
The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries

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Abstract

The EU and its member states are progressively involving third countries in their border control measures at sea. Relevant instruments of cooperative migration control range from capacity building measures to joint patrols in third-country territorial waters and shared surveillance intelligence on ship movements. So far, the discussion on migration control at sea has mainly focused on the illegality of ‘push-backs’ of migrant boats by EU member states to their point of departure. By contrast, the increasing incidence of departure prevention or ‘pull-backs’ by third countries in the service of EU member states has been largely neglected. In particular, such measures raise grave concerns with respect to the right to leave any country, including one’s own. Of central importance during the Cold War, this human right is of no lesser relevance at Europe’s outer borders. This paper explores to what extent departure prevention and pull-back measures are compatible with the right to leave and the law of the sea and discusses the responsibility of EU member states for internationally wrongful acts committed by third countries in such cooperative migration control scenarios.

1 Introduction

Over the years, the EU and its member states have progressively involved third countries in their border control measures at sea, ranging from capacity-building measures to joint patrols in third-country territorial waters and shared surveillance intelligence on ship movements. So far, the discussion on migration control at sea has mainly

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focused on the illegality of ‘push-backs’. By contrast, departure prevention or ‘pull-backs’ by third countries in the service of European Union (EU) member states have been largely neglected in the legal debate, even in discussions over international responsibility in cooperative scenarios.¹

The fact that the ‘Dublin system’ places particular pressure upon the member states at the EU’s external borders² has moved some of them to push migrant boats back to the departure states.³ In *Hirsi Jamaa*, the European Court of Human Rights (ECtHR) declared this practice incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁴ and the prohibition of collective expulsion (Article 4, Protocol No. 4), a provision designed to protect aliens from being deported without an individual examination of their protection needs.⁵ Thus, even at sea, comprehensive individual procedural guarantees apply,⁶ which will usually require disembarkation on the acting member state’s territory.⁷

¹ See, e.g., Gammeltoft-Hansen and Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’, 53 *Columbia Journal of Transnational Law* (2015) 235; Scheinin, ‘The Right to Leave Any Country as a Human Right: Implications for Carrier Sanctions and Other Forms of Pre-Frontier Control’, 2 *Turku Law Journal* (2000) 127; UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, on the Management of the External Borders of the European Union, UN Docs A/HRC/23/46 (2013) and A/HRC/29/36 (2015), para. 61. For a rare exception, see Council of Europe Commissioner for Human Rights (CECHR), *The Right to Leave a Country* (2013), at 9.

² Good overview of the European Union (EU) asylum acquis in Boeles *et al.*, *European Migration Law* (2nd edn, 2014).

³ Human Rights Watch, *Pushed Back, Pushed Around: Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers* (2009); European Council on Refugees and Exiles (ECRE) press statement, 24 January 2014, available at <http://www.ecre.org/12-refugees-die-during-alleged-push-back-operation-off-greek-island/> (last visited 15 June 2016). Overview at EU Agency for Fundamental Rights (FRA), *Fundamental Rights at Europe’s Southern Sea Borders* (2013), at 46–48.

⁴ ECtHR, *Hirsi Jamaa and others v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012. Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 222.

⁵ *Hirsi Jamaa*, *supra* note 4, paras 173–182. The United Kingdom, Greece, Turkey and Switzerland have not ratified Protocol No. 4 to the ECHR 1963, ETS 46, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=046&CM=8&DF=&CL=ENG> (last visited 4 December 2015).

⁶ ECtHR, *Sultani v. France*, Appl. no. 45223/05, Judgment of 20 September 2007, paras 81ff; ECtHR, *Čonka v. Belgium*, Appl. no. 51564/99, Judgment of 5 February 2002, paras 56–57. For Convention Relating to the Status of Refugees (Refugee Convention) 1951, 189 UNTS 150, Art. 33, see G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, 2007), at 311ff and 545ff; S. Peers and N. Rogers, *EU Immigration and Asylum Law* (2006), at 381; de Schutter and de Beco, ‘Les mesures conservatoires et d’urgence susceptibles d’être adoptées par le juge national aux fins de prévenir une violation de la Convention’, in G. Cohen-Jonathan *et al.* (eds), *De l’effectivité des recours internes dans l’application de la Convention européenne des droits de l’homme* (2006) 131; Hofmann and Löhr, ‘Introduction to Chapter V: Requirements for Refugee Procedures’, in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* (2011) 1081. The Charter of Fundamental Rights of the European Union, Doc. 2012/C 326/02, 26 October 2012 also applies. Commission Vice President Barrot, Letter of 15 July 2009 to the LIBE Committee of the European Parliament on Pushback Operations by Italy and Libya. Schengen Border Code, Council Regulation 562/2006, OJ 2006L 105/1, Art. 3(b); Baldaccini, ‘Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea’, in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (2010) 229, at 245–248.

⁷ For the Refugee Convention, *supra* note 6, Art. 33(1), see Hofmann and Löhr, *supra* note 6, at paras 53–55; Fischer-Lescano, Löhr and Tohidipur, ‘Border Controls at Sea: Requirements under International

The tension between such comprehensive obligations and member states' interest in reducing arrival numbers provides a considerable incentive for intensified cooperation with countries of origin and transit.⁸ If these countries prevent departures in the first place, member states can avoid ECHR jurisdiction.⁹ Such measures are already underway not only along the EU's land borders¹⁰ but also along the north and west African coasts.¹¹ The sea route's crucial importance for (illegal¹²) immigration to the EU¹³ and the EU's plans to destroy smugglers' boats in North Africa¹⁴ make this a pressing legal issue – especially for migrants who would be entitled to international protection.¹⁵ In particular, such measures raise questions with respect to the human right to leave¹⁶ and impair access to protection and procedure, secured by the principle

Human Rights and Refugee Law', 21 *International Journal of Refugee Law (IJRL)* (2009) 256, at 287; Pallis, 'Obligations of States toward Asylum-Seekers at Sea: Interactions and Conflicts between Legal Regimes', 14 *IJRL* (2002) 329, at 346–350. On initial screenings in third countries, see Communication No. 323/2007, *JHA v. Spain (Marine I)*, (CAT/C/41/D/323/2007), 21 November 2008, para. 2.4 (rejected); Wouters and den Heijer, 'The Marine I Case: A Comment', 22 *IJRL* (2010) 1; UN High Commissioner on Refugees (UNHCR), *Refugee Protection and International Migration: A Review of UNHCR's Role in the Canary Islands, Spain* (2009), para. 90, n. 34.

⁸ Goodwin-Gill and McAdam, *supra* note 6, at 370. See also the statement passed at the special meeting of the European Council on 23 April 2015.

⁹ But see Gammeltoft-Hansen and Hathaway, *supra* note 1, at 243 and 257–272; on other types of non-arrival policies, see 241–248. See also Goodwin-Gill and McAdam, *supra* note 6.

¹⁰ See Chachipe, *Selective Freedom: The Visa Liberalisation and Restrictions on the Right to Travel in the Balkans* (2011), available at www.ggua.de/fileadmin/downloads/Rueckkehrer_Reisefreiheit/Chachipe_Visa_liberalisation_report_270612.pdf (last visited 4 December 2015); on Turkey, see ECRE press statement of 4 December 2015, available at <https://www.ecre.org/the-eu-turkey-deal-poses-serious-threats-to-refugees-and-migrants-human-rights/> (last visited 15 June 2016).

¹¹ Overview in S. Buckel, 'Welcome to Europe' – Die Grenzen des Europäischen Migrationsrechts. *Juridische Auseinandersetzungen um das Staatsprojekt Europa* (2013), at 204–205, 216–217, 223, 296; see also Brot für die Welt, Medico International, and PRO ASYL (eds), *Im Schatten der Zitadelle* (2014), at 127–128, 137 (Tunisia), 180, 199, 204 (Mauritania), 235 (Senegal); Frontex, *Annual Risk Analysis 2014* (2015), at 8, 39 (Morocco). See section 4 in this article.

¹² On visa requirements, see Goodwin-Gill and McAdam, *supra* note 6, at 375–376; J. Hathaway and M. Foster, *The Law of Refugee Status* (2nd edn, 2014), at 28.

¹³ Frontex, *supra* note 11, at 29–41; Frontex, *FRAN Quarterly: Q1, January–March 2014* (2015), at 14–20.

¹⁴ Commission Communication: EU Action Plan against Migrant Smuggling (2015–2020), Doc. COM(2015) 285 final (2015). But see Amnesty International, 'Libya Is Full of Cruelty': *Stories of Abduction, Sexual Violence and Abuse from Migrants and Refugees* (2015), at 6, 28.

¹⁵ Many boat people have been coming from Syria, Eritrea or Afghanistan. See Frontex, *FRAN Quarterly*, *supra* note 13. These are countries with protection quotas of 50–90 per cent. Bundesamt für Migration und Flüchtlinge, *Asylgeschäftsstatistik für den Monat August 2014* (2014), at 2.

¹⁶ CECHR, *supra* note 1, at 11; Delas, 'Article 12', in E. Decaux (ed.), *Le Pacte international relatif aux droits civils et politiques: Commentaire article par article* (2011) 285, at 295; Trevisanut, 'Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management', in L. Azoulay and K. de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (2014) 106, at 137–138. Historically, see A. Dowty, *Closed Borders: The Contemporary Assault on Free Movement* (1983); R. Hofmann, *Die Ausreisefreiheit nach Völkerrecht und nationalem Recht* (1988); Kuss, 'Das Recht auf Ausreise und Auswanderung in der Gesetzgebung der sozialistischen Staaten', 14 *Europäische Grundrechte-Zeitschrift* (1987) 305.

of non-refoulement and the right to seek asylum.¹⁷ Finally, such measures would have to be compatible with the law of the sea.

This article will first explore the legal framework of non-departure and pull-back measures with respect to the right to leave and the law of the sea (section 2) and then examine on which grounds such measures might be permissible (section 3). Finally, it will illustrate the role of the EU and its member states in relation to such third country measures (section 4) and discuss member state responsibility for internationally wrongful acts by third countries (section 5).

2 The Legal Framework of Departure Prevention by Sea

A *The Right to Leave*

‘Voting with one’s feet’ can be seen as a fundamental democratic freedom and an individualized part of the right to self-determination and minority protection.¹⁸ But leaving to escape persecution or other grave human rights violations is also a necessary precondition to the enjoyment of other fundamental rights.¹⁹ Accordingly, the ‘right to leave any country including one’s own’ is already contained in Article 13(1) of the Universal Declaration of Human Rights (UDHR).²⁰ Article 12(2) of the International Covenant on Economic, Social and Cultural Rights (ICCPR) made it universally binding and served as a model for Article 2(2) of Protocol No. 4 to the ECHR.²¹ It is also contained in several regional and specialized human rights treaties.²² Strictly curtailed in socialist countries during the Cold War,²³ most infamously by the 1961 Berlin Wall,²⁴ the right to leave was considered ‘taken for granted in most of Western

¹⁷ Goodwin-Gill and McAdam, *supra* note 6, at 370.

¹⁸ N. Petersen, *Demokratie als teleologisches Prinzip: Zur Legitimität von Staatsgewalt im Völkerrecht* (2009), at 83ff; A. Grahl-Madsen, *The Status of Refugees in International Law* (1972), vol. 2, 180, at 105; H. Lauterpacht, *International Law and Human Rights* (1950), at 349.

¹⁹ CECHR, *supra* note 1, at 5.

²⁰ Universal Declaration of Human Rights 1948, UN Doc. A/810, 10 December 1948, which is considered customary international law. O. de Schutter, *International Human Rights* (2nd edn, 2014), at 18. See also McAdam, ‘An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty’, 12 *Melbourne Journal of International Law* (2011) 1.

²¹ Assuming a largely identical content, see ECtHR, *Riener v. Bulgaria*, Appl. no. 46343/99, Judgment of 23 May 2006, paras 81–121; Human Rights Committee (CCPR), *Miguel González del Río v. Peru*, 2 Nov. 1992, UN Doc. CCPR/C/46/D/263/1987. International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171.

²² E.g., American Convention on Human Rights 1969, 1144 UNTS 143, Art. 22; African Charter on Human and Peoples’ Rights 1981, 1520 UNTS 217, Art. 12(2); Arab Charter on Human Rights 2004, reprinted in 12 *International Human Rights Report* 893 (2005), Art. 27; Convention on the Elimination of All Forms of Discrimination against Racial Discrimination 1965, 660 UNTS 195, Art. 5; International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, 1015 UNTS 243, Art. II(c); Convention on the Rights of the Child 1989, 1577 UNTS 3, Art. 10(2). See Goodwin-Gill and McAdam, *supra* note 6, at 380.

²³ See, e.g., Dowty, *supra* note 16.

²⁴ See *Mauerschützen I*, BGHSt 39, 1: lethal shots incompatible with ICCPR, *supra* note 21, Art. 12(2), in socialist interpretation.

Europe and the Western hemisphere', to the point that it is not even mentioned in most democratic constitutions.²⁵ Today, it binds all Mediterranean countries²⁶ and EU member states as well as the EU itself.²⁷ For EU citizens, Article 21 of the Treaty on the Functioning of the European Union (TFEU) also encompasses the right to leave one's own member state.²⁸

1 Normative Context and Scope

By securing a way to escape persecution and abuse, the right to leave is closely connected to the right to seek asylum, contained in Article 14 of the UDHR. But it is only 'a right to leave for such country of the person's choice to which he may be admitted'²⁹ – the destination state retains the sovereign right to regulate entry and protect its borders.³⁰ The right to leave is thus just half a right;³¹ without a state that permits entry, it is worthless.³² However, a state's sovereignty over its borders is limited by different prohibitions on refoulement for individuals risking persecution, torture or inhuman or degrading treatment or punishment (or chain refoulement) in the departure state.³³ A 'right to enter' (only) exists within these strict limits,³⁴ permitting absolutely no justification to its restriction. In such situations, Article 31 of the 1951 Refugee

²⁵ Grahl-Madsen, Melander and Ring, 'Article 13', in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999), at 274.

²⁶ For the ICCPR: equally Mauritania and Senegal.

²⁷ Treaty on the European Union (TEU), OJ 2010 C 83/13 Arts 6(3), 21(1); Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon (TFEU), OJ 2010 C 83/49, Arts. 78(1) and 2(g).

²⁸ Case 33/07, *Jipa v. Romania*, [2008] ECR I-5157, para. 18. TFEU, *supra* note 27.

²⁹ *Peltonen v. Finland*, DR 80-A, 43, para. 31 (emphasis added).

³⁰ However, this can be an abuse of right towards protection seekers. Goodwin-Gill and McAdam, *supra* note 6, at 382–383; J. Hathaway, *The Rights of Refugees under International Law* (2005), at 312–313.

³¹ Juss, 'Free Movement and the World Order', 16 *IJRL* (2004) 289, at 293; Eichenhofer, 'Einreisefreiheit und Ausreisefreiheit', 33 *Zeitschrift für Ausländerrecht und Ausländerpolitik* (ZAR) (2013) 135, at 139.

³² Juss, *supra* note 31, at 294, deducts a prohibition on complete denial of entry for aliens; see also Moreno-Lax, 'Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees', 10 *European Journal of Migration and Law* (2008) 315, at 352–354.

³³ Convention Relating to the International Status of Refugees 1933, 159 LNTS 3363, Art. 3(1); Refugee Convention, *supra* note 6, Art. 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85, Art. 3; ECHR, *supra* note 4, Art. 3; ECtHR, *Soering v. UK*, Appl. no. 1/1989/161/217, Judgment of 7 July 1989, at 14. On the application at the border, see Non-Refoulement, EXCOM Conclusion No. 6 (1977), para. (c); W. Kälin, *Das Prinzip des Non-Refoulement* (1982), at 105–109; Hathaway, *supra* note 31, at 315–317 (with historical arguments); Kälin, Caroni and Heim, 'Art 33, para 1', in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (2011) 1327, para. 6; for the earlier position, see A. Grahl-Madsen, *Commentary on the Refugee Convention: Articles 2–11, 13–37* (1997 [1962–1963]), Art. 33, para. (3), available at www.unhcr.org/3d4ab5fb9.html (last visited 4 December 2015). On extraterritorial applicability, see section 1 in this article; against a customary law status, see Hathaway, 'Leveraging Asylum', 45 *Texas Journal of International Law* (2010) 503.

³⁴ Hailbronner, 'Comments on the Right to Leave, Return and Remain', in V. Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (1996) 109, at 114; Gammeltoft-Hansen and Hathaway, *supra* note 1, at 237–238, who call this a 'trump card on migration control'.

Convention even decriminalizes illegal entry.³⁵ Therefore, carrier sanctions and pre-departure immigration control³⁶ raise serious doubts over *bona fide* compliance with both non-refoulement³⁷ and the right to leave.³⁸ As a precondition for the right to seek asylum, the right to leave thus complements the principle of non-refoulement; together, they form the basis of refugee protection.³⁹

The Human Rights Committee (CCPR) General Comment No. 27 contains some general principles on the normative scope of the right to leave.⁴⁰ Article 12(2) of the ICCPR applies also to aliens and stateless individuals, irrespective of the legality of their presence and covers anything from a temporary trip to emigration as well as the necessary travel documents.⁴¹ The CCPR and the ECtHR have therefore considered the refusal to issue⁴² or release⁴³ a passport an interference with the right to leave. Exit visa requirements or exit fees also constitute an interference,⁴⁴ and the duration of the interference is immaterial.⁴⁵ It follows that an interference does not presuppose a complete inability to leave and that excluding certain countries is enough. Similarly, the ECtHR has considered a holding in an airport transit zone detention, despite the possibility of leaving the country by plane.⁴⁶ Mentioning the right to leave, the Court pointed out that this possibility was all but theoretical if no country offering adequate protection was willing to take the applicant in.⁴⁷

Preventing departure by sea therefore constitutes an interference with the right to leave. Departure is complete once a vessel has cleared the territorial waters (Article 2 of the UN Convention on the Law of the Sea [UNCLOS]).⁴⁸ However, pulling it back then

³⁵ Refugee Convention, *supra* note 6. See Hathaway, *supra* note 31, at 385–412; Fischer-Lescano and Horst, 'Das Pönalisierungsverbot aus Art. 31 I GFK. Zur Rechtfertigung von Straftaten bei Flüchtlingseinreisen', 31 ZAR (2011) 81. This only applies to refugees; for the more expansive Dutch practice, see note 144 in this article.

³⁶ *R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport (UNHCR Intervening)*, [2004] UKHL 55.

³⁷ Goodwin-Gill and McAdam, *supra* note 6, at 370; Hathaway, *supra* note 31, at 308–309; see also Lauterpacht, *supra* note 18, at 346.

³⁸ See CCPR, Concluding Observations on Austria, UN Doc. CCPR/C/79/Add.103, 19 November 1998, para. 11; General Comment No. 27: Article 12 (Freedom of Movement), UN Doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999), at para. 10. See also Scheinin, *supra* note 1, at 130–132.

³⁹ Goodwin-Gill and McAdam, *supra* note 6, at 370; Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', 23 *IJRL* (2011) 443, at 444; Trevisanut, 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea', 27 *Leiden Journal of International Law (LJIL)* (2014) 661, at 667.

⁴⁰ General Comment No. 27, *supra* note 38.

⁴¹ *Ibid.*, paras 8–9. See also Delas, *supra* note 16, at 293–296.

⁴² CCPR, *Lichtensztejn v. Uruguay*, Communication No. 77/1980, UN Doc. A/38/40, 31.03 (1983), para. 8.3; CCPR, *Carlos Varela Nunez v. Uruguay*, No. 108/1981, UN Doc. CCPR/C/OP/2, 143 (1990), para. 9. See also CCPR, *Sophie Vidal Martins v. Uruguay*, No. 57/1979, UN Doc. A/37/40/Supp.40, 157 (1982); CCPR, *Loubna El Ghar v. Socialist People's Libyan Arab Jamahiriya*, UN Doc. CCPR/C/82/D/1107/2002 (2004), para. 8.

⁴³ ECtHR, *Baumann v. France*, Appl. no. 33592/96, Judgment of 22 May 2001, paras 61–63.

⁴⁴ M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, 2005), at 270.

⁴⁵ *Baumann*, *supra* note 43, para. 60. It can, however, have an effect on the proportionality assessment.

⁴⁶ ECtHR, *Amuur v. France*, Appl. no. 19776/92, Judgment of 25 June 1996, paras 46–49.

⁴⁷ *Ibid.*, 48.

⁴⁸ Hathaway and Foster, *supra* note 12, at 25. Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3.

would be frustrating the exercise of the right to leave. According to Article 26 of the Vienna Convention on the Law of Treaties, international obligations must be fulfilled in good faith.⁴⁹ It would be a violation of this principle if a state was to wait until a vessel leaves its territorial waters, only to then reach out with a 'long arm' to pull it back.⁵⁰

2 Permissible Restrictions

Unlike non-refoulement, the right to leave has never been considered an absolute right.⁵¹ Article 12(3) of the ICCPR and, with small differences, Article 2(3) of Protocol No. 4 permit restrictions provided by law⁵² to protect national security, public order (*ordre public*), public health⁵³ and the morals or the rights and freedoms of others as long as these restrictions are necessary for these purposes and consistent with the other rights of the Covenant.⁵⁴ The CCPR clarifies that a restriction must not impair the essence of the right and that the freedom to leave must remain the rule and restrictions must remain the exception.⁵⁵ The measure must be proportionate – that is, constitute the least severe among the available suitable measures⁵⁶ – and cannot be discriminatory.⁵⁷ On this basis, the CCPR has accepted, in light of the *travaux préparatoires*, passport denials to secure the execution of military service,⁵⁸ but not for political reasons.⁵⁹ On public order grounds, the right can be restricted to secure financial obligations or judicial procedures⁶⁰ or to give effect to legitimate UN sanctions.⁶¹

The ECtHR and the Commission have accepted restrictions on the grounds of public order and/or the prevention of crime,⁶² to secure pending trials⁶³ or criminal

⁴⁹ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

⁵⁰ Kotzur, 'Good Faith (Bona Fide)', in *Max Planck Encyclopaedia of International Law* (January 2009), para. 20: 'Each party shall ... refrain from taking unfair advantage due to a literal interpretation, if the mere focus on the wording would fall short of respecting the objects, purposes, and spirit of the agreement.' Similarly, for non-refoulement, see *Hirsi Jamaa*, *supra* note 4, at 67–68, Concurring Opinion of Judge Pinto de Albuquerque; Goodwin-Gill, *supra* note 39, at 445.

⁵¹ Goodwin-Gill and McAdam, *supra* note 6, at 370.

⁵² Also at sea, see ECtHR, *Medvedyev v. France*, Appl. no. 3394/03, Judgment of 29 March 2010, paras 79–102.

⁵³ Protocol No. 4, *supra* note 5, Art. 2(3): '[T]he protection of health'; see section 3.D in this article.

⁵⁴ Protocol No. 4, *supra* note 5, Art. 2(3) also allows for restrictions in the interest of preventing crime.

⁵⁵ General Comment No. 27, *supra* note 38, para. 13.

⁵⁶ *Ibid.*, para. 14.

⁵⁷ *Ibid.*, para. 18.

⁵⁸ CCPR, *Lauri Peltonen v. Finland*, UN Doc. CCPR/C/51/D/492/1992 (1994), paras 1–2, 8.2–8.3; see also *Peltonen*, *supra* note 29, at 38; briefly in ECtHR, *Marangos v. Cyprus*, Appl. no. 31106/96, Judgment of 20 May 1997.

⁵⁹ *Lichtensztejn*, *Varela Nunez* and *Vidal Martins*, all cited *supra* note 42.

⁶⁰ Goodwin-Gill and McAdam, *supra* note 6, at 370 (with further references). CCPR, *González del Río v. Peru*, UN Doc. CCPR/C/46/D/263/1987 (1992): arrest warrant.

⁶¹ CCPR, *Sayadi and Vinck v. Belgium*, UN Doc. CCPR/C/94/D/1472/2006 (2008), paras 10.5–8; not necessary. Protocol No. 4, *supra* note 5, was not applicable in ECtHR, *Nada v. Switzerland*, Appl. no. 10593/08, Judgment of 12 September 2012, but Art. 8 and Art. 13 of the ECHR were.

⁶² *M v. Germany*, DR 37, 113, at 118–119; ECtHR, *Makedonski v. Bulgaria*, Appl. no. 36036/04, Judgment of 20 January 2011, para. 38; ECtHR, *Nalbantski v. Bulgaria*, Appl. no. 30943/04, Judgment of 10 February 2011, para. 63; ECtHR, *Prescher v. Bulgaria*, Appl. no. 6767/04, Judgment of 7 June 2011, para. 46.

⁶³ *Schmid v. Austria*, DR 44, 195; inadmissible; *Baumann*, *supra* note 43, paras 65–67; ECtHR, *Sissanis v. Romania*, Appl. no. 23468/02, Judgment of 25 January 2007, paras 66–77; ECtHR, *Iordan Iordanov and ors. v. Bulgaria*, Appl. no. 23530/02, Judgment of 2 July 2009, paras 73–75; ECtHR, *Pfeifer v. Bulgaria*, Appl. no. 24733/04, Judgment of 17 February 2011, para. 57; *Prescher*, *supra* note 62.

sentences⁶⁴ or to prevent dangerous offenders from travelling abroad.⁶⁵ Knowledge of state secrets engages the national security justification.⁶⁶ Large unpaid taxes can justify restrictions in the interest of public order or the rights of others,⁶⁷ and the latter ground also applies in the case of pending bankruptcy proceedings,⁶⁸ court-ordered payments⁶⁹ or the risk of child abduction.⁷⁰ Most of the violation rulings, however, result from a lack of reasons, from an insufficient balancing of individual and communal interests⁷¹ or because the restrictions became disproportionate over time.⁷²

The right to free movement under Article 21 of the TFEU is of a quite different nature, yet the Court of Justice of the European Union (CJEU)'s jurisprudence is remarkably similar.⁷³ To justify a restriction based on public order or safety, the 'personal conduct of the individual concerned' must represent 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society',⁷⁴ and the restriction must be proportionate⁷⁵ and amenable to a court challenge.⁷⁶ Whereas the ECtHR left this question open,⁷⁷ the CJEU has rejected restrictions based on the public order or security of another state (see discussion later in this article).⁷⁸

3 Derogation

Finally, neither Article 4(2) of the ICCPR nor Article 15(2) of the ECHR, applicable under Article 6 of Protocol No. 4, proscribe a derogation from the right to leave. A derogation – which must be declared under the ICCPR – permits measures otherwise

⁶⁴ *M. supra* note 62 (no violation).

⁶⁵ *Nalbantski, supra* note 62, para. 66 (with further references).

⁶⁶ ECtHR, *Bartik v. Russia*, Appl. no. 55565/00, Judgment of 21 December 2006, paras 42–43, 48.

⁶⁷ *Riener, supra* note 21, paras 116, 127, 130; left open for import tax: ECtHR, *Napijalo v. Croatia*, Appl. no. 66485/01, Judgment of 13 November 2003.

⁶⁸ ECtHR, *Luordo v. Italy*, Appl. no. 32190/96, Judgment of 17 July 2003, para. 94.

⁶⁹ ECtHR, *Ignatov v. Bulgaria*, Appl. no. 50/02, Judgment of 2 July 2009, para. 35; ECtHR, *Gochev v. Bulgaria*, Appl. no. 34383/03, Judgment of 26 November 2009, paras 48, 57.

⁷⁰ ECtHR, *Roldan Texeira and others v. Italy*, Appl. no. 40655/98, Judgment of 26 October 2000 (no violation); *Diamante and Pelliccioni v. San Marino*, Appl. no. 32250/08, Judgment of 27 September 2011 (no violation).

⁷¹ On this requirement, see *Baumann, supra* note 43, paras 65–67; *Pfeifer, supra* note 63, paras 56–57.

⁷² *Luordo, supra* note 68, para. 96; *Riener, supra* note 21, paras 121–124; ECtHR, *Földes and Földesné Hajlik v. Hungary*, Appl. no. 41463/02, Judgment of 31 October 2006, paras 35–36; ECtHR, *Bessenyei v. Hungary*, Appl. no. 37509/06, Judgment of 21 October 2008, para. 23; *A.E. v. Poland*, Appl. no. 14480/04, Judgment of 31 March 2009, para. 49; *Makedonski, supra* note 62, paras 43–46; *Gochev, supra* note 69, para. 49; ECtHR, *Miażdzyk v. Poland*, Appl. no. 23592/07, Judgment of 24 January 2012, para. 41.

⁷³ Case 430/10, *Gaydarov v. Bulgaria*, [2011] ECR I-11637, paras 33–38, 41: prison term abroad; Case 434/10, *Aladzhev v. Bulgaria*, [2011] ECR I-11659: tax liability; Case 249/11, *Byankov v. Bulgaria*, judgment of 4 October 2012, (ECLI:EU:C:2012:608): unsecured private debt. See also Spaventa, 'Art 45 – Freedom of Movement and of Residence', in S. Peers *et al.* (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014), 1161, at 1165, 1172–1174.

⁷⁴ EC Council Directive 2004/38, OJ 2004 L 158/77, Art. 27(2).

⁷⁵ Case 33/07, *Jipa v. Romania*, [2008] ECR I-5157, paras 26–27.

⁷⁶ *Gaydarov, supra* note 73, para. 41.

⁷⁷ ECtHR, *Stamose v. Bulgaria*, Appl. no. 29713/05, Judgment of 27 November 2012.

⁷⁸ *Jipa, supra* note 75.

incompatible with that right, to the extent that they are strictly required by the exigencies of the situation and are not inconsistent with other international obligations. Not every disturbance or catastrophe qualifies as an emergency that threatens the life of the nation.⁷⁹ Under the ECHR, the emergency must be actual or imminent; it must affect the whole nation to the extent that the continuance of the organized life of the community is threatened and it must be exceptional, in that the measures normally permitted are plainly inadequate.⁸⁰ Conceivably, in very extreme cases, mass immigration can have such a destabilizing effect, but this is a level that is certainly far from being reached in Europe. Preventing emigration from another country, however, would still have to be compatible with non-refoulement, also bearing in mind that Article 15(2) of the ECHR protects Article 3 of the ECHR from derogation.

B The Law of the Sea

Under the law of the sea, while stateless boats or ships are not entirely without protection (subsection 1), a coastal state wishing to interfere with the departure of a ship sailing under a foreign flag can do so only in limited cases, even in its territorial waters (subsections 2–3).

1 The Status of Stateless Boats and Ships

According to Article 92 of UNCLOS, a state has exclusive jurisdiction over ships flying its flag.⁸¹ The only condition that Article 91(1) of UNCLOS imposes is a ‘genuine link’ between ship and state. However, neither does UNCLOS define the term ‘ship’, nor is there such a uniform concept in the law of the sea.⁸² What is generally accepted is that very small vessels, such as the rubber dinghies used by refugees, are not registrable ships within UNCLOS.⁸³ Such boats cannot rely on the freedom of navigation at high sea or the right to innocent passage in coastal waters,⁸⁴ both of which are rights of the flag state, not of the vessel.⁸⁵ Nor can they invoke a flag state’s exclusive jurisdiction.

⁷⁹ CCPR, General Comment No 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3.

⁸⁰ ECtHR, *Denmark, Norway, Sweden and the Netherlands v. Greece*, Appl. nos. 3321/67, 3322/67, 3323/67 and 3344/67, Judgment of 31 May 1968, para. 113; see also ECtHR, *A and others v. United Kingdom*, Appl. no. 3455/05, Judgment of 19 February 2009, para. 176.

⁸¹ The nationality of those on board is irrelevant. *The M/V Saiga (No. 2) case* (1999), 38 ILM 1347, para. 106. All Mediterranean states except Israel, Syria and Turkey are members of UNCLOS, *supra* note 48; so is the EU.

⁸² Overview over different definitions in Jessen, ‘Was ist ein “Schiff”?’, 65 *Versicherungsrecht* (2014) 670. Each definition serves the purpose of the respective treaty. E.g., the UN Convention on Conditions for Registration of Ships, UN Doc. TD/RS/CONF/19/Add.1 (1986), Art. 2 (not yet in force) defines ‘ship’ as a self-propelled water transport vessel with at least 500 gross registered tonnage.

⁸³ S. Rah, *Asylsuchende und Migranten auf See* (2009), at 15 (with further references). But see R. Churchill and V. Lowe, *Law of the Sea* (1999), at 213; States can consider non-registrable vessels as ships with their nationality if they are owned by a national.

⁸⁴ UNCLOS, *supra* note 48, Art. 90, 17ff; see also section 2.B.2 in this article; see A. Gallagher and F. David, *The International Law of Migrant Smuggling* (2014), at 422–423.

⁸⁵ E.D. Brown, *International Law of the Sea*, vol. 1: *Introductory Manual* (1994), at 292; Goodwin-Gill, *supra* note 39, at 448, 453.

The same is true for actual ships whose statelessness has been established.⁸⁶ This does not mean, however, that such vessels are subject to unlimited interference. Persons on board enjoy the diplomatic protection of their home state⁸⁷ and are not subject to universal jurisdiction.⁸⁸ Notably, human rights guarantees also apply at sea.⁸⁹

2 Enforcement Measures against Foreign Ships

The coastal state is entitled to exercise jurisdiction over ships flying its flag in accordance with Article 92 of UNCLOS within the confines of its human rights obligations. According to Article 17 of UNCLOS, foreign ships enjoy the right to innocent passage in its territorial waters. This encompasses departure from its internal waters or ports.⁹⁰ The coastal state may regulate innocent passage to ensure the safety of navigation and prevent infringements of its customs, fiscal, immigration or sanitary laws and regulations,⁹¹ but not to the effect of denying or impairing the exercise of the right – for example, by making departure impossible – or discriminating against ships carrying cargo to a particular state – for example, to an EU member state.⁹² Only non-innocent passage (or departure) may be prevented, and applicable measures are governed by international customary law.⁹³ Pursuant to Article 19(2)(g) of UNCLOS, passage is not innocent if it is prejudicial to the peace, good order or security of the coastal state, particularly if it engages in the loading or unloading of persons contrary to the immigration laws and regulations of the coastal state. In the contiguous zone, the coastal state can act to prevent, *inter alia*, violations of its immigration laws and regulations, under Article 33(1)(a) of UNCLOS.

In its territorial waters, the coastal state is also entitled to exercise criminal jurisdiction over foreign ships that do not merely pass through if its assistance has been requested, if the consequences of the crime extend to it or if the crime is ‘of a kind to disturb the peace of the country or the good order of the territorial sea’. However, Article 27 of UNCLOS is part of a subsection that only applies to ‘merchant ships or government ships operated for commercial purposes’, and, pursuant to Article 89, the high seas are subject to no jurisdiction. Article 110 grants any state the right to verify a ship’s right to fly the respective flag if there is reason to suspect that the ship

⁸⁶ For an overview of the reasons, see *ibid.*, 162. On the verification of a ship’s nationality, see section 2.B.2 in this article.

⁸⁷ Churchill and Lowe, *supra* note 83, at 214, therefore require a ‘jurisdictional nexus’; see also Y. Tanaka, *International Law of the Sea* (2012), at 162; D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2009), at 17–18; Palls, *supra* note 7, at 351; one who is doubtful is Barnes, ‘The International Law of the Sea and Migration Control’, in Ryan and Mitsilegas, *supra* note 6, 103, at 131–132; against this, see also Brown, *supra* note 85, at 292 (with further references).

⁸⁸ Tanaka, *supra* note 87, at 162.

⁸⁹ See section 1 in this article. For the legal basis necessary, see *Medvedyev*, *supra* note 52.

⁹⁰ UNCLOS, *supra* note 48, Art. 17, 18(1)(b).

⁹¹ *Ibid.*, Art. 21(1)(a) and (h).

⁹² *Ibid.*, Art. 24(1).

⁹³ *Ibid.*, Art. 25(1); D.R. Rothwell and T. Stephens, *The International Law of the Sea* (2010), at 424.

is engaged in slave trade or is stateless. This right belongs to the presumed flag state if the ship seems to fly a false flag or refuses to show it (for example, to evade flag state jurisdiction). The right of visit covers stopping and, if necessary, boarding the ship.⁹⁴ Bringing it into port (pull-backs) would require the consent of the flag state.⁹⁵

By contrast, hot pursuit under Article 111 of UNCLOS can even lead to the use of 'necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel'.⁹⁶ However, the right of hot pursuit serves to enforce the rights of the coastal state, where a foreign ship violated regulations in the territorial waters or contiguous zone and did not comply with a stop signal. It does not grant additional powers.

3 Ensuring Safety at Sea

Under Article 94(1)–(4) of UNCLOS, safety at sea is part of the flag state's obligation to exercise exclusive jurisdiction and control over its ships. Pursuant to Article 94(6), it must also react if other states – for example, EU member states – point out unsafe situations to it – for example, by preventing them from leaving or bringing them back to port. Interferences with unsafe foreign ships headed for departure are addressed by a (non-binding) circular of the International Maritime Organization's Maritime Safety Committee (MSC) on Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea.⁹⁷ This circular confirms the flag state's principal responsibility but permits some emergency measures by the coastal state that will be discussed in the following section.

In the case of distress at sea, rescue and assistance obligations apply under Article 98(1) of UNCLOS, Regulation V/33 of the SOLAS Convention,⁹⁸ paragraph 2.1.10 of the International Convention on Maritime Search and Rescue (SAR)⁹⁹ and Article 10 of the Salvage Convention¹⁰⁰ as well as under customary international law.¹⁰¹ Rescues must be brought to a 'place of safety', according to Annex 1.3.2 of the SAR.

⁹⁴ Tanaka, *supra* note 87, at 161, pointing to UNCLOS, *supra* note 48, Art. 99 (with further references).

⁹⁵ On bilateral agreements, see Jessen, 'United States' Bilateral Shipboarding Agreements: Upholding Law of the Sea Principles While Updating State Practice', in H. Ringbom (ed.), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (2015) 50. On the use of force, see Guilfoyle, *supra* note 87, at 271ff, but see Trevisanut, *supra* note 16, at 126–127.

⁹⁶ *I'm Alone (Canada v. United States)* case (1933), 3 UNRIAA 1609, 1615 (emphasis added); *M/V Saiga (No. 2)* case, *supra* note 81, at 1355, para. 156; Tanaka, *supra* note 87, at 167.

⁹⁷ International Maritime Organization (IMO), Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea (IMO Interim Measures), MSC/Circ. 896/Rev. 1, 12 June 2001.

⁹⁸ International Convention for the Safety of Life at Sea (SOLAS Convention) 1974, 1184 UNTS 278. Ratified by all Mediterranean states (except Bosnia and Herzegovina) as well as Senegal and Mauritania.

⁹⁹ International Convention on Maritime Search and Rescue (SAR) 1979, 1405 UNTS 97, modified by Resolution MSC.155(78), 20 May 2004. Ratified by all Mediterranean states except Egypt and Israel.

¹⁰⁰ International Convention on Salvage 1989, 1953 UNTS 165. Ratified by all Mediterranean EU member states except Cyprus and Malta; in northern Africa, only Egypt and Tunisia are state parties.

¹⁰¹ Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea', 86 *Columbia Journal of Transnational Law* (1998) 399, at 414–415.

In accordance with MSC Guidelines on the Treatment of Persons Rescued at Sea, this must be a place where life and safety of the survivors are no longer threatened, where their basic human needs (such as food, shelter and medical needs) can be met¹⁰² and where they are safe from persecution.¹⁰³ Under the Refugee Convention, which the Guidelines mention as ‘relevant international law’ in their appendix, this would require safety from chain refoulement.¹⁰⁴

3 Preventing Departure by Sea

Preventing departure by sea, coastal states may simply wish to restrict border crossings to specific checkpoints or prevent undocumented departure altogether in the interest of the EU member state of destination. Finally, they may seek to prevent trafficking or smuggling in human beings or to protect the life and health of migrants more generally. On the basis of the legal criteria outlined above, the following sections will examine departure prevention and pull-backs by third countries to protect national interests (subsection A), transnational interests (subsection B), international interests (subsection C) and the interests of migrants (subsection D).

A National Interests: Restricting Departure to Official Border Crossing Points

Refugee boats often do not leave countries of origin or transit from official ports. Criminalizing border crossings outside of official checkpoints, as in Morocco¹⁰⁵ and Mauritania,¹⁰⁶ can be seen to serve the protection of *ordre public* by preventing undocumented immigration, human trafficking or smuggling¹⁰⁷ and import tax evasion. However, the necessary legal provisions¹⁰⁸ limiting the departure of small boats, including fishing boats, to official ports may not exist everywhere. Moreover, there are doubts as to the proportionality of enforcement measures where protection seekers are concerned.¹⁰⁹ If departure were also not possible from official ports or in other ways, the essence of the right would be impaired.¹¹⁰

¹⁰² MSC Resolution 167(78) on Guidelines on the Treatment of Persons Rescued at Sea (MSC Guidelines), MSC 78/26/Add.2, 20 May 2004, Annex 34, para. 6.12; affirmed by UNGA Resolution 16/222 on Oceans and the Law of the Sea, UN Doc. A/RES/61/222, 16 March 2007, para. 70. The latter was not the case in Libya in *Hirsi Jamaa*, *supra* note 4, paras 122–138.

¹⁰³ MSC Guidelines, *supra* note 102, para. 6.12.

¹⁰⁴ Hofmann and Löhr, *supra* note 6, para. 78; see also ECtHR, *TI v. United Kingdom* (Admissibility), Appl. no. 43844/98, Judgment of 7 March 2000.

¹⁰⁵ Buckel, *supra* note 11, at 203.

¹⁰⁶ Brot für die Welt *et al.*, *supra* note 11, at 199.

¹⁰⁷ See section 3.C in this article.

¹⁰⁸ Delas, *supra* note 16, at 297.

¹⁰⁹ On proportionality, see *ibid.*, at 289–299; and section 3.B in this article.

¹¹⁰ See von Bernstorff, ‘Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: Vom Wert kategorialer Argumentationsformen’, 50 *Der Staat* (2011) 165, at 177ff.

B Transnational Interests: Preventing Irregular Entry Abroad

In order to prevent irregular immigration into the EU and preserve visa relaxations,¹¹¹ some neighbouring states have introduced travel bans for deported nationals¹¹² or even prison sentences for unsuccessful asylum applications abroad.¹¹³ As the sea route to the EU gained importance, several Mediterranean states also introduced fines or prison sentences for irregular departure;¹¹⁴ intercepted individuals are often systematically detained.¹¹⁵

At the land border, departure will inevitably also constitute entry. As the destination state is generally entitled to regulate and deny the entry of aliens, it appears that it should also be able to seek assistance from its neighbour in preventing illegal entry. However, this is problematic in light of non-refoulement. As mentioned above, this principle secures the right to leave for those to whom it matters most – those entitled to international protection – by granting a narrowly confined right to enter at the frontier to escape grave human rights violations abroad.¹¹⁶ Importantly, it applies even in the case of illegal entry, as Article 31 of the Refugee Convention highlights.¹¹⁷ If the right to leave could be restricted by the departure state in order to prevent violations of the receiving state's immigration law, access to non-refoulement would be eviscerated.¹¹⁸ Indeed, as discussed in the following subsections, the jurisprudence of the CJEU and the ECtHR, as well as domestic cases, provide little by way of justification for preventing departure to protect another state's immigration laws, and, in any case, enforcement powers are doubtful under the law of the sea.

1 EU Freedom of Movement

The 2008 case of *Jipa v. Romania* concerned a Romanian national who had been deported from Belgium for 'unauthorized presence'.¹¹⁹ Romania, having acceded to the EU in the meantime, banned him from travelling to Belgium for three years.

¹¹¹ In particular, Macedonia. Schuster, *supra* note 10, at 1–3. Visits for up to 90 days per year are visa free. Similar agreements of the EU also exist with Serbia and other countries (since 2007).

¹¹² E.g., Bulgaria and Romania, see text accompanying notes 119 and 122 in this article.

¹¹³ 'Abuse of the right to asylum' by 'giving the false impression of his human rights and fundamental freedoms being threatened'. See s. 350a of the Serbian Criminal Code, available at www.mpravde.gov.rs/files/CRIMINAL%20CODE%20SERBIA.doc (last visited 4 December 2015) (English translation). Contrary to its full title, this provision applies both to facilitators and to the asylum seeker herself. See expert report in Administrative Court (VG) Stuttgart, Case A 11K 5036/13, Judgment of 25 March 2014; Chachipe, *supra* note 10.

¹¹⁴ FRA, *supra* note 3, at 43–44. Since 1950 and 1968 in Turkey and Tunisia, since 2003–2009 in Morocco, Libya, Egypt and Algeria (Libya and Egypt: only for aliens).

¹¹⁵ *Ibid.*, at 44.

¹¹⁶ Goodwin-Gill, 'The Right to Leave, Return and Remain', in Gowlland-Debbas, *supra* note 34, 93, at 99. Of course, non-refoulement also applies in other scenarios, such as expulsion from the territory.

¹¹⁷ Refugee Convention, *supra* note 6.

¹¹⁸ Note that the US representative in the drafting process understood Refugee Convention, *supra* note 6, Art. 33 to also protect against 'reprisals for [the refugee's] attempted escape'. See Hathaway, *supra* note 30, at 318 (with references).

¹¹⁹ *Jipa*, *supra* note 75.

The European Court of Justice (ECJ) (as it then was) found that a restriction of freedom of movement must be based on reasons of public order or safety in the acting member state, not in another member state. Grounds relating to the latter could be taken into account,¹²⁰ but in the present case there had been ‘no specific assessment of [Mr. Jipa’s] personal conduct and no reference to any threat that he might constitute to public policy or public security’ by the authorities of either country.¹²¹

2 *The Right to Leave*

The 2012 case of *Stamose v. Bulgaria* concerned a similar situation.¹²² After the applicant had been deported from the USA for having worked on a student visa, Bulgaria withdrew his passport and issued a two-year travel ban.¹²³ The ECtHR acknowledged that such measures sought to discourage immigration law violations that might lead to tighter immigration or visa policies for Bulgarians¹²⁴ and conceded that Bulgaria may have considered it necessary out of international courtesy and practical reasons to assist other states in the enforcement of their immigration laws. It did not, however, pronounce itself on a possible justification because the authorities had failed to give reasons and to balance the individual circumstances,¹²⁵ including the gravity of the violation, the likelihood of future violations, the applicant’s family, financial and personal situation as well as possible prior convictions.¹²⁶

A similar provision came before the Macedonian Constitutional Court in 2014. Macedonia had introduced passport withdrawals for deported citizens to preserve visa-free entry to the EU, where asylum claims had risen sharply.¹²⁷ The measures were mainly applied against Roma.¹²⁸ In 2013, the Council of Europe’s commissioner for human rights had already recalled the absolute obligation to preserve the essence of the right to leave and the proportionality requirement¹²⁹ and voiced concern over the application of such measures against individuals exercising their right to seek and enjoy asylum.¹³⁰ Just like the CJEU, the Court found itself unable to square the protection of foreign immigration laws and of Macedonia’s international reputation with the justification grounds of Article 12(3) of the ICCPR. National security could only be threatened by immigration but not by emigration.¹³¹

¹²⁰ *Ibid.*, para. 25; see Case 503/03, *Commission v. Spain*, [2006] ECR I-1097, para. 53.

¹²¹ *Jipa*, *supra* note 75, paras 26–27.

¹²² *Stamose*, *supra* note 77.

¹²³ *Ibid.*, paras 16–18.

¹²⁴ *Ibid.*, para. 36; for conclusions, see Report from the Commission to the Council Regarding Bulgaria in the Perspective of the Adoption of the Regulation Determining the List of Third Countries Whose Nationals Must Be in a Possession of Visas When Crossing the External Borders and Those Whose Nationals Are Exempt of That Requirement, COM(2001) 61 final, 2 February 2001; Council Regulation 2317/95, OJ 1995L 234/1.

¹²⁵ *Stamose*, *supra* note 77, para. 32.

¹²⁶ *Ibid.*, paras 35–36 (with further references).

¹²⁷ CECHR, Report Following His Visit to ‘the Former Yugoslav Republic of Macedonia’ from 26 to 29 November 2012, Doc. CommDH(2013)4, 9 April 2013, paras 95–98.

¹²⁸ *Ibid.*, para. 99; Schuster, *supra* note 10, at 1–3.

¹²⁹ CECHR, *supra* note 127, para. 102, with reference to General Comment No. 27, *supra* note 38.

¹³⁰ CECHR, *supra* note 127, para. 104.

¹³¹ Macedonian Constitutional Court, Case no. 189/2012-0-0, Judgment of 25 June 2014.

In Germany, similar provisions in Serbia have led courts to grant refugee status.¹³² The administrative court of Stuttgart described the right to leave under Article 2(2) of Protocol No. 4 as ‘the foundation for any individual to escape power structures with which he disagrees based on the basis of differing political opinion, ... to freely live in accordance with his religion if this is impossible in his home country ... or to free himself from a socially or economically dire situation and to try his luck elsewhere’ – the latter being of particular importance in unbearable conditions without opportunities for relief, as was the case for Roma in Serbia.¹³³ Therefore, custodial sentences of up to three years for unauthorized border crossing in search of asylum, which were being applied in a discriminatory manner against Roma, amounted to persecution for reasons of race.¹³⁴

In the only ECtHR case on departure prevention at sea, the Italian coast guard, operating with permission in Albanian coastal waters, had intercepted and sunk a vessel with Albanian migrants bound for Italy.¹³⁵ The Court considered that this classic pushback operation was designed not to prevent the applicants from leaving Albania but, rather, from entering Italy, such that Article 2(2) of Protocol No. 4 did not apply.¹³⁶ The fact that Italy had acted appears to have been critical to this outcome, leaving it unclear whether similar Albanian measures to prevent a violation of Italian immigration law might have been justified.

3 The Law of the Sea

As mentioned above, a coastal state may interfere with the departure of foreign ships if their passage is not ‘innocent’ within Article 17 of UNCLOS. According to Article 19(2)(g) of UNCLOS, this includes the loading or unloading of persons contrary to the immigration laws and regulations of the coastal state. However, undocumented departure does not violate the coastal state’s immigration laws. The same is true for the coastal state’s enforcement powers in its contiguous zone ‘to prevent [and punish] infringements of its ... immigration ... laws and regulations’.¹³⁷ Other prejudicial activities without ‘a direct bearing’ on the passage are covered by Article 19(2)(l) of UNCLOS. First, though, shipping out undocumented migrants does have a ‘direct bearing’ on the passage and, second, this catch-all clause is meant for very atypical cases and is not supposed to cancel out the limitations on the rights of the coastal state introduced by UNCLOS.¹³⁸

¹³² See also Hathaway and Foster, *supra* note 12, at 247–249.

¹³³ VG Stuttgart, Case A 11 K 5036/13, Judgment of 25 March 2014 (my translation).

¹³⁴ See also VG Münster, Case 4L 461/14.A, Judgment of 8 July 2014 (serious doubts on manifest unfoundedness of asylum claims by Roma from Serbia; disregard of right to leave).

¹³⁵ ECtHR, *Xhavara and others v. Italy and Albania*, Appl. no. 39473/98, Judgment of 11 January 2001 (inadmissible).

¹³⁶ *Ibid.*, para. 3. For a view that is doubtful, see Brouwer, ‘Extraterritorial Migration Control and Human Rights’, in Ryan and Mitsilegas, *supra* note 6, 199, at 224.

¹³⁷ UNCLOS, *supra* note 48, Art. 33 (emphasis added).

¹³⁸ See also M. Lehnert, *Frontex und operative Maßnahmen an den europäischen Außengrenzen* (2013), at 224 (with further references).

According to Article 27(1) of UNCLOS, the coastal state can exercise criminal jurisdiction over merchant ships if the consequences of the crime extend to it or if the crime is ‘of a kind to disturb the peace of the country or the good order of the territorial sea’. Unlike drug trafficking, human smuggling or trafficking are not explicitly listed, which militates against subsuming them under the general category of disturbing crimes.¹³⁹ However, if undocumented departure is criminalized in the coastal state, the consequences requirement will be fulfilled. However, even commercially operated refugee vessels will not usually be registered as ‘merchant ships’,¹⁴⁰ except where scrap cargo ships are used.¹⁴¹

4 Conclusion

As it stands, existing jurisprudence has little to offer by way of justification for restrictions on the right to leave to prevent irregular entry abroad. Even so, they would be permissible under the law of the sea only in very limited cases, as undocumented departure does not constitute non-innocent passage¹⁴² and criminal jurisdiction only extends to merchant ships. The ECtHR considered both *ordre public* grounds and the rights of others but did not decide the issue. In parallel to the CJEU’s jurisprudence on free movement, the Macedonian Constitutional Court clarified that the interests of the state of destination could not serve as justification for restrictions under Article 12(3) of the ICCPR. Furthermore, neither the ECtHR’s jurisprudence nor the CCPR’s General Comment No. 27 and views suggest that protecting the laws of another state could justify interferences with the right to leave.

Moreover, it must be borne in mind that irregular entry of refugees cannot be criminalized.¹⁴³ Of course, this does not apply to individuals entitled to subsidiary protection¹⁴⁴ – and certainly not to individuals who are not entitled to any kind of protection. However, a potential protection status must be immaterial at departure, lest it be for a persecuting state to decide whether one of its victims should be able to leave to seek protection elsewhere. This would frustrate both non-refoulement and the

¹³⁹ Rah, *supra* note 83, at 54.

¹⁴⁰ See Lehnert, *supra* note 138, at 226, n. 946.

¹⁴¹ Coleman, ‘Migrant Ghost Ships: Who Are the People Smugglers?’, *BBC News* (9 January 2015), available at www.bbc.com/news/world-europe-30715001 (last visited 4 December 2015); see also European Commission, Questions and Answers: Smuggling of Migrants in Europe and the EU Response, Doc. MEMO/15/3261, 13 January 2015.

¹⁴² Gallagher and David, *supra* note 84, at 412.

¹⁴³ Refugee Convention, *supra* note 6, Art. 31. Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol) 2000, 2241 UNTS 507, Art. 5 of the Smuggling Protocol protects smuggled individuals from punishment because of the smuggling, including false documents. Travaux préparatoires, UN Doc. A/55/383/Add.1 (2000), para. 93; Harvey and Barnidge, ‘Human Rights, Free Movement, and the Right to Leave in International Law’, 19 *IJRL* (2007) 1, at 16.

¹⁴⁴ There is no corresponding provision in EU Council Directive 2011/95, OJ 2011 L 337/9; see Case 481/13, *Qurbani v. Germany*, judgment of 17 July 2014, (ECLI:EU:C:2014:2101). But see Case 12/01278, judgment of 3 December 2013, (ECLI:NL:HR:2013:1561), para. 2.6.2, applying the Refugee Convention, *supra* note 6, Art. 31 by analogy, based on the Directive’s 2004 version.

right to seek and enjoy asylum. Further, the chilling effect of post-return sanctions for unsuccessful asylum applications and the dilemma of choosing between this risk and persecutory human rights violations are precisely what the right to leave is intended to avoid. This point can only be stronger at sea, where irregular departure does not necessitate irregular entry. Therefore, preventing departure cannot be justified with protecting the receiving state's immigration laws.

C International Interests: Preventing Human Trafficking and Smuggling

According to the Trafficking Protocol¹⁴⁵ and the Smuggling Protocol¹⁴⁶ to the 2000 Palermo Convention,¹⁴⁷ a coastal state has the obligation to criminalize and prevent human trafficking and smuggling¹⁴⁸ both as the flag state of vessels engaged in such activities and as a place of departure or destination of foreign ships. In particular, pursuant to common Article 11(1) of the protocols, it shall reinforce the border controls necessary to preventing and discovering trafficking and smuggling, '[w]ithout prejudice to international commitments in relation to the free movement of people'.¹⁴⁹ The state may consider denying entry to persons involved in such crimes under common Article 11(5), but no mention is made of denying departure to their victims or clients.¹⁵⁰ According to Article 8(1)–(2) of the Smuggling Protocol, if there is reason to suspect human smuggling at sea, no measures can be taken without the flag state's request or consent, except to relieve imminent danger to the lives of persons.¹⁵¹

As Article 19 of the Smuggling Protocol and Article 14 of the Trafficking Protocol confirm, this does not affect human rights and refugee law obligations. Thus, it would be incompatible with non-refoulement for a flag state to give permission for a pull-back if the passengers had a well-founded fear of persecution or torture in the coastal state.¹⁵² Moreover, as Article 11(1) of the Smuggling Protocol clarifies, measures against human smuggling or trafficking must not turn into unjustified prevention of departure.¹⁵³

¹⁴⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) 2003, 2237 UNTS 319; 163 ratifications, including the EU (as of 2014).

¹⁴⁶ Smuggling Protocol, *supra* note 143; 140 ratifications, including the EU (as of 2014).

¹⁴⁷ United Nations Convention against Transnational Organized Crime 2000, 2225 UNTS 209.

¹⁴⁸ Human smuggling serves undocumented entry, while human trafficking serves the exploitation of the victim. Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', 23 *Human Rights Quarterly* (2001) 975.

¹⁴⁹ UN Office on Drugs and Crime, *International Framework for Action to Implement the Smuggling of Migrants Protocol* (2011), at 43.

¹⁵⁰ Smuggling Protocol, *supra* note 143. But see Harvey and Barnidge, *supra* note 143, at 14: '[A] treaty framework by which states can control the departure of migrants' – within the limits of the ICCPR, *supra* note 21, Art. 12(3).

¹⁵¹ Note that the term 'vessel' is broadly defined in the Smuggling Protocol, *supra* note 143, Art. 3(d).

¹⁵² See also the note by the Office of the High Commissioner of Human Rights, the UN Children's Fund and the International Organization on Migration on the draft Palermo Protocols, UN Doc. A/AC.254/27, 8 February 2000, at para. 7. On flag state liability, see Guilfoyle, *supra* note 87, at 331–337.

¹⁵³ See Harvey and Barnidge, *supra* note 143, at 14.

D *Interests of Migrants: Protecting Passengers*

Refugee boats – usually operated by smugglers – are often overloaded or in very bad shape, such that the lives of the passengers can be in severe danger during the passage. Insofar as such operations constitute a criminal offence in the coastal state, *ordre public* under Article 12(3) of the ICCPR is pertinent. As always, though, measures must not impair the essence of the right, under Article 5(1) of the ICCPR, and must be proportionate – in particular, they must be directed at the offenders, not their victims. Article 2(3) of Protocol No. 4 also permits restrictions in the interest of health. Thus, the European Commission on Human Rights has approved a travel ban for a mentally ill person for whom no adequate care was secured in the destination country.¹⁵⁴ Article 12(3) of the ICCPR, applicable outside Europe, provides only for the protection of public health.¹⁵⁵

However, the coastal state has a duty to protect the human rights of those under its jurisdiction, as part of the respect, protect and fulfil framework.¹⁵⁶ This duty to protect may result in an obligation to prevent journeys that will threaten the lives of the passengers and collide with the duty to respect the right to leave.¹⁵⁷ The migrants might be consciously accepting the fatal risk because they value the chance of an arrival in Europe higher and consider that there is no less perilous alternative. In such cases of self-harm, the ECtHR puts great store in the voluntariness of the decision, although it permits regulations designed to prevent hasty decisions.¹⁵⁸ In addition, in scenarios involving third parties (in this case, smugglers), it will not easily accept rights waivers where the rights holder may have felt under pressure.¹⁵⁹ It is quite unclear how this would be resolved by the CCPR or the Court, but, arguably, the voluntariness of the decision would be cast into doubt, permitting interferences with the right to leave.

A duty to protect is also regulated in the law of the sea with respect to foreign vessels. Specifically, the MSC's Circular on Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea obliges a state to prevent an unsafe vessel from leaving port¹⁶⁰ while respecting the law of the sea, refugee law and the rights of the flag state.¹⁶¹ SOLAS Regulation I/19(c) requires that coastal states ensure that such a ship involved does not depart until it can do so without danger to the ship or the persons on board.¹⁶² The use of a vessel is considered 'unsafe' if it is obviously not seaworthy or if it is not properly manned, equipped or licensed for carrying passengers on

¹⁵⁴ *Nordblad v. Sweden*, Appl. no. 19076/91, Judgment of 13 October 1993 (unpublished).

¹⁵⁵ Examples in Hofmann, *supra* note 16, at 168, 179–181; see also Delas, *supra* note 16, at 300.

¹⁵⁶ de Schutter, *supra* note 20, at 280–295.

¹⁵⁷ On autonomy and paternalism, see *ibid.*, at 493ff, especially 497–499.

¹⁵⁸ ECtHR, *Haas v. Switzerland*, Appl. no. 31322/07, Judgment of 20 January 2011, paras 51, 55 (prescription-drug suicide).

¹⁵⁹ ECtHR, *Pretty v. UK*, Appl. no. 2346/02, Judgment of 2346/02, paras 74ff (assisted suicide); see also ECtHR, *D.H. and others v. Czech Republic*, Appl. no. 57325/00, Judgment of 13 November 2007, paras 202–204 (special schooling for Roma children).

¹⁶⁰ IMO Interim Measures, *supra* note 97, para. 4.4.2.

¹⁶¹ *Ibid.*, paras 4.5, 4.6. See also Smuggling Protocol, *supra* note 143, Art. 8(5); Gallagher and David, *supra* note 84, at 433–437.

¹⁶² MSC Guidelines, *supra* note 102, para. 18.

international voyages, such that there is a serious danger for the lives or health of the persons on board, including the conditions of (dis)embarkation.¹⁶³ The flag state's rights are secured by prompt information. It may authorize a stop and visit or further measures.¹⁶⁴ While confirming the flag state's primary responsibility, the coastal state can thus prevent departure to avert a serious danger to the health and life of those on board.

In distress at sea, there is a duty to render assistance and to bring rescues to a 'place of safety'.¹⁶⁵ Boats are considered objectively in distress if – like many refugee boats – they are not seaworthy due to overloading or lack of supplies, such that the passengers cannot reach a place of safety without assistance.¹⁶⁶ Outside of Frontex operations,¹⁶⁷ there are no clear criteria for choosing the place of safety. Pursuant to paragraph 4.8.5 of the SAR 2004, the initiative lies with the state in charge of search and rescue,¹⁶⁸ while SOLAS Regulation V/34.1 emphasizes the individual captain's discretion. The geographic situation is not decisive,¹⁶⁹ but there is no obligation to disembark in the destination state. This means that pull-backs are conceivable rescue measures if the state of departure meets the conditions of a 'place of safety'. However, the 'place of safety' is meant to be a place of temporary residence, until the journey can be continued and completed.¹⁷⁰ As a result of Article 31 of the Refugee Convention, it is immaterial whether this would involve irregular entry.

E Conclusion

The right to leave thus places strict limits on preventing the departure of refugee boats. It does not permit restrictions in order to prevent irregular immigration into another state. While states may restrict departure to specific checkpoints and enforce such regulations, such measures require a legal basis, must be proportionate and must not impair the essence of the right. These requirements are not met in the absence of any individual assessment and if the departure would also be prevented elsewhere. Proportionality is also an issue if measures against human smugglers prevent their victims from leaving.

Additional limits result from the law of the sea where foreign vessels are concerned. Unlawful departure from a coastal state's shores does not render a passage non-innocent, and it can trigger criminal jurisdiction only over merchant ships. Enforcement

¹⁶³ *Ibid.*, para. 2.3.

¹⁶⁴ *Ibid.*, paras 12, 13.

¹⁶⁵ See section 2.B.3 in this article.

¹⁶⁶ See Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea', 23 *IJRL* (2011) 174, at 195–196; Lehnert, *supra* note 138, at 236–238.

¹⁶⁷ E.g., high sea operations will disembark in the third country from which the vessel is assumed to have departed. EU Council Regulation 656/2014 (External Sea Borders Regulation), OJ 2014L 189/93, Art. 10(1), which may conflict with the *Hirsi* requirements, *supra* note 4 and accompanying text.

¹⁶⁸ Malta did not ratify this revision.

¹⁶⁹ MSC Guidelines, *supra* note 102, Appendix, para. 3.

¹⁷⁰ *Ibid.*, para. 6.12, Appendix, para. 3.

powers in the contiguous zone do not extend to unlawful departure. At high sea, the right of visit only permits stopping and boarding the ship. All further measures require flag state consent, even to ensure safety at sea and to combat human smuggling. Exceptionally, however, measures immediately necessary to preserve the life of the persons on board are permitted. As the case may be, this may include preventing departure or bringing the ship back to port, if the coastal state is a 'place of safety' where the rescues are adequately cared for until their journey can be safely continued. If there is an acute danger to life, on the other hand, the coastal state may have a duty to prevent or terminate departure.

4 EU Cooperation with Third Countries on Migration Control

As part of the 'external dimension of asylum and immigration', countries of origin or transit have increasingly been integrated into the EU border control system.¹⁷¹ The EU provides support 'to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return'.¹⁷² The following sections will examine to which extent EU member states support or require departure prevention or pull-backs within such cooperation frameworks.¹⁷³

A Joint Operations

To 'facilitate operational cooperation between Member States and third countries',¹⁷⁴ Frontex has concluded working arrangements with 17 countries, including Turkey and Cape Verde.¹⁷⁵ Negotiations are underway with Egypt, Libya, Morocco, Mauritania, Tunisia and Senegal.¹⁷⁶ The agreements cover intensified information sharing, training and technical development as well as participation in border control operations. During border control operations in its territorial waters,¹⁷⁷ the third country either exercises jurisdiction itself or it gives permission

¹⁷¹ Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Doc. 16054/04, 13 December 2004, at 11–14, para. 1.6.

¹⁷² *Ibid.*, at 11.

¹⁷³ For a similar typology with additional examples from the USA and Asia, see Gammeltoft-Hansen and Hathaway, *supra* note 1, at 251–256.

¹⁷⁴ Council Regulation 2007/2004 (Frontex Regulation), OJ 2004L 349/1, amended by Council Regulation 1168/2011, OJ 2011L 304/1.

¹⁷⁵ List available at <http://frontex.europa.eu/partners/third-countries> (last visited 4 December 2015). These administrative agreements are usually explicitly without binding effect. Lehnert, *supra* note 138, at 68–69.

¹⁷⁶ *Ibid.*

¹⁷⁷ Frontex Regulation, *supra* note 174, Art. 14(7), 2(2). For deploring secrecy, see Goodwin-Gill, *supra* note 39, at 452, 454–456.

to the host member state to do so.¹⁷⁸ While such agreements are usually not publicly accessible,¹⁷⁹ member states seem to usually provide the equipment and carry officials of the third country, so-called ship riders, on board, who then exercise jurisdiction over intercepted vessels, passengers and possible smugglers. For example, this was Spain's model for Seahorse,¹⁸⁰ which was implemented both at the horizontal level¹⁸¹ and as part of the Frontex Operation HERA III,¹⁸² where it was the task of the EU member states to provide:

optimal maritime and aerial surveillance of the waters close to Mauritania and Senegal, with the authorisation of the Mauritanian and Senegalese authorities, carrying onboard the EU vessels personnel from these countries that are the responsibility [sic] of the operations and are the people that must send back the immigrants to the national authorities in the coast.¹⁸³

Departure prevention was an explicit goal of HERA III:

The aim of these patrols, carried out with Senegalese authorities, was to stop migrants from leaving the shores on the long sea journey and thus reducing the danger of losses of human lives. ... [Overall,] a total of 1167 migrants were diverted back to their points of departure at ports at the West African coast, thus preventing them to risk their lives on the dangerous journey.¹⁸⁴

There is no data on the composition of this group, their protection needs or their fate.¹⁸⁵ Other Frontex cooperation projects have been operating similarly.¹⁸⁶

B *Liaison Officers*

Temporary joint operations are complemented by the long-term deployment of liaison officers to contribute to preventing and combating illegal immigration.¹⁸⁷ Countries of origin and transit for illegal immigration are a priority for these deployments if they fulfil 'minimum human rights standards'.¹⁸⁸ By thus providing advice and support, member state officers may become involved in third country decisions to undertake pull-backs or departure prevention.

¹⁷⁸ Thus, in *Xhavara*, *supra* note 135 and accompanying text.

¹⁷⁹ M. den Heijer, *Europe and Extraterritorial Asylum* (2012), at 248, 256; Baldaccini, *supra* note 6, at 251.

¹⁸⁰ From 2006–2010, Seahorse Atlantic was co-financed by the EU with €2.5 million. Seahorse Mediterraneo currently only cooperates with Libya. Response to Parliamentary Question E-010826-15, 23 October 2015.

¹⁸¹ See, e.g., the Agreement with Cape Verde, 21 February 2008, cited in den Heijer, *supra* note 179, at 213, 256–257. See also European Migration Network (EMN), *Practices to Reduce Irregular Immigration: Spain* (2013), at 37–39.

¹⁸² Outlined in den Heijer, *supra* note 179, at 213, n. 16; see also Brot für die Welt *et al.*, *supra* note 11, at 179–180; Buckel, *supra* note 11, at 216–217, 220.

¹⁸³ HERA III Operational Plan, para. 19.1, quoted in den Heijer, *supra* note 179, at 213, n 13.

¹⁸⁴ Frontex, *Hera III Operation*, available at <http://frontex.europa.eu/news/hera-iii-operation-It9SH3> (last visited 4 December 2015). Italy, Luxemburg and France also participated.

¹⁸⁵ Baldaccini, *supra* note 6, at 242.

¹⁸⁶ Frontex, *supra* note 11, at 39 (Morocco with Spain).

¹⁸⁷ Frontex Regulation, *supra* note 174, Art. 14(3), (4); Gammeltoft-Hansen and Hathaway, *supra* note 1, at 253.

¹⁸⁸ Member states and the agency have to respect the minimum standard of EU law also on third country territory. Frontex Regulation, *supra* note 174, Art. 14(1)(2).

C Equipment and Training

Member states also supply equipment to third countries. For example, between 2007 and 2011, Spain donated at least seven patrol boats, a helicopter, and an airplane to Senegal and Mauritania or sold them at a symbolic price.¹⁸⁹ Between 2009 and 2011, Italy donated six patrol boats to Libya and four to Tunisia¹⁹⁰ and promised Tunisia further equipment and staff training.¹⁹¹ Between 2007 and 2013, Morocco received €70m in EU funds to develop its border control capacities,¹⁹² while Seahorse Atlantico equips and trains border control units in West Africa.¹⁹³ Frontex can finance further technical assistance projects.¹⁹⁴ There is no information whether agreements ensure that this equipment is used in line with human rights.¹⁹⁵ Indeed, there is evidence to the contrary.¹⁹⁶ Training may involve non-departure strategies – for example, EU Libya's Border Assistance Mission aims not only to improve search and rescue capacities but also to intercept boats that are not in distress.¹⁹⁷

D Intelligence Networks

Integrated border surveillance systems have already been developed at a regional level. Set up in 1999, Spain's Sistema Integrado de Vigilancia Exterior now covers the entire Spanish Mediterranean coast as well as the Canary Islands,¹⁹⁸ includes coordination centres in Mauritania, Senegal, Guinea and Cape Verde¹⁹⁹ and employs highly developed satellite-based technologies to locate small boats.²⁰⁰

The European Border Surveillance System (EUROSUR) now integrates such regional systems into an EU-wide communication network that provides highly processed border surveillance data and analyses for shared use and exchange with third countries. EUROSUR aims to improve situational awareness and increase border reaction capability in order to detect, prevent and combat illegal immigration and cross-border crime.²⁰¹ Detailed situational pictures, available in near-real time, are compiled on the basis of member state border surveillance information.²⁰² EUROSUR intelligence

¹⁸⁹ FRA, *supra* note 3, at 44–45 (with further references); EMN, *supra* note 181, at 25. See also Brot für die Welt *et al.*, *supra* note 11, at 179–180, 204–205. According to the Action Plan 2011–2015 for Mauritania, there is 'effective emigration and immigration control'.

¹⁹⁰ FRA, *supra* note 3, at 45 (with further references).

¹⁹¹ Brot für die Welt *et al.*, *supra* note 11, at 150.

¹⁹² Buckel, *supra* note 11, at 204–205 (with further references).

¹⁹³ Brot für die Welt *et al.*, *supra* note 11, at 224.

¹⁹⁴ Frontex Regulation, *supra* note 174, Art. 15(5).

¹⁹⁵ A demand by FRA, *supra* note 3, at 11.

¹⁹⁶ *Ibid.*, at 46; fishers suspected of human smuggling shot at from an Italian-donated boat.

¹⁹⁷ Minor interpellation by parliamentary faction Die Linke, BT-Drs. 18/270, 7 January 2014, answer to question 12.

¹⁹⁸ FRA, *supra* note 3, at 59.

¹⁹⁹ Since 2006. EMN, *supra* note 181, at 24–25; Buckel, *supra* note 11, at 211. 80 per cent financed by the EU, 20 per cent by Spain. According to Parliamentary Question E-000331-14, OJ 2014 C 286.

²⁰⁰ FRA, *supra* note 3, at 58.

²⁰¹ It is also supposed to contribute to reducing the loss of lives of migrants. Council Regulation 1052/2013 (EurosUR Regulation), OJ 2013 L 295/11 Art. 1, recital 2.

²⁰² *Ibid.*, Art. 9(2); this may include drones in the future.

activities include the selective monitoring of third-country ports and coasts and of pre-frontier areas, the tracking of ships if they appear to be ‘used for illegal immigration or cross-border crime’ and the monitoring of certain maritime areas ‘to detect, identify and track vessels and other craft being used for, or suspected of being used for, illegal immigration or cross-border crime’.²⁰³ EUROSUR can thus generate very concrete and current information on departing boats, which can be exchanged²⁰⁴ with third countries for further action or coordinated cross-border measures.²⁰⁵

As interceptions can expose migrants to human rights abuses,²⁰⁶ cooperation agreements must comply with EU and international law – in particular, with non-refoulement.²⁰⁷ No information may be exchanged that could be used to identify protection seekers or persons risking violations of fundamental rights.²⁰⁸ The key challenge, however, will be to preserve respect for the right to leave and for non-refoulement in practice.

E Contractual Obligations to Prevent Departure

Finally, third countries incur migration control obligations in agreements with the EU and its member states.²⁰⁹ For example, so-called mobility partnerships,²¹⁰ phrased in rather general terms, offer the prospect of mobility packages in exchange for obligations to take back irregular migrants,²¹¹ improve border control, cooperate and exchange information in border management.²¹² Bilateral agreements, often not readily available to the public, can contain more specific obligations to intensify coastal patrols in order to prevent departures. For example, such obligations were contained in the 1992 Spanish readmission agreement with Morocco,²¹³ which, ‘as a result of Spanish and European Union efforts, ... has been cooperating effectively in the surveillance of its coasts to prevent them being a departure point for irregular immigration’.²¹⁴ Demanding and obliging third countries to prevent irregular migration to the EU can be highly problematic with respect to the right to leave.²¹⁵

²⁰³ *Ibid.*, Art. 12(2), (5).

²⁰⁴ *Ibid.*, Art. 20.

²⁰⁵ *Ibid.*, Art. 16(3).

²⁰⁶ See CECHR, *supra* note 1, at 61.

²⁰⁷ Eurosur Regulation, *supra* note 201, Art. 20(3), recitals 15, 11.

²⁰⁸ *Ibid.*, Art. 20(5).

²⁰⁹ For an overview, see Adepoju *et al.*, ‘Europe’s Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review’, 48 *International Migration* (2010) 42.

²¹⁰ See European Commission, DG Home Affairs, ‘Southern Mediterranean’, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/southern-mediterranean/index_en.htm (last visited 13 April 2015).

²¹¹ Commission Communication: The Global Approach to Migration One Year on: Towards a Comprehensive European Migration Policy, Doc. COM(2006) 735, 30 November 2006.

²¹² Commission Communication: On Circular Migration and Mobility Partnerships between the European Union and Third Countries, Doc. COM(2007) 248 final, 16 May 2007, at 4–5. For an example, see Déclaration conjointe pour le Partenariat de Mobilité entre la Tunisie, l’Union Européenne et ses Etats membres participants, 3 March 2014.

²¹³ Buckel, *supra* note 11, at 196–197.

²¹⁴ EMN, *supra* note 181, at 24.

²¹⁵ Delas, *supra* note 16, at 295.

5 International Responsibility of EU Member States

The cooperation described raises the question whether EU member states incur responsibility if the third countries prevent departure in violation of international norms.²¹⁶ While human rights treaties displace general international law in some areas, this is not the case for the rules of attribution²¹⁷ laid down in the Articles on State Responsibility (ASR).²¹⁸ Reliance on these rules is unnecessary where violations on a state's territory engage its duty to protect,²¹⁹ but this territorial nexus is missing where the state relies on (subsection A) or supports (subsection B) foreign officials outside its territory.²²⁰ Of course, the parallel exercise of jurisdiction can also lead to joint responsibility with the third country (subsection C).

A Imputation

According to Article 6 of the ASR, a state is responsible for the actions of the organ of another state if that organ is put at its disposal in such a way that it exercises parts of its jurisdiction. However, this presupposes that the organ acts 'in conjunction with the machinery' of that state and under its exclusive direction and control, not on the basis of instructions from the home state.²²¹ These criteria are consistent with those used by the ECtHR.²²² In the push-back case of *Xhavara and others*,²²³ the integration requirement clearly precludes imputing Italian violations to Albania.²²⁴ While shipriders are often closely involved in member state operations, the very point is that they exercise their own state's jurisdiction. Even joint instructions by the home state and the foreign (member) state do not constitute integration,²²⁵ such that ship rider actions cannot be imputed to EU member states.²²⁶ *A fortiori*, control under Article 17 of the ASR does not apply either.²²⁷

²¹⁶ On the responsibility of Frontex, see Lehnert, *supra* note 138, at 313–416.

²¹⁷ Detailed discussion in M. den Heijer, 'Shared Responsibility before the European Court of Human Rights', 60 *Netherlands International Law Review* (2013) 411. More generally, see Simma and Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', 17 *European Journal of International Law* (2006) 483, at 425–529.

²¹⁸ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility), UN Doc. A/56/83, 3 August 2001. The Articles on State Responsibility are largely seen as customary international law; see *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Merits, 26 February 2007, ICJ Reports (2007) 43, para. 419.

²¹⁹ See ECtHR, *Al Nashiri v. Poland*, Appl. no. 28761/11, Judgment of 24 July 2014, paras 440–457, 509–519; the parallel case is ECtHR, *Husayn (Abu Zubaydah) v. Poland*, Appl. no. 7511/13, Judgment of 24 July 2014.

²²⁰ The ECtHR has affirmed extraterritorial jurisdiction through effective control. See *Hirsi Jamaa*, *supra* note 4; ECtHR, *Al-Skeini v. United Kingdom*, Appl. no. 55721/07, Judgment of 7 July 2011.

²²¹ Commentary, *supra* note 218, Art. 6 para. 2.

²²² *X and Y v. Switzerland*, (1978) 13 DR 241 (no imputation to Liechtenstein); ECtHR, *Drozd and Janousek v. Spain and France*, Appl. no. 12747/87, Judgment of 26 June 1992 (imputation to Andorra).

²²³ See *Xhavara*, *supra* note 135.

²²⁴ Articles on State Responsibility, *supra* note 218, Art. 6, para. 2, n. 130 (Commentary).

²²⁵ *Ibid.*, para. 3.

²²⁶ Similarly, den Heijer, 'Europe beyond Its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', in Ryan and Mitsilegas, *supra* note 6, 163, at 193; den Heijer, *supra* note 179, at 257.

²²⁷ But see den Heijer, *supra* note 179, at 257.

B Complicity

According to Article 16 of the ASR, a state is responsible for the internationally wrongful act of another state if it (i) provided aid or assistance with knowledge of the circumstances and if (ii) the act would also be wrongful if committed by that state directly. As mentioned, resolving such scenarios via the territorial state's duty to protect²²⁸ is not possible in the cases at hand.²²⁹ Hypothetical direct responsibility poses no problem, since Article 12(2) of the ICCPR binds third countries, the EU member states and even the EU.²³⁰ A particular degree of support is not necessary as long as it has made the commission of the act significantly easier or contributed to it – and if this was also intended. It need not be essential to the commission of the act²³¹ or be a *conditio sine qua non*.²³² However, states seek to limit complicity to cases of active support and emphasize intent.²³³ Examples include the permission to use military bases for the use of force, supplying arms or technology to states that commit severe human rights violations²³⁴ or supplying logistic support and valuable information for the commission of the act.²³⁵

If a third country prevents departure in violation of international norms, the provision of patrol boats for ship riders, the supply of equipment, training and funding for such operations²³⁶ and sharing information on the position of departing boats would clearly be contributing to the violation or significantly facilitating this violation. A member state that is building border management capacity and training staff, especially involving human rights, does not have to assume abuse,²³⁷ even if isolated violations are known.²³⁸ However, if violations of the right to leave are concretely envisioned, and if equipment or information is (also) provided specifically for this purpose, then intent is established – detailed knowledge of the concrete events (as in joint operations) is not required.²³⁹ Thus, EU member states may be complicit in internationally wrongful departure prevention by third countries.

C Joint Responsibility

However, active participation of a member state in pull-backs and departure prevention by third countries can also engage direct responsibility in accordance with Article

²²⁸ E.g., in *Al Nashiri*, *supra* note 219, despite the applicant's reference to the Articles on State Responsibility, *supra* note 218, Art. 16. In general, see den Heijer, *supra* note 179, at 99–100; H. Aust, *Complicity and the Law of International State Responsibility* (2011), at 401–412.

²²⁹ See also den Heijer, *supra* note 179.

²³⁰ See section 2.A in this article. Gammeltoft-Hansen and Hathaway, *supra* note 1, at 281–282, do not require hypothetical responsibility under the same norm.

²³¹ Articles on State Responsibility, *supra* note 218, Art. 16, para. 5 (Commentary).

²³² *Ibid.*, at 212.

²³³ Aust, *supra* note 228, at 209 (with further references).

²³⁴ Articles on State Responsibility, *supra* note 218, Art. 16, paras 7–9 (Commentary).

²³⁵ Aust, *supra* note 228, at 198–199.

²³⁶ See also *Hirsi Jamaa*, *supra* note 4, at 76, Concurring Opinion of Judge Pinto de Albuquerque; Fischer-Lescano *et al.*, *supra* note 7, at 280–281; Gammeltoft-Hansen and Hathaway, *supra* note 1, at 279.

²³⁷ Articles on State Responsibility, *supra* note 218, Art. 16, para. 4 (Commentary).

²³⁸ See also den Heijer, *supra* note 226, at 101, 196.

²³⁹ Thus, in *Al Nashiri*, *supra* note 228, Poland violated the duty to protect by enabling and supporting CIA extraordinary renditions on its soil in full knowledge of the high likelihood that the detainees will be tortured. See also Gammeltoft-Hansen and Hathaway, *supra* note 1, at 280–281.

4 of the ASR, if it involves the exercise of effective control.²⁴⁰ More recently, the ECtHR has also affirmed jurisdiction in the exercise of public powers in a foreign country with the consent, invitation or acquiescence of that country's government, without requiring effective control.²⁴¹ In this case, the states would be jointly responsible in accordance with Article 47 of the ASR.²⁴²

Third country pull-backs would constitute push-backs for the EU member state, violating non-refoulement and the prohibition of collective expulsion.²⁴³ Non-refoulement only applies once the refugee has left their home state's territorial waters. Arguably, however, preventing this would be incompatible with the *bona fide* principle²⁴⁴ – where would-be migrants risk persecution or severe human rights violations in the third country that would oblige the member state to provide protection, preventing them from leaving would constitute an abuse of right.²⁴⁵ In addition, contrary to the ECtHR's views,²⁴⁶ non-departure measures in third countries are not merely designed to prevent entry.²⁴⁷ Even while respecting non-refoulement *à la lettre*, member states can therefore violate the right to leave²⁴⁸ and the right to seek asylum.²⁴⁹

6 Conclusion

Border control measures at sea are subject to strict limits under refugee law, human rights law and the law of the sea. In particular, non-departure measures are permissible under the law of the sea only in very limited cases, and only life-saving operations do not incur serious doubts with respect to the right to leave. Most importantly, EU member states cannot exonerate themselves from their international obligations by engaging countries of origin and transit in migration control. If they require, support or even participate in a third country's internationally wrongful acts, they can be complicit or jointly responsible.

²⁴⁰ Goodwin-Gill, *supra* note 39, at 447.

²⁴¹ *Al-Skeini*, *supra* note 220; discussion in Gammeltoft-Hansen and Hathaway, *supra* note 1, at 267–272.

²⁴² On this principle, see Gammeltoft-Hansen and Hathaway, *supra* note 1, at 272–276.

²⁴³ *Hirsi Jamaa*, *supra* note 4. Two states that are jointly liable need not be violating the same norms. Gammeltoft-Hansen and Hathaway, *supra* note 1, at 274–275.

²⁴⁴ *European Roma Rights Centre & Ors*, *supra* note 36, paras 26 (Lord Bingham), 43 (Lord Steyn) (not at land border); but see UNHCR's *amicus curiae* brief, reprinted in 17 *IJRL* (2005) 427.

²⁴⁵ Goodwin-Gill and McAdam, *supra* note 6, at 383; Goodwin-Gill, *supra* note 116, at 99.

²⁴⁶ *Xhavara*, *supra* note 135, para. 3; see section 3.B.1 in this article.

²⁴⁷ See also Brouwer, *supra* note 135, at 224.

²⁴⁸ See also den Heijer, *supra* note 226, at 192; for its extraterritorial application, see Scheinin, *supra* note 1, at 128–130.

²⁴⁹ Trevisanut, *supra* note 39, at 674.