PROTECTING THE RIGHT TO LEAVE IN AN ERA OF EXTERNALISED MIGRATION CONTROL

Emilie Vivi McDonnell

Hertford College, University of Oxford

1032846

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ABSTRACT

PROTECTING THE RIGHT TO LEAVE IN AN ERA OF EXTERNALISED MIGRATION CONTROL

This thesis explores the right to leave any country, including one's own, in international law and its applicability to externalised migration control. Destination states and the European Union are employing a range of practices designed to prevent certain migrants leaving the state they are in and their irregular arrival, typically in cooperation with other states, private actors, and international organisations. Motivated by this phenomenon, this thesis focuses on the right to leave for migrants (including nationals seeking to leave their own state), which is fundamental on its own terms and in securing liberty and equality. It assesses the compatibility of key externalisation measures with the right and considers which actors bear responsibility for ensuing violations. Part I develops a general framework for determining whether restrictions conform with the right to leave, analysing the right's scope and requirements and outlining corresponding obligations and duty-bearers. This shifts the focus onto challenging the traditional view that states have an almost unfettered right to exclude non-nationals, illustrating obligations to admit before demonstrating that the right to leave is exercisable irrespective of any right of entry. It then reveals the practical and legal necessity of the right for asylum seekers, appropriately formulated as a 'right to leave to seek asylum' and accompanied by several duties. Part II examines the law on jurisdiction and international responsibility. Applying the previous findings, Part III turns to externalisation, analysing the compatibility of visas, carrier sanctions, pushbacks, and pullbacks with the right to leave. It concludes that in most circumstances, such practices violate the right, with each actor responsible for their respective role. Overall, this thesis highlights the need for the primary contours of the right to be integrated into migration control policies and practices, compelling the dismantlement of many externalisation strategies and a re-imagining of the global (im)mobility infrastructure.

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Emilie Vivi McDonnell
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TABLE OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and Peoples' Rights
ADHR	American Declaration of the Rights and Duties of Man
AFP	Australian Federal Police
AGSI	Association for Juridical Studies on Immigration
ALO	Airline Liaison Officer
AmULRev	American University Law Review
APSR	American Political Science Review
ARIO	Articles on the Responsibility of International Organisations
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ATV	Airport Transit Visa
Aust YBIL	Australian Yearbook of International Law
AustJInt'l Aff	Australian Journal of International Affairs
BYBIL	British Yearbook of International Law
CAT	Committee Against Torture
CDC	Centers for Disease Control and Prevention
CEDAW	Committee on the Elimination of Discrimination against Women
CEPS	Centre for European Policy Studies
CERD	Committee on the Elimination of Racial Discrimination
CIHRS	Cairo Institute for Human Rights Studies
CIL	Customary International Law
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
CLR	Commonwealth Law Reports
CMW	Committee on Migrant Workers
CoE	Council of Europe
ColumHumRtsLRev	Columbia Human Rights Law Review
ColumJTransnat'l L	Columbia Journal of Transnational Law
COMESA	Common Market for Eastern and Southern Africa

ConnJInt'l L	Connecticut Journal of International Law
CRC	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CYELS	Cambridge Yearbook of European Legal Studies
DRC	Democratic Republic of the Congo
EACJ	East African Court of Justice
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard Agency
ECDPM	European Centre for Development Policy Management
ECHR	European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECmHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EJML	European Journal of Migration and Law
ELJ	European Law Journal
ETA	Electronic Travel Authorisation
ETS	European Treaty Series
EU	European Union
EUBAM	European Union Border Assistance Mission
EUCFR	Charter of Fundamental Rights of the European Union
EUNAVFOR	European Union Naval Force
EXCOM	Executive Committee
FC	Federal Court
FCA	Federal Court of Appeal
FCR	Federal Court Reports
FLO	Frontex Liaison Officer
FMR	Forced Migration Review
FRA	European Union Agency for Fundamental Rights
FYROM	Former Yugoslav Republic of Macedonia

GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
GeoImmigrLJ	Georgetown Immigration Law Journal
German LJ	German Law Journal
HarvInt'l LJ	Harvard International Law Journal
HRC	Human Rights Committee
HRLJ	Human Rights Law Journal
HRLRev	Human Rights Law Review
HRW	Human Rights Watch
Human Rights Rev	Human Rights Review
HumRtsQ	Human Rights Quarterly
HUP	Harvard University Press
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICIBI	Independent Chief Inspector of Borders and Immigration
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ICON	International Journal of Constitutional Law
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IHR	International Human Rights
IHRL	International Human Rights Law
IHRR	International Human Rights Report
IJHR	International Journal of Human Rights
IJHRL	Interdisciplinary Journal of Human Rights Law
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILO	Immigration Liaison Officer

ILOR	Immigration Liaison Officer Regulation
IMI	International Migration Institute
IMO	International Maritime Organization
IMR	International Migration Review
INA	Immigration and Nationality Act
Int JLC	International Journal of Law in Context
IntCLRev	International Community Law Review
IO	International Organisation
IOM	International Organization for Migration
IRPA	Immigration and Refugee Protection Act
IRPR	Immigration and Refugee Protection Regulations
Italian LJ	Italian Law Journal
IWA	Internationally Wrongful Act
JCWI	Joint Council for the Welfare of Immigrants
JEMS	Journal of Ethnic and Migration Studies
JMHS	Journal on Migration and Human Security
JRCC	Joint Rescue Coordination Centre
JRS	Journal of Refugee Studies
LBCG	Libyan Coast Guard
LIBE	Civil Liberties, Justice and Home Affairs
LJIL	Leiden Journal of International Law
LOS	Law of the Sea
LSE	London School of Economics
MichJInt'L	Michigan Journal of International Law
MJIL	Melbourne Journal of International Law
MoU	Memorandum of Understanding
MPA	Maritime Powers Act
MPF	Migration Partnership Framework
MPI	Migration Policy Institute
MPIL	Max Planck Institute for Comparative Public Law and International Law
MRCC	Maritime Rescue and Coordination Centre
NAFSA	National Association of Foreign Student Advisers
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organisation
NILR	Netherlands International Law Review
NordJInt'l L	Nordic Journal of International Law

NQHR	Netherlands Quarterly of Human Rights
NYIL	Netherlands Yearbook of International Law
NYU J Legis & Pub Poly	New York University Journal of Legislation and Public Policy
OAU	Organization of African Unity
ODI	Overseas Development Institute
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
OPT	Occupied Palestinian Territory
PIL	Public International Law
PNG	Papua New Guinea
QIL	Questions of International Law
RCA	Regional Cooperation Agreement
RSC	Refugee Studies Centre
RSQ	Refugee Survey Quarterly
SAR	Search and Rescue
STC	Safe Third Country
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCLA	University of California, Los Angeles
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCHR	United Nations Commission on Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNCRC	United Nations Convention on the Rights of the Child
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
UNSMIL	United Nations Support Mission in Libya
UNTS	United Nations Treaty Series

USSR	Union of Soviet Socialist Republics
USTS	United States Treaty Series
UTS L Rev	University of Technology Sydney Law Review
VaJInt'l L	Virginia Journal of International Law
VAC	Visa Application Centre
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
Yale LJ	The Yale Law Journal
YBILC	Yearbook of the International Law Commission

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* This thesis complies with OSCOLA, with one modification: numbers in square brackets following judgments or international/regional documents indicate paragraphs.

European Commission of Human Rights

European Court of Human Rights

Human Rights Committee

Inter-American Commission on Human Rights

Inter-American Court of Human Rights

International Court of Justice

International Criminal Tribunal for the Former Yugoslavia

Domestic Courts

Australia

Canada

Italy

Netherlands

Papua New Guinea

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International Law Commission

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Council of Europe

European Union

Commission, ‘Staff Working Document Turkey 2018 Report’ SWD (2018) 153 final 225

EASO, ‘Latest Asylum Trends - 2019 Overview’ (26 February 2020) <https://easo.europa.eu/asylum-trends-annual-overview> accessed 2 December 2020 227

EBCG, ‘Consolidated Annual Activity Report 2018’ (12 June 2019) Reg No 5865 262

EU, ‘EU Support on Migration in Libya: EU Emergency Trust Fund for Africa – North of Africa Window’ (Fact Sheet, October 2020) <https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/eutf-factsheet_2020-libya_2710.pdf> accessed 3 February 2021 266

EU-IOM, ‘EU-IOM Joint Initiative’ (Flash Report No 24, January 2020) <https://migrationjointinitiative.org/sites/default/files/files/articles/eu-iomjointinitiativeflashreport24en.pdf> accessed 5 December 2020 265

European Council, ‘EU-Turkey Statement’ (18 March 2016) <https://perma.cc/4ELL-BCW4> accessed 2 February 2021 225, 264, 292, 303, 320

European Council, ‘Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route’ (3 February 2017) <www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/> accessed 2 February 2021 264, 266

European Parliament, ‘Report with Recommendations to the Commission on Humanitarian Visas (2017/2270(INL))’ [2018] A8-0328/2018 229

FRA, *Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox* (FRA Focus 2/2015) 227

Frontex, ‘HERA 2008 and NAUTILUS 2008 Statistics’ (Press Release, 17 February 2009) <https://frontex.europa.eu/media-centre/news/news-release/hera-2008-and-nautilus-2008-statistics-oP7kLN> accessed 4 February 2020 262

Frontex, ‘Longest Frontex Coordinated Operation – HERA, the Canary Islands’ (Press Release, 19 December 2006) <https://frontex.europa.eu/media-centre/news/news-release/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQlsc> accessed 20 January 2020 262

‘Valletta Summit on Migration, 11-12 November 2015 - Action Plan and Political Declaration’ (12 November 2015) <www.consilium.europa.eu/en/press/press-releases/2015/11/12/valletta-final-docs/> accessed 3 February 2021 264

Official Papers, Policy, and Other Documents

ACHPR ‘General Comment No 5 on the African Charter on Human and Peoples’ Rights: The Right to Freedom of Movement and Residence (Article 12(1))’ (10 November 2019) 54, 55

Australian Border Force, ‘Operation Sovereign Borders Monthly Update: January 2020’ <https://newsroom.abf.gov.au/channels/Operation-Sovereign-Borders/releases/operation-sovereign-borders-monthly-update-january-2020> accessed 10 June 2020 256

Australian Government Department of Home Affairs, *The Administration of the Immigration and Citizenship Program* (Background Paper, 4th edn, 2020) 187

Commonwealth, *Estimates*, Senate, 23 February 2015 302

IACHR, ‘IACHR Expresses Deep Concern about the Situation of Migrants and Refugees in the United States, Mexico, and Central America’ (Press Release 180/19, 23 July 2019) <www.oas.org/en/iachr/media_center/PReleases/2019/180.asp> accessed 28 June 2020 318

IACHR, ‘IACHR Urges Honduras and Guatemala to Guarantee the Rights of People in the Migrant and Refugee Caravan’ (Press Release 37/19, 19 February 2019) <www.oas.org/en/iachr/media_center/PReleases/2019/037.asp> accessed 5 December 2020 51, 113

IACHR, ‘Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System’ (2000) OEA/Ser.L/V/II.106/Doc 40 Rev 86

IACHR, ‘Report on Terrorism and Human Rights’ (2002) OEA/Ser.L/V/II.116 Doc 5 Rev 1 corr 86

ICIBI, *An Inspection of Entry Clearance Processing Operations in Croydon and Istanbul* (July 2017) 213

ICIBI, *Inspection Report of the Amman Visa Section* (October 2015) 213

ICIBI, *Inspection Report of the UK Border Agency Visa Sections in Africa* (June 2012) 213

IOM, 'Annual Report for 2015' (13 June 2016) C/107/4 187

IOM, 'COVID-19 Travel Restrictions Output - 1 February 2021' (4 February 2021) <https://dtm.iom.int/reports/covid-19-travel-restrictions-output-—-1-february-2021> accessed 4 February 2021 5

IOM, 'The Human Rights of Migrants - IOM Policy and Activities' (12 November 2009) MC/INF/298 162

IOM, 'IOM Applauds Italy's Life-Saving Mare Nostrum Operation: "Not a Migrant Pull Factor"' (Press Release, 31 October 2014) <www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor> accessed 20 January 2020 267

IOM, 'IOM and Immigration and Visa Support Solutions' (*Fact Sheet*, 2011) <www.iom.int/files/live/sites/iom/files/What-We-Do/docs/11-IBM-Fact-Sheet-Immigration-and-Visa-Support-Solutions-2011.pdf> accessed 19 February 2020 187, 202

IOM, 'IOM Opens UK Visa Application Office in Guyana' (Press Release, 21 February 2014) <www.iom.int/news/iom-opens-uk-visa-application-office-guyana> accessed 25 June 2019 186

IOM, 'Policy on Protection' (7 September 2015) C/106/INF/9 161

IOM, 'Visa Application Centres' (*Information Sheet*) <www.iom.int/sites/default/files/our_work/DMM/IBM/updated/06visa_application_centres_info_sheet.pdf> accessed 1 June 2019 186

IOM, 'Visa Application Processing Solutions' (*Information Sheet*) <www.iom.int/sites/default/files/our_work/DMM/IBM/ibm-visaapplicationprocessingsolutions_booklet.pdf> accessed 19 February 2020 187

New Zealand Government, *Algorithm Assessment Report* (Stats NZ, 2018) 187

US Centers for Disease Control and Prevention, 'Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists' (13 October 2020) 85 FR 65806 258, 296

INTRODUCTION

Everyone shall be free to leave any country, including his own.[1]

The human right to leave any country, including one's own, is a fundamental element of personal liberty. Well-established in international law under treaty law and amounting to a norm of CIL, the right is characterised as one of 'personal self-determination'[2] and the ability to 'vote with one's feet' is perhaps the ultimate means through which individuals can express their personal liberty.[3] Gaining prominence during the Cold War when restrictions on emigration were commonplace, the ability to flee to seek asylum or express one's dissent were considered to lie at the heart of the right. It follows that the right to leave is an apt starting point in any account of migration and asylum, signifying the beginning of the migrant's journey from their state of origin in search of refuge, a better life, or for any number of reasons (key terms are defined below). More generally, the ability to leave is a prerequisite for seeking and securing international protection. The right is also essential in promoting equality and non-discrimination, contributing to equality of opportunity amongst individuals. Understanding the right to leave is thus integral to taking the rights of people on the move seriously, making examination of the right in international law pertinent.

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1 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12(2).

2 United Nations Commission on Human Rights (Sub-Commission), 'Study of Discrimination in Respect of the Right of Everyone to Leave any Country, including his Own, and to Return to his Country by Special Rapporteur José D Inglés' (1963) UN Doc E/CN.4/Sub.2/220/Rev.1, 9.

3 Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff 1987) 4.

However, human mobility, characterised by complex, irregular movements, is one of the biggest challenges facing the world today.[4] Many states, predominantly those in the Global North, are attempting to prevent certain (would-be) migrants leaving the state they are in, including nationals attempting to leave their own state, and their 'irregular' arrival at state frontiers. Migrants encounter various restrictions on movement well before their potential destination, which generates such complex journeys and the very notion of a 'transit' state (with such categorisation in need of problematisation, as returned to below). States thus have a 'monopoly over the legal means of movement'[5] and a 'shifting border' has emerged, with migration control 'at times penetrating deeply into the interior, at others extending well beyond the edge of the territory'.[6] States traditionally justify immigration control as inherent to their sovereign right to determine access to territory and sojourn, and then who shall be accepted as a potential member of the political community.

Through 'externalised migration control', destination states seek to impede the movement of asylum seekers and other migrants. Externalisation is a contested concept, bearing no legal or singular definition. In this thesis, it is used as a broad label to describe the diverse set of migration control practices and deterrence policies implemented beyond the states' territorial border or having extraterritorial effects, which may be undertaken unilaterally, in partnership with states of origin and transit, and/or through outsourcing to

4 UNHCR EXCOM 'Note on International Protection' (16 June 2017) UN Doc EC/68/SC/CRP.12 [3].

5 John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (2nd edn, CUP 2018) 220.

6 Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility. Ayelet Shachar in Dialogue* (Manchester University Press 2020) 4.

private actors and IOs.[7] The UNHCR recently published a Note and Annex on externalisation, however, they fall outside this thesis' temporal scope and moreover, focus on the externalisation of international protection, rather than migration control.[8] Given this thesis studies the latter, the UNHCR's narrower definition of externalisation is not adopted.

Destination states utilise a range of externalisation measures on land, at sea, by air, and digitally, sometimes unilaterally and oftentimes in cooperation with other states, private companies, and IOs. This includes visas, carrier sanctions, interceptions at sea and on land, offshore detention and processing, and safe country mechanisms.[9] Though externalisation is not new, of great legal interest is how destination states are now enlisting states of origin and transit to perform migration control and stem irregular migration *on their behalf*, including through pullbacks, detention, and criminalisation of exit. Destination states are giving third states funding, equipment, training, and technical support and inducing compliance through visa liberalisation, trade concessions, and development aid, which some have termed 'contactless control'.[10] Private actors and IOs also play a

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7 See among many Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011); Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012); Thomas Gammeltoft-Hansen and Ninna Nyberg Sørensen, *The Migration Industry and the Commercialisation of International Migration* (Routledge 2013); Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017); David S FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019).

8 UNHCR 'Note on the "Externalization" of International Protection' (28 May 2021); UNHCR 'Annex to UNHCR Note on the "Externalization" of International Protection: Policies and Practices related to the Externalization of International Protection' (28 May 2021).

9 See eg Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 ColumJTransnatl L 235; Nikolas Feith Tan, 'International Models of Deterrence and the Future of Access to Asylum' in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

10 Mariagiulia Giuffré and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows' in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

critical role in designing and implementing externalisation. In particular, states are supported by and act through the EU (and its agencies, notably Frontex), IOM, and NATO. The activities of IOM, a related UN organisation,[11] are particularly problematic in this sphere, having rebranded itself as the 'UN Migration Agency' despite lacking a formal protection mandate and being highly deferential to states.[12]

Destination states and the EU appear to be pursuing a strategy of containment in states of origin and transit. Prima facie such practices may violate the right to leave. Externalisation also actively seeks to sever jurisdictional links, bypass and shift legal obligations, and blur lines of responsibility. With numerous actors involved and visible steps performed by other actors, complex issues arise regarding the responsibility of destination states, third states, and IOs, as well as questions of who the duty-bearers are.

A. Impetus

The impetus for this thesis is three-fold. It is motivated primarily by the phenomenon of externalisation and surrounding issues. Accordingly, this thesis explores the right to leave in international law and its applicability to externalisation. It engages not only with relevant primary norms but also with secondary norms of international responsibility, including those on complicity and shared responsibility.

Second, there is a striking dearth of doctrinal research on the right to leave. More specifically, the compatibility of externalisation practices with the right is neglected in the

[11] Agreement concerning the Relationship between the United Nations and the International Organization for Migration, UNGA Res 70/296 (5 August 2016) UN Doc A/RES/70/296 (UN-IOM Agreement).

[12] See Megan Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (Routledge 2020).

jurisprudence and literature.[13] Scholars have tended to assume that externalisation prevents migrants entering state territory, which Hathaway has termed '*non-entrée*',[14] resulting in the primary focus being on the obligation of *non-refoulement*.[15] However, this fails to capture the myriad of ways states control movement and the overarching goal of containment. Moreover, the right is being infringed not only by departure states but also destination states. Adjudicatory bodies have not yet sufficiently examined its opposability to destination states and whether they can infringe the right to leave *another* state.[16] Even during the COVID-19 pandemic, the overarching focus has been on entry restrictions, with the right to leave largely overlooked. This is surprising given the proliferation of travel restrictions and border closures have brought international mobility to a near standstill, preventing usually privileged persons travelling abroad, not only 'migrants'.[17] It is

13 Notable exceptions include *Xhavara v Italy and Albania* App no 39473/98 (ECtHR, 11 January 2001); Galina Cornelisse, 'European Vessels, African Territorial Waters and "Illegal Emigrants": The Right to Leave and the Principle of (Il)legality in a Global Regime of Mobility' (2008) Challenge Working Paper <https://research.vu.nl/en/publications/european-vessels-african-territorial-waters-and-illegal-emigrants> accessed 19 January 2021; Elspeth Guild, *The Right to Leave a Country* (Issue Paper, Council of Europe Commissioner for Human Rights 2013); Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 EJIL 591; Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia, NWV Verlag 2018); Giuffré and Moreno-Lax (n 10) 94-96; Vladislava Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 32 IJRL 403.

14 James C Hathaway, 'The Emerging Politics of *Non-Entrée*' (1992) 91 Refugees 40. See also Gammeltoft-Hansen and Hathaway (n 9).

15 See eg Gammeltoft-Hansen (n 7); Gammeltoft-Hansen and Hathaway (n 9); Bill Frelick, Ian M Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 JMHS 190; Moreno-Lax (n 7).

16 Guild and Stoyanova (n 13) 375-77; Stoyanova (n 13) 405.

17 See IOM, 'COVID-19 Travel Restrictions Output - 1 February 2021' (4 February 2021) <https://dtm.iom.int/reports/covid-19-travel-restrictions-output-—-1-february-2021> accessed 19 February 2021.

therefore timely to move beyond the dominant lens by refocusing attention back onto the right as in the Communist era. The doctrinal analysis also led to a normative reflection on the right itself and its fundamental importance for asylum seekers and refugees.

The third impetus is the desire to examine a range of diverse and pervasive migration control practices for their compatibility with the right, some of which are assumed to be lawful by virtue of the state's right to control entry and their role in constructing and contributing to the precarious, deadly flight of migrants largely ignored. Given the qualified formulation of the right to leave, this thesis puts adequate scrutiny into the justifications: namely legality, proportionality, and consistency with other rights. It also interrogates how states disguise restrictive techniques as pursuing legitimate aims. Non-discrimination is particularly pertinent, especially given the increasing scholarly attention to the racialised nature of borders[18] and notion of a global (im)mobility infrastructure.[19] However, there is a gap in the legal scholarship on whether migration control practices are discriminatory, especially on racial grounds, which this thesis begins to address.

B. Aims and Research Questions

This thesis aims to analyse the scope of the right to leave, fill the lacunae, provide a general framework for interpreting the right, and assess whether state and IO practices restricting the right are justified. This framework can be utilised by litigants, decision-makers,

[18] See eg David Owen, 'Migration, Structural Injustice and Domination on "Race", Mobility and Transnational Positional Difference' (2020) 46 JEMS 2585; E Tendayi Achiume, 'Race, Refugees and International Law' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) (forthcoming) <https://ssrn.com/abstract=3636518> 12 November 2020. See historically BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 JRS 350.

[19] See Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 EJML 452.

practitioners, and scholars in assessing the lawfulness of restrictions on the right. It also aims to elucidate the right's relationship with well-traversed rights and obligations and its relevance in securing the rights of asylum seekers and refugees. By shifting the analysis beyond access to territory and *non-refoulement*, this thesis makes a novel contribution to the migration studies and legal literature on externalisation. Specifically, it aims to demonstrate how the right to leave limits the migration controls states can lawfully impose, the obligations owed to migrants during externalisation, and that destination states can be held responsible for violating the right and failing to uphold their obligations even when attempting to dilute responsibility. Relatedly, it seeks to overcome jurisdictional obstacles under IHRL and ensure the responsibility of all actors is accounted for, which is critical given such practices exemplify cooperative migration control. Finally, this thesis aims to challenge the traditional view that states have an almost unfettered right to exclude non-nationals, the prioritisation of state sovereignty above human rights, and discriminatory practices. Consequently, the guiding questions are:

1. *What is the scope of the right to leave in international law and what obligations does it generate?*
2. *Whether and under what circumstances do key externalisation practices violate the right to leave?*
3. *Under what circumstances do destination states, states of origin and transit, and international organisations bear direct and/or indirect responsibility for violations of the right?*

C. Outline

Given these aims and questions, this thesis is divided into three parts. Part I, comprising Chapters One to Three, develops a general framework for assessing when a measure can be said to violate the right to leave. Chapter One outlines the sources of the right in international law, analyses its scope and corresponding obligations, and examines which

states are considered duty-bearers of the right, while also flagging the obligations of IOs. It does so by examining the right's historical and legal evolution, sources, and the jurisprudence of international and regional adjudicative bodies. It then discusses the key requirements for establishing a violation. Chapter Two explores the state's right to control entry and the delicate relationship between exit and entry. It highlights the obligation on states to admit migrants in certain circumstances and demonstrates that the right to leave is exercisable irrespective of any right of entry. Chapter Three focuses on the right to leave for asylum seekers as externalisation specifically targets them (and would-be refugees) and seeks to obstruct access to protection. It argues that the right to seek asylum, *non-refoulement*, and collective expulsion obligations interact to create a 'right to leave to seek asylum' and explores the duties that follow.

Part II, comprising the single Chapter Four, provides a broad overview of jurisdiction under IHRL and the framework of international responsibility for wrongful conduct by states and IOs, with particular references to externalised migration controls. Parts I and II are applied in Part III to assess the compatibility of key externalisation practices with the right to leave and allow responsibility to be allocated accordingly. Chapter Five examines two long-standing and widespread practices, visas and carrier sanctions, while Chapter Six explores pushbacks and pullbacks of migrants at sea and on land. For each measure, the responsibility of destination states, states of origin and transit, and IOs is considered. It is argued that these measures in their current form violate the right and that implicated actors bear responsibility for their respective role. This thesis concludes by summarising the main contours of the right for integration into migration policies.

D. Scope

This section discusses the thesis' scope and delimitations. Regarding the right to leave, this thesis examines the primary sources of the right in international and regional treaties and as a norm of CIL.[20] The analysis primarily concentrates on the right under Article 12(2) ICCPR and Article 2(2) Protocol 4 ECHR[21] as this is where the right has been most elaborated upon, and the ICCPR possesses global purchase. Domestic laws on the right are beyond the scope of this thesis. As above, the focus is on externalisation. Other violations of the right, for example the archetypal exit visa required by authoritarian and totalitarian states, are not assessed.

The thesis starts with the phenomenon of externalised migration control, as opposed to selecting jurisdictions, and proceeds to examine four key measures: visas, carrier sanctions, pushbacks, and pullbacks, providing a snapshot of practices across regions. These measures were chosen because they are highly prevalent, of contemporary significance, and ripe for analysis vis-à-vis the right to leave. The focus ends up predominantly on the practices of Global North states, particularly Australia, EU Member States, and the US. The latter have become the orthodox jurisdictions for examination, being viewed by scholars as the leading externalising states for having developed and spear-headed externalisation measures and adopted explicit externalisation strategies.[22] In contrast, there is a paucity of research on the externalisation practices of Global South

[20] See Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) USTS 993, art 38(1)(a), (b).

[21] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[22] See Gammeltoft-Hansen and Hathaway (n 9); Gammeltoft-Hansen (n 7); Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018); FitzGerald (n 7).

regimes.[23] Nonetheless, it is important to acknowledge the process of diffusion and transportation of restrictive laws and practices between states in the Global North,[24] and to the Global South. Externalisation has *become* contemporary refugee policy, no longer exceptional and the containment of migrants embedded in the global regime.[25]

Regarding responsible actors, this thesis explores the international responsibility of states and IOs. It does not consider that of private actors; rather, it assesses the responsibility of states and IOs in relation to the conduct of private actors, looking at the rules on attribution and positive obligations under IHRL. In the EU context, the analysis centres on the responsibility of Member States under the ECHR and not EU law, primarily because the right has been the subject of a number of cases before Strasbourg and comparably, is not expressly enshrined in EU law. Although the EU has not yet acceded to the ECHR,[26] this thesis highlights its responsibility for violations of the right under CIL as responsibility does not depend on the existence of judicial fora. It also flags avenues for redress under EU law. Finally, it should be noted that 6 February 2021 was set as the cut-off date for inclusion of relevant developments, with two exceptions, namely reference to the aforementioned UNHCR Note and Annex and a decision of the Canadian Federal Court of Appeal.

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23 See generally Glenn Rayp, Ilse Ruyssen and Katrin Marchand (eds), *Regional Integration and Migration Governance in the Global South* (Springer 2020).

24 Ghezelbash (n 22); FitzGerald (n 7) 13-15, 55-56.

25 See Thomas Gammeltoft-Hansen and Nikolas F Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 JMHS 28, 31-32.

26 Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU) art 6(2); ECHR, art 59(2).

E. Methodology

This thesis adopts a traditional, doctrinal approach to examine primary sources of international law pertaining to the right to leave and other relevant rights and obligations under IHRL, refugee law, and the LOS. Relevant sources include treaty, CIL, and general principles of law per Article 38(1) ICJ Statute. This thesis undertakes an exposition of the right to leave in international law, noting that the right is currently underspecified and infrequently invoked in adjudication. Accordingly, orthodox interpretive techniques are drawn upon to offer a principled interpretation of the right under these conditions of uncertainty. Relatedly, externalisation measures are analysed within the qualified right to leave and standard legality and proportionality frameworks. In that sense, the thesis engages with *lex lata*, setting out a defensible reading of the right under treaty law and CIL. The thesis also envisages the right's further progressive development and makes proposals going beyond the current understanding of what the right requires of states and IOs. In that sense, arguments such as those on positive duties owed to asylum seekers, visa refusals as *refoulement*, and pushbacks as an interference could be considered matters *de lege ferenda*. Externalisation is one phenomenon that may require judiciaries to 'break new ground'.[27]

Interpretation adheres to the rules set out in Articles 31-33 VCLT.[28] Article 31(1) provides that treaties 'shall be interpreted in good faith in accordance with the ordinary meaning of the terms in their context, and in light of their object and purpose'. Relatedly, 'Every treaty in force is binding upon the parties to it and must be performed by them in

[27] Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) 20 EJML 373, 379-80.

[28] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

good faith'.[29] Pursuant to Article 31(3)(b), any subsequent practice which establishes the agreement of the parties regarding the treaty's interpretation shall also be taken into account. Nonetheless, this thesis appreciates the way widespread state practices are chipped away at and rendered unlawful (or parts thereof) as courts delimit and develop a right.

Article 31(3)(c) VCLT requires that treaties be interpreted taking into account 'any relevant rules of international law applicable to the relations between the parties', referring to the broader principle of systemic integration.[30] Systemic integration is the interpretive means requiring courts to interpret treaty obligations by reference to their normative environment and in light of other treaties to ensure they function as part of a coherent, meaningful whole.[31] The principle thus obliges recourse to relevant rules of international law in interpreting the right to leave, being relied upon in Chapters Two, Three, and Six. Relatedly, this thesis seeks to ensure rights are practical and effective and the right to leave well-equipped to capture externalisation, which in addition requires application of the principle of effectiveness and an evolutive interpretation.[32]

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29 VCLT, art 26. See also *Nuclear Tests (Australia v France) Case* (Judgment) [1974] ICJ Rep 253 [46].

30 See generally Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279; Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill Nijhoff 2015).

31 See ILC, 'Report of the Study Group of the ILC on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682, particularly [37]-[43], sect F; Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66 ICLQ 557, 558-59. For its application by the ECtHR see Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010) 13-22, 43-59; Siobhán McInerney-Lankford, 'Fragmentation of International Law Redux: The Case of Strasbourg' (2012) 32 OJLS 609.

32 See Forowicz (n 31) 11-14; ch 1; Daniel Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*' (2010) 79 NordJInt'l L 245.

Article 32 VCLT permits recourse to supplementary means of interpretation, including the *travaux préparatoires*, to confirm the meaning resulting from Article 31 or where the meaning is left ambiguous, obscure, or leads to a manifestly absurd or unreasonable result. Article 38(1)(d) ICJ Statute provides that 'subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations' can be used as subsidiary means to determine the meaning of the law. Accordingly, this thesis draws upon international, regional, and domestic cases, including non-binding advisory opinions,[33] as evidence of the law.[34] Separate and dissenting opinions remain valuable, belonging to the teachings of the most highly qualified publicists.[35] In addition to the *travaux préparatoires*, ILC commentaries, studies/reports from UN Special Rapporteurs, UN treaty body views and comments, other UN documents, publications from the UNHCR and its Executive Committee,[36] and soft law instruments adopted by expert bodies are used as aids in finding the correct interpretation.

Such supplementary means vary in weight (and may also provide evidence of 'law-making'). The work of the ILC, Special Rapporteurs, and expert declarations are deemed analogous to the teachings of highly qualified publicists, with the ILC work most

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33 Alain Pellet, 'Decisions of the ICJ as Sources of International Law?' in Enzo Cannizzaro and others (eds), *Gaetano Morelli Lectures Series: Decisions of the ICJ as Sources of International Law?* vol 2 (International and European Papers Publishing 2018) 18-21.

34 See on *res judicata* James Crawford, *Brownlie's Principles of Public International Law* (9th edn, 2019 OUP) 35-37.

35 Pellet (n 33) 21-22.

36 The Executive Committee is a subsidiary organ of the UN General Assembly. See UN High Commissioner for Refugees, 'Executive Committee' <www.unhcr.org/uk/executive-committee.html> accessed 3 August 2018. See also Guy S Goodwin-Gill, 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law' (2020) 69 ICLQ 1.

authoritative. UN treaty body documents, though non-binding, are likely to be of 'great weight' in interpreting the relevant treaty given their institutional connection, while the UNHCR's materials, especially its Handbook and EXCOM conclusions, are regarded by many as highly persuasive authority, with the latter adopted by an assembly of states.[37] Scholarly work is also drawn upon to assist with analysis. Before delving into the analysis, it is necessary to define key terms.

F. Terminology

The terms 'migrant', 'refugee', and 'asylum seeker' are used in accordance with international law. These concepts are contested in both law and practice, however, for exposition purposes, the following definitions are adopted.

There is no universally accepted legal definition of 'migrant' and long-standing debates persist about the distinction between refugees and migrants and whether 'migrant' encompasses refugees.[38] The UN Department of Economic and Social Affairs specifies that 'most experts agree that an international migrant is someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status', with a distinction generally made between short-term or temporary migration (three to 12 months)

37 See on the work of the HRC *Ahmadou Sadio Diallo (Guinea v DRC)* (Merits) [2010] ICJ Rep 639 [66] (cf in relation to CERD *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE)* (Preliminary Objections) General List No 172 [2021] ICJ 1 [101]); Machiko Kanetake and Andre Nollkaemper, 'The Application of Informal International Instruments before Domestic Courts' (2014) 46 The George Washington International Law Review 765; Richard K Gardiner, *Treaty Interpretation* (2nd edn, OUP 2016) 401-10, ch 8 generally; Crawford (n 34) 39-41.

38 See Jane McAdam and Tamara Wood, 'The Concept of "International Protection" in the Global Compacts on Refugees and Migration' (2021) 23 Interventions 191, 194-98.

and long-term or permanent migration (above one year).[39] OHCHR defines an international migrant as 'any person who is outside a State of which he or she is a citizen or national…'.[40] In contrast, IOM's definition includes mobility *within* a state, with 'migrant' covering:

> [A]ny person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.[41]

To borrow Carling's terminology, these definitions reflect an 'inclusivist view', whereby anyone moving from their usual place of residence is a migrant, regardless of legal status or motivation. This definition includes asylum seekers, refugees, workers, trafficking victims, those moving for economic reasons, and many other categories. The 'residualist view' on the other hand defines migrants as the residual category of persons who have moved *without being refugees*.[42] This thesis adopts the inclusivist view for it recognises that every person on the move may be in need of and entitled to international protection.[43] This is without prejudice to the specific protections afforded to refugees, stateless persons, and other categories under international law.[44] Moreover, categorisation has long been

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39 UN, 'Refugees and Migrants' <https://refugeesmigrants.un.org/definitions> accessed 16 November 2020.

40 OHCHR, 'Differentiation between Migrants and Refugees' <www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf> accessed 16 November 2020.

41 IOM, 'Who is a Migrant?' <www.iom.int/who-is-a-migrant> accessed 7 July 2018.

42 Jørgen Carling, 'The Meaning of Migrants' <https://meaningofmigrants.org> accessed 16 November 2020.

43 See McAdam and Wood (n 38).

44 OHCHR (n 40).

problematised; the nature of migrant trajectories means that individuals may move in and out of categories or fall into multiple categories at once.[45] Various labels, for example 'unlawful', 'illegal', and 'irregular' migrant, are also inherently problematic. They are highly politicised, stigmatising, and malleable, with migrant status primarily constructed by states, as Chapter Five explores further. Hence, this thesis refers to asylum seekers, refugees, and *other* migrants. It also limits 'migrant' to those crossing an international border.

'Refugee' covers individuals who meet the definition under the Refugee Convention and Protocol,[46] the UNHCR's mandate,[47] regional instruments,[48] or domestic laws. Article 1A(2) of the Convention defines a refugee as someone who:

> [O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former

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45 See Heaven Crawley and Dimitris Skleparis, 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crisis"' (2018) 44 JEMS 48.

46 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention); Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

47 See UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (February 2019) UN Doc HCR/1P/4/ENG/REV.4 [13]-[17], [29].

48 See eg OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (OAU Convention) art I(2); Cartagena Declaration on Refugees (adopted 22 November 1984 by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama) (Cartagena Declaration) conclusion III(3); Bangkok Principles on the Status and Treatment of Refugees, 31 December 1966 (adopted 24 June 2001 by the Asian-African Legal Consultative Organization) (Bangkok Principles) art I(2); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 (Qualification Directive) art 2(d), (e).

> habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

According to the UNHCR, refugees are persons 'outside their countries of origin who are in need of international protection because of a serious threat to their life, physical integrity or freedom in their country of origin as a result of persecution, armed conflict, violence or serious public disorder'.[49] This definition reflects the expanded refugee definition in regional instruments in Africa, Latin America, and Asia. Importantly, refugee status is declaratory, meaning a person is a refugee as soon as they meet the criteria: 'Recognition of his refugee status does not therefore make him a refugee but declares him to be one'.[50] This view is not necessarily shared by states or reflected in domestic laws, which often fail to recognise those travelling irregularly as asylum seekers and confine 'refugee' to those granted refugee status.

An 'asylum seeker' is an individual seeking international protection who is either awaiting determination of their claim or has not yet lodged one.[51] Critically, the meaning of 'international protection' extends well beyond the refugee definition. Persons not qualifying as refugees may nonetheless require international protection for fear of other serious harms if returned.[52] As explored in Chapter Two, such individuals may be entitled to complementary, subsidiary, or temporary forms of protection under IHRL, regional

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49 UNHCR 'Persons in Need of International Protection' (June 2017) 1-2.

50 UNHCR 'Handbook' (n 47) [28].

51 UNHCR 'Guidance Note on Safeguards Against Unlawful or Irregular Removal of Refugees and Asylum-Seekers' (Division of International Protection Geneva 2014) fn 1.

52 See McAdam and Wood (n 38) 198-201.

systems, or CIL.[53] International protection is therefore a broad notion encompassing a wide range of persons outside their state of origin fleeing to seek protection, including due to armed conflict, violence perpetrated by gangs, traffickers, and other non-state actors, climate change, and environmental disaster.[54]

States migrants are attempting to reach as their final endpoint are hereinafter referred to as 'destination states'. Countries of origin, meaning a migrant's state of nationality or habitual residence, and countries of transit passed through en route to the destination are referred to as 'third states' where distinction is unnecessary. Critically though, the labels of 'origin', 'transit', and 'destination' are not clear-cut nor mutually exclusive given the dynamic nature of migration, the effect of migration controls, and the fact a state's designation can evolve and change.[55] The labels of refugee-producing or least developed refer to those states regarded as such by the UNHCR and ECOSOC respectively. 'State of sojourn' is used to describe the temporary stay of a person in a state not of their nationality or habitual residence, while 'resident' describes persons living in a state permanently or long-term. Throughout, definitions are developed and clarified as necessary.

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53 See UNHCR 'Guidance' (n 51) fn 1; UNHCR 'Persons in Need' (n 49) 3-4. See also Qualification Directive, arts 2(f), 15, 18; Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007); Hélène Lambert, 'Temporary Refuge from War: Customary International Law and the Syrian Conflict' (2017) 66 ICLQ 723.

54 UNHCR EXCOM 'Note on International Protection' (10 July 2020) UN Doc A/AC.96/1200 [11], [17]-[21].

55 See eg Franck Düvell, 'Transit Migration: A Blurred and Politicised Concept' (2012) 18 Population, Space and Place 415; Mohamed Berriane, Hein de Haas and Katharina Natter, 'Introduction: Revisiting Moroccan Migrations' (2015) 20 The Journal of North African Studies 503; Clare Cummings and others, 'Why People Move: Understanding the Drivers and Trends of Migration to Europe' (2015) ODI Working Paper 430 <www.odi.org/publications/10217-why-people-move-understanding-drivers-and-trends-migration-europe> accessed 19 January 2021.

PART I

CHAPTER ONE: THE RIGHT TO LEAVE ANY COUNTRY

The right to leave any country is underexplored in contemporary academic literature, particularly in comparison to *non-refoulement*.[1] Existing research is piecemeal, rather than comprehensive. Accordingly, this chapter explores the right to leave in detail, delineating its scope and considering corresponding state obligations and duty-bearers. It begins by providing a brief history of mobility, before outlining the sources of the right in

[1] Primary contemporary literature on the right to leave includes: Rosalyn Higgins, 'The Right in International Law of an Individual to Enter, Stay In and Leave a Country' (1973) 49 International Affairs 341; Frederick G Whelan, 'Citizenship and the Right to Leave' (1981) 75 APSR 636; Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff 1987); Louis B Sohn and Thomas Buergenthal, *The Movement of Persons Across Borders* (American Society of International Law 1992); Guy S Goodwin-Gill, 'The Right to Leave, the Right to Return and the Question of the Right to Remain' in Vera Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1996); Martin Scheinin, 'The Right to Leave Any Country as a Human Right - Implications for Carrier Sanctions and Other Forms of Pre-Frontier Control' (2000) 2 Turku Law Journal 127; Vincent Chetail, 'Freedom of Movement and Transnational Migrations: A Human Rights Perspective' in T Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003); Colin Harvey and Robert P Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19 IJRL 1; Guofu Liu, *The Right to Leave and Return and Chinese Migration Law* (Martinus Nijhoff 2007); Galina Cornelisse, 'European Vessels, African Territorial Waters and "Illegal Emigrants": The Right to Leave and the Principle of (Il)legality in a Global Regime of Mobility' (2008) Challenge Working Paper <https://research.vu.nl/en/publications/european-vessels-african-territorial-waters-and-illegal-emigrants> accessed 19 January 2021; Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 MJIL 27; Dimitry Kochenov, 'The Right to Leave Any Country Including Your Own in International Law' (2012) 28 ConnJInt'l L 43; Elspeth Guild, *The Right to Leave a Country* (Issue Paper, Council of Europe Commissioner for Human Rights 2013); Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 EJIL 591; Moria Paz, 'The Incomplete Right to Freedom of Movement' (2017) 111 AJIL 514; Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 MichJInt'l L 21; Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia, NWV Verlag 2018); Vincent Chetail, *International Migration Law* (OUP 2019) 77-92; Vladislava Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 32 IJRL 403; Violeta Moreno-Lax, 'Intersectionality, Forced Migration, and the Jus-generation of the Right to *Flee*: Theorising a Composite Entitlement to Leave to Escape Irreversible Harm' in Basak Çalı, Ledi Bianku and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (OUP 2021).

international law at both international and regional levels. It then looks to the legal evolution of the right and its interpretation by international and regional adjudicative bodies. This analysis illustrates the key contours of the right to leave that have emerged from the jurisprudence and the obligations imposed on states, and which states in particular, while acknowledging areas of contestation. The last section discusses the requirements to be met in assessing whether a measure violates the right. The chapter's overarching aim is to clarify how the right to leave is and ought to be interpreted and applied, and its parameters. Such guidance is invaluable in assessing the applicability of the right in novel areas, for present purposes, externalisation.

A. A Brief History of Mobility

It is pertinent to begin with a brief historical and theoretical narrative of mobility, which lays a foundation of themes and concepts that are returned to throughout.

Mobility has deep roots in personal liberty.[2] Movement across borders has long been a permanent feature of history, marked by a right of travel, sojourn, and stay and a duty of hospitality to allow entry to non-nationals.[3] Critically, free movement and sovereignty were not historically perceived as diametrically opposed. Nowadays, however,

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[2] Hannum (n 1) 4; John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (2nd edn, CUP 2018) 26-63; McAdam (n 1) 3, 6-21; Kochenov (n 1) 47; Vincent Chetail, 'The Transnational Movement of Persons Under General International Law: Mapping the Customary Law Foundations of International Migration Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 10. For further discussion see Stig AF Jagerskiold, 'Historical Aspects of the Right to Leave and to Return' in Karel Vasak and Sidney Liskofsky (eds), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19-20 June 1972* (The American Jewish Committee 1976).

[3] James A R Nafziger, 'The General Admission of Aliens under International Law' (1983) 77 AJIL 804, 807-16; Satvinder S Juss, 'Free Movement and the World Order' (2004) 16 IJRL 289, 292, 297-302; Vincent Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel' (2016) 27 EJIL 901, 902-04, 907-09, 918-20, 922.

the right to control entry is typically regarded as one of the earliest prerogatives of the state, with free movement the exception. Writing against this traditional view, Chetail reveals 'an alternative story to the prevailing narrative of migration control' looking at the work of the founding fathers of the law of nations.[4] He illustrates that the emergence of state sovereignty did not correspond to immigration controls, with free movement the rule up until the late 19th century. This is perhaps unsurprising; free movement underpinned colonisation and previous eras of globalisation.[5] Chapter Two challenges the proposition that states possess a near absolute right to exclude non-nationals.[6]

Restrictions on emigration were a hallmark of the Communist era. During the Cold War, the Soviet Union and Soviet bloc states made leaving (legally) 'virtually impossible', while violations of the right were commonplace in South Africa, authoritarian Latin American states, and similar regimes.[7] Standard restrictions included the need to renounce one's nationality before leaving and exit permits, with the burden on the individual to prove why they should be granted leave against the collective state interest. For example, permits were rarely granted to professionals and skilled workers and routinely denied to Jewish

4 Chetail, 'Sovereignty' (n 3) 902. See also Chetail, 'Transnational Movement' (n 2) 10-15, 29-30.

5 See James F Hollifield, 'The Emerging Migration State' (2004) 38 IMR 885, 889-90; Chetail, 'Sovereignty' (n 3) 903-06, 908.

6 In his seminal article, Nafziger (n 3) challenges this against the development of PIL.

7 Alan Dowty, *Closed Borders: The Contemporary Assault on Freedom of Movement* (Yale University Press 1987) chs 1, 113-27, ch 6. See also Emma Haddad, *The Refugee in International Society: Between Sovereigns* (CUP 2008) 136, 143-48; Cornelisse (n 1) 6-10; Kochenov (n 1) 48, 50, 60, 62.

citizens, depending on political drivers at the time.[8] The Berlin Wall was synonymous with infringements of the right to leave, sealing individuals within state borders to prevent individuals 'voting with their feet' and asylum seeking. Unlike other historical walls, the Berlin Wall was not about fortification and enemy defence.[9] 'Foot voting' through international migration, as Somin terms it, allowed individuals to exercise political choice and express their dissent or rejection of a political jurisdiction.[10] Seeking to emphasise the failings of Eastern Europe and its ideology, Western Europe opened its borders to foot voters and 'refugees fleeing Communism'.[11]

Against this background, political theorists debate the idea of open borders and (a)symmetry between the right to leave and right of entry (the legal position is explored below and in Chapter Two).[12] Their discussion reveals a spectrum from open to hard borders, with whether one views immigration controls as morally inconsistent with the liberal values of freedom and equality or the power to exclude as inherent to sovereignty ultimately determining the structure of migration and refugee regimes. A dissonance

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8 UNCHR (Sub-Commission), 'Study of Discrimination in Respect of the Right of Everyone to Leave any Country, including his Own, and to Return to his Country by Special Rapporteur José D Inglés' (1963) UN Doc E/CN.4/Sub.2/220/Rev.1, 18-22, 25-29; Dowty (n 7) 118-20, 190-204.

9 Inglés (n 8) 58; Haddad (n 7) 144-45. See also Sara Dehm, 'Contesting the Right to Leave in International Law: The Berlin Wall, the Third World Brain Drain and the Politics of Emigration in the 1960s' in Matthew Craven, Sundhya Pahuja and Gerry Simpson (eds), *International Law and the Cold War* (CUP 2019).

10 Dowty (n 7) 4; Ilya Somin, *Free to Move: Foot Voting, Migration, and Political Freedom* (OUP 2020).

11 Haddad (n 7) 136-43, 155-60.

12 See eg Rainer Bauböck, 'Free Movement and the Asymmetry between Exit and Entry' (2006) 4 Ethics and Economics 1; Christopher H Wellman and Phillip Cole, *Debating the Ethics of Immigration* (OUP 2011); Joseph H Carens, *The Ethics of Immigration* (OUP 2013) pt 2; Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (OUP 2016) pt 1.

becomes evident when comparing the free flow of goods, capital, and services but not people, with migration usually tightly regulated as Chapter Five on visas illustrates.[13]

Simultaneously, scholars emphasise the decentering of territory. Sassen shows the rearticulation of territory, authority, and rights that has occurred, with state authority often detached from territory and exercised also by non-state actors.[14] Similarly, Shachar highlights the creation of a shifting, relatively invisible border, with such re-bordering allowing states to implement migration controls that selectively restrict mobility well beyond the physical border.[15] Such global inequalities in movement and opportunity have led to calls for open borders, 'migration as decolonization', and a 'birthright privilege levy'.[16]

This brief outline reveals several areas of contestation surrounding mobility. However, the open borders debate, being directed at entry, overlooks the way states constrain the right to leave and the harms of externalisation, which this thesis addresses. The next sections examine the sources of the right, its development, scope, and the impact of the aforementioned political context.

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13 See Hollifield (n 5).

14 Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2008).

15 Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility. Ayelet Shachar in Dialogue* (Manchester University Press 2020) chs 1, 8.

16 See respectively Carens (n 12) chs 11-12; E Tendayi Achiume, 'Migration as Decolonization' (2019) 71 StanLRev 1509; Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (HUP 2009) ch 2.

B. The Right to Leave in International Law

a. Legal Framework

The right to leave any country, including one's own, is enshrined in most major human rights instruments. The language of Article 12(2) ICCPR is an apt starting point:

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

Other instruments generally formulate the right in this manner. It falls within the broader right to freedom of movement, which includes three distinct rights: the right to move freely within a country and choose one's place of residence, the right to leave any country, and the right to return to one's own country.[17]

The right to leave was first expressed post-World War II in Article 13(2) UDHR, a non-binding instrument.[18] It provides that 'Everyone has the right to leave any country, including his own, and to return to his country'. The UDHR's drafting provides insight into how the right was understood at this juncture, justification for inclusion, and arising concerns. The initial draft included two provisions on freedom of movement. Article 9 covered internal movement, while Article 10 provided that 'The right of emigration and expatriation shall not be denied'.[19] These two rights were considered 'vital'[20] because of

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17 Inglés (n 8) 14; McAdam (n 1) 4-5; Zieck (n 1) 21.

18 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

19 UNCHR Drafting Committee 1st Session (4 June 1947) UN Doc E/CN.4/AC.1/3. See McAdam (n 1) 21-28.

20 UNCHR 3rd Session 55th Meeting (2 June 1948) UN Doc E/CN.4/SR.55, 6 (Indian delegate); UNGA 3rd Committee 3rd Session 120th Meeting (2 November 1948) UN Doc A/C.3/SR.120, 322 (Belgian delegate).

the Nazi regime's curtailment of free movement and forced relocations during World War II.[21] During drafting, the USSR objected to including the right to leave. It asserted, 'every sovereign State should have the right to establish whatever rules it considered necessary to regulate movement on its territory and across its borders', proposing that any right to leave be 'in accordance with the laws of that country'.[22] This was rejected 24 votes to 7 for nullifying the right.[23] Several redrafts outlined restrictions on freedom of movement in the interests of national welfare and security.[24] The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities[25] expressed concern as to how these exceptions would be interpreted,[26] while several delegations raised the UDHR's aspirational nature to justify limiting restrictions.[27] Consequently, all limitations were

21 UNCHR Drafting Committee 2nd Session 36th Meeting (17 May 1948) UN Doc E/CN.4/AC.1/SR.36, 14; 120th Meeting (n 20) 322; UNGA 3rd Committee 3rd Session 90th Meeting (1 October 1948) UN Doc A/C.3/SR.90, 43.

22 55th Meeting (n 20) 7.

23 120th Meeting (n 20) 315-16, 325. Plus 13 abstentions. See Dowty (n 7) 111-12, 136-37.

24 UNCHR Drafting Committee 1st Session (20 June 1947) UN Doc E/CN.4/AC.1/W.2/Rev.2, art 13; UNCHR Drafting Committee 1st Session (1 July 1947) UN Doc E/CN.4/21, annex F, art 13; UNCHR (Sub-Commission), 'Report by Rapporteur Joseph Nisot' (6 December 1947) UN Doc E/CN.4/52, art 13.

25 This was the main subsidiary body of the former UNCHR, now the UN Human Rights Council.

26 UNCHR (Sub-Commission) 1st Session 8th Meeting (28 November 1947) UN Doc E/CN.4/Sub.2/SR.8, 19-20 (UK delegate).

27 55th Meeting (n 20) 6 (Indian delegate), 11 (Australian delegate); 120th meeting (n 20) 316-17 (Chilean delegate), 317-18 (Haitian delegate), 322 (Belgian delegate), 323 (UK delegate).

removed and Article 29's general limitations clause deemed sufficient to assuage concerns.[28] It provides:

> (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Interestingly, the US asserted that immigration restrictions due to economic considerations 'were well known and generally accepted'.[29] The notion of immigration control as inherently legitimate is significant and is returned to in Chapter Two.

The right expressed in the UDHR was incorporated into Article 12 ICCPR, becoming a binding obligation for state parties. The right, outlined above, is not absolute. Article 12(3) provides:

> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Although subject to similar restrictions as in Article 29(2) UDHR, national security (and health) has been added, disregarding concerns during UDHR and ICCPR drafting on how this would be interpreted.[30] Pursuant to Article 2(1) ICCPR, the right must be protected 'without distinction of any kind, such as race, colour, sex, language, religion, political or

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28 55th Meeting (n 20) 6 (Indian Delegate).

29 120th Meeting (n 20) 319.

30 UNGA 10th Session Agenda Item 28 (Part II) (1 July 1955) UN Doc A/2929, 108-10 [50]-[56]. See on art 12(3) Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 270-71, 276.

other opinion, national or social origin, property, birth or other status'. Similar provisions on the right to leave are found in many other international conventions.[31]

At the regional level, Article 2(2) Protocol 4 ECHR provides: 'Everyone shall be free to leave any country, including his own'.[32] Restrictions are permitted pursuant to Article 2(3) if:

> [I]n accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Pursuant to Article 14 ECHR, the right must be secured without discrimination. Similar provisions on the right to leave are included in the ADHR, Articles VIII and XXVIII; ACHR, Article 22(2) and (3); African Charter, Article 12(2); CIS Convention, Article 22(2) and (3); and Arab Charter, Article 27.[33] Several instruments, including the ECHR and

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31 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 5(d)(ii); Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243, art 2(c); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 10(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 19 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW) art 8(1); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 18(1)(c). See also Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 15(4).

32 Although the Charter of Fundamental Rights of the European Union (7 December 2000, entered into force 1 December 2009) [2012] OJ C 326/391 (EUCFR) does not explicitly protect the right, it amounts to a general principle of EU law. See text to n 138 in ch 4.

33 American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) (ADHR); American Convention on Human Rights (Pact of San José) (entered into force 18 July 1978) OAS Treaty Series No 36 (1969) (ACHR); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter); CIS Convention on Human Rights and Fundamental Freedoms (adopted 26 May 1995, entered into force 11 August 1998) 3 IHRR 1, 212 (CIS Convention); Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHRR 893 (Arab Charter). For a summary of the right in treaty law see Chetail, 'Transnational Movement' (n 2) 16-18.

ICCPR, permit derogation from the right during a public emergency (though measures must still meet the requirements for a valid derogation).[34]

Regarding the personal scope of the right, other than in the ADHR, the right is available to everyone.[35] Internal freedom of movement in Article 12(1) ICCPR is limited to those 'lawfully' within state territory. The right to leave in Article 12(2) does not contain such a limitation. Therefore, the individual's nationality or migration status is irrelevant to the personal scope of the guarantee, as is the meaning of 'own country'.[36] However, lawfulness of presence may be relevant at the limitations stage.

The right to leave any country is evidently well-established in treaty law. Its customary status is more contentious. Chetail has undertaken an extensive analysis demonstrating the high likelihood of it having become CIL. As evidence of widespread and consistent state practice and *opinio juris*, Chetail emphasises the many treaties, instruments, and resolutions enshrining or reaffirming the right, their similarity in wording, widespread ratification and endorsement (*including* by traditional opponents), few reservations, and the fact over 100 constitutions protect the right.[37] Moreover, the majority of scholars accept it as CIL.[38] While there is near universal recognition of the right to

34 ECHR, art 15; ICCPR, art 4; ACHR, art 27; CIS Convention, art 35. cf Arab Charter, art 4(2). Other instruments enshrining the right to leave contain no derogation clause.

35 ADHR VIII: 'Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will'. See Nowak (n 30) 268.

36 Nowak (n 30) 268.

37 Chetail, 'Transnational Movement' (n 2) 9-27.

38 ibid 24-25, including fns.

leave,[39] in practice states breach the right. However, regular violations do not negate its customary character nor other consistent practice. First, states often confirm the rule by asserting the lawfulness of their restrictions (as the cases also demonstrate). Second, it cannot easily be asserted that the right is any more violated than other CIL obligations, say on torture, inhuman and degrading treatment or non-discrimination.[40] Finally, restrictions on the right are increasingly imposed by states in the Global North, or on their behalf, those who once critiqued the USSR and Soviet states for hampering the right.[41] It could be queried whether these states now conform to the Soviet view that exit is primarily a matter of state sovereignty. However, the better view is that the right remains underdeveloped, with the jurisprudence focusing predominantly on departure states and yet to sufficiently address externalisation.[42] Therefore, for the aforementioned reasons and adopting Chetail's cogent argumentation, this thesis endorses the view that the right to leave is CIL.

b. Legal Evolution post-UDHR

To clarify the scope of the right, lawfulness of restrictions and corresponding state obligations, it is necessary to outline how the right has been developed by UN Rapporteurs and other experts, before turning to adjudicatory bodies. This reveals the wax and wane of legal attention afforded to the right to leave post-UDHR.

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39 As at 6 February 2021, the ICCPR has 173 state parties and 74 signatories.

40 Chetail, 'Transnational Movement' (n 2) 25-26.

41 Kochenov (n 1) 57; Guild (n 1) 11. On emigration policies generally see Hein de Haas and Simona Vezzoli, 'Leaving Matters: The Nature, Evolution and Effects of Emigration Policies' (2011) IMI Working Paper Series 34 <www.migrationinstitute.org/publications/wp-34-11> accessed 19 January 2021.

42 Guild and Stoyanova (n 1) 374.

a. UN Studies

In 1953, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities made the first official call to study the right.[43] Following preliminary inquiries, in 1960 Judge José Inglés was appointed Special Rapporteur to complete the study. Inglés produced a report and 'Draft Principles on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, including his Own, and to Return to his Country'.[44] Despite being completed in 1963, the study was not discussed by the UNCHR until 1973 and no recommendations were adopted.[45] Dowty and Kochenov attribute this lengthy gestation to existing immigration debates and Soviet opposition, with the USSR having actively sought to block study of the right.[46]

In the absence of UN action and persistent breaches, the right gained international traction and an international colloquium was held in 1972 to build on Inglés' work. At the Uppsala Colloquium experts examined the meaning and essence of Article 13(2) UDHR, adopting a 'Declaration on the Right to Leave and the Right to Return'.[47] This Declaration, Inglés' study, jurisprudence, and state practice provided the basis for the 1986 'Strasbourg

43 For an extensive timeline see Kochenov (n 1).

44 Inglés (n 8).

45 Hannum (n 1) 13-14.

46 Dowty (n 7) 131-41; Kochenov (n 1) 51.

47 'The Right to Leave and the Right to Return: A Declaration Adopted by the Uppsala Colloquium, Sweden, June 21, 1972' (1973) 7 IMR 62 (Uppsala Declaration). See also Karel Vasak and Sidney Liskofsky (eds), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19-20 June 1972* (The American Jewish Committee 1976).

Declaration on the Right to Leave and Return', also adopted during a meeting of experts.[48] In the 1980s, the UN renewed its interest in the right. An analysis of current trends and developments and a draft declaration were completed for the Sub-Commission in 1988 by Special Rapporteur Chama LC Mubanga-Chipoya and expanded upon in 1997 by Volodymyr Boutkevitch.[49] In November 1999, the HRC adopted General Comment Number 27, providing the first authoritative interpretation of Article 12 ICCPR, delved into below.[50]

b. Inglés' Study and the Declarations

It is pertinent to outline the essential ideas from Inglés' study, representing the teachings of a highly qualified publicist and setting the 'whole framework of the proper functioning of the right'.[51] Several advances have been made to this original framework, mainly by the Strasbourg Declaration. Inglés classified Article 13(2) UDHR as having three aspects: the right of a national to leave their own country, the right of a foreigner to leave their country

48 'Strasbourg Declaration on the Right to Leave and to Return, 26 November 1986' (1987) 8 HRLJ 481 (Strasbourg Declaration).

49 UNCHR (Sub-Commission), 'Analysis of Current Trends and Developments in respect of the Right of Everyone to Leave Any Country including His Own and to Return to His Country, and Some Other Rights or Considerations Arising Therefrom, Final Report by Special Rapporteur Chama LC Mubanga-Chipoya' (20 June 1988) UN Doc E/CN.4/Sub.2/1988/35; UNCHR (Sub-Commission), 'Draft Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, including his Own and to Return to his Country' (15 June 1988) UN Doc E/CN.4/Sub.2/1988/35/Add.1 (Draft Declaration); UNCHR (Sub-Commission), 'Working Paper on the Right to Freedom of Movement and Related Issues Prepared by Volodymyr Boutkevitch' (29 July 1997) UN Doc E/CN.4/Sub.2/1997/22. See Dowty (n 7) 218-21.

50 HRC 'General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9.

51 Kochenov (n 1) 53.

of sojourn, and the right to return to one's own country.[52] In doing so, Inglés drew a distinction between the rights of nationals and non-nationals to leave. His proposed draft principles provided that the right of a national to leave shall not be subject to any restrictions except those provided by law and as are reasonable and necessary to protect specified aims. Restrictions on the right of foreigners to leave must merely not be arbitrary.[53] It seems incongruous that Inglés saw greater leeway in states preventing non-nationals leaving, *despite* acknowledging this as more serious for they experience not only the inconvenience inflicted upon nationals but also those besetting nationals prevented from returning to their own country.[54] Nonetheless, this was understandable as states' restrictions on their nationals leaving were widely acknowledged and condemned. Significantly, his draft declared the right to be an 'indispensable condition for the full enjoyment' of all other rights.[55] Inglés also recognised the importance of coordination to facilitate international travel, stating that it would be meaningless to ensure full enjoyment of the right to leave if a person has nowhere to go due to legal or artificial barriers (for instance, walls or visas) to entering another state.[56] He drew attention to the inextricable

52 Inglés (n 8) 14. cf HRC 'General Comment No 27' (n 50) [20] establishing that return to one's 'own country' is broader than nationality.

53 Inglés (n 8) 65-66, annex VI, arts 1, 3(c). See also Draft Declaration, art 12(a), (c).

54 Inglés (n 8) 14-15.

55 ibid 65.

56 ibid 63.

link between the right and possibility of obtaining a passport and sometimes a visa.[57] As will be shown, Inglés' study has had enduring influence.

The Uppsala Declaration and Strasbourg Declaration sought to provide greater understanding of the right. In particular, the Strasbourg Declaration made several advances to previous texts.[58] It details when the right to leave can be restricted, specifying that restrictions must be narrowly construed and subject to international scrutiny with the justificatory burden on the state, and defines key terms in Article 12(3) ICCPR.[59] It also emphasises the importance of being able to obtain travel documents to exercise one's right to leave and accompanying procedural safeguards.[60] Notably, Article 10(c) provides that 'No state shall refuse to issue the documents referred to in Article 9 or shall otherwise impede the exercise of the right to leave, on the ground of the applicant's inability to present authorisation to enter another country'. This idea of the right as self-standing and exercisable irrespective of any right of entry is a central issue to be returned to.

c. Jurisprudence

This section explores how the right is interpreted by adjudicative bodies, moving from the global to the regional, beginning with the ICJ as the principal judicial organ of the UN. Examination is then undertaken of HRC communications/comments, the HRC being the UN treaty body charged with monitoring the implementation of the ICCPR, followed by

57 ibid 13, 45-46.

58 Hurst Hannum, 'The Strasbourg Declaration on the Right to Leave and Return' (1987) 81 AJIL 432, 433-34.

59 Strasbourg Declaration, arts 4, 10.

60 ibid, arts 9, 10. See also Uppsala Declaration, arts 13-16.

the jurisprudence of the CMW, which monitors the implementation of the ICRMW. Other treaty bodies are not discussed as they have not heard any complaints on the right to leave under their respective treaty nor fleshed out its scope. The analysis then explores the right to leave in three of the world's regional human rights systems with jurisdiction to hear complaints concerning violations of their respective treaties. It begins with the ECtHR,[61] then the Inter-American system, composed of the IACtHR and IACHR, and finally, the African system, made up of the ACtHPR and ACHPR. There is a wealth of scholarship on each system's approach to migration, discussion of which is beyond this thesis.[62] Although the right to leave is also protected in regional economic communities, it is conceptually distinct from the right under IHRL, with the former part of a free movement guarantee granting community citizens the right to *move freely, enter, and reside* within that region. Accordingly, regional jurisprudence from bodies such as the COMESA Court of Justice, EACJ, and ECOWAS Court of Justice is not discussed as the right itself does not appear to have generated much attention. Rather, selected cases are cited that raise similar human rights issues to those considered by the adjudicative bodies explored in this section.

The aim of this doctrinal analysis is not necessarily to reach a singular reading of the right to leave. Rather, it provides a global perspective and develops a general framework for its interpretation, which can also be used to animate the right for bodies not discussed here. While not all principles will be applicable to all bodies, the reasoning of one may be persuasive for another (and often has been).

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61 ECmHR decisions are not discussed.

62 See generally Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015); Ademola Abass and Francesca Ippolito, *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Routledge 2016).

a. International Court of Justice

The ICJ has touched on the right to leave on several occasions, though not always under the aforementioned provisions. In *Armed Activities on the Territory of the Congo (DRC v Uganda)*, when considering Uganda's counterclaim, the ICJ held that the maltreatment inflicted upon Ugandan diplomats when they attempted to leave the DRC violated the DRC's obligations under international law on diplomatic relations.[63] In his separate opinion, Judge Simma held that for the other victims, non-diplomats, the Court's reasoning should have gone beyond diplomatic protection and recognised that they were protected under IHRL and therefore, the DRC's conduct violated the right to leave in the ICCPR and African Charter.[64] Additionally, in the *United States Diplomatic and Consular Staff in Tehran (USA v Iran)*, the ICJ ordered Iran to ensure the hostages had the necessary means to leave Iran, however the right to leave was not mentioned.[65]

The ICJ has also demonstrated how freedom of movement intertwines with several other rights. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ found that the wall violated the inhabitants of Occupied Palestine's internal freedom of movement and freedom to choose one's residence in Article 12(1) ICCPR.[66] The wall also violated the rights to work, health,

63 (Judgment) [2005] ICJ Rep 168 [339].

64 [17], [31] (Separate Opinion Simma J).

65 (Judgment) [1980] ICJ Rep 3 [95]. See also *Colombian-Peruvian Asylum Case* (Judgment) [1950] ICJ Rep 266, 278-79.

66 (Advisory Opinion) [2004] ICJ Rep 136 [133]-[134], [136].

education, an adequate standard of living, and family life.[67] The ICJ did not mention the right to leave, which is striking as many Palestinians in the OPT are prevented by Israel from travelling abroad.[68] Perhaps this was because the UNGA's request only raised freedom of movement generally. Holding that the ICCPR and other regimes applied in the OPT, the ICJ found a violation of Article 12(1).[69] It was thus not contentious that the right to leave applied and a violation could have been found. Such lack of engagement may signify a reluctance to engage with the right, an issue which is returned to for it arises in the jurisprudence of other bodies.

b. Human Rights Committee

As mentioned above, in 1999 the HRC issued General Comment No 27 covering freedom of movement and the right to leave in Article 12 ICCPR. Prior to this, the Committee had published a General Comment on the Position of Aliens,[70] which briefly touched on the right to leave. The Comment provides that:

> Once an alien is lawfully within a territory, their freedom of movement within the territory and right to leave that territory may only be restricted in accordance with article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3.[71]

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67 ibid [128], [134], [136].

68 ibid [206], [252], [258].

69 ibid [111]-[113].

70 HRC 'General Comment No 15: The Position of Aliens Under the Covenant' (11 April 1986) UN Doc CCPR/A/41/40.

71 ibid [5], [7]-[8].

This is noteworthy for stressing the state's justificatory burden, particularly when differential treatment is involved. Turning now to General Comment No 27, the sections dedicated to the right to leave and non-discrimination were largely based on Judge Inglés' draft principles, illustrating his study's importance in establishing the basic framework. However, there were divergences. The Comment begins by affirming the importance of free movement as 'an indispensable condition for the free development of a person'.[72] It further states:

> Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country … Likewise, the right of the individual to determine the State of destination is part of the legal guarantee. As the scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State.[73]

Three things are of note. First, the paragraph emphasises the applicability of the right regardless of the purpose for leaving or duration abroad. Accordingly, people can leave for an array of purposes, including seeking asylum. Second, individuals can select their destination. Third, the Comment forgoes the distinction Inglés made between nationals and non-nationals (in line with the text of Article 12(2)). Given the potentially far-reaching nature of restrictions, the Comment stresses:

> [R]estrictions must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed. The laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[74]

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72 HRC 'General Comment No 27' (n 50) [1].

73 ibid [8].

74 ibid [13].

It goes on to provide:

> [I]t is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[75]

This makes clear that restrictions must meet the legality and proportionality tests, which Inglés' study had not explored in depth. The Committee notes its major concern with the numerous obstacles making leaving difficult, particularly for nationals, including repatriation deposits, high passport fees, and harassment.[76] It reiterates that states are obliged to report on restrictions they impose, drawing attention to carrier sanctions for transporting undocumented migrants.[77] This implies that the right is not dependent on entry elsewhere, can be violated even if admission is unlikely, and must be secured by destination states exercising jurisdiction. Finally, the Committee provides that a clear violation exists where restrictions are discriminatory.[78]

Additionally, the HRC has considered fifteen complaints on the merits regarding Article 12(2).[79] Half were decided in the 2000s and are predominantly against Central African, Central Asian, North African, and South American states. In this section, all

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75 ibid [14].

76 ibid [17]. See also Draft Declaration, arts 5, 8.

77 HRC 'General Comment No 27' (n 50) [10].

78 ibid [18].

79 It is sometimes unclear whether cases concern internal movement, the right to leave, or both eg *Karker v France*, Communication No 833/1998 (26 October 2000) UN Doc CCPR/C/70/D/833/1998.

fifteen complaints are cited, with those enumerating key principles examined in greater detail. In the 2004 complaint of *Loubna El Ghar v Libya*, the HRC held that Libya violated the ICCPR in refusing to provide a Libyan national residing in Morocco with a passport to allow her to travel to France for university.[80] A violation was found as the refusal was 'without any valid justification and subjected to an unreasonable delay', clearly indicating that Libya's obligations under Article 12(2) apply to nationals on its territory and those abroad.[81] The latter had previously been expressed in the 'passport cases' concerning refusals by Uruguay to issue passports to nationals living abroad.[82] This illustrates that Article 12(2) protects the right to leave a state of which one is not a national, but a resident of or even merely passing through, with travel documents representing a means through which the right can be fulfilled, and confirms the rights opposability to states exercising jurisdiction. Consequently, states of nationality, residence, and sojourn owe obligations to individuals therein.[83] States must therefore secure the right for their nationals even if on another state's territory and when they want to sojourn or reside elsewhere.

80 Communication No 1107/2002 (15 November 2004) UN Doc CCPR/C/82/D/1107/2002.

81 ibid [7.3], [8]. cf *Bwalya v Zambia*, Communication No 314/1988 (27 July 1993) UN Doc CCPR/C/48/D/314/1988 [6.5] on art 12(1).

82 *Sophie Vidal Martins v Uruguay*, Communication No R13/57 (23 March 1982) UN Doc Supp No 40 A/37/40 [7]; *Carlos Varela Núñez v Uruguay*, Communication No 108/1981 (22 July 1983) UN Doc CCPR/C/OP/2 [6.1], [9.3]; *Mabel Pereira Montero v Uruguay*, Communication No 106/1981 (31 March 1983) UN Doc CCPR/C/OP/2 [9.4]; *Samuel Lichtensztejn v Uruguay*, Communication No 77/1980 (31 March 1983) UN Doc CCPR/C/OP/2 [8.30].

83 See Nowak (n 30) 268-69.

In a second case against Libya, a Libyan national was granted asylum in Switzerland after fleeing political persecution.[84] His wife and three youngest children sought to join him but were prevented from leaving and their passport confiscated. The HRC found a violation of Article 12(2) as Libya failed to provide any justification and such a basis was not apparent.[85] In contrast, in *Moses Solo Tarlue v Canada*, a refusal to return a Liberian citizen's passport to allow him to leave following a rejection of his asylum claim did not violate Article 12(2).[86] The applicant had failed to substantiate his claim in light of Canada's explanation that the passport was seized to execute a lawful removal.[87] Accordingly, states are entitled to retain or confiscate a passport to effect lawful deportations. The lawfulness of an individual's presence is therefore relevant for legitimate aims and proportionality. On another occasion, the HRC found it justifiable on public order grounds to restrict leaving by issuing an arrest warrant against an individual awaiting judicial proceedings. This was provided proceedings were not unduly delayed.[88] By extension, if there is unreasonable delay, passport retention or detention pending removal will not be strictly necessary. Additionally, a state may, if provided by law, refuse a passport to nationals seeking to avoid military service to protect national security and

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84 *Farag El Dernawi v Libya*, Communication No 1143/2002 (31 August 2007) UN Doc CCPR/C/90/D/1143/2002.

85 ibid [6.2]. See also *Aboufaied v Libya*, Communication No 1782/2008 (19 June 2012) UN Doc CCPR/C/104/D/1782/2008 [7.8].

86 Communication No 1551/2007 (28 April 2009) UN Doc CCPR/C/95/D/1551/2007.

87 ibid [7.7].

88 *Gonzalez del Rio v Peru*, Communication No 263/1987 (2 November 1992) UN Doc CCPR/C/46/D/263/1987 [5.3].

public order (though this should be unlawful when nationals exercise the right of conscientious objection).[89]

The HRC has also highlighted that measures must be necessary to protect a specified aim, with the burden on the state to justify the necessity of restrictions. In a complaint against Uzbekistan, the applicant's father was sentenced to five years imprisonment for illegally crossing the Uzbek-Turkmen border for business purposes, which the applicant argued did not constitute a threat to any aims in Article 12(3).[90] The HRC found a violation because the state provided no information or justification as to necessity and proportionality.[91] One of the most recent communications published in 2012 against Turkmenistan involved temporary restrictions on the right to leave for the complainant and her family, which violated Article 12(2) in the absence of any explanation from the state.[92] These last two decisions indicate the failure of the state to defend itself, rather than making more substantive points about lawful limitations.

Overall, the decisions of the HRC illustrate several key principles. First, states of nationality, residence, and sojourn are duty-bearers that must respect the right to leave of all individuals on their territory. This means individuals have the right to leave a state they

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89 *Peltonen v Finland*, Communication No 492/1992 (26 July 1994) UN Doc CCPR/C/51/D/492/1992, [8.3]-[8.4]. See also *Sayadi and Vinck v Belgium*, Communication No 1472/2006 (22 October 2008) UN Doc CCPR/C/94/D/1472/2006 [10.5]-[10.8].

90 *Zoolfia v Uzbekistan*, Communication No 1585/2007 (30 July 2009) UN Doc CCPR/C/96/D/1585/2007.

91 ibid [8.3].

92 *Orazova v Turkmenistan*, Communication No 1883/2009 (4 June 2012) UN Doc CCPR/C/104/D/1883/2009 [7.4]. See also *Oló Bahamonde v Equatorial Guinea*, Communication No 468/1991 (10 November 1993) UN Doc CCPR/C/49/D/468/1991 [8.2], [9.3]. cf *Essono Mika Miha v Equatorial Guinea*, Communication No 414/1990 (10 August 1994) UN Doc CCPR/C/51/D/414/1990 [6.6].

are sojourning in or resident of. Additionally, states must secure the right for their nationals abroad. This comprises an obligation to issue travel documents, which is not severed because the national is abroad. Thus, the right to leave covers movement from the state of nationality to another and vice versa, and between other states. Although the focus at this stage is on the state, as Chapter Four demonstrates, the right also binds and imposes obligations on IOs. Second, interferences with the right include refusals to issue travel documents and their confiscation or retention, prosecution and imprisonment for illegal departure, arrest warrants, and travel bans. Third, the burden is on the state to justify the restriction in accordance with Article 12(3). Finally, while the right to leave applies to everyone, lawfulness of presence is relevant at the limitations stage, which is pertinent regarding restrictions imposed on irregular migrants. Throughout, great emphasis is placed on the need for travel documents. Whether there is a duty to issue documentation to asylum seekers and refugees is addressed in Chapter Three. The importance of documentation has also been highlighted by the CMW, to which the focus now turns.

c. Committee on Migrant Workers

The CMW has not engaged with the right to leave in Article 8 ICRMW in depth, with the complaint mechanism not yet in force. It has however recognised in General Comment No 1 that employers withholding passports is widespread, which restricts the movement of migrant workers out of the country.[93] Accordingly, states should ensure migrant workers retain possession of their travel and identity documents.[94] States should also repeal sex-specific/discriminatory restrictions requiring women to obtain permission from their

[93] CMW 'General Comment No 1 on Migrant Domestic Workers' (23 February 2011) UN Doc CMW/C/GC/1 [12].

[94] ibid [13(d)], [39]. See ICRMW, art 21.

spouse or male guardian to obtain a passport or travel.[95] The CMW has also recommended that states guarantee the right of both regular and undocumented migrant workers to leave any state, decriminalise irregular exit, and refrain from using force to prevent workers and their families leaving.[96] Critically, the Committee has urged Libya to end pullbacks of migrants at sea, which violates the right of migrant workers and their families to leave, drawing attention to a prominent externalisation measure analysed in Chapter Six.[97] Further developments from the CMW are worth monitoring, specifically recommendations concerning externalisation and the duties owed to irregular migrants.

95 ibid [61].

96 eg CMW 'Concluding Observations on the Initial Report of Honduras' (13 October 2016) UN Doc CMW/C/HND/CO/1 [58]-[59]; CMW 'Concluding Observations on the Initial Report of Indonesia' (19 October 2017) UN Doc CMW/C/IDN/CO/1 [31]; CMW 'Concluding Observations on the Second Periodic Report of Algeria' (25 May 2018) UN Doc CMW/C/DZA/CO/2 [39(b)], [40(b)].

97 CMW 'Concluding Observations on the Initial Report of Libya' (8 May 2019) UN Doc CMW/C/LBY/CO/1 [32]-[33].

d. European Court of Human Rights

The ECtHR has considered a number of cases on the merits concerning the right to leave enshrined in Article 2(2) Protocol 4 ECHR.[98] Protocol 4 has been ratified by all CoE Members except Greece, Switzerland, Turkey, and the UK. The jurisprudence overwhelmingly involves impediments imposed by former Soviet and Soviet bloc states. Though many restrictions were dismantled following the end of the Cold War, the first cases were only decided in the 2000s.

The leading case, an *externalisation* case, is *Stamose v Bulgaria*, where for the first time the ECtHR considered a travel ban designed to prevent breaches of foreign immigration laws.[99] Pursuant to a law to this effect, the applicant, a Bulgarian national, was banned from leaving Bulgaria for two years and had to surrender his passport following

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98 *Baumann v France* App no 33592/96 (ECtHR, 22 May 2001); *Roldan Texeira v Italy* App no 40655/98 (ECtHR, 26 October 2000); *Napijalo v Croatia* (2005) 40 EHRR 30; *Földes and Földesné Hajlik v Hungary* App no 41463/02 (ECtHR, 31 October 2006); *Bartik v Russia* App no 55565/00 (ECtHR, 21 December 2006); *Riener v Bulgaria* (2007) 45 EHRR 32; *Sissanis v Romania* App no 23468/02 (ECtHR, 25 January 2007); *Bessenyei v Hungary* App no 37509/06 (ECtHR, 21 October 2008); *AE v Poland* App no 14480/04 (ECtHR, 31 March 2009); *Ignatov v Bulgaria* App no 50/02 (ECtHR, 2 July 2009); *Gochev v Bulgaria* App no 4383/03 (ECtHR, 26 November 2009); *Makedonski v Bulgaria* App no 36036/04 (ECtHR, 20 January 2011); *Dzhaksybergenov v Ukraine* App no 12343/10 (ECtHR, 10 February 2011); *Soltysyak v Russia* App no 4663/05 (ECtHR, 10 February 2011); *Nalbantski v Bulgaria* App no 30943/04 (ECtHR, 10 February 2011); *Pfeifer v Bulgaria* App no 24733/04 (ECtHR, 17 February 2011); *Prescher v Bulgaria* App no 6767/04 (ECtHR, 7 June 2011); *Diamante and Pelliccioni v San Marino* App no 32250/08 (ECtHR, 27 September 2011); *Miazdzyk v Poland* App no 23592/07 (ECtHR, 24 January 2012); *Ivanov v Bulgaria* App no 19418/07 (ECtHR, 14 February 2012); *Sarkizov v Bulgaria* App nos 37981/06, 38022/06, 39122/06 and 44278/06 (ECtHR, 17 April 2012); *Stamose v Bulgaria* App no 29713/05 (ECtHR, 27 November 2012); *Khlyustov v Russia* App no 28975/05 (ECtHR, 11 July 2013); *Kostov v Bulgaria* App no 40026/07 (ECtHR, 3 September 2013); *Battista v Italy* App no 43978/09 (ECtHR, 2 December 2014); *Kerimli v Azerbaijan* App no 3967/09 (ECtHR, 16 July 2015); *Popoviciu v Romania* App no 52942/09 (ECtHR, 1 March 2016); *Vlasov and Benyash v Russia* App nos 51279/09 and 32098/13 (ECtHR, 20 September 2016); *Zabelin and Zabelina v Russia* App no 55382/07 (ECtHR, 4 October 2016); *Cherepanov v Russia* App no 43614/14 (ECtHR, 6 December 2016); *Shioshvili v Russia* App no 19356/07 (ECtHR, 20 December 2016); *Berkovich v Russia* App nos 5871/07 and 9 ors (ECtHR, 27 March 2018); *Navalnyy v Russia* App no 32963/16 (ECtHR, 15 May 2018); *Mursaliyev v Azerbaijan* App nos 66650/13 and 10 ors (ECtHR, 13 December 2018); *Komolov v Russia* App no 32811/17 (ECtHR, 25 February 2020); *Rotaru v Moldova* App no 26764/12 (ECtHR, 8 December 2020).

99 *Stamose* (n 98).

deportation for breaches of US immigration laws. Notably, a letter from the US embassy prompted the prohibition. The applicant argued the ban was 'unjustified and disproportionate', for it was not necessary in a democratic society in pursuit of a legitimate aim. Bulgaria submitted that the law was 'designed to discourage and prevent breaches of the immigration laws of other states' and reduce the likelihood of states refusing entry to or toughening visa requirements for Bulgarians.[100] The ECtHR did not make a finding on whether these objectives pursued the aims of maintenance of *ordre public* or the protection of the rights of others, named by the Court. Rather, it held that 'even if it were prepared to accept' that the interference pursued these aims, the ban failed the 'necessary in a democratic society' test and thus, proportionality.[101] 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 hardly be proportionate.[102] Although 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.[103] Relatedly, in *Streletz, Kessler and Krenz v Germany*, which concerned the border-policing regime at the Berlin Wall, the Court declared that 'a general

100 ibid [24], [32].

101 ibid [32].

102 ibid [33]-[34].

103 ibid [36]. See also Case C-33/07 *Jipa v Romania* EU:C:2008:396, [2008] ECR I-5157.

measure preventing almost the entire population of a State from leaving' cannot be deemed necessary for security.[104]

In considering the proportionality of travel bans imposed on individuals awaiting trial or in ongoing proceedings, the ECtHR has held that any interference must strike a fair balance between the public interest and individual's right, consistent with its approach to other qualified rights.[105] A fair balance will not be struck where the restriction is an automatic measure of indefinite duration.[106] While restrictions may initially be warranted, authorities must ensure they remain justified and proportionate throughout their duration by undertaking periodic reassessments (preferably through the courts).[107] Similarly, the Court in *Miazdzyk* held that restrictions will only be justified 'if there are clear indications of a genuine public interest which outweigh the individual's right to freedom of movement'.[108] Additionally, it appears the proportionality test will be stricter when non-nationals are concerned as the situation 'cannot be compared to a restriction on an applicant's freedom of movement imposed on him or her in his or her own country'.[109]

In a recent case, the Court reiterated that Article 2(2) Protocol 4:

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104 (2001) 33 EHHR 31 [98]-[101].

105 See above (n 98): *Földes* [32]; *Bessenyei* [21]; *Makedonski* [42]; *Prescher* [44]; *Popoviciu* [83]. Being obliged not to leave one's place of residence may also prevent travel abroad *Hajibeyli v Azerbaijan* App no 16528/05 (ECtHR, 10 July 2008) [16], [63]. See before the CJEU Case C-249/11 *Hristo Byankov* EU:C:2012:608 [29]-[48] and other travel ban cases cited therein.

106 See above (n 98): *Földes* [35]-[36]; *Riener* [127]-[130]; *Battista* [47].

107 See above (n 98): *Baumann* [66]; *Bessenyei* [23]; *AE* [49]; *Ignatov* [36]-[37]; *Gochev* [49]-[50]; *Makedonski* [45]; *Pfeifer* [56]-[57]; *Ivanov* [37]; *Sarkizov* [69].

108 (n 98) [35]. See also *Nalbantski* (n 98) [65].

109 *Miazdzyk* (n 98) [39].

> [I]mplies a right to leave for any country of the person's choice to which he may be admitted. Any measure by means of which an individual is denied the use of a document which, had he so wished, would have permitted him to leave the country, amounts to an interference.[110]

Though not providing explicit clarification, the use of 'may', failure to specify that admission *will* be secured, and emphasis on any country of choice can be interpreted as implying that the right is self-standing and independent.[111] As Chapter Two discusses extensively, the right to leave should be understood as distinct from any right of entry, which logically must be the case so individuals can set sail for the high seas.[112] As Weinzierl and Lisson rightly note, when a migrant leaves by sea or is denied a passport, the destination state is not easily identifiable and the theoretical impossibility of securing entry on arrival cannot justifiably play a role in the decision to forestall departure.[113]

To summarise, the following key points are derivable from the case law. First, as is clear from the text, the right is available to everyone. Arguably, as *Miazdzyk* suggests, restrictions against non-nationals should involve a stricter proportionality test given the more severe implications, such as deprivation of family contact.[114] Consequently, in assessing whether a fair balance has been struck, greater weight should be given to the interests of the non-national than the state. This is particularly relevant for asylum seekers stuck in transit, unable to return to their own country due to the risk of harm and subject to

110 *Berkovich* (n 98) [78]. See also eg *Baumann* (n 98) [61].

111 Stoyanova (n 1) 414, including fn 60. cf Moreno-Lax (n 1) 52, 76-77.

112 Guild and Stoyanova (n 1) 381-82.

113 Ruth Weinzierl and Urszula Lisson, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (German Institute for Human Rights 2007) 68.

114 See also Inglés (n 8) 14-15.

restrictions on leaving for elsewhere. Second, restrictions often involve the seizure and retention of passports, refusals to issue travel documents, and travel bans. As discussed in detail below, the Court tends to assume an interference exists. Third, regarding justifications, while restricting the right to prevent breaches of foreign immigration laws *may* be legitimate to maintain public order or protect the rights of others, restrictions are disproportionate when automatic, indefinite, and disregard individual circumstances. Blanket and indiscriminate measures will *always* violate the right to leave. Beyond this, the ECtHR has not fleshed out when preventing breaches of foreign immigration laws is lawful. Additionally, only a clear indication that the public interest outweighs the right will satisfy the Court. Fourth, authorities must conduct periodic reviews of restrictions. It is also worth highlighting that the Court has approved of the framework in the HRC's General Comment No 27.[115]

e. Inter-American System

Several petitions concerning the right to leave have been considered by the IACtHR and IACHR, including some concerning former authoritarian regimes. The IACtHR has considered violations of the right under Article 22(2) and 22(3) ACHR on several occasions. The first case concerned travel restrictions imposed by the Paraguayan courts on a Presidential candidate for statements made during electoral debates.[116] For over eight years, the petitioner was indefinitely prohibited from leaving as a precautionary measure to ensure he did not evade criminal proceedings.[117] The IACtHR endorsed the HRC's

115 *Bartik* (n 98) [36], [46]; *Riener* (n 98) [83].

116 *Ricardo Canese v Paraguay*, Inter-American Court of Human Rights Series C No 111 (31 August 2004) [87].

117 ibid [119]-[120].

General Comment No 27 and held that the right can be restricted pursuant to Articles 22(3) and 30, whereby restrictions must meet the requirements of legality, necessity, and proportionality to the extent necessary in a democratic society.[118] The Court found that Paraguay had violated Article 22(2) and (3) as the state's criminal code did not authorise the measure.[119] It outlined the need for the legal basis to possess certain qualities:

> The State should define precisely and clearly by law, the exceptional circumstances under which a measure such as the restriction to leave the country is admissible … its regulation should lack any ambiguity so that it does not create doubts in those charged with applying the restriction, or the opportunity for them to act arbitrarily and discretionally, interpreting the restriction broadly.[120]

It further held that over time the restriction was no longer necessary and disproportionate, with less restrictive measures available.[121] Similarly, a violation was found in a case involving the criminal trial and sentencing of a former Minister, prevented from leaving Suriname as he tried to board a flight.[122] The prohibition failed the legality requirement as there was not a clear and specific authorising law.[123] In a case concerning a Bolivian Mayor ordered not to leave without authorisation during criminal proceedings, the Court

118 ibid [115]-[117], [123].

119 ibid [128].

120 ibid [125].

121 ibid [131], [133]-[134].

122 *Liakat Ali Alibux v Suriname*, Inter-American Court of Human Rights Series C No 276 (30 January 2014) [130].

123 ibid [133]-[136].

confirmed the interconnected nature of liberty and freedom of movement.[124] In finding a violation, it held that the measure must be provided by law, its purpose compatible with the Convention, strictly necessary and proportional, periodically reviewed, and based on objective elements.[125]

The IACHR has considered the right to leave in Article VIII ADHR and Article 22(2) ACHR on the merits on several occasions. Only the pertinent points and cases are discussed. In *Victims of the Tugboat '13 de Marzo' v Cuba*, the IACHR considered a complaint relating to the deaths of 41 Cuban nationals who died in a shipwreck after being attacked by Cuban state boats as they fled the country.[126] The IACHR found a violation of the right to leave, alongside violations of their rights to life and a fair trial, with the acts preventing all onboard from freely leaving Cuba. The method of leaving was irrelevant 'as the laws in force, the ruling political system and the critical situation of human rights in that country forced them to take desperate measures to achieve their main objective: to flee Cuba'.[127] Along similar lines to the HRC and ECtHR, this statement supports the right as independent of any right of entry.

The IACHR's decision is laudable, going noticeably further than the HRC and ECtHR, in promulgating the right of individuals to leave by any means to seek refuge, supporting Dembour's general thesis that the Inter-American system treats migrants first

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124 *Andrade Salmón v Bolivia*, Inter-American Court of Human Rights Series C No 330 (1 December 2016) [142].

125 ibid [138]-[150]. See also *Álvarez Ramos v Venezuela*, Inter-American Court of Human Rights Series C No 380 (30 August 2019) [171]-[179].

126 Inter-American Commission on Human Rights Case 11.436 Report No. 47/96 (16 October 1996) OEA/Ser.L/V/II.95 Doc 7 Rev at 127.

127 ibid [91].

and foremost as humans and only secondly as foreigners (which they may not be).[128] It is plausible that if faced with a similar issue to the ECtHR in *Stamose*,[129] the IACHR would find it unlawful for one state to restrict departure to uphold another state's immigration laws, given its acknowledgement that migrants are often forced to take desperate journeys. The IACHR has also recognised the state's right to decide its immigration policy but noted that such a 'policy cannot affect the right of nationals to leave and enter the country', result in cruel, inhuman, or degrading treatment, or be discriminatory.[130] The Commission has further affirmed the rights of nationals and migrants to leave, seek, and be granted asylum. In 2019, a 'migrant caravan' headed towards Mexico and the US was faced with checkpoints, blockades, and tear gassed when attempting to leave. In an official press release, the IACHR urged states to guarantee the rights of migrants and refugees, allow people to leave their territories, and refrain from criminalising migration.[131]

Accordingly, the right to leave may be violated when force or intimidation is involved. This was the case when a Guatemalan national was intimidated by customs agents at the airport who intercepted and detained him, asserting his travel documents were false

128 See Dembour (n 62).

129 (n 98). See above text to nn 99-103.

130 *Haitian and Haitian-Origin Dominican Persons in the Dominican Republic* (Provisional Measures Requested by the Inter-American Commission on Human Rights) Inter-American Court of Human Rights, Order of 18 August 2000 [11(a)].

131 IACHR, 'IACHR Urges Honduras and Guatemala to Guarantee the Rights of People in the Migrant and Refugee Caravan' (Press Release 37/19, 19 February 2019) <www.oas.org/en/iachr/media_center/PReleases/2019/037.asp> accessed 5 December 2020.

without any investigation.[132] Though not explicitly stated, it seems the lack of any real investigation meant there was no rational connection between the measure and preventing security threats. This bears significance for externalisation, given the abuse migrants face when attempting to leave places like Libya and the failure to assess individual circumstances. However, as Part III explores, the more interesting question is whether the actors externalising their migration controls bear responsibility in relation to such violations.

In another case, preventing a woman leaving Cuba for the US to join her husband because her professional status was not within the categories of persons allowed to emigrate was found to violate the rights to protection of the family, work, and asylum in the ADHR.[133] Although the right to leave was not considered, the decision is significant in demonstrating its fundamental importance, whereby preventing departure is likely to involve other infringements. It is unclear why the right was not considered, with the IACHR having previously considered it alongside several others. It may be because the case predominantly concerned family ties, a matter of judicial economy, or signifies a reluctance to engage with the right.[134] Perhaps, the relative lack of attention afforded to the right to leave has led to reluctance and omission. As noted above, the ICJ did not discuss the right in its *Wall* advisory opinion, while the HRC has only issued one General Comment on it in 1999.

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132 *Gómez López v Guatemala*, Inter-American Commission on Human Rights Case 11.303 Report No 29/96 (16 October 1996) OEA/Ser.L/V/II.95 Doc 7 Rev at 425 [58], [98]. See also *Pacheco Osco v Bolivia*, Inter-American Commission on Human Rights Petition 301/02 Report No 53/04 (13 October 2004) OEA/Ser.L/V/II.122 Doc 5 Rev 1 at 156 [8].

133 *Calvar Rivero v Cuba*, Inter-American Commission on Human Rights Case 7602 Report No 6/82 (8 March 1982) OEA/Ser.L/V/II.57 Doc 6 Rev 1, 1, 3.

134 See *İletmiş v Turkey* App no 29871/96 (ECtHR, 06 December 2005) [47]-[50] invoking Article 8 as Turkey has not ratified Protocol 4.

In sum, the right is clearly available to nationals, with the IACHR also explicitly recognising its applicability to refugees and migrants, and both bodies have affirmed that it guarantees the right to leave *any* country freely.[135] It is pertinent for the externalisation analysis that attacking a migrant boat amounted to an interference and violation. Critically, the IACHR has recognised the right's importance for those seeking asylum, *by any means*. Numerous measures may thus interfere with the right. The jurisprudence of the IACtHR and IACHR further demonstrates that restrictions must comply with the legality requirement, be necessary and proportionate to achieving the specified purpose(s), and periodically reviewed. It appears that restrictions should also be consistent with other rights, including the right to seek asylum, prohibition on cruel, inhuman, or degrading treatment, and obligation of non-discrimination. It is also evident that the aforementioned principles conform with those propounded by the HRC and ECtHR. This section concludes with the African system.

f. African System

The ACHPR has considered violations of the right to leave in Article 12(2) African Charter on several occasions. The ACtHPR does not appear to have decided any cases on the right. In one case, the ACHPR found a violation of the right where travel restrictions prevented former Ministers and Members of Parliament from leaving The Gambia following an overthrow of the government, facing a maximum sentence of three years for non-compliance.[136] A violation has also been established where the Secretary General of a political party was prevented from leaving Burkina Faso following a publication by that

135 See *Ricardo Canese* (n 116) [114]; *Gómez López* (n 132) [98].

136 *Sir Dawda K Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) [70].

party on the situation in the state. The Commission had no information before it to suggest the journey or the Secretary General threatened public security or morality.[137] Akin to the HRC and ECtHR jurisprudence, the burden is on the state to justify its restrictions, with the Commission having cautioned in an earlier case against a too easy resort to the limitation's clause.[138] In a case against Kenya, the ACHPR recognised the link between discrimination, travel and identity documents, and freedom of movement. It held that the discrimination suffered by Nubian Kenyans, who face enormous obstacles in acquiring travel/identity documents, violated their enjoyment of several rights, including Article 12(2).[139] Similarly, arbitrarily revoking the passports of Rwandan nationals living abroad has amounted to a violation.[140]

In 2019, the ACHPR adopted a General Comment on the right to freedom of movement and residence in Article 12(1).[141] Though not covering the right to leave, several

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137 *Movement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001) [46]-[47]. See *Abdoulaye Baldé v Republic of Senegal*, Case No ECW/CCJ/APP/22/12 (22 February 2013) [56]-[61], [77] where the ECOWAS Court ordered the removal of a 'legally unfounded' travel ban imposed against Former Ministers during preliminary criminal inquiries; *East Africa Law Society v Attorney General of Burundi*, Ref No 1 of 2014, EACJ First Instance Division (15 May 2015) [96] on a travel ban constituting a violation of due process. See further Laurence R Helfer, 'Subregional Courts in Africa: Litigating the Hybrid Right to Free Movement of Persons' (2018) 16 ICON 235.

138 *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) [41]-[42].

139 *The Nubian Community in Kenya v The Republic of Kenya*, ACHPR Communication No 317/06 (28 February 2015) [5], [167]-[168], [170].

140 *Kennedy Gihana v Republic of Rwanda*, ACHPR Communication No 017/2015 (28 November 2019) [89]-[92], [108]-[109]. See also *Open Society Justice Initiative v Côte d'Ivoire*, ACHPR Communication No 318/06 (27 May 2016) [159]-[161]. cf *Okomba v Republic of Benin*, Case No ECW/CCJ/APP/20/15 (10 October 2017) on detention and passport seizure.

141 ACHPR 'General Comment No 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1))' (10 November 2019). On internal free movement and encampment see Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (OUP 2018) 103, 116-18, 148-51.

statements are relevant to its interpretation. The Comment noted that 'every individual' (also in Article 12(2)) encompasses all who are legally and irregularly in the state.[142] The Comment further outlines that limitations should never render rights illusory, must serve a legitimate aim, be proportionate and absolutely necessary, construed with due respect for other Charter rights, cannot be exercised indiscriminately or stigmatise a particular group, and the legal basis must be unambiguous and limit discretion. Rights can also be limited for Article 27(2) purposes: 'due regard to the rights of others, collective security, morality and common interest'.[143] Arguably, such principles also inform the right to leave. It is salient no cases concerned interferences with the right by states implementing the EU's externalisation strategy, for example Libya, Niger, and Tunisia for criminalising and thwarting irregular migration, as Chapter Six explores.[144]

To conclude, there is substantial convergence on the right's scope and interpretation across the treaties and bodies examined. The right to leave has thus developed rather harmoniously, which enables reference to a 'general' right to leave in both custom and treaty. There is a dearth of jurisprudence on whether externalisation measures comply with the right to leave, though Chapter Six highlights several pending cases. To provide an extensive framework on the right's functioning, it is worth delving into the specific requirements.

142 ACHPR 'General Comment No 5' (n 141) [8].

143 ibid [14]-[17]. See on limitations Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) 329-32.

144 See generally on border closures and checkpoints in the ECOWAS context *Afolabi v Nigeria*, Case No ECW/CCJ/APP/01/03, Judgment (27 April 2004) [55]; *Falana v Republic of Benin*, Case No ECW/CCJ/APP/10/07 (24 January 2012) [31], [33], [42].

C. Requirements in Considering a Violation of the Right to Leave

The above analysis reveals five requirements to be examined in determining whether a measure violates the right to leave. First, the complainant must show an interference with the right. The burden then moves onto the state to demonstrate that the restriction is provided by or in accordance with law, in pursuit of a (listed) legitimate aim, proportionate to achieving that aim, and consistent with other rights. This section explores each requirement, with one caveat. While legitimate aim is listed separately under the right, this thesis treats identification of a legitimate aim as the first stage of the proportionality test, in line with most accounts. The focus is on the jurisprudence of the HRC and ECtHR as this is where the requirements have been most elucidated. It is generally accepted that exceptions should be strictly construed and that restrictions must not destroy the essence of the right.[145] This should be considered for all measures limiting the right to leave.

a. Interference

It is noteworthy that the interference stage is rarely engaged with in the jurisprudence. Adjudicative bodies generally accept there has been an interference, either because it is not in dispute or the measure has been immediately assessed, explicitly or implicitly, as an obvious interference.[146] The exception is *Xhavara v Italy and Albania*, which involved an Italian warship intercepting and colliding with an Albanian migrant vessel 35 nautical miles

145 See among many *Klass v Germany* (1979) 2 EHRR 214 [42]; *Jalloh v Germany* (2007) 44 EHRR 32 [97]. See also UNCHR 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (28 September 1984) UN Doc E/CN.4/1985/4 (Siracusa Principles) pt 1; HRC 'General Comment No 27' (n 50) [16]; HRC 'General Comment No 31: The Nature of the General Legal Obligation imposed on States Parties' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [6].

146 For the HRC see: *Peltonen* (n 89) [8.4]; *El Dernawi* (n 84) [6.2]; *Zoolfia* (n 90) [8.2]; *Orazova* (n 92) [7.2]. For ECtHR see eg above (n 98): *Baumann* [62]; *Napijalo* [69]; *Földes* [33]; *Diamante* [211]; *Sarkizov* [66]; *Khlyustov* [65]; *Navalnyy* [17].

from the Italian coast, leading to the migrant boat sinking and numerous deaths. The ECtHR found the right to leave inapplicable because the measures were not aimed at preventing people *leaving* Albania but *entering* Italy.[147] The decisive factor appeared to be that it was Italy acting, leaving it unclear whether an interference would have been found if Albania was acting alone or alongside Italy.[148]

The Court's conclusion is difficult to support. If *Xhavara* were applied more broadly, *all* pre-border control measures, which generally seek to prevent entry and irregular migration to destination states, would not trigger the right to leave.[149] As Nessel and Brouwer argue, such measures were clearly exit controls, with a bilateral agreement authorising Italy to intercept Albanian boats and establish a naval blockade in international and Albanian waters precisely to prevent irregular migration out of Albania.[150] The state's intention in imposing a measure is relevant not to delineating the threshold of a right, but rather to ascertain whether it pursues a legitimate aim and proportionality.[151] The effect of the measure should thus be determinative:[152] whether it actually prevents departure, even if simultaneously preventing entry. When unilateral acts are involved, such as in *Victims of*

147 App no 39473/98 (ECtHR, 11 January 2001).

148 Markard (n 1) 605.

149 Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 160.

150 Lori A Nessel, 'Externalized Borders and the Invisible Refugee' (2009) 40 ColumHumRtsLRev 625, 675; Evelien Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 225.

151 den Heijer (n 149) 160.

152 Tilman Rodenhäuser, 'Another Brick in the Wall: Carrier Sanctions and the Privatisation of Immigration Control' (2014) 26 IJRL 223, 236. cf Zieck (n 1) 41-44.

the Tugboat '13 de Marzo' where Cuban authorities prevented Cubans fleeing, it is easier to establish that a measure is directed at exit. However, as Chapters Five and Six explore, various migration controls are designed to forestall exit and hence entry. As Cornelisse aptly describes, 'By portraying these practices as measures that are necessary to protect the external borders of the Member States, the fact that they entail emigration control is conveniently obscured'.[153]

Stoyanova argues that the closer to the departure state, the easier it may be to show an interference, finding *Xhavara* persuasive because the individuals were far from Albania and the interception did not prevent them leaving.[154] However, the judgement does not specify whether the collision occurred in international or Albanian waters. Nonetheless, such a territorialised reading of 'leaving' renders the right impractical and ineffective. Though Chapter Two distinguishes between exit and entry, a sharp line cannot always be drawn, particularly for air travel or at land borders.[155] Fundamentally, it presumes the right has no 'existence of its own in regard of destination countries' for instance during the implementation of extraterritorial border controls.[156] Ignoring the dual effect of measures and adopting a strictly territorialised approach allows destination states to evade their obligations under the right to leave. Mubanga-Chipoya shows support for this position

153 Cornelisse (n 1) 23. See also Markard (n 1) 616; Mariagiulia Giuffré and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 84-85; Guild and Stoyanova (n 1) 375.

154 Stoyanova (n 1) 415-16.

155 Markard (n 1) 603.

156 Violeta Moreno-Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 EJIL 315, 353-54. See also Weinzierl and Lisson (n 113) 67-68; Guild and Stoyanova (n 1) 386-87; Moreno-Lax, 'Intersectionality' (n 1) 77.

when in 1988 (during a period of heightened attention on the right) he argued that limitations on entry can constitute restrictions on leaving.[157] It should therefore not be presumed that pre-entry controls are not interferences, with the right also opposable to destination states.

Notably, for the right to apply there does not need to be a complete inability to leave for all states.[158] The right protects the freedom of individuals to leave for their state of choice (with admission distinct), with the HRC finding violations when individuals could not travel beyond a certain region or go to the state they specifically wanted to.[159] Nor do the cases suggest there be no other way to leave. The right to return to one's own country also cannot be used to deny leaving for other states, given the right to choose.[160] Stoyanova has asserted that 'The expected level of protection that migrants can avail themselves of in any alternative destination is a relevant factor in assessing whether their right to leave is infringed', though she does add that given the definitional scope of qualified rights is typically interpreted broadly, it will be relatively easy to find an interference.[161] However, alternatives should not affect whether the right applies; the interests it protects are harmed regardless of how many states are closed-off. Rather, alternatives should be addressed under proportionality.

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157 Mubanga-Chipoya (n 49) 65.

158 Markard (n 1) 596.

159 *Peltonen* (n 89); *El Ghar* (n 80); Stoyanova (n 1) 413.

160 Stoyanova (n 1) 406-07.

161 ibid 406-14.

The ECtHR's approach to the right to leave, glossing over the interference stage (other than *Xhavara*), is unusual when compared to its interpretation of other qualified rights, particularly Articles 8 to 11 ECHR. Article 8 on private and family life is used as a contrasting example as numerous cases focus on the interference stage (and many are migration related). Given the seemingly open-ended scope of Article 8 (which is not without criticism), the ECtHR routinely looks at whether the impugned measure limits the right or engages the state's positive obligations.[162] Among many, the Court has considered whether the following interfere with Article 8: criminalising homosexual conduct,[163] secret surveillance,[164] medical intervention,[165] euthanasia,[166] environmental pollution,[167] and citizenship, entry, and expulsion of aliens.[168] In contrast, whether the right to leave is engaged is often assumed without explicit analysis. This may be because the interference is obvious on the facts, such as travel bans or denial and seizure of passports, rather than suggesting something more significant.[169] However, for present purposes, it cannot be

162 See eg *X and Y v Netherlands* (1985) 8 EHRR 235 [23]; *Leander v Sweden* (1987) 9 EHRR 433 [48]; *Olsson v Sweden (No 1)* (1988) 11 EHRR 259 [77].

163 *Dudgeon v UK* (1982) 4 EHRR 149 [41].

164 *Klass* (n 145) [34]-[38]; *Malone v UK* (1984) 7 EHRR 14 [64].

165 *Glass v UK* (2004) 39 EHRR 15 [70].

166 *Pretty v UK* (2002) 35 EHRR 1 [67].

167 *Fadeyeva v Russia* (2007) 45 EHRR 10 [79]-[93].

168 See eg *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471 [66]-[69]; *Al-Nashif v Bulgaria* (2003) 36 EHRR 37 [114]-[115]; *Genovese v Malta* App no 53124/09 (ECtHR, 11 October 2011) [33].

169 See on exit visas Nowak (n 30) 269-70; Harvey and Barnidge (n 1) 16-17.

assumed an externalisation measure interferes with the right considering the lack of exploration.

b. Provided by or in accordance with law

Looking now at the requirement in Article 12(3) ICCPR and Article 2(3) Protocol 4 ECHR that restrictions be provided by or in accordance with law. If not, the measure fails at this stage. The Inter-American and African systems also include this requirement.[170] The legality requirement has generated a large amount of discussion in the ECtHR case law as several other ECHR articles contain similarly worded phrases. Relevant case law is explored here to establish the existence of general principles applicable to the right to leave.

The requirements of 'in accordance with the law' and 'prescribed by law' contained in Articles 8 and 10 ECHR (private/family life and expression) respectively have been held to have two main components. First, the restriction must have a basis in law and second, possess certain qualities.[171] As held in *Malone v UK*, the test 'does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law'.[172] Statute, common law, legal standards, and sources of international law can provide sufficient legal bases.[173] Administrative orders, instructions, guidelines, or

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170 See above text to nn 118-120; ACHR, arts 22(3), 30; African Charter, art 12(2).

171 *The Sunday Times v UK* (1979) 2 EHRR 245 [46]-[49]; *Silver v UK* (1981) 3 EHRR 475 [87]-[88]; *Malone* (n 164) [66]; *Leander* (n 162) [50]-[51]; *Huvig v France* (1990) 12 EHRR 528 [26]; *Kruslin v France* (1990) 12 EHRR 547 [27]; *Weber and Saravia v Germany* App no 54934/00 (ECtHR, 29 June 2006) [84].

172 (n 164) [67]-[68].

173 *Sunday Times* (n 171) [47]; *Silver* (n 171) [86]; *Malone* (n 164) [66]; *Kruslin* (n 171) [29]; *Perry v UK* (2004) 39 EHRR 3 [47]; *Medvedyev v France* (2010) 51 EHRR 39 [79], [96]; *Toniolo v San Marino and Italy* App no 44853/10 (ECtHR, 26 June 2012) [46].

other sources that are 'neither legally binding nor … directly publicly accessible' will usually be insufficient, though they are relevant to foreseeability.[174] The jurisprudence provides no further guidance on whether administrative sources are insufficient for being non-binding, publicly unavailable, or both, or the extent the measure itself must be grounded in substantive law.

To meet the quality of law requirement, the legal basis must be clear, adequately accessible, and foreseeable.[175] To be accessible, individuals 'must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case'.[176] Regarding foreseeability, a 'norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct'.[177] The scope of discretion is also central to foreseeability.[178] Specifically, there must be protection from arbitrary application, requiring the law to not confer unfettered discretion.[179] Where wide powers are conferred on those executing the measure, procedural safeguards must be

174 *Khan v UK* (2000) 31 EHRR 1016 [27]. See also *Golder v UK* (1979) 1 EHRR 524 [17], [45]; *Silver* (n 171) [86]-[89]; *Leander* (n 162) [51]; *Shimovolos v Russia* App no 30194/09 (ECtHR, 21 June 2011) [68]-[69]; Nowak (n 30) 272-73.

175 *Silver* (n 171) [87]-[88].

176 *Sunday Times* (n 171) [49]; *Malone* (n 164) [66].

177 ibid. See also *Olsson* (n 162) [61]; *Medvedyev* (n 173) [80]; *Del Río Prada v Spain* App no 42750/09 (ECtHR, 21 October 2013) [125].

178 *Silver* (n 171) [88].

179 *Malone* (n 164) [67]-[68]; *Al-Nashif* (n 168) [119]; *Weber* (n 171) [94]; *Gillan and Quinton v UK* (2010) 50 EHRR 45 [77].

present to protect against arbitrariness, such as independent or judicial review.[180] Wide discretion is not in itself problematic so long as 'the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference'.[181] The Court has held that for secret measures, given they constitute a serious interference, the law must be particularly precise with clear and detailed rules.[182] Thus, the more severe the intrusion, the stricter the review and the more required from the law.

As to whether detention is in 'accordance with a procedure prescribed by law' under Article 5(1), this refers to conformity with domestic law, or other applicable legal standards where appropriate, and the obligation to comply with the substantive and procedural requirements of those laws.[183] Equally, any deprivation of liberty must protect from arbitrariness.[184] Accordingly, detention must be carried out in good faith, closely connected to the aim of detention relied upon, the place and conditions of detention appropriate, and

180 *Amuur v France* (1996) 22 EHRR 533 [53]; *Capital Bank Ad v Bulgaria* (2007) 44 EHRR 4824 [134]; *Gillan and Quinton* (n 179) [77]-[87]; *Sanoma Uitgevers BV v Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [52].

181 *Malone* (n 164) [68]; *Olsson* (n 162) [61]; *Weber* (n 171) [94]. See *Leander* (n 162) [51] on secret measures.

182 *Huvig* (n 171) [34]; *Kruslin* (n 171) [33]; *Kopp v Switzerland* (1999) 27 EHRR 91 [72]; *Amann v Switzerland* (2000) 30 EHRR 843 [76]; *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) [55]-[56]; *Big Brother Watch v UK* App nos 58170/13, 62322/14 and 24960/15 (ECtHR, 13 September 2018) [304]-[320], [387]-[388].

183 *Anguelova v Bulgaria* (2004) 38 EHRR 31 [154]; *A v UK* (2009) 49 EHRR 29 [164]. See Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016) ch 7, particularly 285-87.

184 *Kurt v Turkey* (1998) 27 EHRR 373 [122]; *Anguelova* (n 183) [154]; *A v UK* (n 183) [164].

length of detention not exceeding what is strictly necessary.[185] In *Medvedyev v France*, concerning the French interdiction of a Cambodian vessel suspected of drug smuggling leading to the crew's detention, the Court underlined the need for the law to be clearly defined and foreseeable.[186] It found that the interception and detention lacked the requisite basis in French and international law. Although a diplomatic note from the Cambodian government provided a basis in international law, it insufficiently covered the fate of the crew, affording only the power 'to intercept, inspect and take legal action against the ship'. It was thus unreasonable to contend that a crew in international waters flying the Cambodian flag could have foreseen they might fall under French jurisdiction.[187] Several partially dissenting judges reasoned that the note should have been sufficient, as authorising action against the ship necessarily concerned the crew, while Papastavridis argues that ad hoc agreements do not need to specify all safeguards; this is for domestic law.[188] Arguably, it was correct for the Court to require detention to be clearly contemplated, reducing the risk of arbitrary detention. Similarly, in *Khlaifia v Italy*, an Italy-Tunisia bilateral agreement failed to provide an adequate legal basis for detention as it failed to mention administrative detention and the full text was publicly unavailable.[189] It was therefore neither accessible nor foreseeable.

185 *Saadi v UK* (2008) 47 EHRR 17 [74]; *A v UK* (n 183) [164].

186 (n 173) [80].

187 ibid [82]-[103].

188 Efthymios Papastavridis, 'II. European Court of Human Rights *Medvedyev et al v France* (Grand Chamber, Application No 3394/03) Judgment of 29 March 2010' (2010) 59 International and Comparative Law Quarterly 867, 876-77. See ibid [7]-[10] (Partly Dissenting Opinion Costa, Casadevall, Bîrsan, Garlicki, Hajiyev, Šikuta and Nicolaou JJ).

189 App no 16483/12 (ECtHR, 1 September 2015) [102].

Overall, the rich case law from the ECtHR demonstrates that to meet the legality requirement a measure must have a clear legal basis in domestic, EU, or international law. It must also be of sufficient quality: accessible, meaning publicly available, and foreseeable as to its effects, which requires the law to be sufficiently precise. Where authorities possess wide discretionary powers, foreseeability requires clear demarcation of their scope and manner of exercise. There must be procedural safeguards in place to protect against arbitrariness, with measures subject only to executive discretion unlawful.

The ECtHR has applied these principles in assessing violations of the right to leave.[190] Restrictions were not in accordance with law where the relevant law was vague, imprecise, and lacking adequate safeguards;[191] where the restriction was not based on a clear and foreseeable provision;[192] was based on an incorrect interpretation and application of domestic law;[193] and where the state did not cite a basis or there was no basis at all.[194] The Court has also found travel bans to be *disproportionate* where the domestic court merely verified the lawfulness of the ban without assessing proportionality.[195] In considering legality in Article 12(3) ICCPR, the HRC has specified that 'the law itself has to establish the conditions under which the rights may be limited', 'should use precise

190 See eg above (n 98): *Riener* [112]; *Gochev* [46]-[47]; *Soltysyak* [40]-[43]; *Stamose* [26]; *Khlyustov* [68]-[77]; *Battista* [38]-[39].

191 *Sissanis* (n 98) [66]-[79]; *Rotaru v Moldova* (n 98) [27]-[35]. See also *Khlyustov* (n 98) [70], [74].

192 *Dzhaksybergenov* (n 98) [59]-[62].

193 *Kerimli* (n 98) [48]; *Cherepanov* (n 98) [45].

194 See above (n 98): *Zabelin* [16]-[21]; *Shioshvili* [60]; *Mursaliyev* [32]-[36].

195 See above (n 98): *Gochev* [50], [57], *Navalnyy* [22]-[23]; *Komolov* [28]-[35].

criteria and may not confer unfettered discretion on those charged with their execution'.[196] However, the Committee has not engaged with these principles in the cases.[197]

The aforementioned principles pronounced by the ECtHR arguably amount to general principles applicable across the ECHR articles. Notwithstanding the different wording, the ECtHR has held that the legality requirements must be interpreted 'in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty'.[198] These principles should always be considered in assessing violations of the right to leave, given both the Court and scholars have identified them as applicable across rights. Such principles would also be useful for the HRC. However, it is perhaps harder to generalise with Article 5(1). Article 5 secures the right to habeas corpus, being in 'the first rank of the fundamental rights that protect the physical security of an individual'.[199] Hence, legal certainty is particularly important.[200] Deprivation of liberty involves confinement in a 'particular restricted space' and is distinct from

196 *de Groot v Netherlands*, Communication No 578/1994 (14 July 1995) UN Doc CCPR/C/54/D/578/1994 [4.3]; HRC 'General Comment No 27' (n 50) [12]-[13].

197 See *Peltonen* (n 89) [6.7]; *Orazova* (n 92) [7.2].

198 *Sunday Times* (n 171) [48]-[49]. See also *Silver* (n 171) [85]; *Malone* (n 164) [66]; *SW v UK; CR v UK* (1995) 21 EHRR 363 [35]; *Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442 [37]; *Ismoilov v Russia* (2008) 49 EHRR 42 [137]; David J Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 302-06, 506-09; Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (OUP 2014) ch 3; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, OUP 2017) 240-43, 334, 343-47.

199 *McKay v UK* (2007) 44 EHRR 41 [30].

200 *Winterwerp v Netherlands* App no 6301/73 (ECtHR, 24 October 1979) [39]; *Medvedyev* (n 173) [80].

movement restrictions, the difference turning on degree and intensity.[201] Therefore, the stricter legality requirements under Article 5 may only be applicable to the right to leave where an interference amounts to a serious form of confinement, for example on small islands like Nauru. Nonetheless, the sliding scale of precision under Article 8 is especially relevant. Given physical liberty (and security) is at stake when attempting to leave, the law should be particularly precise (similar to *Medvedyev*), with detailed guidelines and independent or judicial oversight. The more severe the restriction, such as a ban on leaving for many states, the more precision and safeguarding required. Applying these principles in Part III will be crucial, as externalisation measures feature numerous legality concerns.

c. Proportionality

Next, restrictions on the right to leave must be necessary to achieving a specified aim, which requires compliance with the proportionality test. Measures must: i) pursue a legitimate aim; ii) be rationally connected to that aim (suitability); iii) be strictly necessary, meaning the least intrusive means; and iv) strike a fair balance between the individual's right and aims pursued. A measure that destroys the essence of the right – reversing the right/exception relationship – is plainly disproportionate and thus, unlawful. The principles discussed above will not be reiterated here, rather they are applied in Part III. However, it remains necessary to define the meaning of certain legitimate aims.

[201] *Guzzardi v Italy* (1980) 3 EHRR 333 [93]; *Storck v Germany* (2005) 43 EHRR 96 [74].

a. Legitimate Aim

Article 12(3) ICCPR and Article 2(3) Protocol 4 ECHR outline an exhaustive list of legitimate aims.[202] This section discusses national security, public health, and public order. They have been selected because states frequently invoke national security and public order, which has generated much controversy surrounding their interpretation, while public health and public order are highly relevant to migration control.

National Security

Pursuant to Articles 31 and 32 VCLT, it is necessary to ascertain the ordinary meaning of national security, looking to supplementary means of interpretation for confirmation or where the meaning remains ambiguous. Notably, the ICCPR and ECHR *travaux préparatoires* do not provide any guidance. Inglés observed that national security can be understood as limited to national defence, or covering *anything* affecting public safety or the internal or external security of the state.[203] According to Hannum, national security ordinarily denotes a threat to the existence of the state itself.[204] This finds support in the 'Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR' (adopted by experts at an international conference), which specify that national security can only be invoked 'to protect the existence of the nation or its territorial integrity or political independence against force or threat of force', not for 'local or relatively isolated threats to

202 Article 12(3): 'national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others'. Article 2(3) Protocol 4: 'national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

203 Inglés (n 8) 39. See also Liu (n 1) 62-64.

204 Hannum, *Right to Leave* (n 1) 27-29.

law and order'.[205] Similarly, in the 'Strasbourg Declaration on the Right to leave and Return' national security involves a 'clear, imminent and serious danger to the state'.[206] Though soft law, they provide expert interpretive guidance as highly qualified publicists, with Mubanga-Chipoya's report and declaration replicating their interpretations.[207] National security therefore appears limited to grave military, territorial, or political threats to the whole state.[208]

State secrets,[209] conscription,[210] and implementing UNSC terrorism sanctions[211] have been deemed legitimate national security aims by the HRC and ECtHR. Given the potential breadth of national security, many matters could conceivably fall within its scope, for example border security.[212] States may consequently attempt to justify their restrictions by making overly-wide and vague assertions of national security, claiming that practices merely touching upon security or public safety fall within the justification. This should not be deemed sufficient, given the narrow meaning of national security. As Mubanga-Chipoya

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205 Siracusa Principles [29]-[32].

206 Strasbourg Declaration, art 4(d).

207 Mubanga-Chipoya (n 49) 51-52; Draft Declaration, art 7(d).

208 Nowak (n 30) 276.

209 See above (n 98): *Bartik* [42]-[43]*; Soltysyak* [44]-[45]*; Berkovich* [84]-[85]. See also HRC 'General Comment No 27' (n 50) [16].

210 *Peltonen* (n 89) [8.4].

211 *Sayadi* (n 89) [8.2], [10.7].

212 *Streletz* (n 104) [100]. See also *ND and NT v Spain* App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) [168].

argues, states can misuse 'national security' as a cover for reasons they do not wish to disclose.[213] For instance, most states are unlikely to invoke obstructing asylum and migration from 'unwanted' nationalities as their aims. Nevertheless, deference to the state in assessing national security matters and the margin of appreciation means much of the work will concern proportionality (though deference can also occur here).

Public Health

The enormous mobility issues COVID-19 has created makes it timely to mention the protection of health aim. Article 12(3) ICCPR refers to 'public' health, while Article 2(3) ECHR refers broadly to 'health'. This aim did not appear to face any debate during drafting. The Siracusa Principles specify that public health can be invoked to address a 'serious threat to the health of the population or individual members of the population', confirming the ordinary meaning of the term.[214] Measures 'must be specifically aimed at preventing disease or injury or providing care for the sick and injured', and due regard paid to the WHO's international health regulations.[215] The regulations provide that a public health response to the international spread of disease must be 'commensurate with and restricted to public health risks', avoiding unnecessary interference with international traffic and respecting human rights, while states may be advised to implement exit screening and/or restrictions on persons from affected areas.[216] Accordingly, states can temporarily restrict

213 Mubanga-Chipoya (n 49) 52.

214 Siracusa Principles [25]. See also Draft Declaration, art 7(f); Nowak (n 30) 280.

215 Siracusa Principles [25]-[26].

216 International Health Regulations (adopted 23 May 2005, entered into force 14 June 2007) 2509 UNTS 79 (as amended) arts 2, 3, 18(1), 43(3). See historically Mubanga-Chipoya (n 49) 55.

departure to prevent the spread of disease/infection, provided the remaining right to leave requirements are satisfied. The ICCPR's inclusion of 'public' may mean migrants are not considered part of the state's population. However, this is doubtful given states are obliged to safeguard the lives and health of all individuals within their jurisdiction (as discussed in Chapter Four). The focus now turns to public order/*ordre public*.

Public Order

While the English text of Article 12(3) ICCPR refers to 'public order (*ordre public*)', the French and Spanish texts refer only to l'ordre public and el orden público respectively. Article 2(3) Protocol 4 ECHR refers to 'maintenance of *ordre public*'. These concepts are elusive, being open to several interpretations and differing across legal systems, as demonstrated by the considerable discussion that occurred during Article 12 ICCPR drafting.[217] The drafters had difficulty finding an exact English translation for the French concept of *ordre public*. 'Public order' was deemed unsatisfactory, not being equivalent to the French or Spanish concepts.[218] 'Public order' in common law countries is generally understood as absence of disorder. In French private law, *ordre public* coincides largely with the common law concept of public policy, while in French public law it denotes the sum of principles on which a society is founded.[219] Regarding soft law statements, the

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217 Inglés (n 8) annex IV; Alexandre Charles Kiss, 'Permissible Limitations on Rights' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 299-301; Bert B Lockwood, Janet Finn and Grace Jubinsky, 'Working Paper for the Committee of Experts on Limitation Provisions' (1985) 7 HumRtsQ 35, 56-59; Marc J Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987) 258-59.

218 UNGA 3rd Committee 14th Session Agenda Item 34 (3 December 1959) UN Doc A/4299 [15]-[16].

219 UNGA 3rd Committee 5th Session 288th Meeting (18 October 1950) UN Doc A/C.3/SR.288 [17]-[18] (UK delegate); UNGA 3rd Committee 14th Session 956th Meeting (13 November 1959) UN Doc A/C.3/SR.956 [12] (Belgian delegate), [13] (Philippines delegate), [25] (UK delegate); Inglés (n 8) 36-37; Lockwood, Finn and Jubinsky (n 217) 58-59.

Strasbourg Declaration interprets 'public order (*ordre public*)' as the 'universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based' to which the Siracusa Principles adds, the 'rules which ensure the functioning of society'.[220] Accordingly, public order can be construed narrowly as concerning the absence of disorder or broadly as referring to the French notion of regulating society based on fundamental principles.

Per Articles 31 and 32 VCLT, recourse should be had to the preparatory work as the ordinary meaning leaves ambiguity. Article 33(3) VCLT further provides that 'The terms of the treaty are presumed to have the same meaning in each authentic text'. The *travaux préparatoires* demonstrate that the drafters of the ICCPR and ECHR intended public order and *ordre public* to represent the broader French meaning.[221] Thus, the tension in the ICCPR texts can be removed without recourse to Article 33(4) VCLT.[222] Accordingly, limitations on the right to leave are permissible when necessary to ensure the minimum functioning of society based on fundamental principles. The breadth of what states may deem 'fundamental principles' makes the aim inherently vague and far-reaching, especially when adopting an evolutionary interpretation.[223]

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220 Strasbourg Declaration, art 4(e); Siracusa Principles [22]. See also Draft Declaration, art 7(e); Mubanga-Chipoya (n 49) 11; Nowak (n 30) 277.

221 956th Meeting (n 219) [5], [25]; Explanatory Report to Protocol No. 4 to the ECHR (1963) ETS No 46 [16]; Zieck (n 1) 30. See also Kiss (n 217) 300-302; Lockwood, Finn and Jubinsky (n 217) 57, 59-60. cf Inglés (n 8) 37.

222 See also *LaGrand (Germany v USA)* (Judgment) [2001] ICJ Rep 466 [101]-[104].

223 See Hannum, *Right to Leave* (n 1) 30-41; Cornelisse (n 1) 16; Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014).

Another point of contention is whether public order covers only domestic concerns or also the international public order.[224] Namely, can a state assert that it covers the protection of *another* state's or the international community's public order? The same arises for prevention of crime in Article 2(3) Protocol 4. The answer is highly relevant to externalisation. For instance, whether measures induced by legitimate international obligations, such as to combat trafficking and smuggling, justify restricting the right to leave,[225] or whether third states can thwart departures to prevent irregular migration to destination states?

Looking at the ICCPR *travaux préparatoires*, Zieck argues that public order does not extend beyond domestic concerns. Similar to national security which focuses on threats to the state itself, public order is also geared at protecting the interests of the state invoking the restriction.[226] In contrast, Mubanga-Chipoya states that under the generally recognised interpretation, restrictions based on public order can be applied to individuals posing a serious danger for the state they intend to travel to.[227] The case law from the HRC and ECtHR reveals that the right can be restricted on public order grounds to: secure availability

224 Zieck (n 1) 29.

225 ibid.

226 ibid 30-31.

227 Mubanga-Chipoya (n 49) 54.

at trial,[228] financial obligations,[229] and criminal sentences;[230] prevent convicted but not yet rehabilitated offenders travelling abroad[231] or child abduction;[232] and to implement UNSC sanctions.[233] Several of these indicate that public order can encompass international interests.

In *Jipa v Romania*, involving a ban on a Romanian citizen travelling to Belgium following a deportation, the CJEU held that restrictions on freedom of movement must be based on public order considerations of the state imposing the measure and not exclusively on another Member State, although the latter's can be considered.[234] This holding is remarkable as the CJEU typically adopts a narrow approach to public order. The ECtHR has left open whether protecting the immigration laws of another state is justified.[235] Thus, it is unclear if the facts in *Xhavara* were different, whether *Albania* intercepting migrant boats out of Albania (rather than Italy as on the current facts) to prevent violations of *Italy's*

228 For HRC see: *Gonzalez del Rio* (n 88) [5.3]. For ECtHR see above (n 98): *Földes* [33]; *Bessenyei* [22]; *AE* [47]; *Prescher* [46]; *Miazdzyk* [31]; *Popoviciu* [87].

229 *Napijalo* (n 98) [78]-[82]; *Riener* (n 98) [116].

230 *Pfeifer* (n 98) [54]; *Kerimli* (n 98) [49].

231 See above (n 98): *Nalbantski* [63], [65]; *Ivanov* [36]-[37]; *Sarkizov* [66]; *Kostov* [16]; *Vlasov* [31]; *Navalnyy* [18].

232 *Texeira* (n 98) 5; *Diamente* (n 98) [213].

233 *Sayadi* (n 89) [10.7].

234 (n 103) [25]-[27].

235 *Stamose* (n 98). See above text to nn 99-103.

immigration laws might have been justified.[236] Notably, during negotiations on the draft International Covenant on Human Rights, the UK proposed that the right to emigrate could be restricted to assist neighbouring states control illegal immigration and to prevent 'primitive or unsophisticated communities from exploitation abroad'.[237] This did not make the final provision as a general restrictions clause was preferred.[238]

Zieck's conclusion that public order is limited to domestic concerns seems hasty. Against the backdrop of states sharing responsibility for migration control and a shared commitment to combating trafficking and smuggling under the Palermo Protocols, it seems incongruous and isolationist to conclude there is no international public order.[239] A parallel can be drawn to measures taken in the general interest. As the ICJ held regarding the Genocide Convention, 'contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes…'.[240] There are thus general interests in the international community protected by international law, which reflect a movement away from bilateralism towards a common

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236 Markard (n 1) 605.

237 UNCHR 3rd Session (28 June 1948) UN Doc E/800, Annex, 26, Draft International Covenant on Human Rights, art 11.

238 Bossuyt (n 217) 252, 256.

239 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Trafficking Protocol); Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 12 December 2000, entered into force 28 January 2004) 2241 UNTS 507 (Smuggling Protocol) (Palermo Protocols). cf University of Michigan, 'The Michigan Guidelines on Refugee Freedom of Movement' (Eighth Colloquium on Challenges in International Refugee Law, Michigan, 2017) para 7.

240 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

conscience.[241] Additionally, the ILC's Articles on State Responsibility allow states to invoke the defence of necessity under Article 25 to preclude the international wrongfulness of an act if performed to safeguard an essential interest against a grave and imminent peril, encompassing essential interests of the state and whole international community.[242]

Public order therefore appears to encompass the international public order. However, do states, other than the destination state, have an interest in preventing irregular migration? Can states generate a legitimate aim merely because they owe cooperative obligations to one another or have deemed their actions to pursue shared interests? Notably, Wolman has traced attempts over the last century to establish a duty on departure states to combat irregular emigration, concluding that they have been largely unsuccessful and fail to form a CIL norm.[243] Critically, a normative valuation of aims should be required. It can hardly be legitimate to restrict the right to leave if this destroys the possibility of seeking asylum, undermining international law, with this conclusion finding support from the ECtHR.[244] Consequently, public order interests should not be legitimate where they prejudice other rights and obligations. This requires adjudicative bodies to refrain from simply invoking the state's right to control entry and instead challenge 'hidden' motives.

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241 Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours de l'Académie de Droit International 217, 233-34. See also Géza Herczegh, *General Principles of Law and the International Legal Order* (Akadémiai Kiadó 1969); Giorgio Gaja, 'The Protection of General Interests in the International Community' (2013) 364 Recueil des Cours de l'Académie de Droit International 9.

242 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' [2001] YBILC Vol II(2) 26, Annex to UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83 (ARSIWA); ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' [2001] YBILC Vol II(2) 31 (ARSIWA Commentary) 80 [2], 83 [15].

243 Andrew Wolman, 'The Role of Departure States in Combating Irregular Emigration in International Law: An Historical Perspective' (2019) 31 IJRL 30.

244 See *Amuur* (n 180) [43]. See also Weinzierl and Lisson (n 113) 68.

The ECtHR is, however, often hesitant to declare aims illegitimate.[245] Chapter Six on pushbacks and pullbacks explores these issues further, specifically the lawfulness of obstructing departure to fulfil obligations under the LOS and Palermo Protocols.

d. Consistency with Other Rights

Lastly, restrictions on the right to leave must be consistent with other rights. While not explicitly included in Article 2(3) Protocol 4 ECHR, the requirement that restrictions be necessary in a democratic society can largely be considered the equivalent of the consistency requirement in Article 12(3) ICCPR. It is difficult to see how a restriction otherwise satisfying the exceptions clause could be inconsistent with other rights.[246] Accordingly, this requirement is likely also implicit in the Inter-American and African systems.[247] The HRC has not clarified whether the consistency test involves a comprehensive assessment of the potential infringement of the other right or a less stringent one, where prima facie inconsistency is sufficient.[248] For exposition purposes, the latter interpretation is adopted.

The obligation of non-discrimination is particularly relevant under this head.[249] Both Rapporteurs were mandated by the UN Sub-Commission to study discrimination in

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245 Guild and Stoyanova (n 1) 388.

246 Atle Grahl-Madsen, *The Status of Refugees in International Law: Asylum, Entry and Sojourn*, vol 2 (AW Sijthoff 1972) 107; Lockwood, Finn and Jubinsky (n 217) 43; Hannum, *Right to Leave* (n 1) 43-44.

247 See above text to nn 126-127, 130, 139.

248 eg *Gonzalez del Rio* (n 88) [5.3]. See Nowak (n 30) 274 supporting the latter.

249 See HRC 'General Comment No 15' (n 70) [7]; Guild (n 1) 37-40; Vincent Chetail, *International Migration* (n 1) 145-63.

respect of the right to leave, drawing attention to discriminatory practices with the aim of eliminating them, including discrimination that may force people to leave so as to escape it.[250] This focus was understandable given exercising one's right to leave historically often depended on matters of identity and sovereign affiliation.[251] As mentioned, the HRC has declared that there will be a clear violation if restrictions make distinctions of any kind based on a prohibited ground.[252] Thus, a measure satisfying all other limbs will nonetheless violate the right when applied or operating in a discriminatory manner, impairing the enjoyment or exercise of the right for particular individuals or groups on an equal footing.[253]

In assessing whether externalisation measures comply with the right, non-discrimination is likely to feature prominently, particularly on the grounds of race, nationality, sex, and other status. Not all persons enjoy the right to leave or opportunity to move equally, leading to interferences with other fundamental rights. As Inglés declared, the right is indispensable to the full enjoyment of all other rights.[254] Accordingly, consistency is critical to promoting human rights, equality, and non-discrimination generally. Ultimately, the rights implicated by each measure falls to be determined case by case.

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250 Inglés (n 8) 14-35; Mubanga-Chipoya (n 49) 27-33, 47.

251 Cornelisse (n 1) 13.

252 HRC 'General Comment No 27' (n 50) [18]. See also Nowak (n 30) 274; Zieck (n 1) 27-28.

253 See generally *R v Immigration Officer at Prague Airport, ex p European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1 [72]-[105].

254 Inglés (n 8) 9-11, 65. See also HRC 'General Comment No 27' (n 50) [1].

Conclusion

This chapter demonstrated that the right to leave is well-established in international law. Although of fundamental importance, it became clear that the right is underexplored and underdeveloped, with a wax and wane of attention afforded to it. The chapter addressed this gap by outlining a general framework for how the right is and ought to be interpreted and applied. The analysis revealed that there is substantial convergence on the key components of the right across treaties and how it is interpreted by the adjudicative bodies examined. Other than in the ADHR, the right to leave applies to everyone regardless of nationality or migration status, including refugees, asylum seekers, IDPs, and 'irregular' migrants, being central to upholding their agency. Individuals have the right to leave *any* country, which must be secured by the state of departure and of nationality if abroad, for the state of their *choice*. Relatedly, the jurisprudence supported the right being independent of any right of entry elsewhere and both departure and destination states can interfere with the right. Accordingly, states have an obligation not to obstruct departure and to issue travel documents to nationals. Blanket, indefinite, and automatic restrictions, those not provided by law or of an insufficient quality, and those inconsistent with other rights are incompatible with the right to leave. By way of divergence, the IACHR has clearly recognised the right of asylum seekers to flee by any means, while the ECtHR found there to be no interference with the right when Italian vessels intercepted migrant boats attempting to leave Albania. Lastly, it remains unclear whether a state can lawfully restrict departure to protect another state's immigration laws, with the ECtHR leaving this open. Although public order does appear to encompass international interests, such interests must not undermine other rights and obligations, which requires probing the state's real aims. Next, the asymmetry between leaving and entry is addressed.

CHAPTER TWO: THE STATE'S RIGHT TO CONTROL ENTRY AND OBLIGATIONS TO ADMIT

At the core of the right to leave is the idea that everyone is free to leave the state they are in without unlawful restriction. Conversely, the general starting point is that states have the right to exclude non-nationals from their territory, making the right to leave appear 'incomplete'. This chapter focuses on the state's prerogative to control entry and obligations to admit, relying on the principle of systemic integration to allow entry and admission to be examined alongside leaving. Considering Chetail's alternate narrative that sovereignty and free movement have not always been perceived as incompatible, it challenges the dominant view that states possess a near unfettered right to exclude non-nationals. It does so by demonstrating that in certain circumstances non-nationals enjoy a right of entry. The chapter begins by exploring the state's right to control immigration. Next, it discusses how the right to seek asylum does not generally correspond to a right to be granted asylum, before analysing how the obligation of *non-refoulement*, prohibition on collective expulsion, and right to family life operate to secure admission. The chapter then considers the legality of STC practices and how they may affect entry for asylum seekers. It concludes by delineating the outer limits of the right to leave, arguing that the right to leave and right of entry are distinct, albeit related rights. Overall, Chapter Two provides a more comprehensive understanding of the right to leave and migrant trajectory, fleshing out how certain contexts affect the state's entry control prerogative and the relationship between entry and exit.

A. Right to Control Entry

It is well-established in international law that states have the right to control the admission of non-nationals onto their territory.[1] State powers of immigration control have been deemed quintessential to state sovereignty. Hence, there is no explicit right for non-nationals to enter another state. The right of entry is generally reserved for nationals, who have a right to return to and enter their 'own country', understood as extending to long-term or permanent residents.[2] Border controls are therefore premised on belonging to the state or not.[3] It is worth emphasising that international law supports such exclusion, with the prerogative of states to admit, exclude, and expel non-nationals firmly ingrained in the case law.[4] Dembour characterises the ECtHR's choice to begin with the state's right to exclude as the 'Strasbourg reversal' to 'stress the incongruous nature of a human rights

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1 For discussion see Lassa Oppenheim and Hersch Lauterpacht, *International Law: A Treatise* (Hersch Lauterpacht ed, 8th edn, Longman 1955) 692; Guy S Goodwin-Gill, *International Law and the Movement of Persons Between States* (Clarendon Press 1978) 3-4, 51, 96, 160, 203; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law: Volume 1 Peace* (9th edn, Longman 1992) 897-98, 901-02; Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 MLR 588, 589-98; Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 12-13; Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalisation* (Columbia University Press 2015) ch 3.

2 ICCPR, art 12(4); HRC 'General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [20]: 'own country' denotes 'special ties to or claims in relation to a given country'. cf *Stewart v Canada*, Communication No 538/1993 (1 November 1996) UN Doc CCPR/C/58/D/538/1993 [12.4]-[12.9] and *Nystrom v Australia*, Communication No 1557/2007 (1 September 2011) UN Doc CCPR/C/102/D/1557/2007 [7.4]-[7.5].

3 Goodwin-Gill (n 1) 4-11; Dimitry Kochenov, 'The Right to Leave Any Country Including Your Own in International Law' (2012) 28 ConnJInt'l L 43, 45.

4 See among many *Nishimura Ekiu v US* 142 US 651, 659 (1892); *Samuel Lichtensztejn v Uruguay*, Communication No 77/1980 (31 March 1983) UN Doc CCPR/C/OP/2 [8.3]; *Nuñez* v *Uruguay*, Communication No 108/1981 (22 July 1983) UN Doc A/38/40 [9.3]; *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471 [67]; *Moustaquim v Belgium* (1991) 13 EHRR 802 [43]; *Vilvarajah v UK* (1991) 14 EHRR 248 [102]; *Amuur v France* (1996) 22 EHRR 533 [41]; *Boujlifa v France* (1997) 25 EHRR 686 [42]; *R v Immigration Officer at Prague Airport, ex p European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1 [15], [19]; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 [113].

reasoning which starts with a prerogative which neither serves to affirm human rights nor is inscribed in the text'.[5] As Costello advances, a 'statist assumption' exists whereby states appear to have the right to exclude without justification; a strange notion in an era of human rights.[6]

Against this backdrop, the right to leave is often characterised as 'incomplete'. Individuals bear the right to leave, but this does not correspond to any right to enter another state (save for nationals and long-term residents).[7] Therefore, demonstrating a violation of the right will not guarantee entry.[8] As Chapter Five illustrates, although the right of exit is universally held, free movement is not enjoyed equally. If one does manage to leave, they may find themselves in limbo, unable to reach their destination, return home, or with no state willing to accept them.[9] Notwithstanding, as the following sections demonstrate, the state's prerogative to control entry is not absolute. It remains subject to international

5 Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 4, 507. See also Alan Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?' (2018) 29 EJIL 261, 264.

6 Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016) 10.

7 Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 382; Guy S Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' (2007) 9 UTS L Rev 26, 30.

8 UNCHR (Sub-Commission), 'Analysis of Current Trends and Developments in respect of the Right of Everyone to Leave Any Country including His Own and to Return to His Country, and Some Other Rights or Considerations Arising Therefrom, Final Report by Special Rapporteur Chama LC Mubanga-Chipoya' (20 June 1988) UN Doc E/CN.4/Sub.2/1988/35, 65; Colin Harvey and Robert P Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19 IJRL 1, 20; Moria Paz, 'The Incomplete Right to Freedom of Movement' (2017) 111 AJIL 514, 517.

9 Asher L Hirsch and Nathan Bell, 'The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime' (2017) 18 Human Rights Rev 417, 423; Paz (n 8) 514, 517.

obligations, creating a 'fundamental dialectic'[10] between the individual's right to leave and the state's right to control immigration.

a. Right to Asylum?

This tension deserves critical attention for it raises the question of whether the prerogative operates differently for those leaving to seek asylum. Do they, being persons in need of protection, bear a right of entry? This requires ascertaining the existence of a right to asylum.

There are several conceptions of asylum: the traditional right of the *state* to grant asylum, right of the *individual* to *seek* asylum, and *individual's* right to be *granted* asylum.[11] Asylum in the first sense is a sovereign, discretionary right belonging to the state.[12] It is traditionally understood as 'the protection that a state grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it'.[13] It thus encompasses territorial and diplomatic asylum, the latter covering asylum

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10 Andrew Wolman, 'The Role of Departure States in Combating Irregular Emigration in International Law: An Historical Perspective' (2019) 31 IJRL 30, 52. See also Chantal Thomas, 'What Does the Emerging International Law of Migration Mean for Sovereignty?' (2013) 14 MJIL 392.

11 Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980) 2; Atle Grahl-Madsen, *The Land Beyond: Collected Essays on Refugee Law and Policy* (Peter Macalister-Smith and Gudmundur Alfredsson eds, Martinus Nijhoff 2001) 69; Roman Boed, 'The State of the Right of Asylum in International Law' (1994) 5 Duke Journal of Comparative & International Law 1, 2-16.

12 Atle Grahl-Madsen, *The Status of Refugees in International Law: Asylum, Entry and Sojourn*, vol 2 (AW Sijthoff 1972) 285. See also *Roma Rights* (n 4) [12]-[14].

13 Institute of International Law, 'Asylum in Public International Law' (5th Commission, Resolutions Adopted at its Bath Session, September 1950) art 1.

granted at premises such as diplomatic missions, embassies, and warships.[14] Traditionally, asylum involved admission to residence and lasting protection against persecution and/or another state's jurisdiction.[15] Today, however, asylum (though remaining undefined) constitutes the broad institution of protection against harm, not only the narrow sense of a durable or permanent solution.[16] An individual's right *to* asylum is more contested.

Article 14(1) UDHR guarantees the 'right to seek and to enjoy in other countries asylum from persecution'. Difficulties flow from the UDHR's non-binding nature and wording of Article 14(1). Article 14(1) does not appear to establish a right *to* asylum but only to seek it, leading to uncertainty over whether the provision creates any legal obligation to grant asylum. Though initially included, the drafters replaced 'to be granted' with 'to enjoy' following objections, removing the obligation on states.[17] Grahl-Madsen considered the final formulation of Article 14(1) to be no more than a moral obligation, not going much further than the right to leave in Article 13(2).[18] Similarly, Lauterpacht questioned whether states even intended to assume a moral obligation as Article 14(1) was

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14 See ibid arts 2-3; *Colombian-Peruvian Asylum Case* (Judgment) [1950] ICJ Rep 266, 274-75; *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection*, Advisory Opinion OC-25/18, Inter-American Court of Human Rights Series A No 25 (30 May 2018) [66]-[67], [75]-[93].

15 Goodwin-Gill and McAdam (n 7) 355-69.

16 ibid 343-45, 356-57. See also María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 IJRL 3, 3-4; Guy S Goodwin-Gill, '*Non-Refoulement*, Temporary Refuge, and the "New" Asylum Seekers' in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014).

17 Boed (n 11) 9-11.

18 Grahl-Madsen, *Status of Refugees* (n 12) 101-02, 196.

'artificial to the point of flippancy'.[19] The 1967 Declaration on Territorial Asylum is also non-binding, placing only a moral duty on states not to reject asylum seekers at frontiers: 'It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum'.[20] The continued reluctance in 1967 of states to accept a binding obligation to grant territorial asylum is evident, with the ICCPR (and ECHR) silent on asylum altogether. As Haddad puts it, 'The right to flee the source of persecution is acknowledged, while the right to offer protection from the persecution remains a state prerogative' with the refugee bringing to the forefront 'the clash between sovereign rights and human rights'.[21]

At the regional level, the right to seek and *receive* asylum is expressed in the Inter-American, African, and EU systems. The ADHR provides that 'Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory…', while the ACHR states that for people pursued for political offences or related crimes, 'Every person has the right to seek and be granted asylum in a foreign territory…'.[22] Although the ADHR and ACHR specify that asylum is granted in accordance with domestic law, the IACHR and IACtHR have affirmed that these provisions amount to an obligation to grant asylum in every case where the person satisfies the refugee definition or qualifies for protection from *refoulement*. It is not a matter of state discretion, for refugee

19 Hersch Lauterpacht, *International Law and Human Rights* (Stevens 1950) 421-22. See Goodwin-Gill and McAdam (n 7) 358-61.

20 Declaration on Territorial Asylum (adopted 14 December 1967 UNGA Res 2312 (XXII)) arts 1(3); 3(1).

21 Emma Haddad, *The Refugee in International Society: Between Sovereigns* (CUP 2008) 95.

22 art XXVII; art 22(7). cf OAU Convention, art II(1).

status 'is recognised by the state rather than conferred by it'.[23] Similarly, the African Charter provides that 'Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions'.[24] Article 18 EUCFR also guarantees a right to asylum:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.

Though some scholars argue Article 18 only restates the generally accepted right to seek asylum,[25] most scholars conclude that it does establish a right to be granted asylum when the criteria are met.[26]

Gil-Bazo argues that to deny the existence of a general right to asylum because of its absence in an instrument of universal scope fails to recognise its presence across time, civilisations, and crystallisation as a constitutional norm. She concludes that asylum

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23 IACHR, 'Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System' (2000) OEA/Ser.L/V/II.106/Doc 40 Rev [60], [70]; IACHR, 'Report on Terrorism and Human Rights' (2002) OEA/Ser.L/V/II.116 Doc 5 Rev 1 corr [394], [405]; *Pacheco Tineo Family v Bolivia*, Inter-American Court of Human Rights Series C No 272 (25 November 2013) [139]-[140], [151], [153]-[155]; *Institution of Asylum* (n 14) [123], [131]-[132] but cf on diplomatic asylum [155]-[156], [163].

24 art 12(3). See also Arab Charter, art 28.

25 See Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff 2006) 113-14; Goodwin-Gill and McAdam (n 7) 367-68; Kay Hailbronner, 'Introduction into the EU Immigration and Asylum Law' in Kay Hailbronner (ed), *EU Immigration and Asylum Law: Commentary* (CH Beck, Hart Publishing and Nomos 2010) 19-20; Simon Behrman, 'Refugee Law as a Means of Control' (2019) 32 JRS 42, 44.

26 See eg María-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 RSQ 33; Maarten den Heijer, 'Article 18 - Right to Asylum' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 530-31; Salvatore Fabio Nicolosi, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union' (2017) 23 ELJ 94.

amounts to a binding general principle of international law.[27] This is not entirely convincing. Gil-Bazo appears to be advocating for a norm of CIL, given her focus on crystallisation through state practice. Contrarily, general principles contribute to filling gaps in treaty and custom, with the establishment of 'human rights obligations *qua* general principles' (existing under domestic and international law, or potentially only international law) not equated with state practice.[28] Rather, general principles constitute the numerous ways 'moral and humanitarian considerations' find expression in law.[29]

In sum, it is generally accepted that states do not have an obligation to grant asylum and individuals have no right to receive it,[30] although of course several regional instruments enshrine a right to asylum. Nonetheless, a universal right to *seek* asylum exists. While the Refugee Convention does not enshrine a right to asylum, the right to seek asylum is implicit, for, as Goodwin-Gill, McAdam, and other commentators argue, the very existence of refugees depends on it.[31] As Chapter Three explores, denying the right to seek asylum will, in some cases, frustrate the object and purpose of the Convention for if persons cannot seek asylum, they cannot receive refugee status.

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27 Gil-Bazo, 'Asylum' (n 16) 17, 28.

28 Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Aust YBIL 82, 105.

29 ibid. See also Giorgio Gaja, 'General Principles of Law', *MPIL* (2012) vol 4, paras 17-21.

30 *Ruddock v Vadarlis* (2001) 110 FCR 491, 521; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 [42]; Grahl-Madsen, *Land Beyond* (n 11) 69; Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 112-13; Goodwin-Gill and McAdam (n 7) 366; Behrman (n 25) 43-44.

31 Alice Edwards, 'Human Rights, Refugees, and the Right to Enjoy Asylum' (2005) 17 IJRL 293, 296, 301; Goodwin-Gill and McAdam (n 7) 387-88.

Considering this framework, Article 14 UDHR has been described as an empty right; individuals have the right to leave and seek asylum, but no corollary right to be admitted.[32] This conclusion requires deconstruction as there are several circumstances where migrants enjoy a right of entry.

B. Duties to Admit to Territory

The traditionally broad discretion of states to control their borders is constrained by commitments under IHRL, refugee law, and CIL, as well as free movement regimes.[33] This is reflected in the 2018 Global Compact for Migration concluded by 164 states and endorsed by the UNGA, which 'reaffirms the sovereign right of States to determine their national migration policy … in conformity with international law'.[34] In specific circumstances, states are duty-bound to admit non-nationals, with the HRC highlighting that aliens may enjoy entry and residence when, for instance, issues of discrimination, inhuman treatment, and family life arise.[35] This section argues that despite no universal right of asylum, a right of temporary entry stems from the prohibitions on *refoulement* and collective expulsion. The right to family reunification can also secure entry for a migrant's

32 Susan Kneebone, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (CUP 2009) 10.

33 Goodwin-Gill, *Movement of Persons* (n 1) 3-4, 21-23, 136-47, 160-96, 204-05; Louis B Sohn and Thomas Buergenthal, *The Movement of Persons Across Borders* (American Society of International Law 1992) 1, 49, 52.

34 UNGA 'Global Compact for Safe, Orderly and Regular Migration' (30 July 2018) UN Doc A/CONF.231/3 (GCM) [7], [11], [15]; Vincent Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law' (2020) 16 Int JLC 253, 254-55; Francesca Capone, 'The Alleged Tension between the Global Compact for Safe, Orderly and Regular Migration and State Sovereignty: "Much Ado about Nothing"?' (2020) 33 LJIL 713.

35 HRC 'General Comment No 15: The Position of Aliens Under the Covenant' (11 April 1986) UN Doc CCPR/A/41/40 [5].

relatives. These are addressed in turn. Though not explored further here due to space constraints, regional free movement regimes provide a significant legal basis for non-nationals to secure entry and move freely within specific regions.[36]

a. *Non-refoulement*

On its widest meaning, the obligation of *non-refoulement* provides that no person shall be returned, extradited, or expelled by a state to any place where he or she is likely to face persecution, torture, inhuman, degrading treatment, or punishment, or other serious harms.[37] Under Article 33 of the Refugee Convention, refugees are guaranteed protection from *refoulement*, subject to narrowly defined exceptions, specifically from being returned 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. Article 33 is recognised as extending to asylum seekers and not only those formally recognised as refugees.[38] It also covers protection from direct and indirect *refoulement*[39] and is widely accepted as encompassing rejection at the frontier.[40]

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36 See generally Vincent Chetail, *International Migration Law* (OUP 2019) 92-119.

37 Goodwin-Gill and McAdam (n 7) 201, 285-384.

38 UNHCR EXCOM Conclusion No 6 (XXVIII) '*Non-Refoulement'* (1977) UN Doc A/32/12/Add.1 [(c)]; Lauterpacht and Bethlehem (n 26) paras 89-99; James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 158-60, 303-04; Goodwin-Gill and McAdam (n 7) 232-33.

39 *TI v UK* App no 43844/98 (ECtHR, 7 March 2000) 14; *Hirsi* (n 4) [147]; CAT 'General Comment No 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22' (4 September 2018) UN Doc CAT/C/GC/4 [12]; Lauterpacht and Bethlehem (n 30) para 121.

40 UNHCR EXCOM Conclusion No 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981) UN Doc A/36/12/Add.1, sect II; UNHCR EXCOM Conclusion No 99 (LV) 'General Conclusion on International Protection' (2004) UN Doc A/AC.96/1003 [(l)]. See also Lauterpacht and Bethlehem (n 30) paras 76-86; Hathaway (n 38) 315-17; Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 IJRL 542, 549; Goodwin-Gill and McAdam (n 7) 206-09.

To fulfil their protective duty, states must undertake a risk assessment. This has significant implications for admission, explored below.

Protection from *refoulement* now extends well beyond the Refugee Convention, being complemented by IHRL[41] and generally considered CIL.[42] Therefore, even if a person is not facing persecution, their removal may still be precluded when at risk of other serious harms as a beneficiary of complementary protection. *Refoulement* to 'another state where there are substantial grounds for believing that he would be in danger of being subjected to torture' is explicitly proscribed by Article 3 CAT,[43] and implicitly proscribed for torture, inhuman or degrading treatment or punishment in Article 7 ICCPR[44] and Article

41 See Chetail, *International Migration* (n 36) 119-20. On the relationship between IHRL and refugee law see James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 104-05; Guy S Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press 1996) 66-79; Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 27-84; Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) chs 1, 3-4; Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 28-39.

42 See eg Goodwin-Gill, *Refugee in International Law* (n 41) 167-71; Jean Allain, 'The *Jus Cogens* Nature of *Non-refoulement*' (2001) 13 IJRL 533, 538; Lauterpacht and Bethlehem (n 30) paras 193-253; Goodwin-Gill and McAdam (n 7) 345-54; Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *NYIL 2015: Jus Cogens: Quo Vadis?* (TMC Asser Press 2016) 282-306. cf Hathaway, *Rights of Refugees* (n 38) 363-67.

43 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force on 26 June 1987) 1465 UNTS 85 (UNCAT).

44 See HRC 'General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev.1 at 30 [9]; HRC 'General Comment No 31: The Nature of the General Legal Obligation imposed on States Parties' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [12].

3 ECHR.[45] Other regional instruments also prohibit *refoulement*.[46] Additionally, *non-refoulement* obligations can be triggered by other egregious human rights breaches, including the rights to life and a fair trial.[47] In this sense, the Refugee Convention has lost its monopoly over *non-refoulement*, with the absolute prohibitions under IHRL representing the principal source of protection beyond Convention grounds.

The question here is whether *non-refoulement* obligations entitle individuals to access the territory of a potential state of refuge. Neither the UDHR nor Refugee Convention expressly require entry so individuals can claim asylum.[48] Nonetheless, the UNHCR, its Executive Committee, and numerous scholars conclude that the obligation of *non-refoulement*, underpinned by the right to seek asylum, imposes a duty on states to grant individuals at least temporary entry to access asylum procedures.[49] Though not amounting

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45 *Soering v UK* (1989) 11 EHRR 439 [86]-[87]. The prohibition extends to all forms of art 3 ill-treatment: *Chahal v UK* (1996) 23 EHRR 413 [74], [79]-[80] and all types of removal: *Cruz Varas v Sweden* (1991) 14 EHRR 1 [70]; *Vilvarajah* (n 4) [73]–[74], [79]–[81].

46 OAU Convention, art II(3); ACHR, art 22(8); Cartagena Declaration, conclusion III(5); African Charter, art 12(4); Bangkok Principles, art III; EUCFR, art 19(2). On the ADHR see *The Haitian Centre for Human Rights et al v US*, Inter-American Commission on Human Rights Case 10.675 Report No 51/96 (13 March 1997) OEA/Ser.L/V/II.95 Doc 7 Rev at 550 [164]–[171].

47 For an extensive analysis see Cathryn Costello, 'The Search for the Outer Edges of *Non-refoulement* in Europe: Exceptionality and Flagrant Breaches' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff 2016). See on climate change and the right to life *Teitiota v New Zealand*, Communication No 2728/2016 (23 September 2020) UN Doc CCPR/C/127/D/2728/2016 [9.11].

48 Dauvergne (n 1) 601; Kate Ogg, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates' (2014) 33 RSQ 81, 84.

49 UNHCR EXCOM Conclusion No 85 (XLIX) 'Conclusion on International Protection' (1998) A/53/12/Add.1 [(q)]; UNHCR 'Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea' (Geneva 2002) [25]; Grahl-Madsen, *Status of Refugees* (n 12) 11; Edwards (n 31) 301; Hathaway, *Rights of Refugees* (n 38) 301; Goodwin-Gill and McAdam (n 7) 215, 358, 383-84; Ruth Weinzierl and Urszula Lisson, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (German Institute for Human Rights 2007) 15; Vladislava Stoyanova, 'The Principle of *Non-Refoulement* and the Right of Asylum-Seekers to Enter State Territory' (2008) 3 IJHRL 1, 4-6; Hirsch and Bell (n 9) 427-28.

to a general right of entry, non-rejection at the frontier can be interpreted as amounting to a procedural duty on states to admit individuals pending status determination.[50] As Edwards advances, it would be nonsensical, in light of the Refugee Convention, if entry was not intended at least for status determination, especially where that person has reached state territory. Edwards reasons that access to asylum procedures is an implied right under the Convention because without it, *refoulement* may occur.[51] However, as discussed below, it may be lawful to transfer asylum seekers to STC's for processing.

In contrast, Noll and Gammeltoft-Hansen argue that neither in theory nor in practice do *non-refoulement* obligations amount to a right of admission.[52] According to Noll, 'neither a homogeneous state practice nor a corresponding *opinio juris* can be made out to support a right to access territory in order to seek asylum'.[53] '*Non-refoulement* is about being admitted to the state community, although in a minimalist form of non-removal', being no more than a right to 'transgress an administrative border', something quite different from transgressing the territorial border.[54] Noll's arguments are perhaps outdated, made over fifteen years ago, and largely based on CIL, despite the above arguments being predominantly based on treaty (while also setting a rather high standard for state practice). Similarly though, Gammeltoft-Hansen posits that the fact states do grant admission to

50 Goodwin-Gill and McAdam (n 7) 215.

51 Edwards (n 31) 301-02.

52 Gregor Noll, *Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff 2000) 387; Gammeltoft-Hansen (n 1) 63-64.

53 Noll, 'Embassies' (n 40) 547.

54 ibid 548.

instigate asylum procedures does not equal a *right* to admission.[55] It was envisioned, including by Lauterpacht and Bethlehem, that where a state is unwilling to grant admission or asylum, they must nevertheless adopt a course of action not amounting to *refoulement* or collective expulsion, such as transferring to a STC.[56] This, he concludes, reveals a space 'between the negative responsibility not to return a refugee to persecution and positive obligation of allowing entry'.[57]

Noll and Gammeltoft-Hansen's reasoning is not entirely convincing. For the following reasons it should be accepted that the procedural limb of *non-refoulement* amounts to a de facto right to admission, albeit limited and subject to STC mechanisms. Above all, admission to territory is usually the only way to prevent exposure to risk.[58] Securing the individual's right to seek asylum and ascertaining whether they face risk on return is *near* impossible without conducting a fair and effective asylum procedure where the individual can present their case. As the House of Lords held in *Roma Rights*:

> There would appear to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate enquiry into the persecution of which he claims to have a well-founded fear.[59]

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55 Gammeltoft-Hansen (n 1) 64.

56 ibid. See also Lauterpacht and Bethlehem (n 30) para 76.

57 Gammeltoft-Hansen (n 1) 64.

58 Hathaway, *Rights of Refugees* (n 38) 300-01; Stoyanova (n 49) 4-6; Vincent Chetail, 'The Transnational Movement of Persons Under General International Law: Mapping the Customary Law Foundations of International Migration Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 40.

59 *Roma Rights* (n 4) [26].

Note, however, this conclusion is limited to persons already outside their state of origin and at the destination state's frontier or within its effective control, which is why the applicants in *Roma Rights* failed on these grounds. These limitations are returned to in Chapters Three and Five.

Discharging *non-refoulement* obligations (and effective remedy guarantees eg Article 13 ECHR) requires minimum procedural safeguards to be in place. As the ECtHR recently held in *MK v Poland*, states cannot deny access to their territory to persons presenting themselves at the border alleging a risk of ill-treatment if made to remain in the neighbouring state.[60] It has made clear in several other pushback cases that individuals must be given 'sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints', 'close scrutiny by a national authority, independent and rigorous scrutiny of any claim' and the right of appeal before an independent, impartial body.[61] Legal remedies must be accessible in practice and have suspensive effect, enabling applicants who have been denied entry or had their asylum claim rejected to stay in the territory pending decision on the appeal.[62] Even in transit and international zones at land borders or airports, such obligations apply, making any

60 App nos 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020) [179].

61 *MSS v Belgium and Greece* (2011) 53 EHRR 2 [293], [387]; *Hirsi* (n 4) [198], [201]-[205], 72 (Separate Opinion Albuquerque J); *Kebe v Ukraine* App no 12552/12 (ECtHR, 12 January 2017) [100], [107]; *AEA v Greece* App no 39034/12 (ECtHR, 15 March 2018) [69]-[79]. See also *Pacheco Tineo* (n 23) [152]-[153], [159]; UNHCR 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)' (31 May 2001) UN Doc EC/GC/01/12 [43]; CAT 'General Comment No 4' (n 39) [13].

62 See *MSS* (n 61) [293], [301]-[318]; *Hirsi* (n 4) [200]; *Sharifi v Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014) [167]; Weinzierl and Lisson (n 49) 16, 50-54.

distinction between the administrative and physical border a legal fiction.[63] Additionally, asylum seekers need to be given access to a lawyer and interpreters, protection from unlawful detention, and a reasoned decision in writing from trained asylum experts (not border or coastguard officials).[64] Though the cases do not explicitly specify that migrants are to be brought to the state's territory, as the UNHCR and numerous scholars conclude, providing fair and effective asylum procedures extraterritorially is difficult, if not impossible, particularly onboard maritime vessels.[65] Nonetheless, it remains possible to perform adequate offshore processing in some circumstances, as evidenced by resettlement, visa processing, and embassy asylum procedures.[66]

Accordingly, Edwards' argument that access to asylum procedures on state territory is an implied right under the Refugee Convention should be accepted *and* extended to all *non-refoulement* obligations. Though her argument does not demand onshore processing, where persons have reached the frontier entry should surely be granted, save exceptional circumstances. Furthermore, Article 31 Refugee Convention on non-penalisation recognises the reality of refugee flight may lead refugees and asylum seekers to resort to

63 See *Amuur* (n 4) [43], [52]-[54]; *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 21 November 2019) [163], [213]-[215]; *ZA v Russia* App nos 61411/15 and 3 ors (ECtHR, 21 November 2019) [156], [164]-[171].

64 *Amuur* (n 4) [43]; *MSS* (n 61) [301]; *Sharifi* (n 62) [175]-[178]; UNHCR 'Global Consultations' (n 61) [43]; UNHCR 'Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing' (Division of International Protection Geneva 2010) [58]. See Azadeh Dastyari and Daniel Ghezelbash, 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures' (2020) 32 IJRL 1, 8-16.

65 UNHCR 'Maritime Interception' (n 64) [55]-[59]; Hirsch and Bell (n 9) 428; Dastyari and Ghezelbash (n 64) 25-26. See also ch 6.

66 See *R (Bashir) v Secretary of State for the Home Department* [2018] UKSC 45, [2019] AC 484 [73]-[89] on entry to metropolitan territory from dependent territories.

irregular entry and cannot be punished for doing so.[67] As Goodwin-Gill and McAdam argue, read alongside the obligation of *non-refoulement* and right to leave and seek asylum, Article 31 supports affording individual's temporary admission and due process.[68]

The starting point, as Behrman posits, *may* be that states have the right to decide who to admit.[69] However, it is concluded that *non-refoulement* obligations, together with the right to seek asylum, guarantee individuals a de facto right of entry to have their protection claim assessed on state territory (though potentially displaced by STC mechanisms).[70] This procedural limb, and *non-refoulement* obligations generally, must be observed wherever the state exercises jurisdiction.[71] *Non-refoulement* therefore mitigates against the general absence of a right to asylum and right of entry. Understandably, *non-refoulement* is widely regarded as the cornerstone of refugee protection. Nevertheless, it cannot be conflated with a right *to* asylum. As Hathaway observes, *non-refoulement* under Article 33 Refugee Convention only obliges states not to return individuals to a place where they will face persecution, following admission to avoid exposure to risk, not receive

67 Cathryn Costello, Yulia Ioffe and Teresa Büchsel, 'Article 31 of the 1951 Convention Relating to the Status of Refugees' (Legal and Protection Policy Research Series, UNHCR 2017) 14-23, 30-32.

68 Goodwin-Gill and McAdam (n 7) 384. See also Hirsch and Bell (n 9) 429.

69 Behrman (n 25) 43-44.

70 *AEA* (n 61) [77]-[84]; Grahl-Madsen, *Status of Refugees* (n 12) 11; Hathaway, *Rights of Refugees* (n 38) 301; Hirsch and Bell (n 9) 427.

71 *Haitian Centre* (n 46) [156]-[157], [171]; *Hirsi* (n 4) [74], [81]; HRC 'General Comment No 31' (n 44) [10]; Lauterpacht and Bethlehem (n 30) paras 62-67; Hathaway, *Rights of Refugees* (n 38) 169, 339; Goodwin-Gill and McAdam (n 7) 244-53. cf *Sale v Haitian Centres Council* 509 US 155 (1993); Noll, 'Embassies' (n 40) 55. But note evolution: US Department of State 'Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the ICCPR' (30 December 2011) UN Doc CCPR/C/USA/4 [504]-[505].

refugees.[72] *Non-refoulement* acts as a 'trump card' to the states' prerogative but does not call into question its right to regulate admission.[73] Furthermore, because entry under *non-refoulement* obligations stems entirely from risk, the state can return the individual if that risk ends.[74]

b. Collective Expulsion

The conclusion that states have a procedural obligation to grant individuals entry while they assess *refoulement* risks can likely also be reached for the prohibition on the collective expulsion of aliens in Article 4 Protocol 4 ECHR. While neither the ICCPR nor CAT explicitly prohibit collective expulsion, their respective Committees have found that the prohibition is implied.[75] Collective expulsion is defined as:

> [A]ny measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group.[76]

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72 Hathaway, *Rights of Refugees* (n 38) 300-01.

73 Allain (n 42) 557-58; ibid; Gammeltoft-Hansen (n 1) 14; Costello and Foster (n 42) 306-10. See also *Roma Rights* (n 4) [19].

74 Grahl-Madsen, *Land Beyond* (n 11) 58, 69; Hathaway, *Rights of Refugees* (n 38) 302; André Nollkaemper and others, *The Practice of Shared Responsibility in International Law* (CUP 2017) 492-93. See also Jean-François Durieux, 'Three Asylum Paradigms' (2013) 20 International Journal on Minority and Group Rights 147, 155-56.

75 HRC 'General Comment No 15' (n 35) [10]; CAT 'General Comment No 4' (n 39) [13]. Note art 13 ICCPR only applies to aliens lawfully present. See also ACHR, art 22(9); African Charter, art 12(5); CIS Convention, art 25(4); ICRMW, art 22(1); EUCFR, art 19(1); Arab Charter, art 26(2).

76 *Henning Becker v Denmark* (1975) 4 DR 215, 235; *Hirsi* (n 4) [166]. See also *Nadege Dorzema et al v Dominican Republic*, Inter-American Court of Human Rights Series C No 251 (24 October 2012) [171]; ILC, 'Third Report on the Expulsion of Aliens, by Mr Maurice Kamto, Special Rapporteur' (19 April 2007) UN Doc A/CN.4/581 [107].

In contrast to *non-refoulement*, which is the removal of a single alien to a place of risk, collective expulsion involves the indiscriminate removal of a group of aliens (applicable irrespective of lawful presence).[77] The purpose of Article 4 Protocol 4 is to 'prevent states from being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure…'.[78] Accordingly, it mandates a procedural duty to examine all relevant individual circumstances, including *refoulement* risks. The case of *Hirsi Jamaa v Italy* deserves mention, which involved the interception of migrants on the high seas and their return to Libya in violation of Articles 3, 13 and Article 4 Protocol 4. The ECtHR confirmed the prohibition's extraterritorial application, finding that it applies to the collective expulsion of aliens on state territory, non-admission at the frontier, and removals performed during the exercise of extraterritorial jurisdiction so long as individuals are 'drive[n] away'.[79]

The duty to conduct an independent and rigorous examination of individual circumstances, regardless of where the expulsion occurs, requires states to admit non-nationals to their territory, though, again, STC mechanisms may operate as an exception. Despite the prohibitions on *refoulement* and collective expulsion differing in scope, it can similarly be concluded that states must grant entry to assess individual circumstances,

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77 *Georgia v Russia (I)* App no 13255/07 (ECtHR, 3 July 2014) [170]-[178]; *Sharifi* (n 62) [210], [223]; *Khlaifia v Italy* App no 16483/12 (ECtHR, 1 September 2015) [245].

78 *Hirsi* (n 4) [177]; *Khlaifia* (n 77) [238].

79 *Hirsi* (n 4) [174], [177]-[178], [185]. See also *Khlaifia* (n 77) [243]; *Medvedyev v France* (2010) 51 EHRR 39 [67]; *Sharifi* (n 62) [212]; *ND and NT v Spain* App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) [178]-[187].

accompanied by the aforementioned procedural safeguards.[80] However, in recent collective expulsion cases, the ECtHR has adopted a restrictive, exclusionary approach. In *Khlaifia v Italy*, the ECtHR held that the prohibition on collective expulsion does not guarantee an individual interview in all circumstances, so long as each alien has a genuine and effective possibility to submit arguments against their expulsion.[81] Judge Serghides issued a convincing dissent, arguing that personal interviews are indispensable given ECHR safeguards should not depend on state discretion.[82] Nonetheless, *Asady v Slovakia* affirmed *Khlaifia*, deeming ten minute interviews sufficient to allow the applicants to have their individual circumstances sufficiently considered.[83]

In *ND and NT v Spain*, which concerned the pushback of two sub-Saharan nationals to Morocco after they attempted to climb the border fence at Melilla, Spain, the Grand Chamber reversed the Chamber's decision and found there was no collective expulsion. The Court held that the applicant's own culpable conduct was relevant to assessing the protection afforded by Article 4 Protocol No 4. The lack of individualised decisions and remedies were attributable to the applicants having participated 'in the storming of the Melilla border fences', 'taking advantage of the group's large numbers', 'using force', and failing to 'make use of the existing legal procedures for gaining lawful entry to Spanish territory…'.[84] Importantly though, the Court specified that its finding does not call into

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80 See eg *Hirsi* (n 4) [185]-[186], [206]; *MK* (n 60) [144], [220]. See also *Nadege* (n 76) [156]-[178].

81 (n 77) [248], on suspensive effect [279]-[281].

82 ibid [7], [10]-[12], [21]. See *Čonka v Belgium* (2002) 34 EHRR 54 [62]-[63].

83 App no 24917/15 (ECtHR, 24 March 2020) [63]-[71].

84 (n 79) [200]-[201], [206], [211]-[212], [218]-[220], [231], [242].

question the obligation on states to protect their borders in a manner compliant with the obligation of *non-refoulement* under Article 3 (the Chamber having previously excluded *refoulement* risks for the applicants) nor the *Hirsi* holding on the illegality of pushbacks at sea.[85] Later cases have affirmed *ND* but seem to limit it to cases where such factors are present (eg en masse or failure to use existing pathways).[86] The decision has faced much criticism, being 'fraught with legal inconsistencies and factual inaccuracies', legitimising the rapid expulsion of migrants by focusing on their own conduct rather than the Spanish authorities, including their violent means and the practical impossibility of sub-Saharan Africans securing legal entry (as Chapter Five covers).[87] Nonetheless, *ND* does not nullify the duty to grant temporary entry under the prohibition on collective expulsion. With the Court preserving *non-refoulement* obligations, pushbacks remain unlawful. To uphold *non-refoulement* and collective expulsion obligations, the state *must* undertake individualised procedures on state territory to ascertain protection needs, which ND and NT were not afforded.[88] It does not matter that *refoulement* risks are excluded later in court.

85 ibid [187], [206], [232].

86 See *Asady* (n 83) [62], [15]-[25] (Joint Dissenting Opinion Lemmens, Keller and Schembri Orland JJ); *MK* (n 60) [203], [207], [210].

87 Sergio Carrera, 'The Strasbourg Court Judgement *N.D. and N.T. v Spain*: A *Carte Blanche* to Push Backs at EU External Borders?' (2020) EUI Working Paper RSCAS 2020/21 <https://cadmus.eui.eu/handle/1814/66629> accessed 14 October 2020.

88 *ND* (n 79) [209]; Constantin Hruschka, 'Hot Returns Remain Contrary to the ECHR: *ND & NT* before the ECHR' (*EU Migration Law Blog*, 28 February 2020) <http://eumigrationlawblog.eu/hot-returns-remain-contrary-to-the-echr-nd-nt-before-the-echr/> accessed 14 October 2020.

c. Family Reunification

Lastly, the principle of family reunification can generate a right of entry, being fundamental to protecting the family life of refugees and other migrants.[89] The ECtHR, HRC, and other treaty bodies have recognised that refusal of entry for family reunification interferes with the right to respect for family life and that states have a positive obligation, in some circumstances, to admit to their territory the relatives of migrants residing there.[90] Under Article 8 ECHR, the prospect of securing entry is only available where one family member is present in a contracting state and no obligation exists for a state to allow aliens entry to pursue a private life.[91] For instance, a violation of the right to respect for family life has been found where the state has refused to issue residence permits to allow family members to reunite in its territory.[92] Discrimination in family reunification rules and decisions can also lead to a violation of Article 14, taken together with Article 8.[93]

Given the qualified nature of Article 8, the state enjoys a wide margin of appreciation, with the rights of the migrant unsurprisingly classified as an exception to the

89 See ADHR, arts V, VI; ECHR, art 8; ICCPR, arts 17, 23; ACHR, arts 11(2), 17(1); African Charter, art 18(1); UNCRC, arts 10(1), 16(1); CIS Convention, arts 9, 13(3); ICRMW, art 44; EUCFR, arts 7, 33(1); Arab Charter, arts 21, 33(2). See Cathryn Costello, Kees Groenendijk and Louise Halleskov Storgaard, *Realising the Right to Family Reunification of Refugees in Europe* (Issue Paper, Council of Europe Commissioner for Human Rights 2017).

90 eg HRC 'General Comment No 15' (n 35) [5], [7]; HRC 'General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (27 July 1990) UN Doc HRI/GEN/1/Rev.9 [5]; *Abdulaziz* (n 4) [67]-[68]; *Gül v Switzerland* (1996) 22 EHRR 93; *Şen v Netherlands* (2001) 36 EHRR 81 [31]; *Tuquabo-Tekle v Netherlands* App no 60665/00 (ECtHR, 1 December 2005); *Rodrigues da Silva v Netherlands* (2006) 44 EHRR 729 [39]. See also Chetail, *International Migration* (n 36) 124-32.

91 *Khan v UK* App no 11987/11 (ECtHR, 28 January 2014) [27].

92 See *Şen* (n 90) [40]; *Tuquabo-Tekle* (n 90) [52].

93 eg *Abdulaziz* (n 4) [70]-[89]; *Biao v Denmark* App no 38590/10 (ECtHR, 24 May 2016) [138].

state's right to control immigration.[94] The extent of the state's obligation to admit relatives of *settled* immigrants, not those with temporary status, varies according to the particular circumstances of those involved and general interest (eg extent of ties, obstacles to living in the state of origin, and immigration breaches).[95] Stronger, though non-binding, statements have been made by the CMW and CRC, namely that states must take positive measures to maintain the family unit, including through family reunification, and that refusing to allow a family member to enter or remain may amount to an arbitrary or unlawful interference with family life.[96]

In summary, *non-refoulement*, collective expulsion, and family reunification obligations circumscribe who states can lawfully reject, appearing to provide some of the strongest protections for migrants, including to claim a right of entry (albeit a qualified one). Despite stemming largely from negative obligations, a positive duty to admit has been indirectly created by adjudicative bodies through due process guarantees. As Durieux highlights, the significant point is not only that such obligations trump the state's prerogative, rather, they show that 'immigration control prerogatives encompass the power to admit, as much as to exclude'.[97] Nonetheless, only specific categories of migrants benefit from the right of entry. STC mechanisms add a layer of complexity to this conclusion.

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94 Dembour (n 5) 119; Desmond (n 5) 265.

95 See *Abdulaziz* (n 4) [67]-[68]; *Gül* (n 90) [38]-[39]; *Rodrigues da Silva* (n 90) [39].

96 CMW and CRC 'Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return' (16 November 2017) UN Doc CMW/C/GC/4-CRC/C/GC/23 [27]-[28], [32].

97 Durieux (n 74) 156.

d. ‘Safe Country’ Practices

‘Safe country’ practices may amount to an exception to the conclusion that states have a procedural duty to grant individuals entry to access asylum procedures and accompanying safeguards. The concept ‘safe country’ refers to those countries designated by destination states as either being non-refugee producing or where individuals can enjoy asylum without danger.[98] It encompasses safe countries of origin and safe countries of asylum. The latter allows asylum seekers to be returned to a state where they have *previously received* protection (first country of asylum) or to a place where protection *should* have been sought but was not (safe third country (STC)).[99] Nowadays, the distinction between the two has somewhat dissipated, with STC practices more prevalent and being diverse and malleable.[100] Artificial STC constructs have also been created, where destination states seek to remove asylum seekers to states they have never transited through, for example

98 UNHCR ‘Background Note on the Safe Country Concept and Refugee Status’ (Geneva 1991) UN Doc EC/SCP/68 [3].

99 Cathryn Costello, ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’ (2005) 7 EJML 35, 39. See the distinction drawn in UNHCR EXCOM Conclusion No 15 (XXX) ‘Refugees Without an Asylum Country’ (1979) UN Doc A/34/12/Add.1 [(h)(iv)], [(k)]; UNHCR EXCOM Conclusion No 58 (XL) ‘Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection’ (1989) UN Doc A/44/12/Add.1 [(f)].

100 Costello, ‘Asylum Procedures’ (n 99) 39, 68. Michelle Foster, ‘Responsibility Sharing or Shifting? “Safe” Third Countries and International Law’ (2008) 25 Refuge 64, 64-65. See UNHCR ‘Background Note’ (n 98) [3], [11].

under Australia's offshore processing regime on Nauru and PNG and the US' asylum cooperative agreements with Guatemala, El Salvador, and Honduras.[101]

It is therefore questionable whether STC practices represent responsibility sharing or shirking, with states implementing such mechanisms to reduce their own obligations towards refugees and asylum seekers and shift them onto other states. For instance, the Dublin Regulation, which determines the EU Member State responsible for examining an asylum application based on hierarchical factors, including first point of entry, has always been at odds with free movement and equitable sharing, designed to prevent 'asylum shopping' and disproportionately burdening frontline EU states.[102] Nevertheless, the consensus is that such arrangements do not violate the Refugee Convention provided the STC affords the individual effective protection in line with the Convention and

101 See eg *Migration Act 1958* (Cth) div 8 subdiv B; Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims (signed 26 July 2019, entered into force 15 November 2019) TIAS 19-1115. See on Australia Madeline Gleeson, 'Protection Deficit: The Failure of Australia's Offshore Processing Arrangements to Guarantee "Protection Elsewhere" in the Pacific' (2019) 31 IJRL 415.

102 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31, ch III. See generally Minos Mouzourakis, '"We Need to Talk about Dublin": Responsibility under the Dublin System as a Blockage to Asylum Burden-sharing in the European Union' (2014) RSC Working Paper Series No 105 <www.rsc.ox.ac.uk/publications/we-need-to-talk-about-dublin> accessed 19 January 2021.

international standards.[103] For present purposes, it is accepted that STC practices are lawful in principle but problematic in practice.

STC practices may consequently displace the right to be admitted to access asylum procedures. However, it remains highly dubious whether a state can be deemed safe for a particular person without an individualised assessment first occurring within state territory, giving them the opportunity to rebut the presumption of safety.[104] As Chapter Six explores, a key issue is whether a third state, including a STC, can prevent persons leaving so they do not reach, or return to, a destination state. Perhaps in the context of secondary refugee movements the scope of the right to leave is exhausted when protection needs are met. However, it remains the case that all migrants can leave for other purposes, including family reunification and tourism, subject only to justifiable restrictions.

C. An Independent Right

The preceding sections have concluded that migrants possess a right of entry in certain circumstances. It is thus debatable whether the right to leave can accurately be characterised as 'incomplete', as mentioned above. This leads to further questions regarding the outer edges of the right to leave: when does it end and the right of entry

103 See UNHCR EXCOM Conclusion No 58 (n 99) [(f)], [(g)]; UNHCR 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable 9-10 December 2002)' (February 2003) [15]; 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' (Geneva 2018) [3]-[5], [7]-[10]; Lauterpacht and Bethlehem (n 30) para 76; Hathaway, *Rights of Refugees* (n 38) 326-35; Goodwin-Gill and McAdam (n 7) 392-407; Foster, 'Responsibility Sharing' (n 101) 65-66. cf Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration & Refugee Protection in the 21st Century: Legal Aspects - The Hague Academy of International Law Centre for Research* (Martinus Nijhoff 2015) and literature at fns 21-22.

104 See *Ilias* (n 63) [139]-[164].

begin? It is argued that the right to leave is best characterised as *independent* of any right of entry, as the jurisprudence from Chapter One supports, not *incomplete*.

Critically, leaving and admission are distinct parts of the migrant trajectory. The right to leave protects the freedom to travel, including to leave and not know where one is going. As Chetail posits, 'despite the practical meddling between the two, departure and admission have been conceived and recognized by international law as two distinct legal spheres…'.[105] Leaving in many cases will result in the migrant making contact with another state or its territory and as shown, some migrants have a right to be admitted. However, states are not under a duty to 'complete' the right to leave; rather, it is a right each state must guarantee.[106] Herein lies a key strength of the right, whereby the inability to enter a state does not bar its activation.[107] Moreover, there is no listed exception that persons must prove admission elsewhere. As Mubanga-Chipoya wrote in his report, the fact there is no right of entry 'does not imply that other States are free to prohibit their nationals from leaving the country on such a pretext or excuse'.[108] Rights can exist without possibilities (as 'half' or 'floating' rights) and there is no need to specify the bearers of the duties that rights will require; individuals are entitled to leave to search for possible duty-bearers, in

105 Chetail, *International Migration* (n 36) 92. See also Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 158.

106 Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 382.

107 Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia, NWV Verlag 2018) 381, 392; Vladislava Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 32 IJRL 403, 414.

108 Mubanga-Chipoya (n 8) 65.

this case a state to admit them or otherwise attempt unlawful entry.[109] Framed differently, although the right is self-standing, the value of leaving is clearly strengthened for those granted entry, making refugee and human rights more effective and providing real opportunities.[110]

The right to leave seems to reach its limit when a person seeks entry at the border, preserving its independence. Thus, related measures fall to be examined against the state's right to control entry. Den Heijer argues that to construe entry restrictions as interferences 'transforms the right to leave into a qualified right of entry'.[111] However, any right of entry stems, not from the right to leave, but *non-refoulement*, collective expulsion, and family life obligations for example. Moreover, as already argued in Chapter One, exit and entry cannot always be disentangled from one another, given the nature of movement and borders. What matters is whether the restriction, whether an entry or pre-entry control, has the (dual) effect of obstructing departure.

In sum, this section and Chapter One clearly demonstrate that the right to leave is independent and exercisable *irrespective* of a right of entry elsewhere. Accordingly, states cannot restrict departure by asserting the right's *incompleteness* or that the destination will not grant entry. Moreover, it is not the case that entry restrictions can never violate the right to leave, as later chapters explore further.

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109 den Heijer, *Extraterritorial Asylum* (n 105) 159; Jeremy Waldron, 'Duty-bearers for Positive Rights' (2014) NYU School of Law Public Law Research Paper No 14-58 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510506> 19 October 2020.

110 See *Amuur* (n 4) [48]; Rainer Bauböck, 'Free Movement and the Asymmetry between Exit and Entry' (2006) 4 Ethics and Economics 1, 1-2, 5; den Heijer, *Extraterritorial Asylum* (n 105) 159; Patti Tamara Lenard, 'Exit and the Duty to Admit' (2015) 8 Ethics & Global Politics 25975.

111 den Heijer, *Extraterritorial Asylum* (n 105) 159-61.

Conclusion

This chapter demonstrated how international obligations operate to constrain, rather significantly, the sovereign power of states to control the entry of non-nationals, highlighting the duty on states to admit certain categories of migrants. While there is no universal right to asylum, the chapter illustrated how the prohibitions on *refoulement* and collective expulsion address this shortcoming by, at minimum, requiring states to grant temporary admission so individuals can access relevant procedures. Nonetheless, STC mechanisms may legitimise the transfer of asylum seekers before their claim is heard or entry granted. Additionally, migrants may be granted entry for family reunification purposes. Finally, it was argued that leaving and entry are distinct parts of the migratory process, with the right to leave self-standing. It cannot be limited because of doubts about whether a person will be admitted to the destination and doing so would be erroneous, given some migrants enjoy a right of entry. Above all, it became evident that international law not only limits who states can reject, but also *institutionalises* exclusion (and discriminatory treatment) as the norm and admission the exception.[112] Therefore, the starting point that states have a paramount right to exclude that typically takes priority over human rights and belief in the inherent legitimacy of migration control should not be so easily accepted (if at all). Considering the importance of *non-refoulement* and collective expulsion obligations in securing temporary asylum, Chapter Three explores the intricacies of their relationship with the right to leave and the right's relevance for asylum seekers.

112 Costello, *Human Rights* (n 6) 10.

CHAPTER THREE: THE RIGHT TO LEAVE FOR ASYLUM SEEKERS

This thesis has thus far demonstrated the importance of the right to leave in securing liberty and agency. Relatedly, it has revealed how the right protects individuals as they seek refuge across national borders from persecution or other serious harms. In light of these findings, and the fact externalisation specifically targets asylum seekers, this chapter focuses on the right to leave for asylum seekers, arguing that the right is most appropriately formulated as a 'right to leave to seek asylum'. It begins by reiterating the justifiability of interpreting the right to leave by reference to its normative environment. The chapter then analyses how the right to seek asylum and obligations of *non-refoulement* and collective expulsion inform the legal contents of the right to leave. It also considers if the test for assessing whether a violation of the right to leave has occurred is stricter when asylum seekers are concerned given their protection needs. Lastly, it explores several existing and suggested duties under the right to leave owed by states to asylum seekers, specifically the issuance of travel documents to asylum seekers and refugees, the duty not to obstruct leaving, and a general obligation to facilitate departure. In doing so, this chapter provides guidance to states on how to organise their migration controls to comply with international law.

A. Relevance of Other Rights

As the Main Introduction outlined, the principle of systemic integration obliges recourse to relevant rights and obligations as are applicable between the parties in interpreting the right to leave. Chapter Two highlighted the existence of a universal right to seek asylum and demonstrated how *non-refoulement* and collective expulsion obligations generate a duty on states to temporarily admit asylum seekers. It is therefore pertinent to undertake an in-depth examination of how the right to leave operates alongside these well-traversed rights and

obligations. As this chapter confirms, the significance of the right for asylum seekers requires consideration of all affected rights, further reflected in the requirement that restrictions be consistent with other rights.[1] Moreno-Lax demonstrates the need to adopt an approach 'that apprehends the complexity of the position of refugees and recovers the indivisibility of human rights', which is key to addressing the totality of their plight.[2] This can be done by relying on interpretive aids and rights already within the relevant systems.[3] Although seeking asylum is not enshrined in the ICCPR or ECHR, it is valid to draw on the Refugee Convention's implicit right to seek asylum to ensure the right to leave is properly understood and effective for asylum seekers and that these treaties function as part of a coherent whole.[4] Accordingly, it is justifiable to read the right to leave alongside these rights and obligations.

B. The Right to Leave to Seek Asylum

The right to leave, as this section demonstrates, is of vital importance for individuals fleeing harm and seeking international protection, due to its interplay with the right to seek asylum and prohibitions on *refoulement* and collective expulsion. It follows that the right to leave for asylum seekers is best characterised as a 'right to leave to seek asylum'. Such a

1 Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017) 348.

2 Violeta Moreno-Lax, 'Intersectionality, Forced Migration, and the Jus-generation of the Right to *Flee*: Theorising a Composite Entitlement to Leave to Escape Irreversible Harm' in Basak Çalı, Ledi Bianku and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (OUP 2021) 43, 47.

3 ibid 47.

4 See VCLT, art 31(3)(c); Siobhán McInerney-Lankford, 'Fragmentation of International Law Redux: The Case of Strasbourg' (2012) 32 OJLS 609, 614-18. cf Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010) 232-82.

characterisation is supported by various scholars.[5] Moreno-Lax and Giuffré have aptly argued that the right to leave complements the obligation of *non-refoulement*, being a right to flee to seek asylum or a better life, resulting in an aggregate 'right to leave to seek asylum'.[6]

Before demonstrating the appropriateness of this characterisation, it is pertinent to restate *who* is protected by such a right. This thesis has defined an asylum seeker as any person fleeing to seek international protection, which encompasses a wide range of beneficiaries, and with Chapter Two defining asylum as the broad institution of protection from harm. Consequently, the right to leave to seek asylum is understood as covering all persons escaping persecution or other serious harms. This broad understanding is critical as the reasons people flee are complex and compounding. New protection needs may emerge throughout the journey and many flee uncertain of the protection they are seeking or entitled to. However, the right is unlikely to apply to refugees *sur place*, namely those becoming refugees due to circumstances arising after leaving their state of origin. Although the right to leave protects everyone, it is justifiable to focus this chapter on asylum seekers given externalisation seeks to obstruct access to asylum. However, since this thesis adopts an inclusivist view of migrants, the following conclusions and duties also extend to migrants with protection needs.

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5 See eg Atle Grahl-Madsen, *The Land Beyond: Collected Essays on Refugee Law and Policy* (Macalister-Smith P and Alfredsson G eds, Martinus Nijhoff 2001) 282; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 370, 383; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 165; Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 EJIL 591, 596; Daniel Kanstroom, 'The "Right to Remain Here" as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions' (2017) 5 JMHS 614, 624.

6 Moreno-Lax, *Accessing Asylum* (n 1) ch 9, 348-54; Mariagiulia Giuffré and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 94, 100.

The notion of a right to leave to seek asylum is underpinned by two interrelated reasons. First, the ability to leave is *inherent* to the right to seek asylum, which justifies intertwining the right to leave with seeking asylum. They are two sides of the same coin.[7] As Goodwin-Gill and McAdam aptly highlight, 'To have any meaning, the right to seek asylum implies not only a right to access asylum procedures, but also to be able to leave one's country in search of protection'.[8] 'No one is obliged to sit out his or her fate' even if there is no immediate remedy or right to asylum.[9] Fundamentally, refugee protection is premised on mobility, whereby individual's flee to secure international protection.[10] This is especially so for Convention refugees, with refugee status only available to persons outside their origin state or place of habitual residence pursuant to Article 1A(2) Refugee Convention.[11] As Hannum puts it, 'To "seek" asylum, a refugee must be able to present himself before the appropriate authorities of the country of refuge; by definition, this

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7 Grahl-Madsen (n 5) 282; Alice Edwards, 'Human Rights, Refugees, and the Right to Enjoy Asylum' (2005) 17 IJRL 293, 301-02. See also UNCHR (Sub-Commission), 'Analysis of Current Trends and Developments in respect of the Right of Everyone to Leave Any Country including His Own and to Return to His Country, and Some Other Rights or Considerations Arising Therefrom, Final Report by Special Rapporteur Chama LC Mubanga-Chipoya' (20 June 1988) UN Doc E/CN.4/Sub.2/1988/35, 103.

8 Goodwin-Gill and McAdam (n 5) 384.

9 Guy S Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisation' (2007) 9 UTS L Rev 26, 30.

10 Gregor Noll, *Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff 2000) 354; Katy Long, 'In Search of Sanctuary: Border Closures, "Safe" Zones and Refugee Protection' (2013) 26 JRS 458, 458; Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 MichJInt'l L 21, 21.

11 *R v Immigration Officer at Prague Airport, ex p European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1 [16]; James C Hathaway, 'Special Feature Eighth Colloquium on Challenges in International Refugee Law' (2018) 39 MichJInt'l L 1, 1.

requirement presupposes that he must be able to leave his own country'.[12] Guild adds that if destination states prevent persons leaving their origin state, 'then refugees do not "exist" in the state's eyes or are not the responsibility of the state which has put the measures in place'.[13] It follows that if displaced persons have not crossed an international border they will be IDPs (who nonetheless possess the right to leave).[14] The right to leave and to seek asylum are thus inextricably linked for Convention refugees, with refugee status contingent on escaping.

Essentially, denial of leaving may undermine the right to seek and secure asylum (beyond asylum granted within Convention confines). The IACHR has recognised this, providing that 'the inability to leave your country may also imply a restriction to the right to seek and be granted asylum'.[15] The ECtHR has also identified the linkage, though subtly, holding that the fact the 'applicant had been trying to leave Greece cannot be held against him' given he 'was attempting to find a solution to a situation the Court considers contrary to Article 3'.[16] This acknowledges that departure to seek protection, regularly or irregularly,

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12 Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff 1987) 50.

13 Elspeth Guild, *The Right to Leave a Country* (Issue Paper, Council of Europe Commissioner for Human Rights 2013) 25-26. See also Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 IJRL 542, 553.

14 UNHCR 'Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.2, principle 15.

15 IACHR, 'IACHR Urges Honduras and Guatemala to Guarantee the Rights of People in the Migrant and Refugee Caravan' (Press Release 37/19, 19 February 2019) <www.oas.org/en/iachr/media_center/PReleases/2019/037.asp> accessed 5 December 2020. See text to n 131 in ch 1.

16 *MSS v Belgium and Greece* (2011) 53 EHRR 2 [315].

is legitimate.[17] Reading the two rights in conjunction ensures rights are practical and effective for asylum seekers. In practice, the right to seek asylum is undermined if departure is obstructed, for as Chapter Five shows, securing entry or asylum preceding departure is difficult.[18] It is worth flagging that the right to leave and asylum assume another affiliation, namely that individuals having illegally exited their country and liable to face severe penalties on return are considered refugees if their motive for leaving related to a Convention ground.[19]

Second, bringing *non-refoulement* obligations into consideration, the right to leave protects the individual's right to flee and search for a state to admit them, with *non-refoulement* (and collective expulsion) obligations triggering a right of entry, in other words, *de facto* asylum.[20] As Goodwin-Gill and McAdam highlight, 'the right to leave, the right to seek and to enjoy asylum, and the principle of *non-refoulement* share a delicate but significant relationship'.[21] Similarly, the UNHCR Executive Committee has affirmed *non-refoulement* as a 'logical complement to the right to seek and enjoy asylum', drawing attention to instances of individuals being unable to seek asylum after physical and

17 Giuffré and Moreno-Lax (n 6) 100.

18 Zieck (n 10) 45.

19 See UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (February 2019) UN Doc HCR/1P/4/ENG/REV.4 [61], [168]-[170].

20 Markard (n 5) 603; Moreno-Lax, *Accessing Asylum* (n 1) 348-50.

21 Goodwin-Gill and McAdam (n 5) 382.

administrative barriers prevented their departure.[22] Critically, to enjoy protection from *refoulement* under IHRL, individuals must either be in the state's territory or under its jurisdiction. While there is no requirement that individuals be outside their state of origin as in the Refugee Convention,[23] if individuals cannot leave, it is difficult to access protection from *refoulement*.[24] In other words, to not be *refouled* (or collectively expelled) individuals must be able to bring themselves within the state's jurisdiction. The ability to leave ultimately allows individuals to escape harm and not be sent back to it; the denial of which can have irreversible consequences. The right to leave is therefore a fundamental precondition for the right to seek asylum as well as *non-refoulement* and collective expulsion obligations under both IHRL and the Convention.

Several scholars contend that the right of entry to access asylum procedures can be understood as a procedural limb of the right to leave.[25] Consequently, the right would incorporate 'a substantive-procedural-physical entitlement' to flee to seek asylum accompanied by a right of entry to claim asylum.[26] However, this framing undermines the well-established independent nature of the right to leave. Instead, as argued above, the migrant trajectory should be understood as involving the exercise of one's right to leave in search of a state of asylum, with the prohibitions on *refoulement* and collective expulsion

22 UNHCR EXCOM 'Note on International Protection' (4 June 2018) UN Doc EC/SC/69/CRP.8 [21]-[22].

23 Goodwin-Gill and McAdam (n 5) 385; den Heijer (n 5) 138.

24 Susan Kneebone, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (CUP 2009) 10; Markard (n 5) 603, 606-07.

25 Moreno-Lax, *Accessing Asylum* (n 1) 340-41, 474-75; Giuffré and Moreno-Lax (n 6) 100-01.

26 Moreno-Lax, *Accessing Asylum* (n 1) 476.

operating to secure a right of entry for those who do manage to make contact or reach the frontier. Evidently, entry does not stem from the right to *leave*. Den Heijer and Moreno-Lax have gone so far as to argue that where restrictions on the right to leave involve a risk of extraterritorial *refoulement*, the right to leave to seek asylum becomes absolute in character, given *non-refoulement* obligations under IHRL are absolute. This, Moreno-Lax suggests, disallows any proportionality reasoning and instead imposes a duty on states to actively avoid *refoulement*, with den Heijer concluding that such measures must automatically be deemed disproportionate.[27]

It cannot be accepted that the right to leave for asylum seekers is absolute; the right is clearly qualified in all treaties enshrining it. As Stoyanova argues, 'The interdependence between leaving and seeking asylum – understood as having access to a procedure to be protected from *refoulement* – does not transform the right to leave into an absolute right'.[28] It is far more legally sound to assess whether restrictions on the right are consistent with *non-refoulement* obligations, in accordance with the consistency and proportionality criteria.[29] In fact, den Heijer recognised that construing measures that violate other rights as disproportionate accords with the consistency limb in Article 12(3) ICCPR.[30] In addition, a stricter test should be adopted when assessing violations of the right to leave alongside these rights and obligations. As Moreno-Lax has herself suggested, public order aims of controlling migration should play a much lesser role for asylum seekers as the

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27 den Heijer (n 5) 166; ibid 391-93, 475.

28 Vladislava Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 32 IJRL 403, 436.

29 See text to n 246 in ch 1.

30 den Heijer (n 5) 166.

underlying reasons for fleeing and *refoulement* risks must be given considerable weight (though she goes on to say they should be given no weight at all).[31] This is supported by *MSS v Belgium and Greece*, where the ECtHR attached 'considerable importance to the applicant's status as an asylum seeker and … member of a particularly underprivileged and vulnerable population group in need of special protection' in determining whether his detention and living conditions amounted to inhuman and degrading treatment.[32] Even under Article 3, general and competing interests may be considered, weighing for example medical considerations against removal.[33] Nonetheless, it may be the case that a measure negating the right to seek asylum and/or leading to *refoulement* will almost always fail the legitimacy, proportionality, and consistency tests. However, this does not render the right to flee absolute nor remove the need to apply the limbs of the text.

The right to seek asylum, *non-refoulement*, and collective expulsion therefore inform the legal contents of the right to leave. This does not call into question the right's universal application to all persons, regardless of protection needs. From a legal standpoint however, the purpose of departure matters as the right to seek asylum and related obligations may trump restrictions on the right to leave when applying the proportionality and consistency limbs.[34] Together, these rights and obligations form the basis of international protection, working together to strengthen the protection afforded to asylum

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31 Moreno-Lax, *Accessing Asylum* (n 1) 349. See also Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia, NWV Verlag 2018) 391-93, particularly fn 78.

32 (n 16) [232], [251].

33 See Stoyanova (n 28) 436-37.

34 Zieck (n 10) 32, 35-36.

seekers. Thus far, the significance of the right to leave for asylum seekers has not been properly appreciated by the ECtHR, which fails to address the 'compounded nature of the rights and realities of asylum seekers attempting to leave a country in search of international protection', instead centering only on *non-refoulement* and collective expulsion obligations.[35] Considering this, it is necessary to identify what duties are, or should be, imposed on states to give effect to the right to leave to seek asylum.

C. Duties Owed to Asylum Seekers

It is well-established within IHRL that states are obliged to respect, protect, and fulfil the human rights of individuals within their jurisdiction, which Chapter Four explores further.[36] While the duty to respect is a negative obligation requiring the state to refrain from interfering with rights, obligations to protect and fulfil demand positive action to prevent interferences by other actors and take steps towards actual realisation, respectively. As Waldron and Koch perceptively argue, rights generate a multiplicity of duties, followed by successive waves of duties tailored to what is needed to realise and protect the right.[37]

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35 Moreno-Lax, 'Intersectionality' (n 2) 45-53.

36 See, among many, HRC 'General Comment No 31: The Nature of the General Legal Obligation imposed on States Parties' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [6]-[8]; *X and Y v Netherlands* (1985) 8 EHRR 235 [23]; *Velásquez Rodríguez v Honduras*, Inter-American Court of Human Rights Series C No 4 (29 July 1988) [172]-[177]; *A v UK* (1999) 27 EHRR 611 [22]; *'Street Children' (Villagrán-Morales et al) v Guatemala*, Inter-American Court of Human Rights Series C No 63 (19 November 1999) [144]-[146]; *MC v Bulgaria* (2005) 40 EHRR 20 [148]-[153]; *Opuz v Turkey* (2010) 50 EHRR 28 [128]-[130]. There is extensive literature on this eg Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton University Press 1996) ch 2; Alastair R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004); Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016); Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (CUP 2018) ch 8.

37 Jeremy Waldron, 'Rights in Conflict' (1989) 99 Ethics 503, 509-12; Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 HRLRev 81, 82-83, 100-03.

Accordingly, there are a range of potential obligations generated by the right to leave. As shown earlier, states have a negative obligation to refrain from unjustifiably interfering with departure and a positive obligation to facilitate the right by issuing travel documents to nationals. This part explores several possible duties necessary to respect and ensure the right for asylum seekers, specifically those relating to travel documentation, non-obstruction of departure, and a general facilitative duty (which may also be borne by IOs). Further obligations relating to externalisation are identified as they arise in Part III.

a. Travel Documents

Building on Chapter One, it is necessary to consider whether there is a duty to issue travel documents to asylum seekers and refugees. The HRC, ACHPR, Inglés, and expert declarations all recognised the necessity of travel documents to exercise one's right to leave. The right to obtain a passport is clearly expressed by the HRC in General Comment No 27:

> Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual.[38]

The term 'travel document' describes passports or other forms of identity documents facilitating travel across international borders and return to the issuing state. Chapter One demonstrated that the right to leave imposes obligations on states of nationality, residence, and sojourn so individuals can exercise their right to leave. To date, the jurisprudence of adjudicative bodies has only concerned the issuance of travel documents to nationals.

[38] HRC 'General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [9].

Whether states of sojourn are also obliged to issue travel documents to irregular migrants within their territory has not been clarified, leaving room for the expansion of duties.[39]

Historically, Inglés' principles delimited the duty to provide travel documentation to nationals.[40] Additionally, the obligations on states of residence and sojourn have been largely understood as encompassing a negative duty to refrain from impeding departure.[41] However, nothing in the jurisprudence or right to leave provisions limits it to this. To the contrary, the HRC's above statement appreciates that issuance is 'normally', but not only, incumbent on the state of nationality. Given all states bear obligations and the right's applicability to everyone,[42] the right can be interpreted as obliging states of sojourn to issue travel documents to asylum seekers and refugees, lawfully and unlawfully present.[43] Three key arguments support this conclusion.

First, this reading upholds the principle of effectiveness and fundamental principles of equality and non-discrimination, ensuring that the right is not 'theoretical or illusory but

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39 Explored by Ulrike Brandl, 'The Human Right to Leave a Country: To Protect or Forget?' (Conflict and Compromise between Law and Politics in EU Migration and Asylum Policies conference, Brussels, February 2018).

40 UNCHR (Sub-Commission), 'Study of Discrimination in Respect of the Right of Everyone to Leave any Country, including his Own, and to Return to his Country by Special Rapporteur José D Inglés' (1963) UN Doc E/CN.4/Sub.2/220/Rev.1, 66-67.

41 See Goodwin-Gill and McAdam (n 5) 382; Galina Cornelisse, 'European Vessels, African Territorial Waters and "Illegal Emigrants": The Right to Leave and the Principle of (Il)legality in a Global Regime of Mobility' (2008) Challenge Working Paper, 11 <https://research.vu.nl/en/publications/european-vessels-african-territorial-waters-and-illegal-emigrants> accessed 19 January 2021.

42 Except under Article VIII ADHR.

43 James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 850-51; Zieck (n 10) 88-90.

… practical and effective'[44] for all, not select groups. Second, the right to recognition as a person before the law is enshrined in numerous instruments.[45] Possessing a travel document provides asylum seekers and refugees with crucial recognition of their legal personhood and identity.[46] Third, the issuance of travel documents is likely inherent in the notion of international protection. As Vedsted-Hansen posits, the 'issuance of travel documents to refugees has been one of the most important aspects of international protection of their legal status'.[47] Asylum seekers and refugees are in a special position compared to other migrants, unable to apply to their state of origin for documentation due to fear of persecution or serious harm, or their papers destroyed, lost, or confiscated during their journey.[48] A major implication of the Refugee Convention's cessation provisions in Article 1C is that refugees cannot apply to their state of origin for a passport as this risks cessation of their refugee status, as they may be seen as voluntarily re-availing themselves of the protection of their country of nationality.

It follows that states of sojourn should issue travel documents to asylum seekers and refugees in recognition of their protection needs, potential statelessness, and to prevent irregular migration, enabling them to seek asylum and solutions through regular, safe

44 *Airey v Ireland* (1980) 2 EHRR 305 [24].

45 See ADHR, art XVII; UDHR, art 6; ICCPR, art 16; ACHR, art 3; African Charter, art 5; UNCRC, arts 7 and 8; ICRMW, art 24; Arab Charter, art 22; CRPD, art 12.

46 Guy S Goodwin-Gill, *International Law and the Movement of Persons Between States* (Clarendon Press 1978) 43-44.

47 Jens Vedsted-Hansen, 'Article 28/Schedule' in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 1182, para 1, 1185, para 7, particularly fn 3.

48 ibid.

means if protection is unavailable where they are, for family reunification, resettlement, and other travel purposes.[49] This naturally raises issues surrounding practicality, resources, and identification. However, looking at resettlement schemes and instances where asylum seekers have been evacuated or relocated from places like Libya and the Greek Islands, a global regime can be envisioned that concentrates on protection needs and solutions while upholding individual agency. More contentiously, the proposal has serious implications for state practice that draws a strict distinction between initial and secondary movement and attempts to suppress the latter through externalisation measures. As this thesis will illustrate, the containment of individuals in transit appears to be largely incompatible with the right to leave.

In principle, states are free to issue passports to whomever they choose.[50] Article 28 of the Refugee Convention and the Convention relating to the Status of Stateless Persons obliges states to issue travel documents to refugees and stateless persons lawfully in their territory, unless compelling reasons of national security or public order exist.[51] It also contains a discretionary power to issue documents to any other refugee or stateless person therein, whereby the state shall give 'sympathetic consideration' to those unable to obtain such documents from their country of lawful residence.[52] This supports states of residence

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49 See ICRMW, art 68(1): states 'shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation'.

50 Goodwin-Gill (n 46) 45-46; John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (2nd edn, CUP 2018) 222-23. However, there are limits on whether accompanying rights are opposable to other states see *Nottebohm Case (Liechtenstein v Guatemala)* (Judgment) [1955] ICJ Rep 4.

51 See also OAU Convention, art VI; Qualification Directive, art 25.

52 See also Refugee Convention, sch paras 6(3), 13(1); Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117, sch paras 6(3), 13(1); OAU Convention, art VI.

not only possessing negative duties under the right to leave, but also a positive duty to facilitate leaving.

Thus, the better interpretation of the right is that states are obliged to issue documents to asylum seekers and refugees irregularly present to secure their right to leave.[53] This would be particularly beneficial for asylum seekers and refugees falling outside Article 28 (unrelated to the aforementioned compelling reasons), especially those stuck in transit, given the almost-universal passport requirement for international travel.[54] This can be seen as a revival and expansion of the Nansen Passport, an identification and travel document created by states for refugees and stateless persons post-World War I, whose success depended on states recognising their validity.[55] However, the benefit should not be overstated. As Chapter Five delves into, without an entry visa, a passport may be necessary but insufficient to secure exit, with departure often dependent on possessing a visa or visa-waiver for the destination. Nonetheless, creating an entitlement for all refugees and asylum seekers to receive travel documents is a step closer to ensuring the right to leave is effective and meaningful for all.

b. A Duty not to Obstruct the Right to Leave

It is also argued that a duty exists not to obstruct the right to leave for asylum seekers. As Goodwin-Gill and McAdam argue, the right to leave to seek asylum imposes a duty on states not to frustrate the exercise of this right so as to expose individuals to persecution or

53 Hathaway (n 43) 840-51.

54 See further Sara Dehm, 'Passport' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (OUP 2018).

55 Torpey (n 50) 157-60.

other serious harms, in accordance with the principle of good faith.[56] To comply with the right to leave, states must implement and interpret their treaty obligations in good faith and more specifically, contracting parties must refrain from acting against the object and purpose of the Refugee Convention, namely 'to extend the protection of the international community to refugees, and to assure to refugees "the widest possible exercise of ... fundamental rights and freedoms"'.[57] The imposition of migration controls, by destination states in particular, that systematically obstruct departure and block access to protection not only violates the right to leave, but also demonstrates a lack of good faith in upholding the right to seek asylum and obligations of *non-refoulement* and collective expulsion.[58] They may also constitute discrimination. A good faith interpretation requires states to organise their immigration controls so individuals can leave to seek asylum.[59] As Chapter Two demonstrated, the right to control entry operates *within* the confines of international law and states cannot obstruct departure on the pretext that entry will not be granted.

The existence of this duty faces some opposition. Writing in 1996, Hailbronner rejected such an interpretation, arguing that *non-refoulement* obligations only arise when

56 Goodwin-Gill and McAdam (n 5) 358, 370, 383.

57 See Refugee Convention, preamble; Guy S Goodwin-Gill, 'State Responsibility and the "Good Faith" Obligation in International Law' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions: The Clifford Chance Lectures* (Hart Publishing 2004) 93; Goodwin-Gill and McAdam (n 5) 387-90.

58 Goodwin-Gill and McAdam (n 5) 387-88; Ruth Weinzierl and Urszula Lisson, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (German Institute for Human Rights 2007) 68. See also *AEA v Greece* App no 39034/12 (ECtHR, 15 March 2018) [77]-[85].

59 See HRC 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36 [19]; Moreno-Lax, *Accessing Asylum* (n 1) 349; Moreno-Lax, 'Intersectionality' (n 2) 76, 82.

individuals are within state territory or at the border.[60] However, as demonstrated, *non-refoulement* obligations are widely accepted as applying extraterritorially. More problematic is the *Roma Rights* decision, which concerned the interception of six Czech nationals of Roma ethnicity by British authorities stationed at Prague airport as part of a pre-clearance programme targeting Roma asylum seekers. The House of Lords held that neither Article 33 Refugee Convention nor CIL requires states 'to abstain from controlling the movements of people outside its borders who wish to travel to it in order to claim asylum' nor presented themselves, save in a highly metaphorical sense, at the state's frontier.[61] To argue that such measures are incompatible with the Convention's object and purpose and principle of good faith, 'is to argue for the enlargement of the obligations which are to be found in the Convention', which defines refugees as persons outside their state of origin/habitual residence and requires return to frontiers.[62] Hence, the applicants' appeal failed for they were still in the Czech Republic (though the programme was declared unlawful for involving racial discrimination).

According to Law Lords, neither Article 33 nor CIL supports the proposition that *non-refoulement* obligations extend to general deterrence measures denying would-be refugees the ability to leave their own state.[63] However, the decision of one national court

60 Kay Hailbronner, 'Comments on the Right to Leave, Return and Remain' in Vera Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1996) 115-16.

61 (n 11) [26], [64].

62 ibid [18], [20], [63]-[64].

63 Hathaway (n 43) 307; Goodwin-Gill and McAdam (n 5) 380.

is not determinative and moreover, was only based on the Convention and not IHRL.[64] It is argued that the systematic frustration of the right to flee and containment of asylum seekers in third states, with the express purpose of preventing the destination state's obligations from ever being triggered, displays a clear lack of good faith.[65] States are trying to 'avoid or to "divert" the obligation which it has accepted, or to do indirectly what it is not permitted to do directly'.[66] As identified by the CAT in its most recent General Comment on Article 3, to impose obstacles against leaving clashes with the states duty to take preventive measures against possible violations of the *non-refoulement* obligation.[67] Similarly, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has stated that states cannot engage in any activity or conclude agreements which would undermine or defeat the very object and purpose of the right not to be subjected to torture and ill-treatment or of 'any ancillary rights designed to give it effect in practice, such as the rights to leave any country or territory, to seek and enjoy asylum…'.[68] Other bodies have also recognised that states must not adopt measures

64 See Guy S Goodwin-Gill, '*R (ex parte European Roma Rights Centre et al) v Immigration Officer at Prague Airport and another (UNHCR intervening)*' (2005) 17 IJRL 427, paras 24-38.

65 Goodwin-Gill and McAdam (n 5) 388.

66 Goodwin-Gill (n 57) 93.

67 CAT 'General Comment No 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22' (4 September 2018) UN Doc CAT/C/GC/4 [18].

68 UNHRC 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (23 November 2018) UN Doc A/HRC/37/50 [14].

preventing individuals seeking asylum.[69] Therefore, general deterrence measures imposed by destination states should be deemed incompatible with *non-refoulement* and collective expulsion obligations for breaching the principle of good faith.

If refugee and asylum seeker rights are to be taken seriously, 'a reconsideration of the premise underpinning extraterritorial entry controls is necessary. The rights to asylum and to *non-refoulement* require that access to international protection be not unduly obstructed'.[70] To conclude otherwise upholds the protection gap that results from the lack of a general right of entry, where individuals are only protected from *refoulement* or expulsion if within the state's jurisdiction but cannot access the state to begin with.[71] This further reveals the delicate relationship between exit and entry. Overall, to comply with the duty not to obstruct the right to flee, states must ensure their restrictions do not defeat the object and purpose of relevant rights and obligations nor make seeking asylum impossible.

c. A General Facilitative Duty?

As mentioned, the right to leave is often made dependent on having permission to enter another state, alongside destination states requesting third states to prevent irregular migration. A question arising from such scenarios is whether the right to leave for asylum seekers encompasses a general duty requiring states to take steps to *facilitate* their right to leave through regular, safe means, moving beyond the non-obstruction duty to one of actual

69 UNHCR EXCOM Conclusion No 97 (LIV) 'Conclusion on Protection Safeguards in Interception Measures' (2003) UN Doc A/AC.96/987 [(a)]; *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection*, Advisory Opinion OC-25/18, Inter-American Court of Human Rights Series A No 25 (30 May 2018) [122].

70 Moreno-Lax, *Accessing Asylum* (n 1) 467.

71 Asher L Hirsch and Nathan Bell, 'The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime' (2017) 18 Human Rights Rev 417, 418.

realisation. These scenarios also raise complex issues of international responsibility and the lawfulness of such cooperative arrangements, fleshed out in Part III.

According to Hathaway, Goodwin-Gill, and McAdam, states do not have a duty to facilitate travel to their territories for asylum seekers as *non-refoulement* is not equated with a duty to *receive* refugees.[72] In *ND and NT*, the ECtHR considered that although rights must be practical and effective, 'This does not, however, imply a general duty … to bring persons who are under the jurisdiction of another State within its own jurisdiction'.[73] Nonetheless, the ECtHR's statement was made regarding collective expulsion, without appreciation of the right to leave. As argued, the effectiveness of the right to leave for asylum seekers requires it to be read in a comprehensive manner.[74] It has become evident that all components of the migration trajectory – departure, admission, and sojourn – are framed by international law and that the right to leave imposes duties on departure and destination states.[75] Recognition of a general facilitative duty would therefore ensure all surrounding rights and obligations are duly accounted for and fulfilled. Such a duty would be dynamic, variable, and dependent on the circumstances, for example requiring intense cooperation amongst destination, departure states, and other actors when asylum seekers

72 Hathaway (n 43) 301; Goodwin-Gill and McAdam (n 5) 388.

73 *ND and NT v Spain* App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) [221]. See also *European Roma Rights Centre v Immigration Officer at Prague Airport* [2003] EWCA Civ 666, [2003] 4 All ER 247 [37], [43]; *Roma Rights* (n 11) [43], [64].

74 See Moreno-Lax, 'Intersectionality' (n 2) 45.

75 Vincent Chetail, *International Migration Law* (OUP 2019) 162-63.

are trapped in precarious situations to ensure safe departure to another state.[76] States have already committed to international solidarity and responsibility sharing and hence, interpreting the right to leave to seek asylum as generating this facilitative duty is not far-fetched.[77] Proposing a facilitative duty of *departure* may sound akin to asserting a facilitative duty of *admission*, creating a potential incoherence with the right to leave being understood as distinct from entry. However, it is important to view the migration trajectory holistically and the interrelated nature of exit and entry. A state giving meaningful effect to an individual's right to leave by facilitating departure will necessarily result in entry elsewhere following agreement of that state or another, but this does not deny their distinctiveness. As Chapter Two argued, entry continues to stem from other obligations.

Nonetheless, accepting that there is no general facilitative duty is unlikely to be overly problematic. This is where a strength of the right to leave shows. There is a fine line between the duty not to obstruct departure and a duty to create the conditions under which the right can be exercised. Measures appearing to require positive action to facilitate departure, such as granting visas or removing visa requirements altogether, can instead be viewed as an obstruction of the right to leave, namely the refusal to issue a visa as Chapter Five explores.[78] Whether framed as a negative or positive duty, states must ensure that the right to leave for asylum seekers is upheld.

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76 See Vincent Chetail, 'Freedom of Movement and Transnational Migrations: A Human Rights Perspective' in T Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 59.

77 See UNHCR EXCOM 'Note on International Protection' (16 June 2017) UN Doc EC/68/SC/CRP.12, pt II; UNGA 'Report of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees' GAOR 73rd Session Supp No 12 (2 August 2018) UN Doc A/73/12 (GCR) [4]-[5]; UNHCR EXCOM 'Note on International Protection' (10 July 2020) UN Doc A/AC.96/1200 [2]-[3].

78 See den Heijer (n 5) 158.

Conclusion

This chapter demonstrated the fundamental importance of the right to leave in securing the human rights and agency of asylum seekers. Looking at its interplay with other relevant rights and obligations, it argued that the right to leave for asylum seekers is properly understood as a right to leave to seek asylum. The right was shown to be a precondition for seeking and securing asylum. Ultimately, to be granted refugee status and secure protection from *refoulement* and collective expulsion by triggering one's right of entry, persons must be able to leave the state they are in. Additionally, a stricter test was advocated for in assessing violations of the right to leave in this context. The chapter concluded by demonstrating several duties generated by the right to leave to seek asylum. It was argued that states of sojourn have a duty to provide travel documents to asylum seekers and refugees therein. It was also shown that states must not negate the flight of asylum seekers. This requires states to organise their migration policies so as to enable individuals to seek asylum, giving due regard to the right to leave, *non-refoulement*, collective expulsion, and non-discrimination obligations. States may also be obliged more generally to facilitate departure, taking steps towards actual realisation. Obliging states not to obstruct departure and to allow asylum seekers to search for a state to admit them has profound consequences for externalisation strategies, serving to limit the measures states can impose.

PART II

CHAPTER FOUR: JURISDICTION AND INTERNATIONAL RESPONSIBILITY

This chapter provides a broad overview of the concept of jurisdiction in IHRL and the framework of international responsibility for wrongful conduct by states and IOs. Given externalisation is designed to sever jurisdictional links and avoid responsibility for resultant violations against migrants, it is pertinent to understand these concepts. The chapter begins by defining 'jurisdiction' and outlining the settled and penumbral tests for establishing jurisdiction under relevant human rights treaties, specifically extraterritorial jurisdiction. Next, the fundamentals of the law of state responsibility are presented, followed by a brief canvassing of how positive obligations complement these secondary rules and their potential to hold states responsible for violations of the right to leave. Given the myriad ways states and IOs engage in externalisation, this chapter then explores the complex issue of whether the right to leave binds IOs, state responsibility in relation to the wrongful conduct of an IO, and the responsibility of IOs. It concludes by examining questions of shared and joint responsibility when a plurality of actors are involved. This chapter does not seek to provide an exhaustive account of jurisdiction or international responsibility. Rather, it illustrates the current state of the law, uncertainties, and areas of ongoing development, which is applied and expanded upon in Part III.

A. Jurisdiction

'Jurisdiction' is a necessary condition for engaging a state's (or IO's)[1] responsibility for human rights violations under IHR treaties.[2] It is a term of art in IHR treaties, differing from 'jurisdiction' as a matter of GIL, which usually describes the limits of a state's legal competence, being competent to exercise jurisdiction within the limits of its sovereignty (generally drawn along territorial demarcations).[3] In contrast, jurisdiction under IHRL is not concerned with legal competences. Rather, it triggers the applicability of the relevant treaty and corresponding duties to respect, protect, and fulfil the rights of those within its jurisdiction. It is thus a threshold criterion for obligations to be owed by a state to an individual in the first place.[4] Though interrelated and the two often conflated, jurisdiction is also not to be equated with international responsibility. Before questions of responsibility can arise, the alleged victim must fall within the state's jurisdiction.[5] If so, consideration

1 IOs can accede to certain HR treaties eg the EU has acceded to the CRPD and can to the ECHR.

2 Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 24. See eg *Ilaşcu v Moldova and Russia* (2005) 40 EHRR 1030 [311].

3 See Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 104-07, 112-13; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 23-26. See further Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 Israel Law Review 503, 513-15; Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) chs 14 and 15; Malcolm N Shaw, *International Law* (6 edn, CUP 2008) ch 12; Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2013) 12-13.

4 Gammeltoft-Hansen (n 3) 107-12; Milanovic (n 3) 19; Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 LJIL 857, 862-64.

5 Christina Cerna and others, 'Bombing for Peace: Collateral Damage and Human Rights' (2002) 96 Proceedings of the Annual Meeting, March 13-16, American Society of International Law 95, 100; Dominic McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 42-43.

can move to determining whether a violation has occurred followed by allocation of responsibility. As Besson explains, 'Without jurisdiction, there are no human rights applicable and hence no duties, and there can be no acts or omissions that would violate those duties that can be attributed to a state and a fortiori no potential responsibility…'.[6]

Jurisdiction under IHRL is much debated within the jurisprudence and literature, being plagued with uncertainty and constantly developing.[7] States are usually considered to exercise jurisdiction over their territory.[8] There is also widespread agreement that states can exercise jurisdiction and owe obligations to individuals abroad, with IHR treaties having extraterritorial application. While the meaning of jurisdiction varies somewhat across these treaties,[9] broadly speaking, extraterritorial jurisdiction exists whenever a state exercises effective control over territory or individuals, regardless of its competence to

6 Besson (n 4) 867.

7 Leading literature includes: Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009); Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010); Gammeltoft-Hansen (n 3) ch 4; Milanovic (n 3); Besson (n 4); den Heijer (n 2) ch 2; da Costa (n 3); Vassilis P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 MichJInt'l L 129; Conall Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Hart Publishing 2020); Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020).

8 See eg *Banković v Belgium* (2007) 44 EHRR SE5 [59]; Gammeltoft-Hansen (n 3) 56; den Heijer (n 2) 24; Milanovic (n 3) 22, 58-61.

9 Jurisdictional clauses in treaties enshrining the right to leave: ECHR, art 1; ICCPR, art 2(1); ACHR, art 1(1); UNCRC, art 2(1); CIS Convention, art 1; Arab Charter, art 3(1). The ADHR, Apartheid Convention, CEDAW, African Charter, and CRPD are silent on their *ratione loci*, while several ICERD and ICRMW articles contain specific territorial or jurisdictional limitations eg ICERD, arts 3, 6, 14.

act.[10] Despite the different wording of jurisdictional clauses, adjudicative bodies often cite one another and use the same vocabulary, revealing a systemic interpretative approach. Consequently, there are considerable convergences.[11] Nevertheless, differing institutional, normative, and political contexts seem to have resulted in the HRC and Inter-American bodies adopting a more expansive view than the ECtHR, detached from territorial notions.[12] This section demonstrates several routes to finding that an individual falls within the state's jurisdiction (the relevant focus for externalisation).

The starting point in assessing the scope of an instrument is the text itself.[13] Pursuant to Article 2(1) ICCPR, each state party 'undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. Given its inclusion of territory, Article 2(1) is open to two interpretations: covering only individuals both present within a state's territory *and* subject to its jurisdiction, or covering individuals present within state territory *or* those outside but

10 See eg Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78, 79-82; Christina M Cerna, 'The Extraterritorial Scope of Human Rights Treaties: The American Convention on Human Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 141; Gammeltoft-Hansen (n 3) 84-85, 100; Milanovic (n 3) 53, 127-219; da Costa (n 3) chs 1-2.

11 See Cerna (n 10) 145, 152, 157; McGoldrick (n 5) 68-70; James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 165; Gondek (n 7) 221-22, 225; Milanovic (n 3) 4; da Costa (n 3) 147, 175, 205-06.

12 See Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 Law & Ethics of Human Rights 47, 51-52 and generally, Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012).

13 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [108].

subject to that state's jurisdiction.[14] The latter disjunctive position was confirmed by the HRC in General Comment 31: 'State Parties … must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party'.[15] This interpretation, which moves away from an ordinary reading of Article 2(1), was affirmed by the ICJ in its *Wall* advisory opinion.[16] The HRC's General Comment 36 on the Right to Life shows that jurisdiction is much broader than typically understood, focusing on control over rights, impact, and foreseeability. It requires states to ensure the right to life of:

> [A]ll persons subject to its jurisdiction, that is, all persons *over whose enjoyment of the right to life it exercises power or effective control*. This include persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in *a direct and reasonably foreseeable manner*.[17]

14 ibid. See also da Costa (n 3) 17-89.

15 HRC 'General Comment No 31: The Nature of the General Legal Obligation imposed on States Parties' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [10]. See also *Delia Saldias de Lopez v Uruguay*, Communication No 52/1979 (29 July 1981) UN Doc CCPR/C/OP/1 [12.1]-[12.3]; *Lilian Celiberti de Casariego v Uruguay*, Communication No R.13/56 (29 July 1981) UN Doc Supp No 40 A/36/40 [10.1]-[10.3]; *Sergio Euben Lopez Burgos v Uruguay*, Communication No R.12/52 (29 July 1981) UN Doc Supp No 40 A/36/40 [12.1]-[12.3]. See also the passport cases: *Sophie Vidal Martins v Uruguay*, Communication No R13/57 (23 March 1982) UN Doc Supp No 40 A/37/40 [7]; *Carlos Varela Núñez v Uruguay*, Communication No 108/1981 (22 July 1983) UN Doc CCPR/C/OP/2 [6.1], [9.3]; *Mabel Pereira Montero v Uruguay*, Communication No 106/1981 (31 March 1983) UN Doc CCPR/C/OP/2 [5]; *Samuel Lichtensztejn v Uruguay*, Communication No 77/1980 (31 March 1983) UN Doc CCPR/C/OP/2 [6.1], [8.3].

16 *Wall* (n 13) [109], [111]. See also *Case Concerning Armed Activities in the Territory of the Congo (DRC v Uganda)* (Judgment) [2005] ICJ Rep 168 [216].

17 HRC 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36 [63] (emphasis added). Applied in *AS, DI, OI and GD v Italy*, Communication No 3042/2017 (27 January 2021) UN Doc CCPR/C/130/D/3042/2017 [7.5], [7.8].

The US and Israel consistently oppose the ICCPR's extraterritorial applicability, despite established jurisprudence and state practice.[18]

Turning to the European context, Article 1 ECHR provides that 'Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms' in the Convention. By way of contrast, the EUCFR has no jurisdictional threshold, meaning 'EU fundamental rights obligations simply track all EU activities'.[19] Unlike Article 2(1) ICCPR, the ECHR contains no reference to territory. As Jackson points out, 'The troubled history of extraterritorial jurisdiction under the ECHR is well known', marked by the infamous *Banković* decision where aerial bombing by NATO forces outside their states' borders did not amount to jurisdiction.[20] Post-*Banković,* Strasbourg's approach has been more expansive, consistently holding that extraterritorial jurisdiction arises first, where the state exercises effective control over an area (*territorial model*), and second, where state agents exercise authority and control over individuals (*personal model*).[21] In the seminal case of *Al-Skeini v UK*, though still emphasising as in *Banković* that jurisdiction is 'primarily territorial', the ECtHR held that 'whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation

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18 Gondek (n 7) 231-43. See n 71 in ch 2 on potential evolution.

19 Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) para 59.10.

20 Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27 EJIL 817, 820. See also *Banković* (n 8) [54]-[82]; da Costa (n 3) 127, particularly fn 154.

21 *Loizidou v Turkey* (1996) 23 EHRR 513 [62]; *Cyprus v Turkey* (2002) 35 EHRR 731 [76]-[77]; *Issa v Turkey* (2005) 41 EHRR 27 [68]-[71]; *Öcalan v Turkey* (2005) 41 EHRR 18 [91]; *Al-Jedda v UK* (2011) 53 EHRR 23 [85]; *Al-Skeini v UK* (2011) 53 EHRR 18 [133]-[142]; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 [71]-[75]; *Jaloud v Netherlands* (2015) 60 EHRR 29 [139], [152].

under Article 1' to secure the rights as are relevant to that individual's situation.[22] Accordingly, Convention rights can be divided and tailored and the Convention applies beyond the *espace juridique* of contracting states, abandoning several aspects of *Banković*.[23] However, by finding jurisdiction based on the exercise of 'public powers' by UK troops and authority and control over the victims, the Court created confusion surrounding the public powers requirement.[24]

The jurisprudence of the ECtHR shows that effective control over persons has arisen, for example, through arrest, detention, or custody,[25] unlawful killings by state agents,[26] and abduction.[27] Physical power and control over the person proved decisive.[28] Hence, jurisdiction arises not only where a state exercises de jure control, with the principle of exclusive flag state 'jurisdiction', for example, leading the Court to recognise acts taking

22 (n 21) [131], [137]. See also *Issa* (n 21) [71]; *Hirsi* (n 21) [74].

23 *Al-Skeini* (n 21) [137]-[138], [142].

24 ibid [135], [149].

25 *Al-Skeini* (n 21) [149]; *Al-Saadoon and Mufdhi v UK* App no 61498/08 (ECtHR, 30 June 2009) (admissibility) [86]-[89]; *Öcalan* (n 21) [91]; *Al-Jedda* (n 21) [80]-[86]; *Hassan v UK* App no 29750/09 (ECtHR, 16 September 2014) [76]-[80].

26 *Isaak v Turkey* App no 44587/98 (ECtHR, 28 September 2006) (admissibility) 20-21; *Pad v Turkey* App no 60167/00 (ECtHR, 28 June 2007) [54]; *Andreou v Turkey* App no 45653/99 (ECtHR, 3 June 2008) (admissibility) 9-11; *Solomou v Turkey* App no 36832/97 (ECtHR, 24 June 2008) [44]-[45], [51]; *Andreou v Turkey* App no 45653/99 (ECtHR, 27 October 2009) (judgment) [25].

27 See above (n 15): *de Lopez* [10]; *de Casariego* [10.1]; *Lopez Burgos* [12.1].

28 *Al-Skeini* (n 21) [136]. See eg *Öcalan* (n 21) [91].

place on board state vessels as the exercise of extraterritorial jurisdiction.[29] It also arises through de facto control over individuals, including during interceptions,[30] or when boarding and towing a vessel.[31] The underlying normative claim is that states cannot be permitted to 'perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory', replicating the HRC's position.[32] The ECtHR has also developed a test based on decisive influence in a series of cases concerning Transdniestria, where Transdniestria was found to be 'under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation'.[33]

Scholars have identified several other interpretations of the effective control test and separate avenues to establishing jurisdiction.[34] Two interrelated approaches, the functional and 'cause and effect' approaches, are premised on responsibility following the

29 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art 92(1); *Banković* (n 8) [73]; *Medvedyev v France* (2010) 51 EHRR 39 [65]; *Hirsi* (n 21) [75], [77]; Gammeltoft-Hansen (n 3) 106-07, 110. Note that flag states also bear due diligence obligations regarding private vessels flying its flag.

30 *Hirsi* (n 21) [81].

31 *Medvedyev* (n 29) [63]-[67]. See also *JHA v Spain*, Communication No 323/2007 (21 November 2007) UN Doc CAT/C/41/D/323/2007 [8.2].

32 *Issa* (n 21) [71]. See *Lopez Burgos* (n 15) [12.3].

33 *Ilaşcu* (n 2) [392]-[393]; *Ivanţoc v Moldova and Russia* App no 23687/05 (ECtHR, 15 November 2011) [115]-[120]; *Catan v Moldova and Russia* App nos 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) [122]; *Mozer v Moldova and Russia* App no 11138/10 (ECtHR, 23 February 2016) [110]; *Turturica and Casian v Moldova and Russia* App nos 28648/06 and 18832/07 (ECtHR, 30 August 2016) [30].

34 See also Raible (n 7) ch 3.

exercise of power. They, respectively, emphasise the functional or causal relationship between the individual and state in a given situation and in relation to the specific violation.[35] According to Gammeltoft-Hansen, there has been a shift to a functional approach, where 'What matters is not a generalised test of personal or geographic control, but rather the specific power or authority assumed by the State acting extraterritorially in a given capacity'.[36] Jurisdiction 'flows from the de facto relationship established between the individual and the state through the very act itself, or the potential of acting'.[37] In *Al-Skeini*, Judge Bonello in his concurring opinion also proposed a functional approach, focusing on the state's ability to secure the relevant rights:

> Jurisdiction is neither territorial nor extra-territorial: it ought to be functional – in the sense that when it is within a State's authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction.[38]

Similarly, the HRC adopts a functional approach, holding that the reference to jurisdiction is 'not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights'.[39] The IACHR and IACtHR also accept the extraterritorial reach of the ADHR and ACHR, focusing on

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35 Gammeltoft-Hansen (n 3) 101. See also Besson (n 4) 863, 876; Mallory (n 7) 204-06.

36 Gammeltoft-Hansen (n 3) 124.

37 ibid 125, 150-157. For discussion see Tom De Boer, 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection' (2015) 28 JRS 118.

38 (n 21) [12]. See also Shany (n 12) on functional universalism.

39 *de Casariego* (n 15) [10.2]; *Lopez Burgos* (n 15) [12.2].

whether the person falls within the state's authority and control, generally through direct actions, irrespective of location.[40]

Relatedly, under the general 'cause and effect' approach, jurisdiction is established based on actions taken in the state's territory but having effects extraterritorially.[41] In General Comment 36, the HRC predicates jurisdiction on the directness and foreseeability of harm caused to the individual by state conduct.[42] Similarly, the Committee has recognised the extraterritorial application of the right to leave in the Uruguayan passport cases.[43] Though *Banković* rejected cause and effect,[44] as den Heijer highlights, the Court does not always require physical or effective control.[45] The ECtHR has consistently held that 'acts of the Contracting States performed, or *producing effects*, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the

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40 See eg *Saldaño v Argentina*, Inter-American Commission on Human Rights Report No 38/99 (11 March 1999) OEA/Ser.L/V/II.95 Doc 7 Rev at 289 [15]-[20]; *Armando Alejandre Jr v Cuba*, Inter-American Commission on Human Rights Case 11.589 Report No 86/99 (29 September 1999) OEA/Ser.L/V/II.106 Doc 3 Rev at 586 (*Brothers to the Rescue)* [23]-[25]; *Coard et al v United States*, Inter-American Commission on Human Rights Case 10.951 Report No 109/99 (29 September 1999) OEA/Ser.L./V/II.106 Doc 3 Rev at 1283 [37]; *The Environment and Human Rights (State obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017) [36], [71]-[82], [101]-[104].

41 See Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) 20 EJML 373, 382-385.

42 (n 17) [22], [63]. See also *Munaf v Romania*, Communication No 1539/2006 (21 August 2009) UN Doc CCPR/C/96/D/1539/2006 [14.2]-[14.6].

43 See text to n 82 in ch 1.

44 *Banković* (n 8) [75].

45 den Heijer (n 2) 45-49.

Convention'.[46] What is required is a 'direct and immediate' link between the state conduct and harm.[47] However, as Chapter Five discusses, the Court recently held that visa refusals do not amount to de facto control.[48] Moreover, in *Georgia v Russia (II)*, the Court revived *Banković*, excluding any effective control over individuals during bombing and shelling in active hostilities, demonstrating its continued divergence from the expansive direction of other bodies.[49] Importantly, however, it recognised that in previous cases where effective control arose for unlawful killings/firing, they concerned 'isolated and specific acts' involving *proximity*.[50] In sharp contrast, the IACtHR has explicitly recognised extraterritorial effects jurisdiction. Referring to transboundary environmental harm, it held that jurisdiction under Article 1(1) ACHR 'arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human

46 See *Hirsi* (n 21) [71]-[72] (emphasis added).

47 *Andreou* (n 26) admissibility 10-11, judgment [25]. See also *Ilaşcu* (n 2) [317]; *Isaak* (n 26) 19-21; *Pad* (n 26) [54]; *Solomou* (n 26) [44], [48]-[51]; *Panayi v Turkey* App no 45388/99 (ECtHR, 27 October 2009) [27]; *Nada v Switzerland* (2013) 56 EHRR 18 [121]-[122]; *Big Brother Watch v UK* App nos 58170/13, 62322/14 and 24960/15 (ECtHR, 13 September 2018) [271]. cf *Ben El Mahi v Denmark* App no 5853/06 (ECtHR, 11 December 2006) 7-8.

48 *MN v Belgium* App no 3599/18 (ECtHR, 5 March 2020) [118].

49 App no 38263/08 (ECtHR, 21 January 2021) [133]-[144].

50 ibid [131]-[33].

rights violation', being in a position to prevent the harm.[51] This bears similarity to Altwicker's 'effective control over situations' test.[52]

Evidently, the HRC and Inter-American bodies adopt a more expansive approach, requiring the mere exercise of power or control, looking at the direct and foreseeable impact on individuals. In contrast, the ECtHR jurisprudence is often that of 'patch-work' and 'piecemeal'.[53] Nonetheless, support exists in its jurisprudence for the cause and effect approach. The focus now turns to the law of state responsibility.

B. State Responsibility

Establishing the responsibility of a state for violations of the right to leave (and other international obligations) requires recourse to the rules on state responsibility. The ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) provide the general framework governing state responsibility. The Articles are generally viewed as a codification of CIL and an authoritative formulation of the law on state responsibility, contributing to its progressive development.[54] Courts routinely refer to ARSIWA and the

51 *Environment and Human Rights* (n 40) [102], [104(h)]. See also *Brothers to the Rescue* (n 40) [25]; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 [101], [204] on due diligence.

52 Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 EJIL 581.

53 *Al-Skeini* (n 21) [5] (Concurring Opinion Bonello J); Gondek (n 7) 227; De Boer (n 37) 125.

54 See ARSIWA Commentary, 31 [1]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Bosnian Genocide* case) [401]; *Kotov v Russia* App no 54522/00 (ECtHR, 3 April 2012) [30]; James Crawford, *State Responsibility: The General Part* (CUP 2013) 43-44; André Nollkaemper, 'Introduction' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 3.

accompanying Commentary, illustrating their authoritative nature.[55] Moreover, applying the principle of systemic integration, rules 'cannot be interpreted and applied in a vacuum', including those under IHR treaties.[56] ARSIWA therefore provides the appropriate framework for analysis.

As a collection of secondary rules, the law of state responsibility specifies the general conditions for a state to be held responsible for internationally wrongful acts or omissions (an 'IWA') and the legal consequences that follow.[57] The central premise of ARSIWA, reflected in Article 1, is that 'Every internationally wrongful act of a State entails the international responsibility of that State'. This affirms the basic principle of *independent responsibility,* where 'each State is responsible for its own conduct in respect of its own international obligations', known as direct responsibility.[58] As addressed below, states can also be responsible for participating in another's wrongful conduct.[59]

a. Direct Responsibility

Article 2 ARSIWA provides that to establish an IWA of a state, an act or omission must be both attributable to that state and constitute a breach of one of its international obligations.

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55 See *Jaloud* (n 21) [98]; Nollkaemper (n 54) 3; James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018).

56 *Banković* (n 8) [57]. See also ARSIWA, art 55 *lex specialis.*

57 ARSIWA Commentary, 31 [1], [4(a)]; Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 85; Crawford (n 54) 38, 64-65.

58 ARSIWA Commentary, 32 [1], 33-34 [6], 64 [1].

59 ibid 32-34 [6].

a. Attribution

The rules on attribution determine when conduct by persons or entities can be said to be that of the state.[60] Conduct is attributable to a state if committed by: any of its organs or de facto organs (Article 4);[61] persons or entities empowered by the law of that state to exercise elements of governmental authority (Article 5); the organ of another state placed at its disposal, exercising elements of governmental authority (Article 6); or persons or groups instructed by, or under the direction or control of, the state in carrying out the wrongful conduct (Article 8). Article 7 clarifies that even when organs/entities act ultra vires, conduct remains attributable to the state.[62]

Article 4 permits automatic attribution to the state where the acting entity has an institutional or organic link to it as a state organ. An organ includes any person or entity holding that status under internal law (Article 4(2)) as well as a body that 'does in truth act' as an organ.[63] In contrast, Article 5 was introduced to address the increasing number of 'parastatal entities' empowered to exercise elements of governmental authority, notably private actors.[64] Article 5 is not concerned with whether the state directs or controls the

60 ibid 35 [5]. See ARSIWA, arts 4-11; ibid ch II.

61 See *Bosnian Genocide* case (n 54) [392]; den Heijer (n 2) 72-73; Crawford (n 54) 124-26.

62 ARSIWA Commentary, 39 [8].

63 ibid 42 [11]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) (1986) ICJ Rep 14 [109]-[110]; *Bosnian Genocide* case (n 54) [390]-[395]. See Hannah Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (CUP 2011) 93-95; Crawford (n 54) 124-26.

64 ARSIWA Commentary, 42-43 [1]-[2].

entity (as in Article 8), focusing instead on the conferral of authority.[65] Article 6 covers situations of 'transferred responsibility'.[66] For Article 6 to apply, the entity placed at the receiving state's disposal must be an organ of the sending state and the conduct must involve the exercise of governmental authority of the receiving state. Critically, to be regarded as conduct of the receiving state, the sending state's organ must 'act in conjunction with the machinery of that [receiving] State and under its exclusive direction and control, rather than on instructions from the sending State'.[67] An organ acting on the joint instructions of both may instead lead to Article 47 joint responsibility, as discussed below.

Lastly, Article 8 covers two exceptional situations where a state bears responsibility for the wrongful acts of private persons or entities.[68] The first concerns persons or entities acting on state instruction, while the second covers persons or entities acting under the state's direction or control. The decisive criterion is a control link; that the state exercises de facto power or control over the non-state actors conduct. Critically, as the Commentary makes clear, the instructions, direction, or control must closely relate to the conduct said to amount to an IWA.[69] The standard of control has been much debated. The ICJ considers the test to be 'effective control', requiring more than a general situation of dependence and

65 ibid 43 [7]; Gammeltoft-Hansen, *Access* (n 3) 180.

66 ARSIWA Commentary, 44 [5].

67 ibid 44 [1], [2]. cf *Jaloud* (n 21) [151].

68 See Gammeltoft-Hansen, *Access* (n 3) 186; Crawford (n 54) ch 5.

69 ARSIWA Commentary, 48 [7].

support,[70] while the ICTY adopts the more lenient standard of 'overall control', similar to the ECtHR.[71] The ARSIWA Commentary supports the ICJ's effective control standard, providing that conduct is only attributable to the state if it directed or controlled the specific operation and the wrongful conduct was integral to the operation.[72] It follows that Article 8 requires a high degree of direction or control over the operation, though the specific contours remain unclear.[73]

It is pertinent to briefly mention that although attribution and jurisdiction under IHRL are conceptually different, they may, and often do, overlap.[74] Meeting attributional or jurisdictional tests can be based on the same fact patterns. Case law tends to 'leap' over questions of attribution and in the average case such questions are not in issue. Jurisdiction will necessarily be established where an individual is brought under the control of the state through an act, and that act has to be attributable to the state to begin with.[75] As Milanovic points out, attribution may be a preliminary question to establishing jurisdiction. However, this does not mean the conduct establishing jurisdiction is the same as the conduct said to

70 *Nicaragua* (n 63) [115]; *Bosnian Genocide* case (n 54) [397]-[407].

71 *Prosecutor v Tadić* (Judgment) ICTY-94-1-A (15 July 1999) [115]-[137]. See *Loizidou* (n 21) [54]-[56]; *Cyprus v Turkey* (n 21) [77].

72 ARSIWA Commentary, 47 [3], 48 [5]. See Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 ICLQ 493; Crawford (n 54) 156.

73 See Tonkin (n 63) 114-17, 119-21.

74 Milanovic (n 3) 41-53.

75 den Heijer (n 2) 111.

amount to a violation.[76] It remains necessary to determine whether the latter conduct is attributable to the state (or that it violated a positive obligation). Under the personal model however, there may be almost complete overlap between attribution and jurisdiction, for example, detention amounting to deprivation of liberty.[77]

b. Breach of an International Obligation

The second condition for establishing the direct responsibility of a state, per Article 2(b), is that there has been a breach of an international obligation by that state.[78] For present purposes, the state must be bound by the right to leave and its conduct characterised as a violation. As above, the state must have jurisdiction to trigger the applicability of the right under the relevant treaty. Pertinent to the existence of a breach are Articles 20–25 ARSIWA, which set out circumstances precluding the wrongfulness of conduct that would otherwise breach a state's obligations.[79] Relevant defences are addressed in Part III.

b. Indirect Responsibility

States can still bear responsibility even when not the primary wrongdoer. ARSIWA outlines three instances of indirect or derived responsibility, which holds one state responsible in relation to the IWA of another state, recognising that wrongful conduct often involves collaboration amongst states (or IOs). Indirect responsibility can arise through aid or assistance (Article 16), direction and control over the acting state (Article 17), and

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[76] However, *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25 [206]; *Al Nashiri v Poland* (2015) 60 EHRR 16 [517] appear to collapse the two.

[77] Milanovic (n 3) 51-53.

[78] See also ARSIWA, art 12; ARSIWA Commentary, 54 [1].

[79] Consent (Article 20), self-defence (Article 21), countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24), and necessity (Article 25). See ARSIWA Commentary, 71 [2].

coercion of the acting state (Article 18). Articles 16-18 amount to exceptions to the principle of independent responsibility, representing the 'exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another'.[80] Article 19 provides that this is without prejudice to the responsibility of the state which commits the IWA, or any other state. The discussion is limited to Articles 16 and 17, as Article 18 applies only in extreme cases. Notably, these Articles do not have a jurisdictional requirement. However, if the state is not exercising jurisdiction under the relevant IHR treaty, the respective body will lack jurisdiction *ratione materiae*.[81]

a. Aid and Assistance

Article 16 contains the general rule on aid and assistance (aka complicity).[82] It provides that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.[83]

80 ARSIWA Commentary, 64 [5] (cf 67 [10]). See Crawford (n 54) ch 12.

81 Milanovic (n 3) 20.

82 See generally John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 BYBIL 77; Kate Nahapetian, 'Confronting State Complicity in International Law' (2002) 7 UCLA Journal of International Law and Foreign Affairs 99; Georg Nolte and Helmut Philipp Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law' (2009) 58 ICLQ 1; Aust (n 57); Crawford (n 54) 399-412; Miles Jackson, *Complicity in International Law* (OUP 2015); Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing 2016). The ICJ in the *Bosnian Genocide* case (n 54) [491] held that 'complicity' is similar to 'aid or assistance' under CIL.

83 See also ARSIWA, art 41(2).

The ICJ has confirmed that it reflects CIL.[84] Article 16 holds the assisting state responsible for facilitating or assisting the primary state commit a wrongful act.[85] The assisting states responsibility is derived from and depends on the wrongful act of the primary wrongdoer. Notably, aiding or assisting in a breach becomes an IWA in itself. The assisting state is not responsible as such for the IWA of the primary wrongdoer, distinguishing Article 16 from the joint responsibility of co-perpetrators under Article 47.[86] Responsibility is incurred only to the extent such assistance caused or contributed to the IWA.[87] Article 16 thus bears greater semblance to a primary rule. Importantly, given there is no requirement for control over the acting state, complicity bridges the lack of direct connection to the eventual victim, operating as an alternative when wrongful conduct cannot be attributed to the assisting state.[88]

The rules on 'aid and assistance' are not yet fully developed, with their exact meaning and contours unclear.[89] The ARSIWA Commentary on Article 16 sets out three conditions as to scope:

> First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so;

84 *Bosnian Genocide* case (n 54) [420]. See Nolte and Aust (n 82) 7-10; Aust (n 57) ch 4.

85 Samuel Shepson, 'Jurisdiction in Complicity Cases: Rendition and *Refoulement* in Domestic and International Courts' (2015) 53 ColumJTransnat'l L 701, 712.

86 ARSIWA Commentary, 67 [10]; Aust (n 57) 52, 421; Crawford (n 54)

87 ARSIWA Commentary, 66 [1].

88 Aust (n 57) 211.

89 Nolte and Aust (n 82) 1, 10. See *Bosnian Genocide* case (n 54) [419]-[24].

> and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.[90]

There is considerable debate over what constitutes the requisite mental element under Article 16(a). There are two key issues. First, the meaning of 'knowledge', including whether knowledge encompasses only actual or also constructive knowledge ('should have known') and if wilful blindness is sufficient; and second, whether the assisting state must possess an *intention* to facilitate the IWA.[91] Diverging from the text itself, the Commentary requires the assisting state be aware of the circumstances in which its aid or assistance will be used and that it 'intended by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.[92] In the *Bosnian Genocide* case, the ICJ held that constructive knowledge is insufficient and complicity in genocide does not arise 'unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent' of the principal perpetrator, referring to Article 16 by way of analogy.[93]

Though remaining unresolved, Moynihan concludes, following an in-depth assessment of sources, that the assisting state must have actual or near-certain knowledge that its assistance will be used for unlawful purposes or is wilfully blind.[94] Constructive knowledge is insufficient. Similarly, Jackson supports a standard of 'awareness with

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90 ARSIWA Commentary, 66 [3].

91 See Nolte and Aust (n 82) 14; Aust (n 57) 230-49; Marko Milanovic, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 EJIL 669, 682-84; Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Research Paper, Chatham House 2016) 10-22.

92 ARSIWA Commentary, 66 [4]-[5].

93 (n 54) [420]-[421]. See Nolte and Aust (n 82) 10-14.

94 Moynihan (n 91) 14-15. See also Quigley (n 82) 116-17; Jackson, *Complicity* (n 82) 161-62; Lanovoy (n 82) 222, 237, 240.

something approaching practical certainty as to the circumstances of the principal wrongful act'.[95] In contrast, Aust suggests that wrongful intent is required, where the assisting state must intend to contribute to the *commission* of the IWA, rather than the outcome.[96] However, he acknowledges that states cannot deny their complicity where wrongful acts are manifestly occurring and a due diligence standard may be appropriate in IHRL.[97] As Moynihan recognises, the two positions can be reconciled, for actual or near-certain knowledge can be considered a form of intent whatever the assisting state's purpose (or at least a basis from which intent can be inferred).[98] Moreover, greater weight should be given to the text of Article 16, which does not mention intent, especially when a discrepancy with the Commentary exists.[99]

The second condition specified by the ILC is that the support actually facilitates the wrongful act. The aid or assistance must be 'clearly linked to the subsequent wrongful conduct' and while no particular degree of support is necessary, it must make a significant

95 Jackson, *Complicity* (n 82) 161-62.

96 Supported by Nolte in Nolte and Aust (n 82) 14-15; Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 286; Crawford (n 54) 408.

97 Aust (n 57) 237-49, 420.

98 Moynihan (n 91) 21. See also Nolte and Aust (n 82) 15; Aust (n 57) 242-43; Crawford (n 54) 408; Jackson, *Complicity* (n 82) 160.

99 Giorgio Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85 BYBIL 10, 19-20.

contribution.[100] However, the contribution cannot be too substantial so as to form a necessary element of the IWA, as this would lead to joint responsibility. Aid and assistance, left undefined, encompasses a wide range of conduct, including training, financial, or logistical support, material aid, permission to use military bases, provision of intelligence, and legal or political aid.[101] This suggests the need for positive action, excluding omissions from Article 16's ambit.[102] It follows that incitement, association, or general cooperation with a state employing unlawful methods is insufficient to trigger Article 16.[103] Fundamentally, Article 16 imposes responsibility for support which is prima facie lawful. Wrongfulness is thus established through a nexus between lawful support, wrongful conduct, and actual or near-certain knowledge.[104] Lastly, Article 16(b) requires opposability, namely that the assisting state be bound by the same obligation as the primary wrongdoer. It is generally accepted that states can owe relatively identical obligations

100 ARSIWA Commentary, 66 [5]. Note inconsistency within the Commentary: 67 [10]. However, the ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' [2011] YBILC Vol II(2) 46 (ARIO Commentary) 66 [4] clarifies that a 'significant' contribution is required. See Aust (n 57) 419-20; Crawford (n 54) 402; Jackson, *Complicity* (n 82) 156–157; Lanovoy (n 82) 184-86.

101 ARSIWA Commentary, 66-7 [7]-[9]; Aust (n 57) 198-99.

102 See *Bosnian Genocide* case (n 54) [432]; Crawford (n 54) 403-05. cf Nolte and Aust (n 82) 10; Aust (n 57) 227-30.

103 Aust (n 57) 209, 219; Crawford (n 54) 403. See Miles Jackson, 'State Instigation in International Law: A General Principle Transposed' (2019) 30 EJIL 391.

104 Aust (n 57) 273, 419.

derived from distinct, parallel sources to meet Article 16(b).[105] Moreover, this requirement is unproblematic when the obligation is one of CIL, like the right to leave.

In sum, although many forms of support can amount to aid and assistance, Article 16's threshold remains high, only applying where there is an unequivocal link between the support and IWA and where the support makes significant contribution, with the mental element construed narrowly by the ILC and some commentators.[106]

b. Direction and Control

Indirect responsibility can also arise under Article 17, which provides that 'A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act', subject to the same knowledge and opposability requirements. As Crawford advances, the limited number of cases in which Article 17 has been invoked makes it difficult to ascertain its scope and whether it amounts to CIL.[107] What is known, is that Article 17 entails the responsibility of the directing state *for the act itself,* having directed and controlled the act in its entirety.[108] However, this does not preclude the directed state incurring responsibility for its own wrongful conduct, per

105 See *Nicaragua* (n 63) [181]; ibid 263-64, 420-21; Crawford (n 54) 410; Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 ColumJTransnat'l L 235, 281.

106 Nolte and Aust (n 82) 7, 10, 15; den Heijer (n 2) 104.

107 Crawford (n 54) 415.

108 ARSIWA Commentary, 68 [1].

Article 19. Being directed by another state does not amount to a defence under ARSIWA, it being 'incumbent upon it to decline to comply with the direction'.[109]

To trigger Article 17, direction *and* control must be exercised over the wrongful conduct. Control involves 'cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern', while direction means 'actual direction of the operative kind', not mere incitement or suggestion.[110] Moreover, the mere power to exercise such direction or control is insufficient.[111] Unlike Article 16, the Commentary on Article 17 does not suggest that the mental element equates to intent. On opposability, Article 17(b) requires the act to have been 'wrongful had it been committed by the directing and controlling State itself'. As the Commentary emphasises, 'The essential principle is that a State should not be able to do through another what it could not do itself'.[112] However, recourse is typically had to substantive obligations rather than these secondary rules.

c. Positive Obligations

As various scholars point out, adjudicative bodies tend to incorporate instances of derived responsibility into the well-developed doctrine of positive obligations under IHRL,

109 ibid 69 [9].

110 ibid 69 [7].

111 ibid 68-69 [6].

112 ARSIWA Commentary, 69 [8].

resorting to the latter when necessary to avoid issues with attribution.[113] In particular, primary rules have the potential to hold complicit states responsible, including rules specifically proscribing complicity,[114] as well as those fulfilling a similar function, notably positive obligations. In exploring the right to leave for asylum seekers, Chapter Three highlighted how positive obligations are not subject to hard-edged tests. They operate differently depending on the circumstances, whether the right is absolute or qualified, and the level of discretion afforded to the state in discharging its obligations.[115] The general obligation to protect requires the state to exercise due diligence and take all reasonable steps to prevent violations being committed against individuals under its jurisdiction.[116] In the influential judgement of *Velásquez Rodríguez v Honduras*, the IACtHR held that states will bear responsibility 'not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it'.[117] Direct responsibility is triggered where the state fails to prevent violations by other states or non-state actors, or respond

113 Maarten den Heijer, 'Shared Responsibility before the ECtHR' (2013) 60 NILR 411, 421-24; Helen Keller and Reto Walther, 'Evasion of the International Law of State Responsibility? The ECtHR's Jurisprudence on Positive and Preventive Obligations under Article 3' (2019) 24 IJHR 957; Rosana Garciandia, 'State Responsibility and Positive Obligations in the European Court of Human Rights: The Contribution of the ICJ in Advancing towards More Judicial Integration' (2020) 33 LJIL 177.

114 See eg Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art III(e); *Bosnian Genocide* case (n 54) [167]-[169], [381].

115 See Vladislava Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) 87 NordJInt'l L 344.

116 See Robert P Barnidge, 'The Due Diligence Principle Under International Law' (2006) 8 IntCLRev 81; Monica Hakimi, 'State Bystander Responsibility' (2010) 21 EJIL 341, 371-76 and generally Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020).

117 Inter-American Court of Human Rights Series C No 4 (29 July 1988) [172], [174]. See also *Godínez Cruz v Honduras*, Inter-American Court of Human Rights Series C No 5 (20 January 1989) [175]-[188]; HRC 'General Comment No 31' (n 15) [8].

adequately with an investigation, punishment, and compensation. The state is therefore responsible for its failure to protect (despite some cases attributing the violation itself to the state), avoiding the need for derived responsibility.[118] Critically, the state need not be the source of or directly participate in the violation; its passivity or provision of considerable support is sufficient.[119] This allows shared responsibility (explored below) between the state perpetrating the violation and the state failing to discharge its duty to protect to be fashioned through substantive obligations.[120]

Evidently, positive obligations go beyond non-assistance (unlike Article 16), requiring proactive legal, political, administrative, or other measures.[121] Such duties are unquestionably owed to individuals within state territory. Extraterritorially, positive duties are commensurate with the degree of control the state wields over potential complainants, or its influence over a particular situation or the abusers, and its capacity to prevent violations.[122] It follows that a state exercising jurisdiction may lack the capacity to protect in a specific situation, resulting in the chain of causation breaking. Nonetheless, as Part III

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118 See *Velásquez Rodriguez* (n 117) [185]; *Loizidou* (n 21) [56]; *Cyprus v Turkey* (n 21) [76]-[77]; *El-Masri* (n 76) [206], [211], [239]-[241]; *Al Nashiri* (n 76) [517], [531].

119 Hakimi (n 116) 342, 365-67.

120 See eg *Corfu Channel Case* (*UK v Albania*) (Merits) [1949] ICJ Rep 4, 18-23; *Ilaşcu* (n 2) [392]-[393]; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [284]-[285], [291]-[293]; *MSS v Belgium and Greece* (2011) 53 EHRR 2 [263]-[264], [321], [358]-[359], [367]; den Heijer, 'Shared Responsibility' (n 113) 438-39.

121 See eg *McCann v UK* (1996) 21 EHRR 97 [161]-[162]; *Velásquez Rodriguez* (n 117) [175]-[176]; *Osman v UK* (2000) 29 EHRR 245 [115]-[116]; *González et al ('Cotton Field') v Mexico*, Inter-American Court of Human Rights Series C No 205 (16 November 2009) [236], [243]-[247]; *Opuz v Turkey* (2010) 50 EHRR 28 [128]-[130]. See Stoyanova (n 115) 366-70.

122 See *Ilaşcu* (n 2) [313]-[318], [331]; *Bosnian Genocide* case (n 54) [430]-[431]; Hakimi (n 116) 364-67; den Heijer, *Extraterritorial Asylum* (n 2) 52-55, 87-90; Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 HRLRev 309.

shows, states are obliged to configure their relationships so as to ensure they uphold their positive obligations. This discussion reveals the functional similarity of positive obligations to Article 16, with the state bearing responsibility under the former for complicity through assistance or inaction, when it 'knew or ought to have known' there was a 'real and immediate risk' of violations occurring.[123] Unlike Article 16, positive obligations capture omissions.

Scholars such as Corten and Klein have questioned the usefulness of Article 16, given it is generally easier to resort to due diligence obligations.[124] Complicity is accompanied by several difficulties: a higher mental element of knowledge, or even intent, compared with mere constructive knowledge or risk; adjudicators may have to rule on the lawfulness of the principal perpetrator's conduct, which may be impermissible in the latter's absence in light of the *Monetary Gold* principle or where the primary conduct was by a non-contracting party;[125] and IHR treaties do not directly prohibit aid and assistance. However, these concerns are surmountable. Given *non-refoulement* obligations have been read into provisions proscribing torture and other ill-treatment, a direct prohibition on complicity is not necessary and could be read into obligations. *Non-refoulement* represents

123 *Osman* (n 121) [116]. See also *Bosnian Genocide* case (n 54) [430]-[431]; *Nicaragua* (n 63) [116]; *Hirsi* (n 21) [131]. See further Tom Dannenbaum, 'Public Power and Preventive Responsibility: Attributing the Wrongs of International Joint Ventures' in André Nollkaemper, Dov Jacobs and Jessica NM Schechinger (eds), *Distribution of Responsibilities in International Law* (CUP 2015) 208-15 on the functional similarity between due diligence and attribution.

124 Olivier Corten and Pierre Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the *Corfu Channel* Case' in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge 2012).

125 *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA)* (Preliminary Objections) [1954] ICJ Rep 19 [32].

a form of 'risk-based responsibility for complicity', analogous to Article 16.[126] Besides, a potential bar to *admissibility* before a tribunal does not vitiate the purpose of Article 16, and the fact another state has or could commit a violation can be used to trigger jurisdiction and responsibility, similar to *refoulement* and extradition cases based on speculative risk.[127] Meanwhile, positive obligations bridge the gap between primary and secondary rules where otherwise non-attributable acts or those insufficient to establish derived responsibility would result in a legal vacuum.[128] Therefore, both avenues are pursued in this thesis.

C. International Organisations

Given the role of IOs in designing and implementing externalised migration control, it is necessary to briefly examine whether they bear human rights obligations, followed by the relevant rules on holding states responsible in relation to the IWA of an IO and the responsibility of IOs for its own wrongful conduct and that of a state.[129]

126 Aust (n 57) 397. See also Tzevelekos (n 7) 160.

127 ARSIWA Commentary, 67 [11]; Aust (n 57) 396, 421 (suggesting most international courts do not have such a strict indispensable third-party rule); Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strasbourg?' (2018) 20 EJML 396, 420-21.

128 See Corten and Klein (n 124) 333; Aust (n 57) 415-16, 423.

129 See notably Moshe Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Martinus Nijhoff 1995); Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007); Jan Wouters and others (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010); Jan Klabbers, *Advanced Introduction to the Law of International Organizations* (Edward Elgar 2015); Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016); Jan Klabbers (ed), *International Organizations* (Routledge 2016); Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (OUP 2017); Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2019).

a. Obligations

Identifying which international obligations are incumbent on IOs is highly complex and uncertain terrain. For present purposes, the key question is whether the right to leave binds IOs. It is now beyond doubt that IOs possess a separate legal personality, are capable of bearing obligations, and can incur responsibility for violations.[130] There are many sources of obligations for IOs, including those 'incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.[131] However, IOs are not bound by IHR treaties (except the EU which is party to the CRPD), begging the question of which norms bind them and how.[132] While the general consensus is that IOs must uphold at least some, if not all, human rights, there remains significant disagreement over whether obligations derive from CIL, general principles, or the treaty obligations of member states, and their scope.[133] Some scholars conclude that IOs take on the obligations of the states that create them, 'succeeding' to their

130 See *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179; ILC, 'Draft Articles on the Responsibility of International Organizations' [2011] YBILC Vol II(2) 40, Annex to UNGA Res 66/100 (9 December 2011) UN Doc A/RES/66/100 (ARIO) art 2(a).

131 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73 [37].

132 Jan Wouters and others, 'Accountability for Human Rights Violations by International Organisations: Introductory Remarks' in Jan Wouters and others (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 5-10; Klabbers, *Advanced Introduction* (n 129) 89-96.

133 Wouters and others, 'Accountability' (n 132) 6-7 and accompanying fns; Kristina Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 HarvInt'l LJ 325; Ferstman (n 129) ch 2.

obligations.[134] Similarly, under the IOs-as-vehicle view, given they are agents of state parties to treaties, IOs are also subject to IHRL, otherwise states could evade their obligations through IOs.[135] The least contentious position is that obligations reaching the status of CIL, for example many of those enshrined in the UDHR and ICCPR, are opposable to IOs; however, this too remains controversial.[136]

The simplest case concerns the EU. EU institutions, bodies, and Member States are bound to respect the EUCFR when implementing EU law.[137] Though the right to leave is not expressly enshrined in Article 45 EUCFR on free movement and residence, it is nonetheless binding as a general principle of EU law, since fundamental rights guaranteed in the ECHR and resulting from the constitutional traditions common to the Member States 'constitute general principles of the Union's law', with general principles representing an important source of new or additional rights outside the Charter for inclusion in EU law.[138]

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134 See August Reinisch, 'Securing the Accountability of International Organizations' in Jan Klabbers (ed), *International Organizations* (Routledge 2016) 137-38; Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (6th edn, Brill Nijhoff 2018) 1037. See for the EU: Case C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* EU:C:2011:864, [2011] ECR I-13755 [50]-[51], [101], [107].

135 See George Kent, 'The Human Rights Obligations of Intergovernmental Organizations' (2005) 42 UN Chronicle 32, 33; Daugirdas (n 133) 345-57; Bordin (n 129) 82-85, pt 1 generally.

136 See Olivier De Schutter, 'Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility' in Jan Wouters and others (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 62–64, 72–73; Daugirdas (n 133) 331-35, 357-72; Reinisch (n 134) 134-36; Ferstman (n 129) 28-42; Schermers and Blokker (n 134) 1046-47. See further on the doctrinal debate José Alvarez, 'Review of Dan Sarooshi, International Organizations and their Exercise of Sovereign Powers' (2007) 101 AJIL 674, 677-78; Jan Klabbers, 'Sources of International Organizations' Law: Reflections on Accountability' in Jean d'Aspremont and Samantha Besson (eds), *Oxford Handbook of the Sources of International Law* (OUP 2017) 993-1000.

137 EUCFR, art 51(1).

138 TEU, art 6(3); EUCFR, preamble, art 52(3); Case C–112/00 *Schmidberger v Austria* EU:C:2003:333, [2003] ECR I-5659 [71]-[73]; Emily Hancox, 'The Relationship Between the Charter and General Principles: Looking Back and Looking Forward' (2020) 22 CYELS 233.

The CJEU has also held that the right of free movement for EU citizens includes the right to leave one's state of origin and other Member States.[139] As an EU agency, the European Border and Coast Guard Agency (EBCG) (commonly known as Frontex) is also bound to uphold the EUCFR and general principles, including the right to leave.[140] Frontex enjoys legal personality under its grounding Regulation and is capable of bearing liability under EU law.[141] However, most scholars conclude that it does not enjoy *international* legal personality within the meaning of Article 2(a) ARIO and thus, the EU bears responsibility for the IWA's of Frontex.[142] Notably, in its 2016 agreement with the UN, IOM undertook:

> [T]o conduct its activities in accordance with the Purposes and Principles of the Charter of the United Nations and with due regard to the policies of the United Nations furthering those Purposes and Principles and to other relevant instruments in the international migration, refugee and human rights fields.[143]

In addition to being bound by CIL, 'IOM's mandate has evolved to include the protection of migrants' pursuant to its internal law and established practice, including as an implied power, through constitutional interpretation of its mandate, and under its binding

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139 Case C-430/10 *Hristo Gaydarov* EU:C:2011:749, [2011] ECR I-11637 [24]-[26].

140 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1, preamble 103, arts 5(4), 48(1), 80(1).

141 ibid art 93(1).

142 See Maïté Fernandez, 'The EU External Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill Nijhoff 2016) 398 fn 106; Ferstman (n 129) 36; Melanie Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (OUP 2018) 29-32, 86-88. cf Izabella Majcher, 'Human Rights Violations during EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?' (2015) Silesian Journal of Legal Studies 45, 48-51, fn 32.

143 UN-IOM Agreement, art 2(5). See also IOM, 'Policy on Protection' (7 September 2015) C/106/INF/9.

agreement with the UN.[144] IOM has also stated that its provision of safe transportation and evacuation in conflict situations 'contributes to the full realisation of the right to leave' as well as its commitment to ensuring the rights of migrants are respected during its activities, confirming IOM's duty to protect the rights of migrants, including their right to leave.[145]

Settling all the controversies over which obligations bind IOs and how is beyond the scope of this thesis. Nevertheless, this thesis follows the preponderant yet still controversial view under current PIL scholarship that most human rights, particularly those of customary status, bind IOs, and so assumes IOs are bound by the right to leave. Such uncertainty may, however, be a barrier to implementing the responsibility regime for IOs.[146] While issues also arise vis-à-vis immunities and lack of fora, responsibility is not contingent on the existence of judicial remedies.[147]

b. Responsibility

The framework for the responsibility of IOs is set out in the Articles on the Responsibility of International Organisations (ARIO).[148] As its Commentary points out, given the limited practice concerning the responsibility of IOs, the Articles represent progressive development, rather than codification. They therefore do not, yet, have the same

144 Vincent Chetail, *International Migration Law* (OUP 2019) 372-77.

145 IOM, 'The Human Rights of Migrants - IOM Policy and Activities' (12 November 2009) MC/INF/298 [11], [18].

146 Pierre Klein, 'Responsibility' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016) 1035, 1043-45.

147 See generally Stian Øby Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (CUP 2020).

148 (n 130).

authoritative weight as ARSIWA.[149] Moreover, ARIO sets out a general regime, applicable only to the extent the IO has not adopted its own responsibility rules.[150] Hence, the responsibility of IOs and states in this context is still evolving.

Article 1 makes clear that the Articles apply first, to the responsibility of an IO for an IWA and second, the responsibility of a state in relation to the IWA conduct of an IO. The latter is dealt with first to complete the previous discussion on state responsibility. Article 57 ARSIWA left this possibility open, providing that ARSIWA is 'without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization'. This can arise in several ways. First, states may bear derived responsibility for being implicated in the conduct of an IO. Articles 58-60 ARIO are analogous to Articles 16-18 ARSIWA on aid and assistance, direction and control, and coercion respectively. Notably, the state need not be a member of the IO. Per Article 63, these articles are without prejudice to the responsibility of any other state or IO. Arguably, the aforementioned principles governing Articles 16-18 ARSIWA apply, mutatis mutandis, to Articles 58-60.[151]

Second, member states can bear responsibility for the conduct of the organisation they are part of. Tensions exist over when the veil should be pierced to hold members responsible for their own conduct within the framework, or at the instigation, of an IO.[152]

149 ARIO Commentary, 46-47 [5].

150 ARIO, art 64. See Klein (n 146) 1027-28.

151 ARIO Commentary, 48 [7], 97 [1], [3], 98 [3]; Crawford (n 54) 410-11, 418.

152 Niels M Blokker, 'Preparing Articles on Responsibility of International Organizations: Does the International Law Commission Take International Organizations Seriously? A Mid-term Review' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 323, 331-32; Crawford (n 54) 343-45.

As Klein aptly posits, the obvious concern is to ensure cases do not fall in the gap between state and IO responsibility.[153] Article 61 on circumvention and Article 62 on acceptance of responsibility and reliance highlight that the responsibility of an IO is generally not coupled with the concurrent liability of a member state.[154] Article 61 is pertinent here. It provides that a member state incurs responsibility where it uses an IO to circumvent one of its obligations by causing the organisation to commit an act that, if committed by the state, would amount to an IWA. The act does not need to be wrongful for the IO and where it is, no responsibility would arise for it.[155] Article 61 aims to counteract situations where a state intends to escape its obligations by taking advantage of, and acting through, the organisation's separate personality.[156] For responsibility to arise, the IO must be afforded competence relating to the subject matter of an obligation of the state, which could occur through the transfer of state functions or an IO established to exercise functions states may not have.[157]

In the leading case of *Bosphorus v Ireland*, cited in the Article 61 Commentary as affirming state responsibility in this context, the ECtHR held that member states of an IO to which they have transferred sovereign power remain responsible under the ECHR for 'all acts and omissions of its organs regardless of whether the act or omission in question

153 Klein (n 146) 1042.

154 ARIO Commentary, 100 [2]; Crawford (n 54) 189, 423-34; Catherine Brölmann, 'A Flat Earth? International Organizations in the System of International Law' in Jan Klabbers (ed), *International Organizations* (Routledge 2016).

155 ARIO Commentary, 46 [2].

156 ibid 68 [4], 98-99 [1]-[2]. See Hirsch (n 129) 169-72; Brölmann, *Institutional Veil* (n 129) 262-67 on 'piercing the veil'.

157 ARIO Commentary, 99 [6].

was a consequence … of the necessity to comply with international legal obligations'.[158] The Court established a presumption of equivalent protection of Convention rights, where a state would not be liable if the protection afforded by the IO was 'at least equivalent' to the ECHR. If equivalent protection exists, the presumption is that the state has not departed from the ECHR when it does no more than implement the obligations flowing from its membership of that organisation.[159] For the presumption to apply, first, there must be an absence of any 'margin of manoeuvre' by the state in implementing the obligation imposed by the IO (in *Bosphorus*, EU law).[160] Where discretion exists, a state will be fully responsible under the ECHR for all acts falling outside its strict legal obligations that result from its membership of the IO.[161] This recognises, notwithstanding that the implementing act could be directly attributable to the IO given it imposed the obligation and conditions state conduct, the act can concurrently be attributed to member states.[162] Second, the state must deploy 'the full potential of the supervisory mechanism' provided for under the IOs rules.[163]

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158 (2006) 42 EHRR 1 [153]-[154]. See also *Matthews v UK* (1999) 28 EHRR 361 [32].

159 *Bosphorus* (n 158) [155]-[156]. See also *Michaud v France* (2014) 59 EHRR 9 [102]-[115]; *Avotiņš v Latvia* App No 17502/07 (ECtHR, 23 May 2016) [101]-[125].

160 *Bosphorus* (n 158) [156]-[157]; *Michaud* (n 159) [113]; *Avotiņš* (n 159) [105].

161 *Bosphorus* (n 158) [157]. See *Michaud* (n 159) [103]; *MSS* (n 119) [338].

162 See eg *Her Majesty's Treasury v Mohammed Jabar Ahmed* [2010] UKSC 2, [2010] 2 AC 534; *Al-Jedda* (n 21) [76]–[86]; *Nada* (n 47) [120]-[122]. See also the *Kadi* cases before the EU courts: Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* EU:T:2005:332, [2005] ECR II-3649; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461, [2008] ECR I-6351; Case T-85/09 *Yassin Abdullah Kadi v Commission* EU:T:2010:418, [2010] ECR II-5177; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission v Yassin Abdullah Kadi* EU:C:2013:518.

163 *Bosphorus* (n 158) [160]; *Michaud* (n 159) [114]-[115]; *Avotiņš* (n 159) [105].

Critically, the presumption can be rebutted if, in the circumstances, the protection of fundamental rights was 'manifestly deficient'.[164] The *Bosphorus* presumption seeks to ensure that states who have delegated competence to an organisation ensure the latter upholds human rights. However, the case of *Behrami* seems to absolve states from responsibility in this context. The ECtHR distinguished *Bosphorus*, which found the protection afforded by EU law equivalent to the ECHR, because in *Bosphorus* the seizure of the leased aircraft was by Ireland, acting on its own territory, and following the decision of an Irish Minister, raising no issues as to its competence *ratione personae*. In contrast, in *Behrami*, the impugned acts and omissions of detention and failed de-mining operations in Kosovo were not attributable to the contributing respondent states and had not taken place on their territory or by virtue of a decision of their authorities. They were attributable *only* to the UN;[165] a conclusion much critiqued.[166]

Looking now at the responsibility of IOs, Article 3 provides that every IWA of an IO entails its international responsibility, affirming the principle of independent responsibility for IOs. Akin to ARSIWA, an IWA exists where conduct consisting of either an act or omission is both attributable to the organisation and constitutes a breach of one of its international obligations.[167] Whether an act of an IO can be characterised as wrongful

164 *Bosphorus* (n 158) [156].

165 *Behrami and Behrami v France; Saramati v France, Germany and Norway* (2007) 45 EHRR SE 85, [135], [151] cf *Al-Jedda* (n 21) [83].

166 See eg Guglielmo Verdirame, *The UN and Human Rights: Who Guards The Guardians?* (CUP 2011) 108-13; Crawford (n 54) 199-200, fn 174; Linos-Alexander Sicilianos, 'The European Court of Human Rights Facing the Security Council: Towards Systemic Harmonization' (2017) 66 ICLQ 783, 787-88.

167 ARIO, art 4.

is governed by international law, while a breach can arise 'regardless of the origin or character of the obligation concerned'.[168] Articles 6-9 concern attribution, while Articles 10-13 cover breach of an obligation. The latter Articles on breach largely correspond to Articles 12-15 ARSIWA and hence, the discussion will not be repeated. Relatedly, the Commentary provides that the circumstances precluding wrongfulness in ARSIWA also apply to IOs, but this does not mean the conditions of their invocation are the same as for states.[169]

For responsibility to arise it is necessary to determine whether the conduct amounting to a breach is an act of the IO or otherwise attributable to it, for example whether state conduct can be treated as that of the IO. Pursuant to Article 6 ARIO, the conduct of an organ or agent of an IO in the performance of its functions shall be considered an act of that IO under international law whatever position they hold in respect of the organisation. An organ is 'any person or entity which has that status in accordance with the rules of the organization', while an agent 'is an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and *thus through whom the organization acts*'.[170] Similar to Article 4 ARSIWA, there is no requirement for effective control over the organ or agent. Attribution is automatic, even in the absence of an institutional link with agents. All conduct performed in an official capacity and within the overall functions of the organisation is attributable to the IO, including when there has been an excess of authority or contravention of

168 ARIO, arts 5, 10.

169 Articles 20-25; ARIO Commentary, 48-49 [10], 70 [2].

170 ARIO, art 2(c), (d) (emphasis added). See ARIO Commentary, 55 [2]-[5].

instructions, save purely private conduct (Article 8).[171] However, to add complexity, the Commentary provides, similar to Article 8 ARSIWA, that persons or groups of persons acting under the instructions or direction or control of an IO are to be regarded as agents.[172]

Pursuant to Article 7, the conduct of a state organ or organ or agent of an IO placed at the disposal of an IO is only attributable to the receiving organisation 'if the organization exercises effective control over that conduct'. Article 7 covers the situation where the seconded organ or agent still acts to a certain degree as an organ of the seconding state or organ or agent of the seconding organisation.[173] Hence, it must be determined to which entity the conduct is attributable to: the seconding state or IO, or the receiving organisation. What matters for Article 7 purposes is the 'factual control exercised over the specific conduct' of the organ or agent placed at the receiving organisation's disposal, rather than an institutional link.[174] If the organ or agent is under the receiving IO's effective control then conduct will be treated as the receiving organisation's only, not that of the seconding state or IO.[175] Scholars tend to conclude that effective control is to be understood similarly to Article 8 ARSIWA.[176] It arguably also encompasses normative control, whereby the

171 ARIO Commentary, 55-56 [7].

172 ibid 56 [11].

173 ibid 56 [1].

174 ibid 57 [4].

175 ibid 57-60 [8]-[14].

176 See Kjetil Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test' (2008) 19 EJIL 509, 514-17, 520; Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (OUP 2011) 40 (since publication ARIO was re-numbered. Articles 5 and 6 refer to current Articles 6 and 7); Crawford (n 54) 203-04.

conduct of member states is attributable to the IO when they have no discretion in implementing a binding decision of the organisation, as the *Bosphorus* decision supports in looking at compliance with strict legal obligations and the margin of manoeuvre.[177]

It follows that where effective control is not present, the conduct of the state organ or IOs organ/agent is assumedly attributable to that seconding state or IO pursuant to Articles 4 ARSIWA or 6 ARIO respectively. However, where a state organ or organ/agent of another IO has been *fully seconded* to the receiving organisation, then Article 6 ARIO applies, becoming an agent through which the IO acts.[178] Article 7 thus overcomes automatic attribution to the seconding state or IO, but also on first appearances seems to block the possibility of dual or shared attribution between the receiving IO and seconding IO or state.[179] In *Behrami*, the ECtHR attributed all acts and omissions of the forces placed in Kosovo at the disposal of or authorised by the UN exclusively to the latter and not its members. The decisive factor was whether the UNSC 'retained ultimate authority and control so that operational command only was delegated'.[180] However, the ILC Commentary explicitly provides that 'dual or even multiple attribution of conduct cannot be excluded', recognising that conduct attributable to an IO does not imply that the same conduct cannot be attributed to a contributing state and vice versa (which is supported in

177 Tzanakopoulos (n 176) 37-45; Cristina Contartese, 'Competence-Based Approach, Normative Control, and the International Responsibility of the EU and its Member States' (2019) 16 International Organizations Law Review 339. See also ARIO, art 64 on *lex specialis*.

178 ARIO Commentary, 56 [1]. See Tzanakopoulos (n 176) 35-39.

179 Tzanakopoulos (n 176) 36.

180 *Behrami* (n 165) [132]-[144]. cf *Jaloud* (n 21) [143], [146]. See also ARIO Commentary, 58-59 [10] notably fn 129.

domestic and ECtHR case law), or to several organisations.[181] This contrasts with Article 6 ARSIWA where conduct is attributed to the receiving state at the sending state's exclusion.

An IO may also bear derived responsibility for being implicated in the wrongful conduct of a state or another organisation, which is not attributable to it. Articles 14-16 provide that an IO may be responsible if it aids or assists a state or organisation commit an IWA, directs and controls a state or organisation in such an act, or coerces a state or organisation. These mirror Articles 16-18 ARSIWA, with appropriate modifications. Again, the principles under Articles 16-18 ARSIWA should also apply to these Articles. As the ARIO Commentary highlights, there is no reason to distinguish an IO aiding or assisting, directing or controlling, or coercing a state or organisation from a state doing the same.[182] These Articles are without prejudice to the responsibility of the state or IO which commits the act under Article 19. Each state and IO can bear responsibility for their own conduct, whether as the primary or participating actor, as assessed against ARSIWA and ARIO. To conclude, shared responsibility is explored, which plays a crucial, but contentious role.

D. Shared and Joint Responsibility

States, IOs, and other non-state actors increasingly collaborate, coordinate, and engage in collective conduct to address many issues of international relevance and to achieve shared

181 ARIO Commentary, ch II 54 [4], 57 [4]. See eg *Al-Jedda* (n 21) [80]-[86]; *The State of the Netherlands v Hasan Nuhanovic*, Case 12/03324 LZ/TT, 6 September 2013 (Supreme Court of the Netherlands) [3.5.1]-[3.13]; *Stichting Mothers of Srebrenica v the State of the Netherlands and the UN*, Case C/09/295247/HAZA 07-2973, 16 July 2014 (District Court in The Hague) [4.45], [4.87]-[4.88].

182 ARIO Commentary, 65 [1], 66[1], 67 [1], [6].

purposes or outcomes. Questions of shared responsibility are therefore apposite.[183] Broadly speaking, shared responsibility refers to situations where a multiplicity of actors contribute to a single harmful outcome with legal responsibility distributed among more than one actor.[184] International law accepts the possibility of shared responsibility amongst states and IOs, as shown in the Commentaries. However, the principles remain relatively undeveloped in this area, with cases of multiple attribution in the minority.[185] In the absence of a principled approach to shared responsibility, gaps and problems ensue for claimants and the international legal order, with inconsistencies among scholars too. As Nollkaemper and Jacobs highlight, too little responsibility may be allocated to one actor because of the impossibility of identifying which actor was responsible for what wrongdoing, while the involvement of multiple actors may facilitate blame shifting. Conversely, too much responsibility may be allocated to one actor because of difficulties apportioning responsibility.[186] Nevertheless, it is expected that shared responsibility regimes will vary depending on differences across actors and context.[187]

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183 See André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014); André Nollkaemper and others (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017).

184 André Nollkaemper and Ilias Plakokefalos, 'The Practice of Shared Responsibility in International Law: A Framework for Analysis' in André Nollkaemper and others (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 3.

185 See André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MichJInt'l L 359; Francesco Messineo, 'Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 63; Ferstman (n 129) 66.

186 Nollkaemper and Jacobs (n 185) 389-93. cf *Saddam Hussein v Albania* App no 23276/04 (ECtHR, 14 March 2006) where the ECtHR found no responsibility for any state because the applicant could not identify the specific IWA, with *Certain Phosphate Lands in Nauru* (*Nauru v Australia*) (Preliminary Objections) [1992] ICJ Rep 240 where Australia shouldered full responsibility.

187 Nollkaemper and Plakokefalos, 'Practice of Shared Responsibility' (n 184) 7-10.

Article 47 ARSIWA recognises that 'Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act'. The Commentary makes clear that each state is separately responsible for wrongful conduct attributable to it and responsibility is not diminished because of the concurrent responsibility of another state for the same act.[188] It is notable that the principle of independent responsibility retains its dominant position even in situations of shared responsibility, with the ARSIWA Commentary emphasising its exceptional nature, whereby attribution and responsibility are typically independent, being on an individual basis, and exclusive, with an act generally only attributable to one actor.[189]

Article 48 ARIO is the equivalent of Article 47. As stated above, the fact an organisation bears responsibility does not theoretically exclude dual or multiple attribution and the parallel responsibility of other actors arising from the same circumstances.[190] In contrast to ARSIWA, ARIO seems to accept shared responsibility as a more general rule, perhaps because the sphere surrounding IOs does not feature sensitive issues of state sovereignty.[191]

188 ARSIWA Commentary, 124 [1], [3], 125 [6], [8].

189 ibid 64 [5], 65 [8]; Nollkaemper and Jacobs (n 185) 381-85.

190 ARIO Commentary, 50 [10], 53 [6], ch II 54 [4].

191 Andrea Gattini, 'Breach of International Obligations' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 50-51.

Shared responsibility can be divided into three categories.[192] First, a plurality of states or IOs may engage in 'independent conduct' in relation to an event, where through *separate* wrongful conduct they contribute to a single injury to a third party. Each state or IO is independently responsible for their separate conduct, applying the relevant attribution rules, which gives rise to concurrent responsibility.[193] The case law shows that where several states exercise jurisdiction under IHRL, for example the territorial state and state acting abroad, they may share responsibility for separate breaches of IHRL.[194] The second category of responsibility for collective conduct involves a state or IO being implicated in the wrongful conduct of another through auxiliary conduct. Shared responsibility here is envisioned in (but not limited to) Articles 16-18 ARSIWA and Articles 14-16, 58-60 and 62 ARIO, though direction and control may better fall into the next category. As mentioned, indirect responsibility operates as an exception to independent responsibility.

Lastly, multiple states or IOs may engage in concerted conduct, being *co-authors* of the *same* IWA, each of whom is acting on behalf of a different state or IO.[195] This implies that they engage in a 'single course of conduct', leading to the joint responsibility of all

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192 Applying den Heijer, *Extraterritorial Asylum* (n 2) 94-100. cf Crawford (n 54) 333 on different typologies and labels. See further André Nollkaemper, 'The Duality of Shared Responsibility' (2018) 24 Contemporary Politics 524, 535-39; Crawford (n 54) 343-54.

193 Tzevelekos (n 7) 164-69; Samantha Besson, 'Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdictions, Duties, and Responsibilities' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018). See on multiple attribution Messineo (n 185) 67-71.

194 See eg *Certain Phosphate Lands* (n 186) [148]; *Al-Skeini* (n 21) 137; *Hirsi* (n 21) [74] on rights being divided and tailored; Judge Albuquerque, 78; *Ilaşcu* (n 2) [376]-[94]; and the cases above at (n 120); ARSIWA Commentary, 64 [4], 125 [8]. See also Gammeltoft-Hansen, *Access* (n 3) 146-52; den Heijer, 'Shared Responsibility' (n 113) 414-16.

195 See ARSIWA Commentary, 124 [1]-[2]; Messineo (n 185) 71-73, 79-80; Crawford (n 54) 334.

involved for the whole injury arising from the IWA.[196] It can only properly be characterised as 'joint' when the activity was carried out with the instructions of all involved and all had the power to prevent the breach.[197] Articles 47 ARSIWA and 48 ARIO are limited to cases of concerted conduct. This can arise in several scenarios.[198] For example, multiple states or IOs may work together to carry out an IWA such that they are regarded as acting jointly for the entire operation. States or IOs may also act through a joint organ or a state organ may act on the joint instruction of its own state and another actor(s). This is distinguishable from Article 6 ARSIWA where the organ of one state is placed at the exclusive disposal of another.[199] In the former, any wrongful conduct is attributable to several actors, in accordance with the principle of independent responsibility.[200] Additionally, where a state or IO directs or controls the commission of an IWA under Articles 17 and 15 ARSIWA/ARIO, both actors are responsible for the *same* act (unless the directed actor establishes a defence).[201] While this is the most firmly-established category, it is also the narrowest, limited typically to joint organs.[202]

196 ARSIWA Commentary, 124 [3].

197 den Heijer, 'Shared Responsibility' (n 113) 419-21.

198 ARSIWA Commentary, 44 [3], 64 [2]-[3], noting fn 263, 124 [2]; ARIO Commentary, ch II 54 [4]; den Heijer, *Extraterritorial Asylum* (n 2) 95-100, fn 107; Crawford (n 54) 339-41; Dannenbaum (n 123) 193-96.

199 Messineo (n 185) 83-96.

200 ARSIWA Commentary, 44 [3]. See *Hess v UK* (1975) 2 DR 72, 74 where the ECmHR considered the UK to act 'only as a partner in the joint responsibility which it shares with the three other powers'; den Heijer, *Extraterritorial Asylum* (n 2) 98-99.

201 ARSIWA Commentary, 124 [2].

202 Nollkaemper, 'Duality' (n 192) 539.

Nollkaemper criticises the focus on independent responsibility in situations of joint and cooperative conduct, citing *Behrami* where the ECtHR applied a binary approach, neglecting the possibility of shared responsibility.[203] He argues that shared responsibility should not merely be conceived of as the aggregation of individual responsibilities, given they form an undivided whole. The acts or omissions of one actor mutually influences the responsibility of the others, resulting in the interdependence of conduct on the one hand and interdependence of outcomes on the other. Nollkaemper thus advocates for responsibility based on participation in collective action, where conduct, and thus responsibility, is attributed to each participant simultaneously, even for conduct not their own, appearing much closer to joint and several responsibility.[204] Nollkaemper and Jacobs note how the ILC has refrained from articulating whether responsibility under Articles 47 and 48 ARSIWA/ARIO is joint, or joint and several, with 'several' meaning that 'an entity will only be ultimately liable vis-à-vis other responsible entities for what is attributable to it' and if 'it had to compensate fully for the damage, this principle gives the entity held responsible a claim against the others'.[205] It is essential in allocating responsibility, and to prevent repeated violations, that all layers of involvement by states and IOs are accounted for, appropriately attributed, and not 'flattened' out.[206] This is a key challenge facing the law on international responsibility, while still encouraging valuable cooperation.

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203 ibid 527-8, 535-8. See also Nollkaemper and Jacobs (n 185) 389.

204 Nollkaemper, 'Duality' (n 192) 537-39. See also Nollkaemper and Jacobs (n 185) 422-23; Dannenbaum (n 123) on shared attribution based on preventative control.

205 Nollkaemper and Jacobs (n 185) 392-93, 429.

206 Brölmann, 'A Flat Earth?' (n 154); Ferstman (n 129) 66.

Conclusion

This chapter provided a broad overview of the concept of jurisdiction under IHRL and the responsibility of states and IOs when they engage in internationally wrongful conduct or are otherwise implicated in another's wrongful conduct. It began by outlining the settled, but ever-evolving, jurisdictional tests under IHR treaties. The chapter then explored the frameworks for establishing the responsibility of states and IOs, namely ARSIWA and ARIO. It concluded that IOs are bound by human rights, including the right to leave as a norm of CIL, which is fundamental in avoiding responsibility vacuums. Particular attention was given to complicity, direction and control, and positive obligations. The chapter concluded by exploring possibilities for shared and joint responsibility, revealing that where a multitude of actors are involved in wrongful conduct, they can, in principle, all bear responsibility. States and IOs cannot evade responsibility simply by pointing to the involvement or primary role of another. In the upcoming chapters, these foundational principles and rules are applied to each externalisation practice under consideration, elucidating which states exercise jurisdiction, the duty-bearers of the right to leave during externalisation, and which actors bear responsibility for ensuing violations. As this chapter illustrated, a comprehensive approach must be adopted when assessing violations of the right to leave to prevent responsibility gaps, which requires consideration of all relevant actors and frameworks.

PART III

CHAPTER FIVE: VISA REGIMES AND CARRIER SANCTIONS

This chapter assesses whether visa regimes violate the right to leave. Visa requirements are a long-standing strategy of destination states to proactively prevent migration and keep *certain* would-be migrants far from the physical border. Visas prevent those requiring a visa from travelling lawfully to their destination. To this end, states implement various enforcement mechanisms, notably carrier sanctions and immigration officials posted abroad. Consequently, nationals requiring a visa may be unable to leave their state of origin or transit. If they attempt to travel by plane or ferry without valid documentation, they are likely to be denied boarding by the carrier. The chapter argues that, generally speaking, visa refusals and prevention of embarkation amount to violations of the right to leave, drawing upon various jurisdictions to demonstrate that common features can be distilled across regimes. It challenges these pervasive practices, which are assumed to be lawful, illustrates their failure to satisfy the legality and proportionality requirements, including the disproportionate impact on asylum seekers and refugees, and demonstrates their interference with several other rights.

The chapter begins with an overview of visa policies, their functions, and the involvement of carriers, private companies, and IOM. It then addresses two preliminary obstacles to establishing a violation: jurisdiction and attribution. Next, it assesses the compatibility of visa refusals and denials of embarkation with the right to leave, applying Part I. Given the plurality of actors involved, the chapter concludes by considering the responsibility of states and IOs for violations of the right in this context and positive

obligations. Overall, it reveals a global *(im)*mobility regime, in which visas force certain migrants into irregularity, with carrier sanctions the primary driver generating complex, dangerous, and irregular journeys, leading to loss of life.

A. Visa Policies

a. A Brief History

Visa regimes form part of the broader trend of externalisation by destination states, designed to prevent the arrival of certain migrants at state frontiers, with visas imposing a documentary requirement for entry on individuals. They have been a key instrument, alongside the passport, in controlling movement and migration by modern states since around World War I, though earlier versions exist.[1] As Chapter One explored, immigration controls emerged primarily at the turn of the 20th century. In traditional states of immigration and settlement such as Australia, Canada, and the US, visas have been a long-standing mechanism designed to control immigration, sift and sort migrants, and reduce the arrival of asylum seekers and refugees. Already in the 1920s, the US required tourists and immigrants to apply for visas at consular posts.[2] Preventing migration at the source through visa regimes became the chosen approach of many destination states in the 1980s

[1] See John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (2nd edn, CUP 2018), particularly chs 3-5; Mathias Czaika, Hein de Haas and María Villares-Varela, 'The Global Evolution of Travel Visa Regimes: An Analysis Based on the DEMIG VISA Database' (2017) IMI Working Paper Series 134, 5-6 <www.migrationinstitute.org/publications/the-global-evolution-of-travel-visa-regimes-an-analysis-based-on-the-demig-visa-database> accessed 19 January 2021; Rey Koslowski, 'International Travel Security and the Global Compacts on Refugees and Migration' (2019) 57 International Migration 158, 160.

[2] Aristide R Zolberg, 'Global Movements, Global Walls: Responses to Migration, 1885–1925' in Gungwu Wang (ed), *Global History and Migrations* (Routledge 2018) particularly 298-300; Torpey (n 1) ch 4; David S FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019) ch 2, 59. See generally Andrew Wolman, 'The Role of Departure States in Combating Irregular Emigration in International Law: An Historical Perspective' (2019) 31 IJRL 30, 31-37.

and 1990s, due to increased migratory pressures related to the fall of the Iron Curtain, unfolding civil wars, and greater air travel.[3] According to Hathaway, visas are a classic, albeit relatively invisible, *non-entrée* measure adopted to prevent irregular migration.[4]

b. Regulating Mobility

There are various types of visas worldwide, allowing states to regulate mobility and *pre*-select *who* can and cannot move.[5] Visa categories benefit different types of travellers and lengths of stay: the majority are for temporary stays, including for family, tourism, business, study, and related purposes, with minimal settlement routes since the end of settler societies and move towards hard-line immigration policies.[6] As explored below, a global (im)mobility regime exists which stratifies individuals into two groups: the privileged that can access safe, quick, and cheap travel and the excluded, subject to stringent visa checks, longer queues, and high costs.[7] Generally speaking, visa-free travel

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3 Gallya Lahav, 'Immigration and the State: The Devolution and Privatisation of Immigration Control in the EU' (1994) 24 JEMS 675, 679, 682-83; FitzGerald (n 2) 60-61; 164-56, 221-22. For a history see Aristide R Zolberg, 'The Exit Revolution' in Nancy L Green and François Weil (eds), *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation* (University of Illinois Press 2007); Zolberg (n 2).

4 James C Hathaway, 'The Emerging Politics of *Non-Entrée*' (1992) 91 Refugees 40; Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 ColumJTransnat'l L 235, 244-46.

5 See Hein de Haas, Katharina Natter and Simona Vezzoli, 'Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies' (2018) 52 IMR 324.

6 See Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (CUP 2016).

7 Eric Neumayer, 'Unequal Access to Foreign Spaces: How States Use Visa Restrictions to Regulate Mobility in a Globalised World' (2006) 31 Transactions of the Institute of British Geographers 72; Steffen Mau and others, *Liberal States and the Freedom of Movement: Selective Borders, Unequal Mobility* (Palgrave Macmillan 2012); Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 EJML 452.

is granted most frequently to high-income, Western, democratic states, and less to poor, unstable states. Empirical studies demonstrate that visa-free travel is highest amongst OECD nationals, with many OECD states having visa requirements in place for most Asian and African nationalities.[8] Despite states worldwide having visas in place, this chapter predominantly examines Western States and the EU (the latter's framework particularly accessible), due to the paucity of research on developing states' regimes.

Australia is the only state in the world to impose a virtually universal visa requirement on non-citizens. All non-Australian citizens, except New Zealanders, must be granted a visa prior to arrival. However, nationals of certain states, such as EU and Schengen states, Canada, the US, and selected (aka developed) Asian states can simply apply for an electronic travel authorisation (ETA) online.[9] In the US, nationals of states participating in the Visa Waiver Program, including Australia, New Zealand, most European states, and the UK, can travel to the US without a visa, only requiring an ETA, as well as visa-free rules for Canada and Bermuda and Mexican nationals eligible for border crossing cards. Nationals of all other states require a visa and transit visa when passing through the US en route to another state.[10] In the EU, all Member States (except Ireland) and Iceland, Liechtenstein, Norway, and Switzerland have adopted uniform visa requirements. The EU's common visa policy (Visa Code) sets out harmonised and mandatory procedures and conditions for visa issuance to third-country nationals for transit

8 Neumayer (n 7) 77-81; Brendan Whyte, 'Visa-free Travel Privileges: An Exploratory Geographical Analysis' (2008) 10 Tourism Geographies 127; Steffen Mau and others, 'The Global Mobility Divide: How Visa Policies Have Evolved over Time' (2015) 41 JEMS 1192; Czaika, de Haas and Villares-Varela (n 1).

9 *Migration Regulations 1994* (Cth) sch 2, subclasses 601, 651.

10 Immigration and Nationality Act of 1952 (INA) 8 USC ss 1182(d)(4)(C), 1187 (2018); Immigration and Nationality, 8 CFR s 217.2(a) (2021); Foreign Relations, 22 CFR ss 41.2, 41.71 (2021).

or short-stays (Schengen visas).[11] An EU Regulation sets out the third states whose nationals must possess a visa (the so-called 'blacklist') and those that are exempt (the 'whitelist').[12] The lists have seen several iterations. In 1995, the blacklist increased to 110 states, to 134 in 2001, before dropping to 104 in 2018.[13] The present blacklist includes every state in Africa and most of the Middle East, Asia, Caribbean, and Pacific. The current whitelist includes 63 states, made up primarily of states in the Americas, Europe, Antipodes, some Pacific islands, and wealthy parts of Asia. Additionally, twelve states deemed to produce large numbers of asylum seekers and 'illegal immigrants' are subjected to an airport transit visa (ATV), requiring their nationals to hold a permit for stopovers at a Schengen airport.[14] Though visa rules vary considerably across states, there is a growing convergence of visa waiver policies within OECD states, with Australia, Canada, European states, and the US also converging on carrier sanctions and immigration liaison officer (ILO) networks.[15]

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11 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243/1.

12 See for a history Feller (n 22) 50; Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017) 90-94.

13 Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States [1995] OJ L 234/1; Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L 81/1; Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2018] OJ L 303/39.

14 Visa Code, recital 5, art 3, annex IV.

15 Mau and others, *Liberal States* (n 7) 78-80; FitzGerald (n 2) 14-15. See on South America Diego Acosta, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (CUP 2018) 125-26.

Nonetheless, as Czaika, de Haas, and Villares-Varela demonstrate, reality is more complex than a simplistic North-South mobility divide. Visa regimes reflect the multi-polar and multi-layered nature of international relations, featuring regional and sub-regional levels, alliances and ties between states, and the dissolution and formation of states and regional blocs. Interestingly, while European and North American OECD countries impose restrictive visa controls on Africa and Asia, these latter regions have the highest level of entry restrictions. Developing states in sub-Saharan Africa and South and South-East Asia are among those with the highest levels of entry restrictions.[16] Repressive regimes require visas for almost all states. The freedom OECD nationals enjoy is thus best characterised as freedom to travel to other OECD states.[17] Additionally, while states do pursue reciprocity, OECD states often impose restrictions on those granting them visa-free access.[18] Expectedly, tourism and trade are influential factors.[19] Visa-free travel is more likely to be granted to nationals of geographically proximate states within integrated regional blocs. Intra-European travel is the least visa-restricted area in the world, reflecting EU integration and enlargement.[20] Numerous regional agreements – covering every region of the world – establish the free movement of persons between member states, commonly featuring the

16 Czaika, de Haas and Villares-Varela (n 1) 4-5, 33. cf Mau and others, 'Global Mobility' (n 8). See DEMIG, 'DEMIG VISA' (Version 1.4, IMI 2015) <www.migrationinstitute.org/data/demig-data/demig-visa-data> accessed 22 August 2020, a database tracking bilateral visa requirements.

17 See also Neumayer (n 7) 78.

18 ibid. See also Steffen Mau, 'Mobility Citizenship, Inequality, and the Liberal State: The Case of Visa Policies' (2010) 4 International Political Sociology 339, 349-54.

19 Neumayer (n 7) 76-81; Whyte (n 8) 143-44.

20 Czaika, de Haas and Villares-Varela (n 1) 4, 15-28.

right to enter (through visa exemptions), move freely, establish residence, and work.[21] Visa policies thus represent a state's broader economic, political, and regional interests and intention to facilitate the movement of desirable travellers, while controlling risks and restricting spontaneous asylum.

The particulars of visa policies are explored below when assessing compatibility with the right to leave, with the conditions for granting short-stay visas having reached a level of standardisation across jurisdictions.

B. Delegation, Extraterritorialisation, and Algorithms

In addition to the visa requirement itself, visa regimes feature an array of actors and processes. This includes outsourcing enforcement to commercial carriers, delegation to private visa companies and IOM, as well as automated decision-making, pre-clearance programmes at airports, and the posting of ILOs.

First, visa requirements are inextricably linked to carrier sanctions, which penalise airlines and other transport operators for carrying passengers without the required

[21] See among many the Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right of Establishment (adopted 29 January 2018) arts 1, 6(1). See Vincent Chetail, *International Migration Law* (OUP 2019) 98-119 on free movement regimes; Marie-Laurence Flahaux and Hein de Haas, 'African Migration: Trends, Patterns, Drivers' (2016) 4 Comparative Migration Studies 1 on Africa's restrictiveness towards Africans.

documentation, such as a visa or passport.[22] Though various forms were in existence since the 19th and early 20th centuries, modern day carrier sanctions developed in the second half of the 20th century.[23] Today, carrier sanctions are the norm in developed states and some developing states.[24] Carriers are legally obliged to verify, at the point of departure, that passengers are duly documented and refuse boarding if not. Otherwise, they will face financial and other sanctions, and bear responsibility for their removal. In refusing boarding, carriers may be complying with international, EU, or domestic law.[25] Notably, all Schengen and EU Member States are required to have carrier sanctions legislation in place. Fines must be minimum 3,000 and maximum EUR 5,000 per passenger, or a lump sum of EUR 500,000 for each infringement. States can also impose 'penalties of another kind, such as immobilisation, seizure, and confiscation of the means of transport, or

22 There is extensive literature on carrier sanctions eg Erika Feller, 'Carrier Sanctions and International Law' (1989) 1 IJRL 48; R I R Abeyratne, 'Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees' (1998) 10 IJRL 675; António Cruz, 'Carrier Sanctions in Four European Community States: Incompatibilities Between International Civil Aviation and Human Rights Obligations' (1991) 4 JRS 63; Sarah Collinson, 'Visa Requirements, Carrier Sanctions, "Safe Third Countries" and "Readmission": The Development of an Asylum "Buffer Zone" in Europe' (1996) 21 Transactions of the Institute of British Geographers 76; Sophie Scholten and Paul Minderhoud, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands' (2008) 10 EJML 123; Tendayi Bloom and Verena Risse, 'Examining Hidden Coercion at State Borders: Why Carrier Sanctions Cannot be Justified' (2014) 7 Ethics & Global Politics 65; Tilman Rodenhäuser, 'Another Brick in the Wall: Carrier Sanctions and the Privatisation of Immigration Control' (2014) 26 IJRL 223; Theodore Baird and Thomas Spijkerboer, 'Carrier Sanctions and the Conflicting Legal Obligations of Carriers: Addressing Human Rights Leakage' (2019) 11 Amsterdam Law Forum 4.

23 Feller (n 22) 52-53; Rodenhäuser (n 22) 226; FitzGerald (n 2) 63-64, 166-68, 221-22.

24 See eg Immigration (Emergency Provisions) Act 1947 (Myanmar) s 13(2), (3); Immigration Act 1979 (Thailand) ss 70-71. On South America see Acosta (n 15) 126.

25 International Civil Aviation Organization, Convention on Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention) arts 13, 37(j), Annex 9; Palermo Protocols, art 11(1)-(4); The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19 (CISA) art 26. See Rodenhäuser (n 22) 226.

temporary suspension or withdrawal of the operating licence'.[26] Airlines are often supported by ILOs or airline liaison officers (ALOs) deployed at major international airports and ports in third states to engage in a range of migration-related activities, including assisting carriers with pre-entry and document checks of prospective travellers. Key destination states, including Australia, Canada, EU states, the UK, and US, deploy ILOs at major gateways.[27]

Like many migration control functions, visa processing has been privatised, with many visa applicants now dealing with private companies.[28] Private companies can be authorised to provide information on visa requirements, application forms and supporting documents, collect data (including biometrics) and applications, transmit applications to the consulate, collect fees, manage appointments, and collect and return travel documents and refusals.[29] Two transnational corporations, VFS Global and TLScontact, are the main external service providers in this area. VFS Global has 3490 Visa Application Centres (VACs), operations in 143 countries across 5 continents, with 64 client governments,

[26] CISA, art 26; Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L 187/45 (Carriers Liability Directive) arts 3-5. See Theodore Baird, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' (2017) 19 EJML 307; Moreno-Lax (n 12) ch 5.

[27] See eg Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers [2019] OJ L 198/88 (ILOR); Moreno-Lax (n 12) 121, 133-142; FitzGerald (n 2) ch 4, 168-70, 221.

[28] See generally Thomas Gammeltoft-Hansen and Ninna Nyberg Sørensen, *The Migration Industry and the Commercialisation of International Migration* (Routledge 2013).

[29] See eg Visa Code, arts 40, 43.

ranging from Brazil, India, Japan, Russia, South Africa, Thailand, the UAE, and Vietnam.[30] Present in 90 states, TLScontact operates 150 VACs.[31] Thus, there is widespread use of private visa companies. For instance, the UK and all Schengen and EU Member States, except Romania, require applicants from a range of states to submit their applications at VACs operated by VFS Global or TLScontact.[32]

IOM is also involved, operating VACs in more than 50 states since 1994.[33] IOM partners with VFS Global in operating certain VACs and servicing diplomatic missions.[34] Though its exact role remains uncertain, IOM documents suggest it does or has previously assisted Australia, Canada, several EU Member States, and the UK with processing various visa types, through services including information provision, biometrics, health

30 'About VFS Global' <www.vfsglobal.com/en/individuals/about.html> accessed 6 February 2021. See Margot Gibbs, 'VFS: Who is the Company Subcontracted by the Home Office to Process Visa Applications?' *Independent* (17 August 2019) <www.independent.co.uk/news/uk/home-news/vfs-global-home-office-outsourcing-visa-applications-a9061476.html> accessed 6 November 2019.

31 TLScontact, 'What We Do' <https://corp.tlscontact.com/visa-application> accessed 6 February 2021.

32 See Visa Code Handbook C(2020) 395 final Annex 28 - List of Member States' consular presence, representation arrangements and forms of cooperation for the collection of visa applications, collection by Honorary Consuls or outsourcing of the collection of visa applications. For a study on them implementing the EU visa policy see Federica Infantino, *Outsourcing Border Control: Politics and Practice of Contracted Visa Policy in Morocco* (Palgrave Macmillan 2016).

33 IOM, 'IOM Visa Application Centres' (*Information Sheet*) <www.iom.int/sites/default/files/our_work/DMM/IBM/updated/06visa_application_centres_info_sheet.pdf> accessed 1 June 2019.

34 See IOM, 'IOM Opens UK Visa Application Office in Guyana' (Press Release, 21 February 2014) <www.iom.int/news/iom-opens-uk-visa-application-office-guyana> accessed 25 June 2019.

assessments, document verification and collection, scheduling, and interview facilitation.[35] Consequently, visa controls 'may operate entirely passively, with no need for the state to establish its presence extraterritorially'.[36] Many states now also accept online applications and issue e-visas. More and more would-be migrants are dealing with private actors at the frontline. While some migrants will encounter no border at all, others will encounter several, perhaps beginning with a visit to a privatised VAC.[37] The plurality of actors involved has transformed migration control governance, with states seeking not only to streamline and minimise cost, but also dilute responsibility.

Lastly, there is reliance on advanced technologies. States including Australia, Canada, New Zealand, and the UK are relying on automated processes to assist with visa decisions.[38] In response to legal challenge, the UK Home Office recently suspended its secret 'visa streaming' algorithm operating since 2015, which graded applicants as red, amber, or green based on nationality. It plans to redesign the process to consider issues

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35 See eg IOM, 'IOM and Immigration and Visa Support Solutions' (*Fact Sheet*, 2011) <www.iom.int/files/live/sites/iom/files/What-We-Do/docs/11-IBM-Fact-Sheet-Immigration-and-Visa-Support-Solutions-2011.pdf> accessed 19 February 2020; IOM, 'Annual Report for 2015' (13 June 2016) C/107/4 [83]; IOM, 'Visa Application Processing Solutions' (*Information Sheet*) <www.iom.int/sites/default/files/our_work/DMM/IBM/ibm-visaapplicationprocessingsolutions_booklet.pdf> accessed 19 February 2020.

36 Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 135.

37 Infantino (n 32) 6. See also VisaHQ, 'About Us' <www.visahq.com/about_us.php> accessed 6 November 2019.

38 See New Zealand Government, *Algorithm Assessment Report* (Stats NZ, 2018) 17; Petra Molnar and Lex Gill, 'Bots at the Gate: A Human Rights Analysis of Automated Decision Making in Canada's Immigration and Refugee System' (2018) Citizen Lab and International Human Rights Program Research Report No 114, 14-15, 23-25, 34-35, 38 <https://citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf> accessed 26 January 2021; Australian Government Department of Home Affairs, *The Administration of the Immigration and Citizenship Program* (Background Paper, 4th edn, 2020) [172]-[173].

surrounding unconscious bias and the use of nationality.[39] By 2022, the EU will operate a system that screens visa-exempt nationals for security, illegal immigration, and health risks through automated profiling. ETAs are automatically approved if there are no 'hits' and manually processed otherwise, with the outcome accessible to carriers.[40] The EU Visa Information System will also be amended so all short-stay visa applications are automatically profiled against specific risk indicators.[41] Additionally, private companies contracted by states and airlines may themselves use automated technologies.[42] Automated decision-making elicits serious concerns about the quality of decisions and bias, addressed below.

In sum, visa regimes are characterised by several features: forestalling departure, through extraterritorialisation and outsourcing, as well as being costly, discretionary, and selective. As Mitsilegas highlights, visas possess both temporal and spatial elements. Temporally, visas play a *proactive* and *preventative* function, seeking to control, pre-select, and deter movement at the source and during transit. Spatially, visas allow states to exercise

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39 Helen Warrell, 'Home Office under Fire for using Secretive Visa Algorithm' *Financial Times* (9 June 2019) <www.ft.com/content/0206dd56-87b0-11e9-a028-86cea8523dc2> accessed 20 February 2020; JCWI, 'We Won! Home Office to Stop using Racist Visa Algorithm' (4 August 2020) <www.jcwi.org.uk/news/we-won-home-office-to-stop-using-racist-visa-algorithm> accessed 23 August 2020.

40 Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 [2018] OJ L 236/1, arts 20, 33, 45.

41 Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 767/2008, Regulation (EC) No 810/2009, Regulation (EU) 2017/2226, Regulation (EU) 2016/399, Regulation XX/2018 [Interoperability Regulation], and Decision 2004/512/EC and repealing Council Decision 2008/633/JHA' COM (2018) 302 final.

42 See eg Sopra Steria, 'AI and Intelligent Automation' <www.soprasteria.co.uk/capabilities/digital/ai-and-intelligent-automation> accessed 20 February 2020, contracted by the UK Home Office: Warrell (n 39).

border control functions well beyond their frontiers.[43] They have been aptly categorised by Guild as 'the border abroad' and 'virtual border',[44] allowing states to perform 'remote control'.[45] Given there is no general right of entry for non-nationals, visas are one of the most powerful mechanisms by which states exercise their prerogative to control entry.[46] This 'complex network of privatisation'[47] and outsourcing to IOM creates potential difficulties in meeting jurisdictional tests and attribution rules, to which the focus now turns.

C. Jurisdiction and Attribution

a. Jurisdiction

Before assessing violations of the right to leave, it must be established whether the relevant person is within the state's jurisdiction. Two scenarios require consideration: visa refusals

43 Valsamis Mitsilegas, 'Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019) 291-92.

44 Elspeth Guild, 'The Border Abroad: Visas and Border Controls' in Kees Groenendijk, Elspeth Guild and Paul Minderhoud (eds), *In Search of Europe's Borders* (Kluwer Law International 2003); Elspeth Guild, 'Citizens Without a Constitution, Borders Without a State: EU Free Movement of Persons' in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing 2007) 51.

45 Aristide R Zolberg, 'The Archaeology of 'Remote Control'' in Andreas Fahrmeir, Olivier Faron and Patrick Weil (eds), *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (Berghahn Books 2003); Didier Bigo and Elspeth Guild, 'Policing at a Distance: Schengen Visa Policies' in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005) 234.

46 Neumayer (n 7) 73-74, 76-78.

47 Tendayi Bloom, 'The Business of Migration Control: Delegating Migration Control Functions to Private Actors' (2015) 6 Global Policy 151, 151.

and denial of boarding by carriers. As advanced in Chapter Four, jurisdiction is generally interpreted by the ECtHR as only arising extraterritorially where a state exercises effective control over persons or territory and more generously by the HRC and Inter-American bodies, which emphasise mere control and direct and foreseeable effects.

a. Visa Refusals

Whether a visa refusal brings the individual within the state's jurisdiction as an exercise of effective control is a controversial issue, being the subject of the recent ECtHR case *MN v Belgium* and making *MN* an apt frame for analysis.[48] Remarkably similar to *X and X v Belgium* before the CJEU,[49] *MN* concerned a Syrian family who fled Aleppo and applied for humanitarian visas under Article 25 of the Visa Code at the Belgian embassy in Beirut. The Belgian Aliens Office refused the visas on the basis that the Code only covers short-stay visas, not those for claiming asylum. Illustrating the importance of the case, eleven states[50] intervened for Belgium and seven NGOs for the family.

The Grand Chamber declared the case inadmissible, concluding that the applicants were not within Belgium's jurisdiction and the Convention does not apply to visa applications submitted at embassies/consulates. Echoing Belgium's objections (and the intervening states), the Court held that 'the mere fact that an applicant brings proceedings in a State Party with which he has no connecting tie cannot suffice to establish that State's jurisdiction over him' and 'to find otherwise would amount to enshrining a near-universal

48 App no 3599/18 (ECtHR, 5 March 2020).

49 Case C-638/16 PPU *X and X v Belgium* EU:C:2017:173.

50 Czech Republic, Croatia, Denmark, France, Germany, Hungary, Latvia, Norway, Netherlands, Slovakia, and the UK.

application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves'.[51] This would create an unlimited obligation under Article 3 to allow entry for those at risk of ill-treatment, negating the state's right to control entry.[52] Nor did the diplomatic agents exercise de facto control over the applicants, who were free to come and go.[53]

In concluding that visa refusals do not amount to effective control under Article 1 it appears as if the Court yielded to political pressure and fear of backlash. Nonetheless, principled arguments existed to support a finding of jurisdiction, including the Court's own jurisprudence. The activities of diplomatic or consular agents are recognised in international law as lawful exercises of extraterritorial jurisdiction, with visa processing part of their recognised functions, a position argued for by the applicants, intervening NGOs, and various scholars.[54] Though this view has merit, it does not align with the weight of authority requiring factual control and hence, is not advanced here.

Prior to *MN*, the Court has only examined visa issuance where there is a pre-existing private or family link between the applicant and state, specifically where refugees and other

51 *MN* (n 48) [79]-[81], [86]-[90], [123].

52 ibid [124].

53 ibid [118].

54 See *Vienna Convention on Consular Relations* (adopted 24 April 1963, entered into force 19 March 1) 596 UNTS 261 (VCCR) arts 3, 5(d); *Banković v Belgium* (2007) 44 EHRR SE5 [73]; *MN* (n 48) [83], [91], [93]; Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 IJRL 542, 567-68; Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*' (2011) 23 IJRL 443, 447; Violeta Moreno-Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees' (2008) 10 EJIL 315, 337-38; Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia, NWV Verlag 2018) 378.

beneficiaries have been denied reunification with family, raising Article 8 issues.[55] In such cases, jurisdiction is implied. However, a pre-existing link is not necessary. As several NGO intervenors submitted, it is well-established in the ECtHR and other international bodies' case law that jurisdiction encompasses the decisions of diplomatic and consular agents.[56] The key holding of these decisions, as reflected in *Al-Skeini*, is that 'the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents *exert authority and control over others*'.[57]

Chapter Four demonstrated that the ECtHR does not always demand physical control over the individual. Support for both the functional and 'cause and effect' approaches exists. In *Xhavara* (collision with a vessel on the high seas), *Kovačić v Slovenia* (legislation freezing foreign-currency account withdrawals abroad), *Pad v Turkey* (Turkish military helicopter bombing Iranians in Iranian territory), and *Andreou v Turkey* (Turkish-Cypriot troops open firing on demonstrators in Greek-Cypriot territory), jurisdiction arose

55 See eg *X and Y v Switzerland* (1977) 9 DR 57; *Tuquabo-Tekle v Netherlands* App no 60665/00 (ECtHR, 1 December 2005); *Haydarie v Netherlands* App no 8876/04 (ECtHR, 20 October 2005); *Schembri v Malta* App no 66297/13 (ECtHR, 19 September 2017). See also *East African Asians v UK* (1973) 3 EHRR 76 (Commission Decision) [185]-[187]; *MN* (n 48) [109].

56 *MN* (n 48) [91], [93], [95]. See the debate between Noll (n 54) and Kate Ogg, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates' (2014) 33 RSQ 81 on extraterritorial application.

57 *Al-Skeini v UK* (2011) 53 EHRR 18 [134] (emphasis added). See also *X v Federal Republic of Germany* App no 1611/62 (Commission Decision, 25 September 1965) 168; *X v UK* (1977) 12 DR 73 [1]; *WM v Denmark* (1992) 73 DR 193 [1]; *R (Sandiford) v The Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697 [19]; *R (Islam) v Secretary of State for the Home Department* [2019] EWHC 2169 (Admin) [46].

based on specific acts involving proximity.[58] The Court itself in *MN* reaffirmed that state conduct producing effects abroad engages its responsibility.[59] Furthermore, in *Nada v Switzerland*, the ECtHR held that Switzerland, by banning the applicant from entering or transiting through Switzerland in order to leave the Italian enclave of Campione, exercised jurisdiction.[60]

By extension, visa refusals have a proximate, foreseeable impact on the right to leave of nationals requiring a visa. As the applicants emphasised at the *MN* hearing, if there was no requirement for a visa and no power over their fate, they could simply board a plane.[61] It is this assumption of authority or control over their exercise of rights that matters, not physical contact or individual choices.[62] While applicants entering/leaving consulates do so voluntarily, this is not analogous to an individual voluntarily returning to their state of origin.[63] In refusing a visa, the authorities assume sufficient control over the specific applicant, specifically their *exercise of the right to leave*, creating a functional and/or causal relationship between that individual and the state.[64] Several factors illustrate this: the state

58 App no 39473/98 (ECtHR, 11 January 2001); App nos 44574/98, 45133/98 and 48316/99 (ECtHR, 9 October 2003) 51-52; App no 60167/00 (ECtHR, 28 June 2007) [54]; App no 45653/99 (ECtHR, 27 October 2009) [25] respectively. See *Georgia v Russia (II)* App no 38263/08 (ECtHR, 21 January 2021) [131]-[132]; Moreno-Lax, *Accessing Asylum* (n 12) 278-81.

59 *MN* (n 48) [82], [101] cf [112].

60 (2013) 56 EHRR 18 [121]-[122]. See also *X and Y* (n 55) 73.

61 Citing *X and Y* (n 55); *Nada* (n 60).

62 See for support *R (B) v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344, [2005] 2 WLR 618 [63]-[66]. See Ogg (n 56) 99-102.

63 cf *Khan v UK* App no 11987/11 (ECtHR, 28 January 2014).

64 Gammeltoft-Hansen (n 36) 124-25, 145-46, 150-57.

has control over the applicant's fate and whether they can leave and seek entry lawfully; the refusal brings that applicant directly within the state's authority and control through its decision and immigration laws, emanating from state territory but producing effects abroad, similar to the travel ban in *Nada*; and it is reasonable for the state to secure the individual's right by granting the visa and to avoid foreseeable violations. Notably, the IACtHR has recognised that protection from *refoulement* applies to the conduct of diplomatic agents 'whenever the nexus of personal jurisdiction can be established with the particular person'.[65] Thus, visa refusals can in principle amount to effective control, or if this is not accepted (as before the ECtHR), they nonetheless trigger jurisdiction based on a direct causal or functional relationship.[66] This conclusion accords with the ECtHR's general interpretive approach, treating the Convention and Article 1 as a living instrument that must be interpreted in light of present-day conditions to ensure the ECHR is equipped to respond to developments, including attempts by states to avoid their obligations towards asylum seekers, and to make the rights therein practical and effective.[67]

On first appearances, visa refusals resulting from online processes raises more complex questions. Gammeltoft-Hansen argues that the claim for jurisdiction diminishes where visa processing is conducted at privatised VACs, applications handled by a third

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65 *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection*, Advisory Opinion OC-25/18, Inter-American Court of Human Rights Series A No 25 (30 May 2018) [174]-[176], [188], [192],

66 See for support *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, 75-76 (Separate Opinion Albuquerque J); *MA v Lithuania* App no 59793/17 (ECtHR, 11 December 2018) [8]-[10] (Separate Opinion Albuquerque J).

67 *Soering* (1989) 11 EHRR 439 [87], [102].

state, or submitted online.[68] As Costello notes, visa processing raises difficult questions given its remoteness from the impact on access to protection.[69] Applying at a VAC or handling by IOM does not raise separate jurisdictional issues, so long as the relevant conduct is attributable to the state. Given physical control is not necessary, effective control or jurisdiction based on the direct causal or functional relationship can be established over online (or postal) applicants for the same aforementioned factors. An analogy can be drawn between online processing, and extraterritorial surveillance and telecommunications interception. Virtual methods, such as online visa refusals or digital surveillance, interfere with rights in the same way as the equivalent physical/more direct intervention.[70] Accordingly, there is no reason to treat them differently. It would be inconceivable for adjudicatory bodies to deny technological advancements rendering the 'exercise of manual, physical power over individuals unnecessary or at least less necessary' and allow states to freely engage in practices affecting individuals extraterritorially by holding onto physical notions of control.[71]

Despite the ECtHR's conclusion that visa refusals do not amount to effective control, it is argued that a state can be said to be exercising jurisdiction under Article 1 ECHR when refusing a visa, irrespective of where and how the individual applied, allowing consideration of whether there has been a violation of the right to leave. Jurisdiction is

68 Gammeltoft-Hansen (n 36) 135.

69 Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016) 244.

70 Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56 HarvInt'l LJ 81, 120-130. See *Big Brother Watch v UK* App nos 58170/13, 62322/14 and 24960/15 (ECtHR, 13 September 2018); *Liberty v UK* (2009) 48 EHRR 1.

71 Milanovic (n 70) 120.

established when the individual applies as this is the key moment the state assumes sufficient power and control over their exercise of rights. The ECtHR in *MN* should have adopted such an understanding of effective control or a functional/causal approach, moving away from its focus on physical control, pre-existing links, and individual choices to ensuring states cannot obstruct access to territory and rights free of responsibility. Doing so would have ensured that states are not permitted to hide behind slippery slope arguments and those based on fear and disorder. They are overstated and (thinly) mask their true aim of attempting to bypass obligations towards asylum seekers. Finding jurisdiction does not impose an unlimited obligation of entry; strict conditions for granting visas and a minimum threshold for triggering Article 3's positive obligations remain. Moreover, as emphasised in Chapter Four, directness and foreseeability can form a baseline, delimiting jurisdiction and responsibility. Rather than emphasising such points, the Court accepted the intervening states' oral arguments that expanding jurisdiction would disrupt the orderly system of relief for refugees, whereby visas would be granted from within the state of origin, undermining the Code and international protection regime where refugees are, by definition, already abroad.[72] The Court could also have highlighted the need for the EU to adopt an effective and fair responsibility sharing regime and the importance of safe and legal pathways. Ultimately, adopting this approach would have demonstrated that the Court recognises migrants' 'right to have rights', rather than prioritising the right to control entry and sustaining the 'systemic exclusion of refugees from the international legal order'.[73]

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72 *MN* (n 48) [90].

73 *Hirsi* (n 66) 62 (Separate Opinion Albuquerque J); Adel-Naim Reyhani, 'Expelled from Humanity: Reflections on M.N. and Others v Belgium' (*Verfassungsblog*, 6 May 2020) <https://verfassungsblog.de/expelled-from-humanity/> accessed 25 August 2020.

b. Denial of Embarkation

The second scenario requiring consideration is denial of boarding by carriers. This is less contentious as refusing to let a person embark can much more easily be viewed as effective control. Some scholars argue that while arrest and detention at the border would amount to control over the person, routine border controls do not.[74] However, the acts of carriers in inspecting documentation and actively denying boarding undoubtedly amounts to physical power over the interdicted person.[75] In *Women on Waves v Portugal*, the ECtHR found that Portugal had violated the right to freedom of expression of a Dutch organisation by sending a warship to block entry.[76] This had a direct impact on the organisation, despite the absence of physical contact or violence.[77] Similarly, carriers exercise physical coercion over the individual's movement. Though individuals may have other means to leave, what is pertinent is that a direct causal or functional relationship exists between the denial of embarkation and obstruction of leaving.[78] Extraterritorial jurisdiction has also been recognised by the ECtHR when state agents subjected individuals to checkpoints.[79] Similarly, *Roma Rights* can be read as demonstrating effective control where a person is

74 Gammeltoft-Hansen (n 36) 193-95; Costello (n 69) 119.

75 Moreno-Lax, *Accessing Asylum* (n 12) 319. See also Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 302. cf Rodenhäuser (n 22) 244-45.

76 App no 31276/05 (ECtHR, 3 February 2009).

77 Costello (n 69) 248.

78 Rodenhäuser (n 22) 245-46; Savitri Taylor, 'Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?' in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing 2008) 115.

79 *Jaloud v Netherlands* (2015) 60 EHRR 29 [149]-[152].

prevented from departing by plane.[80] The House of Lords found that British authorities exercised governmental authority when intercepting Roma asylum seekers at Prague airport, finding the UK in breach of its international obligations and the Race Relations Act 1965.[81] Accordingly, interceptions by carriers amount to effective control.[82]

The preceding analysis reveals that visa regimes raise complex jurisdictional issues and potential obstacles. Nonetheless, it is concluded that visa refusals and denials of boarding can in principle meet Article 1 ECHR. A fortiori the lower jurisdictional tests under the ICCPR, ADHR, and ACHR are also met. Thus, even if the above arguments are not yet accepted under the ECHR (as *MN* shows for visas), this is the general trend of extraterritorial jurisdiction.

b. Attribution

To establish a violation of the right to leave it needs to be ascertained whether the conduct of private carriers, visa companies, and IOM is attributable to the relevant destination state (or EU), looking to the rules on attribution set out in Chapter Four.

a. Interception by Carriers

It will first be considered whether the conduct of carriers in preventing embarkation is attributable to the destination state. Private carriers cannot be considered organs of the state under Article 4 ARSIWA. Nonetheless, Article 5 on attribution for the conduct of persons or entities exercising governmental authority applies. Article 5 requires the entity to be

80 Guild and Stoyanova (n 54) 378-79.

81 *R v Immigration Officer at Prague Airport, ex p European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1 [45], [98] cf [21].

82 Moreno-Lax, 'EU Borders' (n 54) 337-38.

exercising governmental authority, empowered by the law of the state to exercise such authority, and acting in its exercise when committing the IWA.[83] These elements appear easily met. It is well-established that migration control is a state prerogative.[84] Moreover, the Commentary categorises immigration control as governmental authority, providing: 'Private or State-owned airlines may have delegated to them certain powers in relation to immigration control'.[85] Being obligated to check travel documentation, refuse boarding, and assume responsibility for and return undocumented non-nationals are powers seemingly within Article 5's ambit. When denying boarding in potential violation of the right to leave, carriers are clearly exercising such authority, having become surrogate consular and border officials.[86] As for an empowering law, states have carrier sanctions legislation in place.[87] In the EU, Member States are required by EU law to introduce such legislation.[88] Though the EU may be exercising normative control over Member States (addressed below when considering the *Bosphorus* presumption), it is arguably not the case

83 ARSIWA Commentary, 43 [2], [5].

84 Scholten and Minderhoud (n 22) 126; Gammeltoft-Hansen (n 36) 181; Hannah Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (CUP 2011) 101; Rodenhäuser (n 22) 231-32.

85 ARSIWA Commentary, 43 [2].

86 Moreno-Lax, *Accessing Asylum* (n 12) 7, 313-16. cf Case C-584/18 *D Z v Blue Air - Airline Management Solutions SRL* EU:C:2020:324 [70]-[81].

87 See eg *Migration Act 1958* (Cth) s 229; Immigration and Asylum Act 1999 (UK) ss 32-33; Immigration and Refugee Protection Act, SC 2001, c 27 (Canada) (IRPA 2001) s 148; Immigration and Refugee Protection Regulations, SOR/2002-227 (Canada) (IRPR 2002) ss 279-280. See above n 24.

88 CISA, art 26(1)(b), (2); Carriers Liability Directive, recital 1.

that carriers are under the EU's control as agents per Article 6 ARIO.[89] Otherwise, all Member State acts applying an EU directive in an area of shared competence would be ipso facto dually attributable to the EU. The EU may instead bear derived responsibility for direction and control.

Against the backdrop of watchful ILOs, the instructions limb of Article 8 also permits attribution when carriers act on the instructions of ILOs or authorities back in the destination state to obstruct prospective travellers.[90] The 'advisory' role of ILOs is doubtful in practice. Though the final decision rests with the airline, studies show ILO 'advice' is almost always followed. In 2004, their advice was followed in 99% of Dutch cases.[91] This is understandable. Carriers are not refusing boarding for their own interests, but because they are legally required to do so.[92] Despite initial opposition,[93] carriers have a financial incentive to comply and be zealous in their efforts. Through sanctions, ILOs, and gate-checks on passengers by immigration officers upon disembarkation states coerce the 'gatekeeper' into mandatory action.[94] Therefore, the conduct of carriers is attributable to

89 See text to n 172 in ch 4.

90 Gammeltoft-Hansen (n 36) 186-88; Moreno-Lax, *Accessing Asylum* (n 12) 317-18.

91 Scholten and Minderhoud (n 22) 138. See also Sophie Scholten, *The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control* (Brill Nijhoff 2015) 130-33, 275.

92 Rodenhäuser (n 22) 233.

93 Feller (n 22) 63-64.

94 Scholten and Minderhoud (n 22) 128-44. See also Bloom and Risse (n 22); Moreno-Lax, *Accessing Asylum* (n 12) 317-318; FitzGerald (n 2) 64, 68-69.

the state under Article 5, or Article 8 when ILOs issue instructions, including when carriers exceed their authority or contravene instructions.[95]

b. Visa Processing

The focus now turns to attribution for visa processing by private companies and IOM. For private companies, Article 5 ARSIWA applies. As above, given the states right to control entry, handling and processing applications for entry visas is evidently an exercise of governmental authority.[96] Delegation to a private company may be enshrined in legislation,[97] or occur by government contract.[98] A contract or other legal instrument should meet the empowering law requirement, as supported by the ARSIWA Commentary, which specifies that 'private security firms may be contracted to act as prison guards and in that capacity may exercise public powers…'.[99]

Notably, private companies and states specify that intermediaries do not have any influence over the decision.[100] IOM also communicates to applicants that the decision rests

95 ARSIWA, art 7; ARSIWA Commentary, 48 [8].

96 See VCCR, art 5(d); *Hirsi* (n 66) 76-78 (Separate Opinion Albuquerque J).

97 See Visa Code, arts 43(2), 45.

98 See eg 'VFS Global Wins Contract to Provide Germany Visa Services in 14 Countries in Asia Pacific' *CISION PR Newswire* (Dubai, 29 October 2018) <www.prnewswire.co.uk/news-releases/vfs-global-wins-contract-to-provide-germany-visa-services-in-14-countries-in-asia-pacific-698860921.html> accessed 25 June 2019; Gibbs (n 30).

99 ARSIWA Commentary, 43 [2]. See also James Crawford, *State Responsibility: The General Part* (CUP 2013) 132; Tonkin (n 84) 111-12. cf Gammeltoft-Hansen (n 36) 182, 185, 187.

100 See eg Visa Code, art 43(4); VFS Global (n 30); Infantino (n 32) 42, 46.

with the state.[101] Accordingly, an attribution issue does not necessarily arise as the act of granting or refusing a visa is performed by the state, undoubtedly attributable to it under Article 4 ARSIWA. Thus, while states may outsource parts of the process, the chain of responsibility is unaffected. These arguments apply equally to online applications. In practice though, private actors filter out applicants. Infantino, in her ethnographic study of the EU visa policy in Morocco, found that private contractors play a pivotal role with the exercise of discretion inherent to their daily tasks. VAC workers influence the outcome by judging on admissibility and making mistakes, such as when uploading data to consulates, pre-vetting documentation, or providing inaccurate information. This may result in the wrong exclusion of migrants, a trend identified by others too.[102] Therefore, it remains important to attribute the private companies conduct to the state to account for the whole process, including errors, through Article 5. The state's obligation to protect is also pertinent, addressed below. Notably, however, no rule under ARSIWA or ARIO explicitly permits attribution to the state for IOM's conduct. Accordingly, IOM's responsibility for aiding and assisting in violations of the right should be assessed.

In summary, the conduct of carriers and visa companies can be attributed to the destination state on whose behalf the conduct is performed. Accordingly, when scrutinising their conduct, this is on the assumption it is attributable to that state. With attribution not possible, the role of the EU and IOM will be captured through derived responsibility.

101 IOM, 'IOM and Immigration' (n 35) 1.

102 Infantino (n 32) 11, 16, 28, 42-59. See Bloom (n 47) 152-53; Moreno-Lax, *Accessing Asylum* (n 12) 113; Gibbs (n 30).

D. Violation of the Right to Leave

This section considers whether the two scenarios outlined above amount to violations of the right to leave: visa refusals and denial of embarkation by carriers. Part I of this thesis outlined several requirements for determining whether a measure violates the right (whether under Article 12(3) ICCPR or Article 2(3) Protocol 4 ECHR): interference, in accordance with law, proportionate to the legitimate aim(s) pursued, and consistency with other rights. Applying these requirements and the principles from relevant adjudicative bodies, it is concluded that both scenarios interfere with the right, but likely meet the legitimate aim requirement. Nonetheless, they fail the legality requirement. There is a lack of foreseeability and review about which states end up, and remain, on blacklists, visa refusals and interceptions by carriers are highly discretionary, and barriers exist to challenging refusals and denials of boarding. Regarding proportionality, the effectiveness of visas and carrier sanctions is also questionable, there are more protective options available, and they bear down heavily on asylum seekers and refugees. Lastly, it is argued both may violate the right to leave for being inconsistent with other rights, notably *non-refoulement*, non-discrimination, and right to life obligations.

Scenario 1: Visa Refusals

a. Interference

Prima facie visa requirements and refusals interfere with the right to leave. Visa policies make leaving dependent on having permission to enter the destination state, either through visa-free access or possessing a visa. The jurisprudence on the right outlined in Part I illustrated numerous types of interferences. Accordingly, there is no reason visas cannot

fall within its scope.[103] As Chapters One and Three demonstrated, the right encapsulates departure from *any* country, departure to a place of the migrant's *choice*, and obligations under the right apply *extraterritorially*. It follows that destination states interfere with the right when their measures or policies prevent non-nationals leaving another country.[104]

By requiring certain nationals to possess a visa, the ability to leave for one's chosen destination is suppressed, requiring them to apply for a visa, travel irregularly, or not at all. An unsuccessful applicant cannot leave the state they are in and travel there legally, though they may be able to travel elsewhere. Transit visas pose a greater interference, being doubly extraterritorial, whereby the person is unable to travel through places such as Canada, the EU, or Turkey for onward travel. This may pose a significant obstacle for asylum seekers. As will be discussed, the plurality of actors making leaving difficult for nationals of states deemed an asylum risk is significant when considering the notion of a global travel ban for refugee-producing states. Den Heijer argues that the practical and legal effect of a refusal only occurs when the visa requirement is enforced through pre-clearance controls.[105] However, it is just as much an interference to force a person to leave legally, rendering travel without permission unlawful.

It could be contended that the right is only opposable to states of departure, however, nothing limits the right in this manner, with Chapter One arguing that the right also applies to states exercising extraterritorial jurisdiction. As Part I demonstrated, the fact visas operate as a pre-entry control should not affect their characterisation as an exit control

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103 See den Heijer (n 75) 157; Elspeth Guild, *The Right to Leave a Country* (Issue Paper, Council of Europe Commissioner for Human Rights 2013) 64-65; Guild and Stoyanova (n 54) 375.

104 den Heijer (n 75) 157.

105 ibid 161.

too and hence, an interference. Otherwise, destination states would be free to inhibit leaving as they pleased.[106] Already in 1989, regarding carrier sanctions, NGOs requested the UN Sub-Commission declare that states refrain from preventing, *even indirectly*, non-nationals leaving their state of origin.[107] Classifying visas as an interference correctly recognises that departure states and states exercising extraterritorial control have obligations under the right to leave, which ensures its effectiveness and upholds its object and purpose, including to protect departure independently of entry. As Chapter Two highlighted, states cannot hide behind a collectivised reading of the right, ignoring the binary nature of obligations (contracting state – individual under jurisdiction).[108] Every state bound by the right must guarantee it to those within their jurisdiction and respect its independent nature, including those imposing visas.[109] States can be found in violation regardless of whether entry will be granted. It is worth noting that this right–duty relationship can be contrasted with the privilege–'no-right' relationship under the Hohfeldian system, whereby the right to leave would be re-conceived of as a privilege/liberty, and its correlative the state's 'no-right'.[110] The individual is not obliged to refrain from leaving, having the *privilege* to leave, and the state has *'no-right'* that the individual shall not leave. However, the state also has no *duty* to refrain from interfering with the individual's exercise of that privilege.

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106 ibid 160.

107 Report of the Secretary General, 'The Right of Everyone to Leave any Country, including his Own, and to Return to his Country' (1989) UN Doc E/CN.4/Sub.2/1989/44/Add.1, 11-12.

108 Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 382; Moreno-Lax, 'EU Borders' (n 54) 353-55.

109 ibid; Guild and Stoyanova (n 54) 394.

110 See Wesley Necomb Hohfeld, 'Fundamental Legal Concepts as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 28-44.

Lastly, as Chapter One argued, an interference does not presuppose a complete inability to leave for everywhere and the availability of alternatives should not affect the right's threshold.[111] Hence, the inability to travel to one state amounts to an interference despite the fact one could travel elsewhere. Rather, alternatives may be relevant to proportionality. Therefore, the dual effect of visas in hindering individuals at the start of the journey, alongside entry, is an interference.

b. In accordance with law

The second requirement is whether visas are in accordance with law. This requires analyses of both the listing and visa refusal processes. It is not contentious that visa policies have a basis in law. The contentious aspect for exploration is whether visa policies meet the quality of law test, outlined in Chapter One.[112]

a. Listing Process

The central issue for present purposes is how a state ends up blacklisted, on what evidence, and possibilities for removal. A general feature of visa regimes is that listing is a foreign policy decision. As such, the quality of law assessment will be fairly lax, despite issues with foreseeability and arbitrariness. For example, EU listing is taken:

> [O]n the basis of a case-by-case assessment of a variety of criteria relating, inter alia, to illegal immigration, public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the Union's external relations with the relevant third countries, including, in particular,

111 See text to nn 158-161 in ch 1.

112 Note the similarity between the ECHR and ICCPR.

> considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity.[113]

An initial reading highlights the wide discretion afforded to the EU in listing a state. The criteria are vague, non-exhaustive, and not formulated with sufficient precision to allow states (or nationals) to foresee whether they will be blacklisted or not.

The EU's listing history provides some clarity.[114] There has been movement between lists, highlighting the existence of periodic review, an important procedural safeguard.[115] Nonetheless, there remains a lack of transparent, published reasoning for why the majority of states are blacklisted. Four benchmarks are considered for movement onto the whitelist: document security; irregular migration, including readmission, asylum, and border and migration management; public order and security; and external relations and fundamental rights.[116] In considering list amendments, it is evident that waivers have been granted for geopolitical reasons, with visa liberalisation a key bargaining chip in international relations.[117] The EU granted visa waivers to five Western Balkan states (Albania, Bosnia and Herzegovina, FYROM, Montenegro, and Serbia), representing the

113 Reg (EU) 2018/1806, art 1.

114 See Maarten den Heijer, 'Visas and Non-discrimination' (2018) 20 EJML 470, 480-85.

115 Reg (EU) 2018/1806, recital 3, art 8(4); ibid.

116 See eg Commission, 'Joint Staff Working Paper First Progress Report of the Implementation by the Republic of Moldova of the Action Plan on Visa Liberalisation' SEC (2011) 1075 final, 1.

117 Czaika, de Haas and Villares-Varela (n 1) 4, 8, 11; den Heijer, 'Visas' (n 114) 483-85; Lena Laube, 'The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy' (2019) 7 Comparative Migration Studies 1, 5-9 <https://doi.org/10.1186/s40878-019-0130-x> accessed 9 January 2020.

first step towards EU membership,[118] as well as Moldova, Ukraine, and Georgia.[119] Waiving visas for Western Balkan states was controversial, having been blacklisted amidst the Yugoslav Wars and ensuing refugee crisis.[120] As discussed under proportionality, the EU conditions liberalisation and threatens restrictive measures on a state's performance in the asylum and border control spheres.[121] Additionally, the risk of and absence of irregular migration is afforded priority, with South America, Ecuador, and Bolivia having been moved to the blacklist based on the illegal immigration and public policy criterions.[122] Conversely, Colombia and Peru were whitelisted, based on significant economic growth,

118 Council Regulation (EC) No 1244/2009 of 30 November 2009 amending Regulation (EC) No 539/2001 [2009] OJ L 336/1, recital 2; Regulation (EU) No 1091/2010 of the European Parliament and of the Council of 24 November 2010 amending Council Regulation (EC) No 539/2001 [2010] OJ L 329/1, recital 2. See Milica Petrovic, 'Freedom of Movement in the European Union: Visa Liberalisation in the Western Balkan Countries' (2010) LSE Migration Studies Unit Working Papers No 2010/04 <www.lse.ac.uk/government/Assets/Documents/pdf/research-groups/msu/WP-2010-04.pdf> accessed 19 January 2021.

119 Regulation (EU) No 259/2014 of the European Parliament and of the Council of 3 April 2014 amending Council Regulation (EC) No 539/2001 [2014] OJ L 105/9, recital 2; Regulation (EU) 2017/372 of the European Parliament and of the Council of 1 March 2017 amending Regulation (EC) No 539/2001 [2017] OJ L 61/7, recital 2; Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 [2017] OJ L 133/1, recital 2.

120 See generally Florian Trauner and Emanuele Manigrassi, 'When Visa-free Travel Becomes Difficult to Achieve and Easy to Lose: The EU Visa Free Dialogues after the EU's Experience with the Western Balkans' (2014) 16 EJML 125.

121 ibid; Tineke Strik, 'The Global Approach to Migration and Mobility' (2017) 5 Groningen Journal of International Law 310, 317-18.

122 Council Regulation (EC) No 453/2003 of 6 March 2003 amending Regulation (EC) No 539/2001 [2003] OJ L 69/10, recital 1; Council Regulation (EC) No 1932/2006 of 21 December 2006 amending Regulation (EC) No 539/2001 [2006] OJ L 405/23, recital 2; Commission, 'Proposal for a Council Regulation amending Regulation (EC) No 539/2001' COM (2002) 679 final, 2-3; Commission, 'Proposal for a Council Regulation amending Regulation (EC) No 539/2001' COM (2006) 84 final, 2-3.

low levels of irregular migration, secure travel documents, a reduction in security threats, cooperation on return, and a strong EU relationship.[123]

For other blacklisted states there remains a lack of transparent reasoning, impacting the individual's right to leave. As Moreno-Lax and den Heijer note, the bulk of blacklisted states have never been properly justified nor reviewed.[124] The absence of a requirement to justify precisely why a state is blacklisted makes it impossible to ascertain the criteria at play.[125] Arguably, this results in the EU visa policy failing the in accordance with law requirement, failing to protect nationals from arbitrariness. The same issues squarely arise for the ATV list, though with graver effects given ATVs hamper travel outside the EU. Other than being aimed at 'combat[ing] illegal immigration' and the EU annually reviewing decisions by Member States to impose additional ATVs (to ascertain whether such states should be transferred to its ATV list), the precise reasoning for listing a state remains unclear and when EU wide reviews are conducted.[126]

Quality of law issues appear to be a problem across visa regimes, which is unsurprising given the political and opaque nature of listing. For example, while Australia has a universal visa requirement, it differentiates between states by allowing nationals with

123 Regulation (EU) No 509/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Regulation (EC) No 539/2001 [2014] OJ L 149/67, recitals 5, 6; Commission, 'Report from the Commission to the European Parliament and the Council On the Fulfilment by Colombia of the relevant criteria in view of the negotiation of a visa waiver agreement between the European Union and Colombia' COM (2014) 665 final; Commission, 'Report from the Commission to the European Parliament and the Council On the Fulfilment by Peru of the relevant criteria in view of the negotiation of a visa waiver agreement between the European Union and Peru' COM (2014) 663 final.

124 Moreno-Lax, *Accessing Asylum* (n 12) 89-94; den Heijer, 'Visas' (n 114) 487.

125 Guild, 'Border Abroad' (n 44) 92-104.

126 Visa Code, recital 5, art 3(3).

an ‘eligible passport’ to apply online for certain visas. The instrument specifying these countries does not explain their inclusion or the exclusion of others.[127] The US position is slightly clearer on which states qualify for visa-free travel: the state must have and maintain a low visa refusal rate (between 2-3% depending) and issue machine-readable passports. However, the state is assessed against inherently vague criteria, including security, law enforcement, and immigration interests.[128] The now-revoked travel ban introduced under the Trump administration preventing the entry of nationals from thirteen states, primarily African, Asian, and Middle Eastern, further illustrates how visa regimes can fall within broad and unconstrained executive powers under domestic law, resulting in unpredictability and arbitrariness.[129] Despite the right to leave being an *individual* right, any review of blacklisting requires state-level action. The focus now moves to the visa procedure.

b. Visa Issuance

The quality of law test as applied to visa refusals (directly affecting the individual) will be more stringent. First, while visa rules may be relatively straightforward and publicly available, the problem lies in the highly discretionary and opaque nature of visa issuance. Even where an applicant apparently meets the requirements the visa may be refused, while

127 Minister for Immigration, Multicultural Affairs and Citizenship (Cth), *Specification of an eVisitor - Eligible Passports*, IMMI 13/078, 26 July 2013; Minister for Citizenship and Multicultural Affairs (Cth), *Specification of ETA-Eligible Passports*, IMMI 18/084, 2 August 2018.

128 See INA 8 USC s 1187 (2018). See Mau and others, *Liberal States* (n 7) 60-62, 70-73; Bernard Ryan, ‘Extraterritorial Immigration Control: What Role for Legal Guarantees?’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 8-10.

129 See Czaika, de Haas and Villares-Varela (n 1) 6-7; NAFSA, ‘Travel Ban: NAFSA Resources’ (20 January 2021) <www.nafsa.org/professional-resources/browse-by-interest/executive-order-travel-ban-nafsa-resources> accessed 20 January 2021.

the issuance/refusal criteria are vague and afford authorities (and private companies) wide powers of interpretation.[130] There are a variety of grounds upon which a visa can be refused by a state, including inability to show a genuine intention to return, usually established through return tickets and interviews, lack of justification for the purpose and duration of the intended stay, insufficient proof of funds for stay, false documents, criminal convictions/activity, or posing a threat to security, public health, or public policy.[131]

Such grounds are generally not formulated with sufficient precision and key concepts capable of a range of interpretations. For instance, the EU Visa Code does not indicate what amounts to a threat to public policy, internal security, or international relations.[132] Decision-makers seem to enjoy near unfettered discretion in assessing whether an individual poses a security or migratory risk, combined with subjective judgements of veracity and intention.[133] In Australia, most individuals are subject to a sweeping character test and their visa refused where, for instance, they have a substantial criminal record, are a potential danger to the community, or mere *general conduct* shows they are not of good

130 Federica Infantino, *Schengen Visa Implementation and Transnational Policymaking: Bordering Europe* (Palgrave Macmillan 2019) 55-64.

131 See eg INA 8 USC ss 1182, 1184(b), 1201(g) (2018); IRPA 2001 (Canada) ss 34-39; IRPR 2002 (Canada) ss 14-20, 179; Immigration Act 2002 (South Africa) ss 10-11, 29-30; Visa Code, arts 21(1), (3), (6)-(7), 32(1); Mark B Salter, 'The Global Visa Regime and the Political Technologies of the International Self: Borders, Bodies, Biopolitics' (2006) 31 Alternatives 167, 176-77.

132 Visa Code, art 32(1)(a)(vi). See also Helen Staples, 'Adjudicating the External Schengen Border' in Kees Groenendijk, Elspeth Guild and Paul Minderhoud (eds), *In Search of Europe's Borders* (Kluwer Law International 2003) 235, 245; Bigo and Guild (n 45) 244-45.

133 See Case C-84/12 *Koushkaki v Bundesrepublik Deutschland* EU:C:2013:862 [55]-[63] on the wide discretion afforded to authorities; Infantino, *Schengen* (n 130) 177-215.

character.[134] This test has been criticised for affording the Minister extremely broad discretionary powers and lacking safeguards.[135] Such imprecision and vagueness means there is a danger of arbitrariness and applicants unable to reasonably foresee the outcome of their application nor how considerations will be applied or weighted. While Australia may be on the far end of the spectrum, these features are likely inherent to many, if not all, visa systems, failing the legality test. As Jansen posits, visa issuance is 'widely experienced as dependent more on the whims of individual functionaries than on transparent criteria. Its discretionary nature – a favour, not a right'.[136] Though such criteria may not be any more vague than other areas of administrative discretion, visa regimes seek to establish powers and discretions, not rules and standards.[137]

There is also a risk of poor-quality decision-making (including errors by private VACs). Staples' 2003 study of the case law of national courts on the Schengen rules found that the system results in arbitrary decisions and lacks legal certainty (admittedly the Visa Code could have improved this).[138] Similarly, the UK Independent Chief Inspector of

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134 *Migration Act 1958* (Cth) s 501; *Migration Regulations 1994* (Cth) sch 4; Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 79 - Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA*, 20 December 2018, s 2, pt B.

135 See Law Council of Australia, Submission No 29 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Migration Amendment (Strengthening the Character Test) Bill 2019*, 14 August 2019.

136 Stef Jansen, 'After the Red Passport: Towards an Anthropology of the Everyday Geopolitics of Entrapment in the EU's "Immediate Outside"' (2009) 15 Journal of the Royal Anthropological Institute 815, 818. See also Francesca Zampagni, 'Unpacking the Schengen Visa Regime. A Study on Bureaucrats and Discretion in an Italian Consulate' (2016) 31 Journal of Borderlands Studies 251.

137 Costello (n 69) 89.

138 Staples (n 132) particularly 223-35, 245-46.

Borders and Immigration, tasked with monitoring the efficiency and effectiveness of the Home Office's functions, has on several occasions expressed concern about the quality of decision-making and inconsistency, for instance visas being incorrectly refused after staff 'disregarded or misinterpreted' evidence or where applicants failed to provide information not requested.[139] Automated decision-making exacerbates arbitrariness, opaqueness (with algorithms and related errors not easily-understood), and issues of procedural fairness and lack of oversight.[140] In 2017, the Inspector warned that the Home Office's visa streaming tool could become 'a de facto decision-making tool', with the danger of confirmation bias.[141] Moreover, the complexities in ascertaining *who* and *what* made the decision and the underlying rationale/reasoning creates obstacles for individuals in knowing why an adverse decision was reached and on what grounds to appeal. Visa regimes are discretionary and opaque by design, which automation perpetuates.

As the ECtHR's jurisprudence in Chapter One demonstrated, wide discretion is less problematic if adequate procedural safeguards exist. The ability to challenge a visa refusal is critical to realising the right to leave, for a first refusal may pave the way for future refusals.[142] Moreover, appeal rights may be absent, limited, or difficult to exercise. For

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139 See eg ICIBI, *Inspection Report of the UK Border Agency Visa Sections in Africa* (June 2012) 5-7, sect 4; ICIBI, *Inspection Report of the Amman Visa Section* (October 2015) 4-5, sect 4.

140 Didier Bigo, 'The (In)securitization Practices of the Three Universes of EU Border Control: Military/Navy – Border Guards/Police – Database Analysts' (2014) 45 Security Dialogue 209, 216-219; Molnar and Gill (n 38) particularly pts 5.1, 5.3, 6.1-6.2.

141 ICIBI, *An Inspection of Entry Clearance Processing Operations in Croydon and Istanbul* (July 2017) 5-6, sect 7.

142 Didier Bigo, 'Criminalisation of "Migrants": The Side Effect of the Will to Control Frontiers and the Sovereignty Illusion' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff 2004) 88; Guild, 'Citizens Without a Constitution' (n 44) 52-53. See eg *Migration Act 1958* (Cth) s 501F; on refusals being recorded, Visa Code, arts 21(9), 32(5).

example, when refused a Schengen visa, individuals possess a right of judicial appeal under national law against the Member State refusing the visa and must be provided with information regarding the appeal procedure.[143] Though informed of their rights, they will have to start proceedings from a third state and will be unable to present their case in person unless granted permission to enter or appear via video.[144] In other states, appeal rights are more precarious, available only in limited circumstances. The UK denies appeal rights to visitors and short-term students, unless they can raise a human rights claim, leaving the applicant to re-apply or seek judicial review.[145] In Australia, non-citizens can only submit an application for review if entitled to review rights, with applicants abroad generally having none,[146] while applicants with no connection to the US are virtually powerless, obstructed by the doctrine of 'consular nonreviewability'.[147] Even when granted a visa, an individual may still be refused entry at the border, with visas/waivers representing only a prima facie case for admission.[148]

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143 Visa Code, arts 32(3), 47(1)(h), annex VI; Case C-403/16 *El Hassani v Minister Spraw Zagranicznych* EU:C:2017:960 [37]-[42]. See Jorrit J Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' (2017) 2 European Papers 571, 574-77 <www.europeanpapers.eu/en/e-journal/external_migration_and_asylum_management_accountability_for_executive_action> accessed 28 January 2021. cf Common consular instructions on visas for the diplomatic missions and consular posts [2005] OJ C 326/1, pt V [2.4].

144 See Staples (n 132) 228-33.

145 Nationality, Immigration and Asylum Act 2002 (UK) s 82(1).

146 *Migration Act 1958* (Cth) ss 338, 500.

147 See *Trump v Hawaii* 138 S Ct 2392, 2418-20 (2018); Donald S Dobkin, 'Challenging the Doctrine of Consular Nonreviewability in Immigration Cases' (2010) 24 GeoImmigrLJ 113; Gabriela Baca, 'Visa Denied: Why Courts should Review a Consular Officer's Denial of a U.S.-Citizen Family Member's Visa' (2015) 64 AmULRev 591.

148 Salter (n 131) 175.

Though limiting appeals may be justifiable from a cost and efficiency perspective, this does not negate fundamental quality of law issues. Visa applicants are non-voluntary customers, often having no choice but to use private companies.[149] The use of third parties and relocation away from the border makes it difficult to assert one's legal rights. The individual may only ever come into contact with a private company or IOM, making frontline workers useful scapegoats.[150] Delegation thus removes such activities from democratic and legal control mechanisms.[151] Outsourcing and automation multiply the chances of visa processes being arbitrary and prevent individuals vindicating their right to leave; the state and safeguards are conveniently hidden. Though an exhaustive account cannot be provided, this examination reveals that listing and refusal processes likely fail at the in accordance with law stage.

c. Proportionality

Nonetheless, improving quality of law compliance is possible. Accordingly, it must be considered whether visa policies and refusals are proportionate, which requires pursuit of a legitimate aim, rational connection to that aim, strict necessity, and that they strike a fair balance between the right to leave and aims pursued.

a. Legitimate Aim

Long-standing existence and widespread state practice have made visas one of the most unchallenged migration controls, being ostensibly legitimate. Lord Bingham in *Roma*

149 Infantino, *Outsourcing* (n 32) 37.

150 Goodwin-Gill and McAdam (n 108) 370; ibid 5, 62-80.

151 Bloom and Risse (n 22) 76.

Rights asserted that 'it could not plausibly be argued that a visa regime would have been contrary to the practice of the nations'.[152] Visas also appear to be broadly accepted by the UNHCR.[153] Accordingly, it could be argued that they meet the definition of a lawful restriction under the right. However, this chapter does not argue that visas are unlawful *in toto* or against the practice of nations; rather, it demonstrates that there are common issues that may arise across visa regimes and visa types, such that they cannot always be said to be a lawful restriction. While immigration control may be a legitimate expression of state sovereignty and due regard must be given to state practice, this does not insulate visas from challenge. It should also be interrogated whether the ECtHR's position that states have the right to control *entry*[154] automatically entitles them to control *exit*. As is conventional within IHRL, adjudicative bodies can declare certain aspects of a practice incompatible with a right to ensure its effectiveness, which is particularly important here given the right to leave is underexplored vis-à-vis destination states.

Visa policies may pursue several legitimate aims listed in right to leave provisions, specifically national security, public safety, public order, prevention of crime, and protection of health.[155] As can be gleaned from the issuance criteria, visas seek to facilitate valued cross-border movements, while simultaneously controlling and curbing movement

152 (n 81) [28]. See also Goodwin-Gill and McAdam (n 108) 371.

153 UNHCR 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach' (9 June 2000) UN Doc EC/50/SC/CRP.17 [17].

154 See eg *Chahal v UK* (1996) 23 EHRR 413 [73].

155 See Feller (n 22) 50; FitzGerald (n 2) 53.

in light of security, health, and other migratory risks.[156] The EU visa policy captures these aims well, being specifically directed at 'facilitating legitimate travel and tackling illegal immigration' and 'strengthening freedom, security and justice', with blacklisting and visa refusals also concerned with threats to public policy, security, and health, economic benefits, external relations, regional coherence, and reciprocity.[157] As explored during balancing, reducing asylum seeker arrivals is also a specific aim of visa regimes, for instance EU law allowing visa requirements to be temporarily reinstated following a substantial increase in asylum applications (or irregular migration).[158]

There are indeed risks associated with migration and mobility, including disease and viruses (as shown by COVID-19), human trafficking and smuggling, and threats to security and public safety associated with terrorism and crime.[159] Public order, defined in Chapter One as ensuring the functioning of society based on fundamental principles, is potentially far-reaching. Visa policies likely fall within this, seeking to facilitate order and 'control' migration through selectivity and preventing irregular migration, while fostering tourism, trade, and other beneficial activities. As Chapter One argued, wide legitimate aims are conditioned by international obligations and consequently, restricting departure to preclude seeking asylum is unlikely to be legitimate. Therefore, targeting asylum seekers

156 Neumayer (n 7) 74.

157 Visa Code, recital 3, arts 21, 32(1); Reg (EU) 2018/1806, art 1. See also IRPA 2001 (Canada) s 3(1). On how trade and security influence visas see Nazli Avdan, *Visas and Walls: Border Security in the Age of Terrorism* (University of Pennsylvania Press 2019).

158 Reg (EU) 2018/1806, art 8(2)(a)(b); Trauner and Manigrassi (n 120) 126, 132-44.

159 See on security and crime Neumayer (n 7) 76; Michelle Mittelstadt and others, 'Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11' (Fact Sheet, MPI 2011) <www.migrationpolicy.org/research/post-9-11-immigration-policy-program-changes> accessed 28 January 2021.

and refugee-producing states, as evinced by the blacklisting process, cannot be deemed a legitimate public order aim. The legitimacy of discriminatory visa policies is also questionable, addressed under consistency. As Chapter One also demonstrated, national security is only implicated in cases of a serious threat to the nation itself, not mere local or isolated threats. This sets a high bar for visa requirements and refusals based on national security, though it is plausible.

Two deeper problems are at play. First, states *construct* the notion of 'illegal immigration', turning those who would otherwise cross the border lawfully into 'illegal'/'irregular' migrants or 'unauthorised arrivals' by operation of their visa policies and immigration laws.[160] Without a documentary requirement, such movement would be lawful. Second, some states may declare their policies to pursue such legitimate ends, but in *reality*, their true aim is to avoid their obligations towards asylum seekers. Moreover, migration is highly politicised and risks exaggerated. The rhetoric of politicians and the media often leverages migrants as a threat to the security, economy, health, identity, and fabric of the host society (as opposed to positive labels like 'tourist', 'expat', 'businessperson').[161] As Fitzgerald aptly expresses:

> Even though the chances of an asylum seeker committing a terrorist act are infinitesimally small, the narrative that these controls are necessary to protect security provides a plausible alternative to the narrative that the

160 Costello (n 69) ch 3. See also Elspeth Guild, 'Who is an Irregular Migrant?' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff 2004).

161 Anastassia Tsoukala, 'Looking at Migrants as Enemies' in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005); Bigo and Guild (n 45) 237; Avdan (n 157) 186-88, 190-91.

> controls deliberately or in effect prevent asylum seekers from seeking safety.[162]

Though adjudicative bodies are likely to afford states a wide margin of appreciation and domestic courts may defer to the legislature and executive, they must scrutinise the motives underlying visa requirements, rather than accepting their legitimacy on face value.[163] States should not be permitted to make vague security or public order assertions, feeding into vilifying rhetoric that masks real aims and discrimination. Nonetheless, many current visa policies will likely be deemed to meet the legitimacy requirement, given the state's right to control entry. The remainder of the proportionality test is therefore critical in ensuring minimum impairment of the right.

b. Rational Connection, Necessity, and Balancing

This section addresses suitability, strict necessity, and balancing in turn, before demonstrating the disproportionate impact of visas on asylum seekers and refugees.

First, visa policies are unsuitable in achieving some of the aforementioned ends. The suitability test requires a rational connection between the measures adopted and objective pursued (though adjudicative bodies may defer on some elements to the national authority). Critically, tailored analysis requires specificity of aims; the state cannot simply invoke them all. There are serious doubts as to whether preventing irregular migration, smuggling, and trafficking is achieved. Visas narrow lawful travel options and are generally difficult to obtain, *fostering* irregular movement and increasing trafficking

162 FitzGerald (n 2) 261.

163 cf *Trump v Hawaii* (n 147) 2418-20.

risks.[164] Analogously in *Quila*, although the UK Supreme Court deemed the government's decision not to grant marriage visas to people under 21 legitimate in combating forced marriage, the law was disproportionate. There was no strong evidence it would have any substantial deterrent effect on forced marriage; instead, the law would interfere with many more voluntary marriages, vastly exceeding the number of deterred forced marriages.[165] Studies show that while visa refusals seem to increase irregular migration, visa requirements are a relatively strong deterrent; however, estimates suggest this deterrent effect is counterbalanced by the considerable deflection of migrants into irregularity.[166] Fundamentally, 'illegal' migration remains the 'product of the laws that seek to combat it'.[167] Regarding the other legitimate aims, visas may address security, crime, safety, and health concerns.[168]

Second, visas (and carrier sanctions) are not strictly necessary, as reasonable, less restrictive alternatives exist. Migration control could occur at the border, rather than in the state of origin/departure. Baird and Spijkerboer propose a more liberal migration policy or

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164 See Bloom and Risse (n 22) 74; Nazli Avdan, 'Human Trafficking and Migration Control Policy: Vicious or Virtuous Cycle?' (2012) 32 Journal of Public Policy 171; Guild and Stoyanova (n 54) 390.

165 *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [50]-[58]; [74]-[77]. See Timothy Endicott, 'Proportionality and Incommensurability' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 320-23, 335-37.

166 Mathias Czaika and Mogens Hobolth, 'Deflection into Irregularity? The (Un)intended Effects of Restrictive Asylum and Visa Policies' (2014) IMI Working Paper Series 84 <www.migrationinstitute.org/publications/wp-84-14> accessed 19 January 2021; Mathias Czaika and Mogens Hobolth, 'Do Restrictive Asylum and Visa Policies Increase Irregular Migration into Europe?' (2016) 17 European Union Politics 345.

167 Costello (n 69) 67.

168 Avdan questions their effectiveness in curbing terrorism and criminal activity: (n 157) 191-92, 196-97.

one combined with limited detention and the return of migrants declared inadmissible (though supervision/reporting arrangements, not detention, are advocated for here), ensuring 'public scrutiny and judicial control in countries of destination, rather than leaving people outside in countries of transit or of persecution'.[169] Admittedly, there are problems and implications with this; control at the border is less effective for remote control purposes, associated with high costs of detention and deportation, greater administrative and financial costs, and obstacles to return.[170] Nonetheless, processing at the destination's border represents a more protective alternative for migrants, and resource implications can be partially addressed, including by requiring rejected migrants to pay for their return journey when possible.[171] Moreover, as highlighted below, the vast majority of people will arguably be allowed entry and some costs related to processing asylum seekers can be reduced by introducing humanitarian corridors. Accordingly, there are reasonable, more protective alternatives and thus, visa regimes are not strictly necessary.

As Chapter One flagged, COVID-19 led many states to institute travel bans, fully or partially closing their borders, as well as suspend visa waivers and visas on arrival. Given the legitimacy of protecting health and life and corresponding positive obligations, some departure controls, such as restricting incoming non-essential travel by non-nationals, may be temporarily necessary. However, as Chapter Six explores further, restrictions must

169 Baird and Spijkerboer (n 22) 17, 19.

170 See eg UNHCR 'Protection Policy Paper: The Return of Persons Found Not to be in Need of International Protection to their Countries of Origin: UNHCR's Role' (November 2010); den Heijer, *Extraterritorial Asylum* (n 75) 163; Matteo Civillini and Lorenzo Bagnoli, 'Skyrocketing Costs for Returning EU Migrants' (*EUobserver*, 5 May 2017) <https://euobserver.com/migration/137720> accessed 25 February 2020.

171 Guild and Stoyanova (n 54) 390-91.

remain proportionate, non-discriminatory, and cannot deny the right to seek asylum.[172] Critically, blanket travel bans and border closures are likely ineffective and counterproductive, risking further spread of the virus as migrants take more hidden routes or end up in 'orbit', undermining their suitability.[173]

There are unlikely to be alternatives to preventing 'unwanted' migrants all together. This requires consideration of the last step of the proportionality analysis, striking a fair balance between the aims and individual's right to leave. Where an individual is subject to widespread visa requirements/refusals, this would likely destroy the essence of the right (unless they pose a clear security or health risk). This cannot, however, be the only scenario where visas are disproportionate.[174] Statistical evidence from the EU highlights their disproportionate nature. Visas have a significant impact on mobility, despite the number of people entering the EU irregularly or refused admission paling in comparison to the vast numbers entering lawfully (indicating too the reasonableness of alternatives).[175] Moreover, as the ECtHR has held, restrictions will not be necessary where they are automatic and disregard individual circumstances.[176]

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172 UNHCR 'Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response' (16 March 2020) [5]-[8].

173 ibid [8]; Natalia Banulescu-Bogdan, Meghan Benton and Susan Fratzke, 'Coronavirus is Spreading across Borders, but it is not a Migration Problem' (Commentary, MPI 2020) <www.migrationpolicy.org/news/coronavirus-not-a-migration-problem> accessed 20 March 2020.

174 cf Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 MichJInt'l L 21, 41-45.

175 Elspeth Guild and Sergio Carrera, 'EU Borders and Their Controls: Preventing Unwanted Movement of People in Europe?' (2013) CEPS Essay No 6, particularly 6, 12-14 <www.ceps.eu/ceps-publications/eu-borders-and-their-controls-preventing-unwanted-movement-people-europe/> accessed 26 January 2021.

176 *Stamose v Bulgaria* App no 29713/05 (ECtHR, 27 November 2012) [36].

While visas may not be a wholly blanket and indiscriminate measure, individuals from blacklisted states are guilty until proven innocent. Paradoxically, passports identify unique individuals, but combined with visas, dismantle 'uniqueness by classifying them into a collectivity restricted by default in terms of cross-border mobility'.[177] This dynamic is disproportionate for placing the burden on applicants to prove they are the exception and do not constitute a risk, notwithstanding their membership of a state which, by definition, is deemed suspicious.[178] This may prove impossible and is more problematic when algorithms classify individuals as 'risky' based on datasets, not evidence. Conversely, there are evident privacy risks with too much individualisation, specifically extensive data capture and sharing. Ultimately, to strike a fair balance, significant weight must be given to individual circumstances, avoiding a broad-brush approach based on preconceived characteristics.

As advanced in Chapter Three, although the right to leave benefits nationals and non-nationals alike, the composite right to leave to seek asylum demands a stricter test when assessing violations for asylum seekers and (would-be) refugees. Visa policies have a disproportionate impact on such groups, demonstrated by widespread blacklisting of refugee and asylum-producing states, visa liberalisation being tied to readmission and reducing asylum, and the fact asylum seekers and refugees are unlikely to meet visa criteria. Visas have been used for decades to deter refugees and asylum seekers. For example, in the 1980s, the UK introduced visas for Sri Lanka, Turkey, and other states in response to rising asylum applications (alongside carrier sanctions), while Germany introduced visas

177 Jansen (n 136) 817.

178 See Jørgen Carling, 'Migration in the Age of Involuntary Immobility: Theoretical Reflections and Cape Verdean Experiences' (2002) 28 JEMS 5, 32-33; Guild, 'Border Abroad' (n 44) 89.

for Afghans, Bangladeshis, Indians, and Sri Lankans.[179] Similarly, Canada overtly uses visas to deter asylum seekers, having previously reinstated them for the Czech Republic and Hungary whenever Roma asylum applications increased. In the interests of visa reciprocity and trade, Canada no longer requires short-stay visas, instead treating EU Member States as STCs.[180] Blacklists generally overlap with the leading source countries for refugees, as determined by the UNHCR, further illustrated by the Passport Index on passport power (or lack thereof).[181] Notably, the EU also requires nationals from Afghanistan, Bangladesh, DRC, Eritrea, Ethiopia, Ghana, Iran, Iraq, Nigeria, Pakistan, Somalia, and Sri Lanka to hold an ATV, while some Members have also introduced ATV's for other top refugee-producing states.[182]

Additionally, states may link their visa policies to reducing asylum. As highlighted earlier, the EU conditions visa facilitation, liberalisation, and specific restrictive measures on cooperation on readmission and strengthening border controls.[183] As part of the 2016 EU-Turkey deal, the EU committed to lifting visas for Turkish citizens in exchange for the

179 Ryan (n 128) 9; Moreno-Lax, *Accessing Asylum* (n 12) 114; FitzGerald (n 2) 164-66.

180 Audrey Macklin, 'A Safe Country to Emulate? Canada and the European Refugee' in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013); FitzGerald (n 2) 60-61.

181 Henley & Partners, 'Passport Index' <https://www.henleypassportindex.com/passport> accessed 1 September 2020 (compiled by a private company advising states on how to monetise on nationality through Citizenship by Investment); UNHCR 'Global Trends Forced Displacement in 2019' (UNHCR 2020) 8 <www.unhcr.org/5ee200e37.pdf> accessed 1 September 2020.

182 Visa Code, annex IV; List of third countries whose nationals are required to be in possession of an airport transit visa when passing through the international transit area of airports situated on the territory of one/some Member States (5 October 2020).

183 See Visa Code, art 25a; Reg (EU) 2018/1806, art 8; Commission, 'The Global Approach to Migration and Mobility' (Communication) COM (2011) 743 final (GAMM); Laube (n 117); Salvatore Fabio Nicolosi, 'Refashioning the EU Visa Policy: A New Turn of the Screw to Cooperation on Readmission and to Discrimination?' (2020) 22 EJML 467.

readmission of all irregular migrants crossing into Greece and prevention of irregular migration.[184] However, Turkey has not yet been granted visa-free access due to outstanding benchmarks, including full implementation of the readmission agreement and visa list harmonisation.[185] It is therefore evident that visa policies have a significant impact on asylum seekers and refugees, inhibiting regularised movement.

This brings the focus to the unlikelihood of asylum seekers and refugees receiving a short-stay or transit visa, due to their inability to satisfy the criteria and evidence requirements. Even if a state is not specifically targeting asylum seekers, claiming asylum is by definition not envisaged in visa regimes, save exceptional humanitarian visas and protected entry programmes. Visa policies subsume asylum seekers and refugees into the broader class of nationals requiring a visa, ignoring the protection they are entitled to.[186] For short-stay visas, individuals must typically possess a valid passport, specify their dates and purpose, provide details and evidence about the journey, such as accommodation and means of subsistence, and critically, must prove their intention to leave afterwards.[187] First, an asylum seeker or refugee may not possess a valid passport or travel document.[188] As the UNHCR emphasises, requiring asylum seekers and refugees to obtain a passport or visa

184 European Council, 'EU-Turkey Statement' (18 March 2016) <https://perma.cc/4ELL-BCW4> accessed 2 February 2021; Czaika, de Haas and Villares-Varela (n 1) 7-10; Avdan, *Visas and Walls* (n 157) 168-78.

185 Commission, 'Staff Working Document Turkey 2018 Report' SWD (2018) 153 final, 48-49.

186 Moreno-Lax, 'EU Borders' (n 54) 317-18; Moreno-Lax, *Accessing Asylum* (n 12) 100-06.

187 Salter (n 131) 176-77. See for the EU: Moreno-Lax, *Accessing Asylum* (n 12) 96-99, 103-06.

188 Andrew Brouwer and Judith Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide' (2003) 21 Refuge 6, 8-9.

ignores the very issues giving rise to protection needs.[189] Hence, Article 31 Refugee Convention prohibits penalisation for irregular entry, recognising the general inability to meet entry requirements. The authorities responsible for issuing travel documents often constitute the threat or individuals may be unable or unwilling to avail themselves of their protection.[190] In collapsed states, there will be no competent issuing agency. Stateless persons and those without secure proof of their nationality are also effectively excluded. Even with a passport, individuals may be unable to travel to or fearful of visiting an embassy or unable to wait around during visa processing when facing imminent risk.[191]

Second, it is near impossible, without lying about intentions, for asylum seekers to prove the temporary nature of their stay; they are necessarily seeking longer-term protection abroad.[192] Their reliability and the authenticity of travel documents will be interrogated, and if they pose a risk of irregular migration, the visa refused. Providing evidence of an address in the destination, family ties, or funds for stay (or paying for the visa itself) may be prohibitive, including for migrants without asylum claims but from poorer states.[193] Asylum seekers from states requiring an ATV have usually already been classified as a migratory risk. Their right to leave is more disproportionately impacted, for

189 UNHCR 'UNHCR Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions)' (16 August 1991). See also Moreno-Lax, 'EU Borders' (n 54) 326-27, particularly fn 85.

190 UNHCR 'Dublin' (n 189); Feller (n 22) 56, 61.

191 See UNHCR 'Dublin' (n 189).

192 James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 291-93.

193 UNHCR 'Dublin' (n 189).

they will not be granted a visa to *even transit* through a state if they risk claiming asylum.[194] Thus, they will either need to travel irregularly or hide their intentions and claim asylum at the border.

Obtaining a visa may also be physically impossible (and states may try to ensure this). States may not have consulates or VACs in every state, yet still require appearance in person, necessitating migrants to travel long distances. For instance, it appears no EU Member State currently has a presence in Liberia, Sierra Leone, or Somalia and all visa sections in South Sudan and Syria temporarily closed.[195] Tellingly, the number of Schengen visas issued to Syrians before the conflict was over 30,000, dropping to almost zero in 2013.[196] In contrast, despite the mass exodus from Venezuela, with around 45,150 asylum requests in the EU in 2019 alone (ranking it third behind Syria and Afghanistan), Venezuela remains visa-free.[197] If asylum requests continue to increase, it will be interesting to monitor EU policy shifts.

Therefore, neither in law nor in practice are visas accessible to most asylum seekers and refugees, preventing travel by air and ferry. They are 'the most explicit blocking mechanism for asylum flows and it denies most refugees the opportunity for legal

194 See eg Immigration Rules (UK) app pt v 7.5; Visa Code, arts 14(2), 21(6).

195 Visa Code Handbook, Annex 28.

196 FRA, *Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox* (FRA Focus 2/2015) 2; Moreno-Lax, *Accessing Asylum* (n 12) 107.

197 EASO, 'Latest Asylum Trends - 2019 Overview' (26 February 2020) <https://easo.europa.eu/asylum-trends-annual-overview> accessed 2 December 2020.

migration',[198] having been criticised by numerous bodies for obstructing the right to seek asylum.[199] Physical impossibility or a policy of non-issuance are plainly disproportionate and in violation of the right to leave.

As discussed above, less restrictive alternatives exist for achieving the legitimate aims of security, public order, health etc. If states are serious about ending irregular migration, they should facilitate the arrival of asylum seekers by providing safe, regular routes. Alongside increasing resettlement options, states and the EU should introduce and/or expand complementary protection pathways.[200] This includes protected entry and humanitarian corridors permitting individuals to approach embassies and receive humanitarian visas so they can travel lawfully to seek asylum. Noll et al suggest that such options will boost protection capabilities, dissuade some disorderly movement, and have strong savings potential compared to territorial asylum procedures.[201] This should be accompanied by private sponsorship programmes, family reunification, labour mobility

198 John Morrison and Beth Crosland, 'Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy' (2001) UNHCR New Issues in Refugee Research Working Paper No 39, 1, 28 <www.unhcr.org/research/working/3af66c9b4/trafficking-smuggling-refugees-end-game-european-asylum-policy-john-morrison.html> accessed 19 January 2021.

199 See eg Council of Europe 'Parliamentary Assembly Recommendation 1163 (1991) on the Arrival of Asylum-Seekers at European Airports' [7]-[10]; UNHCR 'UNHCR Position: Visa Requirements and Carrier Sanctions' (September 1995); ECRE, 'Defending Refugees' Access to Protection in Europe' (ECRE 2007) 27-28, 32 <www.ecre.org/wp-content/uploads/2016/07/ECRE-Defending-Refugees-Access-to-Protection-in-Europe_December-2007.pdf> accessed 28 January 2021.

200 See Tamara Wood, 'The Role of "Complementary Pathways" in Refugee Protection' (Report, Kaldor Centre for International Refugee Law 2020) <www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Complementary_Pathways_in_Refugee_Protection.pdf> accessed 1 December 2020.

201 Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, *Study on the Feasibility of Processing Asylum Claims outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (Danish Centre for Human Rights and European Commission 2003) particularly sects 5 and 7. See also Claire Higgins, *Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees* (Policy Brief 8, Kaldor Centre for International Refugee Law 2019).

schemes, and educational opportunities.[202] Currently, many authorities are unlikely to grant visas for asylum purposes, with existing programmes ad hoc and discretionary. For example, EU states could issue a limited territorial validity visa on humanitarian grounds. However, whether this falls within the Code remains contentious, with the EU failing to institutionalise and oblige states to issue humanitarian visas.[203] Instead, denial of the right to seek asylum is a key feature of visa policies. There are not obvious alternatives when this is the intention. Therefore, in balancing, the interests of those fleeing should much more readily outweigh the interests of states in obstructing the search for refuge.[204]

It is also important to consider proportionality in the context of widespread blacklisting of asylum and refugee-producing states. Destination states and the EU engage in 'visa cascading', pressuring transit states, for example Indonesia, Mexico, Morocco, and Turkey, to impose or adopt stricter visa requirements for nationals from states posing a risk of significant irregular migration, alongside the regional harmonisation of visa lists, for

202 See GCM [20]-[21]; GCR [90]-[96]; François Crépeau, 'Towards a Mobile and Diverse World: "Facilitating Mobility" as a Central Objective of the Global Compact on Migration' (2018) 30 IJRL 650; Koslowski (n 1) 170.

203 Visa Code, art 25(1). See eg *X and X* (n 49) [51] cf *X v Ministry of Foreign Affairs and Ministry of Health* (21 February 2019) (Ordinary Tribunal of Rome); Ulla Iben Jensen, 'Humanitarian Visas: Option or Obligation?' (Study for the LIBE Committee, European Parliament 2014) <www.epgencms.europarl.europa.eu/cmsdata/upload/eb469bdf-0e31-40bb-8c75-8db410ab13fc/Session_2_-_Study_Humanitarian_visas.pdf> accessed 27 January 2021; European Parliament, 'Report with Recommendations to the Commission on Humanitarian Visas (2017/2270(INL))' [2018] A8-0328/2018.

204 Moreno-Lax, 'EU Borders' (n 54) 356-57; den Heijer, *Extraterritorial Asylum* (n 75) 166; Guild and Stoyanova (n 54) 391-93.

example by Canada and the US.[205] Cascading exemplifies the notion of 'Fortress Europe', where the 'creation of a borderless Europe was always a doubly constitutive process: removing fences within, it built higher fences around'.[206] Visa cascading raises deeper proportionality concerns. Where many states blacklist a refugee-producing state or refuse visas to the majority of applicants, this effectively amounts to a global travel ban and deprives individuals a functional right to leave. Blacklisting condemns individuals to unsafe conditions and irregularised travel, with whole regions inaccessible. Cumulative containment by states, as currently exists for Syrians, can be perceived as a collective violation of the right, leading to shared responsibility amongst states. Where knowledge exists of a substantial risk of harm by keeping visa requirements in place, states arguably have a duty to withdraw or at least temporarily suspend requirements (and carrier sanctions) until the risk dissipates.[207]

On balance, visa policies fail the proportionality test. There are clear issues with suitability, more protective alternatives exist, and nationals are assessed against predetermined group stereotypes. Visas are largely unavailable to asylum seekers and refugees, denying their right to leave to seek asylum with possibly fatal effects.

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205 See GAMM (n 183) 3-7; Heather Grabbe, 'Stabilising the East While Keeping Out the Easterners: Internal and External Security Logics in Conflict' in Sandra Lavenex and Emek M Uçarer (eds), *Migration and the Externalities of European Integration* (Lexington Books 2002); Francesca Mussi and Nikolas Feith Tan, 'Comparing Cooperation on Migration Control: Italy–Libya and Australia–Indonesia' in Fiona de Londras and Siobhán Mullally (eds), *The Irish Yearbook of International Law*, vol 10, 2015 (Hart Publishing 2017) 98; Laube (n 117) 12-16; FitzGerald (n 2) 61-63, 161, 183-7.

206 Jansen (n 136) 819-20. See also Neumayer (n 7) 75-76.

207 ECRE (n 199) 35; Moreno-Lax, *Accessing Asylum* (n 12) 312-13.

d. Consistency with other rights

Lastly, restrictions on the right to leave must be consistent with other rights, as provided for in Article 12(3) ICCPR and, as argued in Chapter One, implicitly under Article 2(3) Protocol 4 ECHR. This section argues that prima facie visa policies are inconsistent with *non-refoulement* and non-discrimination obligations, though other rights may also be implicated.

a. Non-refoulement

The generally accepted view under Article 33 Refugee Convention is that in imposing visa requirements and refusing visas to individuals with a well-founded fear of persecution the state does not breach its *non-refoulement* obligations.[208] As outlined in Chapter Three, the Law Lords in *Roma Rights* rejected the argument that Article 33 and CIL requires states to refrain from imposing deterrence measures that prevent would-be refugees leaving their own state, holding that such measures do not breach the principle of good faith nor frustrate the Convention's object and purpose.[209] On an ordinary reading of Article 33 (per Article 31(1) VCLT), this conclusion is correct insofar as refugees are by definition outside their state of origin and the provision explicitly refers to *refoulement* to frontiers. If someone has not yet left, it cannot be said they have returned to a frontier.[210] Under this interpretation, refusing a visa to a person inside their state of origin is not *refoulement*.

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208 Hathaway, *Rights of Refugees* (n 192) 307, 310-12; Goodwin-Gill and McAdam (n 108) 370; Moreno-Lax, *Accessing Asylum* (n 12) 264.

209 See text to nn 61-63 in ch 3.

210 Hathaway, *Rights of Refugees* (n 192) 307-08; Noll (n 54) 553; Ogg (n 56) 87; Moreno-Lax, *Accessing Asylum* (n 12) 264-65.

Different considerations arise under Article 33 when the person is outside their state of origin. According to Gammeltoft-Hansen, merely refusing a visa does not necessarily provide a sufficient causal link to any future *refoulement*; it is enforcement of the visa requirement by another actor, namely the territorial state or carrier, which may lead to *refoulement*.[211] However, Gammeltoft-Hansen's argument should not be accepted. A sufficient causal link can exist between the visa refusal and risk of *refoulement.* It is the initial visa requirement, followed by the visa refusal, which suppresses lawful departure first and may force an individual to return to and remain subject to persecution. The latter does not only arise at the point a carrier or another state denies embarkation for the destination state. Both denial of a visa *and* its enforcement may violate Article 33, and *non-refoulement* obligations under IHRL, if they cause an individual to return to persecution.[212] However, again, it is difficult to establish under the Convention that a refusal amounts to return to the state's frontier, for they remain in the same (transit) state.[213] Nevertheless, a risk of indirect *refoulement* may exist.[214]

Rejecting *Roma Rights* and looking to the object and purpose of the Refugee Convention would allow protection from *refoulement* to extend to persons remaining in the same state as a *direct consequence* of departure/pre-entry controls. As argued in Chapter Three, a good faith interpretation of *non-refoulement* obligations, including under the Convention, requires states to organise their migration controls so individuals can seek

211 Gammeltoft-Hansen (n 36) 134.

212 Noll (n 54) 564–72; Ogg (n 56); Moreno-Lax, *Accessing Asylum* (n 12) 265.

213 Noll (n 54) 556.

214 Ogg (n 56) 108.

asylum. The aforementioned analysis demonstrates that visa policies are generally not implemented in good faith, designed to contain asylum seekers and prevent *non-refoulement* and other obligations being triggered at all.[215] Article 31(3)(b) VCLT provides that subsequent state practice can be taken into account in interpreting a treaty. Although visas are in widespread use and presumably states believe they are complying with *non-refoulement* obligations (or have not put their mind to it), concluding that visa refusals cannot amount to *refoulement* runs counter to the Refugee Convention's object and purpose (Article 31(1) VCLT). Accordingly, such an interpretation ought not lightly be inferred from state practice.[216] Few states may uphold their obligations and externalising states are actively seeking to bypass their obligations under the Convention.[217] Rejection by the Law Lords of the good faith argument was only under the 1951 Convention/CIL and hence, even if such arguments are not accepted, visas remain challengeable under IHRL.

Establishing that a visa policy leads to *refoulement* is more straightforward under IHRL, for there is no need for the claimant to be outside their state of origin.[218] Under the ECHR and ICCPR, a refusal can amount to *refoulement* where the individual is exposed to a real risk of irreparable harm and compelled to return to or remain in that territory.[219] Exposure is sufficient as the treatment need not be immediate or certain.[220] Despite the

215 Goodwin-Gill and McAdam (n 108) 382-83, 388.

216 Taylor (n 78) 109.

217 ibid.

218 See text to n 23 in ch 3; Ogg (n 56) 106-07, 111.

219 Moreno-Lax, *Accessing Asylum* (n 12) 309-11, 313-20.

220 Noll (n 54); Ogg (n 56) 106; ibid 309.

ECtHR holding that visa refusals do not trigger *non-refoulement* obligations for want of jurisdiction, it is argued that refusing a visa to an applicant seeking to exercise their right to leave and in danger of ill-treatment engages that state's positive obligations. States cannot turn a blind eye to an evident need for protection, being obliged to 'find out about the treatment to which the applicants would be exposed'.[221] The high likelihood a visa refusal will lead to denial of boarding, as shown below, obliges the state to take preventative measures, including issuing humanitarian visas or suspending visa requirements.[222]

In conclusion, a prima facie case can be made that visa policies violate the right to leave for being inconsistent with *non-refoulement* obligations under IHRL where an individual is exposed to a real risk of harm. On present understandings, unless the aforementioned good faith argument is accepted, Article 33 Refugee Convention is only violated where there is a risk of indirect *refoulement* from the transit state. Though perhaps seeming far-reaching, as argued above, the applicant still has to establish such risk and concerns about the 'burden' of refugees should be addressed through global responsibility sharing.

b. Discrimination

Visa policies may also violate the right for being built on a system of indirect racial discrimination, as well as featuring class, religious, and gender-based discrimination. As

221 *Hirsi* (n 66) [133], 70 (Separate Opinion Albuquerque J); den Heijer, *Extraterritorial Asylum* (n 75) 140. This remains contentious under UNCAT as art 3(1) prevents return to '*another* state'. cf Noll (n 54) 556 and Ogg (n 56) 111.

222 Moreno-Lax, *Accessing Asylum* (n 12) 311-13.

the HRC has stated, a clear violation arises where restrictions are discriminatory.[223] In the global (im)mobility regime, individuals are rendered either mobile or immobile. As Spijkerboer powerfully argues, the current infrastructure reinforces discrimination and exclusion, facilitating selective mobility along lines of nationality, race, class, and gender, being disproportionately white, wealthy, and male.[224]

For present purposes, the key question is whether visa policies prima facie violate non-discrimination obligations, such as Article 14 ECHR, given the blacklisting of certain nationalities. Due to space constraints, only racial discrimination is explored. Discrimination involves any distinction, exclusion, restriction, or preference based on one or more prohibited grounds, such as race, national origin, sex, religion, or other status, which has the purpose or effect of nullifying or impairing the enjoyment or exercise of rights.[225] Discrimination may be direct or indirect. For instance, in *Roma Rights*, the pre-clearance arrangement was declared unlawful for being 'inherently and systemically discriminatory' on racial grounds.[226] The Law Lords found that immigration officials were targeting those of Roma ethnicity, amounting to *direct* race discrimination based on ethnic origin. Conversely, *indirect* discrimination is where a general policy or measure, though facially neutral, has disproportionately prejudicial effects on a particular group and does

223 See generally Sarah Fine, 'Immigration and Discrimination' in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (OUP 2016).

224 Spijkerboer (n 7) 453-54, 469. See also Bigo and Guild (n 45) 234; Bigo, 'Criminalisation' (n 142) 62-63, 82.

225 HRC 'General Comment No 18: Non-discrimination' (10 November 1989) UN Doc HRI/GEN/1/Rev.1 at 26 [6]-[7]. See ECHR, art 14; ICCPR, arts 2(1), 26; ICERD, art 1.

226 *Roma Rights* (n 81) [38], [73]-[75], [97].

not require discriminatory intent.[227] Indirect discrimination is only unlawful if lacking an objective and reasonable justification.

Roma Rights and ECHR cases such as *Biao* demonstrate that states cannot discriminate between non-citizens on racial grounds.[228] However, visa regimes are premised on differentiating between *nationalities*. There are huge complexities in establishing racial discrimination. Critically, not all differentiations based on nationality will be accepted as race discrimination and it remains uncertain when migration controls can be deemed racially discriminatory. Nationality is not an explicit ground of discrimination in the ECHR, ICCPR, or ICERD, only national origin.[229] Nonetheless, the grounds are not exhaustive, with Chetail highlighting how virtually all treaty bodies have confirmed nationality as a prohibited ground.[230]

The cases brought by Qatar to the ICJ and CERD, relating to an expulsion order and travel bans imposed against Qataris based on national origin by the UAE and Saudi Arabia, illustrate this controversy. Recently, the ICJ found it had no jurisdiction to hear the application, holding that 'national origin' in Article 1(1) ICERD does not encompass present nationality, looking to its ordinary meaning, the Convention's object and purpose, *travaux préparatoires*, and practice of CERD.[231] It declined to follow CERD, which had

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227 *Biao v Denmark* App no 38590/10 (ECtHR, 24 May 2016) [103].

228 *Roma Rights* (n 81) [101]; ibid [89]-[94]. See also Guild, *Right to Leave* (n 103) 37-50, 54-55, 65.

229 cf Equality Act 2010 (UK) art 9(1)(b). But see sch 3 pt 4 s 17.

230 Chetail (n 21) 151-56, particularly fns 403, 405.

231 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE)* (Preliminary Objections) General List No 172 [2021] ICJ 1 [74]-[105].

previously dismissed the UAE and Saudi Arabia's objections and found that the absence of 'nationality' in the definition does not affect its competence *ratione materiae*, citing Article 1(3) which specifies that laws concerning nationality, citizenship, or naturalisation cannot discriminate against any *particular nationality*.[232] The Committee relied on its General Recommendation 30, which provides that differential treatment based on 'citizenship or immigration status' will constitute discrimination if the criteria are not applied pursuant to a legitimate aim and are disproportionate.[233]

Race-based immigration restrictions have a long history.[234] The ECtHR has recognised that most immigration policies differentiate based on nationality, and indirectly race, ethnic origin, and possibly colour. According to the Court, although contracting states cannot implement 'purely racist' policies, preference to persons from states they have the closest ties with does not constitute racial discrimination.[235] However, it has also held that 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with

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232 *Decision on the Admissibility of the Inter-state Communication Qatar v Saudi Arabia* (30 August 2019) UN Doc CERD/C/99/6 [11]-[19]; *Decision on the Admissibility of the Inter-state Communication Qatar v UAE* (30 August 2019) UN Doc CERD/C/99/4 [53]-[63].

233 CERD 'General Recommendation 30 on Discrimination Against Non-Citizens' (23 February-12 March 2004) UN Doc CERD/C/64/Misc.11/rev.3 [1], [4], [7]. See Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?' (2019) 30 IJRL 661, 662-63.

234 See Daniel Ghezelbash, 'Legal Transfers of Restrictive Immigration Law: A Historical Perspective' (2017) 66 ICLQ 235; Eve Lester, *Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia* (CUP 2018).

235 *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471 [84]. See also Guy S Goodwin-Gill, *International Law and the Movement of Persons Between States* (Clarendon Press 1978) 83-87, 91-96.

the Convention'.[236] Given the aforementioned legitimate aims, demonstrating that visa policies have no objective reasonable justification unrelated to nationality is problematic.

Nonetheless, there is evidence that visa regimes entail indirect racial discrimination. As illustrated, visa regimes have a disproportionately prejudicial effect on blacklisted nationalities on account of their perceived threat and migratory risk, with refugee-producing and low-income states specifically targeted. Blacklists typically cover almost all states whose populations are least developed and primarily black or Muslim.[237] While there may be objective grounds for blacklisting a specific state, there is a risk of listing due to prejudicial, speculative attitudes based on race, religion, and class.[238] According to den Heijer, it is the lack justification and review, notably for all African states, that allows the EU's policy to be accused of discrimination on racial and religious grounds.[239] Individual assessments also risk being based on problematic inferences and predetermined stereotypes of certain nationalities, for instance 'overstayers' or 'asylum seekers'.[240] Tellingly, a study shows that Africans are twice as likely to be refused a UK visitor visa.[241] Moreover, though

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236 *Gaygusuz v Austria* (1997) 23 EHRR 364 [42]. See also *Biao* (n 227) [93].

237 See on President Trump's 'Muslim ban': Harsha Panduranga, Faiza Patel and Michael W Price, 'Extreme Vetting & the Muslim Ban' (Report, Brennan Center for Justice 2017) <www.brennancenter.org/our-work/research-reports/extreme-vetting-and-muslim-ban> accessed 26 January 2021; den Heijer, 'Visas' (n 114) 470-71.

238 See *Biao* (n 227) [126].

239 den Heijer, 'Visas' (n 114) 474, 480-87. See also Moreno-Lax, *Accessing Asylum* (n 12) 90-94; Nicolosi (n 183).

240 See *Roma Rights* (n 81) [82]; Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 Journal of Political Philosophy 191, 194, 200-04.

241 All-Party Parliamentary Group, 'Visa Problems for African Visitors to the UK' (Joint Report 2019) 8-9 <https://royalafricansociety.org/wp-content/uploads/2020/01/APPG-Report-on-Visa-problems-for-African-visitors-to-the-UK_v1.58web.pdf> accessed 27 January 2021.

facially neutral, many algorithms embody pre-existing biases, suffer from feedback loops, and discriminate by design when persons holding 'suspect' nationalities are treated differently.[242] This exemplifies the 'birthright lottery', resulting in the unequal distribution of mobility rights and racial exclusion.[243]

Extrapolating from such examples, it follows that visa policies may be grounded in harmful nationality stereotypes and exaggerated economic and security concerns, not objective justifications (while also being disproportionate). Accordingly, they should be seen as incompatible with the ECHR and other relevant treaties. In light of Article 1(3) ICERD, Article 5(d)(ii) prohibiting racial discrimination in the enjoyment of the right to leave, and that discrimination between groups of non-nationals/migrants is inimical to ICERD,[244] CERD can find that visa policies unlawfully discriminate against certain nationalities and asylum seekers and refugees, including on the basis of race or national or ethnic origin.[245] In conclusion, visa policies feature indirect racial discrimination, plausibly violating the right to leave.

Scenario 2: Denial of Embarkation

The focus now turns to the second scenario of individuals being denied embarkation by carriers in enforcing the state's visa policy. As much of the analysis has already been done,

242 Molnar and Gill (n 38) sect 5.1; JCWI (n 39).

243 Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (HUP 2009).

244 Guild, 'Global Compact' (n 233) 663.

245 See UNHRC 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (25 April 2018) UN Doc A/HRC/38/52 [14], [19], [30], [65], [67(b)]. See on the exclusion of Palestinians from a UK resettlement scheme *R (Turani) v Secretary of State for the Home Department* [2019] EWHC 1586 (Admin).

this section will deal only briefly with the requirements under the right to leave in arguing that carrier sanctions violate the right. The conclusions here apply broadly, as carrier sanction frameworks share analogous features.

There is little doubt a carrier preventing a person boarding an airplane or ferry interferes with the right. Carriers not only prevent the person effectuating an illegal entry but obstruct their ability to leave the country they are in.[246] The HRC has implicitly acknowledged that carrier sanctions interfere with the right, having expressed concern about the effect of carrier sanctions and 'other pre-frontier arrangements' on the right to leave, requesting state parties include information in their reports on carrier sanctions and other rules and measures adversely affecting the right.[247] On the accordance in law requirement, carrier sanctions are enshrined in national and EU laws. The issue lies in the lack of foreseeability for individuals regarding when they will be denied boarding, the wide discretion carriers have, and lack of procedural safeguards to protect against arbitrary decisions by private actors. Though individuals may reasonably foresee that if they lack the requisite documentation they will be denied boarding, it is unclear under what circumstances a carrier, perhaps advised by an ILO, will deny boarding due to profiling and other risk factors, as *Roma Rights* demonstrates.

Pre-screening activities that profile passengers based on risk factors using algorithms raise serious legality issues, including the opaqueness of algorithms and

246 den Heijer, *Extraterritorial Asylum* (n 75) 161.

247 HRC 'General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [10]; HRC 'Concluding Observations of the Human Rights Committee: Austria' (19 November 1998) UN Doc CCPR/C/79/Add.103 [11]. Austria responded by referencing national provisions waiving sanctions when asylum is granted and its *non-refoulement* obligations: HRC 'Fourth Periodic Report: Austria' (20 November 2006) UN Doc CCPR/C/AUT/4 [180].

whether data collection laws are sufficiently clear and precise.[248] Critically, individuals must be able to challenge denial by the carrier, the results of automated processes, and no-fly listings.[249] Challenging a denial is difficult as privatisation obscures the role of the state; the individual can only engage indirectly through the private actor. As Bigo argues, 'What happens with an asylum seeker who is stopped by these agents [carriers] and who risks being handed over to the authorities that he is trying to flee? ... What appeals can he make?'.[250]

States have long been imposing carrier sanctions and are obligated to do so by international conventions, though only as a *limited* means to combat smuggling and trafficking.[251] Accordingly, they suffer from the same assumed lawfulness as visas. Costello, in examining the Global Compacts on Refugees and Migration, points out that 'carrier sanctions are largely absent from the Compacts, a striking omission, given their central role in rendering refugees' flight and mobility dangerous' and that the Compacts are intended to avert refugee crises and prevent unsafe migration by facilitating ordinary mobility.[252] Through omission, carrier sanctions are normalised in the global refugee

248 Elif Mendos Kuşkonmaz, 'GCM Indicators: Objective 11: Manage Borders in an Integrated, Secure and Coordinated Manner' (*RLI Blog on Refugee Law and Forced Migration*, 8 July 2019) <https://rli.blogs.sas.ac.uk/2019/07/08/gcm-indicators-objective-11-manage-borders-in-an-integrated-secure-and-coordinated-manner/> accessed 20 November 2019.

249 See also Opinion 1/15 (EU-Canada PNR Agreement) of the Court (Grand Chamber) of 26 July 2017, EU:C:2017:592 [168]-[174].

250 Bigo, 'Criminalisation' (n 142) 89.

251 Chicago Convention, Annex 9; Palermo Protocols, art 11(1)-(4); CISA, art 26. See Feller (n 22); Rodenhäuser (n 22) 226-27.

252 Cathryn Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' (2018) 30 IJRL 643, 644, 647-48. See also Crépeau (n 202).

regime. As the enforcement arm of visa policies, they pursue the same legitimate aims. They were also introduced to avoid the 'administrative, financial and indeed social burden' of having to process 'failed' asylum seekers and enforce their removal.[253] Carrier sanctions should not be deemed legitimate in obstructing the flight of asylum seekers and would-be refugees. It is also unlikely that avoiding economic and social costs falls within the public order aim. Referring to the drafting history, the ECtHR highlighted in a case concerning freedom to choose one's residence that economic reasons can never justify restricting the right to leave.[254]

Again, much of the work will be done under the remaining proportionality stages. As shown, the right to leave is instrumental in seeking asylum. The combination of visas and carrier sanctions has an undeniably disproportionate impact on asylum seekers, would-be refugees, and stateless and undocumented individuals.[255] Notably, international and EU law preserve *non-refoulement* obligations, including under the Refugee Convention, when implementing carrier sanctions, while some legislation allows fines to be waived if individuals are admitted to asylum procedures or granted protection.[256] Nonetheless, studies demonstrate the ineffectiveness of these safeguards. The threat of sanctions typically results in carriers erring on the side of caution, refusing boarding regardless of

253 *Roma Rights* (n 81) [2]; den Heijer, *Extraterritorial Asylum* (n 75) 163-64.

254 *Garib v Netherlands* App no 43494/09 (ECtHR, 6 November 2017) [109]; den Heijer, *Extraterritorial Asylum* (n 75) 164.

255 Feller (n 22) 50; Hathaway, *Rights of Refugees* (n 192) 291; UNGA 'Report of the Special Rapporteur on the Human Rights of Migrants' (3 August 2010) UN Doc A/65/222 [15], [39]; Costello, 'Refugees and (Other) Migrants' (n 252) 647.

256 Trafficking Protocol, arts 11(3), 14; Smuggling Protocol, arts 11(3), 19; CISA, art 26(1), (2); Carriers Liability Directive, recital 3, art 4(2). cf Migration Act 1958 (Cth) s 228B(2). See ECRE (n 199) 28-29; Scholten (n 91) 82-84.

protection needs.[257] Visas and carrier sanctions represent the *precise structural conditions* which generate irregularised travel and the demand for smugglers and false documents, resulting in migrants ending up in detention, trapped in transit, and loss of life. Carrier sanctions deny the possibility of movement to *all* asylum seekers/refugees unable to obtain documentation, to save *some* from traffickers, demonstrating their unsuitability in achieving certain aims.[258] Baird and Spijkerboer aptly argue that:

> Carrier sanctions are an integral part of a system of migration control which results in migrants being unable to access the protection to which they are entitled under international law, and in migrants dying on their way to Europe, North America, Australia...[259]

But for carrier sanctions, the 'undocumented' could board planes and ferries. States are dressing up restrictive techniques as tackling smuggling and trafficking, despite awareness of their perverse effects and unsuitability, including forcing migrants into 'illegality'.[260] This destroys the essence of the right. Moreover, it cannot be proportionate that to 'exercise a *legal* entitlement to escape in search of international protection refugees need *generally* to breach the law'.[261] This is even more salient given the ECtHR's recent decision in *ND and NT v Spain* that pushbacks to Morocco did not amount to a collective expulsion, including because the migrants failed to use existing legal pathways, including obtaining a

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257 den Heijer, *Extraterritorial Asylum* (n 75) 184-87; Scholten (n 91) 249-58, 276-77. See also UNHCR 'Dublin' (n 189); ECRE (n 199) 29-30.

258 Bloom and Risse (n 22) 74-75.

259 Baird and Spijkerboer (n 22) 6-7. See also Feller (n 22) 50; Hathaway, *Rights of Refugees* (n 192) 291; Taylor (n 78) 100.

260 Rodenhäuser (n 22) 228; Czaika and Hobolth, 'Deflection' (n 166).

261 Moreno-Lax, 'EU Borders' (n 54) 356. See also Brief Amicus Curiae of the UNHCR in Support of Respondents, *McNary v Haitian Centers Council Inc*, 509 US 155 (1993) 11-13.

visa.[262] This severely disregards the phenomenon of externalisation and general unavailability of legal pathways for African migrants (with such pathways *nonetheless* outside the Convention's protection given *MN*).[263]

There are also clear issues in meeting the consistency with other rights test. First, carrier sanctions appear inconsistent with *non-refoulement* obligations.[264] The existence of savings clauses demonstrates clearly that carrier sanction frameworks are bound by *non-refoulement* obligations under the Refugee Convention and IHRL. Nonetheless, some scholars argue that, apart from exceptional cases, refusing boarding does not foreseeably result in harm.[265] This conclusion cannot be upheld. The risk of *refoulement* is inherent and well-known, accompanied by a lack of statistics making the situation difficult to monitor. Airline staff are neither authorised to grant protection nor professional immigration officers with sufficient expertise or training in IHRL or refugee law, focused on profit and avoiding sanctions, not refugee protection and *non-refoulement.*[266] Simultaneously, ILOs seek to curtail undocumented movement, including of asylum seekers.[267] Refusal of boarding can

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262 App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) [209]-[212], [231].

263 See Sergio Carrera, 'The Strasbourg Court Judgement *N.D. and N.T. v Spain*: A *Carte Blanche* to Push Backs at EU External Borders?' (2020) EUI Working Paper RSCAS 2020/21, 10-17 <https://cadmus.eui.eu/handle/1814/66629> accessed 14 October 2020.

264 Rodenhäuser (n 22) 236-37; Goodwin-Gill and McAdam (n 108) 385–86.

265 Bloom and Risse (n 22) 66-67; Baird and Spijkerboer (n 22) 9.

266 UNHCR 'Dublin' (n 189); Feller (n 22) 56-57, 63-64; Virginie Guiraudon, 'Before the EU Border: Remote Control of the "Huddled Masses"' in Kees Groenendijk, Elspeth Guild and Paul Minderhoud (eds), *In Search of Europe's Borders* (Kluwer Law International 2003) 202-04.

267 See *Roma Rights* (n 81); Commission, 'Staff Working Document Evaluation of the Council Regulation (EC) 377/2004 on the Creation of an Immigration Liaison Officers Network' SWD (2018) 197 final, 4-5, 8.

thus lead to migrants being stuck in the state of persecution or elsewhere facing *refoulement*, denied the right to seek asylum.

Regarding non-discrimination obligations, carriers (perhaps operating alongside an ILO/ALO) are likely to be engaging in discriminatory profiling based on ethnic origin, gender, and asylum risk (attributable to the state). Such likelihood is evidenced, for example, by the treatment of Roma at Prague airport and unaccompanied Saudi women at airports suspected of travelling to seek asylum in Australia.[268] This also infringes the right to seek asylum. Profiling on account of asylum risk or immigration status can also amount to discrimination based on 'other status'.[269] Furthermore, although carrier sanctions impact men and women, given women may be more likely to be trafficked or experience other forms of violence during irregular journeys, a prima facie case of gender discrimination exists.[270] Building on *Opuz* and *Rantsev*, cases concerning violence and discrimination against women, states must ensure their migration policies do not discriminate against women and are duty-bound to protect them from harm.[271] As CEDAW has highlighted, 'increased border control, refusal of entry, pushbacks, expulsion or detention limit the movement of women and girls fleeing from crises and conflict zones', heightening their

268 See Guild, *Right to Leave* (n 103) 56; Sophie McNeill, Sharon O'Neill and Mary Fallon, '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 25 June 2019.

269 See *Hode and Abdi v the United Kingdom* (2013) 56 EHRR 27 [46]-[48].

270 Catherine Briddick, 'Some Other(ed) "Refugees"?: Women Seeking Asylum under Refugee and Human Rights Law' in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 283-84, 288-89.

271 *Opuz v Turkey* (2010) 50 EHRR 28 [184]-[202]; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [283]–[93]; ibid 287-88.

vulnerability.[272] Expanding legal pathways would be far more effective in countering exploitation.[273]

In certain circumstances carrier sanctions may also be incompatible with right to life obligations. Pushing individuals into dangerous routes and narrowing safe pathways, there is a clear link between carrier sanctions and increased migrant deaths.[274] In comparison, nationals with privileged access to the global mobility infrastructure enjoy the full protection of international law, with greater protection of their rights to life, family life, health, housing, and work.[275] In light of the prima facie violations of other rights and evident legality and proportionality issues, carrier sanctions appear to violate the right to leave, preventing individuals departing for their destination and creating longer, more expensive, and unsafe routes.

E. International Responsibility

The above analysis demonstrated that visa refusals and denials of embarkation likely violate the right to leave, leading to the direct responsibility of destination states, given attribution and jurisdictional tests appear met. As shown previously, states are bound by the right under treaty and CIL. Further, Chapter Three highlighted that the right to leave generates an array of obligations on both states and IOs. They have a duty not to obstruct

272 CEDAW 'General Recommendation No. 38 (2020) on Trafficking in Women and Girls in the Context of Global Migration' (20 November 2020) UN Doc CEDAW/C/GC/38 [5], [24].

273 See ibid [56]-[58].

274 Thomas Spijkerboer, 'Moving Migrants, States, and Rights: Human Rights and Border Deaths' (2013) 7 The Law & Ethics of Human Rights 213; 'Human Costs of Border Control' <www.borderdeaths.org> accessed 20 November 2019.

275 Thomas Spijkerboer, 'Wasted Lives. Borders and the Right to Life of People Crossing Them' (2017) 86 NordJInt'l L 1; Spijkerboer, 'Global Mobility' (n 7) 467.

the right, which demands the overhaul of many current visa regimes. At minimum, states and the EU must improve on quality of law, ensuring strict safeguards are in place, including oversight mechanisms and appeal avenues. Blacklists should be reviewed, with unnecessary listings removed. Visas and other pathways must also be truly available to all migrants and assessments not performed against group stereotypes or using discriminatory algorithms. Critically, states must ensure individuals are not denied legal routes to safety or experience cumulative containment. More protective alternatives are available that have cost saving potential and can reduce irregular movement: migrants can be processed at the border and resettlement and complementary pathways increased.

As Chapter Four demonstrated, states will also bear responsibility for failing to protect migrants from other actors violating the right, even where the violation is not attributable to it. However, delimiting the scope of protective duties is complex. The precise scope must be considered *in concreto*, looking to reasonableness, proximity, and knowledge, alongside conflicting obligations.[276] Given the control states wield over visa issuance and carriers, an obligation to protect undoubtedly arises. By assuming control over entry, 'the state places itself in proximate relationships with harm that might arise in relation to these activities … Control thus implies closer proximity and more demanding positive obligations'.[277] The state must show it acted with due diligence, taking all reasonable steps to protect migrants from threats it knew or ought to have known of, and responded adequately following a violation. As the above analysis demonstrated, there are foreseeable risks of harm under visa regimes, explicitly recognised by the savings clauses

[276] Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 HRLRev 309, 320-24, 329. See text to nn 115, 122 in ch 4.

[277] ibid 345.

in some carrier sanctions legislation. It follows that destination states should bear responsibility where migrants suffer violations flowing from the infrastructure *they* created and retain control over. To fulfil their positive obligations, states and the EU must structure their relationships with carriers to prevent and address violations of the right to leave, right to life, and obligations of *non-refoulement* and non-discrimination.[278] Alongside implementing the above recommendations, carriers should be exempted from fines when individuals enter the asylum process and steps taken to ensure operations are not conducted in a discriminatory manner, providing carriers and ILOs with proper training on non-discrimination and asylum.[279]

The territorial state will also be in breach of its positive obligation to secure the right to leave and protect migrants from violations by the destination state when carriers deny boarding. It is not an issue that two states may share jurisdiction, as Chapter Four illustrated. Alternatively, the territorial state could be seen as complicit within the meaning of Article 16 ARSIWA for letting its territory be used to enforce visa regimes.[280] However, *but for* the territorial state's actual or tacit consent, violations of the right could not occur. This is not complicity, instead giving rise to shared responsibility for separate IWAs.

a. The EU and IOM

The focus now turns to the responsibility of IOs. As Chapter Four demonstrated, IOs are bound by the right to leave as a norm of CIL (though not without controversy), with the EU also bound as a general principle of EU law. Regarding the EU visa policy, the

278 ibid 314-15, 322.

279 See *Roma Rights* (n 81) [89]-[91].

280 See ARSIWA Commentary, 66-67 [8].

Bosphorus presumption discussed in Chapter Four is likely rebuttable. EU Member States remain responsible under the ECHR for violations of the right to leave because in implementing the Visa Code they retain discretion in deciding when to issue or refuse a visa and whether to outsource visa processing. Accordingly, with the EU not party to the ECHR, only Member States will bear responsibility before Strasbourg for violating the right when refusing a visa. As above, the conduct of carriers is not dually attributable to the EU. Nonetheless, the EU can arguably be held responsible under CIL and the EUCFR. Notably, it may be responsible, alongside the Member State, when the latter's ILO implements *the EU* visa regime at borders abroad and instructs carriers. Migrants could bring an action for damages against the EU to the CJEU for sufficiently serious breaches of their right to leave (and others), though there are significant hurdles to overcome.[281]

The EU may also bear derived responsibility under Article 15 ARIO for directing and controlling Member States in violation of the right (which is without prejudice to the latter's responsibility under Article 19). In setting blacklists, imposing visa and carrier sanctions requirements, and establishing the ILO network, the EU exercises normative control and conditions Member State conduct.[282] However, given states have wide discretion in interpreting visa criteria, ultimate authority to refuse visas and determine ILO mandates,[283] it is likely only carrier sanctions meet the threshold of actual direction and

[281] Consolidated Version of Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU) arts 268, 340(2); EUCFR, art 41(3). See generally Melanie Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (2019) 56 Common Market Law Review 1227; Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (7th edn, OUP 2020) ch 17.

[282] It may also be instigating wrongful acts through visa cascading.

[283] See ILOR, arts 1(2), 3(1).

control. The knowledge and opposability requirements of Article 15 are met, with the EU unable to argue it was unaware denials of embarkation may breach the right.

IOM's involvement in visa processing may trigger its responsibility for aid and assistance under Article 14 ARIO. It must be shown that IOM aided or assisted the destination state in violating the right to leave, had knowledge of the circumstances of the violation, facilitated it, and that the act would have been wrongful if committed by IOM itself. Operating VACs and performing various services, including application handling, biometrics, and document verification, is likely to amount to aid and assistance. Such support must have made a significant contribution.[284] Though the final decision rests with the state, IOM makes it significantly easier for states to perform their adjudicative role by undertaking several critical tasks on their behalf, facilitating the violation. Although there is an ongoing debate over whether knowledge or intent is required, like the EU, it is difficult for IOM to argue it does not have knowledge that its assistance may lead to visa refusals and denials of leaving by carriers, with actual or near-certain knowledge effectively a form of intent. Lastly, opposability is met, with IOM bound by the right to leave. It follows that IOM can bear responsibility for complicity. IOM's limited involvement means it is unlikely to be directly responsible for any violations of the right (Article 6 ARIO). Nonetheless, by continuing to provide visa services to states violating the right to leave it is demonstrating a lack of due diligence and failing to protect migrants.

Overall, violations of the right to leave occurring as part of visa regimes gives rise to shared responsibility. No circumstances precluding wrongfulness seem to apply. Being

284 ARSIWA Commentary, 66 [5].

clear examples of cooperative deterrence, as Nollkaemper suggests they should lead to the joint and several responsibility of all actors involved.[285]

Conclusion

This chapter argued that visa refusals and prevention of embarkation amount to violations of the right to leave. It was shown that visa refusals and interceptions by carriers can trigger jurisdiction under IHRL and issues of attribution overcome. Both scenarios interfere with the right, suppressing lawful travel by plane and ferry, with the right opposable to destination states exercising jurisdiction. While visa regimes may pursue several legitimate aims, they fail the legality and proportionality requirements. By design, they are highly discretionary, obscure access to procedural safeguards, and render migrants relatively powerless against the state's prerogative to control entry. Serious doubts exist as to the suitability of visa regimes in tackling irregular migration and more protective alternatives are available and workable. Critically, asylum seekers are denied their right to leave to seek asylum, disproportionately impacting and forcing them and other migrants into illegality. Lastly, there are inconsistencies with *non-refoulement,* non-discrimination, and right to life obligations. Though right to leave obligations differ slightly, the problems outlined in this chapter appear to be general features across existing visa regimes, requiring states and the EU to take tangible steps to address their unlawful and problematic aspects. The chapter concluded by establishing the shared responsibility of states, the EU, and IOM for their respective role in obstructing the right to leave and failing to discharge positive obligations. In sum, this chapter has challenged the presumed lawfulness of visas and carrier sanctions. It should be seriously questioned whether a global (im)mobility infrastructure that

[285] See text to nn 203-205 in ch 4.

normalises discrimination, exclusion, and contributes to the precarious, deadly flight of those seeking refuge complies with international law.

CHAPTER SIX: PUSHBACKS AND PULLBACKS

The previous chapter examined visas and carrier sanctions, this one examines whether pushbacks and pullbacks at sea and on land constitute violations of the right to leave for (would-be) migrants. As part of their externalisation strategies, destination states implement an array of pushback and pullback practices. Such practices are malleable, featuring a spectrum of involvement by the destination state and complex interactions amongst states and IOs. Though factual uncertainties exist, it is argued that in most circumstances pushbacks and pullbacks violate the right to leave. Among other problems, they fail the legality requirement, are disproportionate, and lead to a host of other rights violations. Building on Part I, the chapter further clarifies the scope of the right to leave, including its opposability to destination states, whether such measures amount to interferences, and the lawfulness of third states restricting the right to stem irregular migration.

The chapter begins by defining key terms and providing a non-exhaustive overview of pushback and pullback practices across regions. It traces the shift from unilateral practices to cooperative deterrence and finally, to destination states providing funding, equipment, training, and technical support to third states, highlighting the involvement of the EU, Frontex, IOM, and NATO. It then considers LOS obligations and their relevance to the present analysis. Next, it examines jurisdiction and attribution, seeking to overcome attempts to sever links between the migrant and destination state. The chapter then assesses whether pushbacks and pullbacks violate the right to leave, before finally considering the responsibility of the myriad actors involved for their role in violating the right, failure to uphold positive obligations, and possibilities for derived and shared responsibility. Above

all, such practices represent another form of exclusion and discrimination against migrants, routinely infringing their right to leave to seek asylum and right to life.

A. Overview of Practices

In an attempt to contain and suppress migration out of states of origin and transit, destination states have employed a variety of interception practices. Such externalisation strategies have evolved and shifted over time, partly in response to legal challenges, and raise critical concerns about rights protection and responsibility. This section provides a snapshot of practices around the world, relevant shifts, and the role of IOs. It is important to note that such practices are not mutually exclusive, and states can, and do, utilise several simultaneously.

a. Unilateral Practices

There is no legal definition of 'interception', which is used interchangeably with 'interdiction'. The meaning of interception is derived from state practice and has been defined by the UNHCR Executive Committee in an EXCOM Conclusion (which recall are developed by states) as:

> … measures employed by States to:
>
> i. prevent embarkation of persons on an international journey;
> ii. prevent further onward international travel by persons who have commenced their journey; or
> iii. assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;

> where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter…[1]

This definition encompasses measures on land, at sea, or by air. Unilateral interceptions on the high seas form part of the traditional set of '*non-entrée*' measures.[2] 'Pushbacks' are a well-known example, which though lacking a universally agreed upon definition, are commonly understood as the interception and forcible return of migrants to their place of departure, immediately back over the border, or through other actions denying entry and driving migrants away without any proper individualised assessment or opportunity to apply for asylum. Their summary nature distinguishes them from lawful removals. In contrast, 'pullbacks' involve third states preventing migrants leaving, intercepting and returning them to the place of departure, discussed below.

Pushbacks have a long history. Already in 1939, the St Louis ocean liner carrying around 1,000 Jewish refugees with Cuban visas was prevented from landing on Cuban, Canadian, and US shores.[3] The term 'pushback' appears to have originated during the Indochinese refugee crisis (1975-1995), where hundreds of thousands of asylum seekers left by boat, prompting Malaysia and Thailand to push many back out to sea.[4] It was not

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1 UNHCR EXCOM Conclusion No 97 (LIV) 'Conclusion on Protection Safeguards in Interception Measures' (2003) UN Doc A/AC.96/987, preamble. cf UNHCR 'Interception of Asylum-seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach' (9 June 2000) UN Doc EC/50/SC/CRP.17 [10] which is broader, more passive, and would encompass visas.

2 Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 ColumJTransnat'l L 235, 244-48.

3 David S FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019) 24-33.

4 See Arthur C Helton, 'Asylum and Refugee Protection in Thailand' (1989) 1 IJRL 20, 20-32.

until the Comprehensive Plan of Action was adopted in 1989 that pushbacks halted following commitments of international resettlement and repatriation.[5]

More recently, unilateral pushbacks at sea can be observed around the world, for example of Haitians and Cubans by the US Coast Guard.[6] Pushbacks of Rohingya and Bangladeshi asylum seekers in the Bay of Bengal and Andaman Sea by Thailand, Malaysia, and Indonesia have been an ongoing issue, most notably during the 2015 Andaman Sea crisis when thousands were left stranded at sea and refused disembarkation, marking a return to earlier policies.[7] Since 2013, under the infamous military-led *Operation Sovereign Borders,* Australia has engaged in 'turnbacks' and 'takebacks'. Turnbacks involve the return of vessels to the edge of the departure state's territorial waters, specifically Indonesia, or transfer of migrants onto self-navigational lifeboats with just enough fuel to wash up on Indonesian shores. During 'takebacks', Australia works with the state of departure, usually the Sri Lankan and Vietnamese governments, to return those aboard.[8]

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5 W Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck' (2004) 17 JRS 319. See on the right to leave Andrew Wolman, 'The Role of Departure States in Combating Irregular Emigration in International Law: An Historical Perspective' (2019) 31 IJRL 30, 44-47.

6 *Sale v Haitian Centres Council* 509 US 155 (1993); *The Haitian Centre for Human Rights et al v US,* Inter-American Commission on Human Rights Case 10.675 Report No 51/96 (13 March 1997) OEA/Ser.L/V/II.95 Doc 7 Rev at 550. See FitzGerald (n 3) ch 5.

7 See Bríd Ní Ghráinne, 'Left to Die at Sea: State Responsibility for the May 2015 Thai, Indonesian and Malaysian Pushback Operations' in Fiona de Londras and Siobhán Mullally (eds), *The Irish Yearbook of International Law*, vol 10, 2015 (Hart Publishing 2017); Madeline Gleeson, 'Unprecedented but Unfulfilled: Refugee Protection and Regional Responses to the Andaman Sea "Crisis"' (2017) 38 Antropologi Indonesia 6, 8-10; Sunai Phasuk, 'Stop Inhumane Navy "Push-Backs"' *Bangkok Post* (22 September 2017) <https://m.bangkokpost.com/opinion/opinion/1328975/stop-inhumane-navy-push-backs> accessed 11 June 2020.

8 Violeta Moreno-Lax, *The Interdiction of Asylum Seekers at Sea: Law and (Mal)practice in Europe and Australia* (Policy Brief 4, Kaldor Centre for International Refugee Law 2017) 2-3, 10; Australian Border Force, 'Operation Sovereign Borders Monthly Update: January 2020' <https://newsroom.abf.gov.au/channels/Operation-Sovereign-Borders/releases/operation-sovereign-borders-monthly-update-january-2020> accessed 10 June 2020.

Operation Sovereign Borders operates alongside Australia's notorious mandatory detention policy, including offshore detention and processing on Nauru and PNG (though transfers have ceased and pushbacks performed instead). The Greek and Turkish coastguards have reportedly been encircling small vessels in a manner that threatens to capsize them in the bow wave, while Greece has been routinely pushing migrants back to Turkey, including in tent-like inflatable life rafts, reminiscent of Australia's lifeboats.[9]

Systematic, violent pushbacks on land are well-documented, including along the Western Balkan Route, notably by Croatia, Hungary, Greece, and Slovenia;[10] the US to Mexico, Mexico to Central America;[11] India to Bangladesh;[12] and Spain to Morocco, explored below. Contrarily, Vollmer reports on the ease of circumventing EU border controls through coach travel, which suggests that border violence is typically experienced by those on foot (especially people of colour).[13] US pushbacks have been occurring under the 'Remain in Mexico' policy initiated in 2019 (currently suspended and under review by

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9 FitzGerald (n 3) 209; Niamh Keady-Tabbal and Itamar Mann, 'Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations' (*Just Security*, 22 May 2020) <www.justsecurity.org/70309/tents-at-sea-how-greek-officials-use-rescue-equipment-for-illegal-deportations> accessed 23 May 2020.

10 See Border Violence Monitoring Network, 'The Black Book of Pushbacks' (The Left in the European Parliament 2020) vols 1 and 2 <www.borderviolence.eu/launch-event-the-black-book-of-pushbacks/> accessed 1 February 2021.

11 Amnesty International, 'USA: Government must Stop Illegal Pushbacks of Asylum Seekers to Mexico' (11 April 2019) <www.amnesty.org/en/latest/news/2019/04/usa-government-must-stop-illegal-pushbacks-of-asylum-seekers-to-mexico/> accessed 4 February 2020; 'Mexican Police Push Back Hundreds of US-bound Migrants' *BBC* (24 January 2020) <www.bbc.co.uk/news/av/world-latin-america-51235005/mexican-police-push-back-hundreds-of-us-bound-migrants> accessed 4 February 2020.

12 HRW, *"Trigger Happy": Excessive Use of Force by Indian Troops at the Bangladesh Border* (HRW 2010).

13 Bastian A Vollmer, 'Making Light of Borders: The Case of the External EU Border' (2012) 9 Migration Letters 131.

the Biden administration), resembling a form of extraterritorial asylum processing as most migrants were returned to Mexico for the duration of their asylum proceedings.[14] During COVID-19, the US Centers for Disease Control and Prevention (CDC) passed an Order authorising the summary expulsion of non-citizens crossing irregularly or without valid documentation arriving from Canada and Mexico 'as rapidly as possible'.[15] For decades, the US has been using advanced surveillance technologies to detect migrants (and other activities) at the US-Mexico border.[16] Pushbacks have also intensified in other regions during the pandemic, for example by Libya and Algeria to the Niger desert.[17]

Such practices operate in parallel to the proliferation of walls and fences at a range of borders worldwide, including between US-Mexico, Pakistan-Afghanistan, India-Bangladesh, and Bulgaria-Turkey. As Chapter One mentioned, walls were historically erected to keep enemies out, with the Berlin Wall exceptional for seeking to prevent citizens exiting. Nowadays, most walls and fences are used to prevent migrants entering

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14 US Department of Homeland Security, 'Migrant Protection Protocols' (Press Release, 24 January 2019) <www.dhs.gov/news/2019/01/24/migrant-protection-protocols> accessed 5 February 2020; Sarah Pierce and Jessica Bolter, 'Dismantling and Reconstructing the US Immigration System: A Catalog of Changes under the Trump Presidency' (Report, MPI 2020) 24-29 <www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency> accessed 4 August 2020.

15 US Centers for Disease Control and Prevention, 'Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists' (13 October 2020) 85 FR 65806 (replacing the initial Order issued March 2020); Pierce and Bolter (n 14) 2, 13-15, 68.

16 Todd Miller, 'More Than A Wall: Corporate Profiteering and the Militarization of US Borders' (Transnational Institute 2019) 19-22 <www.tni.org/files/publication-downloads/more-than-a-wall-report.pdf> accessed 17 June 2020.

17 See Giacomo Zandonini, 'Hundreds of Migrants Stuck in Niger Amid Coronavirus Pandemic' *Al Jazeera* (9 April 2020) <www.aljazeera.com/news/2020/04/hundreds-migrants-stuck-niger-coronavirus-pandemic-200409131745319.html> accessed 10 June 2020; UN, 'COVID-19 and People on the Move' (Policy Brief, June 2020) 19-20 <https://unsdg.un.org/resources/policy-brief-covid-19-and-people-move> accessed 3 February 2021.

and halt spontaneous movement.[18] Borders and high-tech fences have become important sites of intelligence gathering, with such information shared with third states as part of cooperative deterrence strategies.

b. Cooperative Deterrence

As various scholars note, there has been a shift towards cooperative forms of deterrence, encompassing interceptions pursuant to bilateral agreements, joint patrols with coastal state officials on board ('shipriders'), and joint operations.[19] Nonetheless, destination state cooperation with third states in the area of migration control is not new. Since at least the 1980s, bilateral agreements have been concluded permitting destination states to intercept coastal state's vessels on the high seas suspected of people smuggling and operate in that state's territorial waters.[20] For instance, bilateral agreements between Italy-Albania and Italy-Libya have allowed Italy to patrol and interdict vessels within Albanian and Libyan

18 See eg Élisabeth Vallet (ed), *Borders, Fences and Walls: State of Insecurity?* (Routledge 2016); Moria Paz, 'The Law of Walls' (2017) 28 EJIL 601; Said Saddiki, *World of Walls: The Structure, Roles and Effectiveness of Separation Barriers* (Open Book Publishers 2017).

19 See eg Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) ch 5; Gammeltoft-Hansen and Hathaway (n 2) 248-57; Mariagiulia Giuffré and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 82-92; Nikolas Feith Tan, 'International Models of Deterrence and the Future of Access to Asylum' in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 172-77.

20 Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 95-110.

territorial waters.[21] Bilateral agreements also establish joint operations between destination and third states. Italy's 2009 pushback campaign involved patrolling the Libyan coast and international waters with mixed crews on vessels supplied by Italy and crews composed only of Italian forces, which culminated in the *Hirsi Jamaa v Italy* case.[22] Similar cooperative arrangements are visible at land borders. Spain and Morocco have long cooperated to apprehend and prevent migrants crossing into Spanish enclaves, including Spain handing migrants over to Morocco and notifying Moroccan authorities when movement is detected at the fence, who then 'pullback' the migrants.[23] The US and Mexico also work together to apprehend US-bound migrants.[24]

In the European context, cooperation with third states is often under the auspices of the EBCG, aka Frontex. The Agency oversees the effective functioning of border control at EU external borders, provides technical and operational assistance to Member States and

21 See eg Protocol between Italy and Albania to Prevent Certain Illegal Acts and Render Humanitarian Assistance to Those Leaving Albania, 2 April, Gazzetta Ufficiale della Repubblica Italiana, No 163 (15 July 1997); *Xhavara v Italy and Albania* App no 39473/98 (ECtHR, 11 January 2001); Protocol between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya (29 December 2007); Additional Technical-Operational Protocol to the Cooperation Protocol between the Italian Republic and the Great Socialist Libyan Arab Jamahiriya, to Deal with the Phenomenon of Clandestine Immigration (29 December 2007); Treaty on Friendship, Partnership, and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya (signed 30 August 2008, entered into force 2 March 2009). See further den Heijer (n 19) 224-25; Elisa Vari, 'Italy-Libya Memorandum of Understanding: Italy's International Obligations' (2020) 43 Hastings Int'l & Comp L Rev 105, 107-22.

22 (2012) 55 EHRR 21.

23 See *ND and NT v Spain* App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020); Council of Europe, 'Report of the Fact-finding Mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on Migration and Refugees, to Spain, 18-24 March 2018' (3 September 2018) SG/Inf(2018)25, section 3; Renata Brito, 'Migrant Arrivals Plunge in Spain after Deals with Morocco' *Associated Press* (26 April 2019) <https://apnews.com/6e4c62e3255444c78196aef3f463fca0> accessed 4 February 2020.

24 See US Embassy & Consulates in Mexico, 'The Merida Initiative' <https://mx.usembassy.gov/our-relationship/policy-history/the-merida-initiative/> accessed 4 February 2020.

third states through joint operations and rapid interventions, supports search and rescue (SAR) operations, and coordinates and conducts return operations.[25] Operations take place in Member States' territorial waters, international waters, and third states' territory. For example, Operation *Nautilus* sought to control movement between North Africa and Italy and Malta, while Operation *Poseidon* currently operates in the Aegean Sea in support of Greece.[26] NATO also runs naval and aerial operations in the Aegean and Mediterranean Seas and territorial waters of Greece and Turkey, tracking migrant boats and sharing real-time information with their coastguards and Frontex (through Greek, Turkish, and Frontex Liaison Officers (FLOs)), resulting in the interception and return of migrants to Libya by the coastguards.[27]

Frontex operates an extensive aerial surveillance system,[28] which has reportedly led to its involvement in pullbacks by the Libyan and Tunisian coastguards and pushbacks by

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25 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1 (Frontex Regulation) preamble 3, arts 3, 10, 36-37, 71, 73. See also Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L 189/93 (Sea Borders Regulation) arts 5-9. See Melanie Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (OUP 2018) ch 2.

26 Frontex Regulation, preamble 91, arts 3(1)(g), 36(2)(c), 71-77; HRW, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers* (HRW 2009) 36-37; Frontex, 'Main Operations: Operation Poseidon (Greece)' <https://frontex.europa.eu/along-eu-borders/main-operations/operation-poseidon-greece-/> accessed 11 June 2020.

27 Ben Cowles, 'Turkish Naval Ship Aids Pushback of Refugees to Libya' *Morning Star* (29 January 2020) <https://morningstaronline.co.uk/article/w/turkish-naval-ship-aids-pushback-of-refugees-to-war-torn-libya> accessed 18 June 2020; NATO, 'Assistance for the Refugee and Migrant Crisis in the Aegean Sea' (20 June 2019) <www.nato.int/cps/en/natohq/topics_128746.htm> accessed 17 June 2020.

28 Sea Borders Regulation.

Croatia and Greece for example.[29] There is mounting evidence that Frontex planes and ships have been near several pushbacks by Greece, at times creating waves and blocking boats while waiting for the Greek coastguard.[30] Frontex has also concluded several arrangements with third states to handle irregular migration, alongside reliance on Member States' bilateral agreements.[31] Operation *Hera* involved patrols and interceptions off the Canary Islands in the territorial waters of Senegal, Mauritania, and Cape Verde pursuant to Spain's bilateral agreements.[32] During operations, shipriders are present on Frontex vessels.[33] The US also utilises this model, having shiprider agreements in place with states

29 See EBCG, 'Consolidated Annual Activity Report 2018' (12 June 2019) Reg No 5865, 45; Alarm Phone and others, 'Remote Control: The EU-Libya Collaboration in Mass Interceptions of Migrants in the Central Mediterranean' (Report, June 2020) <https://eu-libya.info/img/RemoteControl_Report_0620.pdf> accessed 30 June 2020; ECRE, 'Med: 118 Rescued, 211 into Quarantine while Italy Faces Legal Action for Pull-backs' (26 June 2020) <www.ecre.org/med-118-rescued-211-into-quarantine-while-italy-faces-legal-action-for-pull-backs/> accessed 5 August 2020.

30 See eg Giorgos Christides and others, 'EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign' *Spiegel* (23 October 2020) <www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7> accessed 25 October 2020.

31 Frontex Regulation, art 73; Frontex, 'Non-EU Countries' <https://frontex.europa.eu/partners/non-eu-countries/> accessed 4 February 2020. See Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017) 173-78.

32 See Agreement between the Kingdom of Spain and the Republic of Cape Verde on Monitoring Joint Maritime Areas Under the Sovereignty and Jurisdiction of Cape Verde (21 February 2008) (Spain-Cape Verde Treaty); Frontex, 'Longest Frontex Coordinated Operation – HERA, the Canary Islands' (Press Release, 19 December 2006) <https://frontex.europa.eu/media-centre/news/news-release/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQlsc> accessed 20 January 2020; Frontex, 'HERA 2008 and NAUTILUS 2008 Statistics' (Press Release, 17 February 2009) <https://frontex.europa.eu/media-centre/news/news-release/hera-2008-and-nautilus-2008-statistics-oP7kLN> accessed 4 February 2020.

33 Spain-Cape Verde Treaty, arts 3(1)(b), 6; den Heijer (n 19) 224-25.

such as the Bahamas, Canada, and Dominican Republic.[34] Although cooperative deterrence still occurs, destination states now often operate *through* third states.

c. Remote Control

The critical shift that has occurred is the recent move by destination states and the EU towards more remote forms of control, which have become a central pillar of externalisation. Destination states in the Global North have turned to third states to prevent migrants leaving their territories, with third states being enticed and pressured to enhance their border and exit controls, notably through pullbacks and pre-emptive interceptions, and prevent new arrivals to their territory. Third states are provided funding, training, equipment, and technical support and incentivised (or threatened) with aid, trade concessions, access to labour markets, and laxed visa requirements. Giuffré and Moreno-Lax describe this phenomenon as 'contactless control'.[35]

The external dimension of the EU's migration policy is a case in point. The EU and Member States have been partnering with third states to prevent migrants reaching the external borders.[36] This is done through an array of instruments and initiatives, including: the Global Approach to Migration and Mobility, mobility partnerships, dialogues, and

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34 See eg Agreement Between the Government of the United States of America and the Government of the Commonwealth of the Bahamas Concerning Cooperation in Maritime Law Enforcement (29 June 2004) TIAS 04-629; Agreement Between the Government of the United States of America and the Government of the Dominican Republic Concerning Cooperation in Maritime Law Enforcement (20 May 2003) TIAS 03-520. See also FitzGerald (n 3) 91-92.

35 Giuffré and Moreno-Lax (n 19) 97.

36 See Mark Akkerman, 'Expanding the Fortress: The Policies, the Profiteers and the People Shaped by EU's Border Externalisation Programme' (Report, Transnational Institute and Stop Wapenhandel 2018) 12-18 <www.tni.org/files/publication-downloads/expanding_the_fortress_-_1.6_may_11.pdf> accessed 2 February 2021; FitzGerald (n 3) ch 8, particularly 177-180, ch 9.

Common Agendas on Migration and Mobility;[37] the EU Agenda on Migration and Emergency Trust Fund for Africa (worth €4.7 billion), which earmarks significant funds for border control and migration management, conditioning aid on efforts taken to curb irregular migration;[38] and the Migration Partnership Framework (MPF), which identifies sixteen priority states and commits to using 'all leverages and tools' to reach compacts with them to 'better manage migration', including by stemming irregular movement and through readmission agreements.[39] The MPF was inspired by the 2016 EU-Turkey deal, with Turkey committing to stem departures. North African and sub-Saharan states in particular have become Europe's 'new frontier', notably Libya, Morocco, and Niger.[40] Alongside development assistance and commitments to open legal pathways, this has involved pushing them to criminalise exit and human smuggling.[41] The EU has also funded a large

37 See GAMM; Commission, 'Global Approach to Migration and Mobility' <https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/global-approach-migration-and_en> accessed 2 February 2020.

38 Commission, 'A European Agenda on Migration' (Communication) COM (2015) 240 final, 5, 7-8; Commission, 'EU Emergency Trust Fund for Africa' <https://ec.europa.eu/trustfundforafrica/index_en> accessed 1 February 2020. See Tuuli Raty and Raphael Shilhav, *The EU Trust Fund for Africa: Trapped between Aid Policy and Migration Politics* (Briefing Paper, Oxfam 2020) 3-4, 10, pt 2.

39 Commission, 'Establishing a new Partnership Framework with third countries under the European Agenda on Migration' (Communication) COM (2016) 385 final.

40 eg 'Valletta Summit on Migration, 11-12 November 2015 - Action Plan and Political Declaration' (12 November 2015) <www.consilium.europa.eu/en/press/press-releases/2015/11/12/valletta-final-docs/> accessed 3 February 2021; European Council, 'Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route' (3 February 2017) <www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/> accessed 2 February 2021 (Malta Declaration).

41 eg Law No 02/03 (2003) Morocco; Law No 2004-6 (2004) Tunisia; Law No 19 (2010) Libya; Law No 2015-36 (2015) Niger. See Vasja Badalič, 'Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and Their Impact on Human Rights' (2019) 20 Journal of International Migration and Integration 85.

part of IOM's activities in the region, including to secure the Niger-Libyan border.[42] The EU's 'management' of migration plainly undermines the African Union and other regional bodies' agendas on free movement, infringing provisions on the right to leave and move freely (and sitting uncomfortably with the EU's own model).[43]

The EU-Libya relationship and Italy's primary role deserve further exploration. Both parties have been infamously cooperating with and strengthening the Libyan Coast Guard (LBCG) to stem departures and crossings across the Mediterranean. Libya and Italy have been closely cooperating on migration for many years, having concluded several treaties and MoUs.[44] Well aware that pushbacks violate international law, with the Court in *Hirsi* closing a 'legal black hole', Italy has sought to achieve the same aims by outsourcing to Libya what it is prohibited from doing directly. Pursuant to the 2017 Italy-Libya MoU, Italy provides funding, training, surveillance data, and equipment, including boats, a helicopter, and surveillance devices, to help Libya and the LBCG control its borders and stem migration.[45] Malta and Libya recently concluded a deal and MoU, with

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42 Julien Brachet, 'Policing the Desert: The IOM in Libya Beyond War and Peace' (2016) 48 Antipode 272, 276-77; Akkerman (n 36) 12-14, 80-81; EU-IOM, 'EU-IOM Joint Initiative' (Flash Report No 24, January 2020) <https://migrationjointinitiative.org/sites/default/files/files/articles/eu-iomjointinitiativeflashreport24en.pdf> accessed 5 December 2020.

43 See n 21 in ch 5; Amanda Bisong, 'Win-win-win: Africa and Europe in 2019 Should Move Towards Solutions that Benefit Migrants Too' (*ECDPM*, 28 January 2019) <https://ecdpm.org/talking-points/win-win-win-africa-europe-2019-move-towards-solutions-benefit-migrants-too/> accessed 5 February 2020.

44 See above n 21; Vari (n 21) 107-22; Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strasbourg?' (2018) 20 EJML 396, 399-404.

45 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) (Libya-Italy MoU) preamble, arts 1, 2(2), (3). See Sandra Uselli and others (trs), 'Libya-Italy MoU' <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 3 December 2020.

Malta financing coordination centres in Tripoli and Valletta to combat 'illegal immigration' and the LBCG agreeing to intercept and pullback migrants headed for Malta.[46] Italy's responsibility for pullbacks by the LBCG is currently pending before the ECtHR in *SS v Italy*.[47] A complaint has also been filed with the HRC against Italy, Libya, and Malta, arguing that a pullback violated the complainants' right to leave (and other rights), following 'delegation' of the rescue to the LBCG.[48] The EU provides its backing and support, endorsing the MoUs, bolstering the LBCG with training through the EU Naval Force Mediterranean (EUNAVFOR MED) Task Force (aka Operation *Sophia/Irini*), and operating the EU Border Assistance Mission in Libya (EUBAM Libya).[49] There has thus been a strategic shift to *refoulement* by proxy. Recently, more hidden modalities have emerged, with coastal states engaging in 'privatised pushbacks' and proxy pullbacks. This has involved the Italian MRCC co-opting passing merchant vessels to intercept migrant boats, liaise with the LBCG, and disembark survivors in Libya (resulting in a HRC

46 Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of the Republic of Malta in the Field of Combatting Illegal Immigration (28 May 2020); Ivan Martin, 'Exposed: Malta's Secret Migrant Deal with Libya' *Times of Malta* (10 November 2019) <https://timesofmalta.com/articles/view/exposed-maltas-secret-migrant-deal-with-libya.748800> accessed 12 June 2020.

47 App 21660/18 (Communicated 26 June 2019). See also *CO and AJ v Italy* App no 40396/18 (pending).

48 AGSI and CIHRS, 'Complaint to the UN Human Rights Committee Over the Role of Italy, Malta, and Libya in Violating the Right to Leave Libya, Resulting in Denial of the Rights of Asylum Seekers' (Press Release, 24 July 2020) <www.statewatch.org/media/1267/un-asgi-cihrs-complaint-libya-pull-backs-pr-24-7-20.pdf> accessed 5 August 2020.

49 See Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya) [2013] OJ L 138/15; Malta Declaration; Council Decision (CFSP) 2019/535 of 29 March 2019 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) [2019] OJ L 92/1; EU, 'EU Support on Migration in Libya: EU Emergency Trust Fund for Africa – North of Africa Window' (Fact Sheet, October 2020) <https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/eutf-factsheet_2020-libya_2710.pdf> accessed 3 February 2021.

complaint);[50] Libya co-opting merchant ships operating near oil rigs off Libya to pullback migrants;[51] and Malta hiring fishing trawlers and directing merchant vessels to take back migrants to Libya.[52]

This shift is accompanied by an alarming disengagement at sea by the EU and Member States of their SAR capacity, ongoing disputes over disembarkation, and the criminalisation and harassment of NGO SAR vessels.[53] Italy's year-long Operation *Mare Nostrum*, which rescued around 150,000 migrants,[54] was superseded by EU (*Sophia*, now *Irini*) and Frontex operations (*Triton*, now *Themis*). They are mandated to engage in border control and surveillance, disrupt smuggling and trafficking, and support the LBCG, with

50 *SDG v Italy*, Communication to the HRC (18 December 2019) [60].

51 Patrick Kingsley, 'Privatised Pushbacks: How Merchant Ships Guard Europe' *The New York Times* (20 March 2020) <www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html> accessed 12 June 2020.

52 Patrick Kingsley, 'Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet' *The New York Times* (27 April 2020) <www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html> accessed 1 May 2020; Alarm Phone, 'Also in the Central Mediterranean Sea: Black Lives Matter!' (6 July 2020) <https://alarmphone.org/en/2020/07/06/also-in-the-central-mediterranean-sea-black-lives-matter/> accessed 5 August 2020.

53 Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application No 21660/18 *SS and others v Italy* CommDH(2019)29 [13]-[15].

54 Italian Ministry of Defence, 'Mare Nostrum Operation' <www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx> accessed 20 January 2020; IOM, 'IOM Applauds Italy's Life-Saving Mare Nostrum Operation: "Not a Migrant Pull Factor"' (Press Release, 31 October 2014) <www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor> accessed 20 January 2020.

none having SAR as their primary objective.[55] Operation *Sophia* withdrew all naval assets in 2019, leaving only aircraft passing surveillance data to Libya.

Across the waters, Australia seeks to prevent, disrupt, and deter migrant vessels travelling to Australia through agreements with neighbouring states, including funding immigration detention, extraterritorial processing, and capacity building.[56] Notably, it stations liaison officers at known transport hubs and a multi-agency task force led by the Australian Federal Police (AFP) gathers intelligence on people-smuggling plans and passes it to local authorities for interception purposes.[57] As part of 'regional cooperation' and 'incentivised policy transfer', Australia provides substantial funding to states such as Indonesia, Malaysia, Sri Lanka, and Vietnam to strengthen their border controls and the capacity of local authorities.[58] The Regional Cooperation Agreement (RCA) between Australia, Indonesia, and IOM, established in 2000 by exchange of letters, involves the Indonesian authorities intercepting migrants 'thought to be intent on travelling irregularly to Australia or New Zealand', alongside Australia encouraging Indonesia to use detention to deter migrants and funding IOM for detention purposes, capacity building, and other

55 See Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI) [2020] OJ L 101/4; Frontex, 'Main Operations: Operation Themis (Italy)' <https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/> accessed 10 June 2020.

56 See eg Asher Lazarus Hirsch, 'The Borders Beyond the Border: Australia's Extraterritorial Migration Controls' (2017) 36 RSQ 48; Nikolas Feith Tan, 'State Responsibility and Migration Control: Australia's International Deterrence Model' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017).

57 See Helen Davidson, 'Almost 300 Asylum Seekers Prevented from Sailing to Australia in Past Year' *The Guardian* (11 November 2018) <www.theguardian.com/australia-news/2018/nov/12/hundreds-of-asylum-seekers-disrupted-while-trying-to-sail-to-australia-in-past-year> accessed 10 April 2020.

58 Amy Nethery and Carly Gordyn, 'Australia-Indonesia Cooperation on Asylum-Seekers: A Case of "Incentivised Policy Transfer"' (2014) 68 AustJInt'l Aff 177, 190; Hirsch (n 56) 71, 75.

migration control activities.[59] Regional cooperation has included donating patrol boats, aircrafts, motorcycles, deploying the AFP to run training, and intelligence swapping.[60]

In the Americas, the US has long sought to keep out Central American migrants, bolstering the migration control capacity of Mexico and Central American States, using similar methods to Australia and the EU.[61] Mexico has become an important 'buffer zone', intensifying security operations and apprehending migrants travelling from the Northern Triangle into the US following US pressure.[62] In October 2007, the Mérida Initiative was announced, with the US providing financial and technical assistance to Mexico (and neighbouring states/islands), which, among other things, seeks to create a 21st century US-Mexican border, curtail irregular migration, and improve immigration enforcement and border security.[63] Between 2011 and 2017, more than $100 million USD was provided in training and equipment to secure Mexico's southern border.[64] Since 2019, when the US

59 Amy Nethery, Brynna Rafferty-Brown and Savitri Taylor, 'Exporting Detention: Australia-Funded Immigration Detention in Indonesia' (2013) 26 JRS 88, 94-95; Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 22 IJHR 681, 688-99.

60 Hirsch (n 56) 71-76; Francesca Mussi and Nikolas Feith Tan, 'Comparing Cooperation on Migration Control: Italy–Libya and Australia–Indonesia' in Fiona de Londras and Siobhán Mullally (eds), *The Irish Yearbook of International Law*, vol 10, 2015 (Hart Publishing 2017); Azadeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 HRLRev 435, 439-42.

61 FitzGerald (n 3) 91-92, chs 6-7.

62 Adam Isacson, Maureen Meyer and Hannah Smith, 'Mexico's Southern Border: Security, Central American Migration, and US Policy' (Report, WOLA 2017) 7-11 <www.wola.org/wp-content/uploads/2017/06/WOLA_Mexicos-Southern-Border-2017-1.pdf> accessed 2 February 2021; FitzGerald (n 3) 123-46.

63 Merida Initiative (n 24).

64 US Congressional Research Service, *Mexico: Evolution of the Mérida Initiative, 2007-2021* (Clare Ribando Seelke, IF10578, 2021).

threatened to impose tariffs after increased arrivals, Mexico increased apprehensions, deploying more than 25,000 guards to both borders.[65] Simultaneously, the US has sought to strengthen Mexico's asylum system.[66] In 2019, the US concluded various agreements with Guatemala, Honduras, and El Salvador, including STC agreements (the latter now being terminated), with US officials deployed to train relevant counterparts.[67]

Three broad categories of pushbacks and pullbacks emerge, with each raising distinct jurisdictional queries: walls and physical infrastructure; 'active' but still indirect deterrence measures, involving officials or ships, such as bow wave manoeuvres; and physical interceptions. Simultaneously, several outsourcing modalities exist, comprising third states, private actors, IOM, Frontex, and NATO. This leads to complex issues of jurisdiction, attribution, and responsibility allocation, alongside obstacles to fully assessing rights compliance due to a general lack of transparency.

B. Law of the Sea

It is necessary to first briefly outline relevant LOS obligations and the legal basis for interdiction, given many practices occur in the maritime context and the ongoing movement

65 Maureen Meyer and Adam Isacson, 'The "Wall" Before the Wall: Mexico's Crackdown on Migration at its Southern Border' (Report, WOLA 2019) 7-20 <www.wola.org/analysis/mexico-southern-border-report/> accessed 2 February 2021; Pierce and Bolter (n 14) 28-29. See also FitzGerald (n 3) 139-41.

66 Meyer and Isacson (n 65) 43-44.

67 US Department of Homeland Security, 'DHS Agreements with Guatemala, Honduras and El Salvador (Fact Sheet, November 2019) <www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf> accessed 5 December 2020.

of migrants by sea.[68] This will inform the right to leave analysis, in particular the legality and legitimate aim limbs.

One of the oldest maritime obligations is the duty to render assistance to individuals in distress at sea, 'regardless of the nationality or status' of the person or 'circumstances in which that person is found', with this duty applying everywhere at sea.[69] Every state must require shipmasters flying its flag to rescue persons in distress.[70] Distress is a 'situation wherein there is a reasonable certainty that a person, vessel, or other craft is threatened by grave and imminent danger and requires immediate assistance'.[71] The state must ensure rescued persons are delivered to a 'place of safety', which requires disembarkation to a place where the survivors' safety of life is no longer threatened and where their basic needs can be met.[72] The UNHCR has added that this encompasses protection from persecution and *refoulement*.[73] The focus is thus on ensuring the rights of those at sea, revealing the intersection between the LOS, IHRL, and refugee law. Additionally, coastal states must

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68 See generally Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (CUP 2016); Violeta Moreno-Lax and Efthymios Papastavridis, *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill Nijhoff 2016).

69 UNCLOS, arts 18(2), 58(2), 98(1), (2). See also International Convention for the Safety of Life at Sea (adopted 1 November 1974, entry into force 25 May 1980) 1184 UNTS 278 (SOLAS) ch V, reg 33(1.1); International Convention on Maritime Search and Rescue (adopted 27 April 1979, entry into force 22 June 1985) 405 UNTS 97 (SAR) annex [2.1.10].

70 UNCLOS, art 98(1). See also SOLAS, ch V, reg 33.

71 SAR [1.3.13].

72 SOLAS, ch V, reg 33(1.1), (6); SAR [1.3.2], [3.1.9]; IMO Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea (adopted 20 May 2004) [6.12].

73 UNHCR 'General Legal Considerations: Search-and-Rescue Operations involving Refugees and Migrants at Sea' (November 2017) [1], [6], [16]-[17].

provide an 'adequate and effective' SAR service in their SAR region, bearing 'primary responsibility' for ensuring coordination and cooperation so that survivors are delivered to safety.[74]

Turning now to the legal basis for interdicting migrant vessels, which is intricate, contested, and importantly, circumscribed by international law.[75] Interdiction involves the boarding, inspection, and search of a ship suspected of prohibited conduct, and where this suspicion proves justified, taking certain measures such as arrest of the vessel.[76] Critically, the duty to rescue cannot be equated with a general right of interdiction, with SAR operations not considered interdictions.[77] Article 87 UNCLOS sets out the fundamental principle of freedom of the high seas. Vessels on the high seas are subject to the exclusive jurisdiction of their flag state;[78] other states may only interdict foreign vessels when permitted by international law or with the consent of the flag or coastal state in whose zone the vessel is found.[79] Article 110 UNCLOS sets out the right of visit, representing the most

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74 SOLAS, ch V, regs 7, 33(1.1); SAR, chs 2-3; UNCLOS, art 98(2). See also Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 277-84.

75 For the most comprehensive volume on interdiction see Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009). See also Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing 2013) ch 8.

76 Guilfoyle (n 75) 4.

77 UNHCR EXCOM Conclusion No 97 (n 1) preamble; Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 IJRL 174, 176-77.

78 UNCLOS, art 92(1).

79 Guilfoyle (n 75) 5, ch 13.

significant exception to freedom of the high seas.[80] Warships or other duly authorised vessels can board foreign vessels on the high seas in limited circumstances, including where there are reasonable grounds for suspecting piracy, the slave trade, or that the vessel is without nationality.[81]

Article 110(1) also contemplates interdiction derived from 'powers conferred by treaty'. Under the Smuggling Protocol, interdiction is permitted where there are reasonable grounds to suspect a vessel of migrant smuggling *and* following express authorisation from the flag state, which can approve appropriate measures.[82] Smuggling is defined in Article 3(a) as the 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'. As highlighted, several bilateral agreements have been concluded where flag states authorise another state to intercept its vessels and coastal states permit interceptions in their territorial waters.[83] A state may also board and search a vessel without nationality suspected of smuggling. If such suspicion is confirmed, the state may take appropriate measures in accordance with domestic and international law.[84] In contrast, the Trafficking Protocol merely provides that state parties shall strengthen 'border controls as may be necessary to prevent and detect trafficking in persons'.[85] Notably, the UNSC has

80 See Papastavridis (n 75).

81 Article 92(2) includes ships with uncertain nationality.

82 Smuggling Protocol, arts 8(2), (5). See Papastavridis (n 75) 80-81.

83 Papastavridis (n 75) 281-89.

84 Smuggling Protocol, art 8(7).

85 Trafficking Protocol, art 11(1).

reinforced EUNAVFOR operations, authorising the inspection and seizure of vessels on the high seas off the Libyan coast suspected of smuggling or trafficking. However, any further action *must comply fully* with IHRL and not prevent seeking asylum.[86] As is returned to when considering the legality of pushbacks and pullbacks, enforcement-style measures cannot easily be derived from these clauses. Moreover, states remain bound to uphold their obligations, reflected in saving clauses, which is relevant also to legitimate aims.

Where the interception takes place in a state's territorial sea or contiguous zone, the coastal state can exercise more sovereign powers. A state has full sovereignty over its territorial sea, subject to other rules of international law and UNCLOS, notably the right of innocent passage for ships.[87] Passage 'is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State', being prejudicial where the ship engages in 'loading or unloading of any ... person' contrary to the coastal state's customs or immigration laws.[88] Scholars disagree over whether passage to request international protection is innocent.[89] Critically, seeking asylum is protected by international law and Article 31 Refugee Convention prohibits penalisation for unauthorised entry, suggesting

86 UN Security Council Resolution 2240 (9 October 2015) UN Doc S/RES/2240 [5]-[8], [10]-[13]; UNSC Res 2491 (3 October 2019) UN Doc S/RES/2491 [2]. See Efthymios Papastavridis, 'EUNAVFOR MED Operation Sophia and the Question of Jurisdiction over Transnational Organized Crime at Sea' (2016) 30 QIL Zoom-in 19, 27-30 <www.qil-qdi.org/eunavfor-med-operation-sophia-question-jurisdiction-transnational-organized-crime-sea/> accessed 3 December 2020.

87 UNCLOS, arts 2, 17.

88 ibid arts 19(1), 2(g).

89 cf Goodwin-Gill and McAdam (n 74) 274 with Moreno-Lax, 'Seeking Asylum' (n 77) 191-92; Moreno-Lax, *Interdiction* (n 8) 4. See also Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 EJIL 591, 599.

innocent passage. Regardless, coastal states may only take 'necessary steps' to prevent non-innocent passage and must still comply with other 'rules of international law'.[90] Similarly, in its contiguous zone, a state may only exercise the control 'necessary' to prevent or punish infringements of its customs and immigration laws within its territory or territorial sea.[91] Again, there is ambiguity over whether interdiction is covered but nonetheless, any exercise of jurisdiction remains limited by refugee and IHRL.[92]

In summary, when scrutinising pushbacks and pullbacks, LOS considerations must be accounted for, notably the constraints on interdiction and preservation of protections under refugee law and IHRL. LOS obligations should be interpreted consistently with these protections, pursuant to the systemic integration principle.

C. Jurisdiction and Attribution

a. Jurisdiction

This section seeks to establish that the pushed or pulled back migrant falls within the state's jurisdiction under IHRL, as Chapter Four explored. Otherwise, the state will not owe duties under the right to leave nor incur responsibility for violations.

a. Pushbacks

For physical pushbacks at sea and on land, there is no obvious obstacle to finding that the intercepting state exercises extraterritorial jurisdiction. As various adjudicative bodies have

90 UNCLOS, arts 2(3), 25(1), 27(1); Goodwin-Gill and McAdam (n 74) 274.

91 UNCLOS, art 33.

92 See ibid arts 58(1), 86, 87(1); Moreno-Lax, 'Seeking Asylum' (n 77) 190-91.

held, jurisdiction exists where factual control is exerted by the state over vessels or persons, as well as through activities occurring on board state vessels, reflecting flag state jurisdiction.[93] This was the case for pushbacks to Libya in the ground-breaking *Hirsi* case,[94] during the interception, boarding, and towing to port of a vessel on the high seas,[95] rescues at sea,[96] and mere collision with a vessel.[97] Blockades and using warships to prevent entry have also amounted to jurisdiction and by extension, active deterrence measures involving violence, the threat of, or otherwise producing a 'chilling effect' that stops or diverts migrants (eg patrols and encirclement) should meet the threshold.[98] Vessels/migrants are deprived of the only course of action available to them, navigation. The same applies to land pushbacks. Several ECtHR cases have found migrants to be within the respondent state's jurisdiction when pushed back at the border.[99] Open firing, use of force, and vehicle

93 See on jurisdiction at sea Efthymios Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 German LJ 417.

94 (n 22) [75], [77], [81]. See also *Sonko v Spain* Communication No 368/2008 (20 February 2012) UN Doc CAT/C/47/D/368/2008 [10.3]; *Medvedyev v France* (2010) 51 EHRR 39 [65]; *Sharifi v Italy and Greece* App no 16643/09 (21 October 2014).

95 *Medvedyev* (n 94) [63]-[67].

96 *JHA v Spain*, Communication No 323/2007 (21 November 2007) UN Doc CAT/C/41/D/323/2007 [8.2].

97 *Xhavara* (n 21) 5-6.

98 *Women on Waves v Portugal* App no 31276/05 (ECtHR, 3 February 2009); Moreno-Lax, *Interdiction* (n 8) 9-10; Papastavridis, 'European Convention' (n 93) 424-26, 429-30.

99 *MA v Lithuania* App no 59793/17 (ECtHR, 11 December 2018) [70], [4]-[6] (Separate Opinion Albuquerque J); *MK v Poland* App nos 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020) [129]-[132]. See also *ND and NT* (n 23) [104]-[111].

checkpoints have also involved the exercise of jurisdiction.[100] For walls and fences, much will turn on the test adopted. When guarded, barriers have the same chilling effect as other measures. However, so does a wall with no guards, which nonetheless directly impacts one's right to leave and ability to assert a right of entry.[101] Therefore, pushbacks and other measures that force migrants away/back amount to effective control or trigger jurisdiction based on a functional or causal relationship.

b. Pullbacks

Pullbacks raise more difficult issues, with destination states actively trying to sever jurisdictional links and avoid *Hirsi*-like results. The third state performing the pullback clearly exercises effective control, akin to pushbacks. The key question is whether migrants are within the destination states jurisdiction because of the funding, training, equipment, and intelligence they provide to the third state. As Chapter Four highlighted, there are differing conceptions of jurisdiction. Three possible routes exist to finding jurisdiction for pullbacks: effective control, functional/cause and effect, and complicity, with each addressed in turn.

The starting point is *SS v Italy*, awaiting hearing before the ECtHR.[102] *SS* concerned a pullback by the LBCG in 2017, after it obstructed the rescue of around 150 migrants by Sea-Watch in the Mediterranean, leading to the death of 20 migrants and return of 47 migrants to Libya. The Applicants, 17 survivors, allege violations of their rights to life, torture and ill-treatment, *refoulement*, and collective expulsion. The Court has the chance

100 *Andreou v Turkey* App No 45653/99 (ECtHR, 27 October 2009) [25]; *Al-Skeini v UK* (2011) 53 EHRR 18 [136]; *Jaloud v Netherlands* (2015) 60 EHRR 29 [149]-[152].

101 See Paz (n 18); Moria Paz, 'The Legal Reconstruction of Walls: *N.D. & N.T. v. Spain*, 2017, 2020' (2020) 22 NYU J Legis & Pub Poly 693, 697, 709-13.

102 See (n 47).

to set a landmark precedent by finding that Italy breached its obligations in supporting and partnering with Libya. Italy's extensive support plainly amounts to effective control over the pulled-back migrants, acting through its proxy, the LBCG.[103] Italy donated the vessel performing the pullback and 8 out of the 13-member crew were trained as part of Operation *Sophia*, which Italy contributed to. The Rome MRCC sent the distress signal to the LBCG and Sea-Watch, directed them both to the dinghy, and an Italian helicopter was present overhead.[104] Italy continuously coordinated and controlled the interception and rescue, creating the conditions that allowed (potential) violations to materialise.[105] More broadly, without Italian and EU support, the previously non-existent LBCG would not have been capable of pullbacks.[106] Their backing allowed Libya to declare a SAR Region and establish its JRCC. As several scholars argue, the decisive influence exercised in such situations (eg Australia over Indonesia, US over Mexico, and EU over Turkey) is comparable to *Ilaşcu* and *Catan* (mentioned in Chapter Four), despite the latter cases unique circumstances. Without such influence and pressure, third states would not and

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103 CSDM Submission under Article 20 of the UN Convention against Torture concerning Italy's Responsibility for the Torture of Migrants Pulled back to Libya (25 June 2020) [232]-[262].

104 For a detailed account see Forensic Oceanography, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration Across the Mediterranean' (Report, May 2018) particularly 87-99 <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf > accessed 3 February 2021.

105 Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *SS and Others v Italy*, and the "Operational Model"' (2020) 21 German LJ 385, 406. See also Lena Riemer, 'From Push-backs to Pull-backs: The EU's New Deterrence Strategy Faces Legal Challenge' (*FluchtforschungsBlog*, 16 June 2018) <https://blog.fluchtforschung.net/from-push-backs-to-pull-backs-the-eus-new-deterrence-strategy-faces-legal-challenge/> accessed 27 April 2020; Pijnenburg (n 44) 411.

106 Commissioner for Human Rights (n 53) [20], [35]; Giulia Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?' (2018) 4 Italian LJ 489, 527-28; Forensic Oceanography (n 104) 19-56.

could not obstruct departure, as in the past.[107] Hence, during pullbacks at sea or on land, destination states exert significant influence and control over migrants and their situation, amounting to effective control.

Second, jurisdiction can be established based on the direct and foreseeable impact state actions and policies have on migrants, applying a functional or causal approach. This remains the case where the state did not coordinate the specific pullback and when physical contact is lacking. Externalisation creates the *precise* conditions that lead to pullbacks and ensuing violations. As the UNHCR advanced in its *SS* submissions, where the coordination or involvement of an MRCC is likely to determine the course of events, IHRL obligations will be engaged.[108] Similarly, the complaint to the HRC for Italy's role in privatised pushbacks argues that by orchestrating the interdiction, Italy decisively contributed to and violated the victim's right to leave Libya in a direct and unjustifiable manner.[109] Furthermore, as the NGO interveners in *SS* submit, the proximate and foreseeable effects of state authority on ECHR rights are particularly manifest where the power to issue decisions and act extraterritorially derives from international obligations, such as LOS obligations.[110] Control and knowledge of distress should thus be decisive in establishing

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107 Giuffré and Moreno-Lax (n 19) 87-90, 105-07; Moreno-Lax, 'Architecture' (n 105) 408-11. See also *Hirsi* (n 22) 76 (Separate Opinion Albuquerque J); Pijnenburg (n 44) 413-15.

108 UNHCR '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) [3.1.5], [4.5], s 3.2.

109 *SDG* (n 50) [17], [56]-[58], [62]-[68], [100].

110 Written Submissions on behalf of the AIRE Centre (Advice on Individual Rights in Europe), the Dutch Refugee Council (DCR), the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ) *SS and Others v Italy* Application No. 21660/18 before the European Court of Human Rights (11 November 2019) 1-7. cf Moreno-Lax, 'Architecture' (n 105) on a functional public powers model.

jurisdiction.[111] Destination states operate extensive border surveillance systems, demonstrating their functional control, specifically knowledge and capacity to prevent violations.[112]

The HRC recently confirmed this approach, finding that Italy exercised jurisdiction over and violated the right to life of more than 200 migrants whose vessel sank in the Mediterranean. Even though the individuals were within the Maltese SAR region (and under its concurrent jurisdiction), a 'special relationship of dependency' was established between the migrants and Italy based on the initial distress call to the Italian MRCC, close proximity of an Italian naval vessel, and the MRCC's ongoing involvement. Accordingly, the migrants were 'directly affected' in 'a manner that was reasonably foreseeable' by Italy's delayed rescue and failure to promptly respond.[113]

Critically, containment and return 'are not accidental, unforeseen, or unintended'; they are a 'planned and expected' part of externalisation.[114] Both the CAT and HRC found Australia to be exercising jurisdiction over migrants at its offshore detention centres based on the accumulation of several factors, including its establishment of the centres, funding,

111 Papastavridis, 'European Convention' (n 93) 435.

112 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) UN Doc A/72/335 [64]. See *SDG* (n 50) [10].

113 *AS, DI, OI and GD v Italy*, Communication No 3042/2017 (27 January 2021) UN Doc CCPR/C/130/D/3042/2017 [7.8], [8.4]-[8.5]. See on Malta *AS, DI, OI and GD v Malta*, Communication No 3043/2017 (27 January 2021) UN Doc CCPR/C/128/D/3043/2017.

114 Moreno-Lax, 'Architecture' (n 105) 387, 410.

and provision of services.[115] Likewise, there is a functional and/or direct causal relationship between the pulled back migrants and destination state equipping third states to perform pullbacks.[116] This can extend to cases that are truly 'contactless', where the state gives resources and turns a blind eye. Such states retain capacity to uphold their obligations, but instead, foster curtailment of the right to leave.[117]

Lastly, the aid and assistance provided by Italy and other states can be approached from a complicity lens. This builds on Jackson's work, who argues that the rule in *Soering* be re-imagined to prevent all forms of extraterritorial complicity, not just in torture.[118] Reading jurisdiction as encompassing aid and assistance would, quite rightly, be tantamount to a prohibition on complicity in violations occurring during externalisation. Ultimately, in *SS*, the Court should find jurisdiction. Although in the *MN* visa case, the ECtHR relied on formalities to avoid adjudicating on a politically sensitive topic, it should not adopt a passivist approach towards pullbacks, especially given its condemnation of pushbacks.[119] Applying one of the above tests will prevent responsibility gaps, affecting

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115 CAT 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia' (23 December 2014) UN Doc CAT/C/AUS/CO/4-5 [17]; HRC 'Concluding Observations on the Sixth Periodic Report of Australia' (1 December 2017) UN Doc CCPR/C/AUS/CO/6 [35]; Nikolas Feith Tan, 'The Manus Island Regional Processing Centre: A Legal Taxonomy' (2018) 20 EJML 427, 444-47.

116 See Annick Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control?' (2020) 20 HRLRev 306, 325.

117 See on positive obligations den Heijer (n 19) 48; Pijnenburg, 'Italian Pushbacks' (n 44) 410.

118 Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27 EJIL 817; Pijnenburg, 'Containment' (n 116) 327. See also *Hirsi* (n 22) 78 (Separate Opinion Albuquerque J).

119 See Majd Achour and Thomas Spijkerboer, '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 2 June 2020.

other contracting parties performing pushbacks by proxy. Destination states must not be able to strategically evade their duties, despite obvious control. Thus, the right to leave should not only be opposable to the departure state during pullbacks; both can share jurisdiction.

b. Attribution

Given the many actors involved, it also needs to be ascertained to which state and/or IO pushbacks and pullbacks are attributable to, applying the frameworks in Chapter Four.

a. Pushbacks

Pushbacks performed by the destination state give rise to no attribution issues. Such conduct is carried out by state organs (whether border authorities on land or naval ships), undoubtedly meeting Article 4 ARSIWA.[120] Hence, the destination state may bear responsibility when the right is breached. Regarding privatised pushbacks, the conduct of private vessels, acting on the instructions of the destination state's MRCC to 'rescue' migrants and cooperate with the third state, is also attributable to the destination state under the instruction's limb of Article 8 ARSIWA. In such cases, the destination state's coordination is of such significance that it determines the course of events and migrants' fate: return to Libya.[121] The control link is further solidified where the fishing/merchant vessel is officially contracted for such purposes. The privatised interception is likely dually

120 *MK* (n 99) [130]; Gammeltoft-Hansen and Hathaway (n 2) 268.

121 *SDG* (n 50) [100]; UNHCR Submission (n 108) [4.5]; Papastavridis, 'European Convention' (n 93) 432.

attributable to the third state involved, namely Libya, for its joint role in directing the vessel (Article 8) and then using its assets to force the migrants to disembark (Article 4).[122]

In the Mediterranean and Aegean Sea, EU Member States may be involved in pushbacks during Frontex joint operations and NATO patrols. Such multi-actor operations raise attribution and responsibility challenges. For Frontex operations, it needs to be determined whether conduct is attributable only to the host state, participating states, and/or the EU.[123] This feeds into a notorious problem highlighted by scholars regarding the unclear division of responsibilities between the Agency and Member States and lack of accurate information on arrangements.[124] During joint operations, a Member State acts as the 'host state' and relies on teams made up of the EBCG standing corps, including national guards deployed and seconded by Member States to Frontex and Frontex statutory staff, all wearing EU and Frontex insignias.[125] Technical equipment and assets come from Members and Frontex. In principle, the host state has full operational command, whereby teams 'shall only perform tasks and exercise powers under instructions from and, as a general rule, in the presence of border guards or staff … of the host Member State'.[126] The starting point is that the conduct of deployed personnel is attributable to their contributing

122 See *SDG* (n 50) [6], [14].

123 For comprehensive studies on Frontex responsibility see Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (CUP 2016); Fink (n 25).

124 See den Heijer (n 19) 268-69; Jorrit J Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' (2017) 2 European Papers 571, 588 <www.europeanpapers.eu/en/e-journal/external_migration_and_asylum_management _accountability_for_executive_action> accessed 28 January 2021; Moreno-Lax, *Accessing Asylum* (n 31) 160.

125 Frontex Regulation, preamble 17, 20-22, arts 54-57, 70, 78, 82(6); Fink (n 25) 45-58.

126 Frontex Regulation, art 82(4), (8).

entity under Articles 4 ARSIWA and 6 ARIO.[127] However, presuming operations uphold the outlined command structure, Article 6 ARSIWA applies. Article 6 renders the conduct of participating states attributable to the host state, given their officials are placed at the disposal of and under the host's exclusive command, and exercise governmental authority (eg interdictions) on its behalf.[128]

The actual chain of command is far less established than first appearances, featuring a 'multi-layered authority structure', where all actors have capacity to influence operations.[129] Participating states retain some authority and command over their assets and personnel. Notably, the Regulation on external border surveillance specifies that 'participating units' fall under the responsibility of the host state *or* participating state. Though the host instructs teams through a Coordination Centre, states contributing large assets also issue instructions, retain command over their vessels, aeroplanes, and personnel, and can authorise measures against vessels in certain cases.[130] However, no rule covers attribution to a state for the conduct of IO organs/agents (here, Frontex staff/team members to the host state). This gap creates much uncertainty. It has been assumed that Article 6

127 Fink (n 25) 111-13, 122.

128 See den Heijer (n 19) 267-68; Mungianu (n 123) 61-73; Rijpma (n 124) 588.

129 Maïté Fernandez, 'The EU External Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill Nijhoff 2016); Fink (n 25) 66-67, 124-25.

130 Sea Borders Regulation, arts 2(5), 6(4)-(6), 7(4)-(6), (9), (11); Frontex Regulation, arts 43(5), 45; Fernandez (n 129) 393-94; Fink (n 25) 69-70, 124-26, 140.

ARSIWA applies by analogy to these transfers, despite the Commentary specifying that Article 6 is limited to inter-state cases.[131]

Though Frontex presents itself as a mere coordinator, it plays a decisive role throughout operations. Frontex agents may also exceed their formal mandate.[132] For instance, Frontex officers have reportedly engaged in independent patrols in Greece,[133] which would lead to attribution to Frontex/EU under Article 6 ARIO. Though ECBG teams are formally under the host state's command, they could plausibly also be under Frontex's effective control in certain situations per Article 7 ARIO. Frontex manages and deploys teams and equipment, its Executive Director draws up the Operational Plan with the host state (in consultation with participating states), instructions of the host state have to comply with the Operational Plan, and a Frontex Coordinating Officer deployed to each operation ensures implementation and communicates Frontex's views to the host state, who shall follow them to the extent possible. Moreover, Coordination Centres are made up of host state officers, Frontex representatives, and participating state officers. These factors considerably limit the host's command.[134] As Moreno-Lax argues, the Agency's provision of intelligence, tactical coordination, and funding enables operations on the ground, with a

131 ARSIWA Commentary, 45 [9]; Fink (n 25) 122-23.

132 See ARIO, art 8; Izabella Majcher, 'Human Rights Violations during EU Border Surveillance and Return Operations: Frontex' Shared Responsibility or Complicity?' (2015) 7 Silesian Journal of Legal Studies 45, 53-64; Fernandez (n 129) 393-94.

133 Gammeltoft-Hansen and Hathaway (n 2) 268-69.

134 Sea Borders Regulation, preamble 18, art 2(6), (7); Frontex Regulation, arts 21, 38, 43(2), (3), 44; Majcher (n 132) 60-64; Fernandez (n 129) 398-402.

co-dependency emerging between Frontex and Member States.[135] However, it remains contentious whether Frontex exercises only *ultimate* authority and control.[136]

Nonetheless, ECBG teams cannot be said to always be under the exclusive control of the host state. This renders Article 6 ARSIWA inapplicable, which requires exclusive attribution to the latter. However, the ARIO Commentary envisions dual or multiple attribution for contributing states and IOs.[137] Moreover, the Frontex Regulation recognises prospects for shared responsibility, providing that Frontex shall implement 'border management as a shared responsibility of the Agency and of the national authorities'.[138] Accordingly, and given all actors rely on each other and work together, multiple attribution is possible, with pushbacks attributable to the host state, participating states (excluding those providing only minor equipment), and the EU under Articles 4 ARSIWA and 6 and 7 ARIO.[139] Later in the chapter, the *Bosphorus* presumption is rebutted and responsibility explored further. If the exclusive command of the host is apparent or multiple attribution not accepted, participating states and Frontex may still bear responsibility for failing to prevent violations and complicity.

NATO missions follow a different structure. Patrols in the Aegean involve the deployment of a multinational, integrated maritime force, made up of assets from allied

135 Moreno-Lax, *Accessing Asylum* (n 31) 180.

136 See Fink (n 25) 136-41.

137 ARIO Commentary, ch II 54 [4]. See also *Jaloud* (n 100) [146].

138 Frontex Regulation, preamble 12, art 7(1). See also Gammeltoft-Hansen and Hathaway (n 2) 275-6; Majcher (n 132) 54-55, 64.

139 Fernandez (n 129) 398-403.

states placed permanently at NATO's disposal and reinforced by ships from NATO allies, which works alongside Greek and Turkish units. It operates under the command of a lead state's Rear Admiral and falls under NATO's central authority.[140] Hence, in comparison to Frontex, it can be presumed NATO has effective control over the forces at its disposal, and any pushback attributable to it under Article 7 ARIO.[141] This remains the case even if the state performing the pushback contravened instructions (Article 8).[142] This presumption is rebuttable when Greece or Turkey retain sufficient command over their assets, leading to dual attribution with NATO. NATO's Operation Sea *Guardian* in the Mediterranean follows much the same structure. However, allied nations provide various forms of support and can operate independently, permitting dual attribution depending on the precise circumstances.[143]

Lastly, and only briefly given the shift towards other practices, the conduct of shipriders from third states cannot be attributed solely to the destination state. Neither Articles 6 nor 8 ARSIWA apply. A key feature of shiprider agreements is that all officers have enforcement powers and each state retains jurisdiction.[144] Such operations are best

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140 NATO (n 27) including fact sheet.

141 See Nauta David, *The International Responsibility of NATO and its Personnel during Military Operations* (Brill Nijhoff 2017) 155-65. See also Tom Dannenbaum, 'Dual Attribution in the Context of Military Operations' in Ana Sofia Barros, Cedric Ryngaert and Jan Wouters (eds), *International Organizations and Member State Responsibility* (Brill Nijhoff 2017).

142 eg Cowles (n 27).

143 NATO, 'Operation Sea Guardian' <https://mc.nato.int/missions/operation-sea-guardian> accessed 11 August 2020.

144 den Heijer (n 19) 269-70; Mariagiulia Giuffré, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 IJRL 692, 724-25; Markard (n 89) 611, 614. See for Canada-US: Integrated Cross-Border Maritime Law Enforcement Operations Act, SC 2012, c 19 (Canada) s 12.

viewed as a concerted act, leading to joint responsibility under Article 47 ARSIWA.[145] Applying the aforementioned arguments, where shipriders are used during Frontex operations, Frontex may share responsibility, either directly or indirectly, with the host and third state.

b. Pullbacks

Moving now to attribution for pullbacks, which raise different obstacles. Critically, pullbacks are performed by the third state on behalf of the destination state and EU. Pullbacks are directly attributable to the third state pursuant to Article 4 ARSIWA (and Article 8 when Libya co-opts private vessels).[146] In the Italy-Libya context, the status of the LBCG may be problematic, as it is a fragmented institution partially controlled by militias.[147] Nonetheless, given the LBCG is held out as operating under the Ministry of Defence and does *in fact* act as an organ, Article 4 seems met.[148]

The contentious question is whether pullbacks can be attributed to the destination state (and EU), such that the latter is directly responsible for potential violations of the right to leave. As Chapter Four emphasised, while jurisdiction and attribution are distinct, they do overlap, and the same factors can be used to establish attribution. Conduct, such as directing and instructing third parties and the provision of support, funding, and equipment,

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145 *Hirsi* (n 22) 78 (Separate Opinion Albuquerque J); Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*' (2011) 23 IJRL 443, 453. cf den Heijer (n 19) 269.

146 Gammeltoft-Hansen and Hathaway (n 2) 268; Giuffré (n 144) 723; Giuffré and Moreno-Lax (n 19) 107.

147 Forensic Oceanography (n 104) 19, 31, 37-39.

148 Libya-Italy MoU, art 1(c).

is directly attributable to the destination state per Article 4, which is pertinent when considering positive duties. However, neither Articles 6 nor 8 permit attribution to the destination state for pullbacks.[149] The ARSIWA Commentary explicitly provides that Article 6 does not cover 'ordinary situations of inter-state cooperation'.[150] It is highly unlikely coastguards or officials from third states are fully integrated with the destination state's machinery, especially when operating in their own territory.[151] Further, Article 8 only encompasses control of a non-state actor (with Article 17 covering control of another state). Guidance could be taken from the ECtHR's extraordinary rendition case law, where conduct has been attributed to the respondent state 'for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities'.[152] However, as Chapter Four highlighted, the ECtHR prefers to address complicity through positive obligations. The analysis will therefore focus on positive obligations and whether destination states bear responsibility for aid and assistance and direction and control.

Turning to EU (not Frontex) partnerships with third states, whether pullbacks can be attributed to the EU under Article 7 ARIO depends on whether it exercises effective control. Although the EU provides extensive support, conditions aid and visa liberalisation, and makes associated threats to secure pullbacks, it is implausible that the third state loses

149 cf UNHCR Submission (n 108) [4.5]; Gammeltoft-Hansen and Hathaway (n 2) 268.

150 ARSIWA Commentary, 44 [2], [4].

151 ARSIWA Commentary, 44 fn 130 mentions *Xhavara* (n 21) on Italian patrols not being attributable to Albania; Pijnenburg, 'Italian Pushbacks' (n 44) 412; Vladislava Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 32 IJRL 403, 419-20.

152 *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25 [206]; Pijnenburg, 'Italian Pushbacks' (n 44) 412-13.

command over its organ. Thus, multiple attribution could be adopted, or establishing the EU's derived responsibility may be more suitable. During Frontex operations in third states, the latter 'hosts' and issues instructions to the Frontex team, in accordance with the Operational Plan.[153] Where teams are deployed to a third state, Member States place their officials under the third state's control and command, pursuant to a model status agreement between the EU and third state.[154] This suggests that the conduct of Member States' guards is attributable to the third state, applying Article 6 ARSIWA. As above, ambiguity persists over whether the conduct of Frontex officials can be attributed to the third state. Nonetheless, FLOs deployed to non-EU states plausibly have some control and may issue directions to the third state.[155] Given Frontex and participating states play a critical role in joint operations, one option is to adopt a multiple attribution framework that attributes the pullback to each party under the respective articles. Alternatively, the derived responsibility of Frontex and states can be assessed.

In summary, pushbacks are attributable to the destination state, including privatised pushbacks (and dually attributable to the third state). Depending on the precise scenario, pushbacks during Frontex operations are attributable to the host state, states providing large assets, and the EU, provided multiple attribution is accepted. Pushbacks during NATO missions will only be dually attributable to NATO and the intercepting state if both share control. Critically, pullbacks cannot be attributed to the destination state, while attributing

153 Frontex Regulation, art 43(1).

154 ibid arts 54(6), 73(3), 76(1); Rijpma (n 124) 593-94; Fink (n 25) 43-45.

155 Frontex Regulation, art 77.

pullbacks to the EU or Frontex would require multiple attribution. Where attribution is not possible or easily established, recourse to the rules on derived responsibility is necessary.

D. Violation of the Right to Leave

With questions of jurisdiction and attribution addressed, consideration can now turn to whether pushbacks and pullbacks at sea and on land amount to violations of the right to leave. The requirements outlined in Part I are applied to determine whether such measures violate the right under Article 12(3) ICCPR or Article 2(3) Protocol 4 ECHR. Pushbacks and pullbacks are dealt with simultaneously, as they raise many analogous issues, with key differences noted. It is concluded that in most circumstances, other than when classified as a genuine rescue, pushbacks and pullbacks violate the right to leave of (would-be) migrants, being highly disproportionate, blanket, and indiscriminate, destroying the essence of the right, and obstructing the search for asylum, preventing any duty to admit being triggered. Though they may pursue some legitimate aims, these are often indeterminate, mask true aims, and can be counterproductive. Pushbacks and pullbacks also starkly fail the in accordance with law requirement. Lastly, such measures are inconsistent with other rights, being accompanied by numerous, well-accounted for human rights violations.

a. Interference

First, it needs to be determined whether pushbacks and pullbacks interfere with the right to leave. As Chapter One established, any measure which curtails leaving a country can amount to an interference, including attacks on migrant boats as in *Victims of the Tugboat '13 de Marzo' v Cuba*.[156] It is argued that pullbacks are a blatant interference as the third

[156] Inter-American Commission on Human Rights Case 11.436 Report No. 47/96 (16 October 1996) OEA/Ser.L/V/II.95 Doc 7 Rev at 127.

state prevents migrants leaving for one or several destination states. However, whether pullbacks engage the right has not yet been adjudicated. In *SS v Italy*, it was not submitted that pullbacks violate the right to leave (confirming the broader point from Chapter One on reluctance to invoke the right before adjudicative bodies). Nonetheless, pullbacks squarely implicate the right. This is recognised in the aforementioned complaint to the HRC, which submits that the pullback by the LBCG, with Italian and Maltese cooperation, violates the right to leave Libya and significantly, leads to the denial of other rights of asylum seekers.[157]

Pullbacks, in both design and effect, obstruct the departure of would-be migrants for destination states. The various arrangements that require third states to act as gatekeepers, whether under the EU-Turkey deal, US-Mexico agreement, or Australian-Indonesian model, all work to deny exit and contain migrants in third states.[158] Pullbacks can occur just prior to departure, for example through a pre-emptive 'rescue' if by boat, when the migrant attempts to cross a land border, or further out at sea. In the maritime context, departure from a state is technically complete once the vessel has left its territorial waters (UNCLOS Article 2).[159] However, pulling back migrants once their vessel has left the territorial sea frustrates the exercise of the right and deprives it of meaningful effect. States should not be able to wait until the territorial sea is crossed and then inhibit leaving

157 AGSI and CIHRS (n 48). See also *SDG* (n 50) [96], [98].

158 Giuffré and Moreno-Lax (n 19) 95, 107.

159 Mapping national airspace, Chicago Convention arts 1-2.

carte blanche.[160] A good faith understanding means that an interference occurs even if the pullback occurs beyond the territorial sea.

As outlined in Chapter One, engaging the right is a low threshold and accordingly, finding an interference does not require the inability to leave for all states and the availability of alternatives does not preclude its engagement.[161] In comparison to visas where only some states may be excluded, containment arrangements often entail the complete inability to travel to any destination or leave migrants trapped in transit. Migrants have several 'choices': return to their state of origin, leave for neighbouring states where they may also face abuse, wait for resettlement or evacuation in a potentially harmful situation (eg Libya), or leave and seek to make contact with a destination state and trigger protections.[162] Other than the latter, such alternatives are typically intolerable and may be unavailable. Nonetheless, and contrary to what Stoyanova suggests as addressed in Chapter One, alternatives should never affect the right's threshold, as the interests protected by the right are still harmed.[163] Instead, complete denial shows their disproportionate nature. Further, the fact pullbacks may simultaneously operate to prevent 'unlawful' entry does not bar their classification as an interference. The right protects individual interests, not the state's prerogative, with the latter considered under proportionality.[164] Critically, as Chapter Two demonstrated, given the right to leave's independent nature, states cannot

160 VCLT arts 26, 31(1); den Heijer (n 19) 161-62; Markard (n 89) 596-97.

161 Markard (n 89) 596.

162 Stoyanova (n 151) 412.

163 ibid 407-10. See text to nn 159-161 in ch 1.

164 See Stoyanova (n 151) 413-14.

justify pullbacks because the destination will not grant entry. Moreover, third states are enlisted *precisely* to prevent migrants asserting their right of entry.

Whether pushbacks interfere with leaving is more contentious, given they may be focused predominantly on entry and occur well beyond the departure state. As argued in Chapter One, the overarching focus should be on whether the measure also controls exit, not a strictly territorialised reading of the right to leave. As Chapter One concluded, *Xhavara* was incorrectly decided, for the Court failed to recognise that Italian interceptions in effect prevented both exit and entry.[165] It should not be decisive that the measure took place on the high seas, after formal departure occurs.[166] Some pushbacks occur where exit and entry cannot easily be separated, for example the short stretch between Turkey and Greece where individuals will quickly reach the other territory. As Part I demonstrated, destination states are duty-bound to respect and not obstruct departure from third states and thus, pushbacks can be deemed interferences.[167]

Pushbacks in a third state's territorial waters, including joint operations, cannot be said to focus only on entry; they seek to control exit so as to *avoid* having to control entry.[168] Returns to the edge of territorial waters, handing over to the third state, or pushbacks on land also deprive the right of meaningful effect and obstruct the migrant's search for

165 See text to nn 147-157 in ch 1.

166 cf Stoyanova (n 151) 415.

167 See also *SDG* (n 50) [96], [100].

168 Ruth Weinzierl and Urszula Lisson, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (German Institute for Human Rights 2007) 3, 70; Markard (n 89) 616; Fink (n 25) 44.

protection and a state to admit them.[169] This is starkly clear when migrants make multiple attempts and are pushed back every time, or where coastguards aggressively manoeuvre to deter small vessels and force them to turn back for fear of drowning. Similarly, walls also interfere with the right, preventing migrants crossing into another state and triggering obligations.[170] Migrants are back where they began.

This is not to say every return or refusal to admit interferes with leaving. There is a fundamental difference between a migrant having the opportunity to claim entry at the border, being denied following due process, and returned, and a summary pushback without due process.[171] This is supported by the HRC, which in 1997 stated that the refusal to let asylum seekers disembark at French ports to claim asylum implicated the right to leave.[172] As Stoyanova argues, the more meaningful consideration the state gives to individual circumstances, the easier it is to conclude that the operation involves preventing unauthorised entry, and depending on the measures taken next, *non-refoulement* the applicable obligation.[173] However, as explored below, this is not the case for pushbacks, which may amount to *refoulement* and render leaving ineffective.

In conclusion, pullbacks interfere with the right to leave. Though more challenging, pushbacks should also be understood as an interference. Consequently, the right to leave

169 den Heijer (n 19) 160-61, 258-59.

170 Paz, 'Law of Walls' (n 18) 604, 613-14.

171 See den Heijer (n 19) 161-62.

172 HRC 'Concluding Observations of the Human Rights Committee: France' (4 August 1997) UN Doc CCPR/C/79/Add.80 [20].

173 Stoyanova (n 151) 415-16.

constrains how states can employ such measures. Unless pushbacks and pullbacks comply with the following requirements, they will amount to violations.

b. In accordance with law

The second requirement under the right to leave is whether pushbacks and pullbacks are provided for or in accordance with law. They must have a basis in law and meet the quality of law test outlined in Chapter Four. It is widely accepted that most pushback and pullback operations are on unstable legal grounds, as well as highly arbitrary, lacking foreseeability, and without essential safeguards.[174]

First, regarding whether pushbacks and pullbacks are prescribed by law (domestic, EU, or international law). As mentioned, pushbacks are not the same as refusals of entry or lawful removals under domestic law. Domestic laws often include saving clauses, explicitly requiring interceptions and border controls to comply with obligations under IHRL and refugee law and accordingly, pushbacks are unlikely to actually uphold domestic or EU law.[175] Moreover, as set out in Chapter One, sources that are neither legally binding nor publicly accessible will usually be insufficient legal bases. Accordingly, summary expulsions based on administrative orders or mere policy appear insufficient, such as recent expulsions to Mexico and Canada pursuant to the US CDC Order. In contrast, Australian legislation, inter alia, permits vessels to be stopped and boarded and the vessel/persons

174 See eg den Heijer (n 19) 256, 259; Efthymios Papastavridis, '"Fortress Europe" and FRONTEX: Within or Without International Law?' (2010) 79 NordJInt'l L 75, 99-100; Stoyanova (n 151) 427.

175 See eg Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77/1, arts 3-4, 6(5)(c), 14; *ND and NT* (n 23) on Spanish domestic laws.

'taken' to a destination.[176] Similarly, EU law allows Frontex to engage in interceptions, specifically to order towards, conduct, or handover vessels/migrants suspected of smuggling or attempting to circumvent border checks to a third state.[177] EUNAVFOR Operations are established pursuant to Council Decisions.[178] The US has primarily relied on agreements with third states to legitimise interdiction operations at sea and cooperation at land borders.[179]

It is not contentious that genuine SAR operations have a legal basis under the LOS. However, interdictions remain circumscribed by UNCLOS, IHRL, and other relevant treaties. Neither the right of visit in UNCLOS nor Smuggling Protocol explicitly provide for interdiction and enforcement measures beyond stop and search powers.[180] Article 8(7) of the Smuggling Protocol, which allows states to take 'appropriate measures' against a stateless vessel if evidence is found confirming suspicions, is inherently vague.[181] Most scholars agree that the right of visit does not extend to enforcement-style measures, such as interdiction, return to port, arrest, and detention.[182] Therefore, even when authorised by

176 Maritime Powers Act 2013 (Cth) (MPA 2013) s 21, pt 3 divs 2, 7-9.

177 Sea Borders Regulation, arts 6-8.

178 See TEU, arts 42(4), 43(2); Council Decision (CFSP) 2020/472.

179 Katherine H Tennis, *Outsourcing Control: The Politics of International Migration Cooperation* (McGill-Queen's University Press 2020) chs 2-3.

180 Guilfoyle (n 75) ch 8; Papastavridis, *Interception* (n 75) 264-67; Thea Coventry, 'Appropriate Measures at Sea: Extraterritorial Enforcement Jurisdiction over Stateless Migrant Smuggling Vessels' (2019) Maritime Safety and Security Law Journal 5, 9-10, 15-21.

181 See for analogy *Medvedyev* (n 94) [95].

182 Goodwin-Gill and McAdam (n 74) 272; Moreno-Lax, 'Seeking Asylum' (n 77) 186-88 and fns; Papastavridis, *Interception* (n 75) 264-67.

domestic or EU law, pushbacks and pullbacks fall outside what is permitted under international law and should not provide sufficient bases. Nonetheless, flag and coastal states can authorise destination states to intercept their vessels and take certain measures, including in their territorial sea, which would provide a legal basis for forced returns.[183] However, as Goodwin-Gill and McAdam argue, enforcement measures in the territorial or contiguous zones may violate international law when they exceed what is permissible to protect the *coastal* states immigration interests.[184]

A key issue affecting both limbs of the in accordance with law test concerns the type of agreements concluded between destination and third states. Such agreements are often obscure, publicly inaccessible, and marked by a high level of informality, thus, lacking sufficient legal grounding.[185] For example, while EUNAVFOR Missions and the agreements entered into by the US are publicly available and formalised, the EU, its Member States, and Australia conclude informal arrangements such as MoUs, statements, and mobility dialogues, which are non-binding, do not specify their legal basis, and may be unpublished.[186] Australia's RCA with Indonesia and IOM was established through mere exchange of letters. Frontex Operational Plans are not publicly available and little is known of the details surrounding operations.[187] However, Frontex is obliged to appoint a

183 Smuggling Protocol, art 8(2). cf Papastavridis, 'Fortress Europe' (n 174) 93.

184 Goodwin-Gill and McAdam (n 74) 276-77.

185 See den Heijer (n 19) 259-61.

186 Caterina Molinari, 'The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) 44 EL Rev 824; Giuffré and Moreno-Lax (n 19) 95; Vladislava Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21 German LJ 436, 443-44.

187 Fink (n 25) 339-41.

fundamental rights officer and monitors in an attempt to ensure compliance with human rights.[188] Problematically, third states enter into partnerships with destination states and agree to pullbacks under the auspices of development aid, security, trade, and visa deals. Consequently, while such arrangements may proclaim compliance with international obligations, they suffer from a general lack of transparency and oversight, undermining essential safeguards.

Where pushbacks and pullbacks can be said to have a legal basis, such frameworks nonetheless fail the *quality of law* requirement. As well as lacking in accessibility and transparency, relevant frameworks lack legal certainty and procedural safeguards, failing to provide migrants with protection from arbitrary interference with their right to leave. First, agreements and authorising laws do not specify with sufficient precision on what grounds, under what conditions, or the procedure to be followed when intercepting and obstructing departure.[189] The ensuing consequences for migrants also remain unclear. Agreements/laws either refer generally to interception being authorised,[190] or simply the aim of preventing irregular migration. For example, the 2017 Italy-Libya MoU mentions stemming illegal migration, not pullbacks.[191] Thus, it is argued that such legal bases do not endow states with explicit authority to obstruct migrants leaving and consequently,

188 Frontex Regulation, arts 109-110.

189 den Heijer (n 19) 260-61.

190 See eg Sea Borders Regulation, arts 6-8.

191 art 1(a). See Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia, NWV Verlag 2018) 387; Giuffré (n 144) 702-05 on the absence of express provisions authorising pushbacks to Libya under earlier agreements.

measures doing so fall outside their remit.[192] In *Medvedyev* (discussed in Chapter One), the Court found that the crew's detention following interdiction was not sufficiently covered by Cambodia's ad hoc authorisation to be 'prescribed by law'.[193] Therefore, given the high level of precision required, especially when physical security is at stake, current agreements and laws are of insufficient quality. Migrants are unable to foresee when/how their right to leave will be infringed, where they will be taken, if they will be detained, or their protection claims assessed. State authorities have almost unfettered discretion when interfering with leaving, resulting in severe arbitrariness.

Second, the legal basis must provide for independent review, access to asylum procedures, and effective remedies. Pushbacks and pullbacks risk being conducted outside clear procedural frameworks, with the surrounding laws and agreements lacking necessary safeguards to guarantee IHRL and refugee law standards.[194] Although the discretion of intercepting authorities is theoretically limited by saving clauses, safeguards are typically unavailable, ineffective, or fail to specify how they will be upheld. Under Australian law, turnbacks/takebacks are valid irrespective of Australia's international obligations and 'rules of natural justice do not apply'.[195] In the US, summary expulsions during COVID-19 have been occurring outside regular removal processes, taking place without a hearing and providing no opportunity to effectively claim asylum beyond those based on fear of

192 den Heijer (n 19) 259-61.

193 (n 94) [82]-[102]. See also *Khlaifia v Italy* App no 16483/12 (ECtHR, 1 September 2015) [102].

194 den Heijer (n 19) 164, 259-60.

195 Migration Act 1958 (Cth) s 197C; MPA 2013, ss 22A(1)(a), 75A, 75B. See also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 [11]-[13], [53], [118]-[119], [125]-[126].

torture.[196] The US Supreme Court recently upheld the expedited removal of asylum seekers without access to habeas corpus review to prove credible fear of persecution.[197]

In comparison, EU law requires full compliance with fundamental rights and international law.[198] Before returning intercepted persons or handing them over to a third state, Frontex units, inter alia, shall 'assess their personal circumstances', inform them of the proposed destination, and give them the opportunity to express that disembarkation there would amount to *refoulement.*[199] Though officials on board are meant to be trained in IHRL and refugee law, as Moreno-Lax highlights, it remains unclear how obligations are complied with for each individual and assumes on-board evaluations are effective.[200] As argued in Chapter Two, effective protection from *refoulement* and collective expulsion is near impossible during on-board screening.[201] *Hirsi* made clear that procedural safeguards are required even if states are struggling to cope with a large influx of migrants.[202] While Australia and the US do perform on-board screenings, some migrants have not been subject to any screening, not all protection risks are screened for, and proof of fear may lead to

196 Daniel Ghezelbash and Nikolas Feith Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection' (2020) EUI Working Paper RSCAS 2020/55, 6 <https://cadmus.eui.eu/handle/1814/68175> accessed 19 October 2020. See also Pierce and Bolter (n 14) 8, 68.

197 *Department of Homeland Security v Thuraissigiam* 140 S Ct 1959 (2020).

198 See Frontex Regulation, arts 1, 36(2), 71-73, 80.

199 Sea Borders Regulation, art 4.

200 Moreno-Lax, *Interdiction* (n 8) 11-12. See also den Heijer (n 19) 311-12.

201 See *Hirsi* (n 22) [185]. See also text to nn 61-65 in ch 2.

202 *Hirsi* (n 22) [113]-[138], [146]-[157], [183]-[186], [197]-[206]. See also *ND and NT* (n 23) [195]-[199].

offshore processing on Guantanamo, Nauru, or PNG.[203] Though paying lip-service to the letter of the law, on-board screenings are summary pushbacks and it remains unknown how many returnees had protection needs. Lack of individualised assessment is also relevant for proportionality.

Such failures (and violations of substantive rights) are enabled by the hidden nature of pullbacks and pushbacks, performed 'out of sight and out of mind' or by third states. This leads to a lack of comprehensive information on the violence and harm migrants are subjected to and great difficulty challenging one's interception at the time or before a court later on. For instance, bow wave encirclement and tent-pushbacks by Greece usually take place at night or far out at sea, while the harm suffered by migrants intercepted at land borders remains largely unseen. Meanwhile, Australia has an explicit policy of secrecy for 'on-water' matters.[204] Given migrants may end up in third states, go missing, or lose their lives, appealing one's interception and accessing domestic protections in the destination state is often impossible.[205] Bringing *SS* before the ECtHR was only achievable because of greater evidentiary material and the investigative efforts of NGOs. Despite 20,335 migrants pulled back to Libya in 2017 (the same year as *SS*), the fate of most remains unknown.[206]

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203 See eg Commonwealth, *Estimates*, Senate, 23 February 2015, 136-39; for US practice see *Haitian Centre* (n 6) [57], [120]; Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018) chs 4, 5, particularly 100-03, 129-30; Azadeh Dastyari and Daniel Ghezelbash, 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures' (2020) 32 IJRL 1, 16-24.

204 Ghezelbash (n 203) 138.

205 See *SDG* (n 50) [104].

206 Forensic Oceanography (n 104) 87.

Accordingly, migrants are typically denied effective remedies, unable to vindicate their right to leave. Similarly, the EU and Member States are shielded from responsibility under EU law when cooperating with third states, excluding people 'not merely from European territory, but also from European law'.[207] The CJEU found EU law inapplicable to the EU-Turkey statement based on formalities, declaring it not to be an act of an EU institution.[208] Moreover, EUNAVFOR Operations are excluded from the CJEU's jurisdiction.[209] Regarding Frontex, numerous obstacles exist to obtaining redress before the CJEU, while the opaqueness of operations weakens the position of migrants, unable to ascertain which actor to bring a case against.[210]

Detailed procedures and effective safeguarding are necessary to meet the legality requirement, including independent review and ensuring appeals against return have suspensive effect. However, such measures are *designed* to deflect migrants and thrive on secrecy, not safeguard rights. As argued below, complying with international law demands stopping pullbacks/pushbacks all together. Though the majority of contemporary pushbacks and pullbacks fail at this stage, improving compliance is theoretically possible and thus, the remaining right to leave requirements should be addressed.

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207 Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalisation of Migration Policy before the EU Court of Justice' (2018) 31 JRS 216.

208 Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v Council* EU:T:2017:128, EU:T:2017:129, EU:T:2017:130. See also Achour and Spijkerboer (n 119) on the Libyan Supreme Court using formalities to uphold the Libya-Italy MoU.

209 TEU, art 24(1); TFEU, art 275; Rijpma (n 124) 594.

210 Majcher (n 132) 70-74; Fink (n 25) 4-5, 9, ch 4, 348-49.

c. Proportionality

This section examines whether pushbacks and pullbacks are proportionate to achieving specified aims. It demonstrates that although they may pursue several legitimate aims, in most circumstances they fail the proportionality test. Save when amounting to genuine SAR operations, such measures systematically and indiscriminately prevent migrants leaving, being highly disproportionate and obstructing the right to seek asylum.

a. Legitimate Aim

Given the overarching aims of externalisation, it is necessary to scrutinise the legitimate aims pursued by pushbacks and pullbacks, which is also critical for applying the remaining proportionality limbs. There are several aims states have and could rely upon, which plausibly fall within the listed aims of public order, public safety, protection of health, and prevention of crime under the right to leave. Nonetheless, some claims are open to debunking.

Protecting Migrants and LOS Obligations

States routinely describe their measures as necessary to save lives by deterring and preventing migrants embarking on perilous journeys, potentially with a smuggler. For example, the European Agenda on Migration was introduced to 'avert further loss of life' in the Mediterranean.[211] This easily falls under the health or public safety exceptions, including to uphold LOS and positive obligations. The LOS obliges states and shipmasters to render assistance to persons in distress at sea. States also have a duty to respect and

[211] COM (2016) 385 final, 1-2.

ensure the right to life of individuals within their jurisdiction.[212] States therefore have a duty to protect the lives of those who seek to leave through irregular, dangerous means.

However, the good faith of destination states and the EU when they claim to be concerned with protecting migrants can be questioned. Using the language of humanitarianism and presenting 'as acceptable the deliberate exposure of refugees to death', destination states engage in pushbacks and require pullbacks, fully aware of the inhuman and dangerous conditions migrants will be exposed to on land.[213] They have converted rescue into an interdiction tool, inflating their maritime powers while manipulating the meanings of 'distress' and 'place of safety'.[214] This remains the case despite aid directed at alleviating the suffering of migrants in third states, improving reception conditions, and boosting asylum capacity. Under a thin veil, states claim to save lives, while simultaneously endangering life. As the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated, 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'.[215] Endangerment is abundantly clear when rather than rescuing, EU assets and the Italian and

212 HRC 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36 [4], [6]-[7], [22], [63].

213 Daria Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' (2018) 29 EJIL 1173, 1183-84, 1187. See also Giuffré and Moreno-Lax (n 19) 97, 103.

214 Violeta Moreno-Lax, 'Protection at Sea and the Denial of Asylum' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) (forthcoming) <https://ssrn.com/abstract=3623029> accessed 3 February 2021.

215 UNGA (n 112) [59].

Maltese MRCC's ignore distress calls, delay rescue, or facilitate pullbacks to unsafe places.[216]

Given most migrant vessels are unseaworthy and 'in distress' by definition,[217] whether coastal states are justified in obstructing departure reveals a potential clash between the right to leave and LOS obligations, returned to below. Nonetheless, as held in *Hirsi*, states cannot circumvent responsibility by describing pushbacks as rescues.[218] Rescue operations require migrants to be delivered to a place of safety, which in the European context is generally only available in European states.[219] Furthermore, as argued in Chapter One, it cannot be deemed legitimate to restrict the right to leave if this destroys the possibility of seeking asylum, as externalisation overtly aims to do. Therefore, unless states can show they are actually seeking to protect the life and health of migrants, for example genuine rescues with disembarkation to a place of safety, legitimacy under this head should not be accepted.

Relatedly, during COVID-19, states have engaged in pushbacks under the pretext of public health. At least 99 states with border closures made no exception for asylum seekers.[220] States have exploited the pandemic to strengthen existing hardline policies,

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216 Moreno-Lax, 'Seeking Asylum' (n 77) 177; OHCHR, 'Note on Migrant Rescues in the Mediterranean' (Press Briefing, 8 May 2020) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875&LangID=E> accessed 3 December 2020; Alarm Phone and others (n 29).

217 Moreno-Lax, 'Seeking Asylum' (n 77) 195-96.

218 (n 22) [79].

219 See Anuscheh Farahat and Nora Markard, *Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility* (Heinrich-Böll-Stiftung 2020).

220 UN (n 17) 19-20.

halting spontaneous asylum and the right to seek asylum, with no proof of a health risk.[221] For instance, Italy and Malta declared their ports 'unsafe' for disembarkation, while Malaysia has been pushing back boats of Rohingya refugees and deploying patrol boats to deter entry.[222] Meanwhile, Bangladesh has sent rescued Rohingya to the remote, uninhabitable island of Bhasan Char. As the UNHCR has stressed, 'denial of access to territory without safeguards to protect against *refoulement* cannot be justified on the grounds of any health risk'.[223] Therefore, pushbacks and pullbacks cannot be deemed legitimate on public health grounds or to protect life where they negate the right to seek asylum and renege on *non-refoulement* obligations.

Human Trafficking and Smuggling

Pushbacks and pullbacks are also said to combat human trafficking and smuggling.[224] As Chapter One explored, combating trafficking and smuggling represent international public order interests. The Smuggling Protocol obliges states to 'cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea' and contemplates that flag states will consent to additional measures against vessels suspected of smuggling.[225]

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221 Ghezelbash and Tan (n 196).

222 AFP, 'Another Rohingya Boat Turned Back from Malaysia Waters' *New Straits Times* (11 June 2020) <www.nst.com.my/news/nation/2020/06/599851/another-rohingya-boat-turned-back-malaysia-waters?mc_cid=09580fe07a&mc_eid=48d64f22f5> accessed 25 June 2020; OHCHR (n 216); Alarm Phone, 'Black Lives Matter' (n 52).

223 UNHCR 'Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response' (16 March 2020) [6].

224 See eg Commission, 'Migration on the Central Mediterranean Route. Managing Flows, Saving Lives' (Communication) JOIN (2017) 4 final, 2, 5-9; 'The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime' <www.baliprocess.net> accessed 26 June 2020.

225 Smuggling Protocol, arts 7, 8(2), (5).

Both Protocols oblige states to strengthen border controls as necessary.[226] As Hathaway aptly argues, the Protocols emphasis on the cooperative intensification of border controls provides destination states with a justification to implement deterrence measures and partner with third states, placing them in a better position to stymie the flight of asylum seekers.[227] Prima facie the Palermo Protocols make it legitimate for states to control departure.

In practice however, the Smuggling Protocol has been interpreted in an overly-broad manner, encompassing many forms of mobility and humanitarian assistance, and being misused to stem irregular migration.[228] The Protocol defines migrant smuggling as the 'procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person…' and applies only to 'offences [that] are transnational in nature and involve an organized criminal group…'.[229] Accordingly, combating smuggling can only be deemed legitimate when directed at *transnational organised* crime for *gain*.

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226 Trafficking Protocol, arts 5, 9-11; ibid arts 10-14.

227 James C Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 VaJInt'l L 1, 6, 12-13, 25-35, 41. See also Colin Harvey and Robert P Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19 IJRL 1, 14; Wolman (n 5) 49-51.

228 See *R v Appulonappa* 2015 SCC 59, [2015] 3 SCR 754 (Canada); Rachel Landry, 'The "Humanitarian Smuggling" of Refugees: Criminal Offence or Moral Obligation?' (2016) RSC Working Paper Series No 119 <www.rsc.ox.ac.uk/publications/the-humanitarian-smuggling-of-refugees-criminal-offence-or-moral-obligation> accessed 19 January 2021; Susan Kneebone and Antje Missbach, 'The Human Rights Implications of Australian and Indonesian Anti-Smuggling Laws' (2018) 4 International Journal of Migration and Border Studies 379; Delphine Perrin, 'Smuggling of Migrants: The Misused Spirit of the Palermo Protocol, in the Light of the Nigerien Experience' (*Border Criminologies*, 2020) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/05/smuggling> accessed 13 August 2020.

229 arts 3(a), 4.

Moreover, the Protocols do not go so far as to allow states to interfere with the right to leave freely. As mentioned, the Protocols (alongside UNCLOS and relevant UNSC resolutions) require the rights of migrants to be protected and preserve 'other rights, obligations and responsibilities of States and individuals under international law', including the Refugee Convention and IHRL.[230] Consequently, the Protocols do not authorise pullback and pushback operations that violate the right to leave, right to seek asylum, obligations of *non-refoulement* and collective expulsion, or penalise asylum seekers in breach of Article 31 Refugee Convention. As Harvey and Barnidge argue, 'the right to leave one's own country is a fundamental human right, and this remains the case, notwithstanding a migrant's attempt to be smuggled'.[231] Therefore, while such measures may be legitimate under this head (provided smuggling is read narrowly), the operation still has to comply with the other requirements of the right to leave.

Immigration Control and Preventing Irregular Migration

The wider aim of pushbacks and pullbacks is to prevent irregular migration and unlawful entry, allowing destination states to control immigration. Notably, signatories to the Global Compact for Migration committed to 'manage our national borders … facilitating safe and regular cross-border movements of people while preventing irregular migration'.[232] Accordingly, third states can claim that restricting departure to official points, requiring valid documentation, and upholding international commitments are legitimate goals, falling within the public order aim. Moreover, IHRL clearly accommodates the interests of

230 Trafficking Protocol, arts 2, 4-6, 11(1), 14; Smuggling Protocol arts 2, 4-6, 9(1)(a), 11(1), 16, 19.

231 Harvey and Barnidge (n 227) 14.

232 GCM [27].

destination states in controlling their borders.[233] However, this thesis has shown that the right to leave cannot be restricted because the destination will not grant entry, undermining suggestions that controlling *entry* falls within the right to *leave*.

Accordingly, it remains questionable whether third states, including STC's, can legitimately restrict leaving to prevent irregular migration to destination states. The fact public order encapsulates international concerns does not make it legitimate to obstruct departure. As Chapter One noted, the UK proposed this during ICCPR negotiations but was rejected, making such claims doubtful.[234] As Markard argues, this conclusion is consistent with UNCLOS where actions taken in the territorial waters and contiguous zone can only be to preserve the coastal states immigration laws.[235] Moreover, in *Stamose v Bulgaria* discussed in Chapter One, the ECtHR held that there needs to be compelling circumstances to justify preventing breaches of another state's immigration laws.[236] It follows that pullbacks are not legitimate unless compelling circumstances exist, say where irregular migration is truly unmanageable (and not fostered by destination states) or form part of responsibility sharing agreements that secure effective protection for migrants.

Nevertheless, principled arguments exist to refute the legitimacy of pushbacks and pullbacks on these grounds. Above all, destination states are seeking to elude their obligations, negate the right to seek asylum, and prevent migrants asserting a right of entry.

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233 Stoyanova, 'Right to Life' (n 186) 450.

234 Giuffré and Moreno-Lax (n 19) 98-99. See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 279.

235 UNCLOS arts 17, 19(2)(g), 33; Markard (n 89) 605, 613.

236 App no 29713/05 (ECtHR, 27 November 2012) [36].

This is mirrored in the Global Compact, which, as Chetail highlights, glaringly omits any mention of the right to leave, revealing the political agenda of states in espousing a preventive approach to migration.[237] Though third states may have a shared interest in combating smuggling and trafficking, they appear predominantly concerned with avoiding sanctions and receiving promised benefits. To legitimise pushbacks/pullbacks on such bases goes against a good faith reading of protective obligations.

In sum, such measures appear to only be legitimate when narrowly and genuinely directed at combating smuggling and trafficking or saving lives and protecting health.

b. Rational Connection, Necessity, and Balancing

The remainder of the proportionality test requires pushbacks and pullbacks to be suitable to achieving these aims, the least intrusive means, and strike a fair balance, especially for asylum seekers. Each limb is addressed sequentially. Critically, the burden is on the state to show the justifiability of their measures.

First, it is highly questionable whether pushbacks and pullbacks are rationally connected to combating smuggling and trafficking, saving lives, and protecting health. It is argued that states and the EU have not sufficiently demonstrated their suitability in reducing deaths, dismantling organised smuggling networks, or preventing trafficking. This would require presentation of much more reliable evidence of their effectiveness.[238] However, states are unlikely to be able to proffer such evidence. In fact, their desire to control immigration largely conflicts with such aims and related obligations. As Chapter

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237 Vincent Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law' (2020) 16 Int JLC 253, 255-57.

238 Stoyanova, 'Right to Life' (n 186) 454-55; Stoyanova, 'Right to Leave' (n 151) 429-31.

Five made clear, visas and carrier sanctions exclude many migrants from safe, regular travel options, pushing them into the hands of smugglers and more dangerous routes.[239] By committing states to criminalise smuggling and intensify border control practices, simple smuggling may be transformed into highly risky trafficking situations.[240] Relatedly, even if preventing irregular migration was legitimate, though some arrivals may be deterred, borders are notoriously porous and externalisation diverts migrants into other routes.

Second, such measures are not strictly necessary, as reasonable, more protective alternatives exist. The ECtHR has held that 'a state's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking', taking operational measures that provide migrants with effective protection.[241] While the Court in these cases did not hold that states must facilitate lawful migration, in *ND and NT* explored in Chapter Two, the Court stated that it will consider whether the state provided genuine and effective access to legal means of entry when adjudicating on collective expulsions. By implication, and notwithstanding the overall dangerous precedent set, the case can counterintuitively be read as urging states to secure legal pathways.[242] It should not be strictly necessary for states to close or reduce the availability of regular pathways and then

239 Stoyanova, 'Right to Life' (n 186) 450-58.

240 See eg Hathaway (n 227) 6, 12-13; Thomas Spijkerboer, 'Wasted Lives. Borders and the Right to Life of People Crossing Them' (2017) 86 NordJInt'l L 1, 8.

241 *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [283]–[93]; *Chowdury v Greece* App no 21884/15 (ECtHR, 30 March 2017) [86]-[89]. See Catherine Briddick, 'Some Other(ed) "Refugees"?: Women Seeking Asylum under Refugee and Human Rights Law' in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 287-88.

242 Daniel Thym, 'A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's *N.D. & N.T.*-Judgment on "Hot Expulsions"' (*EU Migration Law Blog*, 17 February 2020) <http://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/> accessed 31 March 2020. See also *MN v Belgium* App no 3599/18 (ECtHR, 5 March 2020) [126].

obstruct the only form of travel migrants have left open. As Chapter Five argued, to reduce irregular entries and spontaneous arrivals, reasonable alternatives include introducing and increasing humanitarian visas and corridors, access to study and work opportunities, and family reunification pathways. This caters to the state's right to control entry, facilitating orderly arrivals, and is more protective of migrants against loss of life, smuggling, and exploitation.[243] To save lives at sea, dedicated SAR operations should be a priority.[244] However, if states are not interested in receiving these migrants at all, there are no equally effective alternatives and balancing must be performed (but only if preventing irregular migration is deemed legitimate).

Before doing so, it must be highlighted that pushbacks and measures denying entry to asylum seekers during COVID-19 are not strictly necessary or proportionate to achieving public health aims. While safeguarding public health and life are weighty interests, blanket measures precluding 'the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against *refoulement*, would be discriminatory and would not meet international standards'.[245] Moreover, there are clear alternatives to mitigate risk. Like other travellers, migrants can be subject to testing, (limited) quarantine, or self-isolation.[246]

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243 Stoyanova, 'Right to Life' (n 186) 454-56. See on eliminating abuse and legal channels: Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the *Rantsev* Case' (2012) 30 NQHR 163, 175-79.

244 Stoyanova, 'Right to Leave' (n 151) 434.

245 UNHCR 'Key Legal Considerations' (n 223) [6]. See also HRW, 'US: COVID-19 Policies Risk Asylum Seekers' Lives' (2 April 2020) <www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives> accessed 27 June 2020.

246 UNHCR 'Key Legal Considerations' (n 223) [6]-[8].

The last step of proportionality requires balancing the migrant's right to leave against the particular interest articulated by the state. As Chapter One outlined, lawfulness of presence is relevant to proportionality. Critically, however, indiscriminate and automatic measures cannot be regarded as proportionate. This is plainly the case for pushbacks and pullbacks, which systematically impede departure, thwart the search for safety, and fail to consider individual circumstances, even where cursory screenings are performed. The obvious intention of agreements entered into with third states is to prevent migrants leaving altogether, destroying the essence of the right and rendering such measures unlawful.[247] Although protecting everyone, the right to leave is of fundamental importance for seeking asylum. As the UNHCR Executive Committee has stated, interceptions cannot result in denial of access to protection or *refoulement*.[248] However, pushbacks and pullbacks render the right to seek asylum illusory and lacking in practical effect. Individuals unable to flee their state of origin, for example following a pullback or pushback, cannot become a refugee under the Refugee Convention. Pullbacks prevent individuals accessing the protections and rights they would otherwise be entitled to under IHRL and the Convention if they came into contact with the destination state. If contact is made or the migrant is nearing a border wall/fence, destination states may engage in pushbacks. Such measures display a lack of good faith, being at odds with the state's duty to admit those with protection needs and penalising them for their mode of arrival.[249] Considering the right to flee to seek asylum, the lack of alternative travel options, and the harms migrants are

247 Markard (n 89) 602; Guild and Stoyanova (n 191) 386, 391-93; Giuffré and Moreno-Lax (n 19) 85, 99-100.

248 UNHCR EXCOM Conclusion No 97 (n 1) [a].

249 Weinzierl and Lisson (n 168) 67; Goodwin-Gill and McAdam (n 74) 387-88.

exposed to when contained in third states, individual stakes weigh heavily against state interests.

A caveat is needed for those leaving by sea. The migrant's agency in exercising their right to leave appears to conflict with the state's unconditional obligation to rescue those in distress. On the one hand, whatever the associated risks, individuals have the right to choose to embark and determine for themselves where they will be safest, and so long as the person has freely and autonomously made that decision, the departure state should not restrict leaving because of safety concerns.[250] Nonetheless, states are obliged to rescue migrants in distress. To reconcile these sides, it is argued that a violation of the right to leave has not occurred if 'interception' amounts to a genuine rescue and fully complies with human rights and refugee standards, which demands delivery to a place of safety and protection from *refoulement.* As various scholars argue, a fragmentary approach to maritime obligations must be rejected in favour of systemic integration, ensuring LOS obligations are read consistently with IHRL and refugee law.[251] Even where a boat does not request to be rescued, an objective assessment should be performed. This does not, however, justify pullbacks disguised as 'pre-emptive rescues'. The disproportionate nature of pushbacks and pullbacks is further affirmed by their undermining of other rights.

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250 James C Hathaway, 'The False Panacea of Offshore Deterrence' (2006) 26 FMR 56, 57; Markard (n 89) 608; University of Michigan, 'The Michigan Guidelines on Refugee Freedom of Movement' (Eighth Colloquium on Challenges in International Refugee Law, Michigan, 2017) para 6; Stoyanova, 'Right to Leave' (n 151) 437.

251 See Moreno-Lax, 'Seeking Asylum' (n 77); Giuffré (n 144) 708; Efthymios Papastavridis, 'The Interplay Between Maritime Interdiction Operations and Human Rights Law' (2014) 1 Southern African Journal of Criminology 36.

d. Consistency with other rights

Lastly, restrictions on the right to leave must be consistent with other human rights. As reiterated by the ECtHR in *Khlaifia*, problems 'managing migratory flows or with the reception of asylum-seekers cannot justify recourse to practices' breaching the Convention.[252] As already alluded to, there are several other rights infringed by pushbacks and pullbacks. This section provides a broad summary to demonstrate that such measures violate the right to leave for being prima facie incompatible with an array of other rights. Restrictions violating other rights, particularly those of *jus cogens* status like the right to life, must be construed as disproportionate.[253] Though the specific harms migrants experience depends on where they are contained and their circumstances, abuse is a systemic feature of and well-accounted for during interceptions at sea and land, including *refoulement*, collective expulsion, torture, inhuman and degrading treatment, slavery, arbitrary detention, enforced disappearances, and deprivation of life.[254] The migrant experience is marked by border violence at all stages of the migration trajectory.[255] As the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions describes, the

252 (n 193) [241]. See also *MSS v Belgium and Greece* (2011) 53 EHRR 2 [223]; *Hirsi* (n 22) [122]; [179].

253 den Heijer (n 19) 166.

254 See above text to nn 215-216.

255 UNGA (n 112) sects 2-3; Itamar Mann, 'The New Impunity: Border Violence as Crime' (2020) 42 University of Pennsylvania Journal of International Law (forthcoming) <https://ssrn.com/abstract=3548181> accessed 3 February 2021.

situation ‘is a human rights and humanitarian crisis’ and the ‘tolerance for its fatalities’ is ‘grave and disturbing’.[256]

Moreover, partner states are arguably chosen, at least partly, because of their deficient oversight mechanisms, alongside their geographical proximity and ‘willingness’ to enter into cooperative partnerships due to regional hegemony. States likely rely on the likelihood of migrants enduring harm as a deterrence mechanism.[257] In key partner states such as Niger the abuse of migrants is rife, asylum systems like Mexico’s fail to meet international standards, or states may not be party to the Refugee Convention, for example Indonesia and Malaysia.[258] The gross abuse of migrants in Libya is well-documented,[259] and for those sent to Australia’s ‘cruel’ offshore detention centres.[260] While states have designated places like Turkey, Guatemala, Honduras, and El Salvador STC’s, the general consensus is that they are unsafe for migrants. Notably, the Canadian Federal Court recently ruled that the US is no longer a STC, including because asylum seekers face a risk of *refoulement*; however, this was overturned on appeal, including on the basis that it was not the STC agreement that causes the infringement (if there is one), but the review and

256 UNGA (n 112) [1]-[2].

257 ibid [91].

258 See Dastyari and Hirsch (n 60) 8-10, 17-21; Giacomo Zandonini and Francesco Bellina, ‘Niger, Part 1: At the Centre of a Brewing Militant Storm’ *The New Humanitarian* (28 March 2019) <www.thenewhumanitarian.org/special-report/2019/03/28/niger-part-1-centre-brewing-militant-storm> accessed 28 June 2020; Meyer and Isacson (n 65) 28-38.

259 See among many *Hirsi* (n 22) [35]-[42]; [123]-[128]; UNSMIL and OHCHR, ‘Detained and Dehumanized: Report on Human Rights Abuses against Migrants in Libya’ (December 2016) <www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> accessed 5 December 2020.

260 See eg UNHRC ‘Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Australia and the Regional Processing Centres in Nauru’ (24 April 2017) UN Doc A/HRC/35/25/Add.3.

assessment process that leaves the US' designation in place.[261] Nonetheless, there are clear *refoulement* risks under Article 33 Refugee Convention and IHRL during pushbacks and pullbacks involving such states and those similarly situated. The Special Rapporteur on the Human Rights of Migrants has recently stated that pushbacks at the Turkey-Greece border constitute collective expulsion and *refoulement*.[262] Similarly, pushbacks to Mexico where migrants become trapped in dire conditions or face chain *refoulement* back to 'gruesome acts of violence and extreme economic and environmental deprivation' in Central America hardly comply with international obligations.[263]

The applicability of *non-refoulement* obligations during pullbacks has not yet been adjudicated and raises complexities. As explored in Chapters Two and Five, protection from *refoulement* under IHRL is broad in scope. Regardless of whether the individual has crossed state borders, pullbacks and pushbacks will violate such obligations when migrants are exposed to a real risk of harm, being forced to remain in unsafe territory or returned there.[264] In contrast, Article 33 Refugee Convention requires individuals to be outside their state of origin and returned to frontiers (with Article 3 UNCAT also requiring return to 'another state'). Given pullbacks typically take place when migrants are within *transit*

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261 *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)* 2020 FC 770; *Canada (Minister of Citizenship and Immigration) v Canadian Council of Refugees* 2021 FCA 72. It remains unclear whether the decision has been appealed to the Supreme Court of Canada.

262 OHCHR, 'Greece: Rights Violations Against Asylum Seekers at Turkey-Greece Border Must Stop – UN Special Rapporteur' (Press Release, 23 March 2020) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25736&LangID=E> accessed 28 June 2020.

263 See IACHR, 'IACHR Expresses Deep Concern about the Situation of Migrants and Refugees in the United States, Mexico, and Central America' (Press Release 180/19, 23 July 2019) <www.oas.org/en/iachr/media_center/PReleases/2019/180.asp> accessed 28 June 2020.

264 Moreno-Lax, *Accessing Asylum* (n 31) 309-11, 313-20; Pijnenburg, 'Containment' (n 116) 318-20.

states, no issues arise. Similarly, pushbacks to transit states can be understood as involving the transfer of jurisdiction back to the transit state.[265] The problem is establishing that pullbacks by the third state within its territory amount to a return to frontiers or another state. Nonetheless, like visas, pullbacks are against a good faith reading of such obligations, preventing individuals asserting their right of entry stemming from these obligations.[266]

Pushbacks and pullbacks involve repeated loss of life and thus, routinely violate the right to life, applicable at all times and without discrimination.[267] Spijkerboer has established a clear link between increasing migrant deaths en route to Europe, Australia, and the US and increased migration controls. Their right to life is 'protected' either by prevention of departure or SAR, which contrasts to the strong protections afforded to regularised travellers.[268] Since January 2014, IOM has recorded almost 41,000 migrant fatalities.[269] As the Rapporteur on Extrajudicial, Summary or Arbitrary Executions declares, 'it is impossible to protect the right to life while simultaneously attempting to deter entry by endangering life', highlighting the excessive use of force amounting to arbitrary deprivation of life that occurs during border controls, including of Rohingyas and Bangladeshis on the high seas, when guards in Egypt and Yemen shoot those attempting to leave, and rubber bullets and tear gas fired by Spanish guards against migrants near the

265 See *Al-Saadoon and Mufdhi v UK* (2010) 51 EHRR 9 [140], [143]; Pijnenburg, 'Containment' (n 116) 320.

266 Goodwin-Gill and McAdam (n 74) 382-83, 388.

267 UNGA (n 112) [14]-[15].

268 Thomas Spijkerboer, 'Moving Migrants, States, and Rights: Human Rights and Border Deaths' (2013) 7 The Law & Ethics of Human Rights 213; Spijkerboer, 'Wasted Lives' (n 240).

269 IOM, 'Missing Migrants' <https://missingmigrants.iom.int> accessed 6 February 2021.

Ceuta seawall.[270] The foreseeable risk of death is abundantly clear when distress calls are ignored, coastguards aggressively manoeuvre, or migrants are placed in rafts that float dangerously at sea. The aforementioned risks reveal the inconsistency of pushbacks and pullbacks with non-discrimination obligations. Drawing on Chapter Five's analysis, such practices target irregular migrants and have a disproportionate impact on account of nationality (eg Syrians under the EU-Turkey deal), race, and immigration status, including mode of arrival, lack of papers, and protection needs.[271] Fundamentally, all persons must be rescued, regardless of characteristics.[272]

In summary, pushbacks and pullbacks have a grave impact on the rights of migrants. Therefore, given they also fail the other requirements, such measures do not comply with the right to leave.

E. International Responsibility

In light of this conclusion, it is necessary to address which actors bear responsibility for their role in violating the right to leave during pushback and pullback operations. Relying on Chapter Four, it will first be considered which states and IOs bear primary responsibility, before considering derived responsibility. It will briefly be argued that no circumstances precluding wrongfulness apply, including during a pandemic.

270 UNGA (n 112) [25]-[35], [59]. See also *Sonko* (n 94).

271 UNHRC (n 260) [36]; Giuffré and Moreno-Lax (n 19) 99.

272 Weinzierl and Lisson (n 168) 38, 69.

a. Primary Responsibility

Pushbacks lead to the direct responsibility of the destination state performing the interception. Article 2 ARSIWA is met, requiring conduct to be attributable to that state, which as above encompasses privatised pushbacks, and a breach of its obligations. Accordingly, given jurisdictional and attribution tests are met, when destination and third states jointly direct a privatised pushback/pullback this leads to joint responsibility under Article 47 as co-perpetrators.

Similarly, applying Articles 6 and 7 ARIO, the EU is responsible for pushbacks that violate the right to leave during Frontex operations (being an EU body with no independent legal personality and the EU bound by the right per Chapter Four), with such conduct attributable to it under a multiple attribution framework and in breach of its obligations. It is also responsible for the independent actions of its officers or FLOs that commit violations, say during independent patrols or when supporting EUBAM Libya or EUNAVOR Operations on the ground.[273] Joint responsibility under Articles 47 and 48 ARSIWA/ARIO appears appropriate, with the EU, host, and participating states providing large assets deemed co-perpetrators and Coordination Centres their joint organs.[274] A nuanced approach would ensure each actor is only responsible to the extent it contributed to the overall harm.

With the EU unable to be brought before the ECtHR, rebutting the *Bosphorus* presumption will allow Frontex host/participating states to be held responsible for

[273] Frontex, 'Liaison Officers Network' <https://frontex.europa.eu/partners/liaison-officers-network/> accessed 29 June 2020.

[274] Gammeltoft-Hansen and Hathaway (n 2) 272, 275-76.

pushbacks, following the reasoning in *Al-Jedda v UK* and *Nada v Switzerland* on attribution to contributing states, rather than the UN. Although the Frontex Regulation, Schengen Borders Code, and Operational Plan condition state conduct, states bear discretion in the precise actions they choose to adopt to comply with fundamental rights, which warrants holding them responsible. The host has operational command, certain participating states retain command, and both can shape the Operational Plan. They can thus ensure interceptions amount to genuine SAR, as opposed to *refoulement*, creating waves, or refusing to rescue.[275] Simultaneously, an action for damages could be brought against Frontex before the CJEU.[276] Similarly, NATO can bear responsibility for pushbacks performed by its multinational forces. If before the ECtHR, the *Bosphorus* presumption will only be rebuttable where the national coastguard also exercised effective control and discretion in pushing/pulling migrants back.

Pullbacks lead to the direct responsibility of the third state performing the pullback. However, they cannot also be attributed to the destination state, requiring recourse to the rules of derived responsibility. In contrast, a multiple attribution framework would allow the EU to bear primary responsibility for pullbacks it has effective control over (eg by the LBCG) and those occurring during Frontex operations hosted by third states per Article 7 ARIO. However, given legal uncertainties and difficulties proving effective control against the third state's preeminent role, derived responsibility may be more fitting.

When third states allow destination states to operate in their territory and territorial waters, they are (concurrently) responsible for breaching their protective obligations under

275 See Fernandez (n 129) 400; Fink (n 25) 96-97, 168, 176-179.

276 Frontex Regulation, arts 97(4), 98; Fink (n 25) 4-5, 9, ch 4, 347-49.

the right to leave (and maybe the violation itself if the approach in *El-Masri* is followed). Relatedly, given destination states have jurisdiction, they are duty-bound to protect the right to leave of migrants from infringements by other states, private actors, and IOs. Positive obligations do not dissipate because states have entered into cooperative agreements, nor because the third state is the 'direct' perpetrator.[277] At minimum, when partnering with third states, destination states and IOs must carefully appraise whether engagement will lead to violations. In circumstances where it is foreseeable operations will likely result in harm, assistance and cooperation must be conditioned on clear and effective measures to mitigate that risk. Otherwise, there should be a presumption against cooperation.[278] As Ferstman argues, due diligence policies must not, as they often do, become rubber stamps, while the commission of abuse continues with support.[279]

However, destination states and the EU are not simply failing to protect migrants; they are *explicitly requiring* third states to hamper leaving. Their involvement, as well as NATO's, means they possess actual knowledge such arrangements will lead to harm or are otherwise on notice because the situation is well-known and easily verifiable.[280] In line with the ICJ's *Corfu Channel Case*, where minelaying by another state led to Albania's responsibility for failure to warn of such danger, the failure of the destination state to

277 See *Saadi v Italy* (2009) 49 EHRR 30 [126]; *Hirsi* (n 22) [129]; Moreno-Lax, 'Seeking Asylum' (n 77) 201-02; Carla Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German LJ 459, 466-70.

278 UNHCR Submission (n 108) [5.8]-[6.1].

279 Ferstman (n 277) 460, 468, 470-71, 486.

280 *Hirsi* (n 22) [121], [131], [137], [156]; *MSS* (n 252) [258]-[59]; UNHCR Submission (n 108) [5.8]-[5.9]; Ciliberto (n 106) 527-28; Giuffré and Moreno-Lax (n 19) 102-03, 106-07.

protect and the pullback by the third state leads to the concurrent responsibility of both.[281] Moreover, the obligation of rescue does not depend on jurisdiction. Ignoring distress calls, disengagement at sea, replacement of SAR with military operations, and criminalising NGO vessels are clearly incompatible with SAR duties.[282] In many cases, states, Frontex, and NATO are systematically leaving people to die through a policy of non-assistance (or even creating waves), allowing states to engage in pullbacks/pushbacks instead of rescuing or intervening, and failing to discharge their duty of rescue and protect migrants from foreseeable violations.[283]

To ensure the right to leave, related rights, and discharge positive obligations, destination states, third states, and IOs should: immediately cease all forms of pushbacks and pullbacks and involvement therein, end policies of non-assistance and criminalisation, and provide redress (eg visas/protection) to known migrants previously pushed/pulled back. States should refrain from deploying officials and assets to Frontex and NATO operations or terminate participation when pushbacks/pullbacks are occurring, and otherwise refuse to engage in them. Under its own Regulation, Frontex shall monitor and investigate rights compliance and suspend or terminate operations when there are persisting or serious violations.[284] Suspension or termination is thus obligatory (as Frontex recently did with its operations in Hungary), particularly with Frontex under investigation by EU

281 [1949] ICJ Rep 4, 17-18, 22-23; Goodwin-Gill (n 145) 453; Giuffré and Moreno-Lax (n 19) 107.

282 See SOLAS, ch V, reg 33(1); SAR [4.2.1], [4.3]; Moreno-Lax, *Interdiction* (n 8) 6-7.

283 See HRC 'General Comment No 36' (n 212) [6]-[7], [22]; Fink (n 25) 153-60.

284 Frontex Regulation, arts 46, 109(2)(b).

bodies for its involvement in pushbacks.[285] Activities must be limited to genuine rescues, leading to timely disembarkation and access to territory for asylum procedures, accompanied by dedicated SAR operations and robust monitoring mechanisms.[286] As Stoyanova aptly argues, considerable attention must be given to the 'cumulative outcome of their migration policies', ensuring migrants are not left with no reasonable pathways to leave.[287]

b. Derived Responsibility

Even if the relevant destination state or IOs own conduct does not directly violate the right to leave, whether because attribution or jurisdictional tests are not met, they can still bear responsibility for aid and assistance and/or direction and control in relation to violations by other actors.

Destination states (eg Australia, EU states, and the US) are arguably aiding and assisting third states (eg Indonesia, Libya, and Mexico) to violate the right within the meaning of Article 16 ARSIWA. There is wide support for the conclusion that destination states, in seeking to prevent irregular migration, are aiding and assisting third states to

285 Commission, 'Extraordinary Meeting of Frontex Management Board on the Alleged Push Backs on 10 November 2020' (News, 11 December 2020) <https://ec.europa.eu/home-affairs/news/extraordinary-meeting-frontex-management-board-alleged-push-backs-10-november-2020_en> accessed 5 December 2020; 'EU Migration Chief Welcomes Frontex Suspension of Operations in Hungary' *Euronews* (28 January 2021) <www.euronews.com/2021/01/28/eu-migration-chief-welcomes-frontex-suspension-of-operations-in-hungary> accessed 6 February 2021.

286 Moreno-Lax, *Interdiction* (n 8) 12-13.

287 Stoyanova, 'Right to Life' (n 186) 439, 456-58.

commit several IWA, including the right to leave.[288] First, financing pullbacks, capacity building, technical assistance, surveillance data, and secondment of officials can be characterised as aid and assistance.[289] Second, such aid and assistance must be given to facilitate the commission of an IWA, being close to near-certain knowledge or intent. It is hard to think of a more paradigm case. Third states act on behalf of destination states and are given such aid and assistance for the explicit purpose of engaging in pullbacks and preventing departure, establishing a clear nexus and with such aid making a significant contribution.[290] Destination states can hardly claim they are unaware their assistance will be used for this or migrants exposed to harm, revealing an overt intention to facilitate violations of the right to leave.[291] Lastly, the opposability requirement is met, as the source of the right is redundant. Third states are bound by the right in the ICCPR or under CIL.

Therefore, destination states are responsible for their complicity in violating the right, which is without prejudice to the third state's primary responsibility. Given destination states are likely to be acutely aware of the prevailing situation in third states, it can also be concluded that they are complicit in other violations, for example ill-treatment and arbitrary detention. As the Rapporteur on Extrajudicial, Arbitrary and Summary Executions has concluded, 'where migrants or refugee[s] are subject to systemic abuse [in

288 See eg Markard (n 89) 615; Jean-Pierre Gauci, 'Back to Old Tricks? Italian Responsibility for Returning People to Libya' (*EJIL:Talk!*, 6 June 2017) <www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/> accessed 31 May 2020; Ciliberto (n 106) 522-25; Dastyari and Hirsch (n 60); Giuffré and Moreno-Lax (n 19) 101-03; Pijnenburg, 'Containment' (n 116) 327-31.

289 Gammeltoft-Hansen and Hathaway (n 2) 279.

290 Dastyari and Hirsch (n 60) 29-30; Giuffré and Moreno-Lax (n 19) 102-03.

291 Dastyari and Hirsch (n 60) 29-30; Pijnenburg, 'Containment' (n 116) 329-30.

third states], it seems appropriate to call for destination states to stop providing funding and equipment for migration control'.[292] Though Article 16 remains untested within the context of externalisation, principled arguments exist for finding complicity.[293] As argued above, given the ECtHR's preference to address complicity through positive obligations, *Soering*-type cases can be extended to prevent all forms of extraterritorial complicity and positive obligations used to ensure states are responsible for violations they facilitate.

Third states may also be seen to be acting under the direction and control of the destination state pursuant to Article 17 ARSIWA. As Chapter Four highlighted, Article 17 requires a relationship of domination, not one of 'oversight' or 'mere influence', while direction 'connotes actual direction of an operative kind'. 'Complete power' is not required, meaning general instructions may suffice.[294] Though difficult to assess *in abstracto* as well as there being a spectrum of direction and control exercised by destination states, the relationship between most destination and third states covered in this chapter's overview plausibly meets Article 17's threshold. As Giuffré and Moreno-Lax argue, although states may not exert minute by minute control over the activities of partners on the ground, the de facto binding nature of agreements and reciprocal commitments entered into with states such as Turkey and Libya significantly restricts their discretion. Third states are 'not given discretion to carry out conduct that, while complying with the decision' would not amount to a violation of the right to leave.[295] Moreover, many neighbouring

292 UNGA (n 112) [37], [40].

293 Gammeltoft-Hansen and Hathaway (n 2) 277-82.

294 ARSIWA Commentary, 69 [7]; Giuffré and Moreno-Lax (n 19) 104.

295 Giuffré and Moreno-Lax (n 19) 103-04. See also Pijnenburg, 'Italian Pushbacks' (n 44) 424-26.

states depend on aid from the EU and its Member States, reducing defiance. Together, the EU and Italy re-established the LBCG, which is only capable of acting because of the multiform support, coordination, and instruction.[296] Though the LBCG is now partially self-reliant and has its own JRCC, this is the product of Italian and EU capacity-building.

Similarly, in the Australian context, the situation is not one of mere encouragement or facilitation. Australia is the more powerful player that bullies other states in the region, engaging in 'incentivised policy transfer', which is in part possible due to several states (and former colonies) relying on Australia for foreign aid.[297] Likewise, Mexico increased interceptions in response to diplomatic pressure from the US, threatened tariffs, and aid cuts, alongside capacity building and the like.[298] This is not to say third states are always wilful implementers; they often bargain for mutually beneficial relationships.[299] Nonetheless, as argued for jurisdictional purposes, *but for* the destination state, the third state would not obstruct departure, and in many cases, would not be equipped to do so. Third states operate on behalf of and in the interests of the destination state, becoming the new frontiers and buffer zones. Merely conditioning aid or other incentives on the criminalisation or obstruction of exit is unlikely, however, to establish a sufficient

296 Forensic Oceanography (n 104) 8-11, 19-56. See also Guild and Stoyanova (n 191) 360.

297 Nethery and Gordyn (n 58); George Megalogenis, 'Neighbourhood Bully: Australia Views Asia Through the Wrong End of the Telescope' *The Guardian* (17 February 2019) <www.theguardian.com/australia-news/2019/feb/18/neighbourhood-bully-australia-views-asia-through-the-wrong-end-of-the-telescope> accessed 18 June 2020.

298 See Rodrigo Dominguez-Villegas, 'Protection and Reintegration: Mexico Reforms Migration Agenda in an Increasingly Complex Era' (Feature, MPI 2019) <www.migrationpolicy.org/article/protection-and-reintegration-mexico-reforms-migration-agenda> accessed 17 June 2020.

299 See eg Antje Missbach and Gerhard Hoffstaedter, 'When Transit States Pursue Their Own Agenda' (2020) 3 Migration and Society 64. See also *Namah v Pato* [2016] PJSC 13 (26 April 2016) where the Supreme Court of PNG ruled detention on Manus Island unconstitutional.

relationship of domination. Article 17 is likely met where an MRCC or ILO deployed to a third state instructs that state to pullback migrants, including providing real-time locations and maintaining communication.[300] As above, knowledge and opposability are established. However, Article 17 is rarely invoked, being largely of historical significance and the threshold high.

Shared responsibility for violations of the right to leave with relevant IOs is crucial. Most significantly, the EU is aiding and assisting in pullbacks and pushbacks, including by its Member States, under Article 14 ARIO.[301] Most visibly, EU policies are facilitating migrant abuse in Libya and by the LBCG.[302] EU funding of third states, conditioning aid on obstructing departures, and provision of a vast amount of technical, logistical, and material support amounts to aid and assistance, making a significant contribution to the relevant state's capacity to perform pullbacks.[303] This commitment to bolstering third states remains unabated in the Commission's New Pact on Migration and Asylum.[304] IOM is also arguably complicit in interceptions, having partnered with the EU and Australia. Its aid and

300 See Vari (n 21) 131-32.

301 See Fernandez (n 129) 403-06.

302 HRW, 'EU: Time to Review and Remedy Cooperation Policies Facilitating Abuse of Refugees and Migrants in Libya' (28 April 2020) <www.hrw.org/news/2020/04/28/eu-time-review-and-remedy-cooperation-policies-facilitating-abuse-refugees-and> accessed 30 June 2020.

303 See Daria Davitti and Annamaria La Chimia, 'A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control' in Fiona de Londras and Siobhán Mullally (eds), *The Irish Yearbook of International Law*, vol 10, 2015 (Hart Publishing 2017); Thomas Spijkerboer and Elies Steyger, 'European External Migration Funds and Public Procurement Law' (2019) 4 European Papers 493 <www.europeanpapers.eu/en/e-journal/european-external-migration-funds-and-public-procurement-law> accessed 28 January 2021; ibid on a complaint to the European Court of Auditors.

304 Commission, 'New Pact on Migration and Asylum' (Communication) COM (2020) 609 final, 14, 16, 20-21.

assistance can for example be seen in the capacity building, technical assistance, and training it provides to Libyan, Indonesian, and Nigerien authorities to manage and secure their borders.[305]

Any surveillance and assistance provided by EUNAVFOR and Frontex assets to third states (eg Libya, Tunisia) and Member States (eg Greece, Croatia) makes the EU complicit in pullbacks and pushbacks (alongside the states providing assets and otherwise coordinating or assisting by blocking and creating waves).[306] Frontex and participating states are also aiding and assisting in violations during joint operations through their provision of officials, large vessels/aircraft, and for Frontex, organisational contributions, which may facilitate pushbacks by host states and pullbacks by third states.[307] Similarly, where a pushback cannot be attributed to NATO, provision of location data to the national coastguard amounts to complicity, as would support from NATO contributing states per Articles 14 ARIO and 16 ARSIWA. Where a pushback is only attributable to NATO, contributing states may nonetheless be complicit under Article 58 ARIO. FLOs also support NATO missions and NATO shares intelligence with Frontex, meaning both may be aiding and assisting one another. However, a sufficiently close nexus to the violation may not exist. In all the aforementioned scenarios, states and IOs are well-aware violations are occurring not least because they are active on the ground (save states providing only minor equipment).[308] In particular, externalisation has been *designed* and *executed* at the

305 Brachet (n 42) 276-77; Hirsch and Doig (n 59) 693-94, 697.

306 See Alarm Phone and others (n 29).

307 Majcher (n 132) 67-69; Fink (n 25) 160-171.

308 See on Frontex, Christides and others (n 30).

EU level. Lastly, opposability is met, with IOs bound by the right to leave per Chapter Four.

Though not expanded upon due to space restrictions, based on the arguments made for destination states, Frontex/EU may be directing and controlling violations of the right per Article 15 ARIO. This would occur when FLOs or EU forces direct a specific pullback, providing intelligence, coordination, and capacity building. Joint responsibility is thus appropriate for interceptions performed by the third state but under the direction and control of destination states and/or the EU.

c. Defences

Lastly, no relevant circumstances precluding wrongfulness for breaches of the right to leave by states or IOs apply (consent, *force majeure*, distress, and necessity: Articles 20, 23-25 ARSIWA/ARIO). Though coastal and flag states may 'consent' to interdictions, measures must fall 'within the limits of that consent' and presumably states cannot consent to another actor infringing their nationals' rights.[309] As above, agreements do not generally authorise prohibitions on leaving (or other violations). *Force majeure*, distress, and necessity all require that the state has not substantially contributed to the situation.[310] As has been emphasised, irregular migration and the need for pushbacks and pullbacks are, to a large extent, the product of destination state (and EU) policies that limit lawful travel and construct 'irregular' migrants. While perhaps states could claim that migration crises and great loss of life amount to situations of *force majeure*, it must be 'materially impossible'

309 Papastavridis, 'Fortress Europe' (n 174) 97-99.

310 ARSIWA Commentary, 78 [9], 80 [9], 84 [20].

to comply with the right to leave and involve 'involuntary' conduct.[311] States and IOs clearly have the ability to comply with human rights during such crises (as evidenced by available alternatives), while externalisation and associated measures are hardly involuntary. Given third states can decline to engage in pullbacks, even when under the destination's direction and control, they cannot invoke *force majeure.*[312] Relatedly, distress requires there be no other reasonable way of saving life than to violate the right to leave. Though plausible, pushbacks and pullbacks, as opposed to SAR, arguably create 'comparable or greater peril' to life.[313] Necessity also requires the measures be 'the only way' to protect 'an essential interest'.[314] Irrespective of whether the aforementioned legitimate aims amount to essential interests, measures must not 'seriously impair' an essential interest of the international community, which they evidently do in undermining the right to seek asylum.[315] Such defences fail for the same reasons in the context of pushbacks/pullbacks performed during COVID-19. Again, it is not materially impossible to respect relevant rights nor is there no other way to save lives or protect the life and health of one's nationals, as the proportionality analysis demonstrated.

311 ibid 76-77 [2]-[4]; Vari (n 21) 132-33.

312 ARSIWA Commentary, 69 [9].

313 ibid 78 [1], 80 [10].

314 ibid 83-84 [15]-[17].

315 Vari (n 21) 132-33. See also Papastavridis, 'Fortress Europe' (n 174) 97.

Conclusion

This chapter demonstrated that pushbacks and pullbacks at sea and on land violate the right to leave of migrants, save when they can be considered genuine rescues with disembarkation to a place of safety. Pushbacks and pullbacks are often dressed up as pursuing humanitarian ends, fail to meet legality standards, are highly disproportionate and indiscriminate, and lead to an array of grave human rights violations. This destroys the essence of the right to leave, while also obstructing the right to seek asylum and the ability of migrants to trigger a right of entry stemming from the state's duty to admit. When externalising and partnering with third states, destination states believe they can successfully deflect responsibility. This argument is unsustainable in light of the above analysis, which showed that destination states can bear responsibility for directly violating the right to leave during pushbacks, failing to uphold positive obligations, and for aiding and assisting or directing and controlling third states to engage in pullbacks. Many difficulties surrounding attribution and jurisdiction can be overcome. Moreover, various actors share responsibility in this context, including third states, the EU, IOM, and NATO. Capturing their involvement and responsibility is critical in challenging externalisation. Rather than rendering migrants unable to access safe territory and subjecting them to discriminatory and exclusionary measures, to comply with the right to leave (and other obligations) states and IOs must ensure safe pathways exist, cease implementing or assisting with pushbacks and pullbacks, and resume SAR operations.

CONCLUSION: FROM CONTAINMENT TO LEGAL ROUTES OF MOBILITY

This thesis has explored the right to leave any country, including one's own, in international law and its applicability to externalised migration control. Through their externalisation strategies, destination states and the EU are actively seeking to contain migrants in states of origin and transit across the Middle East, Africa, Central America, Southeast Asia, and more. This denies many people from the Global South their right to leave, subjecting them to a selective and unequal mobility regime. Accordingly, this thesis was dedicated to understanding the right to leave for would-be refugees and other migrants and its fundamental significance in securing liberty, equality, and international protection.

The thesis answered three guiding questions in three parts:

1. *What is the scope of the right to leave in international law and what obligations does it generate?*
2. *Whether and under what circumstances do key externalisation practices violate the right to leave?*
3. *Under what circumstances do destination states, states of origin and transit, and international organisations bear direct and/or indirect responsibility for violations of the right?*

Part I, comprising Chapters One to Three, developed a general framework for assessing whether restrictions conform with the right to leave. Chapter One outlined how the right is and ought to be interpreted, its key requirements, corresponding obligations, and duty-bearers. Chapter Two challenged the starting premise that states have an almost unfettered right to exclude non-nationals, highlighting their obligations to admit. It also examined how leaving and entry are distinct, albeit interrelated, rights. Chapter Three focused on the notion of a 'right to leave to seek asylum' and its concomitant duties. Part II, comprising Chapter Four, synthesised the current and evolving law on jurisdiction under IHRL and

international responsibility for wrongful conduct by states and IOs. Building on the aforementioned analyses, Part III shifted the focus to externalisation, with Chapters Five and Six assessing whether visas, carrier sanctions, pushbacks, and pullbacks comply with the right to leave. It was concluded that in most circumstances, these practices interfere with and violate the right. It was further illustrated that destination states, third states, the EU, IOM, and NATO bear international responsibility for their role in violating the right, whether as the direct perpetrator, for failing to uphold positive obligations and obligations under the LOS, or for complicity and direction and control over another actor. It also highlighted the importance of shared responsibility for violations, given the myriad actors involved in designing and implementing externalisation.

In undertaking these analyses, this thesis made a substantial contribution to the literature and field in three primary ways. First, in developing a general framework and highlighting the right's interplay with relevant rights and obligations, it recentred attention back onto the right to leave, after it had been neglected intellectually and jurisprudentially since the Cold War. The thesis addressed a significant gap, exploring the applicability of the right to states of destination, not only departure, and externalisation through a new, highly germane lens, moving beyond entry prevention and *non-refoulement.* Moreover, it put adequate scrutiny into potential justifications for interferences with the right to leave, which had never been done so extensively, as well as the compatibility of externalisation measures with the right. Second, it challenged the presumed legality of visas and carrier sanctions, emphasising that the burden of justifying the lawfulness of migration controls lies *squarely* with the state. The state is not insulated from challenge by mere virtue of its prerogative to control entry. Finally, and fundamentally, it became evident that states and IOs exercising jurisdiction retain their obligations under IHRL and refugee law when engaging in externalisation. Thus, they cannot evade responsibility for ensuing violations.

Although there are significant obstacles to overcome, it is evident that the right to leave, jurisdictional thresholds, and law of international responsibility are capable of constraining externalisation practices. Accordingly, actors engaged in externalisation cannot hold themselves out as abiding by international law.

There is therefore a clear need for destination and third states, the EU, IOM, and NATO to operationalise and integrate the parameters of the right to leave and the findings of this thesis into their migration control policies and practices. They are briefly summarised here.

At the foundational level, the right to leave is well-established in international law under treaty and custom, available to everyone regardless of migration status or lawfulness of presence. The right must be secured by the state of departure and state of nationality if one is abroad. Critically, it is also opposable to destination states exercising extraterritorial control. All states have an obligation not to obstruct departure and to issue travel documents to their nationals. Restrictions not provided by law nor of a sufficient quality, those that are blanket, automatic, indefinite, or otherwise destroy the essence of the right, or that are inconsistent with other rights, are overtly contrary to the right to leave. Accordingly, adjudicative bodies may need to probe the real aims underlying a measure and not simply accept sweeping assertions of national security or public order.

The interplay between exit and entry is particularly complex and a clear-cut line cannot always be drawn. Nonetheless, the right to leave and right of entry remain distinct parts of the migration trajectory, with the right to leave operating independently of any right of entry. This is crucial, for it means that states cannot obstruct departure on the basis that persons may not be admitted by the destination state. Accordingly, individuals are entitled to leave *any* country for *any* state they *choose*. Although the right itself is not accompanied by a concomitant right of entry, in certain circumstances, individuals have a

right to admission stemming from *non-refoulement*, collective expulsion, and family reunification obligations. To ensure effective protection from *refoulement* and collective expulsion, states must grant temporary admission so individuals can access asylum procedures on state territory accompanied by necessary procedural safeguards. This does not however preclude transfers to *safe* countries for processing.

Additionally, the right bears a special significance for asylum seekers and refugees. It amounts to a practical and legal necessity. To be granted refugee status and to secure protection from *refoulement* and collective expulsion, persons must be able to leave the state they are in. It follows that the right to leave for asylum seekers is properly characterised as a 'right to leave to seek asylum'. A stricter test is warranted when assessing violations of the right to leave read alongside these other rights and obligations, with considerable weight afforded to protection needs and *refoulement* risks over and above the state's interests. The notion of a right to leave to seek asylum generates several obligations. States must not obstruct the flight of asylum seekers or their search for a state to admit them, and sound arguments exist for obliging states of sojourn to issue travel documents to asylum seekers and refugees therein. Most contentiously, states may bear a general facilitative duty to secure the right, for instance, cooperating with other actors to secure departure or evacuation.

Turning to externalisation, significant and radical reform is required to comply with the right to leave and discharge relevant obligations under IHRL, refugee law, and the LOS. Such reform demands the dismantlement of many externalisation strategies, requiring states and the EU to move away from containment and externalisation to developing migration policies that uphold international law and promote responsibility sharing, not shifting.

For visa regimes, states and the EU must improve their legality, proportionality, and consistency. This includes ensuring that individuals from 'blacklisted states' can obtain visas and that visa assessments are performed against objective and precise criteria, removing unnecessary blacklisting, and providing individuals with effective avenues to challenge visa refusals or denials of embarkation. Strict safeguards must be in place when utilising carrier sanctions and ILOs or allowing them to operate on one's territory, including accountability mechanisms, adequate training, and legal provisions and processes that exempt carriers from sanctions when individuals enter the asylum process. Visas and carrier sanctions should be suspended when a substantial risk of harm exists for specific groups/nationalities. Relatedly, IOM should re-consider the provision of services which aid in violating the right to leave.

Regarding pushbacks and pullbacks at sea and on land, states and IOs should immediately cease implementing or assisting with such practices and end policies of non-assistance and the criminalisation of NGO rescue vessels. States, the EU, Frontex, IOM, and NATO must also refrain from engaging in, assisting, or directing operations where pushbacks/pullbacks are occurring or likely to occur and have robust monitoring mechanisms in place. All operations should be dedicated to saving lives, not blocking access to safety, followed by timely disembarkation and access to asylum procedures.

Through restrictive border control policies and practices, states construct the very problems they seek to avoid, pushing migrants into irregularity and vulnerability. This thesis has exposed the unsuitability and unnecessary nature of externalisation measures. If states are serious about reducing irregular migration, they must ensure the *availability* of safe, orderly, and regular mobility routes on a much larger scale and promote their *accessibility* on an equitable basis. This requires introducing and/or expanding resettlement options and complementary pathways for asylum seekers, alongside education, work,

labour, and family reunification opportunities more generally, which do not reproduce exclusionary or discriminatory patterns. Though there are practical and political constraints, workable and more protective solutions exist. Nonetheless, spontaneous movement will always occur, and the international community should continue to address the root causes of forced displacement. The state's right to control entry is clearly circumscribed by the right to leave and other obligations under international law. Accordingly, the state must execute its migration controls consistently with these obligations and in good faith. This is not to say that states must provide entry to every migrant. Rather, it demonstrates that the right to leave and right to control entry do not need to conflict; a better balance can be struck that places the protection of migrants *at the centre*.

Implementation of these recommendations has direct and far-reaching implications for regimes that inhibit departure and prevent migrants reaching their territories. It would help to prevent the abuse of migrants and remedy the situation of those stuck in origin and transit states. It would also foster a much more liberal and equal global mobility regime than the one currently plagued by exclusion and discrimination. Free movement would again become the rule and exclusion the exception. Significantly, it would destabilise the global interlocking system, in which numerous states and actors implement externalisation, collaborate, and spread restrictive ideas, which is especially harmful in *collectively containing* migrants across the globe.[1] To achieve this, adjudicative bodies must take seriously the boundaries of the right to leave, including domestic and regional bodies pertaining to partner states in the Global South who have an important role to play in

[1] See David S FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019) 12, 14.

litigating the right and declaring externalisation practices unlawful.[2] Litigants can also use the framework developed in this thesis to stimulate consideration of this remarkably underexplored right.

Relatedly, this thesis opens up several avenues for further research. With the justificatory burden on the state and the fact that a whole range of migration and refugee-related practices may implicate the right to leave, their compatibility with the right deserves exploration. The lawfulness of measures restricting departure imposed during the pandemic to achieve public health aims is particularly pertinent (and will no doubt be litigated). Further research is also needed on the externalisation practices of Global South states, alongside international responsibility for measures not reaching the threshold of complicity, for example destination states simply pressuring third states to criminalise exit. Lastly, the discriminatory effect of migration control is ripe for deeper analysis, specifically whether and which migration controls amount to unlawful discrimination, in particular racial discrimination, and how non-discrimination obligations can be used to challenge exclusionary practices and shape more open mobility regimes. This would be particularly fitting, given the renewed focus on colonial legacies, race, and the exclusionary, racialised character of international law.

In conclusion, it is the hope that this thesis has illustrated the necessity for the right to leave to be at the forefront of any discussions on migration and asylum. Marking the beginning of the migrant journey, the right is indispensable in protecting the human rights of asylum seekers, refugees, and other migrants. Migrants are *first and foremost* individuals needing protection and therefore, the state's prerogative to exclude should not be prioritised

[2] See Nikolas Feith Tan and Thomas Gammeltoft-Hansen, 'Topographical Approach to Accountability for Human Rights Violations in Migration Control' (2020) 21 German LJ 335.

in international law, *even if* migration control is legitimate. The starting point and overarching focus should be on protecting people on the move, regardless of status, protecting their 'right to have rights'. If human rights continue to be placed second to the state's prerogative and the right to leave systematically obstructed, migrants have little hope of availing themselves of international protection and their rights routinely infringed. We must endeavour to make rights practical and effective, eliminate practices that force migrants into 'illegality' and harmful situations, and undo the global *(im)*mobility infrastructure. It is therefore timely to re-imagine and re-structure migration control in light of the right to leave.

BIBLIOGRAPHY

— — ‘About VFS Global’ <www.vfsglobal.com/en/individuals/about.html> accessed 6 February 2021

— — ‘EU Migration Chief Welcomes Frontex Suspension of Operations in Hungary’ *Euronews* (28 January 2021) <www.euronews.com/2021/01/28/eu-migration-chief-welcomes-frontex-suspension-of-operations-in-hungary> accessed 6 February 2021

— — ‘Human Costs of Border Control’ <www.borderdeaths.org> accessed 20 November 2019

— — ‘VFS Global Wins Contract to Provide Germany Visa Services in 14 Countries in Asia Pacific’ *CISION PR Newswire* (Dubai, 29 October 2018) <www.prnewswire.co.uk/news-releases/vfs-global-wins-contract-to-provide-germany-visa-services-in-14-countries-in-asia-pacific-698860921.html> accessed 25 June 2019

— — ‘Mexican Police Push Back Hundreds of US-bound Migrants’ *BBC* (24 January 2020) <www.bbc.co.uk/news/av/world-latin-america-51235005/mexican-police-push-back-hundreds-of-us-bound-migrants> accessed 4 February 2020

— — ‘The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime’ <www.baliprocess.net> accessed 26 June 2020

Abass A and Ippolito F, *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Routledge 2016)

Abeyratne RIR, ‘Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees’ (1998) 10 IJRL 675

Achiume ET, ‘Migration as Decolonization’ (2019) 71 StanLRev 1509

— — ‘Race, Refugees and International Law’ in Costello C, Foster M and McAdam J (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) (forthcoming) <https://ssrn.com/abstract=3636518> 12 November 2020

Achour M and Spijkerboer T, ‘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 2 June 2020

Acosta D, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (CUP 2018)

AFP, ‘Another Rohingya Boat Turned Back from Malaysia Waters’ *New Straits Times* (11 June 2020) <www.nst.com.my/news/nation/2020/06/599851/another-rohingya-boat-turned-back-malaysia-waters?mc_cid=09580fe07a&mc_eid=48d64f22f5> accessed 25 June 2020

AGSI and CIHRS, ‘Complaint to the UN Human Rights Committee Over the Role of Italy, Malta, and Libya in Violating the Right to Leave Libya, Resulting in Denial of the Rights

of Asylum Seekers' (Press Release, 24 July 2020) <www.statewatch.org/media/1267/un-asgi-cihrs-complaint-libya-pull-backs-pr-24-7-20.pdf> accessed 5 August 2020

Akkerman M, 'Expanding the Fortress: The Policies, the Profiteers and the People Shaped by EU's Border Externalisation Programme' (Report, Transnational Institute and Stop Wapenhandel 2018) <www.tni.org/files/publication-downloads/expanding_the_fortress_-_1.6_may_11.pdf> accessed 2 February 2021

Alarm Phone, 'Also in the Central Mediterranean Sea: Black Lives Matter!' (6 July 2020) <https://alarmphone.org/en/2020/07/06/also-in-the-central-mediterranean-sea-black-lives-matter/> accessed 5 August 2020

—— Borderline Europe, Mediterranea and Sea-Watch, 'Remote Control: The EU-Libya Collaboration in Mass Interceptions of Migrants in the Central Mediterranean' (Report, June 2020) <https://eu-libya.info/img/RemoteControl_Report_0620.pdf> accessed 30 June 2020

All-Party Parliamentary Group, 'Visa Problems for African Visitors to the UK' (Joint Report, 2019) <https://royalafricansociety.org/wp-content/uploads/2020/01/APPG-Report-on-Visa-problems-for-African-visitors-to-the-UK_v1.58web.pdf> accessed 27 January 2021

Allain J, 'The *Jus Cogens* Nature of *Non-refoulement'* (2001) 13 IJRL 533

Altwicker T, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 EJIL 581

Alvarez J, 'Review of Dan Sarooshi, International Organizations and their Exercise of Sovereign Powers' (2007) 101 AJIL 674

Amnesty International, 'USA: Government must Stop Illegal Pushbacks of Asylum Seekers to Mexico' (11 April 2019) <www.amnesty.org/en/latest/news/2019/04/usa-government-must-stop-illegal-pushbacks-of-asylum-seekers-to-mexico/> accessed 4 February 2020

Aust HP, *Complicity and the Law of State Responsibility* (CUP 2011)

Avdan N, 'Human Trafficking and Migration Control Policy: Vicious or Virtuous Cycle?' (2012) 32 Journal of Public Policy 171

—— *Visas and Walls: Border Security in the Age of Terrorism* (University of Pennsylvania Press 2019)

Baca G, 'Visa Denied: Why Courts should Review a Consular Officer's Denial of a U.S.-Citizen Family Member's Visa' (2015) 64 AmULRev 591

Badalič V, 'Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and Their Impact on Human Rights' (2019) 20 Journal of International Migration and Integration 85

Baird T, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' (2017) 19 EJML 307

—— and Spijkerboer T, ‘Carrier Sanctions and the Conflicting Legal Obligations of Carriers: Addressing Human Rights Leakage’ (2019) 11 Amsterdam Law Forum 4

Banulescu-Bogdan N, Benton M and Fratzke S, ‘Coronavirus is Spreading across Borders, but it is not a Migration Problem’ (Commentary, MPI 2020) <www.migrationpolicy.org/news/coronavirus-not-a-migration-problem> accessed 20 March 2020

Barnidge RP, ‘The Due Diligence Principle Under International Law’ (2006) 8 IntCLRev 81

Battjes H, *European Asylum Law and International Law* (Martinus Nijhoff 2006)

Bauböck R, ‘Free Movement and the Asymmetry between Exit and Entry’ (2006) 4 Ethics and Economics 1

Behrman S, ‘Refugee Law as a Means of Control’ (2019) 32 JRS 42

Berriane M, de Haas H and Natter K, ‘Introduction: Revisiting Moroccan Migrations’ (2015) 20 The Journal of North African Studies 503

Besson S, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25 LJIL 857

—— ‘Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdictions, Duties, and Responsibilities’ in van Aaken A and Motoc I (eds), *The European Convention on Human Rights and General International Law* (OUP 2018)

Bigo D, ‘Criminalisation of “Migrants”: The Side Effect of the Will to Control Frontiers and the Sovereignty Illusion’ in Bogusz B, Cholewinski R, Cygan A and Szyszczak E (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff 2004)

— — ‘The (In)securitization Practices of the Three Universes of EU Border Control: Military/Navy – Border Guards/Police – Database Analysts’ (2014) 45 Security Dialogue 209

—— and Guild E, ‘Policing at a Distance: Schengen Visa Policies’ in Bigo D and Guild E (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005)

Bisong A, ‘Win-win-win: Africa and Europe in 2019 Should Move Towards Solutions that Benefit Migrants Too’ (*ECDPM*, 28 January 2019) <https://ecdpm.org/talking-points/win-win-win-africa-europe-2019-move-towards-solutions-benefit-migrants-too/> accessed 5 February 2020

Bjorge E, *The Evolutionary Interpretation of Treaties* (OUP 2014)

Blokker NM, ‘Preparing Articles on Responsibility of International Organizations: Does the International Law Commission Take International Organizations Seriously? A Mid-term Review’ in Klabbers J and Wallendahl Å (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011)

Bloom T, ‘The Business of Migration Control: Delegating Migration Control Functions to Private Actors’ (2015) 6 Global Policy 151

—— and Risse V, ‘Examining Hidden Coercion at State Borders: Why Carrier Sanctions Cannot be Justified’ (2014) 7 Ethics & Global Politics 65

Boed R, ‘The State of the Right of Asylum in International Law’ (1994) 5 Duke Journal of Comparative & International Law 1

Border Violence Monitoring Network, ‘The Black Book of Pushbacks’ (The Left in the European Parliament 2020) vols 1 and 2 <www.borderviolence.eu/launch-event-the-black-book-of-pushbacks/> accessed 1 February 2021

Bordin FL, *The Analogy between States and International Organizations* (CUP 2019)

Bossuyt MJ, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987)

Brachet J, ‘Policing the Desert: The IOM in Libya Beyond War and Peace’ (2016) 48 Antipode 272

Bradley M, *The International Organization for Migration: Challenges, Commitments, Complexities* (Routledge 2020)

Brandl U, ‘The Human Right to Leave a Country: To Protect or Forget?’ (Conflict and Compromise between Law and Politics in EU Migration and Asylum Policies conference, Brussels, February 2018)

Briddick C, ‘Some Other(ed) “Refugees”?: Women Seeking Asylum under Refugee and Human Rights Law’ in Juss SS (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019)

Brito R, ‘Migrant Arrivals Plunge in Spain after Deals with Morocco’ *Associated Press* (26 April 2019) <https://apnews.com/6e4c62e3255444c78196aef3f463fca0> accessed 4 February 2020

Brölmann C, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007)

—— ‘A Flat Earth? International Organizations in the System of International Law’ in Klabbers J (ed), *International Organizations* (Routledge 2016)

Brouwer A and Kumin J, ‘Interception and Asylum: When Migration Control and Human Rights Collide’ (2003) 21 Refuge 6

Brouwer E, ‘Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States’ in Ryan B and Mitsilegas V (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010)

Brownlie I, *Principles of Public International Law* (7th edn, OUP 2008)

Capone F, 'The Alleged Tension between the Global Compact for Safe, Orderly and Regular Migration and State Sovereignty: "Much Ado about Nothing"?' (2020) 33 LJIL 713

Carens JH, *The Ethics of Immigration* (OUP 2013)

Carling J, 'Migration in the Age of Involuntary Immobility: Theoretical Reflections and Cape Verdean Experiences' (2002) 28 JEMS 5

—— 'The Meaning of Migrants' <https://meaningofmigrants.org> accessed 16 November 2020

Carrera S, 'The Strasbourg Court Judgement *N.D. and N.T. v Spain*: A *Carte Blanche* to Push Backs at EU External Borders?' (2020) EUI Working Paper RSCAS 2020/21 <https://cadmus.eui.eu/handle/1814/66629> accessed 14 October 2020

Cerna CM, 'The Extraterritorial Scope of Human Rights Treaties: The American Convention on Human Rights' in Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

—— Hannum H, Greenwood C and Farer T, 'Bombing for Peace: Collateral Damage and Human Rights' (2002) 96 Proceedings of the Annual Meeting, March 13-16, American Society of International Law 95

Chetail V, 'Freedom of Movement and Transnational Migrations: A Human Rights Perspective' in Aleinikoff TA and Chetail V (eds), *Migration and International Legal Norms* (TMC Asser Press 2003)

—— 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Rubio-Marín R (ed), *Human Rights and Immigration* (OUP 2014)

—— 'The Transnational Movement of Persons Under General International Law: Mapping the Customary Law Foundations of International Migration Law' in Chetail V and Bauloz C (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014)

—— 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel' (2016) 27 EJIL 901

—— *International Migration Law* (OUP 2019)

—— 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law' (2020) 16 Int JLC 253

Chimni BS, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 JRS 350

Christides G, Freudenthal E, Lüdke S and Poppand M, 'EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign' *Spiegel* (23 October 2020) <www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7> accessed 25 October 2020.

Ciliberto G, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?' (2018) 4 Italian LJ 489

Civillini M and Bagnoli L, 'Skyrocketing Costs for Returning EU Migrants' (*EUobserver*, 5 May 2017) <https://euobserver.com/migration/137720> accessed 25 February 2020

Cogan JK, Hurd I and Johnstone I (eds), *The Oxford Handbook of International Organizations* (OUP 2016)

Collinson S, 'Visa Requirements, Carrier Sanctions, "Safe Third Countries" and "Readmission": The Development of an Asylum "Buffer Zone" in Europe' (1996) 21 Transactions of the Institute of British Geographers 76

Commission, 'EU Emergency Trust Fund for Africa' <https://ec.europa.eu/trustfundforafrica/index_en> accessed 1 February 2020

—— 'Global Approach to Migration and Mobility' <https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/global-approach-migration-and_en> accessed 2 February 2020

Contartese C, 'Competence-Based Approach, Normative Control, and the International Responsibility of the EU and its Member States' (2019) 16 International Organizations Law Review 339

Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

Cornelisse G, 'European Vessels, African Territorial Waters and "Illegal Emigrants": The Right to Leave and the Principle of (Il)legality in a Global Regime of Mobility' (2008) Challenge Working Paper <https://research.vu.nl/en/publications/european-vessels-african-territorial-waters-and-illegal-emigrants> accessed 19 January 2021

Corten O and Klein P, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the *Corfu Channel* Case' in Bannelier K, Christakis T and Heathcote S (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge 2012)

Costello C, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 EJML 35

—— *The Human Rights of Migrants and Refugees in European Law* (OUP 2016)

—— 'The Search for the Outer Edges of *Non-refoulement* in Europe: Exceptionality and Flagrant Breaches' in Burson B and Cantor DJ (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff 2016)

—— 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' (2018) 30 IJRL 643

—— and Foster M, 'Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' in den Heijer M and van der Wilt H (eds), *NYIL 2015: Jus Cogens: Quo Vadis?* (TMC Asser Press 2016)

—— Groenendijk K and Halleskov Storgaard L, *Realising the Right to Family Reunification of Refugees in Europe* (Issue Paper, Council of Europe Commissioner for Human Rights 2017)

—— Ioffe Y and Büchsel T, 'Article 31 of the 1951 Convention Relating to the Status of Refugees' (Legal and Protection Policy Research Series, UNHCR 2017)

Coventry T, ‘Appropriate Measures at Sea: Extraterritorial Enforcement Jurisdiction over Stateless Migrant Smuggling Vessels’ (2019) Maritime Safety and Security Law Journal 5

Cowles B, ‘Turkish Naval Ship Aids Pushback of Refugees to Libya’ ‘Turkish Naval Ship Aids Pushback of Refugees to Libya’ *Morning Star* (29 January 2020) <https://morningstaronline.co.uk/article/w/turkish-naval-ship-aids-pushback-of-refugees-to-war-torn-libya> accessed 18 June 2020

Craig P and De Búrca G, *EU Law: Text, Cases, and Materials* (7th edn, OUP 2020)

Crawford J, *State Responsibility: The General Part* (CUP 2013)

—— *Brownlie’s Principles of Public International Law* (9th edn, 2019 OUP)

—— and Keene A, ‘The Structure of State Responsibility under the European Convention on Human Rights’ in van Aaken A and Motoc I (eds), *The European Convention on Human Rights and General International Law* (OUP 2018)

Crawley H and Skleparis D, ‘Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe’s “Migration Crisis”’ (2018) 44 JEMS 48

Crépeau F, ‘Towards a Mobile and Diverse World: “Facilitating Mobility” as a Central Objective of the Global Compact on Migration’ (2018) 30 IJRL 650

Cruz A, ‘Carrier Sanctions in Four European Community States: Incompatibilities Between International Civil Aviation and Human Rights Obligations’ (1991) 4 JRS 63

Cummings C, Pacitto J, Lauro D and Foresti M, ‘Why People Move: Understanding the Drivers and Trends of Migration to Europe’ (2015) ODI Working Paper 430 <www.odi.org/publications/10217-why-people-move-understanding-drivers-and-trends-migration-europe> accessed 19 January 2021

Czaika M and Hobolth M, ‘Deflection into Irregularity? The (Un)intended Effects of Restrictive Asylum and Visa Policies’ (2014) IMI Working Paper Series 84 <www.migrationinstitute.org/publications/wp-84-14> accessed 19 January 2021

— — and Hobolth M, ‘Do Restrictive Asylum and Visa Policies Increase Irregular Migration into Europe?’ (2016) 17 European Union Politics 345

Czaika M, de Haas H and Villares-Varela M, ‘The Global Evolution of Travel Visa Regimes: An Analysis Based on the DEMIG VISA Database’ (2017) IMI Working Paper Series 134 <www.migrationinstitute.org/publications/the-global-evolution-of-travel-visa-regimes-an-analysis-based-on-the-demig-visa-database> accessed 19 January 2021

da Costa K, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2013)

Dannenbaum T, ‘Public Power and Preventive Responsibility: Attributing the Wrongs of International Joint Ventures’ in Nollkaemper A, Jacobs D and Schechinger JNM (eds), *Distribution of Responsibilities in International Law* (CUP 2015)

—— ‘Dual Attribution in the Context of Military Operations’ in Barros AS, Ryngaert C and Wouters J (eds), *International Organizations and Member State Responsibility* (Brill Nijhoff 2017)

Dastyari A and Ghezelbash D, 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures' (2020) 32 IJRL 1

Dastyari A and Hirsch A, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 HRLRev 435

Daugirdas K, 'How and Why International Law Binds International Organizations' (2016) 57 HarvInt'l LJ 325

Dauvergne C, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 MLR 588

— — *The New Politics of Immigration and the End of Settler Societies* (CUP 2016)

David N, *The International Responsibility of NATO and its Personnel during Military Operations* (Brill Nijhoff 2017)

Davidson H, 'Almost 300 Asylum Seekers Prevented from Sailing to Australia in Past Year' *The Guardian* (11 November 2018) <www.theguardian.com/australia-news/2018/nov/12/hundreds-of-asylum-seekers-disrupted-while-trying-to-sail-to-australia-in-past-year> accessed 10 April 2020

Davitti D, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' (2018) 29 EJIL 1173

— — and La Chimia A, 'A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control' in de Londras F and Mullally S (eds), *The Irish Yearbook of International Law*, vol 10, 2015 (Hart Publishing 2017)

De Boer T, 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection' (2015) 28 JRS 118

de Haas H and Vezzoli S, 'Leaving Matters: The Nature, Evolution and Effects of Emigration Policies' (2011) IMI Working Paper Series 34 <www.migrationinstitute.org/publications/wp-34-11> accessed 19 January 2021

de Haas H, Natter K and Vezzoli S, 'Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies' (2018) 52 IMR 324

De Schutter O, 'Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility' in Wouters J, Brems E, Smis S and Schmitt P (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010)

Dehm S, 'Passport' in Hohmann J and Joyce D (eds), *International Law's Objects* (OUP 2018)

— — 'Contesting the Right to Leave in International Law: The Berlin Wall, the Third World Brain Drain and the Politics of Emigration in the 1960s' in Craven M, Pahuja S and Simpson G (eds), *International Law and the Cold War* (CUP 2019)

Dembour MB, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015)

DEMIG, 'DEMIG VISA' (Version 1.4, IMI 2015) <www.migrationinstitute.org/data/demig-data/demig-visa-data> accessed 22 August 2020

den Heijer M, *Europe and Extraterritorial Asylum* (Hart Publishing 2012)

— — 'Shared Responsibility before the ECtHR' (2013) 60 NILR 411

— — 'Article 18 - Right to Asylum' in Peers S, Hervey T, Kenner J and Ward A (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014)

— — 'Visas and Non-discrimination' (2018) 20 EJML 470

Desmond A, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?' (2018) 29 EJIL 261

Dobkin DS, 'Challenging the Doctrine of Consular Nonreviewability in Immigration Cases' (2010) 24 GeoImmigrLJ 113

Dominguez-Villegas R, 'Protection and Reintegration: Mexico Reforms Migration Agenda in an Increasingly Complex Era' (Feature, MPI 2019) <www.migrationpolicy.org/article/protection-and-reintegration-mexico-reforms-migration-agenda> accessed 17 June 2020

Dominicé C, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in Crawford J, Pellet A, Olleson S and Parlett K (eds), *The Law of International Responsibility* (OUP 2010)

Dowty A, *Closed Borders: The Contemporary Assault on Freedom of Movement* (Yale University Press 1987)

Durieux JF, 'Three Asylum Paradigms' (2013) 20 International Journal on Minority and Group Rights 147

Düvell F, 'Transit Migration: A Blurred and Politicised Concept' (2012) 18 Population, Space and Place 415

ECRE, 'Defending Refugees' Access to Protection in Europe' (ECRE 2007) <www.ecre.org/wp-content/uploads/2016/07/ECRE-Defending-Refugees-Access-to-Protection-in-Europe_December-2007.pdf> accessed 28 January 2021

— — 'Med: 118 Rescued, 211 into Quarantine while Italy Faces Legal Action for Pull-backs' (26 June 2020) <www.ecre.org/med-118-rescued-211-into-quarantine-while-italy-faces-legal-action-for-pull-backs/> accessed 5 August 2020

Edwards A, 'Human Rights, Refugees, and the Right to Enjoy Asylum' (2005) 17 IJRL 293

Endicott T, 'Proportionality and Incommensurability' in Huscroft G, Miller BW and Webber G (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014)

Farahat A and Markard N, *Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility* (Heinrich-Böll-Stiftung 2020)

Feller E, 'Carrier Sanctions and International Law' (1989) 1 IJRL 48

Fernandez M, 'The EU External Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts' in Moreno-Lax V and Papastavridis E (eds), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill Nijhoff 2016)

Ferstman C, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (OUP 2017)

— — 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German LJ 459

Fine S, 'Immigration and Discrimination' in Fine S and Ypi L (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (OUP 2016)

— — and Ypi L (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (OUP 2016)

Fink M, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (OUP 2018)

— — 'EU Liability for Contributions to Member States' Breaches of EU Law' (2019) 56 Common Market Law Review 1227

FitzGerald DS, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019)

Flahaux ML and de Haas H, 'African Migration: Trends, Patterns, Drivers' (2016) 4 Comparative Migration Studies 1

Forensic Oceanography, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration Across the Mediterranean' (Report, May 2018) <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf> accessed 3 February 2021

Forowicz M, *The Reception of International Law in the European Court of Human Rights* (OUP 2010)

Foster M, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007)

— — 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law' (2008) 25 Refuge 64

Frelick B, Kysel IM and Podkul J, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 JMHS 190

Frontex, 'Liaison Officers Network' <https://frontex.europa.eu/partners/liaison-officers-network/> accessed 29 June 2020

— — 'Main Operations: Operation Poseidon (Greece)' <https://frontex.europa.eu/along-eu-borders/main-operations/operation-poseidon-greece-/> accessed 11 June 2020

— — 'Main Operations: Operation Themis (Italy)' <https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/> accessed 10 June 2020

— — ‘Non-EU Countries’ <https://frontex.europa.eu/partners/non-eu-countries/> accessed 4 February 2020

Gaja G, ‘General Principles of Law’, *MPIL* (2012) vol 4

— — ‘The Protection of General Interests in the International Community’ (2013) 364 Recueil des Cours de l’Académie de Droit International 9

— — ‘Interpreting Articles Adopted by the International Law Commission’ (2015) 85 BYBIL 10

Gallagher AT and David F, *The International Law of Migrant Smuggling* (CUP 2014)

Gammeltoft-Hansen T, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011)

— — ‘International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law’ (2018) 20 EJML 373

— — and Hathaway JC, ‘*Non-Refoulement* in a World of Cooperative Deterrence’ (2015) 53 ColumJTransnat’l L 235

— — and Sørensen NN, *The Migration Industry and the Commercialisation of International Migration* (Routledge 2013)

— — and Tan NF, ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy’ (2017) 5 JMHS 28

Garciandia R, ‘State Responsibility and Positive Obligations in the European Court of Human Rights: The Contribution of the ICJ in Advancing towards More Judicial Integration’ (2020) 33 LJIL 177

Gardiner RK, *Treaty Interpretation* (2nd edn, OUP 2016)

Gattini A, ‘Breach of International Obligations’ in Nollkaemper A and Plakokefalos I (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014)

Gauci JP, ‘Back to Old Tricks? Italian Responsibility for Returning People to Libya’ (*EJIL:Talk!*, 6 June 2017) <www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/> accessed 31 May 2020

Ghezelbash D, ‘Legal Transfers of Restrictive Immigration Law: A Historical Perspective’ (2017) 66 ICLQ 235

— — *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018)

— — and Tan NF, ‘The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection’ (2020) EUI Working Paper RSCAS 2020/55 <https://cadmus.eui.eu/handle/1814/68175> accessed 19 October 2020

Ghráinne BN, ‘Left to Die at Sea: State Responsibility for the May 2015 Thai, Indonesian and Malaysian Pushback Operations’ in de Londras F and Mullally S (eds), *The Irish Yearbook of International Law*, vol 10, 2015 (Hart Publishing 2017)

Gibbs M, ‘VFS: Who is the Company Subcontracted by the Home Office to Process Visa Applications?’ *Independent* (17 August 2019) <www.independent.co.uk/news/uk/home-

news/vfs-global-home-office-outsourcing-visa-applications-a9061476.html> accessed 6 November 2019

Gil-Bazo MT, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 RSQ 33

—— 'Asylum as a General Principle of International Law' (2015) 27 IJRL 3

Giuffré M, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 IJRL 692

—— and Moreno-Lax V, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Juss SS (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019)

Gleeson M, 'Unprecedented but Unfulfilled: Refugee Protection and Regional Responses to the Andaman Sea "Crisis"' (2017) 38 Antropologi Indonesia 6

—— 'Protection Deficit: The Failure of Australia's Offshore Processing Arrangements to Guarantee "Protection Elsewhere" in the Pacific' (2019) 31 IJRL 415

Gondek M, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009)

Goodwin-Gill GS, *International Law and the Movement of Persons Between States* (Clarendon Press 1978)

—— *The Refugee in International Law* (2nd edn, Clarendon Press 1996)

—— 'The Right to Leave, the Right to Return and the Question of the Right to Remain' in Gowlland-Debbas V (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1996)

—— 'State Responsibility and the "Good Faith" Obligation in International Law' in Fitzmaurice M and Sarooshi D (eds), *Issues of State Responsibility before International Judicial Institutions: The Clifford Chance Lectures* (Hart Publishing 2004)

—— '*R (ex parte European Roma Rights Centre et al) v Immigration Officer at Prague Airport and another (UNHCR intervening)*' (2005) 17 IJRL 427

—— 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' (2007) 9 UTS L Rev 26

—— 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*' (2011) 23 IJRL 443

—— '*Non-Refoulement*, Temporary Refuge, and the "New" Asylum Seekers' in Cantor DJ and Durieux JF (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014)

—— 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law' (2020) 69 ICLQ 1

—— and McAdam J, *The Refugee in International Law* (3rd edn, OUP 2007)

Grabbe H, 'Stabilising the East While Keeping Out the Easterners: Internal and External Security Logics in Conflict' in Lavenex S and Uçarer EM (eds), *Migration and the Externalities of European Integration* (Lexington Books 2002)

Grahl-Madsen A, *The Status of Refugees in International Law: Asylum, Entry and Sojourn*, vol 2 (AW Sijthoff 1972)

—— *Territorial Asylum* (Almqvist & Wiksell International 1980)

—— *The Land Beyond: Collected Essays on Refugee Law and Policy* (Macalister-Smith P and Alfredsson G eds, Martinus Nijhoff 2001)

Guild E, 'The Border Abroad: Visas and Border Controls' in Groenendijk K, Guild E and Minderhoud P (eds), *In Search of Europe's Borders* (Kluwer Law International 2003)

—— 'Who is an Irregular Migrant?' in Bogusz B, Cholewinski R, Cygan A and Szyszczak E (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff 2004)

—— 'Citizens Without a Constitution, Borders Without a State: EU Free Movement of Persons' in Baldaccini A, Guild E and Toner H (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing 2007)

—— *The Right to Leave a Country* (Issue Paper, Council of Europe Commissioner for Human Rights 2013)

—— 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?' (2019) 30 IJRL 661

—— and Carrera S, 'EU Borders and Their Controls: Preventing Unwanted Movement of People in Europe?' (2013) CEPS Essay No 6 <www.ceps.eu/ceps-publications/eu-borders-and-their-controls-preventing-unwanted-movement-people-europe/> accessed 26 January 2021

—— and Stoyanova V, 'The Human Right to Leave Any Country: A Right to Be Delivered' in Benedek W, Czech P, Heschl L, Lukas K and Nowak M (eds), *European Yearbook on Human Rights 2018* (Intersentia, NWV Verlag 2018)

Guilfoyle D, *Shipping Interdiction and the Law of the Sea* (CUP 2009)

Guiraudon V, 'Before the EU Border: Remote Control of the "Huddled Masses"' in Groenendijk K, Guild E and Minderhoud P (eds), *In Search of Europe's Borders* (Kluwer Law International 2003)

Haddad E, *The Refugee in International Society: Between Sovereigns* (CUP 2008)

Hailbronner K, 'Comments on the Right to Leave, Return and Remain' in Gowlland-Debbas V (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1996)

—— 'Introduction into the EU Immigration and Asylum Law' in Hailbronner K (ed), *EU Immigration and Asylum Law: Commentary* (CH Beck, Hart Publishing and Nomos 2010)

Hakimi M, 'State Bystander Responsibility' (2010) 21 EJIL 341

Hannum H, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff 1987)

—— 'The Strasbourg Declaration on the Right to Leave and Return' (1987) 81 AJIL 432

Hancox E, 'The Relationship Between the Charter and General Principles: Looking Back and Looking Forward' (2020) 22 CYELS 233

Harris DJ, O'Boyle M, Bates EP and Buckley CM, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014)

Harvey C and Barnidge RP, 'Human Rights, Free Movement, and the Right to Leave in International Law' (2007) 19 IJRL 1

Hathaway JC, *The Law of Refugee Status* (Butterworths 1991)

—— 'The Emerging Politics of *Non-Entrée*' (1992) 91 Refugees 40

—— *The Rights of Refugees under International Law* (CUP 2005)

—— 'The False Panacea of Offshore Deterrence' (2006) 26 FMR 56

—— 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 VaJInt'l L 1

—— 'Special Feature Eighth Colloquium on Challenges in International Refugee Law' (2018) 39 MichJInt'l L 1

Helfer LR, 'Subregional Courts in Africa: Litigating the Hybrid Right to Free Movement of Persons' (2018) 16 ICON 235

Helton AC, 'Asylum and Refugee Protection in Thailand' (1989) 1 IJRL 20

Henley & Partners, 'Passport Index' <https://www.henleypassportindex.com/passport> accessed 1 September 2020

Herczegh G, *General Principles of Law and the International Legal Order* (Akadémiai Kiadó 1969)

Higgins C, *Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees* (Policy Brief 8, Kaldor Centre for International Refugee Law 2019)

Higgins R, 'The Right in International Law of an Individual to Enter, Stay In and Leave a Country' (1973) 49 International Affairs 341

Hirsch AL, 'The Borders Beyond the Border: Australia's Extraterritorial Migration Controls' (2017) 36 RSQ 48

—— and Bell N, 'The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime' (2017) 18 Human Rights Rev 417

—— and Doig C, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 22 IJHR 681

Hirsch M, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Martinus Nijhoff 1995)

Hohfeld WN, 'Fundamental Legal Concepts as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16

Hollifield JF, 'The Emerging Migration State' (2004) 38 IMR 885

Hruschka C, 'Hot Returns Remain Contrary to the ECHR: *ND & NT* before the ECHR' (*EU Migration Law Blog*, 28 February 2020) <http://eumigrationlawblog.eu/hot-returns-remain-contrary-to-the-echr-nd-nt-before-the-echr/> accessed 14 October 2020

HRW, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers* (HRW 2009)

— — *"Trigger Happy": Excessive Use of Force by Indian Troops at the Bangladesh Border* (HRW 2010)

— — 'US: COVID-19 Policies Risk Asylum Seekers' Lives' (2 April 2020) <www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives> accessed 27 June 2020

— — 'EU: Time to Review and Remedy Cooperation Policies Facilitating Abuse of Refugees and Migrants in Libya' (28 April 2020) <www.hrw.org/news/2020/04/28/eu-time-review-and-remedy-cooperation-policies-facilitating-abuse-refugees-and> accessed 30 June 2020

Infantino F, *Outsourcing Border Control: Politics and Practice of Contracted Visa Policy in Morocco* (Palgrave Macmillan 2016)

— — *Schengen Visa Implementation and Transnational Policymaking: Bordering Europe* (Palgrave Macmillan 2019)

IOM, 'Missing Migrants' <https://missingmigrants.iom.int> accessed 6 February 2021

— — 'Who is a Migrant?' <www.iom.int/who-is-a-migrant> accessed 7 July 2018

Italian Ministry of Defence, 'Mare Nostrum Operation' <www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx> accessed 20 January 2020

Isacson A, Meyer M and Smith H, 'Mexico's Southern Border: Security, Central American Migration, and US Policy' (Report, WOLA 2017) <www.wola.org/wp-content/uploads/2017/06/WOLA_Mexicos-Southern-Border-2017-1.pdf> accessed 2 February 2021

Jackson M, *Complicity in International Law* (OUP 2015)

— — 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27 EJIL 817

— — 'State Instigation in International Law: A General Principle Transposed' (2019) 30 EJIL 391

Jagerskiold SAF, 'Historical Aspects of the Right to Leave and to Return' in Vasak K and Liskofsky S (eds), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19-20 June 1972* (The American Jewish Committee 1976)

Jansen S, 'After the Red Passport: Towards an Anthropology of the Everyday Geopolitics of Entrapment in the EU's "Immediate Outside"' (2009) 15 Journal of the Royal Anthropological Institute 815

JCWI, 'We Won! Home Office to Stop using Racist Visa Algorithm' (4 August 2020) <www.jcwi.org.uk/news/we-won-home-office-to-stop-using-racist-visa-algorithm> accessed 23 August 2020

Jennings R and Watts A (eds), *Oppenheim's International Law: Volume 1 Peace* (9th edn, Longman 1992)

Jensen UI, 'Humanitarian Visas: Option or Obligation?' (Study for the LIBE Committee, European Parliament 2014) <www.epgencms.europarl.europa.eu/cmsdata/upload/eb469bdf-0e31-40bb-8c75-8db410ab13fc/Session_2_-_Study_Humanitarian_visas.pdf> accessed 27 January 2021

Johansen SØ, *The Human Rights Accountability Mechanisms of International Organizations* (CUP 2020)

Juss SS, 'Free Movement and the World Order' (2004) 16 IJRL 289

Kanetake M and Nollkaemper A, 'The Application of Informal International Instruments before Domestic Courts' (2014) 46 The George Washington International Law Review 765

Kanstroom D, 'The "Right to Remain Here" as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions' (2017) 5 JMHS 614

Keady-Tabbal N and Mann I, 'Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations' (*Just Security*, 22 May 2020) <www.justsecurity.org/70309/tents-at-sea-how-greek-officials-use-rescue-equipment-for-illegal-deportations> accessed 23 May 2020

Keller H and Walther R, 'Evasion of the International Law of State Responsibility? The ECtHR's Jurisprudence on Positive and Preventive Obligations under Article 3' (2019) 24 IJHR 957

Kent G, 'The Human Rights Obligations of Intergovernmental Organizations' (2005) 42 UN Chronicle 32

Kingsley P, 'Privatised Pushbacks: How Merchant Ships Guard Europe' *The New York Times* (20 March 2020) <www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html> accessed 12 June 2020

—— 'Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet' *The New York Times* (27 April 2020) <www.nytimes.com/2020/04/30/world /europe/migrants-malta.html> accessed 1 May 2020

Kiss AC, 'Permissible Limitations on Rights' in Henkin L (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981)

Klabbers J, *Advanced Introduction to the Law of International Organizations* (Edward Elgar 2015)

—— (ed), *International Organizations* (Routledge 2016)

—— 'Sources of International Organizations' Law: Reflections on Accountability' in d'Aspremont J and Besson S (eds), *Oxford Handbook of the Sources of International Law* (OUP 2017)

Klein P, 'Responsibility' in Cogan JK, Hurd I and Johnstone I (eds), *The Oxford Handbook of International Organizations* (OUP 2016)

Kneebone S, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (CUP 2009)

— — and Missbach A, ‘The Human Rights Implications of Australian and Indonesian Anti-Smuggling Laws’ (2018) 4 International Journal of Migration and Border Studies 379

Koch IE, ‘Dichotomies, Trichotomies or Waves of Duties?’ (2005) 5 HRLRev 81

Kochenov D, ‘The Right to Leave Any Country Including Your Own in International Law’ (2012) 28 ConnJInt’l L 43

Koslowski R, ‘International Travel Security and the Global Compacts on Refugees and Migration’ (2019) 57 International Migration 158

Krieger H, Peters A and Kreuzer L (eds), *Due Diligence in the International Legal Order* (OUP 2020)

Kuşkonmaz EM, ‘GCM Indicators: Objective 11: Manage Borders in an Integrated, Secure and Coordinated Manner’ (*RLI Blog on Refugee Law and Forced Migration*, 8 July 2019) <https://rli.blogs.sas.ac.uk/2019/07/08/gcm-indicators-objective-11-manage-borders-in-an-integrated-secure-and-coordinated-manner/> accessed 20 November 2019

Lahav G, ‘Immigration and the State: The Devolution and Privatisation of Immigration Control in the EU’ (1994) 24 JEMS 675

Lambert H, ‘Temporary Refuge from War: Customary International Law and the Syrian Conflict’ (2017) 66 ICLQ 723

Landry R, ‘The “Humanitarian Smuggling” of Refugees: Criminal Offence or Moral Obligation?’ (2016) RSC Working Paper Series No 119 <www.rsc.ox.ac.uk/publications/the-humanitarian-smuggling-of-refugees-criminal-offence-or-moral-obligation> accessed 19 January 2021

Lanovoy V, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing 2016)

Larsen KM, ‘Attribution of Conduct in Peace Operations: The “Ultimate Authority and Control” Test’ (2008) 19 EJIL 509

Laube L, ‘The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy’ (2019) 7 Comparative Migration Studies 1 <https://doi.org/10.1186/s40878-019-0130-x> accessed 9 January 2020

Lautenbach G, *The Concept of the Rule of Law and the European Court of Human Rights* (OUP 2014)

Lauterpacht E and Bethlehem D, ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in Feller E, Türk V and Nicholson F (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003)

Lauterpacht H, *International Law and Human Rights* (Stevens 1950)

Lavrysen L, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016)

Law Council of Australia, Submission No 29 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Migration Amendment (Strengthening the Character Test) Bill 2019*, 14 August 2019

Lenard PT, 'Exit and the Duty to Admit' (2015) 8 Ethics & Global Politics 25975

Lester E, *Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia* (CUP 2018)

Liu G, *The Right to Leave and Return and Chinese Migration Law* (Martinus Nijhoff 2007)

Lockwood BB, Finn J and Jubinsky G, 'Working Paper for the Committee of Experts on Limitation Provisions' (1985) 7 HumRtsQ 35

Long K, 'In Search of Sanctuary: Border Closures, "Safe" Zones and Refugee Protection' (2013) 26 JRS 458

Macklin A, 'A Safe Country to Emulate? Canada and the European Refugee' in Lambert H, McAdam J and Fullerton M (eds), *The Global Reach of European Refugee Law* (CUP 2013)

Majcher I, 'Human Rights Violations during EU Border Surveillance and Return Operations: Frontex' Shared Responsibility or Complicity?' (2015) 7 Silesian Journal of Legal Studies 45

Mallory C, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Hart Publishing 2020)

Mann I, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (CUP 2016)

— — 'The New Impunity: Border Violence as Crime' (2020) 42 University of Pennsylvania Journal of International Law (forthcoming) <https://ssrn.com/abstract=3548181> accessed 3 February 2021

Markard N, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 EJIL 591

Martin I, 'Exposed: Malta's Secret Migrant Deal with Libya' *Times of Malta* (10 November 2019) <https://timesofmalta.com/articles/view/exposed-maltas-secret-migrant-deal-with-libya.748800> accessed 12 June 2020

Mau S, 'Mobility Citizenship, Inequality, and the Liberal State: The Case of Visa Policies' (2010) 4 International Political Sociology 339

— — Brabandt H, Laube L and Roos C, *Liberal States and the Freedom of Movement: Selective Borders, Unequal Mobility* (Palgrave Macmillan 2012)

— — Gülzau F, Laube L and Zaun N, 'The Global Mobility Divide: How Visa Policies Have Evolved over Time' (2015) 41 JEMS 1192

McAdam J, *Complementary Protection in International Refugee Law* (OUP 2007)

—— 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 MJIL 27

—— and Tamara Wood, 'The Concept of "International Protection" in the Global Compacts on Refugees and Migration' (2021) 23 Interventions 191

McGoldrick D, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

McInerney-Lankford S, 'Fragmentation of International Law Redux: The Case of Strasbourg' (2012) 32 OJLS 609

McLachlan C, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279

McNeill S, O'Neill S and Fallon M, '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 25 June 2019

Megalogenis G, 'Neighbourhood Bully: Australia Views Asia Through the Wrong End of the Telescope' *The Guardian* (17 February 2019) <www.theguardian.com/australia-news/2019/feb/18/neighbourhood-bully-australia-views-asia-through-the-wrong-end-of-the-telescope> accessed 18 June 2020

Merkouris P, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill Nijhoff 2015)

Meron T, 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78

Messineo F, 'Attribution of Conduct' in Nollkaemper A and Plakokefalos I (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014)

Meyer M and Isacson A, 'The "Wall" Before the Wall: Mexico's Crackdown on Migration at its Southern Border' (Report, WOLA 2019) <www.wola.org/analysis/mexico-southern-border-report/> accessed 2 February 2021

Milanovic M, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 EJIL 669

—— *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011)

—— 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56 HarvInt'l LJ 81

Miller T, 'More Than A Wall: Corporate Profiteering and the Militarization of US Borders' (Transnational Institute 2019) <www.tni.org/files/publication-downloads/more-than-a-wall-report.pdf> accessed 17 June 2020

Missbach A and Hoffstaedter G, 'When Transit States Pursue Their Own Agenda' (2020) 3 Migration and Society 64

Mitsilegas V, 'Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade' in Carrera S, Santos Vara J and Strik T (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019)

Mittelstadt M, Speaker B, Meissner D and Chishti M, 'Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11' (Fact Sheet, MPI 2011) <www.migrationpolicy.org/research/post-9-11-immigration-policy-program-changes> accessed 28 January 2021

Molinari C, 'The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) 44 EL Rev 824

Molnar P and Gill L, 'Bots at the Gate: A Human Rights Analysis of Automated Decision Making in Canada's Immigration and Refugee System' (2018) Citizen Lab and International Human Rights Program Research Report No 114 <https://citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf> accessed 26 January 2021

Moreno-Lax V, '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' (2008) 10 EJIL 315

— — 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 IJRL 174

— — 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Goodwin-Gill GS and Weckel P (eds), *Migration & Refugee Protection in the 21st Century: Legal Aspects - The Hague Academy of International Law Centre for Research* (Martinus Nijhoff 2015)

— — *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017)

— — *The Interdiction of Asylum Seekers at Sea: Law and (Mal)practice in Europe and Australia* (Policy Brief 4, Kaldor Centre for International Refugee Law 2017)

— — 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *SS and Others v Italy*, and the "Operational Model"' (2020) 21 German LJ 385

— — '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 and Motoc I (eds), *Migration and the European Convention on Human Rights* (OUP 2021)

— — 'Protection at Sea and the Denial of Asylum' in Costello C, Foster M and McAdam J (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) (forthcoming) <https://ssrn.com/abstract=3623029> accessed 3 February 2021

— — and Costello C, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Peers S, Hervey T, Kenner J and Ward A (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014)

— — and Papastavridis E, *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill Nijhoff 2016)

Morrison J and Crosland B, 'Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy' (2001) UNHCR New Issues in Refugee Research Working Paper No 39 <www.unhcr.org/research/working/3af66c9b4/trafficking-smuggling-refugees-end-game-european-asylum-policy-john-morrison.html> accessed 19 January 2021

Mouzourakis M, '"We Need to Talk about Dublin": Responsibility under the Dublin System as a Blockage to Asylum Burden-sharing in the European Union' (2014) RSC Working Paper Series No 105 <www.rsc.ox.ac.uk/publications/we-need-to-talk-about-dublin> accessed 19 January 2021

Mowbray AR, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004)

Moynihan H, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Research Paper, Chatham House 2016)

Mungianu R, *Frontex and Non-Refoulement: The International Responsibility of the EU* (CUP 2016)

Mussi F and Tan NF, 'Comparing Cooperation on Migration Control: Italy–Libya and Australia–Indonesia' in de Londras F and Mullally S (eds), *The Irish Yearbook of International Law*, vol 10, 2015 (Hart Publishing 2017)

NAFSA, 'Travel Ban: NAFSA Resources' (20 January 2021) <www.nafsa.org/professional-resources/browse-by-interest/executive-order-travel-ban-nafsa-resources> accessed 2 January 2021

Nafziger JAR, 'The General Admission of Aliens under International Law' (1983) 77 AJIL 804

Nahapetian K, 'Confronting State Complicity in International Law' (2002) 7 UCLA Journal of International Law and Foreign Affairs 99

NATO, 'Assistance for the Refugee and Migrant Crisis in the Aegean Sea' (20 June 2019) <www.nato.int/cps/en/natohq/topics_128746.htm> accessed 17 June 2020

—— 'Operation Sea Guardian' <https://mc.nato.int/missions/operation-sea-guardian> accessed 11 August 2020

Nessel LA, 'Externalized Borders and the Invisible Refugee' (2009) 40 ColumHumRtsLRev 625

Nethery A and Gordyn C, 'Australia-Indonesia Cooperation on Asylum-Seekers: A Case of "Incentivised Policy Transfer"' (2014) 68 AustJInt'l Aff 177

Nethery A, Rafferty-Brown B and Taylor S, 'Exporting Detention: Australia-Funded Immigration Detention in Indonesia' (2013) 26 JRS 88

Neumayer E, 'Unequal Access to Foreign Spaces: How States Use Visa Restrictions to Regulate Mobility in a Globalised World' (2006) 31 Transactions of the Institute of British Geographers 72

Nicolosi SF, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union' (2017) 23 ELJ 94

— — 'Refashioning the EU Visa Policy: A New Turn of the Screw to Cooperation on Readmission and to Discrimination?' (2020) 22 EJML 467

Noll G, *Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff 2000)

— — 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 IJRL 542

— — Fagerlund J and Liebaut F, *Study on the Feasibility of Processing Asylum Claims outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (Danish Centre for Human Rights and European Commission 2003)

Nollkaemper A, 'Introduction' in Nollkaemper A and Plakokefalos I (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014)

— — 'The Duality of Shared Responsibility' (2018) 24 Contemporary Politics 524

— — and Jacobs D, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MichJInt'l L 359

— — and Plakokefalos I (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014)

— — and Plakokefalos I, 'The Practice of Shared Responsibility in International Law: A Framework for Analysis' in Nollkaemper A, Plakokefalos I, Schechinger JNM and Kleffner JK (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017)

— — Plakokefalos I, Schechinger JNM and Kleffner JK, *The Practice of Shared Responsibility in International Law* (CUP 2017)

Nolte G and Aust HP, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law' (2009) 58 ICLQ 1

Nowak M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005)

Ogg K, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates' (2014) 33 RSQ 81

OHCHR, 'Differentiation between Migrants and Refugees' <www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf> accessed 16 November 2020

Oppenheim L and Lauterpacht H, *International Law: A Treatise* (Lauterpacht H ed, 8th edn, Longman 1955)

Owen D, 'Migration, Structural Injustice and Domination on "Race", Mobility and Transnational Positional Difference' (2020) 46 JEMS 2585

Panduranga H, Patel F and Price MW, 'Extreme Vetting & the Muslim Ban' (Report, Brennan Center for Justice 2017) <www.brennancenter.org/our-work/research-reports/extreme-vetting-and-muslim-ban> accessed 26 January 2021

Papastavridis E, 'II. European Court of Human Rights *Medvedyev et al v France* (Grand Chamber, Application No 3394/03) Judgment of 29 March 2010' (2010) 59 International and Comparative Law Quarterly 867

— — '"Fortress Europe" and FRONTEX: Within or Without International Law?' (2010) 79 NordJInt'l L 75

— — *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing 2013)

— — 'The Interplay Between Maritime Interdiction Operations and Human Rights Law' (2014) 1 Southern African Journal of Criminology 36

— — 'EUNAVFOR MED Operation Sophia and the Question of Jurisdiction over Transnational Organized Crime at Sea' (2016) 30 QIL Zoom-in 19 <www.qil-qdi.org/eunavfor-med-operation-sophia-question-jurisdiction-transnational-organized-crime-sea/> accessed 3 December 2020

— — 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 German LJ 417

Pauwelyn J and Elsig M, 'The Politics of Treaty Interpretation' in Dunoff JL and Pollack MA (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012)

Paz M, 'The Incomplete Right to Freedom of Movement' (2017) 111 AJIL 514

— — 'The Law of Walls' (2017) 28 EJIL 601

— — 'The Legal Reconstruction of Walls: *N.D. & N.T. v. Spain*, 2017, 2020' (2020) 22 NYU J Legis & Pub Poly 693

Pellet A, 'Decisions of the ICJ as Sources of International Law?' in Cannizzaro E, Cimiotta E, Napoletano N and Palchetti P (eds), *Gaetano Morelli Lectures Series: Decisions of the ICJ as Sources of International Law?* vol 2 (International and European Papers Publishing 2018)

Perrin D, 'Smuggling of Migrants: The Misused Spirit of the Palermo Protocol, in the Light of the Nigerien Experience' (*Border Criminologies*, 2020) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/05/smuggling> accessed 13 August 2020

Petrovic M, 'Freedom of Movement in the European Union: Visa Liberalisation in the Western Balkan Countries' (2010) LSE Migration Studies Unit Working Papers No 2010/04 <www.lse.ac.uk/government/Assets/Documents/pdf/research-groups/msu/WP-2010-04.pdf> accessed 19 January 2021

Phasuk S, 'Stop Inhumane Navy "Push-Backs"' *Bangkok Post* (22 September 2017) <https://m.bangkokpost.com/opinion/opinion/1328975/stop-inhumane-navy-push-backs> accessed 11 June 2020

Pierce S and Bolter J, 'Dismantling and Reconstructing the US Immigration System: A Catalog of Changes under the Trump Presidency' (Report, MPI 2020) <www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency> accessed 4 August 2020

Pijnenburg A, 'From Italian Pushbacks to Libyan Pullbacks: Is *Hirsi 2.0* in the Making in Strasbourg?' (2018) 20 EJML 396

— — 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control?' (2020) 20 HRLRev 306

Quigley J, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 BYBIL 77

Rachovitsa A, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66 ICLQ 557

Raible L, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020)

Rainey B, Wicks E and Ovey C, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, OUP 2017)

Raty T and Shilhav R, *The EU Trust Fund for Africa: Trapped between Aid Policy and Migration Politics* (Briefing Paper, Oxfam 2020)

Rayp G, Ruyssen I and Marchand K (eds), *Regional Integration and Migration Governance in the Global South* (Springer 2020)

Reinisch A, 'Securing the Accountability of International Organizations' in Klabbers J (ed), *International Organizations* (Routledge 2016)

Reyhani AN, 'Expelled from Humanity: Reflections on M.N. and Others v Belgium' (*Verfassungsblog*, 6 May 2020) <https://verfassungsblog.de/expelled-from-humanity/> accessed 25 August 2020

Riemer L, 'From Push-backs to Pull-backs: The EU's New Deterrence Strategy Faces Legal Challenge' (*FluchtforschungsBlog*, 16 June 2018) <https://blog.fluchtforschung.net/from-push-backs-to-pull-backs-the-eus-new-deterrence-strategy-faces-legal-challenge/> accessed 27 April 2020

Rietiker D, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*' (2010) 79 NordJInt'l L 245

Rijpma JJ, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' (2017) 2 European Papers 571 <www.europeanpapers.eu/en/e-journal/external_migration_and_asylum_management_accountability_for_executive_action> accessed 28 January 2021

Robinson WC, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck' (2004) 17 JRS 319

Rodenhäuser T, ‘Another Brick in the Wall: Carrier Sanctions and the Privatisation of Immigration Control’ (2014) 26 IJRL 223

Ryan B, ‘Extraterritorial Immigration Control: What Role for Legal Guarantees?’ in Ryan B and Mitsilegas V (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010)

—— and Mitsilegas V (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010)

Saddiki S, *World of Walls: The Structure, Roles and Effectiveness of Separation Barriers* (Open Book Publishers 2017)

Salter MB, ‘The Global Visa Regime and the Political Technologies of the International Self: Borders, Bodies, Biopolitics’ (2006) 31 Alternatives 167

Sassen S, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2008)

—— *Losing Control? Sovereignty in an Age of Globalisation* (Columbia University Press 2015)

Scheinin M, ‘The Right to Leave Any Country as a Human Right - Implications for Carrier Sanctions and Other Forms of Pre-Frontier Control’ (2000) 2 Turku Law Journal 127

Schermers HG and Blokker NM, *International Institutional Law: Unity within Diversity* (6th edn, Brill Nijhoff 2018)

Scholten S, *The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control* (Brill Nijhoff 2015)

—— and Minderhoud P, ‘Regulating Immigration Control: Carrier Sanctions in the Netherlands’ (2008) 10 EJML 123

Shachar A, *The Birthright Lottery: Citizenship and Global Inequality* (HUP 2009)

—— *The Shifting Border: Legal Cartographies of Migration and Mobility. Ayelet Shachar in Dialogue* (Manchester University Press 2020)

Shany Y, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law’ (2013) 7 Law & Ethics of Human Rights 47

Sharpe M, *The Regional Law of Refugee Protection in Africa* (OUP 2018)

Shaw MN, *International Law* (6 edn, CUP 2008)

Shepson S, ‘Jurisdiction in Complicity Cases: Rendition and *Refoulement* in Domestic and International Courts’ (2015) 53 ColumJTransnat’l L 701

Shue H, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton University Press 1996)

Sicilianos LA, ‘The European Court of Human Rights Facing the Security Council: Towards Systemic Harmonization’ (2017) 66 ICLQ 783

Simma B, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 Recueil des Cours de l’Académie de Droit International 217

—— and Alston P, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1988) 12 Aust YBIL 82

Sohn LB and Buergenthal T, *The Movement of Persons Across Borders* (American Society of International Law 1992)

Somin I, *Free to Move: Foot Voting, Migration, and Political Freedom* (OUP 2020)

Sopra Steria, ‘AI and Intelligent Automation’ <www.soprasteria.co.uk/capabilities/digital/ai-and-intelligent-automation> accessed accessed 20 February 2020

Spijkerboer T, ‘Moving Migrants, States, and Rights: Human Rights and Border Deaths’ (2013) 7 The Law & Ethics of Human Rights 213

—— ‘Wasted Lives. Borders and the Right to Life of People Crossing Them’ (2017) 86 NordJInt’l L 1

—— ‘Bifurcation of People, Bifurcation of Law: Externalisation of Migration Policy before the EU Court of Justice’ (2018) 31 JRS 216

—— ‘The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control’ (2018) 20 EJML 452

—— and Steyger E, ‘European External Migration Funds and Public Procurement Law’ (2019) 4 European Papers 493 <www.europeanpapers.eu/en/e-journal/european-external-migration-funds-and-public-procurement-law> accessed 28 January 2021

Staples H, ‘Adjudicating the External Schengen Border’ in Groenendijk K, Guild E and Minderhoud P (eds), *In Search of Europe’s Borders* (Kluwer Law International 2003)

Stoyanova V, ‘The Principle of *Non-Refoulement* and the Right of Asylum-Seekers to Enter State Territory’ (2008) 3 IJHRL 1

—— ‘Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the *Rantsev* Case’ (2012) 30 NQHR 163

—— ‘Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights’ (2018) 18 HRLRev 309

—— ‘The Disjunctive Structure of Positive Rights under the European Convention on Human Rights’ (2018) 87 NordJInt’l L 344

—— *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States’ Positive Obligations in European Law* (CUP 2018)

—— ‘The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law’ (2020) 32 IJRL 403

—— ‘The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling’ (2020) 21 German LJ 436

Strik T, ‘The Global Approach to Migration and Mobility’ (2017) 5 Groningen Journal of International Law 310

Talmon S, ‘The Responsibility of Outside Powers for Acts of Secessionist Entities ’ (2009) 58 ICLQ 493

Tan NF, ‘State Responsibility and Migration Control: Australia’s International Deterrence Model’ in Gammeltoft-Hansen T and Vedsted-Hansen J (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017)

—— ‘The Manus Island Regional Processing Centre: A Legal Taxonomy’ (2018) 20 EJML 427

—— ‘International Models of Deterrence and the Future of Access to Asylum’ in Juss SS (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019)

—— and Thomas Gammeltoft-Hansen, ‘Topographical Approach to Accountability for Human Rights Violations in Migration Control’ (2020) 21 German LJ 335

Taylor S, ‘Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?’ in McAdam J (ed), *Forced Migration, Human Rights and Security* (Hart Publishing 2008)

Tennis KH, *Outsourcing Control: The Politics of International Migration Cooperation* (McGill-Queen’s University Press 2020)

Thomas C, ‘What Does the Emerging International Law of Migration Mean for Sovereignty?’ (2013) 14 MJIL 392

Thym D, ‘A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR’s *N.D. & N.T.*-Judgment on “Hot Expulsions”’ (*EU Migration Law Blog*, 17 February 2020) <http://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/> accessed 31 March 2020

TLScontact, ‘What We Do’ <https://corp.tlscontact.com/visa-application> accessed 6 February 2021

Tonkin H, *State Control Over Private Military and Security Companies in Armed Conflict* (CUP 2011)

Torpey J, *The Invention of the Passport: Surveillance, Citizenship, and the State* (2nd edn, CUP 2018)

Trauner F and Manigrassi E, ‘When Visa-free Travel Becomes Difficult to Achieve and Easy to Lose: The EU Visa Free Dialogues after the EU’s Experience with the Western Balkans’ (2014) 16 EJML 125

Tsoukala A, ‘Looking at Migrants as Enemies’ in Bigo D and Guild E (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005)

Tzanakopoulos A, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (OUP 2011)

Tzevelekos VP, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (2014) 36 MichJInt’l L 129

UN, 'Refugees and Migrants' <https://refugeesmigrants.un.org/definitions> accessed 16 November 2020

UNHCR, 'Executive Committee' <www.unhcr.org/uk/executive-committee.html> accessed 3 August 2018

University of Michigan, 'The Michigan Guidelines on Refugee Freedom of Movement' (Eighth Colloquium on Challenges in International Refugee Law, Michigan, 2017)

US Embassy & Consulates in Mexico, 'The Merida Initiative' <https://mx.usembassy.gov/our-relationship/policy-history/the-merida-initiative/> accessed 4 February 2020

Uselli S, Di Filippo M, Marati E and Palm A (trs), 'Libya-Italy MoU' <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 3 December 2020

Vallet É (ed), *Borders, Fences and Walls: State of Insecurity?* (Routledge 2016)

Vari E, 'Italy-Libya Memorandum of Understanding: Italy's International Obligations' (2020) 43 Hastings Int'l & Comp L Rev 105

Vasak K and Liskofsky S (eds), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19-20 June 1972* (The American Jewish Committee 1976)

Vedsted-Hansen J, 'Article 28/Schedule' in Zimmermann A, Dörschner J and Machts F (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011)

Verdirame G, *The UN and Human Rights: Who Guards The Guardians?* (CUP 2011)

Viljoen F, *International Human Rights Law in Africa* (2nd edn, OUP 2012)

VisaHQ, 'About Us' <www.visahq.com/about_us.php> accessed 6 November 2019

Vollmer BA, 'Making Light of Borders: The Case of the External EU Border' (2012) 9 Migration Letters 131

Waldron J, 'Rights in Conflict' (1989) 99 Ethics 503

—— 'Security and Liberty: The Image of Balance' (2003) 11 Journal of Political Philosophy 191

—— 'Duty-bearers for Positive Rights' (2014) NYU School of Law Public Law Research Paper No 14-58 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510506> 19 October 2020

Warrell H, 'Home Office under Fire for using Secretive Visa Algorithm' *Financial Times* (9 June 2019) <www.ft.com/content/0206dd56-87b0-11e9-a028-86cea8523dc2> accessed 20 February 2020

Weinzierl R and Lisson U, *Border Management and Human Rights: A Study of EU Law and the Law of the Sea* (German Institute for Human Rights 2007)

Wellman CH and Cole P, *Debating the Ethics of Immigration* (OUP 2011)

Whelan FG, 'Citizenship and the Right to Leave' (1981) 75 APSR 636

Whyte B, 'Visa-free Travel Privileges: An Exploratory Geographical Analysis' (2008) 10 Tourism Geographies 127

Wilde R, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 Israel Law Review 503

Wolman A, 'The Role of Departure States in Combating Irregular Emigration in International Law: An Historical Perspective' (2019) 31 IJRL 30

Wood T, 'The Role of "Complementary Pathways" in Refugee Protection' (Report, Kaldor Centre for International Refugee Law 2020) <www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Complementary_Pathways_in_Refugee_Protection.pdf> accessed 1 December 2020

Wouters J, Brems E, Smis S and Schmitt P (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010)

— — 'Accountability for Human Rights Violations by International Organisations: Introductory Remarks' in Wouters J, Brems E, Smis S and Schmitt P (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010)

Zampagni F, 'Unpacking the Schengen Visa Regime. A Study on Bureaucrats and Discretion in an Italian Consulate' (2016) 31 Journal of Borderlands Studies 251

Zandonini G, 'Hundreds of Migrants Stuck in Niger Amid Coronavirus Pandemic' *Al Jazeera* (9 April 2020) <www.aljazeera.com/news/2020/04/hundreds-migrants-stuck-niger-coronavirus-pandemic-200409131745319.html> accessed 10 June 2020

— — and Bellina F, 'Niger, Part 1: At the Centre of a Brewing Militant Storm' *The New Humanitarian* (28 March 2019) <www.thenewhumanitarian.org/special-report/2019/03/28/niger-part-1-centre-brewing-militant-storm> accessed 28 June 2020

Zieck M, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 MichJInt'l L 21

Zolberg AR, 'The Archaeology of 'Remote Control'' in Fahrmeir A, Faron O and Weil P (eds), *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (Berghahn Books 2003)

— — 'The Exit Revolution' in Green NL and Weil F (eds), *Citizenship and Those Who Leave : The Politics of Emigration and Expatriation* (University of Illinois Press 2007)

— — 'Global Movements, Global Walls: Responses to Migration, 1885–1925' in Wang G (ed), *Global History and Migrations* (Routledge 2018)