British Institute of International and Comparative Law

EXIT RIGHTS, SEAMLESS BORDERS AND THE NEW CARCERAL STATE

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Abstract The human right to leave any country protects an intrinsic interest in free movement and is also a vital pre-condition to seeking asylum. The right to leave attracts little academic interest, but it is quietly being eroded. Exit restrictions in States of origin or transit have become an instrument of extraterritorial migration control for European Union Member States seeking to prevent the arrival of unwanted migrants. This article first explores the revival of exit restrictions, focusing on agreements between European destination States and select African States of departure. It argues that the adoption of exit restrictions from one State to prevent entry to another creates the paradox of seamless borders, where regulation of exit and entry are harmonized and fused to serve the singular objective of preventing entry to the destination State. The article further argues that the political and discursive coupling of anti-smuggling and search-and-rescue regimes occlude the rights-violating character of exit restrictions and enables breach of the right to leave to hide in plain sight. Additionally, current approaches to jurisdiction and State responsibility in regional and international courts render the prospect of destination State liability uncertain in circumstances where the destination State does not exercise legal and physical control over enforcement. The article draws on 'crimmigration' and border criminology literature to identify the common element of carcerality that connects confinement of migrants to the territory of departure States with migrant detention inside the territory. Beyond lamenting the erosion of exit rights, the article concludes by querying whether the erosion of the right to leave is symptomatic of a larger trend toward the regulation of mobility itself.

Keywords: exit rights, right to leave, right to seek asylum, migration, European Union, Libya, Italy, Tunisia, Smuggling Protocol, search and rescue, irregular departure.

I. INTRODUCTION

The human right to leave any country is being quietly and selectively eroded. It is not a widespread phenomenon, but it warrants inquiry. Why is it happening, and why does it matter? This article answers these questions by documenting

[*ICLQ* vol 73, October 2024 pp 891–929] doi:10.1017/S0020589324000381

the subversion of the right to leave any country, the practical, legal and discursive techniques that have enabled its decline to pass largely unremarked, and what this might signify for the regulation of mobility.

The right to leave any State, including one's own, is enshrined in international human rights instruments, including Article 13(2) of the Universal Declaration of Human Rights and Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR).[1] It also appears in regional human rights instruments in Europe, Africa, the Americas, Arab States and various specialized human rights instruments.[2] The right to exit has intrinsic value as an expression of liberty.[3] It is also a vital complement to refugee protection, because the refugee definition stipulates that a person must be outside their country of nationality to qualify for asylum. Absent a right to exit, a person would be deprived of the capacity to seek asylum. In 1968, political philosopher Hannah Arendt asserted that 'to depart for where we will is the prototypical gesture of being free'.[4] Banning departure from a State is itself a repressive measure targeting those who, in the words of AO Hirschman, wish to express their disaffection through exit rather than voice.[5] In Arendt and Hirschman's time, violation of the right to leave was typified by the Cold War exit restrictions imposed by communist regimes.

[1] Universal Declaration of Human Rights, UNGA Res 217 A(III) (adopted 10 December 1948) UN Doc A/RES/217(III), art 13(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 12(2) (ICCPR).

[2] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art 12(2); Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHRR 893, art 27; American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) art VIII; American Convention on Human Rights (Pact of San José) (entered into force 18 July 1978) OAS Treaty Series No 36 (1969) art 22(2); Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (adopted 26 May 1995, entered into force 11 August 1998) 3 IHRR 1, 212, art 22(2); Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (adopted 19 November 2012) art 15; Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, as amended by Protocol 11 (16 September 1963) ETS 46, art 2.2 (ECHR Protocol 4); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, art 5(d)(ii); International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (Apartheid Convention) art 2(c); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 10(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, art 8(1); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 18(1)(c).

[3] Exit rights under ICCPR (n 1) art 12(2) may be subject to limitations based on 'national security, public order (*ordre public*), public health or morals or the rights and freedoms of others'. Examples include restrictions on individuals charged with criminal offences, or persons subject to conscription.

[4] H Arendt, *Men in Dark Times* (Harcourt Brace 1968) 9.

[5] AO Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and State* (Harvard University Press 1970).

From 1990 onwards, exit restrictions gradually ended along with the communist regimes that imposed them. Within a couple of decades, however, a shift began among States and institutions of the Global North away from taking exit for granted as a fundamental right and toward regarding it as an inconvenient impediment to advancing State interests in a revised world order. The right to leave emerged in international legal instruments post-World War II in a period where it performed two conjoined purposes. Legally, a right to exit one State was linked to (and was a precondition for) the exercise of the right to seek asylum in another State under international refugee law.[6] Politically, the Cold War narrative portrayed exit restrictions as imprisoning citizens in totalitarian regimes, and gave the West another cudgel to wield in its ideological battle against communism.[7]As long as the paradigmatic refugee was the Soviet dissident defector, politics and law pointed in the same direction.

From a twenty-first-century securitization perspective, exit restrictions occupy a different political valence.[8] While the right to leave still appears in the text of various human rights instruments, its twentieth-century proponents have quietly switched teams. The States that championed exit rights now actively subvert them, seeking to contain migrants and asylum seekers as far away as possible from the European Union (EU), North America and Australia.

Enlisting States of origin or transit ('departure States') to prevent exit from their own territory has emerged as a tool for preventing entry into the territory of 'destination States'.[9] Violeta Moreno-Lax and Mariagiulia Giuffré dub this trend 'consensual containment'.[10] They join a handful of other scholars who provide incisive and critical analyses of the history and doctrine of exit rights under international law, especially in relation to refugees.[11] Scholarship under

[6] M Giuffré and V Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows' in SS Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

[7] In 1974, as the Soviet Union blocked attempts by Russian Jews (among others) to emigrate, US Congress passed the Jackson–Vanik Amendment, Trade Act of 1974 § 2101, 19 U.S.C. §§ 2432(a)–(e) (1988) which made normalization of US–Soviet trade relations conditional on Soviet bloc compliance with the internationally protected right to exit any country, including one's own. The strategy spectacularly backfired in April 1980, when Castro declared that any Cuban could depart via Mariel port without an exit visa. By the time the Mariel boatlift ended some six months later, about 125,000 Cubans (including people released from prisons and mental health facilities) had arrived in Florida.

[8] Eritrea and North Korea remain notorious for maintaining strict restrictions on exit. See B Milena and G Cole, 'The Right to Exit as National and Transnational Governance: The Case of Eritrea' (2022) IntlMigrr <https://doi.org/10.1111/imig.13078>; D Han, S Kim and K Lee, 'Freedom of Movement in North Korea' (Korea Institute for National Reunification, 2017) 45–57 <https://repo.kinu.or.kr/bitstream/2015.oak/8553/1/Freedom%20of%20Movement%20in%20North%20Korea.pdf>.

[9] The author recognizes that the labels 'departure State' and 'destination State' replicate a Global North perspective that tacitly regards populations of the Global South as prospective migrants, even though the majority of migration is in fact between States of the Global South.

[10] Giuffré and Moreno-Lax (n 6).

[11] N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27(3) EJIL 591; J McAdam, 'An Intellectual History of Freedom of Movement

the rubric of 'crimmigration' or 'border criminology' interrogates the criminalization of migration and the carceral character of migrant detention. This article complements and extends earlier work by exploring how criminalizing exit effectively abrogates the right to leave to create an uninterrupted regulatory apparatus directed at the prevention of entry. This is labelled the 'seamless border'. The concept of the 'carceral State' links the function of exit restrictions in confining actual or prospective migrants on the territory of a State, and the function of detention in confining migrants to dedicated carceral spaces within that territory.

The argument proceeds as follows: Section II explores the practical erosion of the right of exit as an element of externalization of border control, providing a range of examples and mechanisms through which departure States restrict exit in the service of preventing entry to destination States. The illustrations focus on cooperation between Member States of the EU and relatively proximate third States that are viewed as departure States for migrants and refugees,[12] and explain the legal, political and operational mechanisms through which the effacement of the right to leave is achieved and implemented. These include the criminalization of exit, the 'crime' of irregular departure, pull-backs at sea, and subsequent arbitrary detention, cruel, inhuman and degrading treatment, and *refoulement*.

Section III introduces the concept of 'seamless borders' to explain how exit restrictions by a departure State fuse with a destination State's entry restrictions to squeeze out the normative and physical space between the right to leave one country and entry into another. A seamless border thus creates an integrated apparatus for controlling movement. This is followed by an account of how the practical enjoyment of the right to leave is constrained by the architecture of international human rights provisions regarding mobility, legally occluded by the anti-smuggling regime, and replaced by the humanitarian mechanism

in International Law: The Right to Leave as a Personal Liberty' (2011) 12 MIJL 1; E Guild and V Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' in W Benedek et al (eds), *European Yearbook on Human Rights* (Intersentia 2018); F Mégret, 'Transnational Mobility, the International Law of Aliens, and the Origins of Global Migration Law' (2017) 111 AJILUnbound 13; V Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 32 IJRL 403; E McDonnell, 'Challenging Externalisation through the Lens of the Human Right to Leave' (2024) 71 NILR 119; G Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?' (2018) 4(2) ItalLJ 489; A Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control' (2020) 20(2) HRLRev 306.

[12] This article does not address the US relationship with Mexico and Central America, in which the US pressures Honduras, Guatemala and Mexico to prevent the exit of US-bound migrants caravans through less formalized means than those presented in this article. See B Corson and J Hallock, 'Intersecting Crises: Pandemic and Hurricanes add to Political Instability Driving Migration from Honduras' (Migration Information Source, 10 June 2021) <https://www.migrationpolicy.org/article/pandemic-hurricanes-political-instability-migration-honduras>; 'How Mexico is Helping Biden and Harris at the U.S. Border' *Washington Post* (Washington, DC, 14 September 2024) <https://www.washingtonpost.com/world/2024/09/14/mexico-migrant-border-merry-go-round/>.

of search and rescue (SAR).[13] The article turns next to addressing the impediments that regulating through exit restrictions creates for attributing legal accountability to the departure States that sponsor and support them.

Section IV draws on crimmigration and border criminology literature in revealing conceptual links between exit restrictions and migrant detention. Scholars focusing on migrant detention document the transition from a model of administrative detention to its contemporary character as a carceral space. It is argued that exit restrictions adopted to prevent entry to destination States render States of departure as the new 'carceral State', in which the State itself operates as a punitive space of confinement for detaining actual or prospective migrants who are unwanted by destination States.

Finally, the Conclusion queries whether current developments reveal that the commitment to a right of exit was always more fragile than supposed. Once shorn of its Cold War utility, the right to exit is exposed as politically dispensable. It may be that a paradigm of mobility organized around entry and exit is veering toward obsolescence and being replaced by a logic of governance over movement itself.

II. PREVENTING ENTRY BY PREVENTING EXIT

A. Externalization

Even before the Cold War ended, the vector of migration was changing. Post-war decolonization reversed the historic direction of flows from metropole to periphery among former colonial powers. From the 1980s onwards, asylum seekers from the Global South grew in absolute numbers and relative to those from Eastern Europe. The externalization of borders by States of the Global North is not new, and States often swap, emulate and adopt one another's policies.[14] Nor is it new that the targets of externalization are predominantly people who are racialized as Black or Brown. Recent scholarship and advocacy address contemporary bordering as a legacy of empire, the role of borders in maintaining and enforcing global racial hierarchies, and border violence as an extension of racial domination.[15] Simply put, race is everywhere in bordering.

[13] V Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-Through-Interdiction/Rescue-Without-Protection" Paradigm' (2018) 56(1) JComMarSt 119; P Pallister-Wilkins, The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evros' (2015) 9 IntlPolSociol 53.

[14] T Gammeltoft-Hansen and N Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5(1) JMigr&HumSec 28; D Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018); A Macklin, 'A Safe Country to Emulate' in H Lambert, J McAdam and M Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013).

[15] ET Achiume, 'Migration as Decolonization' (2019) 71(6) StanLRev 1509; ET Achiume 'Racial Borders' (2022) 110(3) GeoLJ 445; 'A Counter-Investigation into the Racist Massacre of 24 June 2022' (Border Forensics, 18 June 2024) <https://www.borderforensics.org/investigations/nadormelilla/#A_counter-investigation_into_the_racist_massacre_of_24_June_2022>.

https://doi.org/10.1017/S0020589324000381 Published online by Cambridge University Press

An array of mechanisms is deployed to prevent unwanted people from reaching States where they may enter irregularly and/or seek refugee protection.[16] States have progressed from requiring passports for international travel, to selective demands to obtain visas in advance at a consulate or embassy abroad and, most recently, to online electronic travel authorization that functions like a visa-lite for travellers from visa-exempt States. Excisions of territory and airport departure lounges create the legal fiction that State territory is not State territory for the purposes of enforcing migration and refugee law. Immigration officials from destination States are dispatched to airports abroad to vet passengers before they board flights. Carrier sanctions discipline private airlines and shipping lines for transporting improperly documented passengers and deputize them to scrutinize the validity of travel documents. Some States send deterrent advertisements directly or through international bodies like the International Organization for Migration (IOM).

Safe third-country designations require asylum seekers to submit their refugee claims in the first 'safe' country of arrival and authorize transfer of asylum seekers back to those States. They enforce a norm of responsibility sharing that distributes the responsibility to protect refugees according to a State's geographic proximity to the refugee-producing State because the closer the third State to the country of origin, the more likely it is that a migrant will pass through it en route to the ultimate destination State. The endpoint of these 'safe third country' regimes is to augment the responsibility of States of the Global South, who already host 75 per cent of the global refugee population.[17] Maritime interdictions in the form of push-backs are straightforward exercises of force whereby the coast guard of a destination State (eg Italy, Malta or Greece) intercepts vessels with migrants aboard and repels them to the territory of another State. Sometimes passengers are transferred back to authorities in the State of departure (eg Libya or Tunisia), and, sometimes, the vessels sink or capsize and people drown.[18] The Mediterranean Sea is the world's deadliest maritime crossing, with almost

[16] See, generally, A Macklin, 'Disappearing Refugees: Reflections on the Canada–US Safe Third Country Agreement' (2005) 36 ColumHumRtsLR 365; T Gammeltoft-Hansen and JC Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 ColumJTransnatlL 235.

[17] See 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 L180/31 (Dublin III Regulation); Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (5 December 2002) CTS 2004 No 2, as amended by Additional Protocol to the Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (29 March 2022) CTS 2023/3.

[18] Push-backs across land borders also occur. See, eg, Case C-392/22 *X v Staatssecretaris van Justitie en Veiligheid* ECLI:EU:C:2024:195, concerning push-backs by Poland into Belarus.

30,000 recorded dead or missing between 2014 and 2023.[19] Many more deaths are likely to remain unrecorded.

B. Making Exit Illegal

As an operational matter, States can externalize their entry controls and rely on the passive acquiescence of affected States. The last two decades, however, bear witness to an acceleration of extraterritorial tactics that engage other States in cooperative or coordinated action to prevent unwanted migrants or asylum seekers from reaching destination States.

The spectre of 'offshore disembarkation platforms' for asylum determination recedes and reappears with different State proponents. From 2022 to 2024, Britain doggedly pursued the UK and Rwanda Migration and Economic Development Partnership, whereby the United Kingdom (UK) would pay Rwanda to accept asylum seekers forcibly and permanently removed from the UK for asylum determination, settlement or repatriation. The plan was abandoned in mid-2024 by the newly elected Labour government. Italy's agreement with Albania to detain and deport asylum seekers interdicted at sea by Italian authorities was swiftly ruled unlawful by Italian courts in October 2024, but it is likely to be only a matter of time before another State revives and champions a similar scheme.[20]

Readmission agreements between States of departure and destination States facilitate deportation by the latter to the former. United States' (US) pre-clearance zones in Canadian and Irish airports enable the US to conduct border inspections in foreign airports, and 'juxtaposed' border controls allow the UK, France, Belgium and the Netherlands to do the same at certain cross-Channel routes. The efficacy of unilateral, bilateral and multilateral informal agreements, as well as privatized techniques of deterrence and deflection, are enhanced by increasingly sophisticated methods of surveillance, data

[19] IOM, 'Migration within the Mediterranean: Dead and Missing by Year' <https://missingmigrants.iom.int/region/mediterranean>; see also IOM, 'Calculating Death Rates in the Context of Migration Journeys: Focus on the Central Mediterranean' (IOM Global Migration Data Analysis Centre 2020) <https://publications.iom.int/system/files/pdf/mortality-rates.pdf>; IOM, 'Middle East and North Africa: Migrants Deaths and Disappearances in 2023 (IOM Middle East and North Africa 2023) <https://mena.iom.int/sites/g/files/tmzbdl686/files/documents/2024-06/2023-mmp-mena-annual-briefing.pdf>.

[20] Prior to being abandoned in 2024, the UK Supreme Court ruled the Rwanda plan unlawful, finding that Rwanda was not a safe country for purposes of return. *R (AAA and Others) v Secretary of State for the Home Department* [2023] UKSC 42. On Italy's agreement, see 'Italy's Albania Asylum Deal Has Become a Political Disaster for Giorgia Meloni' *The Guardian* (London, 14 November 2024) <https://www.theguardian.com/world/2024/nov/14/italy-albania-asylum-deal-complete-failure-giorgia-meloni>. For an early and critical analysis of exterritorial refugee processing, see G Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5(3) EurJMigr&L 303.

https://doi.org/10.1017/S0020589324000381 Published online by Cambridge University Press

collection, integration and sharing, including (but not limited to) biometric and artificial intelligence (AI) technology.[21]

In all instances, extraterritoriality complicates legal accountability for the direct or delegated exercise of legal authority. The European Court of Human Rights' (ECtHR) judgment in *Hirsi Jamaa v Italy*[22] addressed Italy's push-backs on the Mediterranean high seas. Italy intercepted a boat carrying 200 asylum seekers, forcibly returned them to Libya without allowing them to assert a refugee claim, and then transferred them to the Libyan authorities, who detained and subjected them to torture and/or cruel, inhuman and degrading treatment. Rejecting US Supreme Court precedent, the ECtHR ruled that Italy exerted extraterritorial jurisdiction over the applicants for the purposes of Article 1 of the European Convention on Human Rights (ECHR).[23] The Court found that the Italian push-backs violated Article 3 (torture and/or cruel, inhuman and degrading treatment) and Article 4 of Protocol 4 (collective expulsion) of the ECHR.[24]

Despite this ruling by the ECtHR, push-backs reportedly continue apace more than a dozen years later. Refugee advocates have found themselves in a cat-and-mouse game concerning jurisdiction. As Itamar Mann explains, State authorities read adverse decisions not as a lesson about respecting human rights, but rather as advice on how to relocate the locus of the human rights violation beyond the ECtHR's jurisdiction to adjudicate.[25] One tactic is to supplement or substitute push-backs by destination States with pull-backs by departure States.[26] The logic of a push-back is prevention of entry; the logic of a pull-back is prevention of exit. The context in which these practices arise makes it indisputable that these interceptions are conducted in the interests of, and at the behest of, destination States. The critical point is that destination States do not exert direct, physical control over the people who are immobilized by these practices, leading Giuffré and Moreno-Lax to label them 'contactless control'.[27]

[21] For detailed discussion on new technologies in migration control, see in this issue A Papachristodoulou, 'The Exercise of State Power over Migrants at Sea through Technologies of Remote Control: Reconceptualizing Human Rights Jurisdiction' (2024) 73 ICLQ 931.

[22] *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, 23 February 2012).

[23] Compare *Sale v Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

[24] European Convention on Human Rights and Fundamental Freedoms (1950) CETS 5 (ECHR).

[25] I Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights 1993–2013' (2013) 54(2) HarvIntlLJ 315.

[26] The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defined a pull-back as interception that is 'designed to physically prevent migrants from leaving the territory of their State of origin or a transit State (retaining State), or to forcibly return them to that territory before they can reach the jurisdiction of their destination State'. See UN Human Rights Council, '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, para 54.

[27] Giuffré and Moreno-Lax (n 6).

Desultory diplomatic efforts by destination States to persuade departure States to impede exit are not new, but anecdotal reports suggest that the practice gained momentum early in the new millennium. In 2000, Australia supplemented its maritime 'push-back' apparatus by entering into a Regional Cooperation Agreement with Indonesia and the IOM. Indonesia (with Australian financial, logistical and technical support) intercepts putatively Australian-bound third-country migrants and asylum seekers, and they are 'accommodated' in Indonesia while the IOM provides 'repatriation assistance' to return them to their countries of origin.[28] Indonesia is not a party to the Convention Relating to the Status of Refugees, and does not extend effective protection to refugees.[29] In 2006, the Conference of Ministers of the Western Mediterranean 'welcomed the efforts of the countries of the southern Mediterranean to contain illegal *emigration* to Europe'.[30] Indeed, Senegal boasted of arresting more than 1,500 'potential illegal emigrants' attempting to sail from Senegal to the Canary Islands.[31] Before Israel built a fence in 2012 to prevent Eritrean and Sudanese asylum seekers reaching Israel via the Sinai, Egypt acceded to Israel's request to 'work to prevent future infiltrations [into Israel] from its territory'.[32] The Egyptian military thereafter (and unilaterally) adopted a practice of shooting at asylum seekers—killing and wounding many—as they attempted to cross into Israeli territory via the Sinai.[33]

Although exit restrictions are pursued by various destination States, this article focuses on agreements by EU destination States with select departure States. A thread that runs through all of these practices is the creation or revival of laws in departure States that turn the exercise of a right to leave into an offence or crime of 'irregular departure'.

1. Libya and Tunisia

Italy and Libya concluded their first Treaty of Friendship, Partnership and Cooperation in 2008, while Muammar Gaddafi still ruled Libya.[34] A post-revolution Memorandum of Understanding (MOU) providing for readmission of expelled migrants followed in 2012, which was in force when the *Hirsi*

[28] A Dastyari and A Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19(3) HRLRev 435.

[29] Convention Relating to the Status of Refugees (signed 28 July 1951; entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention); see Dastyari and Hirsch ibid 442–4.

[30] C Rodier, 'Analysis of the External Dimension of the European Union's Asylum and Immigration Policies: Summary and Recommendations for the European Parliament' (Directorate-General for External Policies of the Union, 2006) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2006/374366/EXPO-DROI_ET(2006)374366_EN.pdf> (emphasis added).

[31] ibid.

[32] Human Rights Watch, 'Sinai Perils: Risks to Migrants, Refugees, and Asylum Seekers in Egypt and Israel' (2008) <https://www.hrw.org/report/2008/11/12/sinai-perils/risks-migrants-refugees-and-asylum-seekers-egypt-and-israel>.

[33] ibid.

[34] The Treaty is referenced in *Hirsi Jamaa and Others v Italy* (n 22) para 20.

https://doi.org/10.1017/S0020589324000381 Published online by Cambridge University Press

Jamaa case was litigated.[35] Five years later, in 2017, Italy and Libya's faltering Government of National Accord concluded a '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'.[36] The stated objective of the Italy–Libya MOU is to halt the flow of migrants through Libya to Italy across the Central Mediterranean route.[37] Under the MOU, Italy provides financial, technical, military, logistical and infrastructure support to Libya in exchange for blocking migrants' departure or intercepting them on boats, pulling them back to Libya, and detaining them in so-called 'reception centres'.[38] In this model, pull-backs by Libya replace push-backs by Italy. The European Council's Malta Declaration of 2017 endorsed the Italy–Libya MOU and pledged EU support.[39]

Migrants in Libya remain vulnerable to predation inside and outside detention. The Libyan Coast Guard and, more recently, the Tarek Bin Zayed (TBZ) militia, interfere with SAR efforts by non-governmental organizations (NGOs), reportedly let migrants drown, and brutalize those rescued by them.[40] Once pulled back to Libya and detained in 'reception centres', they are exposed to starvation, extortion, forced labour, enslavement, trafficking, torture and cruel and inhuman or degrading treatment, murder and *refoulement*.[41]

The United Nations (UN) Support Mission in Libya notes that 'the overwhelming majority of migrants and refugees are placed in indefinite detention pending deportation without being charged, tried or sentenced under applicable Libyan laws'.[42] Although Libya lacks a functioning government or justice system, it has enacted and revised laws from 1987

[35] *Hirsi Jamaa and Others v Italy* ibid.

[36] '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' (2017) (Italy–Libya MOU) <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>.

[37] M Micallef and T Reitano, 'The Anti-Human Smuggling Business and Libya's Political End Game' (Institute for Security Studies and The Global Initiative Against Transnational Organized Crime, 2017) <https://globalinitiative.net/wp-content/uploads/2018/01/Libya_ISS_Smuggling.pdf>.

[38] Italy–Libya MOU (n 36).

[39] European Council, 'Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route' (2017) <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>.

[40] F Marsi et al, 'European Powers Allow Shadowy Libyan Group to Return Refugees' (*Al Jazeera*, 11 December 2023) <https://www.aljazeera.com/features/longform/2023/12/11/with-europes-help-a-libyan-brigade-accused-of-killings-returns-refugees>.

[41] United Nations (UN) Human Rights Council, 'Report of the Independent Fact-Finding Mission on Libya' (20 March 2023) UN Doc A/HRC/52/83, paras 40–53.

[42] UN Support Mission in Libya and Office of the High Commissioner for Human Rights, 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' (20 December 2018) 25 <https://www.ohchr.org/sites/default/files/Documents/Countries/LY/LibyaMigrationReport.pdf>.

onwards to criminalize irregular migration. Libyan law allows for the automatic and indefinite detention, forced labour and deportation of those who commit the 'crime' of irregular departure, and provides the legal authority for enforcement via pull-backs.[43]

In July 2023, the EU and Tunisia entered into an MOU[44] which promotes various economic and trade initiatives, as well as measures to enhance 'cooperation in combating and reducing irregular migration flows', in the context of a 'migration/development nexus'.[45] Indeed, this relatively recent MOU can be viewed as extending the earlier pattern of bilateral or multilateral mobility partnership agreements dating from the 1990s and early 2000s. In exchange for financial, technical and operational support, the prospect of enhanced 'legal mobility' and 'legal pathways' for Tunisians seeking access to the EU, Tunisia undertakes to facilitate repatriation of irregular Tunisian migrants from the EU, and to improve 'coordination of search and rescue operations at sea'.[46] This coordination translates into official affirmation of Tunisian pull-backs, a practice that predates the 2023 MOU.[47]

As with Libya, Tunisian pull-backs are authorized by domestic laws prohibiting exit through 'illicit' means, which includes departure at an unofficial border crossing, or through fraud, impersonation or use of false documents. Unlike Libya, Tunisian law also prohibits Tunisian citizens from exiting without prior authorization. Similar laws exist in Morocco and Algeria. Maximum imprisonment terms range from months (Algeria and Morocco), to 20 years (Tunisia).[48] The Tunisian law criminalizing 'irregular entry and exit' and 'any act of assistance to irregular migrants and asylum seekers' dates from 2004, a year after Tunisia entered into an MOU with Italy.[49] Human rights organizations report that migrants intercepted by Tunisia are subject to beatings and robbery during apprehension and after

[43] ibid 24–5. Law No. (2) of 2004 amending certain provisions of Law No. (6) of 1987 on organising the entry and residence of foreigners in Libya, art 1 <https://security-legislation.ly/sites/default/files/lois/841-Law%20No.%20%282%29%20of%202004_EN.pdf>; Law No. (19) of 2010 on Combatting Illegal Immigration (28 January 2010) arts 2, 6 <https://security-legislation.ly/latest-laws/law-no-19-of-2010-on-combatting-illegal-immigration/>.

[44] European Commission, 'Press Release: Memorandum of Understanding on a Strategic and Global Partnership between the European Union and Tunisia' (16 July 2023) (EU–Tunisia MOU) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3887>.

[45] ibid, preamble, para 5.

[46] ibid, para 5.

[47] F Raach, H Sha'ath and T Spijkerboer, 'Country Report: Tunisia' (2022) <https://www.asileproject.eu/wp-content/uploads/2022/08/D5.2_WP5-Tunisia-Country-Report-Final.pdf>.

[48] Stichting Landelijk Ongedoumenteerden Steunpunt, 'Post-Deportation Risks: A Country Catalogue of Existing References' (2018) <http://www.stichtinglos.nl/sites/default/files/los/CountryCatalogueDEF18-10-17.pdf >.

[49] 'Organic Law [Tunisia] No. 2004-6 of February 3, 2004, amending and supplementing Law No. 75-40 of May 14, 1975, relating to passports and travel documents, JORT n°11 of February 6, 2004, pages 252 et seq', as cited in fn 6 in F Raach, 'Tunisia–EU Cooperation in Migration Management: From Mobility Partnership to Containment' (2024) <https://www.asileproject.eu/wp-content/uploads/2024/02/ASILE-POLICY-BRIEF-Tunisia.pdf>.

return to Tunisia, and then expelled en masse across the land borders in remote and dangerous desert locations.[50]

Noting the decline in maritime migrant arrivals in Italy after 2017, the IOM observed the rise in the number of interceptions conducted by Tunisia and Libya:

> The … number of people being returned to North African shores has increased in recent years. Interceptions by the Tunisian and Libyan coast guards accounted for 8 percent of all search and rescue operations in the Central Mediterranean in 2016, but by 2018, 49 percent of the total number people recorded attempting to cross were brought back to Tunisia or Libya. This shift can be attributed to several factors, including the decreased maritime patrol area of Italian authorities and the shift of EU/Frontex assets from maritime vessels to drones incapable of conducting rescue at sea.[51]

In 2022, the IOM reported that 58,900 migrants departed Tunisia via the Central Mediterranean, of which 26,500 (45 per cent) were intercepted and pulled back to Tunisia.[52] Of those returned, 29 per cent were Tunisian. The same IOM report notes that during the same year 24,738 migrants were intercepted by the Libyan Coast Guard and returned to Libya (31 per cent of those departing Libya).

2. *The Balkans and Turkey*

In 2013, the Council of Europe's Commissioner for Human Rights reported that Central and Eastern European States selectively restricted the exit of Roma in order to avoid jeopardizing visa-free access to EU Member States:

> What appears to be happening in the Western Balkans is that as EU member states increase pressure on these states to the effect that if the numbers of their nationals applying for asylum in the EU does not decrease, then all nationals of the state will be subjected to a mandatory visa requirement (again), the authorities of these states are seeking to restrict the departure of individuals who they consider at risk of applying for asylum, that is, the Roma.[53]

Western Balkan States are not unique in their willingness to trade the mobility of marginalized citizens for the promise of enhanced access to the EU for preferred citizens. The 2016 EU–Turkey Statement committed Turkey to readmitting asylum seekers, including Syrians, who had entered Greece from Turkey, in exchange for the EU resettling Syrian refugees via legal pathways in the

[50] Human Rights Watch, 'African Migrants Intercepted at Sea, Expelled' (2023) <https://www.hrw.org/news/2023/10/10/tunisia-african-migrants-intercepted-sea-expelled>.

[51] IOM, 'Migration within the Mediterranean' <https://missingmigrants.iom.int/region/mediterranean>.

[52] IOM and UNHCR, 'Migrant and Refugee Movements through the Central Mediterranean Sea, Joint Annual Overview for 2022' (2022) 2 <https://dtm.iom.int/sites/g/files/tmzbdl1461/files/reports/UNHCR-IOM%20Joint%20Annual%20overview%20for%202022-%20FINAL.pdf>.

[53] Council of Europe, 'The Right to Leave a Country' (2013) 48 <https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510>.

same proportion.[54] Even prior to the EU–Turkey Statement, Turkey required Syrian refugees with temporary protected status in Turkey to obtain 'the permission of the Directorate General [of Migration Management] as a condition of lawful exit from Turkey'—a form of exit law.[55] In the Statement, Turkey also pledged to 'take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and [to] cooperate with neighbouring states as well as the EU to this effect'.[56] In practice, this cooperation appears to involve a combination of push-backs by Greece and pull-backs by Turkey of migrants suspected of using Turkey to transit to European destinations. For example, in 2022 to 2023, the Turkish Coast Guard/Police reported that it had prevented or intercepted 100,000 asylum seekers attempting to cross the Aegean Sea to Greece. About 60 per cent of the boats pulled back by Turkey had also been pushed back by Greece.[57] Turkey's Deputy Minister of the Interior also reported that in March 2022, 'Turkish authorities stopped 17,587 irregular migrants in the country who were trying to make it to Europe "illegally".'[58] Turkey currently hosts the largest number of refugees (mostly Syrian) in the world.

3. *Cameroon and Niger*

Whereas the cooperative regimes described above rely on bilateral agreements, Cameroon is unique because it incorporates into domestic law a pre-emptive restriction on exit for the purpose of 'illegal' entry elsewhere. With French technical, logistical and enforcement support, Cameroon has formally created the crime of exiting Cameroon with the intention of entering another State unlawfully.[59]

Under the aegis of an EU-supported anti-smuggling campaign, Niger swept facilitation of 'illegal exit' into its definition of smuggling in 2015, and introduced carrier sanctions for, inter alia, Nigerien bus companies transporting people within Nigerien borders who did not possess documentation proving Nigerien citizenship or authorized presence in

[54] European Council, 'EU–Turkey Statement, 18 March 2016' (2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

[55] Grand National Assembly of Turkey, 'Law No. 6458: Law on Foreigners and International Protection' (2013) <https://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/02/law_on_foreigners_and_international_protection.pdf>. The exit permission requirement was maintained by Turkey after the 2016 Statement went into effect.

[56] European Council (n 54) para 3.

[57] Aegean Boat Report, 'Annual Report 2022' <https://aegeanboatreport.com/annual-reports/#jp-carousel-9081>. Daily Sabah, 'Türkiye Rescues 25,000 Pushed-Back Migrants in 2023' (2 January 2024) <https://www.dailysabah.com/politics/turkiye-rescues-25000-pushed-back-migrants-in-2023/news>.

[58] InfoMigrants, 'Turkey Stops 168 Italy-Bound Migrants in the Aegean' (22 April 2006) <https://www.infomigrants.net/en/post/39681/turkey-stops-168-italybound-migrants-in-aegean>.

[59] MJ Alpes, 'Airport Casualties: Non-Admission and Return Risks at Times of Internalized/Externalized Border Controls' (2015) 4(3) SocSci 742.

https://doi.org/10.1017/S0020589324000381 Published online by Cambridge University Press

Niger.[60] This extensive regulation of mobility both within and at Niger's borders provoked considerable backlash. The domestic unpopularity of these migration regulations 'from beyond' is evinced in the fact that within months of a military coup in Niger in July 2023, the new regime repealed the 2015 anti-migration law that criminalized transporting non-citizens within Nigerien territory.

Anecdotally, Amanda Bisong reports that a Nigerian court convicted a dozen Nigerians deported from Niger for 'attempting to irregularly migrate to Europe through Niger', even though no Nigerian law criminalizes 'irregular emigration'.[61] Niger and Cameroon (and at least one Nigerian court) formally turned their own law into an extension of other States' extraterritorial migration enforcement apparatus, capturing not only migrants transiting through their territory, but their own nationals.[62] Among other impacts, these EU-incentivized exit restrictions, in tandem with bilateral arrangements with individual African States, undermine and thwart regional free movement initiatives of the Economic Community of West African States (ECOWAS).[63]

Legacies of colonialism and race shape the dynamic between States of departure and destination—with one notable exception that proves the rule. Under the terms of the 2018 Anglo-French Sandhurst Agreement (renewed in 2023),[64] the UK agreed to pay France to patrol French beaches to prevent irregular small-boat departures across the English Channel. While the Agreement manifestly failed to stem the movement of people crossing the Channel in small boats, it appears that the French Gendarmerie, acting as border guards, have resorted to violence to prevent departures.[65]

[60] République de Niger (2015) Loi 2015-36 relative au trafic illicite de migrants; J Brachet, 'Manufacturing Smugglers: From Irregular to Clandestine Mobility in the Sahara' (2018) 676(1) AnnalsAmAcadPol&SocSci 16; as Spijkerboer notes, few Nigeriens possess identity documents proving nationality, and citizens of Economic Community of West African States (ECOWAS) do not require travel documents to enter Member States. T Spijkerboer, 'The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger' in P Minderhoud, S Mantu and K Zwaan (eds), *Caught in Between Borders: Citizens, Migrants and Humans. Liber Amicorum in Honour of Prof. Dr. Elspeth Guild* (Wolf Legal Publishers 2019).

[61] A Bisong, 'EU External Migration Management Policies in West Africa: How Migration Policies and Practices in Nigeria Are Changing' (*ASILE* Forums, 2021) <https://www.asileproject.eu/eu-external-migration-management-policies-in-west-africa/>.

[62] 'Niger's Military Government Repeals Anti-Migration Law after Nine Years' (*Al Jazeera*, 28 November 2023) <https://www.aljazeera.com/news/2023/11/28/nigers-military-government-repeals-anti-migration-law-after-eight-years>.

[63] C Castillejo, 'The Influence of EU Migration Policy on Regional Free Movement in the IGAD and ECOWAS Regions' (2019) <https://www.die-gdi.de/uploads/media/DP_11.2019.pdf>; L Landau, 'A Chronotope of Containment Development: Europe's Migrant Crisis and Africa's Reterritorialization' (2019) 51(1) Antipode 169; Spijkerboer (n 60).

[64] United Kingdom–France Summit Communiqué (18 January 2018) (Sandhurst Agreement) <https://assets.publishing.service.gov.uk/media/5a81f0ba40f0b62302699fc3/2018_UK-FR_Summit_Communique.pdf>, renewed in UK–France Joint Leaders' Declaration (10 March 2023) <https://www.gov.uk/government/publications/uk-france-joint-leaders-declaration/uk-france-joint-leaders-declaration>.

[65] M Jaeger et al, 'Feasibility Study on the Setting up of a Robust and Independent Human Rights Monitoring Mechanism at the External Borders of the European Union' (Pro Asyl, 4 May 2022) 138–9 <https://www.proasyl.de/wp-content/uploads/Feasibility-Study-FINAL.pdf>.

C. Coordination and Cooperation

The exchange of material benefits for preventing exit illustrates the use of conditionality to persuade departure States to advance EU destination States' migration policy goals. Today, States of departure anticipate substantial remuneration in money, military equipment and infrastructure from destination States who contract with them to intercept migrants on their territory or in territorial waters. An obvious asymmetry of power structures these arrangements in a manner that subordinates the interests of departure States in facilitating regional and transnational mobility. Many States of departure rely on remittances from nationals working abroad and have little domestic motive to discourage emigration. They may also wish to reap the benefits of regional free movement regimes. Of course, some States hope that restraining the departure of migrants who are unwanted by the destination States will open up lawful channels for the admission of their own nationals. So, halting the migration of some is done with the expectation of facilitating the emigration of others, to the economic, diplomatic and reputational benefit of the State of departure.[66] However, improved access for nationals has not yet materialized for the origin States.

Collusion between States of departure and destination raises critical questions regarding the complicity and responsibility of EU destination States in human rights violations ensuing from prevention of exit, especially maritime pull-backs.[67] At the operational level, national coast guards and border enforcement officials in Italy, Greece and Malta coordinate and cooperate with their counterparts from countries of origin or transit in intercepting migrants on dinghies and boats, in obstructing maritime rescue by civil society actors, and in facilitating pull-backs. The European Border and Coast Guard Agency (Frontex) is an important team member. Frontex was created by regulation in 2004 with a mandate of integrating management of the surveillance and control of external borders by individual States. Initially, it played a coordinating and technical support role, but its mandate, budget and personnel expanded significantly over the course of four major amendments to its founding regulation between 2007 and 2019, especially after the Syrian crisis in 2015.[68]

[66] L Garcia Andrade and E Frasca, 'The Memorandum of Understanding between the EU and Tunisia: Issues of Procedure and Substance on the Informalisation of Migration Cooperation' (EU Immigration and Asylum Law and Policy, 26 January 2024) <https://eumigrationlawblog.eu/the-memorandum-of-understanding-between-the-eu-and-tunisia-issues-of-procedure-and-substance-on-the-informalisation-of-migration-cooperation/?print=print>.

[67] Guild and Stoyanova (n 11); Markard (n 11); Giuffré and Moreno-Lax (n 6); Pijnenburg (n 11).

[68] 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 L295/1. Rather than depending on staff contributed by Member States, Frontex now has its own armed standing corps (projected to reach 10,000 by 2027), see M Gkliati, 'The New European Border and Coast Guard: Do Increased Powers Come with Enhanced

https://doi.org/10.1017/S0020589324000381 Published online by Cambridge University Press

Frontex now boasts the largest budget of any EU agency. The EU Commission's 2023 European Integrated Border Management strategy conjoins national authorities and Frontex into the European Border and Coast Guard.[69] Frontex is empowered to exercise enforcement powers akin to national border/coast guards, and to monitor, surveille and conduct risk analysis of irregular migration at the EU external borders. It can develop and participate in joint operations with Member States and with third countries, gather and share data, and execute returns to third countries. One commentator describes EU external border management as 'increasingly hybrid in nature featuring a "multi-actor" European Border and Coast Guard, comprised of Frontex and national competent authorities often interacting in convoluted ways, subject to heterogenous legal frameworks combining EU and national law'.[70]

Frontex is widely reported to cooperate in push-backs, pull-backs and disruptions of maritime rescue.[71] The role of Frontex in maritime operations in the Mediterranean has instigated allegations of human rights abuses and an absence of accountability mechanisms, culminating in media disclosure of a damning investigatory report by the EU anti-fraud watchdog.[72] Frontex Executive Director Fabrice Leggeri resigned in 2022. Frontex's specific role in Libyan and Tunisian pull-backs was documented by Border Forensics and Human Rights Watch in 2022 and 2023.[73] In 2024, a Swedish coast-guard officer confirmed that Frontex continues to collaborate in Libyan pull-backs: 'As soon as we see a migrant boat leave Libya, for example, we call [Libyan authorities] and try to persuade them to take them back. And a lot of the time we succeed.'[74]

An obvious and critical question is whether the EU role in pull-backs brings their actions within the jurisdiction of any court or tribunal for the purpose of attributing liability. Before turning to this issue, however, it is important to assess critically the significance of restricting exit from one State in order to prevent entry to another in relation to the asymmetry between rights of exit

Accountability?' (EU Law Analysis, 17 April 2019) <http://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html>.

[69] See European Commission, 'Establishing the multiannual strategic policy for European integrated border management' COM (2023) 146 final.

[70] F Coman-Kund, 'Hybrid EU External Border Management: Frontex, the Rule of Law, and the Quest for Accountability (Verfassungsblog, 6 September 2022) <https://verfassungsblog.de/hybrid-eu-external-border-management/>.

[71] See, eg, 'Analysis: Criticism of Frontex's Operations at Sea Mounts' (Statewatch, November 2012) <https://www.statewatch.org/media/documents/analyses/200-frontex-search-rescue.pdf>.

[72] European Anti-Fraud Office (OLAF), 'Final Report: Investigation into FRONTEX, Case OC/2021/0451/A1' <https://cdn.prod.www.spiegel.de/media/00847a5e-8604-45dc-a0fe-37d920056673/Directorate_A_redacted-2.pdf>.

[73] Human Rights Watch/Border Forensics, 'Airborne Complicity: Frontex Aerial Surveillance Enables Abuse' (8 December 2022) <https://www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse>.

[74] 'Frontex Collaboration with Libya: "We Call Them and Try to Persuade Them to Take Them Back"' (Statewatch, 12 June 2024) <https://www.statewatch.org/news/2024/june/frontex-collaboration-with-libya-we-call-them-and-try-to-persuade-them-to-take-them-back/>.

and entry under international human rights law. Maritime pull-backs present the issue starkly.

III. SEAMLESS BORDERS

The high seas represent a rupture in the contiguous patchwork quilt of bordered territory over the surface of the earth; in practical terms, the high seas are the only place where an individual right to leave can be exercised without simultaneously confronting a concomitant State prerogative to exclude. This absence of a sovereign claiming jurisdiction over the high seas helps explain the coordination and cooperation among State actors to control human mobility in nautical space, over which no single State can claim sovereignty.

The bilateral and multilateral arrangements whereby destination States proffer funds, resources, technology, resources and infrastructure in exchange for departure States' restrictions on exit by sea go beyond externalization of migration control by destination States and point toward the paradox of seamless borders. Where prevention of exit from one State conjoins politically, legally and operationally with prevention of entry to another State (or States), bordering fuses rather than separates the authority of national sovereigns. This functional articulation of exit and entry policies of different States seals the border from both sides. In the case of the high seas, it transforms a borderless space into a nautical border zone, where the border happens wherever a State actor confronts a migrant. It represents the terminus of strategies to confine migrants, potential migrants, and refugees in departure States unless and until their movement is authorized by destination States.

The resort to exit restrictions as a means of preventing entry is not concealed. The task is less to expose the phenomenon than to explain how it can hide in plain sight. This section opens with an account of the asymmetry of exit and entry and the difference between the right of an individual, the power of a State, and the right of a State in relation to mobility (Section III.A). It then explains how the conjunction of anti-smuggling and SAR represents States as victims of rights violations by smugglers and as humanitarian actors when assisting in pull-backs (Section III.B). Finally, this section identifies the hurdles of State responsibility and jurisdiction that hamper efforts to pursue legal liability for violations of the right to leave against both departure and destination States (Section III.C).

A. Asymmetry Between Entry and Exit

Under international law, individuals possess a right to exit any State, but no right to enter another. This asymmetry creates the obvious dilemma that the right of an individual to leave any State is hollow if no other State has a duty to admit them. The formal and evasive answer offered by international law is that the right to leave may be frustrated but is not abrogated by the absence

of a right to enter any other State. The answer from liberal political theory is that sovereignty, self-determination, and stability as a self-governing political community, require that States control entry and membership, but the same principles do not justify restricting exit.[75]

The ICCPR expresses the asymmetry by defining the scope of the protected right (or freedom) and its limitations in different ways. Article 12 articulates three general norms regarding freedom of movement. First, everyone 'lawfully within the territory of a State' enjoys freedom of movement within that State. Second, everyone has the right to exit any country, including their own. Third, everyone has the right to enter and remain in their 'own country'.[76]

The right to exit any State, including one's own, seems to require little explanation or justification within a legal framework that centres freedom as the absence of State coercion.[77] Indeed, the 1868 Burlingame Treaty between China and the US disclaimed Imperial China's prohibition on emigration of Chinese subjects, affirming 'the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects …'.[78] Andrew Wolman notes that various attempts from the late nineteenth century to the interwar years to produce international agreements to combat 'irregular migration' through exit restrictions ultimately failed to win sufficient support.[79] Vincent Chétail argues that the right to leave any State has attained the status of customary international law.[80] As noted earlier, the right to leave is also a vital complement to the right to seek asylum.

The right to leave is the broadest of the mobility rights under the ICCPR because, unlike free movement within a State or the right to enter one's 'own' country, the right of exit does not depend on lawful presence or membership in the State. Nevertheless, exit may be limited for reasons of

[75] Rainer Baubock offers a qualified defence of the asymmetry, concluding (somewhat reluctantly) that 'in a world of extreme inequalities of wealth and political stability between countries, however, states cannot avoid treating emigration and immigration asymmetrically'. R Baubock, 'Free Movement and the Asymmetry between Exit and Entry' (2006) 4(1) Ethics&Econ 1.

[76] ICCPR (n 1) art 12(1), (2), (4). See, generally, C Harvey and R Barnidge, 'The Right to Leave One's Own Country Under International Law' (Global Commission on Migration, 2005) <https://www.iom.int/sites/g/files/tmzbdl486/files/2018-07/TP8.pdf>.

[77] Baubock (n 75); Guild and Stoyanova (n 11); C Harvey and R Barnidge, 'Free Movement and the Right to Leave in International Law' (2007) 19(1) IJRL 1; McAdam (n 11).

[78] Treaty between China and the United States 1868 (signed 28 July 1868, entered into force 23 November 1869) 16 Stat 739, Treaty Series 48, art V. Less than two decades later, of course, the US reversed course and embarked on a series of racist laws and policies that restricted the entry of Chinese immigrants.

[79] A Wolman, 'The Role of Departure States in Combating Irregular Emigration in International Law: An Historical Perspective' (2019) 31(1) IJRL 30.

[80] Chétail also describes it as a right enjoying 'a long historical pedigree primarily grounded on the philosophy of natural law', V Chétail, 'The Transnational Movement of Persons under General International Law – Mapping the Customary Law Foundations of International Migration Law' in V Chétail and C Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 10.

national security, public order (*ordre public*), public health or morals.[81] For example, the legality of the various COVID-19 pandemic restrictions on entry and exit imposed by States depends on the interpretation of 'public health' and non-arbitrary limitations on Article 12 rights. Commonly accepted limitations on the right to exit concern persons subject to conscription and the criminally accused facing trial.

The right to enter one's 'own country' is narrowest in scope because it protects only citizens and those who might be functionally equivalent to citizens, but once established, it permits few exceptions. A restriction on the right of entry must be non-arbitrary, and the Human Rights Committee (HRC) has declared repeatedly that 'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.[82]

The obverse of this narrow but virtually unqualified right of entry into one's 'own country' is that non-nationals have no right to enter a country that is not their 'own'. This, in turn, is frequently recast into the misleading proposition that, as expressed by the ECtHR in *Saadi v Italy*, '… as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens'.[83]

The author has argued elsewhere that the right of a State under international law to exclude non-citizens is a right against the State of nationality (which owes a reciprocal duty to readmit its citizen), not against non-citizens as individuals. International law recognizes the rights of States against other States, not against individuals, and under international human rights law, individuals have rights against States, but not vice versa. Thus, non-citizens do not possess a human right to enter a State, nor do States have a *right* to exclude non-citizens. Rather, States exercise a sovereign *power* to exclude non-citizens, but this power, like other State powers, is subject to the constraints of international human rights. Confusing the power of a State to exclude with a right to exclude is a formal error with profound normative repercussions.[84] Yet it is undeniable that border control is commonly represented as a right of States against non-citizens that flows from the principle of sovereignty. Casting State power to exclude as a State 'right' matters because the exercise of a right requires no justification beyond itself: 'I can do X because I have a right to do X.' It also facilitates the depiction of States as victims of rights violations when unwanted migrants (including refugees) attempt entry, instead of orienting the inquiry to whether and how

[81] ICCPR (n 1) art 12(3).

[82] UN Human Rights Committee, 'General Comment No. 27, Freedom of Movement (Article 12)' (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 21.

[83] *Saadi v Italy* App No 37201/06 (ECtHR, 28 February 2008) para 124.

[84] A Macklin, 'Liminal Rights: Sovereignty, Constitutions and Borders' in M Tushnet and D Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar 2023).

the exercise of State power to exclude might violate an individual right to leave or to seek asylum. The next section explains how the discursive disappearance of the migrant as a rights-bearing legal subject is enabled by the coupling of the anti-smuggling regime with the practice of maritime SAR.

B. States as Victims and Heroes

Until the end of the twentieth century, international law did not regulate mobility through criminalization. This changed with the adoption of the UN Convention against Transnational Organized Crime,[85] supplemented by the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol),[86] the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol),[87] and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms Protocol).[88]

The Smuggling Protocol prohibits profit-driven facilitation of 'illegal entry'. The Trafficking Protocol is directed at the coerced movement of people within and across borders for purposes of exploitation.[89] It matters that trafficking and smuggling of people are located in an instrument dedicated to suppression of transnational organized crime rather than, for example, the protection of human or labour rights. It is also significant that the movement of people is placed alongside the trade in firearms. Like illicit guns, illicit people figure as dangerous contraband commodities that organized crime actors transport across borders, inflicting harm on the destination State.[90]

Even though trafficked persons (unlike smuggled persons) are depicted as victims of the private actors who exploit them, their vulnerability is subordinate to the victimization of the State by smugglers and traffickers. It is first and foremost the State, not smuggled or trafficked people, that is victimized by transnational organized criminals. That the State is the primary victim of a

[85] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

[86] Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 12 December 2000, entered into force 28 January 2004) 2241 UNTS 507 (Smuggling Protocol).

[87] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Trafficking Protocol).

[88] Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (adopted 31 May 2001, entered into force 3 July 2005) 2326 UNTS 209 (Firearms Protocol).

[89] Precedent does exist for the regulation of the sex trade, known in the late nineteenth and early twentieth centuries as the 'white slave' trade.

[90] A Macklin, 'At the Border of Rights: Migration, Sex-Work and Trafficking' in N Gordon (ed), *From the Margins of Globalization: Critical Perspectives on Human Rights* (Lexington Books 2004).

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criminal offence is consistent with the structure of domestic criminal law where the State (and not the individual victim) prosecutes perpetrators in the name of the sovereign.[91]

The EU anti-smuggling framework diverges in certain respects from the international approach. It embeds smuggling into a broader framework that is explicitly aimed at criminalizing irregular migration. The legal framework was established in 2002 with the 'facilitators package', consisting of a Council Directive and Council Framework Decision directed against the facilitation of unauthorized entry, transit and residence. The Decision defines smuggling and promotes the harmonization of minimum penalties and escalating sanctions among Member States.[92] Notably, the definition of smuggling does not require that smugglers gain a financial or material benefit. It permits, but does not require, exemption for those who act on humanitarian grounds. Domestic prosecution of humanitarian actors, SAR NGOs, family members and even smuggled persons themselves reveals that suppressing organized crime does not drive policy or enforcement; indeed, it is widely recognized that few smugglers belong to any 'organized crime' network anyway. Rather, anti-smuggling is simply a tool for criminalizing irregular entry as part of the EU's larger project of 'migration management'.[93]

In 2023, an Italian court referred a case to the Court of Justice of the EU on the question of whether the prosecution of a Congolese mother for smuggling her daughter and niece breached the EU Charter of Fundamental Rights.[94] A few months later, the European Commission proposed a Directive on smuggling to replace the facilitators package with minimum rules that would, inter alia, specify that a smuggling offence requires facilitation of entry, transit or stay

[91] Within the Protocols, another indicator of the primacy of the State as victim is evinced by the fact that the States owe no legal obligations to protect trafficking victims on their territory. Art 7 of the Trafficking Protocol (n 87) advises States Parties to 'consider' adopting measures that enable trafficked victims to remain in the territory of the receiving State temporarily or permanently 'in appropriate cases', taking into account humanitarian and compassionate factors. Art 8 counsels that repatriation 'shall preferably be voluntary'. These exhortations are carefully phrased in the language of discretion. The sovereign powers to determine entry and residence, and to expel, remain carefully untouched by the Smuggling and Trafficking Protocols.

[92] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17; and Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the intentional facilitation of unauthorised entry, transit and residence of a migrant on the territory of a Member State (2002/946/JHA) [2002] OJ L328/1. The package provides for a common definition of smuggling humans and the harmonization of national penal frameworks.

[93] F Patanè et al, 'Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of *Scafisti* in Italy' (2020) 39(2) RefugeeSurvQ 123; E Becatoros, 'Greece Criminalizes Migration, Prosecutes Aid Workers: Critics' *Globe and Mail* (Toronto, 15 November 2021) <https://www.theglobeandmail.com/world/article-greece-criminalizes-migration-prosecutes-aid-workers-critics/>.

[94] Case C-460/23, *Kinshasa*: Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023—Criminal proceedings against OB [2023] OJ C338/12. For discussion of the *Kinshasa* reference, see V Mitsilegas, 'Reforming EU Criminal Law on the Facilitation of Unauthorised Entry: The New Commission Proposal in the Light of the *Kinshasa* Litigation' (2024) 15(1) NJECL 3.

where the accused receives a financial or material benefit or creates a 'high likelihood of causing serious harm to a person'.[95] It does not, however, explicitly exempt familial or humanitarian assistance.

The logic of anti-smuggling, with its focus on how people cross borders, contrasts with the logic of the Refugee Convention, which constrains State power based on why people cross borders. Note that the means of movement (such as being smuggled) and the motives for movement (such as fleeing persecution) are fundamentally different. That someone is smuggled discloses nothing about whether they are a refugee, or the human rights consequences of excluding them. Article 31 of the Refugee Convention provides that refugees should not be penalized for entering or remaining irregularly, recognizing that desperate people will take desperate measures in order to obtain refuge.[96] In other words, the means of entry cannot be held against someone whose reasons for entry make them a refugee.

As a matter of law, anti-smuggling regimes cannot derogate from human rights obligations contained in other international instruments, including *non-refoulement*, non-penalization of irregular entry under the Refugee Convention, or the right to leave under the ICCPR, the ECHR and other instruments. As a matter of fact, they do. Most people who are apprehended and repelled at the EU's external borders are nationals of conflict-ridden and/or repressive regimes. Whether they would qualify for asylum is unknowable in the absence of the opportunity to seek it. There are no lawful, regular migration routes for asylum seekers, or for the many migrants whose desperation does not register in the refugee definition. It is incontrovertible that restrictive migration laws create the market for smugglers, and that the conditions that impel people to move will not improve through policy interventions designed to deter movement. Notwithstanding the structural factors that produce and perpetuate irregular migration, anti-smuggling provides States with an attractive explanation rooted in international and EU law that foregrounds rights (of States), crime (against States) and victimization (of States first, and migrants, second). The problem is smugglers, migrants are their contraband cargo, and the solution is to break the smugglers' business model to prevent the importation of contraband.[97] Within this framework, migrants lose their status as rights-bearing legal

[95] European Commission, 'Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA' COM (2023) 755 final. For a critical analysis of the proposed Directive, see Mitsilegas ibid; and G Sanchez, L Achilli and F Alagna, 'The EU's New Counter-Smuggling Directive Proposal: Persisting Challenges and Recommendations towards Implementation' (EUI Migration Centre Policy Brief, January 2024) <https://cadmus.eui.eu/bitstream/handle/1814/76397/RSC_PB_2024_01.pdf?sequence=1>.

[96] Refugee Convention (n 29) art 31.

[97] For example, the European Council's 2017 Malta Declaration promotes 'efforts to disrupt the business model of smugglers through enhanced operational action, within an integrated approach involving Libya and other countries on the route'. European Council (n 39) art 6(b).

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subjects; rather, they are dangerous commodities—much like the weapons that are the subject of the Firearms Protocol—contraband humans to be managed and eliminated in the name of vindicating the State's 'right' to exclude.

This presentation of States as the primary victims of smugglers is incomplete, as the tragedy of people drowning in sinking boats in the Mediterranean creates overwhelming political pressure on States for a humanitarian response. Operationally, this response of destination States is not grounded in the legal obligations imposed by the Refugee Convention or human rights law. Instead, it is located within the humanitarian apparatus of maritime SAR.[98] Smugglers exploit and endanger migrants by setting them adrift in overcrowded, unseaworthy boats, callously abandoning them unless States intervene and rescue them. This enables interdiction and pull-backs to be depicted as fundamentally benevolent SAR operations in which State actors heroically rescue migrant victims from evil smugglers, rather than as forcible returns to departure States (who perpetrate grave human rights abuses, including *refoulement*).[99]

While EU leaders acknowledge SAR as a legal duty, the practice is imbued with a humanitarian and discretionary character that masks its role in the larger framework of halting migration. SAR is organized around the urgent and immediate need to save lives that are episodically endangered at sea. The structural causes that produce maritime emergencies, and the predictable consequences of interception by brutal and corrupt State actors, lie outside the borders of the humanitarian snapshot that focuses on saving lives in a moment of crisis. The logic of anti-smuggling produces a narrative where the suffering and death of migrants in transit is tragic, but attributable to bad choices by individuals who attempt to migrate through irregular means, and to the smugglers they hire. States of departure and/or destination who engage in SAR act seemingly heroically from a perch of innocence and humanitarian duty.

As a humanitarian undertaking, SAR will always be reactive, and always fall short of saving the lives of everyone at risk, especially as EU actors progressively disengage from direct intervention and outsource rescue to departure States.[100] Within a SAR model, it matters little whether the life is saved by an NGO vessel or the Italian or Libyan coast guard, or where the

[98] See Ciliberto (n 11) 503–10.

[99] For example, the 'EU Action Plan for the Central Mediterranean' aims to 'develop jointly targeted actions to prevent irregular departures, support more effective border and migration management, and reinforce search and rescue capacities, in full respect of fundamental rights and international obligations'. European Commission, Migration and Home Affairs, 'EU Action Plan for the Central Mediterranean' (21 November 2022) para 3 <https://home-affairs.ec.europa.eu/eu-action-plan-central-mediterranean_en>. The dismal human rights record of Libya and Tunisia regarding returned migrants is described in Section II.B.1.

[100] V Moreno-Lax, 'A New Common European Approach to Search and Rescue? Entrenching Proactive Containment' (*EU Immigration and Asylum Law and Policy Blog*, 3 February 2021) <https://eumigrationlawblog.eu/a-new-common-european-approach-to-search-and-rescue-entrenching-proactive-containment/?utm_source=rss&print=print>.

rescued people disembark. But within a model of combatting irregular migration to the EU, it matters that State authorities practically and legally obstruct NGO vessels in their rescue operations, and that brutality and *refoulement* await migrants intercepted by Libya and Tunisia. And, of course, migrants inevitably disappear and drown in these incidents, serving as a cautionary tale to others who might follow. The notion that possible rescue from drowning operates as a 'pull factor' drawing migrants to the EU can be used to rationalize exposing some or many migrants to death by drowning and signals the subordination of SAR to the imperative of combatting irregular migration. The resort to exit restrictions is not denied in this narrative. Rather, it can be 'laundered into an ethically sustainable strategy of border governance'[101] where preventing exit protects migrants from smugglers and pull-backs rescue them from smugglers.

The role of departure States in this regime is to immobilize migrants unwanted by Europe by preventing departure and/or by pulling them back if they do set sail. The Italy–Libya MOU usefully illustrates the operation of this jurispathic tactic of eradicating refugee and human rights law and supplanting it with anti-smuggling/trafficking law and SAR. The preamble of the Italy–Libya MOU declares the parties' 'resolute determination to cooperate in identifying urgent solutions to the issue of clandestine migrants crossing Libya to reach Europe by sea', and sets out eight substantive articles in furtherance of suppressing irregular migration.[102] These include Italian financial and technical support for Libyan border guards and coast guards, the creation of 'reception centres' to detain irregular migrants with a view to their voluntary or forced removal to countries of origin, and cooperation with international organizations that facilitate removal to countries of origin.[103] The MOU also commits to job creation initiatives to enable Libyans to replace income generated by migrant smuggling and trafficking.[104] The MOU appears to have enjoyed some success on this front: the same criminal organizations and militia that previously profited from the lucrative business of smuggling and trafficking in migrants have, thanks to Italy, transitioned into the more profitable occupation of policing the Libyan coast to prevent departure. As one Libyan militia leader put it, 'Right now, in Libya, you are either in the smuggling business or the anti-smuggling business.'[105] These militia perform both tasks with exceptional violence, cruelty and lethality.[106] Nowhere in the Italy–Libya MOU do the words 'refugee' or 'asylum' appear, except by implication in the oblique undertaking to 'interpret and apply the present Memorandum in respect of the international obligations and the

[101] Moreno-Lax (n 13) 119.
[102] Italy–Libya MOU (n 36).
[103] ibid, arts 1, 2, respectively.
[104] ibid, art 2.
[105] Micallef and Reitano (n 37) 9.
[106] ibid; Clingendael Netherlands Institute of International Relations, 'Multilateral Damage: The Impact of EU Migration Policies on Central Saharan Routes' (2018) <https://www.clingendael.org/sites/default/files/2018-09/multilateral-damage.pdf>.

https://doi.org/10.1017/S0020589324000381 Published online by Cambridge University Press

human rights agreements to which the two Countries are parties'.[107] The right to leave any country and the right to seek asylum sink from view.

The Italy–Libya MOU, like the EU–Tunisia MOU, demonstrates how the asymmetry between entry and exit rights can be resolved by flipping the problem. Instead of rationalizing how the right to leave a State can be preserved despite an inability to enter another, the right to leave is simply discarded in order not to frustrate the right of another State to exclude. The new offence of 'irregular departure' does the necessary semantic work. Preventing 'irregular departures' is an explicit objective of the EU Anti-Smuggling Operational Partnerships with States of departure.[108] Preventing irregular departure articulates perfectly with preventing irregular entry. No asymmetry remains. The alignment of exit with entry is seamless.

This brings the discussion full circle: a right that Chétail describes as 'fundamentally at the heart of the theory of human rights',[109] a right whose breach was once regarded as a paradigmatic form of repression by communist States, turns out to be a right that is expendable. Today, of course, the threat to exit rights comes from destination States[110] who staunchly defended the right to leave, yet now regard exit restrictions as an attractive (or at least unobjectionable) mechanism of migration control.

C. Legal Accountability

Legal challenges to exit restrictions against both departure States and their destination State sponsors have recently gathered momentum in various forums. The prospects for accountability are dimmed by an array of practical, procedural and theoretical challenges that complicate the attribution of State responsibility and jurisdiction to adjudicate extraterritorial conduct under international and regional instruments. Indeed, one attraction of pull-backs from an EU perspective is that they distance destination States from the direct, physical contact that triggered liability for extraterritorial push-backs in the *Hirsi Jamaa* case. In other words, evading jurisdiction under human rights instruments is the whole point of destination State-sponsored pull-backs. This section offers a survey of current litigation against exit

[107] Italy–Libya MOU (n 36) art 5.

[108] European Commission, 'A renewed EU action plan against migrant smuggling (2021–2025)' COM (2021) 591 final. Preventing irregular departures from Egypt, Libya and Tunisia is identified in the subsequent EU Action Plan for the Central Mediterranean, see European Commission, Migration and Home Affairs (n 99), as well the Action Plan for the Eastern Mediterranean in respect of Turkey. It does not appear in Action Plans for the Western Mediterranean or Western Balkans.

[109] Chétail (n 80) 10.

[110] See, eg, A Stilz, 'Is There an Unqualified Right to Leave?' in S Fine and L Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (OUP 2016); L Ypi, 'Justice in Migration: A Closed Borders Utopia?' (2008) 16(4) JPolPhil 391; G Brock and M Blake, *Debating Brain Drain: May Countries Restrict Emigration?* (OUP 2015).

restrictions in regional and international forums. No case has proceeded to hearing, been adjudicated, or otherwise reached a resolution.

Before it was repealed, the pre-2023 Nigerien law was subject to a complaint to the ECOWAS Court of Justice[111] on the basis that it impeded the free movement guarantees under ECOWAS and under Article 12 (right to leave) of the African Charter on Human and Peoples' Rights.[112] Otherwise, most of the litigation to date targets Libya as departure State and Italy, Malta and/or Greece as destination States, as well as the EU Agency, Frontex.[113]

A coalition of NGOs submitted a Communication to the UN HRC in 2020 regarding the role of Libya, Italy and Malta in violating, inter alia, the right to leave any country under Article 12(2) of the ICCPR.[114] The same coalition also initiated a request with the African Commission on Human Rights to investigate Libyan atrocities against migrants.[115]

In an Article 15 Communication to the Office of the Prosecutor (OTP) of the International Criminal Court launched in 2022, the European Center for Constitutional and Human Rights, the International Federation for Human Rights, and Lawyers for Justice in Libya alleged violations of international criminal law in respect of Libyan pull-backs.[116] The Communication called on the OTP to investigate 24 named officials in Libyan, Maltese, Italian and EU agencies (including Frontex) concerning the coordinated EU–Libya interdictions of migrants in the Central Mediterranean by Libya. It argued that pull-backs constitute crimes against humanity, and identified the officials as co-perpetrators who formulated a 'common plan' to intercept and return migrants to Libya, making 'essential contributions' to operationalizing the plan, with knowledge of the exploitation and abuse (amounting to a crime against humanity) that Libya perpetrated on migrants and refugees.

[111] See McDonnell (n 11). The complaint remains outstanding although the offending laws have been repealed.

[112] African Charter (n 2).

[113] Frontex is only subject to the jurisdiction of the Court of Justice of the EU.

[114] Association for Juridical Studies on Migration (ASGI) and the Cairo Institute for Human Rights Studies (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' (24 July 2020) <https://sciabacaoruka.asgi.it/en/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/>.

[115] ASGI and CIHRS, 'NGO Coalition Request to African Commission on Human Rights to Probe Atrocities Against Migrants in Libya' (29 October 2022) <https://sciabacaoruka.asgi.it/en/the-african-commission-on-human-and-peoples-rights-must-condemn-atrocities-committed-against-migrants-in-libya/>. See E van der Wal, 'Exploring the African Accountability Avenue: Libya's Responsibility for Violating the Right to Leave under Article 12 (2) ACHPR through Pullback Operations' (2024) VU Migration Law Working Paper No 22.

[116] Article 15 Communication to the Office of the Prosecutor. Only an Executive Summary of the November 2022 Communication is publicly available, see European Center for Constitutional and Human Rights, 'Situation in Libya – Article 15 Communication to the ICC Prosecutor on the Commission of Crimes Against Migrants and Refugees: Interceptions at Sea and Return to and Detention in Libya are Crimes Against Humanity' (2022) <https://www.ecchr.eu/fileadmin/user_upload/ECCHR_Executive_Summary_ICC_Libya.pdf>.

Since destination States deliberately refrain from direct physical participation in pull-backs, or the enforcement of exit restrictions, attribution of State responsibility before international or regional institutions is particularly contentious. As previously noted, evading judicial scrutiny is widely assumed to be one of the objectives of the multi-actor, informalized, dispersed and externalized governance of European border control, including the measures directed at preventing 'irregular departures'.[117]

The International Law Commission (ILC) Draft Articles on State Responsibility[118] address customary law principles of attribution to States for acts or omissions that breach international legal obligations. Only States can formally invoke the responsibility of another State for its wrongful acts and pursue remedies of cessation and reparation before the ICJ. However, national, regional and international tribunals rely on the ILC Draft Articles for interpretive guidance in attributing State responsibility across a range of legal forums and contexts. Chapter IV of the Draft Articles addresses collaboration among States in the commission of wrongful acts, and Article 16 deals specifically with complicity in the form of one State aiding and abetting the commission of an internationally wrongful act by another State.[119] Establishing a destination State's complicity in a departure State's breach of the right to leave, along with the human rights violations entailed by pull-backs, detention and *refoulement*, would require proof that Libya's conduct constituted a wrongful act or acts and that Italy substantially contributed to the commission of the wrongful acts. Beyond the causal nexus, Italy's assistance would require knowledge of the circumstances that made Libya's actions wrongful and awareness of the serious risk that Libya would act in breach its international obligations.[120]

[117] Giuffré and Moreno-Lax (n 6) 85 (the 'ultimate goal is … to sever any jurisdictional link with EU countries, in an attempt to elude any concomitant responsibility'). This view is widely shared among scholars and activists. See, eg, T Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) 20 EurJMigr&L 373, 380; European Center for Constitutional and Human Rights ibid iv: 'The transformation of this engagement with Libya by EU Member States and EU agencies has largely been driven by the latter's interest in avoiding the legal obligations triggered when people seeking protection arrive on EU Member States' territory or within their respective scope of responsibility at sea.'

[118] ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) II(2) UNYBILC, Annex to UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, corrected by UNGA Corrigendum (6 June 2007) UN Doc A/56/49(Vol. I)/Corr.4 (ILC Draft Articles on State Responsibility) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>.

[119] ibid. For a more detailed consideration of the application of art 16, as well as art 17 (direction and control) and art 47 (direct responsibility), see Giuffré and Moreno-Lax (n 6) 101–7; Pijnenburg (n 11) 327–31; Dastyari and Hirsch (n 28).

[120] For detailed analysis of the application of the ILC Draft Articles on State Responsibility (n 118) to Italy in relation to Libyan pull-backs, see Pijnenburg (n 11); M Kos, 'Italy's Responsibility under International Law for Human Rights Violations of Migrants Intercepted at Sea and Returned to Libya by the Libyan Coast Guard with the Support of Italy' (2019) VU Migration Law Working Paper No 19 <https://acmrl.org/wp-content/uploads/2024/04/MigrationLawSeries19MaartenKos-1.pdf>.

Turning from general principles of international legal responsibility to the domain of international human rights law, the most significant procedural hurdle is jurisdiction. The attribution of wrongful conduct to a State is analytically distinct from the existence of a jurisdictional link between the State and the individual suffering harm under human rights law. The key question in respect of EU States is whether jurisdiction under the ECHR or the ICCPR extends to extraterritorial conduct where the State does not exercise physical control over the victims of alleged human rights violations. The answer remains unclear.

Among States that apply exit restrictions directly, Turkey, Libya, Tunisia, Cameroon and Niger are parties to the First Optional Protocol of the ICCPR.[121] Among destination States implicated in pull-backs, Greece, Italy and Malta are also parties. In early 2021, the HRC issued a decision under the ICCPR arising out of communications against Italy for its failure to rescue a ship in distress in 2013, which resulted in the drowning of more than 200 migrants, including at least 60 children.[122] The HRC determined that while the ship was located beyond the territory of both Malta and Italy, the requirement of a jurisdictional link between Italy and the victims was satisfied because the victims 'were directly affected by decisions taken by the Italian authorities in a manner that was reasonably foreseeable'.[123] This approach to jurisdiction combines both causality (the effect of Italy's decisions on victims) and objective foreseeability of harm flowing from those decisions.[124]

The *Hirsi Jamaa* case involved a push-back by Italy to Libya, where Italy's *de jure* and *de facto* control over the passengers on board Italian military ships—and thus extraterritorial jurisdiction under the ECHR—was relatively straightforward.[125] However, a case raising the issue of jurisdiction in the absence of physical control has been pending before the ECtHR since 2018. In *SS and Others v Italy*, the Global Legal Action Network and 17 survivors have alleged that Italy, pursuant to the Italy–Libya MOU of 2017, coordinated, facilitated and supported the Libyan Coast Guard's interference with the NGO Sea Watch's rescue of a vessel in distress and the subsequent interception of the vessel by the Libyan Coast Guard. Sea Watch rescued 59

[121] See UN Treaty Collection, Status of Treaties, Human Rights (Ch IV) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en#EndDec>.

[122] *AS and Others v Italy* Comm No 3042/2017 (27 January 2021) UN Doc CCPR/C/130/D/3042/2017.

[123] ibid, para 7.8. A communication against Malta as State Party was ruled inadmissible due to a failure to exhaust local remedies. *AS and Others v Malta* Comm No 3043/2017 (13 March 2020) UN Doc CCPR/C/128/D/3043/2017.

[124] In *Munaf v Romania* the HRC found that 'A State party may be responsible for extraterritorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extraterritorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time.' *Munaf v Romania* Comm No 1539/2006 (30 July 2009) UN Doc CCPR/C/96/D/1539/2006, para 14.2.

[125] *Hirsi Jamaa and Others* (n 22) paras 76–82.

https://doi.org/10.1017/S0020589324000381 Published online by Cambridge University Press

passengers but at least 20 people drowned, and 47 were pulled back to Libya and into detention.[126]

The ECtHR's criteria for extraterritorial jurisdiction, set out in *Al-Skeini v United Kingdom* and applied subsequently in *Hirsi Jamaa*, enumerate three bases for personal jurisdiction. The first emerges from acts of diplomatic or consular officials, the second arises from the State's exercise of public powers, and the third occurs where the State exerts actual authority and physical control.[127] None apply neatly to 'contactless control', where the identity of the State exercising power in a collaborative multi-State enterprise is not the State exercising physical control. In extraterritorial scenarios, the current interpretation of the three bases of jurisdiction risks incentivizing and rewarding States' exploitation of this lacuna by developing governance models that 'game the system' to evade jurisdiction. At the same time, attenuating the nexus required between State and individual in order to establish jurisdiction risks creating a theoretically and practically unstable universalization of human rights responsibility.

Violeta Moreno-Lax responds to the risk of exploitation by States by proposing a 'functional' approach to jurisdiction that does not focus narrowly on the exercise of control at the precise moment of rights violation. Rather, her approach enquires whether the State asserts effective (but not necessarily exclusive) control in the creation and operation of a system that imposes material effects on individuals. Her reinterpretation of the 'public powers' branch of jurisdiction develops a conception of effective control that aggregates policy-making and operational implementation, as well as legislative, executive and adjudicative actions. She measures effectiveness by outcomes that determine a course of events culminating in interception and pull-back, rather than by insisting on physical force or presence at the moment of interception.[128] This revision attempts to confront and resist the tactical dispersal of control among States by refashioning the indicia of control to respond to models of governance that are informalized, complex, multi-actor and collaborative. One consequence is the possibility of concurrent jurisdiction of more than one State under international human rights law.[129]

[126] The specific facts of the case are summarized by Violeta Moreno-Lax, who is also a litigation advisor to the Global Legal Action Network. V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model"' (2020) 21(3) GermLJ 385, 388–90. For a detailed account, see C Heller and L Pezzani, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration across the Mediterranean' (Forensic Oceanography, 4 May 2018) <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>.

[127] *Al-Skeini v United Kingdom* [Grand Chamber] App No 55721/07 (ECtHR, 7 July 2011).

[128] Moreno-Lax (n 100).

[129] This does not determine the separate question of whether all States can or will be parties before a given court.

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Vladislava Stoyanova is alert to the risk of universalizing human rights responsibility and cautions against expansive approaches to human rights jurisdiction that attenuate the required nexus between State and individual. She contends that the normative predicate of jurisdiction in human rights law (unlike general international law) presupposes an exclusive relationship between the legal subject and the sovereign that transpires within a bounded political community of interdependent political equals. Decisions and actions by the State distribute burdens and benefits within that community, in which members of the community participate and the State ostensibly governs to advance the common interest. Calculating and incorporating the interests of 'outsiders' to this relationship cannot be inserted easily into this model. Nor can the claim to an exclusive relationship of political authority accommodate concurrent sovereignty by more than one State even if, for example, Italy actively participates in the extraterritorial regulation of migrants. Stoyanova reaches the grim conclusion that existing jurisdictional principles ensure that the 'interests of the individuals as protected by human rights law cannot be opposed to the interests of the States that actually exercise powers in ways that seriously harm these individuals'.[130]

There is force to these arguments, although one may query whether Stoyanova takes sufficient account of the normativity of the relationship created between States and non-citizens through the principle of *non-refoulement*. The eventual ECtHR judgment in *SS and Others v Italy* may reveal whether a governance model that disperses authority and control across different actors, entities, instruments and operations can successfully 'game' the system of jurisdiction. If so, perhaps the law will permit Italy to do indirectly to migrants what *Hirsii Jamaa* says they cannot do directly, which is ensure the delivery of Italy-bound migrants and asylum seekers to Libya.

Even assuming that the jurisdictional hurdles in *SS and Others v Italy* can be surmounted, adjudication of the merits requires a determination of whether Libya's exit restrictions in law and practice violate the right to leave any country, such that Italy breaches its own obligations under the ECHR through its cooperation and assistance.[131] Since Libyan law imposes a general prohibition on exit by a non-citizen without a visa, the conclusion that Libya breaches its own legal obligation to respect the right to leave seems compelling.[132]

A 2024 decision by a first-level Italian Civil Court illustrates how States can try to 'change the channel' on a human rights narrative and try to replace it with

[130] Stoyanova (n 11) 423.

[131] Another potential obstacle to adjudication of the right to leave (but not *refoulement)* is the principle that a court should not adjudicate the legality of conduct by a State that is not a party before the court. See Ciliberto (n 11) 525–6.

[132] Some scholars address the objection that the right is not violated where migrants could exit to neighbouring States, but the generality of the Libyan law restricting exit refutes the premise of the claim.

a SAR script. In March 2024, a SAR NGO (SOS Humanity) was conducting a rescue operation when the Libyan Coast Guard intervened and directed it to cease and depart. SOS Humanity refused, and was subsequently detained in Italy after disembarking survivors, on the grounds that it had ignored orders from Libyan authorities and thereby endangered the lives of the migrants. In other words, SOS Humanity unlawfully thwarted a Libyan Coast Guard SAR operation. The Civil Court of Crotone resisted the claim that the Libyan Coast Guard was, in fact, conducting a rescue operation, despite the narrative constructed by the Italy–Libya MOU. Instead, it found that the Libyan Coast Guard was armed and violent, firing shots at both the migrants' and the SOS Humanity vessels, and subjected migrants to extreme abuse during and after their return to Libya. After reviewing the evidence, the court concluded that:

> As things stand, Libya cannot be considered a safe place within the meaning of the [1979] Hamburg [SAR] Convention, as the Libyan context is characterised by gross and systematic human rights violations and Libya has never ratified the 1951 Geneva Refugee Convention. … All these elements are sufficient to exclude the existence of any qualification of the operations carried out by the Libyan coastguard … as rescue operations, in the sense recognised by the multiple international sources.[133]

Assuming that higher courts are similarly unconvinced by the re-casting of Libyan pull-backs as benevolent SAR operations, the legal analysis will focus on whether Italy's complicity in Libya's breach of exit rights (among other violations) is justified by reference to the permissible justifications for restrictions on the right to leave under Article 2(3) of Protocol 4 to the ECHR. Limitations on the exercise of the right must be 'in accordance with law and … 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'.[134]

Halting 'irregular migration' appears to be the objective motivating Italy to collaborate in obstructing the right to leave Libya. The ECtHR considered the legitimacy of prohibiting exit from one State to prevent entry to another in *Stamose v Bulgaria*.[135] Bulgaria denied Stamose a passport for two years at the behest of the US, which had deported Stamose. Bulgaria enacted a law authorizing a travel ban to deter its nationals from violating the immigration

[133] Case No NRG 348/2024, Interlocutory Proceedings (Civil Court of Crotone, Italy, 19 April 2024) 8–9 (unofficial translation).

[134] ECHR Protocol 4 (n 2) art 2.3. A threshold criterion is that limitations must be promulgated through law. The informal character of the Italy–Libya MOU (which seems drafted to deflect claims that it is legally binding under EU law) pulls in the opposite direction within ECtHR jurisprudence. Limitations on ECHR rights must comply with rule-of-law features of clarity, publicity and certainty, and it is at least arguable that the MOU fails to meet that standard precisely because it is not a legal instrument.

[135] *Stamose v Bulgaria* App No 29713/05 (ECtHR, 27 November 2012).

laws of other States, in the hope that this would reduce the risk of other States—especially EU States—excluding Bulgarian nationals and/or imposing restrictive visa requirements. In its judgment, the ECtHR equivocated on the legitimacy of banning exit in the service of preventing entry:

> Although the Court might be prepared to accept that a prohibition to leave one's own country in relation to breaches of the immigration laws of other States may in certain compelling situations be regarded as justified, it does not consider that the automatic imposition of such a measure without any regard to the individual circumstances of the person concerned may be characterized as necessary in a democratic society.[136]

The ECtHR did not elaborate on what might constitute a compelling circumstance. In 2016, Macedonia admitted to obstructing the exit of Roma nationals in the interests of advancing visa liberalization with the EU, and conceded before the ECtHR that it breached the freedom of movement, right of exit and non-discrimination of Roma applicants under the ECHR.[137] Although the jurisprudence is tentative, it does not sanction a generalized prohibition on exit in the service of enforcing other States' immigration laws, especially in the case of Libya (and Tunisia), where all departures require an exit visa[138] and the restriction is automatic, has no regard to individual circumstances, and precludes access to any asylum process.

To the extent that Italy can re-cast its objectives as the protection of migrants from deadly voyages and/or combatting human smuggling, analysis shifts to the means deployed to attain the objectives. It might be inferred that evidence of Libya's conduct required to establish jurisdiction under the ECHR would undermine the argument that facilitating interceptions and pull-backs to Libya is an acceptable means of protecting the lives of migrants or combatting smuggling. Less restrictive alternatives that could better protect human rights and/or reduce smuggling would include resumption of destination State SAR operations, refugee resettlement, asylum/humanitarian visas, and other regular pathways to protection. This would require Italy and other EU States redirecting the collaboration, cooperation and coordination currently expended on repelling migrants and refugees into the creation of a regime that would necessarily result in the lawful admission of more refugees (and possibly other migrants) to European States.

[136] ibid, para 36.

[137] Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on the former Yugoslav Republic of Macedonia, adopted on 24 February 2016 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806d23e>; *Dželadin v North Macedonia* App No 43440/15 (ECtHR, 3 September 2019).

[138] The blanket requirement for an exit visa undermines an argument sometimes made that the right to leave is not violated by measures by the departure State that make it impossible to access one or more States, as long as the individual has the option to enter other States.

If these alternatives seem unrealistic and infeasible in the present or foreseeable future, perhaps it is because they clash with the actual objective of Italy and other States, which is simply to prevent irregular migration, whether or not smugglers are involved, and whether or not the migrants are refugees. This acknowledgement flows downstream into the final stage of a proportionality analysis, namely the balancing of the interests of those subject to interception, pull-back and detention in Libya, and Italy's interests. The right to leave is subject to various potential justifications that would ordinarily permit a balancing of interests but recalling that a right to leave is indispensable to the realization of a right to seek asylum, this justification for upholding a limitation on exit rights seems especially weak where the people exercising a right to leave may be refugees.[139]

The dilemma of balancing extends beyond the formal question of whether the ECtHR will explicitly engage in a proportionality analysis if *SS and Others v Italy* reaches the adjudication phase. The claim that Italy violates the right to exit by orchestrating and assisting Libyan interdiction and pull-backs necessarily confronts the competing claim that a State must be able to exercise migration control as a condition of self-determination and sovereignty. A confounding aspect of this migration control argument is that it does not actually rely on the benefits of a given law, policy or practice beyond the fact that it instantiates control. Similarly, the harm averted by enforcement may be unrelated to a specific risk posed by any particular migrant. Instead, the harm consists of the diminution of control over admission that results from the imposition of human rights and rule of law constraints. This ostensible justification for migration control is at once highly abstract and existential, in which the admission of people as a matter of legal obligation rather than sovereign prerogative *is* the harm; every gate is a floodgate on this view. This is erroneous. Requiring more from the State in terms of justification does not entail the repudiation of State power to regulate migration (open borders), but it does impose a duty to defend limitations on the right of exit with more than a generic assertion that it advances border control.

IV. MOBILITY AND THE NEW CARCERAL STATE

Formal exit restrictions remain exceptional. The offence of 'illegal departure' seen in Libya, Tunisia, Niger, Cameroon and Turkey over the last decade serves a different purpose from its Cold War-era predecessors, or even current restrictions in Eritrea or North Korea.[140] Yet, the novelty of criminalizing exit recedes when set against the criminalization of migration more broadly. The rich legal and interdisciplinary scholarship on the theme of crimmigration and border criminology documents the nexus between

[139] See discussion in Stoyanova (n 11) 435–7.

[140] See n 8.

https://doi.org/10.1017/S0020589324000381 Published online by Cambridge University Press

criminal and immigration law, policy, practice and discourse.[141] A prominent illustration of the 'crimmigration' phenomenon is the transformation of unauthorized entry into the crime of 'illegal entry', a matter previously regulated through administrative law as breach of an immigration statute.[142] Criminalizing exit extends the logic of criminalizing entry, and takes it further. Whereas criminalizing entry turns the wrong of an administrative offence into a crime, the criminalization of exit has the added feature of transforming the exercise of a right (to leave) into a wrong.

The evolution of migrant detention also lies at the nexus of criminal and immigration fields. Migrant detention is formally classified as administrative detention, but it has become harsher, more 'prison like' and more punitive as the migrants subjected to it have become increasingly criminalized as 'illegals' in public discourse and in law. Although the legitimate uses of migrant detention must relate to the administration of immigration law,[143] detention is frequently an instrument of specific and general deterrence—a tool for inflicting suffering on detained migrants so they give up and depart, and for warning prospective migrants of the suffering that awaits them if they attempt the journey. The experience of detention as punishment means that migrant detention operates not merely as a space of containment, but as a specifically carceral space.

Exit restrictions also matter to our understanding of migrant detention and carcerality. When a departure State criminalizes exit, enforcement amounts to confinement on the territory of the departure State on behalf of the destination State. This invites a reimagining of the metaphor of the 'carceral State'. Criminology scholars invoke the term to identify the punitive ideologies, institutions and practices of confinement, containment, surveillance and incarceration that extend beyond the traditional radius of the penal system within a State. The concept of the new carceral State is invoked here to convey how the territory of a State can function *in toto* as a punitive space of confinement in relation to other States. Libya is Italy's carceral State, Cameroon is a carceral State for France. Turkey, Niger and Tunisia are carceral States for Europe's unwanted migrants. When people try to escape, they may be apprehended, returned and punished by confinement within those States.

Thinking about the 'carceral State' in this way also invites attention to the links between the way exit restrictions confine people to a State, and the way

[141] For a sample of the burgeoning literature, see V Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015); J Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56(2) AmULRev 367; S Pickering and J Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge 2014); M Bosworth, A Parmar and Y Vazquez (eds), *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging* (OUP 2018).

[142] See A Spalding, *The Treatment of Immigrants in the European Court of Human Rights: Moving Beyond Criminalization* (Bloomsbury 2022) Ch 1.

[143] Examples include averting a flight risk (people going 'underground'), managing a risk to public safety, or facilitating imminent removal.

migrant detention confines them within a State. In the recently overturned Australian case of *Al Kateb v Godwin*, the Australian High Court offered a rationale for indefinite migrant detention where deportation was not foreseeably possible. The court reasoned that if the State has the power to exclude non-citizens from the territory, it must also possess the power to 'permit … exclusion from the Australian community'—by indeterminate separation from the Australian community via detention if an inadmissible non-citizen managed to enter the territory.[144]

Although the High Court subsequently repudiated 'separation from the community' as a legally cognizable purpose of migrant detention, the political force of this logic should not be underestimated.[145] On this view, detention is not merely a prelude to exclusion from the State, or a response to a specific risk posed by the individual, but a third-best mechanism of exclusion, ranking somewhere below prevention of entry and post-entry expulsion. Segregation via detention prevents entry into the socio-political space of the State following the failure to prevent entry to the territorial space. Indeed, this resembles the function of refugee camps in the Global South, as well as Europe's refugee detention camps on Greek islands or Lampedusa in circumstances where States lack either capacity or will to prevent entry physically or effect the expulsion of refugees en masse.

It is important to situate detention within the larger trajectory of exclusion measures that comprise bordering regimes. It begins in countries of origin, continues through transit countries, and stretches into detention centres, segregating non-citizens within the territory of a destination or transit State where entry has not been prevented. Migrant detention resembles imprisonment in its punitive aspect, but it differs from penal incarceration because the segregation from community that detention imposes is not ancillary to the project of controlling human movement, it is an instantiation of it.

In most cases, migrant detention is a rear-guard action by destination States once the attempt to deter entry has failed, or where non-citizens have lost their status and been marked for deportation. But exit restrictions insert detention into the migration trajectory as a pre-emptive tactic. In countries of departure like Libya, detention aids in precluding migrants' access to Italy. Alison Mountz's concept of the detention archipelago graphically illustrates how islands like Manus Island, Lampedusa and Guantanamo Bay operate as

[144] *Al-Kateb v Godwin* [2004] HCA 37.

[145] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37. The Court explains that one of the flaws in formulating 'separation from the community' as a purpose of detention is that it conflates what detention physically does (segregate people from the community) with its purpose (segregation from the community), thereby rendering 'any inquiry into whether a law authorising the detention is reasonably capable of being seen to be necessary for the identified purpose circular and self-fulfilling' (para 49).

containers for unwanted migrants.[146] Susan Coutin recounts how Central Americans detained and deported from the US experience their country-of-origin post-return as a 'zone of confinement' that, in practical terms, they cannot leave.[147] She observes that:

> The fact that national territories in some ways resemble detention centers—both of these confine, both restrict movement—challenges liberal notions of nations as entities through which individuals can realize their capacities.[148]

Libya's role as the EU's extraterritorial prisoner-of-migration camp makes the confinement Coutin describes both literal and legal: the Libyan State apparatus (such as it is) deliberately incarcerates inhabitants on its territory for the 'crime' of irregular departure. Libya not only deflects migrants from the EU, but it also holds captive those whom the EU imagines as prospective migrants. Libyan 'reception centres' are smaller, grislier containers nested within a larger one. In Libya, migrant detention is to territorial containment what solitary confinement is to imprisonment—a more concentrated version of the same technology. Foregrounding the carceral dimension of exit restrictions reveals that what is ultimately at stake is the governance of mobility through immobilization.

V. CONCLUSION: TOWARD THE GOVERNANCE OF MOVEMENT

The claim that a State is sovereign to the extent that it controls its borders is a truism of conventional political discourse. Yet, if exclusion enacts State sovereignty, then the exit restrictions described in this article arguably undermine it. The European project of financing, equipping and training State and non-State actors to police the movement of people within and across African States' borders gives the appearance of enhancing the border governance capacity of those African States, and thereby their sovereignty. And yet, the very act of subordinating their own migration governance to the interests and will of another sovereign, often at the expense of their own interests, only diminishes the sovereignty of these departure States.[149]

One may detect whiffs of imperial arrogance in the ever more expansive reach of European governance into the domestic policies of foreign States. After all, controlling the mobility of the 'natives' in the colonies and overseas territories

[146] A Mountz, K Coddington and JM Loyd, 'Conceptualizing Detention: Mobility, Containment, Bordering, and Exclusion' (2012) 37(4) ProgressHumGeog 522.

[147] S Coutin, 'Confined Within: National Territories as Zones of Confinement' (2010) 29(4) PolGeog 200.

[148] ibid 201.

[149] These domestic interests include facilitating regional free movement, protecting economic activity, avoiding the consequences of criminalizing routine behaviour, and local political opposition. See S Stille, 'The Criminalization of Mobility in Niger: The Case of Law 2015-36' (*ASILE* Blogs, November 2023) <https://www.asileproject.eu/the-criminalization-of-mobility-in-niger-the-case-of-law-2015-36/>; Raach, Sha'ath and Spijkerboer (n 47).

https://doi.org/10.1017/S0020589324000381 Published online by Cambridge University Press

was a preoccupation of imperial powers.[150] Indeed, the merits of restricting the emigration of Brown and Black citizens of Global South countries in the name of averting a 'brain drain' was—and remains—a debatable topic of academic inquiry. Sara Dehm reviews the historical record within the UN concerning the denunciation of exit restrictions imposed by Communist States versus the ambivalence around 'brain drain' restrictions. She concludes that the divergence is revealing of the compromised status of citizens of the Global South as subjects of international human rights law:

> While the people of the 'highly industrialized' world are placed in the position of the universal subject of international human rights law (and are granted a largely-unencumbered 'right to leave'), the people of the Third World are instead enrolled within the enterprise of Third World development through the very interpretation of this 'right to leave'.[151]

But now, when Thomas Spijkerboer observes that '[p]opulation management in the Middle East and Africa is, once again, a legitimate subject of European policy',[152] the important difference is that the populations are today being managed by Europeans for the ostensible benefit of Europeans.

That said, perhaps what is detected are also whiffs of desperation. Europe's extraterritorial forays into migration governance of departure States can be read as a tacit admission of depleted sovereignty, at least as measured in terms of effective border control. Destination States perpetually and inexorably fail to 'manage' migration within the margins of domestic political acceptability and/or legal legitimacy.[153] It seems that no political leader can afford to admit the limited capacity of their State—and all States—to fully control human movement. Instead, leaders continue to propound that perfecting border control is within reach, if only the right kind, combination and intensity of technology and force are expended. Even where departure States are recruited into aiding destination States in the task, leaders will still,

[150] See R Mongia, *Indian Migration and Empire: A Colonial Genealogy of the Modern State* (Duke University Press 2018). Throughout the late eighteenth and the nineteenth centuries, colonial powers sought to restrict the free circulation of racialized labour by physically and legally managing the movement of slaves, indentured labourers and ordinary workers. State-managed circulation of labour from exit to entry to repatriation survives today in transnational migrant labour schemes. The *kafala* system in Saudi Arabia, under which migrant workers cannot leave the country without first being 'released' by their employers, is a particularly stark instance of privatized exit control. N Lori, *Offshore Citizens: Permanently Temporary Status in the Gulf* (CUP 2019).

[151] S 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 M Craven, S Pahuja and G Simpson (eds), *International Law and the Cold War* (CUP 2020) 178. For contemporary scholarship on the 'brain drain', see references in n 110.

[152] T Spijkerboer, 'Migration Management Clientelism' (2022) 48(12) JEthnic&MigrStud 2892, 2903.

[153] For hypotheses of the possible rationales for continued efforts in the face of failure, see Spijkerboer (n 60). For an account of how the spectacle of border walls signifies weakening sovereignty, see W Brown, *Walled States, Waning Sovereignty* (Princeton University Press 2010).

inevitably, fail to satisfy populist demands to fortify the border ever more intensively in the name of sovereignty.

At the same time, the articulation of exit restrictions with entry restrictions—the seamless border—opens a window onto what a networked regime of circulation could look like. If it is accepted that realizing the goal of 'managed migration' legitimates regulating the movement of people to, from and inside Niger, for example, then controlling migration begins to converge with controlling movement. Where mobility itself is the target, borders and nationality become technologies to be activated in order to pool, distribute, and aggrandize States' capacity to surveille, direct and contain movement as needed and as desired.

One can lament States' defection from their international human rights obligation to respect and protect the right of exit, but the recrudescence of exit restrictions does more than demonstrate that the line between frustration and abrogation of exit rights is decomposing. It also suggests that a liberal model that proceeds from a premise of free movement, and then interposes episodic State-imposed obstacles to transnational movement, decreasingly fits with reality. States and regional units are expanding and coordinating their techniques of governance to subject human movement to conditions where it is knowable and controllable. The shift might be described as a departure from State-driven governance of borders (wherever they are deemed to arise), and toward the governance of movement.[154] The anodyne objective of 'managed migration' promoted in global State-led conversations cannot but generate a momentum to govern human circulation even before it begins.

The endurance of securitization following 11 September 2001 (9/11), accompanied by enhanced techniques of AI, surveillance, data-gathering, information-sharing, cooperation and coordination, is nudging governance away from simply the management of exit or entry per se, toward the assumption of control over movement as such. Although specific attention to COVID-19 pandemic restrictions lies beyond the scope of this article, the activation of surveillance and policing of movement inside State territory to contain the spread of the virus demonstrated both the will to govern movement of all people within State territory as well as across borders, and the rapid advancement of technologies to enhance the capacity to do so.[155]

The investment by States in their capacity to govern movement invites us to reconsider the premise of free movement that is interrupted by intermittent State impediments erected at or near borders, or embassies, or airports. One might flip

[154] MB Salter, 'To Make Move and Let Stop: Mobility and the Assemblage of Circulation' (2013) 8(1) Mobilities 7.

[155] See A Macklin, '(In)Essential Bordering: Canada, COVID, and Mobility' in A Triandifyllidou (ed), *Migration and Pandemics: Spaces of Solidarity and Spaces of Exception* (Springer 2022). For a defence of mobility restrictions as justified limitations on the right of exit, see M Sullivan, 'A Limited Defence of Public Health Exit Restrictions' (2023) IntlMigr <https://doi.org/10.1111/imig.13103>.

the picture and begin by identifying multiple, proliferating, dispersed and networked technologies that anticipate, detect, constrain, arrest or compel movement. Humanity is already subject to this regime of governing circulation. Privileged citizens of wealthy States do not notice the digital walls, the biometric gates and the remote-control portals because they are less visible and violent than their material analogues and because one passes through them unhindered, but they are no less operational for that reason. Individuals, especially those regarded as highly mobile, might subjectively experience their movement as free, unimpeded and unrestrained, but what is perceived today as free movement may be drifting toward permitted movement. One might not realize it until permission is denied. This is one reason to pay closer attention to the quiet erosion of the right to leave.

ACKNOWLEDGEMENTS

The author especially thanks Jaya Ramji Nogales and Thomas Spijkerboer for incisive and constructive criticism, and participants in the Global Migration Law workshop and the MOBILE Centre workshop at the University of Copenhagen for excellent feedback and suggestions. Gratitude is also extended to Tommy Pham and Lisa Ariemma for superb research and editorial assistance.