on the move in Indonesia, Mexico and Libya. On the other hand, the legal analysis reveals stark contrasts between the Pacific, North America and the Mediterranean, both in terms of substantive and procedural human rights protection. Nevertheless, overall, the foregoing demonstrated that the international and regional human rights regimes provide only limited accountability mechanisms for violations of the human rights of people on the move in the context of externalisation.

6 Conclusion

This article examined to what extent the international and regional human rights regimes provide accountability mechanisms for violations of the human rights of people on the move in the context of externalisation. Using the cooperation between Australia and Indonesia, the USA and Mexico, and Italy and Libya respectively as examples, it first showed that these states implement similar externalisation policies. The latter are characterised by the provision of funding, training and equipment by an externalising state in the Global North to a neighbouring state in the Global South where people on the move are confined and where they often suffer human rights violations. The analysis further revealed that, in addition to the UN human rights regime, different regional regimes apply to each context and even state, ranging from no regional regime at all to overlapping regional regimes. Moreover, as the strength of each regime varies and states engage to different degrees with each system, what complaint procedures are available to people on the move varies per context. Overall, however, the foregoing showed that the international and regional human rights regimes provide only limited accountability mechanisms for violations of the human rights of people on the move in the context of externalisation.

This sobering conclusion, in turn, points to two issues that deserve further investigation. First, the analysis in this article focused on substantive and procedural dimensions of states' engagement with human rights regimes. In other words: which human rights obligations and complaint mechanisms apply to each state? This analysis must be complemented by further research that examines the effectiveness in practice of the available mechanisms, by investigating issues of practical accessibility, admissibility requirements (beyond the question of jurisdiction), remedies and implementation. The second issue concerns which other accountability mechanisms are available in addition to the regional and international procedures examined here. This includes, at a minimum, domestic judicial procedures in each jurisdiction, as well as other human rights accountability mechanisms at the international and regional level. This article thus sought to contribute to a wider mapping exercise of avenues for accountability in the context of externalisation. Having an overview of

the available avenues and how they can be used, with examples from several regions, may show how advocates and practitioners in the Global South and the Global North may be able to join forces to protect the human rights of people on the move in the context of externalised migration control.

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