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ARTICLE

Challenging Externalisation Through the Lens of the Human Right to Leave

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Abstract

Around the world, externalised migration controls continue to proliferate, leading to host of human rights harms for migrants. Migrants (and citizens) are being contained in states of origin and transit and denied their fundamental right to leave. However, externalisation is typically understood as preventing migrants entering state territory and accessing asylum, which has shaped litigation efforts and the rights and obligations that are invoked. Accordingly, this article seeks to demonstrate that the right to leave any country remains a largely overlooked avenue for challenging harmful externalisation practices and to highlight the important role it can play in remedying accountability gaps. It provides a broad overview of the right to leave in international law and its main contours as a starting point for considering the applicability of the right to externalisation measures. It examines the key jurisprudence concerning externalisation and the cases invoking the right to leave, including with respect to pushbacks, offshore processing, safe country arrangements, visa regimes, carrier sanctions and pullbacks, illustrating missed opportunities and positive developments. The article calls for a change in approach that recognises the great potential of the right to leave in tackling externalisation and containment, suggesting future opportunities for the right to be litigated and developed across different fora.

Keywords Externalisation · The right to leave any country · Migration control · Strategic litigation · Accountability · Human rights

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1 Introduction

All individuals possess the human right to leave any country, including (would-be) asylum seekers, refugees and other migrants. Yet globally we are seeing the proliferation of externalised migration controls, especially by states in the Global North, which not only serve to prevent migrants reaching and entering state territory, but as a means of containment to prevent their departure from states of origin and transit.[1] Despite the array of human rights harms experienced by migrants subject to externalisation, ensuring the accountability of states and other actors remains largely elusive. This article argues that the right to leave can play an important role in holding states and other actors responsible for externalisation practices and closing accountability gaps but has so far remained a largely overlooked and underexplored avenue. The article begins by discussing how the overarching focus is typically on how externalisation impacts entry and access to territorial asylum, not on how externalisation (simultaneously) infringes the right to leave, which has shaped how externalisation measures are challenged before different fora and the rights being invoked. It then provides a broad overview of the main contours of the right to leave as a starting point for considering the right's applicability to externalised migration controls. Next, the article examines the key jurisprudence relating to the externalisation measures of European states, the US and Australia, and in particular, cases that have invoked the right to leave, illustrating the lack of attention afforded to this fundamental right and missed opportunities. It concludes with reflections on future opportunities for the right to be litigated and developed before different fora, highlighting the great potential of the right to leave in tackling the containment of migrants through externalisation and the inequalities of the global mobility regime.

2 Externalisation: Blocking Entry, Departure or Both?

Much has been written on the externalisation of migration controls and efforts by states and the European Union (EU) to externalise their international protection obligations.[2] While there are ongoing discissions about how to conceptualise and define 'externalisation' as a phenomenon and term,[3] it has become clear that externalisation is typically viewed through the lens of entry and access to territory/asylum. For example, the United Nations High Commissioner for Refugees (UNHCR) defines the externalisation of international protection as '[m]easures … which directly or indirectly prevent asylum-seekers and refugees from reaching a particular "destination" country or region, and/or from being able to claim or enjoy protection there'.[4]

[1] This article draws from and builds on the authors doctoral thesis McDonnell (2021a) as well as McDonnell (2021b).

[2] See e.g., Gammeltoft-Hansen (2011); den Heijer (2012); Moreno-Lax (2017); FitzGerald (2019); Dastyari, Nethery and Hirsch (2022).

[3] See Tan (2021); UNHCR (2021), paras. 4 and 5; Refugee Law Initiative (2022), para. 2; Cantor et al. (2022), pp. 122–123.

[4] UNHCR (2021), para. 5.

The Refugee Law Initiative Declaration on Externalisation and Asylum similarly focuses on access to territorial asylum, highlighting how states are increasingly using 'externalised forms of border controls to prevent access by non-nationals to their territory'.[5] Scholars have, for instance, defined externalisation as 'prevent[ing] migrants … from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims';[6] 'operat[ing] beyond the state to disrupt migration pathways by preventing individuals from reaching or entering a state's territory';[7] and 'measures taken by states beyond their borders to obstruct or deter the arrival of foreign nationals lacking permission to enter their intended destination country'.[8] While there are exceptions,[9] the overarching focus is on one end of the migration trajectory—how externalisation prevents migrants entering state territory (so-called *non-entrée*[10]) and accessing asylum on their shores.[11]

While it is certainly the case that states engage in externalisation to prevent irregular arrivals and avoid their protection obligations being triggered, externalisation is equally designed as a tool of *containment* and to impede movement from *the beginning and throughout* the migrant trajectory. For instance, long-standing measures, such as visas and carrier sanctions, seek to obstruct departure from the very beginning and keep (would-be) migrants as far as possible from the border.[12] States of origin and transit are now being enlisted by destination states and the EU to prevent irregular migration out of their territories, including through pullbacks, criminalisation of exit and detention.[13] Frontline states are containing migrants in hotspots and islands to prevent onward movement, while so-called 'safe countries'[14] are required not only to readmit irregular migrants, but also strengthen border controls.[15] Externalised migration controls allow states to obstruct entry and exit *simultaneously*. The two are highly interconnected and indeed, if states were successful in fully controlling exit, they would avoid all together having to control the entry of irregular and

[5] Refugee Law Initiative (2022), para. 11.

[6] Frelick, Kysel and Podkul (2016), p. 193.

[7] The Comparative Network on Refugee Externalisation Policies (2022), p. 8.

[8] Crisp (2020).

[9] See Scheinin (2000); Cornelisse (2008); Guild (2013); Markard (2016); Guild and Stoyanova (2018); Giuffré and Moreno-Lax (2019), pp. 94–96; Stoyanova (2020a).

[10] Hathaway (1992); Gammeltoft-Hansen and Hathaway (2015).

[11] See e.g., Gammeltoft-Hansen (2011); den Heijer (2012); Moreno-Lax (2017), FitzGerald (2019). This is not to say that their works do not mention or engage with the right to leave or exit controls, but that they focus on access to asylum.

[12] See Guild (2003); Neumayer (2006); Rodenhäuser (2014).

[13] See Commission, 'Establishing a new Partnership Framework with third countries under the European Agenda on Migration' (Communication), COM (2016) 385 final. Giuffré and Moreno-lax (2019) label this 'contactless control'.

[14] This encompasses safe countries of origin and safe countries of asylum. See UNHCR, Background Note on the Safe Country Concept and Refugee Status, 1991, EC/SCP/68.

[15] Commission, 'The Global Approach to Migration and Mobility' (Communication), COM (2011) 743 final (GAMM); European Council, 'EU-Turkey Statement' (18 March 2016); Laube (2019).

other undesirable migrants.[16] Macklin describes the 'seamless articulation of exit and entry policy', querying whether states with their seamless borders have moved away from 'obstructing exit and preventing entry as ends in themselves, and more on asserting control over movement as such'.[17]

Containment is a key pillar of externalisation and yet as the following sections illustrate, the way externalisation measures may infringe and violate the right to leave has not featured prominently in the jurisprudence to date, despite the right being integral to people on the move. The key literature that has been discussed in this section having framed externalisation as a phenomenon primarily impacting only one end of the migration trajectory has predictably shaped and influenced efforts taken to secure accountability for the resulting harms and the specific violations raised.

3 The Right to Leave in International Law

The right to leave any country, including one's own, is enshrined in almost all major human rights instruments. The right was first expressed post-World War II in Article 13(2) of the Universal Declaration of Human Rights and then incorporated into Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR), becoming a binding right with global reach.[18] Article 12(2) provides that '[e]veryone shall be free to leave any country, including his own'. The right is a qualified one, which can only be restricted when provided by law, as necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and must be consistent with the other rights recognised in the Covenant (Art. 12(3)). Regionally, the right to leave is protected in Article 2(2) of Protocol 4 of the European Convention on Human Rights (ECHR), as well as human rights instruments across Africa, America, Asia, Eurasia and the Middle East.[19] The right to leave is also generally accepted as a norm of customary international law.[20]

[16] See Weinzierl and Lisson (2007), pp. 70, 79; Markard (2016), p. 616 on emigration controls and non-departure measures deployed in third states.

[17] Macklin (2023), pp. 6 and 12.

[18] The right to leave is also enshrined in a range of other international conventions including the International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5(d)(ii); Apartheid Convention, Art. 2(c); Convention on the Rights of the Child, Art. 10(2); Migrant Workers Convention, Art. 8(1); Convention on the Rights of Persons with Disabilities, Art. 18(1)(c).

[19] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948), Art. VIII; American Convention on Human Rights (Pact of San José) (entered into force 18 July 1978), OAS Treaty Series No. 36 (1969), Art. 22(2); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982), 21 ILM 58, Art. 12(2); Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (adopted 26 May 1995, entered into force 11 August 1998), 3 IHRR 1, 212, Art. 22(2); Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), 12 IHRR 893, Art. 27; ASEAN Human Rights Declaration (adopted 19 November 2012), Art. 15.

[20] Chetail (2014), pp. 9–27.

The right to leave any country including one's own is thus recognised as a fundamental right, internationally and regionally. Yet it remains poorly understood and underdeveloped.[21] Nonetheless, key parameters of the right can be derived from the text of the right itself and the interpretive work of the UN Human Rights Committee (HRC) and European Court of Human Rights (ECtHR) in particular. The HRC in General Comment No. 27 on Freedom of Movement from 1999—its first and only general comment on Article 12—begins by emphasising that '[l]iberty of movement is an indispensable condition for the free development of a person'.[22] It provides that freedom to leave a country must not be made dependent on any specific purpose or on the period a person chooses to stay outside the country. The 'right of the individual to determine the State of destination is part of the legal guarantee' and the right to leave is not restricted to persons lawfully within the territory of a state, with migrants being legally expelled from the country also entitled to elect their state of destination, subject to the agreement of that state.[23] That the right to leave applies to 'everyone' within any given territory, regardless of nationality or legal status, is clear from the text of the right itself.[24] However, lawfulness of presence is relevant in assessing permissible limitations. In one individual communication to the HRC, the applicant complained that in refusing to return his passport after his asylum claim was rejected, Canada had breached his right to leave under Article 12(2). The HRC found the complaint inadmissible as the applicant had failed to substantiate his claim against Canada's explanation that the passport was seized to execute a lawful removal.[25]

The HRC in General Comment No. 27 makes clear that the right to leave imposes obligations, both positive and negative, on both the state of residence and state of nationality. The right also includes the right to obtain the necessary travel documents for international travel, in particular a passport, which is normally incumbent on the state of nationality.[26] Indeed, the majority of individual communications considered by the Committee concern breaches of the right to leave because of refusals to issue passports to nationals living abroad or revocations by the state without any explanation or valid justification.[27] While the text of the right plainly encompasses

[21] This was the impetus for the author's doctoral research.

[22] HRC, General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 1. Note that the HRC's General Comment has been endorsed by the Inter-American Court of Human Rights (IACtHR): *Ricardo Canese v. Paraguay*, 31 August 2004, IACtHR Series C No. 111, paras. 115–117, 123 and the ECtHR, see, *Bartik v. Russia*, Appl. No. 55565/00, 21 December 2006, paras. 36, 46; *Riener v. Bulgaria* (2007) 45 EHRR 32, para. 83.

[23] General Comment No. 27 (n. 22), para. 8.

[24] Nowak (2005), p. 268.

[25] HRC, *Moses Solo Tarlue v. Canada*, Comm. No. 1551/2007, 28 April 2009, CCPR/C/95/D/1551/2007, para. 7.7. See for a discussion of HRC jurisprudence, Harvey and Barnidge (2007), pp. 6–11; Guild and Stoyanova (2018), pp. 382–384.

[26] General Comment No. 27 (n. 22), para. 9.

[27] See the HRC's 'Passport Cases': *Sophie Vidal Martins v. Uruguay*, Comm. No. R13/57, 23 March 1982, A/37/40; *Carlos Varela Núñez v. Uruguay*, Comm. No. 108/1981, 22 July 1983, CCPR/C/OP/2; *Mabel Pereira Montero v. Uruguay*, Comm. No. 106/1981, 31 March 1983, CCPR/C/OP/2; *Samuel Lichtensztejn v. Uruguay*, Comm. No. 77/1980, 31 March 1983, CCPR/C/OP/2. See also *Loubna El Ghar v. Libya*, Comm. No. 1107/2002, 15 November 2004, CCPR/C/82/D/1107/2002. Cf. *Peltonen v.*

departure from 'any country' where a person is present, the passport cases further elucidate that the right must be secured by states of departure as well as states exercising extraterritorial jurisdiction.[28] The HRC has explicitly expressed major concern with the manifold legal and bureaucratic barriers affecting the right of individuals to leave the country and requested states to report on such measures, in particular sanctions on carriers for transporting people without the required documents.[29]

Any restriction on the right to leave must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality.[30] The Committee states that 'restrictions must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed'.[31] The law authorising the restriction 'should use precise criteria and may not confer unfettered discretion on those charged with their execution'.[32] Crucially, restrictions be consistent with other rights in the Covenant and the fundamental principles of equality and non-discrimination. Even where a restriction is otherwise permissible under Article 12(3), it would be a clear violation if the right to leave were restricted in a discriminatory manner based on a prohibited ground.[33]

Similarly, the right to leave enshrined in Article 2(2) Protocol 4 of the ECHR protects the right of 'everyone' to leave 'any country'. The Court's jurisprudence has predominantly focused on restrictions imposed by former Soviet and Soviet bloc states (where restrictions on emigration were commonplace during the Cold War), such as travel bans and the seizure and denial of passports. The issues before the Court often concern legality and the necessity of the measure in question. According to the Court, restrictions on the right to leave will not be 'in accordance with law' where the law is, for instance, vague, imprecise or lacking adequate safeguards[34]; where the basis is not clear or foreseeable[35]; or when there is no legal basis at all.[36] The Court has been clear that restrictions on leaving that are automatic, indefinite or disregard individual circumstances cannot be considered necessary or proportionate to pursuing a legitimate aim.[37] Any interference must strike a fair balance between

Footnote 27 (continued)
Finland, Comm. No. 492/1992, 26 July 1994, CCPR/C/51/D/492/1992, where Finland's refusal to issue a passport to a national avoiding military service was found not to violate Art. 12(2) because the refusal was provided by law and necessary to protect national security and public order.

[28] See also Nowak (2005), pp. 268–269; Moreno-Lax (2008), pp. 353–355; Guild and Stoyanova (2018), pp. 375 and 386.

[29] General Comment No. 27 (n. 22), paras. 10 and 17.

[30] Ibid., para. 16.

[31] Ibid., para. 13. See on proportionality, para. 14.

[32] HRC, *de Groot v. Netherlands*, Comm. No. 578/1994, 14 July 1995, CCPR/C/54/D/578/1994, para. 4.3; General Comment No. 27 (n. 22), paras. 12 and 13.

[33] General Comment No. 27 (n. 22), para. 18.

[34] ECtHR, *Sissanis v. Romania*, Appl. No. 23468/02, 25 January 2007, paras. 66–79; ECtHR, *Rotaru v. Moldova*, Appl. No. 26764/12, 8 December 2020, paras. 27–35.

[35] ECtHR, *Dzhaksybergenov v. Ukraine*, Appl. No. 12343/10, 10 February 2011, paras. 59–62.

[36] ECtHR, *Zabelin and Zabelina v. Russia*, Appl. No. 55382/07, 4 October 2016, paras. 16–21; ECtHR, *Mursaliyev v. Azerbaijan*, Appl. Nos. 66650/13 and 10 ors, 13 December 2018, paras. 32–36.

[37] ECtHR, *Földes and Földesné Hajlik v. Hungary*, Appl. No. 41463/02, 31 October 2006, paras. 35–36; ECtHR, *Riener v. Bulgaria* (2007) 45 EHRR 32, paras. 127–130; ECtHR, *Stamose v. Bulgaria*, Appl. No. 29713/05, 27 November 2012, paras. 33–36.

the public interest and individual's right to leave, with only clear indications of a genuine public interest being capable of outweighing the individual's right to freedom of movement.[38]

Like the HRC, the Strasbourg Court has also emphasised the individual's right to elect their destination, holding that Article 2(2) Protocol 4 'implies a right to leave for any country of the person's choice to which he may be admitted'.[39] The Court in its jurisprudence has not explained the meaning of 'to which he may be admitted', leaving two possible readings open. First, that the right to leave is *limited* by the state of choice/receiving state's willingness to admit the person and second, as *affirming* the self-standing nature of the right to leave as independent and distinct from any right of entry to the destination state. The right to leave is well-understood in terms of the latter reading—that the right is exercisable irrespective of whether entry will be granted.[40] Notably, the right itself does not contain any requirement that persons must first prove they will be admitted elsewhere. As for the Strasbourg Court's framing, rather than specifying that admission 'will' be secured, the Court uses 'may', which speaks to possibility, while also emphasising the element of choice.[41] Furthermore, as Guild and Stoyanova have argued, logically the right to leave must be understood as independent from admission so that individuals can set sail onto the high seas.[42] Individuals, and asylum seekers in particular, may also not have a specific destination state in mind when their right to leave is inhibited. As Weinzierl and Lisson aptly argue, when a person exits a state by sea or their freedom to exit is obstructed by the denial of a passport, the destination state is not easily determinable and the theoretical impossibility of securing entry on arrival to any such destination cannot justifiably be taken into account when obstructing departure.[43] Indeed, the ECtHR has not taken this theoretical impossibility into account when finding that passport refusals and travel bans violate the right to leave.[44] The case law further demonstrates that preventing an individual from travelling beyond a particular region or group of countries (for example, the Schengen Area) constitutes an interference with the right, hampering their ability to travel to countries of their

[38] ECtHR, *Makedonski v. Bulgaria*, Appl. No. 36036/04, 20 January 2011, para. 36; ECtHR, *Miazdzyk v. Poland*, Appl. No. 23592/07, 24 January 2012, para. 35.

[39] See e.g., ECtHR, *Baumann v. France*, Appl. No. 33592/96, 22 May 2001, para. 61; ECtHR, *Berkovich v. Russia*, Appl. Nos. 5871/07 and 9 ors, 27 March 2018, para. 78.

[40] See e.g., Goodwin-Gill and McAdam (2007), pp. 381–382; Harvey and Barnidge (2007), p. 20; den Heijer (2012), pp. 156–159; Guild and Stoyanova (2018), pp. 381–382, 385; Chetail (2019), p. 92.

[41] Stoyanova (2020a), p. 414, fn. 60. Cf Moreno-Lax (2017), pp. 358–359; Moreno-Lax (2021), pp. 52 and 76–77.

[42] Guild (2013), p. 9; Guild and Stoyanova (2018), pp. 381–382.

[43] Weinzierl and Lisson (2007), p. 68. Guild and Stoyanova (2018), p. 385 further highlight the issue of third state officials restricting leaving over concerns that people may not be admitted to their destination, despite not being qualified to perform such an examination.

[44] E.g., *Baumann* (n. 39); *Stamose* (n. 37); *Berkovich* (n. 39); and more recently, ECtHR, *S.E. v. Serbia*, Appl. No. 61365/16, 11 July 2023, where the Court found a violation because of the refusal to issue a recognised Syrian refugee with a travel document for seven years. See den Heijer (2012), p. 156.

choice outside this region.[45] While it is well-established within international law that a state has the right to control the entry of non-nationals into its territory, subject to its treaty obligations,[46] unclear statements from the ECtHR and HRC should not be interpreted so as to render the right to leave *dependent* on securing admission elsewhere prior to departure.

For present purposes, these principles provide a useful starting point for practitioners, scholars and (potential) litigants to consider whether a specific externalisation measure raises issue with the right to leave and whether to invoke the right before a relevant adjudicative body.[47] In the next section, the key jurisprudence on externalisation is outlined, revealing how the aforementioned principles on the right to leave are, for the most part, yet to be applied and expounded to address externalisation.

4 Litigating Externalised Migration Control

Litigation has been brought across a growing range of fora and diverse legal regimes to challenge externalisation. Tan and Gammeltoft-Hansen have argued for a 'topographical approach' to ensuring accountability for human rights violations during migration control, which requires taking a bird's-eye view of the site of a violation to realise the different accountability structures that are available across diverse legal regimes and geographies.[48] Applying this topographical approach, Pijnenburg and van der Pas in a recent article provide an overview of the plethora of strategic litigation brought against different actors implicated in European migration control policies in the Central Mediterranean across domestic, regional and international forums.[49] This section builds on this discussion by focusing not on the fora and legal regimes being utilised, but on the *subset of international obligations and human rights* typically litigated in an attempt to bring an end to harmful externalisation measures. It looks first to the rights and obligations raised in the jurisprudence concerning key externalisation measures, before moving to the cases challenging externalisation under the right to leave. The purpose of Sects. 4.1 (pushbacks), 4.2 (offshore processing and safe country arrangements) and 4.3 (visa regimes and carrier sanctions) is not to demonstrate that these measures infringe the right to leave (the instances in which they might are unpacked in Sects. 4.4 and 4.5). Rather, the

[45] ECtHR, *Soltysyak v. Russia*, Appl. No. 4663/05, 10 February 2011, para. 37; ECtHR, *L.B. v. Lithuania*, Appl. No. 38121/20, 14 June 2022, para. 81. See also *Peltonen* (n. 27). The HRC has also found a violation of Art. 12(2) where an individual could not travel to the specific country they wanted to: *Loubna El Ghar* (n. 27). See Stoyanova (2020a), pp. 406–407 and 413.

[46] See e.g., ECtHR, *Abdulaziz, Cabales and Balkandali v. UK* (1985) 7 EHRR 471, para. 67; ECtHR, *Chahal v. UK* (1996) 23 EHRR 413, para. 73; ECtHR, *Hirsi Jamaa v. Italy* (2012) 55 EHRR 21, para. 113.

[47] For further discussion of the right see: Hannum (1987); Kochenov (2012); Guild (2013); Markard (2016); Guild and Stoyanova (2018); Chetail (2019), pp. 77–92.

[48] Tan and Gammeltoft-Hansen (2020).

[49] Pijnenburg and van der Pas (2022).

purpose is to reveal the extensive litigation of other rights and obligations vis-à-vis externalisation measures, compared with the very limited cases invoking the right to leave (Sect. 4.4), even where an interference with departure is apparent.

4.1 Pushbacks

Pushbacks at sea and on land have been litigated extensively.[50] As a result, states have been held accountable to some extent for pushbacks and their accompanying rights violations. The obligation of *non-refoulement* and prohibition on collective expulsion are the primary rights being relied upon to declare pushbacks unlawful. In Europe, for example, in the seminal case of *Hirsi Jamaa v. Italy*, the ECtHR found Italy's practice of intercepting boats and pushing them back to Libya unlawful for violating the obligation of *non-refoulement* under Article 3 ECHR, the prohibition on collective expulsion under Article 4 Protocol 4 and the applicant's right to an effective remedy under Article 13.[51] Similar findings have been made regarding the systematic expulsion and pushback policies of Bulgaria,[52] Croatia,[53] Hungary,[54] Lithuania,[55] and Poland[56] of migrants at their borders. Domestic and EU courts have also declared pushbacks unlawful for violating multiple human rights, including *non-refoulement*, collective expulsion and right to asylum enshrined under EU law.[57]

However, this approach has not always led to accountability (or indeed brought an end to the widespread use and normalisation of pushbacks at Europe's borders). In the much-criticised decision of *ND and NT v. Spain*, Strasbourg held that Spain's summary return of migrants attempting to cross into the Melilla enclave back to Morocco did not breach the prohibition on collective expulsion, as the lack

[50] See generally on pushbacks: UN Human Rights Council, Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and At Sea: Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, 12 May 2021, A/HRC/48/30; Commissioner for Human Rights (2022).

[51] *Hirsi* (n. 46).

[52] ECtHR, *D v. Bulgaria*, Appl. No. 29447/17, 27 July 2021.

[53] ECtHR, *M.H. and others v. Croatia*, Appl. Nos. 15670/18 and 43115/18, 1 November 2021.

[54] ECtHR, *Shahzad v. Hungary*, Appl. No. 12625/17, 8 July 2021; ECtHR, *H.K. v. Hungary*, Appl. No. 18531/17, 22 September 2022. The Court of Justice of the European Union (CJEU) has also concluded that Hungary's pushbacks violate EU law in C-808/18 *Commission v. Hungary*, 17 December 2020, ECLI:EU:C:2020:1029.

[55] ECtHR, *M.A. v. Lithuania*, Appl. No. 59793/17, 11 December 2018.

[56] ECtHR, *M.K. and others v. Poland*, Appl. Nos. 40503/17 et al., 23 July 2020; ECtHR, *D.A. and others v. Poland*, Appl. No. 51246/17, 8 July 2021; ECtHR, *A.B. and others v. Poland*, Appl. No. 42907/17, 14 May 2022; ECtHR, *A.I. and others v. Poland*, Appl. No. 39028/17, 30 June 2022; ECtHR, *T.Z. and others v. Poland*, Appl. No. 41764/17, 13 October 2022.

[57] See e.g., Administrative Court of Republic of Slovenia, I U 1490/2019-92, 22 June 2020; Constitutional Court of Serbia, decision Už-1823/2017, 29 December 2020; Austria, Supreme Administrative Court [Verwaltungsgerichtshof—VwGH], Styrian Provincial Police Headquarters, Ra 2022/21/0074-6, 19 May 2022 and Styrian Provincial Police Headquarters, Ra 2021/21/0274, 5 May 2022; CJEU, C-72/22 PPU *M.A. v. Valstybės sienos apsaugos tarnyba*, 30 June 2022, ECLI:EU:C:2022:505; Provincial Administrative Court in Białystok, Poland, Cases II SA/Bk 492/22, II SA/Bk 493/22 and II SA/Bk 494/22, 15 September 2022.

of any individualised examination was attributable to the applicants' own 'culpable conduct'.[58] The ECtHR has also dismissed cases against Latvia[59] and North Macedonia[60] for pushbacks and collective expulsions due to evidentiary difficulties and applying *ND and NT's* culpable conduct carve-out, respectively. However, with an unaccompanied Malian child as the applicant, the Committee on the Rights of the Child (CRC) strongly condemned Spain's policy of summarily deporting unaccompanied children to Morocco, finding that Spain had violated multiple provisions of the Convention on the Rights of the Child.[61]

Outside of Europe, in the widely criticised 1997 case of *Sale v. Haitian Centres Council*, the US Supreme Court upheld the US government's migrant interdiction program that saw the forcible return of Haitian nationals to Haiti and the detention of Haitians in Guantanamo Bay following the interdiction of their vessels on the high seas by the US coastguard.[62] The Supreme Court held that the obligation of *non-refoulement* under the 1967 Protocol Relating to the Status of Refugees and domestic law did not apply extraterritorially and was limited to aliens already within US territory. However, this decision is an outlier, with the weight of authority accepting that *non-refoulement* obligations apply wherever a state exercises jurisdiction.[63] In fact, the Inter-American Commission on Human Rights (IACHR) when it heard the case reached the opposite conclusion, finding that the US had breached the obligation of *non-refoulement* under Article 33 of the Refugee Convention.[64] More recently, domestic courts in the US enjoined and struck down the US government's Title 42 policy allowing the summary removal of thousands of asylum seekers at its border with Mexico without a hearing, including because plaintiffs would suffer irreversible harm if expelled to countries where they may be persecuted or tortured.[65] However, the US Supreme Court later allowed Title 42 to remain in place while the case was ongoing, before the policy was terminated and replaced by a similar rule—described as an 'asylum ban'—that was immediately litigated.[66]

[58] ECtHR, *ND and NT v. Spain*, Appl. Nos. 8675/15 and 8697/15, 13 February 2020.

[59] ECtHR, *M.A. and others v. Latvia*, Appl. No. 25564/18, 5 May 2022.

[60] ECtHR, *A.A. and others v. North Macedonia*, Appl. Nos. 55798/16, 55808/16 and 55817/16, 5 April 2022.

[61] CRC, *D.D. v. Spain*, 1 February 2019, CRC/C/80/D/4/2016. Spain's Supreme Court recently ruled that the return of hundreds of unaccompanied children to Morocco in 2021 was illegal and constituted collective expulsion: *Anonymous v. the City of Ceuta and the General Administration of the State (Spain)*, 22 January 2024, STS 114/2024.

[62] *Sale v. Haitian Centres Council*, 509 US 155 (1993). See discussion, Ghezelbash (2018), pp. 77–81.

[63] HRC, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, HRI/GEN/1/Rev.1 at 30, para. 10; *Hirsi* (n. 46), paras. 74 and 81; Lauterpacht and Bethlehem (2003), paras. 62–67.

[64] IACHR, *The Haitian Centre for Human Rights et al. v. US*, Case 10.675, Report No. 51/96, 13 March 1997, OEA/Ser.L/V/II.95 Doc. 7 Rev at 550, paras. 156–157, 171.

[65] See US Court of Appeals for the District of Columbia Circuit, *Huisha-Huisha v. Mayorkas*, No. 21-5200, 4 March 2022; US District Court for the District of Columbia, *Huisha-Huisha v. Mayorkas*, No. 21-100, 15 November 2022.

[66] *Arizona v. Mayorkas*, 598 US__(2022). See on the new rule which became effective on 11 May 2023, Human Rights Watch (2023b); US District Court of the Northern District of California, *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST, 25 July 2023; US Court of Appeals for the Ninth Cir-

Another approach for securing accountability has been to focus on the *way* border authorities systematically carry out pushbacks and summary expulsions. Physical violence, verbal abuse, strip searches and family separation during pushbacks, as well as the deprivation of essential items, such as food and water and conditions of detention following interception, have been found to violate the right to life[67] and prohibition on torture and inhuman and degrading treatment.[68] In *M.H. v. Croatia*, Croatia was found to have violated the procedural limb of the right to life under Article 2 for investigative failures in relation to the death of a six-year-old Afghan girl who was hit by a train after her family was pushed back from Croatia to Serbia and told to follow the train tracks.[69] During the humanitarian crisis that unfolded at Europe's borders with Belarus in August 2021 when thousands of migrants were violently pushed back and denied humanitarian assistance, 69 requests for interim measures were made by applicants claiming a real risk of irreversible harm under Articles 2 and 3 ECHR. Strasbourg issued 65 interim measures against Poland (and some against Latvia and Lithuania), indicating that those on Polish territory should not be removed to Belarus and the governments should provide the applicants with food, water, clothing, adequate medical care and, if possible, temporary shelter.[70]

In relation to the 2014 sinking of a migrant boat that caused the death of 11 women and children, Greece was found to have breached their right to life and the prohibition of torture, inhuman or degrading treatment. The ECtHR held that the Greek authorities failed to do all that they could reasonably have been expected to do to protect the right to life of those on board and subjected survivors to degrading treatment by making them disrobe publicly and body searching them.[71] Italy has also been found to have violated the right to life by the HRC's for failing to respond promptly to a distress call, causing the death of more than 200 people whose vessel

Footnote 66 (continued)

cuit, *East Bay Sanctuary Covenant v. Biden*, No. 23-16032, 3 August 2023; US Court of Appeals for the Ninth Circuit, *East Bay Sanctuary Covenant v. Biden*, No. 23-16032, 21 February 2024.

[67] See ECtHR, *Alkhatib and others v.* Greece, Appl. No. 3566/16, 16 January 2024 concerning excessive use of force by the coastguard. See communicated cases, *H.T. and others v. Greece*, Appl. No. 4177/21, Communicated 2 December 2021; *S.A.A. and others v. Greece*, Appl. No. 22146/21, Communicated 2 December 2021. The ECtHR has also issued interim measures ordering Greece not to remove the applicants from Greek territory and provide them with food, water, clothing, and medical care, see Greek National Commission for Human Rights (2023), p. 14. The Committee on Migrant Workers (2022) has 'deplored the violations of the right to life' of at least 23 migrants attempting to cross from Morocco into Spain.

[68] ECtHR, *Moustahi v. France*, Appl. No. 9347/14, 25 June 2020 finding that the detention of two unaccompanied children who arrived to Mayotte, France by boat violated Art. 3; *M.H.* (n. 53) finding that conditions in the transit immigration centre breached Art. 3 for the child applicants. In ECtHR, *Doumbe Nnabuchi v. Spain*, Appl. No. 19420/15, 1 June 2021 and ECtHR, *M.B. and R.A. v. Spain*, Appl. No. 20351/17, 5 July 2022, the applicants complained that they had been subject to ill-treatment at the border by authorities, but both were declared inadmissible for lack of evidence. See also *M.A. and Z.R. v. Cyprus*, Appl. No. 39090/20, Communicated 25 April 2022, on Art. 3 ill-treatment and Art. 5 deprivation of liberty.

[69] *M.H.* (n. 53), paras.183–204.

[70] Requests for interim measures concerning the situation at the borders with Belarus ECHR 372 (2021), 6 December 2021.

[71] ECtHR, *Safi and Others v. Greece* Appl. No. 5418/15, 7 July 2022.

sank in the Mediterranean.[72] New practices are also being litigated as amounting to inhuman and degrading treatment and violating the right to life, with complaints lodged to the ECtHR concerning life-threatening drift backs where the Greek coast-guard forces migrants onto inflatable rafts and then left to drift at sea, or left to die.[73] Legal actions have also been brought to the CJEU against Frontex for its operations in the Aegean Sea and involvement in pushbacks, alleging violations, *inter alia*, of the right to life, *refoulement*, collective expulsion and denial of the right to asylum. However, Frontex has thus far been shielded from accountability. The first ever legal action against Frontex was dismissed as inadmissible, which had been brought on behalf of two asylum seekers for Frontex's failure to act to terminate or suspend its operations in the Aegean, despite serious and persisting violations of fundamental rights.[74] In 2023, the CJEU dismissed two further actions for damages against Frontex, one concerning Frontex's role in a joint return operation with Greece of Syrian nationals who on arrival in Greece declared that they wanted to apply for asylum but were returned to Turkey,[75] and the second concerning a Syrian national who argued he was sent back out to sea from Greece towards Turkey while a Frontex plane surveilled overhead.[76]

4.2 Offshore Processing and Safe Country Arrangements

Litigation concerning offshore or third country processing arrangements has brought different rights and approaches to the fore. These arrangements have typically been challenged for failing to meet the required international (or domestic) refugee and human rights standards for such arrangements to be lawful and that the receiving state does not meet the criteria to be designated a 'safe third country'.[77] However, the results have been mixed. The High Court of Australia struck down Australia's agreement with Malaysia, which would have seen asylum seekers who arrived

[72] HRC, *A.S., D.I., O.I. and G.D. v. Italy*, Comm. No. 3042/2017, 27 January 2021, CCPR/C/130/D/3042/2017. A complaint was also brought against Malta but was declared inadmissible: *A.S., D.I., O.I. and G.D v. Malta*, Comm. No. 3043/2017, 27 January 2021, CCPR/C/128/D/3043/2017.

[73] *G.R.J. v. Greece; A.A.J. and H.J. v. Greece*, Appl. Nos. 15067/21 and 24982/21, Communicated 2 December 2021); GLAN (2021); Keady-Tabbal and Mann (2021).

[74] CJEU, Case T-282/21 *S.S. and S.T. v. Frontex*, 7 April 2022. The Court held that because Frontex had, in a letter to the organisations, stated that the conditions for withdrawing financing, suspending or terminating its activities were not satisfied, there was no failure to act as Frontex had adopted a position.

[75] CJEU, Case T-600/21 *W.S. and Others v. Frontex*, 6 September 2023, ECLI:EU:T:2023:492. The Court held that since Frontex has no competence with respect to the merits of return decisions or applications for international protection, and its only task during return operations is to provide technical and operational support to Member States, a direct causal link between the damage alleged and the conduct could not be established.

[76] CJEU, Case T-136/22 *Hamoudi v. Frontex*, 13 December 2023, ECLI:EU:T:2023:821. The Court held that the applicant had not demonstrated the actual damage he alleged and specifically, that the evidence produced was manifestly insufficient to demonstrate conclusively that he was present at and involved in the alleged incident. An appeal has now been filed under C-136/24.

[77] See UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, 2018; Refugee Law Initiative (2022), paras. 16–25.

irregularly by sea transferred there, because Malaysia was not legally bound by international law or its own domestic law to provide asylum seekers protection and access to effective procedures.[78] The Canadian Federal Court in 2020 ruled that the US could no longer be considered a safe third country for the purpose of the Canada-US safe third country agreement (STCA), which allows both countries to turn back asylum seekers at their shared border, including because of the risk of *refoulement* from the US.[79] However, this ruling was overturned by the Federal Court of Appeal, followed by the Supreme Court upholding the STCA.[80] The EU-Turkey deal, pursuant to which Turkey agreed to the readmit all irregular migrants crossing into Greece and 'end' irregular migration to the EU, has similarly been challenged; however, the CJEU dismissed the action on the ground that the Court lacked jurisdiction.[81] Following the Trump administration concluding asylum cooperative agreements with Guatemala, El Salvador and Honduras, which authorised the rapid removal of asylum seekers to these countries without allowing them to claim asylum in the US, a case was brought against the Guatemala agreement (the only one operationalised).[82] The case was never decided, with the Biden administration terminating the agreements.

Recently, the UK Supreme Court found the UK-Rwanda Asylum Partnership Arrangement to be unlawful, holding that Rwanda cannot be considered a safe third country to send asylum seekers to because individuals removed there would face a real risk of *refoulement*.[83] The transfer of asylum seekers to 'first countries of asylum' and 'safe third countries' has similarly been litigated. EU Member States have been found in breach where Dublin returns exposed the applicant to a violation of their Article 3 rights,[84] while decisions declaring asylum applications inadmissible and ordering the applicants' summary removal to a third country deemed 'safe' without an adequate and sufficient assessment have also been deemed unlawful.[85]

[78] *Plaintiff M70/2011 v. Minister for Immigration and Citizenship* [2011] HCA 32. However, the Australian government simply legislated around this decision to allow it to decide which countries should be designated as regional processing countries: *Plaintiff S156/2013 v. Minister for Immigration and Border Protection* [2014] HCA 22.

[79] *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)* 2020 FC 770.

[80] *Canada (Minister of Citizenship and Immigration) v. Canadian Council of Refugees* 2021 FCA 72; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)* 2023 SCC 17. The Supreme Court recognised the risk of detention upon return, the detention conditions and concluded that, even assuming that claimants face a real risk of *refoulement* from the US, there are safety valves in Canada's legislation that can exempt them from return.

[81] CJEU, Cases T-192/16, T-193/16 and T-257/16 *N.F., N.G. and N.M. v. Council*, ECLI:EU:T:2017:128, EU:T:2017:129, EU:T:2017:130. See Spijkerboer (2018a). See also Refugee Support Aegean (2024) on the preliminary questions referred by the Greek Council of State to the CJEU concerning Turkey as a 'safe third country', which has refused to readmit asylum seekers since 2020.

[82] US District Court for the District of Columbia, *U.T. v. Barr*, No. 1:20-cv-00116, 15 January 2020.

[83] *R (on the application of AAA and others) v. Secretary of State for the Home Department* [2023] UKSC 42. See also Human Rights Watch (2022). The UK government is attempting to circumvent the judgement through a binding treaty with Rwanda and the Safety of Rwanda (Asylum and Immigration) Bill, tabled 7 December 2023.

[84] See e.g., ECtHR, *M.S.S. v. Belgium and Greece* (2011) 53 EHRR 2; ECtHR, *Sharifi v. Italy and Greece*, Appl. No. 16643/09, 21 October 2014.

[85] ECtHR, *Ilias and Ahmed v. Hungary*, Appl. No. 47287/15, 21 November 2019; CJEU, C-924/19 PPU and C-925/19 PPU *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 14 May 2020, ECLI:EU:C:2020:367; CJEU,

With many transfer arrangements being used by states to shirk their asylum responsibilities and send asylum seekers to places known to be unsafe and with poor rights records, Macklin has described such agreements as 'legally laundered push-backs'.[86]

In the Australian context, much of the focus has been on the unlawful conditions and treatment asylum seekers and refugees endured during offshore detention on Nauru and Manus Island. Various international fora and actors have raised their grave concerns with Australia's offshore regime, including for violating the right of asylum seekers to be free from torture or cruel, inhuman or degrading treatment, subjecting them to mandatory detention and protracted periods of closed detention, the creation of serious physical and mental pain and suffering, and lives being at immediate and critical risk.[87] The mistreatment, conditions and trauma experienced by Salvadoran and Honduran asylum seekers transferred to Guatemala by the US has also been documented.[88] In 2016, the Supreme Court of Papua New Guinea (PNG) declared Australia's regional processing centre on Manus Island unconstitutional for forcibly bringing to and detaining asylum seekers on Manus in breach of their personal liberty.[89] Similarly, the containment of asylum seekers at the border or in transit zones in Europe has come before European courts on multiple occasions, turning on whether such containment is found to amount to a deprivation of liberty and not a 'mere' restriction on freedom of movement, including whether the applicants were free to leave these zones.[90]

4.3 Visa Regimes and Carrier Sanctions

Visa regimes and carrier sanctions have thus far been the least challenged migration controls despite their principal role in keeping certain nationals and would-be migrants far from the border. When courts have been called upon to examine visas, this has typically been through the lens of the right to respect for private and family

Footnote 85 (continued)
C-564/18 *LH v. Bevándorlási és Menekültügyi Hivatal*, 19 March 2020, ECLI:EU:C:2020:218. See Mouzourakis and Costello (2022), pp. 85–90.

[86] Macklin (2023), p. 6.

[87] Committee Against Torture, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia, 3 December 2014, CAT/C/AUS/CO/4-5, para. 17; HRC, Concluding Observations on the Sixth Periodic Report of Australia, 1 December 2017, CCPR/C/AUS/CO/6, para. 35; UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 6 March 2015, A/HRC/28/68/Add.1, pp. 7–9; UNHCR (2018); Office of the Prosecutor of the International Criminal Court (2020).

[88] UNHCR (2019); Human Rights Watch (2020).

[89] *Namah v. Pato (Minister for Foreign Affairs and Immigrations) and Ors* (2016) PJSC 13. See also *Kamasaee v. Commonwealth* [2017] VSC 537, a class action on behalf of detainees in negligence and false imprisonment brought against the Australian government and contractors. It was settled out of court with the detainees awarded AUD $70 million.

[90] ECtHR, *R.R. and others v. Hungary*, Appl. No. 36037/17, 21 March 2021. Cf. *Ilias* (n. 85), paras. 234–249. See before the CJEU, *FMS* (n. 85); *LH* (n. 85); *Commission v. Hungary* (n. 54). See Stoyanova (2020a), pp. 407–411. Soderstrom (2019) argues that implementing transit zones on land borders 'facilitates the externalisation of responsibility for processing asylum seeker claims to its neighbouring European states'.

life, at times in conjunction with the obligation of non-discrimination, such as where refugees and other protection beneficiaries have been denied family reunification.[91] More recently, cases have been brought before the CJEU (*X and X v. Belgium*) and ECtHR (*M.N. v. Belgium*) in relation to two Syrian families who applied for humanitarian visas under Article 25 of the Visa Code at the Belgian embassy in Beirut to allow them to leave Aleppo and seek asylum in Belgium.[92] In both cases the applicants argued that Belgium's refusal to issue the visas exposed them to a risk of torture or inhuman or degrading treatment in breach of Article 3 ECHR and Article 4 of the EU Charter of Fundamental Rights (CFR). Neither case went to the merits. The CJEU concluded that applications for humanitarian visas fall solely within national law and therefore, EU Charter provisions do not apply.[93] Strasbourg declared the case inadmissible, holding that applying for a visa at the Belgian embassy did not bring the applicants within Belgium's jurisdiction for Article 1 ECHR purposes and therefore, no Convention protections were triggered.[94] With respect to carrier sanctions, the most notable cases concern those brought by carriers opposing the initial imposition of carrier sanctions laws, as opposed to challenging a specific penalty relating to a passenger.[95] For instance, in 1999, ferry company Hoverspeed unsuccessfully challenged the UK's Immigration Carriers' Liability Act 1987, with the Court holding that carrier sanctions were 'neither an unreasonable nor a disproportionate response to the need for effective immigration control', noting the 'imperative needs of immigration control in the face of ever-growing pressures from around the world'.[96]

Visas processes, pre-clearance controls and other migration policies have also been litigated for being discriminatory on religious and racial lines, though success remains limited.[97] In the case of *Roma Rights*, the House of Lords declared the UK government's pre-clearance programme at Prague airport targeting Roma asylum seekers inherently and systemically discriminatory on racial grounds. British authorities refusing leave to enter to Czech nationals of Roma ethnicity before they embarked for the UK was found to breach the UK's international obligations and the Race Relations Act 1965.[98] A legal challenge was brought against the UK's secret 'visa streaming' algorithm, operating since 2015 to grade applicants as red, amber

[91] E.g., *X and Y v. Switzerland* (1977) 9 DR 57; *Abdulaziz, Cabales and Balkandali v. UK* (1985) 7 EHRR 471; ECtHR, *Tuquabo-Tekle v. Netherlands*, Appl. No. 60665/00, 1 December 2005; ECtHR, *Haydarie v. Netherlands*, Appl. No. 8876/04, 20 October 2005; ECtHR, *Biao v. Denmark*, Appl. No. 38590/10, 24 May 2016.

[92] CJEU, Case C-638/16 PPU *X and X v. Belgium*, ECLI:EU:C:2017:173; ECtHR, *M.N. v. Belgium*, Appl. No. 3599/18, 5 March 2020.

[93] *X and X* (n. 92), paras. 44–45 and 51.

[94] *M.N.* (n. 92), paras. 110–126. See for a critique of the outcome, Stoyanova (2020b).

[95] See Feller (1989), pp. 63–64, and generally, Moreno-Lax (2017), ch. 5. See on a specific penalty imposed e.g., *Ryanair Ltd v. Secretary of State for the Home Department* [2018] EWCA Civ 899.

[96] *R v. Secretary of State for the Home Department ex parte Hoverspeed* [1999] INLR 591. See Scholten and Minderhoud (2008); Scholten (2015), ch. 8.

[97] See generally Briddick and Costello (2021).

[98] *R v. Immigration Officer at Prague Airport, ex p European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1.

or green based on nationality. The legal action argued that the tool involved racial discrimination and breached the Equality Act 2010, leading the Home Office in 2020 to suspend its use pending a redesign of the process to consider 'issues around unconscious bias and the use of nationality generally in the streaming tool'.[99] The Trump administration's travel ban to prevent and limit the entry of nationals from predominantly Muslim countries faced immediate litigation and was blocked by a number of federal courts as constituting religious discrimination,[100] before the US Supreme Court dismissed the discriminatory intent behind the ban and upheld the ban as constitutional.[101] While not likely falling within the remit of externalisation, the International Court of Justice (ICJ) and International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Committee have considered the discriminatory nature of migration controls. Qatar brought inter-state cases concerning the expulsion orders and entry bans imposed by the UAE and Saudi Arabia against Qataris, alleging such measures discriminate against Qataris based on their current nationality. In a much-critiqued decision, the ICJ found it had no jurisdiction to hear the application, holding that 'national origin' in the definition of racial discrimination in Article 1(1) CERD does not encompass 'current nationality',[102] at odds with the CERD Committee's admissibility decisions.[103]

Examining and synthesising the key externalisation jurisprudence concerning pushbacks, offshore processing, safe country arrangements, visa regimes and carrier sanctions has highlighted the primary rights and obligations being litigated across fora. Pushbacks have been predominantly challenged under the obligation of *non-refoulement* and prohibition on collective expulsion, though some cases also raise the right to life, prohibition on torture and other forms of ill-treatment, and right to asylum in EU law. Offshore processing and return arrangements are typically challenged for failing to meet relevant international standards and the application of the 'safe country' concept to countries that cannot be considered safe, while various rights are invoked to highlight the unlawful conditions and treatment people are subject to upon transfer. Cases concerning visa refusals have predominantly been brought under the right to family life, while the visa refusal cases raising *non-refoulement* have been unsuccessful. Visa algorithms, racial profiling, travel bans and expulsions have been challenged for discriminating against nationals and migrants based on prohibited grounds.

[99] Warrell (2019); McDonald (2020).

[100] Brennan Center for Justice (2020); Rahami (2020); ACLU (2023).

[101] *Trump v. Hawaii* 138 S Ct 2392, 2418-20 (2018).

[102] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE)* (Preliminary Objections), Judgment, 4 February 2021, ICJ Reports 2021, p. 71. See Costello and Foster (2021).

[103] CERD Committee, *Decision on the Admissibility of the Inter-state Communication Qatar v. Saudi Arabia*, 30 August 2019, CERD/C/99/6; *Decision on the Admissibility of the Inter-state Communication Qatar v. UAE*, 30 August 2019, CERD/C/99/4.

4.4 The Right to Leave Cases

Turning now to the jurisprudence concerning the right to leave and externalisation. In comparison to the rich case law concerning *refoulement* and collective expulsion in particular, the jurisprudence on the right to leave remains limited. Only a handful of right to leave cases have been decided concerning travel bans to prevent breaches of foreign immigration laws and interceptions at sea, demonstrating that the right has been a largely ignored avenue for pursuing accountability in the context of externalisation despite, as will be shown, cases where an infringement of the right is evident on the facts. However, several cases have been brought more recently that invoke the right to leave with respect to privatised pushbacks by merchant vessels, documentation stripping during pushbacks, pullbacks, and laws criminalising people smuggling and exit by partner states.

The leading case decided by the ECtHR is *Stamose v. Bulgaria* of 2012, which concerned a Bulgarian national who was banned from leaving Bulgaria for two years and had to surrender his passport following deportation for breaches of US immigration laws.[104] The applicant complained under Article 2 Protocol No. 4 that the travel ban was 'unjustified and disproportionate'. Bulgaria argued that the law providing the basis for travel bans was designed to prevent breaches of foreign immigration laws and reduce the likelihood of states refusing entry to or toughening visa requirements for Bulgarians.[105] The Court held that the applicant's right to leave had been breached. The Court stated that even if it were prepared to accept that the interference with leaving pursued the legitimate aims of maintenance of *ordre public* or the protection of the rights of others, the ban failed the 'necessary in a democratic society' test.[106] A blanket and indiscriminate measure preventing 'the applicant from travelling to any and every foreign country on account of his having committed a breach of the immigration laws of one particular country' could not be proportionate.[107] While the Court may in 'compelling situations' accept that restrictions aimed at preventing breaches of foreign immigration laws are justified, measures will not be characterised as necessary when they are automatic and disregard individual circumstances.[108] In the context of states of origin and transit restricting departure to prevent irregular migration to and at the behest of destination states, *Stamose* and its 'compelling situation' threshold is an important decision.

Interdictions and pushbacks at sea have also been challenged under the right to leave. As mentioned above, in 1997 the IACHR decided a case against the US' migrant interdiction program.[109] The petitioners argued that the interdiction program violated their right to leave any country in Article 22(2) of the American Convention

[104] *Stamose* (n. 37).
[105] Ibid., paras. 24, 32.
[106] Ibid., para. 32.
[107] Ibid., paras. 33–34.
[108] Ibid., para. 36. See also CJEU, Case C-33/07 *Jipa v. Romania*, ECLI:EU:C:2008:396, [2008] ECR I-5157.
[109] *The Haitian Centre* (n. 64).

on Human Rights (ACHR).[110] However, the Commission did not make a finding with respect to the right to leave. As the US has not ratified the ACHR, the Commission only looked to the American Declaration of the Rights and Duties of Man of Human Rights and the petitioners had not raised Article VIII enshrining the right to leave. It instead found, *inter alia*, that the US violated the right of the Haitians to seek and receive asylum as provided by the American Declaration.[111] Notably, the right to leave is well-understood as a *precondition to seeking and securing asylum*, with refugee status contingent on being able to escape one's own country.[112] Indeed, the IACHR has recognised this, stating that 'the inability to leave your country may also imply a restriction to the right to seek and be granted asylum'.[113]

In the 2001 case of *Xhavara v. Italy and Albania*, the ECtHR considered an incident from 1997 involving an Italian warship intercepting and colliding with an Albanian migrant vessel 35 nautical miles from the Italian coast, leading to the boat sinking and 58 deaths.[114] Prior to the incident, Italy and Albania concluded multiple bilateral agreements which authorised Italy to intercept any vessel carrying Albanian citizens and establish a naval blockade in international and Albanian waters. Days after the incident, a further Protocol was signed allowing Italy to order any vessel to turn back to an Albanian port.[115] The applicants invoked their right to leave; however, the ECtHR held that the right was inapplicable because the measures were not aimed at preventing Albanians leaving Albania but entering Italy, with the Court seemingly focused on intention and not also the effect of the measure.[116] Yet, in finding that there had been no interference with the right to leave, the Court ignored how the bilateral arrangement authorising such measures was entered into precisely to prevent irregular migration out of Albania.[117] It is certainly more clear-cut where measures are taken unilaterally by the departure state. For instance, the emigration restrictions of authoritarian regimes have been found to violate the right to leave, notably the Cuban authorities attacking a boat of Cubans who were fleeing the country,[118] and the border-policing regime at the Berlin Wall preventing almost the entire population from leaving.[119] As argued in Sect. 2, various externalised migration controls simultaneously operate to prevent departure and entry,

[110] See IACHR, *Decision of the Commission as to the Admissibility*, Rights Case 10.675, Report No. 28/93, 13 October 1993, paras. 9 and 13.

[111] *The Haitian Centre* (n. 64), paras. 151–163.

[112] See e.g., Hannum (1987), p. 50; Goodwin-Gill and McAdam (2007), p. 384; Guild (2013), pp. 25–26; Markard (2016), pp. 595–596; Moreno-Lax (2017), pp. 340–341, 348–354; Moreno-Lax (2021).

[113] IACHR (2019).

[114] ECtHR, *Xhavara v. Italy and Albania*, Appl. No. 39473/98, 11 January 2001.

[115] Ibid., pp. 3–4.

[116] Ibid., p. 7.

[117] Nessel (2009), p. 675; Brouwer (2010), p. 225; Markard (2016), p. 616.

[118] IACHR, *Victims of the Tugboat '13 de Marzo' v. Cuba*, Case 11.436, Report No. 47/96, 16 October 1996, OEA/Ser.L/V/II.95 Doc. 7 Rev at 127. In 1994, the US concluded a joint communique with Cuba, which committed Cuba to 'take effective measures in every way it possibly can … to prevent unsafe departures', in effect calling on Cuba to infringe the right to leave: U.S.-Cuba Joint Communique on Migration, 9 September 1994, http://balseros.miami.edu/pdf/September9.pdf (accessed 4 March 2024).

[119] *Streletz, Kessler and Krenz v. Germany* (2001) 33 EHHR 31, paras. 98–100.

entailing both emigration *and* immigration control. The dual effect (and design) of such measures should not render the right to leave inapplicable, for this allows destination states to evade their obligations under the right.[120] As Cornelisse argues, '[b]y 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'.[121]

Two cases have been brought before the HRC invoking the right to leave in relation to pushback practices and new modalities of performing pushbacks and *refoulement* by proxy. In 2019, the Global Legal Action Network (GLAN) filed a case, *SDG v. Italy*, on behalf of an individual who was intercepted on the high seas after leaving Libya by a Panamanian merchant vessel, the Nivin.[122] This case was the first of its kind challenging 'privatised pushbacks', the practice of EU coastal states co-opting passing merchant vessels to intercept migrant boats and return them to unsafe places. The Italian Maritime Rescue Coordination Centre (MRCC) instructed the Nivin to rescue a migrant boat in distress in the Mediterranean, but rather than direct it to deliver the survivors to a place of safety, instead told the Nivin to liaise with the Libyan Coastguard (LBCG) and disembark the survivors in Libya, fully aware of the abuses they would be subjected to back in Libya (this important distinction between a genuine rescue—unquestionably a legitimate aim—, and an interdiction followed by disembarkation to an unsafe place is discussed further in Sect. 4.5). The complaint argued that by orchestrating the interdiction jointly with the LBCG, Italy decisively contributed to and led to the violation of the individual's right to leave Libya, thus engaging Italy's responsibility under Article 12(2) ICCPR.[123] It argued that states cannot declare border measures to be rescue measures and maritime operations that aim to intercept boats at sea and/or prevent migrants leaving a third country, are a misconception of search and rescue (SAR) duties.[124] Therefore, preventing departure by sea, pursuant to for example the Italy-Libya Memorandum of Understanding (MoU) of February 2017, constitutes 'an undue interference with the right to leave that fails to comply with the minimum criteria of legality and legitimacy, and bearing the potential to violate, if not completely annul, its core content'.[125] The complaint continues by highlighting the link between the right to leave, right to seek asylum, and protection from *refoulement,* which 'renders the right to leave of vital importance to those fleeing irreversible harm'.[126] It submitted that preventing

[120] See Guild and Stoyanova (2018), p. 375; Giuffré and Moreno-Lax (2019), p. 84 who argue that the financing of Global South states for pullbacks, detention camps and pre-emptive rescues at sea transforms (pre-)entry controls (by destination countries) into exit vetting (by countries of departure), negating the right to leave and foreclosing *non-refoulement* obligations.

[121] Cornelisse (2008), p. 23. See also Markard (2016), p. 616; Giuffré and Moreno-Lax (2019), pp. 84–85.

[122] *SDG v. Italy*, Communication to the HRC, 18 December 2019, https://www.glanlaw.org/_files/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf (accessed 4 March 2024).

[123] Ibid., para. 100.

[124] Ibid., para. 67.

[125] Ibid., para. 96.

[126] Ibid., paras. 94, 98.

individuals from leaving a country they face persecution or severe rights violations in may not only violate *non-refoulement* and collective expulsion obligations, but is also incompatible with a *bona fide* interpretation and implementation of the right to leave.[127] Although the complaint was declared inadmissible due to a lack of exhaustion of domestic remedies, given the HRC's expansive approach to jurisdiction and well-established principles that restrictions on the right to leave must be based on clear legal grounds, comply with other rights in the ICCPR (such as on *non-refoulement*) and be necessary to protect legitimate aims, it is likely the Committee will have found the above arguments persuasive.

The second case brought by GLAN in 2020, still ongoing at the time of writing, challenges Greece's systematic practice of summarily expelling individuals apprehended when attempting to cross the Evros river at the land border with Turkey. The general pattern involves individuals being detained incommunicado, stripped of their belongings and sometimes their documentation, and expelled to Turkey on a rubber boat.[128] The complaint to the HRC concerns one such incident, arguing that in stripping the applicant of his German residence permit and passport, which allowed him to prove his legal and refugee status, the applicant was prevented from leaving Turkey and re-entering his own country for over 1,000 days in violation of Articles 12(2) and (4).[129] As already outlined, while the HRC has made it clear that the right to leave includes the right to obtain the necessary travel documents, this complaint creatively invokes the right to leave and its concomitant duty to issue travel documentation to challenge a specific aspect of Greece's pushback policy.

Whether a specific pushback interferes with and violates the right to leave is likely to be case specific, turning on whether the measure deprives the right to leave of meaningful effect by obstructing the migrant's search for refuge and a state to admit them, causing them to end up right back where they began—the state from which they were fleeing. A former Council of Europe Commissioner on Human Rights has concluded that along with visas, carrier sanctions and readmission agreements, pushbacks hinder people from leaving the country they are in towards the EU, urging Member States to end 'push-backs which prevent people from leaving the country of origin or from reaching the EU, and from exercising their human right to seek and enjoy asylum'.[130] In contrast, pullbacks are a blatant interference with the right to leave.[131] They are 'designed to physically prevent migrants from leaving the territory of their State of origin or a transit State (retaining State), or to forcibly return them to that territory, before they can reach the jurisdiction of their

[127] Ibid., para. 100.

[128] *FAA v. Greece*, Registered with the HRC, 5 November 2021 (filed as *FAJ v. Greece*), https://www.glanlaw.org/_files/ugd/14ee1a_4e9dea36dd1043d48e6a50dbe5b78f04.pdf (accessed 4 March 2024).

[129] Ibid., paras. 151–152.

[130] Guild (2013), pp. 7–8, 53. On readmission agreements, Guild highlights how they are often linked to measures which the person's state of origin must take to prevent persons expelled from leaving again.

[131] That the right to leave can be breached after a person has 'formally' departed a country i.e., they have entered the high seas, is explored in the author's doctorate, McDonnell (2021a).

destination State'.[132] According to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pullbacks by their very nature prevent migrants exercising their right to leave any country.[133] The UN Committee on Migrant Workers has specifically urged Libya to end the pullback of migrants at sea, which violates the right of migrant workers and their families to leave any state, including Libya.[134]

In what appears to be the first of its kind before an international body, a complaint has been filed with the HRC against Italy, Libya and Malta on behalf of two individuals who allege that their right to leave Libya was violated by a pullback carried out by the LBCG with the cooperation of Italian and Maltese authorities.[135] The complaint argues that Italy and Malta contributed to the violation by delegating the rescue operation to the LBCG and through the material and political support they provide to Libya to stem migration to Europe. Having been alerted about a vessel in distress in the Maltese SAR zone, Italy and Malta did not activate any SAR operation; instead, they waited for the LBCG to arrive, who pulled the survivors back to Libya—the very country they had just fled from. Similarly, complaints to the European Court of Auditors and the European Parliament argue that the EU's financial support to Libya enables and facilitates the Libyan authorities to return migrants to Libya, denying their right to leave the country, in breach of EU budget and constitutional law.[136]

A complaint has also been brought to the UN Committee on the Elimination of Discrimination Against Women against Italy and Libya by two Nigerian women victims of trafficking for violations of the right to non-discrimination and protection from exploitation of prostitution under Articles 2 and 6 of the Convention for the Elimination of Discrimination against Women (CEDAW).[137] Although the right to leave does not appear to have been raised, as CEDAW does not explicitly mention it,[138] the complaint exposes how Italy's externalisation policies and support to Libya makes it almost impossible for people to leave Libya towards Italy. Even when the

[132] See UN Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/37/50 (23 November 2018), para. 54.

[133] Ibid., para. 55.

[134] Committee on Migrant Workers, Concluding Observations on the Initial Report of Libya, 8 May 2019, CMW/C/LBY/CO/1, paras. 32–33.

[135] ASGI and CIHRS (2020).

[136] Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' (IBM) Programme, 27 April 2017, para. 76, https://www.glanlaw.org/_files/ugd/14ee1a_ae6a20e6b5ea4b00b0aa0e77ece91241.pdf (accessed 4 March 2024); Petition to the European Parliament Regarding the Mismanagement of EU Funds by the EU Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' (IBM) Programme, 11 June 2020, para. 76, https://www.glanlaw.org/single-post/2020/06/11/petition-to-european-parliament-challenges-eu-s-material-support-to-libyan-abuses-against (accessed 4 March 2024).

[137] ASGI (2021).

[138] See CEDAW, Art. 15(4).

women did attempt to flee by sea, they were pulled back to Libya and imprisoned, where they were further exposed to trafficking, exploitation and abuse.[139]

Litigants are also starting to pursue accountability for violations of the right to leave through the regional courts of partner states enlisted by destination states as the 'new frontiers' to stem migration and departures. In 2022, a complaint was made to the Economic Community of West African States (ECOWAS) Court of Justice on the legality of Niger Law No. 36/2015.[140] Niger has been an important partner in the EU's externalisation strategy, as a transit country for migrants from West Africa to Libya, an onwards towards Europe.[141] In exchange for development aid and funding for capacity building, Niger was pushed by the EU to criminalise people smuggling, criminalise illegal entry and exit, and require transport companies to ensure all people entering and travelling within Niger possess documentation, with the passing of Law No. 36/2015 a direct response to this pressure.[142] The law was repealed in November 2023 following the junta's military coup; however, the complaint still warrants attention.[143] The complaint argued that the implementation of the law has led to increased controls on ECOWAS citizens along Niger's borders and on internal movement, which has effectively prevented movement in the Agadez region. This is said to amount to a major violation by Niger of the right to free movement of ECOWAS citizens, including of Article 12 of the African Charter which protects the right to free movement within a state and the right to leave any country, and obligations under the ECOWAS free movement protocol. It further argued that the law exposes ECOWAS citizens to detention, torture, inhuman and degrading treatment, *refoulement* and sometimes death, with the law shrinking the space to move and leading to more dangerous journeys. As the press conference concerning the case emphasised, this complaint is of great significance in demonstrating the connectivity between the restrictive laws and policies within ECOWAS territory and the EU's externalisation policies, and the impact the latter has in undermining not only mobility to Europe but the African agenda on free movement and community integration.[144] It also brings to the forefront how the criminalisation of migrant smuggling, as required under the Palermo Protocol, is being implemented in a manner inconsistent with international law and 'misused in the service of the fight against migration'.[145] The complaint (if still heard) provides an African court with the opportunity to set an important precedent in the region and beyond on the rights of people impacted by

[139] ASGI (2021), p. 5.

[140] ASGI (2022a).

[141] Emergency Trust Fund for Africa, Niger, https://trust-fund-for-africa.europa.eu/where-we-work/regions-countries/sahel-lake-chad/niger_en (accessed 4 March 2024); Oxfam (2020); Bøås (2021).

[142] Tinni et al (2023), pp. 19 and 24; Perrin (2020).

[143] Hardy (2024).

[144] ASGI (2022b).

[145] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime (adopted 12 December 2000, entered into force 28 January 2004), 2241 UNTS 507, Art. 6; Perrin (2020).

externalisation, to send a strong signal to the EU and other countries engaged in externalisation, and put countries on notice of the dangers of such migration control partnerships and agreements (as the coup itself highlights).[146]

4.5 Missed Opportunities

Despite these positive developments, several cases have also been brought recently where the right to leave was not invoked, despite the right being squarely implicated. *S.S. v. Italy* is currently pending before the Strasbourg Court, which concerns Italy's responsibility for a pullback performed by the LBCG in 2017.[147] The communication alleges that the LBCG obstructed the rescue of around 150 people by Sea-Watch in the Mediterranean, which led to deaths at sea and the return of individuals to Libya. The applicants, 17 survivors, complain that Italy failed to protect their right to life and right to be free from torture and ill-treatment under Articles 2 and 3 of the ECHR as the Rome MRCC coordinated the rescue operation and allowed the LBCG to take part. They also raised several other complaints under Articles 3, 4, 13 and Article 4 Protocol No. 4, including *refoulement* and collective expulsion to Libya, but not Article 2(2) Protocol No. 4 on the right to leave. In contrast, in its submission as intervenor in the case, the UNHCR explicitly mentions the right to leave as a relevant obligation in assessing whether a state that provides capacity-building or other assistance to a coastal state bears responsibility for the violations committed by the latter.[148] The UNHCR states that a breach of the right to leave by the assisted state, in this case Libya, may entail the secondary responsibility of the assisting state (i.e., Italy), under Article 16 (responsibility for aiding or assisting an internationally wrongful act) of the Articles on the Responsibility of States for Internationally Wrongful Acts.[149]

Similarly, a domestic case was brought in 2017 before the Tripoli Court of Appeal challenging the Italy-Libya MoU.[150] The plaintiffs raised several claims, including with respect to Libya not being a party to the 1951 Refugee Convention,

[146] ASGI (2022b); Statewatch (2023).

[147] *S.S. and others v. Italy*, Appl. No. 21660/18, Communicated 26 June 2019. See also *C.O. and A.J. v. Italy*, Appl. No. 40396/18 (not yet communicated). See also Irish Centre for Human Rights and GLAN, Submission to the UN Special Rapporteur on the human rights of migrants' report on pushback practices and their impact on the human rights of migrants, 2 February 2021, which addresses pushbacks by proxy and aerial *refoulement* but does not mention the right to leave, https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/Joint_ICHR_NUIG_GLAN_Submission.pdf (accessed 4 March 2024).

[148] Submission by the Office of the United Nations High Commissioner for Refugees in the case of *S.S. and Others v. Italy* (Appl. No. 21660/18) before the European Court of Human Rights, 14 November 2019, paras. 5.1 and 5.7, https://www.refworld.org/docid/5dcebff54.html (accessed 4 March 2024).

[149] Ibid. Although not explored in this article, the ILC Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, ILC Yearbook 2001, vol. II(2), pp. 31 et seq. (ARSIWA), notably Art. 16, are a particularly ripe avenue for establishing the responsibility of destination states for violations of the right to leave, as explored in the author's doctorate.

[150] 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); Achour and Spijkerboer (2020).

Libya's inability to protect migrants from rights violations, and the return of people to serious harm. It did not argue that intercepting and pulling back migrants at sea who have just departed from Libya implicates the right to leave (like GLAN's 2019 complaint to the HRC did) and does not only 'prevent them from reaching Italy'.[151] However, the case was never decided on the merits as the Libyan Supreme Court declared the application inadmissible on appeal due to a lack of competence, annulling the Court of Appeals interim injunction.[152]

These represent missed opportunities to plead the right to leave and argue that pullbacks are a highly disproportionate, blanket and indiscriminate measure that destroy the essence of the right to leave (including to seek asylum) and entail shared responsibility.[153] As Giuffré and Moreno-Lax argue, an interference that entails the complete inability to leave for irregular migrants, as is the aspiration behind the EU-Turkey deal and cooperation with Libya, is simply irreconcilable with the right to leave.[154] In other words, pullbacks cannot be said to meet the requirements for a lawful restriction of the right, even if preventing irregular migration to destination states was accepted as a legitimate aim. Moreover, pullbacks cannot be dressed up as pursuing the legitimate aims of saving lives and protecting migrants embarking on dangerous journeys (falling within the public health and safety aims listed under the right), and great attention should be given by litigants and practitioners to articulate this, given the typically high degree of deference afforded to states' migration control prerogatives by the ECtHR in particular.[155] As highlighted above in relation to *SDG v. Italy*, there is a fundamental difference between *genuine rescues*, which would not constitute a violation of the right to leave, and *interdictions for migration control purposes*. The duty to rescue persons in distress under the law of the sea requires individuals to be delivered to a 'place of safety' where their life and safety is no longer threatened and basic needs are met, including protection from persecution and *refoulement*.[156] Notably, the UNHCR has made clear that disembarkation arrangements must not frustrate the rescuees right to leave and seek asylum.[157]

[151] Writ of Summons, no. 30/2017, Tripoli Court of Appeal. See for the documents https://drive.google.com/drive/folders/1yzhnBz10z_DASHnIyCn0aHl89-2v2rkY (accessed 4 March 2024).

[152] Supreme Court of Libya, Administrative appeal number 151/64K, 26 June 2019.

[153] See Markard (2016), pp. 596–597; Ciliberto (2018), pp. 513 and 515–516; Guild and Stoyanova (2018), pp. 386–394; McDonnell (2021b); Cantor et al (2022), p. 139. The agreements said to underpin pullbacks also often lack sufficient legal grounding and are of insufficient quality.

[154] Giuffré and Moreno-Lax (2019), p. 96.

[155] Dembour (2015); O'Cinnéide (2021).

[156] International Convention for the Safety of Life at Sea (adopted 1 November 1974, entry into force 25 May 1980), 1184 UNTS 278, Ch. V, Reg. 33(1.1), (6); International Convention on Maritime Search and Rescue (adopted 27 April 1979, entry into force 22 June 1985), 405 UNTS 97, Annex, paras. 1.3.2 and 3.1.9; IMO Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea (adopted 20 May 2004), guideline 6.12; UNHCR, General legal considerations: search-and-rescue operations involving refugees and migrants at sea, 2017, paras. 1, 6 and 16–17.

[157] UNHCR, Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum, 2022. See also Guild and Stoyanova (2018), pp. 392–393.

Save in cases of genuine rescues at sea to avert serious threat to the health and life of those on board,[158] destination states are instead facilitating pullbacks to unsafe places, often with full knowledge of the inhuman and dangerous conditions pulled back migrants will be exposed to back on land.[159] As the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has aptly described, it cannot be 'acceptable to discourage exit out of countries where lives are endangered on the grounds that doing so saves lives from the dangers of border crossing: that is simply permitting a more secret death elsewhere'.[160] Pullbacks expose migrants to an array of grave violations, including *refoulement*, torture, inhuman and degrading treatment, slavery, arbitrary detention, enforced disappearances, and deprivation of life.[161] Furthermore, while the Palermo Protocols on trafficking and smuggling oblige states to strengthen border controls as necessary to prevent trafficking and smuggling, they also stipulate that states must continue to protect the rights of migrants and uphold their international obligations.[162] This includes ensuring that border measures comply with the requirements of the right to leave, which in the case of pullbacks (as opposed to genuine rescues) is unlikely to be met.[163]

Of course, there may be valid and strategic reasons why the right to leave has not been raised in the aforementioned cases. For instance, the practitioners who brought the case of *S.S. v. Italy* seem not to have raised the underdeveloped and under-litigated right to leave because they were already faced with the obstacle of establishing Italy's jurisdiction over the pulled-back migrants when acting through its proxy, the LBCG, before the Strasbourg Court.[164] This could also explain why the case was not framed around mostly untested arguments of state responsibility for complicity, as the UNHCR intervened on. In *M.N. v. Belgium*, the right to leave was also not invoked regarding visa refusals to Syrian nationals who were then not able to leave for Belgium. Like in *S.S. v. Italy,* the litigators may not have wanted to make any novel arguments concerning the right to leave, foreseeing that the Court may not support a finding that Belgium exercised jurisdiction, as was indeed the outcome. However, there are also several other possible reasons. The practitioners may have looked to *Consorts Demir v. France*, where the applicants complained that France's refusal to issue an entry visa for medical treatment breached Article 2 Protocol No. 4. The ECtHR held that this article does not confer a right for individuals to obtain

[158] Markard (2016), pp. 609–610 argues that pullbacks are conceivably rescue measures *if* the state of departure meets the conditions of a 'place of safety'. See also Refugee Law Initiative (2022), fn. 2.

[159] Davitti (2018), pp. 1183–1184 and 1187.

[160] UNGA, Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions on Unlawful Death of Refugees and Migrants, 15 August 2017, A/72/335, para. 59.

[161] E.g., UNSMIL and OHCHR (2016); ibid., pt. 3; UN Human Rights Council, Report of the Independent Fact-Finding Mission on Libya, 3 March 2023, A/HRC/52/83.

[162] Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime (adopted 15 November 2000, entered into force 25 December 2003), 2237 UNTS 319, Arts. 2, 4–6, 11(1), 14; Smuggling Protocol, Arts. 2, 4–6, 9(1)(a), 11(1), 16, 19.

[163] Harvey and Barnidge (2007), p. 14; Hathaway (2008); Markard (2016), p. 607.

[164] One of the practitioners indicated this regarding the right to leave to the author.

a visa to stay in a state, declaring this grievance inadmissible for being incompatible *ratione materiae*.[165]

However, the Court did not provide sufficient reasoning as to why visa refusals cannot engage the right to leave. The Court approached the issue by considering whether Article 2 Protocol No. 4 *generated a right* to obtain a visa, rather than examining how visas interfere with leaving by making *departure dependent* on having permission to enter the destination state and visa refusals forcing individuals to travel to that state irregularly or not at all, having rendered travel without permission unlawful.[166] Indeed, the HRC has recognised that pre-entry controls may infringe the right to leave, having expressed concern about the effect of carrier sanctions and 'other pre-frontier arrangements' on the right.[167] Moreover, the ECtHR itself has indicated that while exercising one's right to leave may be conditional upon obtaining necessary travel documents, such as a passport or visa, the possibility of obtaining these documents *should be accessible in practice* and stated that a person's right to leave 'would not be practical and effective without him obtaining some type of travel document'.[168] Alternatively, *Consorts Demir* may not have influenced the litigation strategy at all; the practitioners may simply have omitted to see the potential applicability of the right.

Rather than viewing the decision in *Consorts Demir* as ending the debate, it points to the necessity of practitioners being able to clearly articulate the specific instances when visa regimes and refusals may unlawfully interfere with the right to leave. For instance, due to the lack of procedural safeguards to challenge a refusal,[169] the inaccessibility and unavailability of visas for many asylum seekers and refugees and the disproportionate impact on them,[170] for being inconsistent with other rights, such as discrimination against certain nationalities and groups who are then pushed into dangerous journeys,[171] or a failure to give sufficient weight to the individual circumstances of applicants from blacklisted states subject to visa requirements.[172] Litigants should also consider questioning whether the state's sovereign power to control *entry* also entitles it to control *exit* and raise arguments as to the availability of reasonable alternatives (under the proportionality test in Article 12(3) ICCPR/ Article 2(3) Protocol 4 ECHR), namely that entry control can occur at the border (which is often the only form of control for those with visa-free access), rather than at departure.

[165] ECtHR, *Consorts Demir v. France*, Appl. No. 3041/02, 4 April 2006, para. 23.

[166] See Guild (2013), pp. 54–56, 64–65; Guild and Stoyanova (2018), pp. 375, 378; Macklin (2023), p. 3 highlights the 'demand that a refugee-producing regime allow persecuted and endangered nationals to flee—if they are pre-authorized to enter another state'.

[167] General Comment No. 27 (n. 22), para. 10.

[168] ECtHR, *L.B. v. Lithuania*, Appl. No. 38121/20, 14 June 2022, paras. 59–62, 95–96. See also ECtHR, *Mogoş v. Romania*, Appl. No. 20420/02, 6 May 2004; ECtHR, *Ioviţă v. Romania*, Appl. No. 25698/10, 7 March 2017, paras. 67–78; *S.E. v. Serbia* (n. 44), paras. 47, 49 and 88.

[169] See e.g., Dobkin (2010) on the US doctrine of 'consular nonreviewability'.

[170] See Moreno-Lax (2008), pp. 355–357. For concrete examples see, European Union Agency for Fundamental Rights (2015).

[171] See den Heijer (2018), p. 487; All-Party Parliamentary Group (2019); Carrera (2020), pp. 11–17.

[172] See Guild (2003), p. 89.

In other cases, it may be that the relevant legal instrument does not explicitly mention the right to leave. For instance, the transitional Libyan Constitutional Declaration recognises the broader right to freedom of movement; nonetheless, the right to leave still could have been raised as the human rights complaints were not based on the Constitutional Declaration, but international law. The right to leave is also not expressly enshrined in Article 45 of the CFR on free movement and residence. However, the right to leave still could have been raised as a general principle of EU law before the CJEU in *X and X* on visa refusals, a case which, as Costello and Mann have argued, offered the Court the 'opportunity to catalyse significant changes in refugee containment'.[173] Similarly, while the applications for annulment against the EU-Turkey statement did allege that the agreement was broadly incompatible with fundamental rights, this would have been an apt moment to posit that Turkey agreeing to prevent departures to Europe breached the right of migrants to leave Turkey.[174]

Unpacking the jurisprudence challenging externalisation measures demonstrates that, by and large, the right to leave has not featured prominently. While several cases yet to be considered at the time of writing, do invoke the right, the vast majority of cases continue to focus on other rights and obligations. This remains so even where the measure is clearly directed at containing migrants in states of origin and transit and obstructing departure and onward movement, such as pullbacks and visas. These omissions speak to the crux of the issue: that the lack of attention afforded to the right to leave has led to a vicious cycle where on the one hand, the right remains underdeveloped as it is not being litigated and on the other hand, the fact that the right remains largely untested and its contours underdeveloped seems to have led practitioners to shy away from invoking it, losing opportunities for development to occur.

5 Closing Accountability Gaps

Closing accountability gaps and bringing an end to harmful externalisation practices requires an appreciation of the role the right to leave can play. Destination states and the EU have shifted their strategy towards forms of 'remote control' to achieve their goal of containment, acting through partner states to obstruct movement at the source and during transit, rather than directly themselves (though this continues). Their changing modalities, for instance pushbacks to pullbacks,[175] calls for a change in approach and strategy. This necessitates tackling the vicious cycle outlined above through legal research honing arguments on the compatibility of externalisation measures with the right to leave,[176] documenting migration control practices obstructing departure, and bringing cases across different fora to develop a body of precedent and allow adjudicative bodies to clarify the scope of the right and

[173] Costello and Mann (2020), p. 320.
[174] *N.F., N.G. and N.M.* (n. 81).
[175] Pijnenburg (2018).
[176] See McDonnell (2021a).

its requirements vis-à-vis externalisation. It would also be pertinent for the HRC to issue a new general comment on the right to leave, given its only general comment on the topic is nearly 25 years old, expanding upon the principles already set forth to elucidate how migration control measures (beyond carrier sanctions and pre-frontier arrangements) may interfere with the right and the circumstances in which they may or may not meet the requirements under the right.

In addition to invoking the right to leave with respect to pullbacks and privatised pushbacks to Libya, cases could also be brought against both departure and destination states (depending on the adjudicative body) addressing pullbacks and/or the criminalisation of exit such as by Egypt, Tunisia or Lebanon at the behest of the EU and its Member States, including before European courts as well as courts in the region;[177] Australia's funding and equipping of states in the Asia–Pacific to strengthen their border controls and intercept migrants headed for Australia;[178] or the US bolstering Mexico's capacity to apprehend migrants at its borders travelling from the Northern Triangle to the US.[179] Tactics, such as Turkish border guards shooting Syrians as they attempt to leave Syria and cross into Turkey,[180] or Croatia's violent pushback of migrants to Bosnia and Herzegovina,[181] could also be challenged on the basis that they render the right to leave, including to seek asylum, illusory and lacking meaningful effect, and grappling head on with the fact that exit and entry cannot always be easily separated. Alongside challenging visa refusals, cases could also be brought against the destination state and potentially private companies where an individual has been denied embarkation by an airline or ferry subject to that state's carrier sanctions laws,[182] or by one of the state's immigration officials deployed abroad, for example as part of US preclearance at foreign airports.[183] Complaints should especially be brought where asylum seekers are prevented from fleeing a country,[184] and that bring attention to discriminatory profiling by states, such as the denial of Hungarian Roma from travelling to Canada at Budapest's international airport or the interception of unaccompanied Saudi women at airports suspected of travelling to seek asylum in Canada and Australia respectively.[185]

Detention and geographical confinement are also being used to contain migrants in frontline states, such as asylum seekers in camps on the Greek Islands and in Italian hotspots to manage new arrivals, prevent onward movement and facilitate

[177] See Badalič (2019); Refugee Platform in Egypt (2022); El Murr (2023); Tinni et al (2023), p. 30; Human Rights Watch (2023d).

[178] Nethery and Gordyn (2014); Hirsch (2022).

[179] US Embassy & Consulates in Mexico (2021); US Department of State (2022).

[180] Human Rights Watch (2023a).

[181] Human Rights Watch (2023c).

[182] Art. 5 ARSIWA permits the conduct of carriers to be attributed to the state as carriers are exercising governmental authority, namely immigration control. See ARSIWA Commentary, p. 43 para. 2.

[183] US Customs and Border Protection (2023).

[184] In a roundtable on carriers' liability, the UNHCR (2001) highlighted that carrier personnel may find themselves de facto accomplices to a violation of asylum seekers' right to leave a country where they fear persecution, given the indiscriminate character of carrier sanctions. See also Moreno-Lax (2017), pp. 144–147.

[185] Boudjikanian (2015); McNeill, O'Neill and Fallon (2019).

returns;[186] by states of origin and transit, such as Libya, Indonesia and Turkey, who use migrant detention as a form of 'territorial containment' to prevent emigration to and at the behest of Global North states who may have declared them a safe third country, as in the case of Turkey; as well as in places such as Nauru and PNG where migrants have never transited through.[187] As Macklin argues, migrant detention is 'not ancillary or instrumental to the project of controlling human circulation, it is an instantiation of it' and detention as a form of exit restriction so migrants cannot reach Italy or Europe, for example, seems 'different in kind' from detention—an interference with the right to leave.[188] This angle may provide new avenues for accountability, in particular challenging the role and complicity of destination states in enlisting partner states and funding detention and offshoring in potential breach of the right to leave, such as Italy's new deal to set up detention centres in Albania.[189]

Of course, the right to leave will not be applicable to all externalisation measures or relevant in every case. The relevant state may also not be bound by the right to leave under the relevant instrument, for example Greece, Switzerland, Turkey and the UK have not ratified Protocol 4 ECHR. It will be for practitioners to assess whether there is an arguable case under the right to leave, the strategic value of doing so, and the consequences of a negative decision (or indeed, a positive one as in the case of *Hirsi*, with Italy now outsourcing to Libya what would be unlawful if Italy did itself). There will always be an array of challenges to pursuing accountability for externalisation, from jurisdictional hurdles, to standing, to the practical obstacles for survivors and families of deceased migrants bringing a case. However, continuing to overlook the right to leave and not plead it, particularly in cases where the right is squarely infringed and establishing a violation may be easier than proving *refoulement*, denies the possibility of generating significant reform to strategies of containment and externalisation and developing robust normative standards governing the right to leave and its applicability to migration controls.

Were a destination state deemed to be held responsible for violating the right to leave and recognised as exercising extraterritorial control over a migrant by providing financial, logistical and political support to a partner state, this would raise the stakes. It would affirm the obligation of destination states to respect the right extraterritorially and not obstruct departure out of third states, potentially compelling states to develop lawful alternatives to the containment of migrants, such as safe and legal pathways.[190] However, practitioners should not be deterred by a negative decision, especially from the ECtHR, such as in *M.N. v. Belgium* or *Xhavara*, as other

[186] ECRE (2016). In ECtHR, *H.A. and others v. Greece*, Appl. Nos. 4892/18 and 4920/18, 13 June 2023, the Court found that the living conditions in the Moria hotspot on Lesbos violated Art. 3 ECHR. The applicants were prevented from leaving Lesbos under the EU-Turkey deal. See also ECtHR, *J.A. and Others v. Italy*, Appl. No. 21329/18, 30 March 2023.

[187] See Guild (2013), pp. 35–36; Dastyari and Hirsch (2019); Cornelisse (2022), pp. 465–468.

[188] Macklin (2023), pp. 10–12.

[189] Wallis (2024).

[190] See Stoyanova (2020c) on the positive obligation to consider alternatives to measures of containment, such as granting humanitarian visas.

human rights bodies often take a more expansive, human rights-centred approach.[191] If partner states were to be held accountable by domestic and regional bodies for pullbacks, migrant detention or criminalising exit funded or supported by destination states, it will become ever more challenging for destination states to convince states in the Global South to act on their behalf.[192] Cases brought by nationals arguing that externalisation not only impacts migrants, but the right of nationals to leave their own state, as in the complaint submitted to ECOWAS, may also prompt partner states to reconsider their role in the externalisation strategies of destination states that are hampering the mobility of their citizens. Given that restrictions on the right to leave will be unlawful when applied or operating in a discriminatory manner, litigation that illuminates differential treatment based, for example, on race, religion, class and gender, will be especially important in rectifying the inequities and enduring legacies of colonialism that underpin access to the global mobility regime.[193]

6 Conclusion

This article has argued that approaching externalised migration control through the lens of the right to leave can provide a powerful avenue to remedying, at least partly, persistent accountability gaps. Synthesising the jurisprudence on key externalisation measures and the cases concerning the right to leave revealed that the right to leave remains largely overlooked to date. There have been multiple missed opportunities for the right to be invoked and its scope and requirements clarified and elucidated, including in cases where an interference with departure is evident on the facts. The article posited several reasons for this situation, including that practitioners and litigants may not realise the potential applicability of the right to the measure in question, or may be hesitant to raise the right given it is largely untested and underdeveloped in relation to externalisation. Inattention to the right to leave in litigation appears to have been overarchingly moulded by the way in which externalisation is typically understood as a phenomenon primarily hampering entry and access to asylum. Several recent cases have been brought across different fora arguing that the measure in question violates the right to leave. These cases point to a *new direction* in litigation efforts that recognises externalisation as equally harmful to the right to leave any country, not only other rights, such as protection from *refoulement*. At a time when states around the world are implementing measures and policies that obstruct departure and contain migrants and citizens in states of origin and transit, it is time for scholars, practitioners and stakeholders to heed the potential of the right to leave in tackling externalisation. Litigating the right to leave across different fora would not only provide new avenues to achieving accountability for the harms migrants are experiencing throughout their journey but may even compel states and other actors to afford greater attention to their obligations under the right to leave when engaging in externalisation.

[191] See Dembour (2015).
[192] Pijnenburg and van der Pas (2022), p. 427.
[193] See e.g., Shachar (2009); Spijkerboer (2018b); Achiume (2019).

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References

Achiume ET (2019) Migration as decolonization. Stanf Law Rev 71:1509–1574

Achour M, Spijkerboer T (2020) The Libyan litigation about the 2017 Memorandum of Understanding between Italy and Libya. EU Migration Law Blog, 2 June 2020. http://eumigrationlawblog.eu/the-libyan-litigation-about-the-2017-memorandum-of-understanding-between-italy-and-libya/. Accessed 4 Mar 2024

ACLU (2023) Lawsuits related to Trump's Muslim ban. https://www.aclu.org/other/lawsuits-related-trumps-muslim-ban. Accessed 4 Mar 2024

All-Party Parliamentary Group (2019) Visa problems for African visitors to the UK. Joint report. https://royalafricansociety.org/wp-content/uploads/2020/01/APPG-Report-on-Visa-problems-for-African-visitors-to-the-UK_v1.58web.pdf. Accessed 4 Mar 2024

ASGI (2021) Legal framework. Italian and Libyan responsibilities for the violation of Articles 2 and 6 of the CEDAW. December 2021. https://www.asgi.it/wp-content/uploads/2021/12/Juridical-Framework_1.pdf. Accessed 4 Mar 2024

ASGI (2022a) Ecowas Court of Justice called to judge the legality of Niger Law No. 36/2015. 22 September 2022. https://en.asgi.it/ecowas-court-of-justice-called-to-judge-the-legality-of-niger-law-no-36-2015/. Accessed 4 Mar 2024

ASGI (2022b) Ecowas Court of Justice called to judge the legality of Niger Law No. 36/2015. Press conference, 22 September 2022. https://vimeo.com/752492548. Accessed 4 Mar 2024

ASGI, CIHRS (2020) Complaint to the UN Human Rights Committee over the role of Italy, Malta, and Libya in violating the right to leave Libya, resulting in denial of the rights of asylum seekers. 24 July 2020. https://www.statewatch.org/media/1267/un-asgi-cihrs-complaint-libya-pull-backs-pr-24-7-20.pdf. Accessed 4 Mar 2024

Badalič V (2019) Tunisia's role in the EU external migration policy: crimmigration law, illegal practices, and their impact on human rights. J Int Migr Integr 20:85–100

Bøås M (2021) EU migration management in the Sahel: unintended consequences on the ground in Niger? Third World Q 42:52–67

Boudjikanian R (2015) Hungarian Roma regularly prevented from boarding Canada-bound flights. CBC News, 5 October 2015. https://www.cbc.ca/news/canada/montreal/hungarian-roma-refugee-claim-cbsa-air-transat-budapest-gabor-lukaçs-1.3257661. Accessed 4 Mar 2024

Brennan Center for Justice (2020) Muslim ban litigation. 3 February 2020. https://www.brennancenter.org/our-work/court-cases/muslim-ban-litigation. Accessed 4 Mar 2024

Briddick C, Costello C (2021) Introduction to the Symposium on undoing discriminatory borders. Am J Int Law Unbound 115:328–332

Brouwer E (2010) Extraterritorial migration control and human rights: preserving the responsibility of the EU and its Member States. In: Ryan B, Mitsilegas V (eds) Extraterritorial immigration control: legal challenges. Martinus Nijhoff, Leiden, pp 199–228

Cantor D et al (2022) Externalisation, access to territorial asylum, and international law. Int J Refugee Law 34:120–156

Carrera S (2020) The Strasbourg Court judgement N.D. and N.T. v Spain: a carte blanche to push backs at EU external borders? EUI Working Paper RSCAS 2020/21. https://cadmus.eui.eu/handle/1814/66629. Accessed 4 Mar 2024
Chetail V (2014) The transnational movement of persons under general international law: mapping the customary law foundations of international migration law. In: Chetail V, Bauloz C (eds) Research handbook on international law and migration. Edward Elgar, Cheltenham, pp 1–72
Chetail V (2019) International migration law. Oxford University Press, Oxford
Ciliberto G (2018) Libya's pull-backs of boat migrants: can Italy be held accountable for violations of international law? Italian Law J 4:489–530
Commissioner for Human Rights (2022) Pushed beyond the limits: four areas for urgent action to end human rights violations at Europe's borders. Council of Europe, April 2022. https://rm.coe.int/pushed-beyond-the-limits-urgent-action-needed-to-end-human-rights-viol/1680a5a14d. Accessed 4 Mar 2024
Comparative Network on Refugee Externalisation Policies (2022) Analysis of refugee externalisation. Blog Compendium, July 2022. https://arts.unimelb.edu.au/__data/assets/pdf_file/0006/4264143/CONREP-Blog-Compendium-Final.pdf. Accessed 4 Mar 2024
Cornelisse G (2022) Criminalisation, containment and courts: a call for cross-fertilisation between the social sciences and legal-doctrinal research into immigration detention in Europe. In: Tsourdi L, De Bruycker P (eds) Research handbook on EU migration law. Edward Elgar, Cheltenham, pp 455–470
Committee on Migrant Workers (2022) UN committee urges prompt investigation into deaths of migrants at Moroccan-Spanish border. 28 June 2022. https://www.ohchr.org/en/press-releases/2022/06/un-committee-urges-prompt-investigation-deaths-migrants-moroccan-spanish. Accessed 4 Mar 2024
Cornelisse G (2008) European vessels, African territorial waters and 'illegal emigrants': the right to leave and the principle of (il)legality in a global regime of mobility. Challenge Working Paper. https://research.vu.nl/en/publications/european-vessels-african-territorial-waters-and-illegal-emigrants. Accessed 4 Mar 2024
Costello C, Foster M (2021) Race discrimination effaced at the International Court of Justice. Am J Int Law Unbound 115:339–344
Costello C, Mann I (2020) Border justice: migration and accountability for human rights violations. Ger Law J 21:311–334
Crisp J (2020) What is externalization and why is it a threat to refugees? Chatham House, 14 October 2020. https://www.chathamhouse.org/2020/10/what-externalization-and-why-it-threat-refugees. Accessed 4 Mar 2024
Dastyari A, Hirsch A (2019) The ring of steel: extraterritorial migration controls in Indonesia and Libya and the complicity of Australia and Italy. Hum Rights Law Rev 19:435–465
Dastyari A, Nethery A, Hirsch A (eds) (2022) Refugee externalisation policies responsibility, legitimacy and accountability. Routledge, London
Davitti D (2018) Biopolitical borders and the state of exception in the European migration 'crisis'. Eur J Int Law 29:1173–1196
Dembour MB (2015) When humans become migrants: study of the European Court of Human Rights with an Inter-American counterpoint. OUP, Oxford
den Heijer M (2012) Europe and extraterritorial asylum. Hart Publishing, Oxford
den Heijer M (2018) Visas and non-discrimination. Eur J Migr Law 20:470–489
Dobkin DS (2010) Challenging the doctrine of consular nonreviewability in immigration cases. Georget Immigr Law J 24:113–146
ECRE (2016) The implementation of the hotspots in Italy and Greece: a study. https://ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf. Accessed 4 Mar 2024
El Murr Y (2023) Intercepted at sea: anatomy of a pullback. The Public Source, 13 February 2023. https://thepublicsource.org/lebanon-departure-state-pullbacks-migration. Accessed 4 Mar 2024
European Union Agency for Fundamental Rights (2015) Legal entry channels to the EU for persons in need of international protection: a toolbox. FRA Focus 2/2015
Feller E (1989) Carrier sanctions and international law. Int J Refugee Law 1:48–66
FitzGerald DS (2019) Refuge beyond reach: how rich democracies repel asylum seekers. OUP, Oxford
Frelick B, Kysel IM, Podkul J (2016) The impact of externalization of migration controls on the rights of asylum seekers and other migrants. J Migr Hum Secur 4:190–220
Gammeltoft-Hansen T (2011) Access to asylum: international refugee law and the globalisation of migration control. CUP, Cambridge

Gammeltoft-Hansen T, Hathaway JC (2015) Non-refoulement in a world of cooperative deterrence. Columbia J Transnatl Law 53:235–284
Ghezelbash D (2018) Refuge lost: asylum law in an interdependent world. CUP, Cambridge
Giuffré M, Moreno-Lax V (2019) The rise of consensual containment: from 'contactless control' to 'contactless responsibility' for forced migration flows. In: Satvinder JS (ed) Research handbook on international refugee law. Edward Elgar, Cheltenham, pp 82–109
GLAN (2021) 'Drift-backs' and torture on the Aegean. March 2021. https://www.glanlaw.org/aegean-push-backs. Accessed 4 Mar 2024
Goodwin-Gill GS, McAdam J (2007) The refugee in international law, 3rd edn. OUP, Oxford
Greek National Commission for Human Rights (2023) Recording mechanism of incidents of informal forced returns. January 2023. https://rsaegean.org/wp-content/uploads/2023/01/Interim_Report_echanism_en.pdf. Accessed 4 Mar 2024
Guild E (2003) The border abroad: visas and border controls. In: Groenendijk K, Guild E, Minderhoud P (eds) In search of Europe's borders. Kluwer Law International, The Hague, pp 87–104
Guild E, Stoyanova V (2018) The human right to leave any country: a right to be delivered. In: Benedek W, Czech P, Heschl L, Lukas K, Nowak M (eds) European yearbook on human rights 2018. Intersentia, Cambridge, pp 373–394
Guild E (2013) The right to leave a country. Issue Paper, Council of Europe Commissioner for Human Rights
Hannum H (1987) The right to leave and return in international law and practice. Martinus Nijhoff, Dordrecht
Hardy E (2024) EU-Niger migration cooperation at risk. Euronews, 3 January 2024. https://www.euronews.com/my-europe/2024/01/03/eu-niger-migration-cooperation-at-risk. Accessed 4 Mar 2024
Harvey C, Barnidge RP (2007) Human rights, free movement, and the right to leave in international law. Int J Refugee Law 19:1–21
Hathaway JC (1992) The emerging politics of non-entrée. Refugees 91:40–41
Hathaway JC (2008) The human rights quagmire of 'human trafficking'. Va J Int Law 49:1–59
Hirsch AL (2022) Externalisation and access to asylum: an investigation into Australia's migration control cooperation with Indonesia. DPhil Thesis, Monash University
Human Rights Watch (2020) Deportation with a layover. Failure of protection under the US-Guatemala Asylum Cooperative Agreement. 19 May 2020. https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative#6401. Accessed 4 Mar 2024
Human Rights Watch (2022) Public letter to UK Home Secretary on expulsions to Rwanda. 11 June 2022. https://www.hrw.org/news/2022/06/11/public-letter-uk-home-secretary-expulsions-rwanda. Accessed 4 Mar 2024
Human Rights Watch (2023a) Turkish border guards torture, kill Syrians. Turkey should end impunity. 27 April 2023. https://www.hrw.org/news/2023/04/27/turkish-border-guards-torture-kill-syrians. Accessed 4 Mar 2024
Human Rights Watch (2023b) US: Biden 'asylum ban' endangers lives at the border. 11 May 2023. https://www.hrw.org/news/2023/05/11/us-biden-asylum-ban-endangers-lives-border. Accessed 4 Mar 2024
Human Rights Watch (2023c) Croatia: ongoing, violent border pushbacks. EU turns blind eye to routine brutality toward migrants, asylum seekers. 3 May 2023. https://www.hrw.org/news/2023/05/03/croatia-ongoing-violent-border-pushbacks. Accessed 4 Mar 2024
Human Rights Watch (2023d) Tunisia: no safe haven for black African migrants, refugees. Security forces abuse migrants; EU should suspend migration control support. 19 July 2023. https://www.hrw.org/news/2023/07/19/tunisia-no-safe-haven-black-african-migrants-refugees. Accessed 4 Mar 2024
IACHR (2019) IACHR urges Honduras and Guatemala to guarantee the rights of people in the migrant and refugee caravan. Press Release 37/19, 19 February 2019. https://www.oas.org/en/iachr/media_center/PReleases/2019/037.asp. Accessed 4 Mar 2024
Keady-Tabbal N, Mann I (2021) 'Pushbacks' as euphemism. EJIL:Talk!, 14 April 2021. https://www.ejiltalk.org/pushbacks-as-euphemism/. Accessed 4 Mar 2024
Kochenov D (2012) The right to leave any country including your own in international law. Conn J Int Law 28:43–71
Laube L (2019) The relational dimension of externalizing border control: selective visa policies in migration and border diplomacy. Comp Migr Stud 7:1–22

Lauterpacht E, Bethlehem D (2003) The scope and content of the principle of non-refoulement: opinion. In: Feller E, Türk V, Nicholson F (eds) Refugee protection in international law: UNHCR's global consultations on international protection. CUP, Cambridge, pp 87–177

Macklin A (2023) Exit rights, seamless borders and the new carceral state. MOBILE Working Paper Series No 6. https://osf.io/preprints/socarxiv/wfqhj/. Accessed 4 Mar 2024

Markard N (2016) The right to leave by sea: legal limits on EU migration control by third countries. Eur J Int Law 27:591–616

McDonald H (2020) Home Office to scrap 'racist algorithm' for UK visa applicants. The Guardian, 4 August 2020. https://www.theguardian.com/uk-news/2020/aug/04/home-office-to-scrap-racist-algorithm-for-uk-visa-applicants. Accessed 4 Mar 2024

McDonnell E (2021a) Protecting the right to leave in an era of externalised migration control. DPhil thesis, University of Oxford

McDonnell E (2021b) Realising the right to leave during externalised migration control. EJIL:Talk!, 27 September 2021. https://www.ejiltalk.org/realising-the-right-to-leave-during-externalised-migration-control/. Accessed 4 Mar 2024

McNeill S, O'Neill S, Fallon M (2019) Australian border force accused of targeting women suspected of fleeing Saudi Arabia. ABC News, 4 February 2019. www.abc.net.au/news/2019-02-04/border-force-accused-of-targeting-saudi-women-traveling-alone/10768036. Accessed 4 Mar 2024

Moreno-Lax V (2008) Must EU borders have doors for refugees? On the compatibility of Schengen visas and carriers' sanctions with EU Member State' obligations to provide international protection to refugees. Eur J Migr Law 10:315–365

Moreno-Lax V (2017) Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law. OUP, Oxford

Moreno-Lax V (2021) Intersectionality, forced migration, and the jus-generation of the right to flee: theorising a composite entitlement to leave to escape irreversible harm. In: Çalı B, Bianku L, Motoc I (eds) Migration and the European Convention on Human Rights. OUP, Oxford, pp 43–83

Mouzourakis M, Costello C (2022) Effective judicial protection of migrants and refugees? The role of Europe's supranational courts in protecting and generating rights. In: Tsourdi L, De Bruycker P (eds) Research handbook on EU migration law. Edward Elgar, Cheltenham, pp 79–97

Nessel LA (2009) Externalized borders and the invisible refugee. Columbia Hum Rights Law Rev 40:625–700

Nethery A, Gordyn C (2014) Australia-Indonesia cooperation on asylum-seekers: a case of 'incentivised policy transfer'. Aust J Int Aff 68:177–193

Neumayer E (2006) Unequal access to foreign spaces: how states use visa restrictions to regulate mobility in a globalised world. Trans Inst Br Geogr 31:72–84

Nowak N (2005) UN Covenant on Civil and Political Rights: CCPR commentary, 2nd edn. NP Engel, Kehl

O'Cinnéide C (2021) Why challenging discrimination at borders is challenging (and often futile). Am J Int Law Unbound 115:362–367

Office of the Prosecutor of the International Criminal Court (2020) Letter to Andrew Wilkie MP, OTP-CR-322/14/001, 12 February 2020. https://andrewwilkie.org/wp-content/uploads/2022/12/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers.pdf. Accessed 4 Mar 2024

Oxfam (2020) The EU trust fund for Africa. Trapped between aid policy and migration politics. January 2020. https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620936/bp-eu-trust-fund-africa-migration-politics-300120-en.pdf?sequence=1. Accessed 4 Mar 2024

Perrin D (2020) Smuggling of migrants: the misused spirit of the Palermo Protocol, in the light of the Nigerien experience. Border Criminologies. www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/05/smuggling. Accessed 4 Mar 2024

Pijnenburg A (2018) From Italian pushbacks to Libyan pullbacks: is Hirsi 2.0 in the making in Strasbourg? Eur J Migr Law 20:396–426

Pijnenburg A, van der Pas K (2022) Strategic litigation against European migration control policies: the legal battleground of the central Mediterranean migration route. Eur J Migr Law 24(3):401–429

Ramahi Z (2020) The Muslim ban cases: a lost opportunity for the court and a lesson for the future. Calif Law Rev 108:557–586

Refugee Law Initiative (2022) Refugee law initiative declaration on externalisation and asylum. Int J Refugee Law 34:114–119

Refugee Platform in Egypt (2022) EU funding for the Egyptian coast guard (strengthening a partnership that violates human rights). https://rpegy.org/en/editions/eu-funding-for-the-egyptian-coast-guard-strengthening-a-partnership-that-violates-human-rights/. Accessed 4 Mar 2024

Refugee Support Aegean (2024) Hearing before the Court of Justice of the European Union on Thursday 14 March on the preliminary questions of the Greek Council of State regarding Turkey as a 'safe third country'. 13 March 2024. https://rsaegean.org/en/court-of-justice-of-the-eu-greek-council-turkey-as-a-safe-third-country/. Accessed 14 April 2024

Rodenhäuser T (2014) Another brick in the wall: carrier sanctions and the privatisation of immigration control. Int J Refugee Law 26:223–247

Scheinin M (2000) The right to leave any country as a human right—implications for carrier sanctions and other forms of pre-frontier control. Turku Law J 2:127–134

Scholten S, Minderhoud P (2008) Regulating immigration control: carrier sanctions in the Netherlands. Eur J Migr Law 10:123–147

Scholten S (2015) The privatisation of immigration control through carrier sanctions: the role of private transport companies in Dutch and British immigration control. Brill Nijhoff, Leiden

Shachar A (2009) The birthright lottery: citizenship and global inequality. HUP, Cambridge

Soderstrom K (2019) Flexible borders: the fiction of non-entry and asylum seekers in Germany. CONREP Blog, 17 July 2019. https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/flexible-borders. Accessed 4 Mar 2024

Spijkerboer T (2018a) Bifurcation of people, bifurcation of law: externalisation of migration policy before the EU Court of Justice. J Refugee Stud 31:216–239

Spijkerboer T (2018b) The global mobility infrastructure: reconceptualising the externalisation of migration control. Eur J Migr Law 20:452–469

Statewatch (2023) EU: Commission halts migration cooperation with Niger, but for how long? 7 September 2023. https://www.statewatch.org/news/2023/september/eu-commission-halts-migration-cooperation-with-niger-but-for-how-long/. Accessed 4 Mar 2024

Stoyanova V (2020a) The right to leave any country and the interplay between jurisdiction and proportionality in human rights law. Int J Refugee Law 32:403–439

Stoyanova V (2020c) The right to life under the EU Charter and cooperation with third states to combat human smuggling. Ger Law J 21:436–458

Stoyanova V (2020b) M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas. EJIL: Talk!, 12 May 2020. https://www.ejiltalk.org/m-n-and-others-v-belgium-no-echr-protection-from-refoulement-by-issuing-visas/. Accessed 4 Mar 2024

Tan NF (2021) Conceptualising externalisation: still fit for purpose? Forced Migr Rev 68:8–9

Tan NF, Gammeltoft-Hansen T (2020) Topographical approach to accountability for human rights violations in migration control. Ger Law J 21:335–354

Tinni AB et al (2023) Asylum for containment. ASILE Project, March 2023. https://www.asileproject.eu/asylum-for-containment/. Accessed 4 Mar 2024

UNHCR (2001) Round table on carriers' liability related to illegal immigration. Opening statement by Jean-Francois Durieux, Deputy Director, Bureau for Europe, UNHCR, 30 November 2001. http://briguglio.asgi.it/immigrazione-e-asilo/2001/dicembre/unhcr-vettori.html. Accessed 4 Mar 2024

UNHCR (2018) UNHCR appeals to Australia to act and save lives at immediate risk. 23 October 2018. https://www.unhcr.org/uk/news/news-releases/unhcr-appeals-australia-act-and-save-lives-immediate-risk. Accessed 4 Mar 2024

UNHCR (2019) Statement on new U.S. asylum policy. 19 November 2019. https://www.unhcr.org/news/news-releases/statement-new-us-asylum-policy. Accessed 4 Mar 2024

UNHCR (2021) Note on the 'externalization' of international protection. 28 May 2021. https://www.refworld.org/pdfid/60b115604.pdf. Accessed 7 Mar 2024

UNSMIL, OHCHR (2016) Detained and dehumanized: report on human rights abuses against migrants in Libya. December 2016. https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf. Accessed 4 Mar 2024

US Customs and Border Protection (2023) Preclearance. 15 May 2023. https://www.cbp.gov/travel/preclearance. Accessed 4 Mar 2024

US Department of State (2022) Summary of the Action Plan for U.S.-Mexico Bicentennial Framework for Security, Public Health, and Safe Communities. 31 January 2022. https://www.state.gov/summary-of-the-action-plan-for-u-s-mexico-bicentennial-framework-for-security-public-health-and-safe-communities/. Accessed 4 Mar 2024

US Embassy & Consulates in Mexico (2021) The Merida Initiative. 7 September 2021. https://mx.usembassy.gov/the-merida-initiative/. Accessed 4 Mar 2024

Wallis E (2024) Albania's Constitutional Court approves Italian migrant deal. InfoMigrants, 30 January 2024. https://www.infomigrants.net/en/post/54861/albanias-constitutional-court-approves-italian-migrant-deal. Accessed 4 Mar 2024

Warrell W (2019) Home Office under fire for using secretive visa algorithm. Financial Times, 9 June 2019. https://www.ft.com/content/0206dd56-87b0-11e9-a028-86cea8523dc2. Accessed 4 Mar 2024

Weinzierl R, Lisson U (2007) Border management and human rights: a study of EU law and the law of the sea. German Institute for Human Rights, Berlin