REVUE BELGE DE DROIT INTERNATIONAL
2023/1-2 – Éditions BRUYLANT, Bruxelles

MIGRATION CONTAINMENT POLICIES IN NIGER IN LIGHT OF MIGRANTS' RIGHT TO LEAVE A COUNTRY

BY

Amirsalar KAVOOSI*

RÉSUMÉ

Depuis 2015, le Niger est devenu le gardien de l'Europe. Ce pays, qui était autrefois un centre névralgique pour la migration, a été contraint de criminaliser le trafic de migrants. À la mi-2016, le Niger a commencé à appliquer la loi 36/2015 sur le trafic de migrants, ce qui a entraîné une diminution spectaculaire du nombre de migrants entrant en Libye et en Algérie depuis le Niger. Tout d'abord, ce travail a identifié trois politiques importantes de confinement de la migration : (1) la criminalisation de l'assistance à la sortie illégale des migrants, (2) les sanctions contre les transporteurs nationaux, et (3) l'extorsion et l'interdiction aux points de contrôle. Ensuite, ces restrictions ont été évaluées à la lumière du droit des migrants de quitter un pays, ce qui a conduit à de nombreux arguments juridiques remettant en question la validité de ces politiques de confinement.

ABSTRACT

Since 2015, Niger has become the gatekeeper of Europe. This country, that once was a central hub for migration, has been pressured to criminalize migrant smuggling. In mid-2016, Niger started to implement Law 36/2015 on migrant smuggling, which resulted in a dramatic decrease of migrants entering Libya and Algeria from Niger. Firstly, this work identified three important migration containment policies: (1) the criminalization of assisting in the illegal exit of migrants, (2) domestic carrier sanctions, and (3) extortion and interdiction at checkpoints. Next, these restrictions have been assessed in light of migrant's right to leave a country, resulting in numerous legal arguments challenging the validity of these containment policies.

I. – INTRODUCTION

For decades, Niger has been a main transit country for Sub-Saharan migrants (1) in their journey to Algeria, Libya and Europe. (2) Until 2015, the

* Lawyer at the Brussels Bar and Teaching Assistant at the Institute for European Law of KU Leuven.

(1) The term "migrant" will be employed to refer to refugees and persons who leave their country for other reasons.

(2) F. BOYER, "Sécurité, développement, protection. Le triptyque de l'externalisation des politiques migratoires au Niger" (2019) 172(1) *Hérodote* 171, 172 <https://www.cairn.info/

dominant view in Niger was one of acceptance toward transit migration,(3) a perspective significantly shaped by the policies of the Economic Community of West African States (ECOWAS), which promote the free movement of people within its member states.(4) Furthermore, Niger recognized that these migration patterns not only bolstered the country's economy but were also broadly embraced and accepted within its society.(5)

Against the backdrop of the so-called "refugee crisis" in Europe, Niger faced pressure from the European Union (EU) and its member states to halt irregular migration(6).(7) In 2015, the government of Niger adopted Law 2015/36 of 26 May 2015 relating to the illegal trafficking in migrants (Law 36/2015 or Law No 36/2015).(8) Data of the International Organisa-

revue-herodote-2019-1-page-171.htm&wt.src=pdf> accessed 22 June 2023; M. BØÅS, "EU migration management in the Sahel: unintended consequences on the ground in Niger?" (2020) 42(1) *Third World Quarterly* 52, 57; EEAS, "Niger Action and Progress under the Migration Partnership Framework June 2016 - June 2017" <https://www.eeas.europa.eu/sites/default/files/factsheet_work_under_partnership_framework_with_niger.pdf> accessed 22 June 2023. It is estimated that since 2000 some 100.000 migrants have passed through Niger, with 2017 forming a peak at 330.000 migrants, see F. MOLENAAR, "Irregular migration and human smuggling networks in Niger" (Clingendael Institute, February 2017) 4, <https://www.clingendael.org/sites/default/files/pdfs/irregular_migration_and_human_smuggling_networks_in_niger_0.pdf> accessed 22 June 2023.

(3) In a 2003 interview, the regional governor of the Agadez asserted that: "These are African nationals who have every right to transit through Niger. The rest is their responsibility". See A. BENSAÂD, "Agadez, carrefour migratoire sahélo-maghrébin" (2003) 19(1) *Revue Européenne Des migrations Internationales*, §20 <https://journals.openedition.org/remi/336> accessed 8 July 2023. According to Bolouvi, the prevailing discourse regarded travel to Libya and Algeria as a legitimate activity, emphasizing that Niger adhered to the ECOWAS principle of free movement of people, see OECD, *Regional Challenges of West African Migration*, West African Studies, OECD Publishing, 2009, 201.

(4) Article 3(2)(d)(iii) and 59(1) Economic Community of West African States Revised Treaty (adopted 24 July 1993, entered into force 23 August 1995); Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment (adopted 29 May 1979, entered into force 5 June 1980).

(5) M. TIDJANI ALOU, "Monitoring the neopatrimonial state on a day-to-day basis: politicians, customs officials and traders in Niger", in D. BACH and M. GAZIBO (eds), *Neopatrimonialism in Africa and Beyond*, 1st edn, Routledge, 2011, 146-147.

(6) The term "irregular migration" is defined by the IOM as "movement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination", see IOM, "Key Migration Terms" <https://www.iom.int/key-migration-terms> accessed 22 June 2023.

(7) In 2016, Niger was one of the five African priority countries of origin and transit under the EU's New Partnership Framework. In a 2016 Communication from the European Commission, it is stated that the visits of the High Representative/Vice-President to Niger in September 2015, followed by Commissioner Mimica in November 2015 "were instrumental in launching a dialogue which has led to concrete action to curb the flow of irregular migrants through Niger". Furthermore, Niger received visits from the German and French Ministers of Foreign Affairs in May 2016 and from the German Chancellor in October 2016 – the first visit to Niger of a German Chancellor – where migration was a key issue, see European Commission, "Communication from the Commission to the European Parliament, the European Council and the Council" (Communication) (2016) 700 final, 5.

(8) Republique du Niger, Loi n° 2015-36 du 26 mai 2015 relative au trafic illicite de migrants. The original text of the law, in French, can be retrieved from http://www.justice.gouv.ne/images/lois/pdfs/loi_relative_au_trafic_illicite_de_migrants.pdf. The legal provisions, originally written in French, have been freely translated by the author.

tion for Migration (IOM) shows the significant impact it had. (9) Prior to law's enactment, from April to September 2016, the IOM registered 325.642 (mostly foreign) migrants crossing the Nigerien-Libyan border. (10) However, between September and December 2016 that number dramatically decreased to 37.755 registered migrants, (11) with the majority being Nigerien nationals. (12) The former UN Special Rapporteur on the Human Rights of Migrants observed that the implementation of this law resulted in "a *de facto* ban of all travel north of Agadez", (13) as visualized by the red line on the map below.

Map by Pestalozza and Dauchy (14)

(9) IOM, "Migration trends from, to and within the Niger 2016-2019" (2020) 1 <https://publications.iom.int/system/files/pdf/iom-niger-four-year-report.pdf> accessed 6 August 2023.

(10) *Ibid*.

(11) In order to evaluate these mobility restrictions on their "effectiveness", from the perspective of wanting to reduce emigration, special attention should be paid to, *inter alia*, the work of De Haas *et al.*, who argue that "migration policies can have unintended side effects that limit their effectiveness to achieve intended goals". The researchers identified four types of so-called "substitution effects". Firstly, there can be "spatial substitution through the diversion of migration via other routes or to other destinations". Secondly, categorial substitution could result in a reorientation toward other legal or illegal channels". Thirdly, inter-temporal substitution can impact the timing of migration due to the expectation or fear of future toughening of policies. Lastly, there can be "reverse flow substitution if immigration restrictions interrupt circulation by discouraging return and encouraging permanent settlement". For more information, see H. DE HAAS, M. CZAIKA, M.-L. FLAHAUX, E. MAHENDRA, K. NATTER, S. VEZZOLI, M. VILLARES-VARELA, "International Migration: Trends, Determinants, and Policy Effects" (2019) 45(4) *Population and Development Review* 885, 907.

(12) IOM, "Migration trends from, to and within the Niger 2016-2019" (2020) 1 <https://publications.iom.int/system/files/pdf/iom-niger-four-year-report.pdf> accessed 6 August 2023.

(13) Human Rights Council, "Visit to Niger – Report of the Special Rapporteur on the human rights of migrants" (16 May 2019) UN Doc A/HRC/41/38/Add.1, § 32 (Special Rapporteur, visit to Niger).

(14) A. DAUCHY, "Field Arrests of People Smugglers in Niger: A Criminalization of Mutual-Aid Practices in Migration Situations" (Metropolitics, 8 July 2022) <https://metropolitics.org/Arrests-of-People-Smugglers-in-Niger-A-Criminalization-of-Mutual-Aid-Practices.html> accessed 15 August 2023.

This contribution aims to answer two questions. Firstly, it wants to assess how migrants in Niger, both in practice and by law, are prevented from entering Libya and Algeria. Building on this, the study investigates whether these mobility restrictions violate the right to leave a country of migrants.

To identify the main mobility restrictions, desk research is conducted on the basis of books, journal articles, NGO reports, newspaper articles, blog-posts and official documents. Moreover, this contribution augments this investigation by delving into the contextual framework in which migration unfolded in Niger prior to the implementation of Law 36/2015. By analyzing this context, a more comprehensive understanding can be developed regarding the interplay between restrictions stemming from Law 36/2015 and the pre-existing migration landscape. This comprehensive approach aims to shed light on how the law influenced and modified the previous mechanisms which facilitated the mobility of migrants. The methodology employed for identifying these mobility constraints within this context draws on "contextual analysis", which examines the environment in which a given phenomenon operates in order to assess when and how the contexts shape a social phenomenon and *vice versa*. (15) This approach involves observing and interpreting the qualitative nuances of the migration landscape to better elucidate the mobility restrictions that emerged with the implementation of Law 36/2015.

To evaluate whether these mobility restrictions violate the right to leave, it is necessary to note that the right to leave is ensured in multi-layered human rights law, consisting of treaties and soft law, (16) at a regional and global level. (17) In order to cope with this fragmented framework, Brems suggests to adopt an integrated view. (18) This entails, *inter alia*, a comprehensive approach in order to have a maximum widening of the range of human rights sources on the table. (19) Therefore, this contribution will examine the right to leave a country in the UN human rights regime and the African, Inter-American and European human rights protection systems.

This contribution is organized into four chapters. Following the introduction, Chapter II explores migration containment policies in Niger. The first section situates these restrictions within the context of the migration patterns in Niger and West Africa before the adoption of Law 36/2015. Based

(15) A. Willems, "Contextual Analysis", in J.-F. Morin, C. Olsson and E. Özlem Atikcan (eds), *Research Methods in the Social Sciences: An A-Z of key concepts*, 1st edn, Oxford University Press, 2021, 62.

(16) E. Brems, "Smart Human Rights Integration", in E. Brems and S. Ould Chaib (eds), *Fragmentation and Integration in Human Rights Law: Users' Perspectives*, Edward Elgar Publishers, 2018, 165.

(17) E. Brems, "Introduction: rewriting decisions from a perspective of human rights integration", in E. Brems and E. Desmet (eds), *Integrated Human Rights in Practice: Rewriting Human Rights Decisions*, Edward Elgar Publishing, 2017, 3.

(18) E. Brems, "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration" (2014) (4) *European Journal of Human Rights* 447, 451.

(19) *Ibid.*, 452.

on this portrayed context, the second section of this chapter identifies the primary mobility restrictions preventing migrants from traveling north, rooted in both law and practice. Subsequently, Chapter III presents a comprehensive framework of the right to leave a country within a multi-layered human rights regime and proceeds to examine whether the identified mobility restrictions in Niger comply with this legal framework. Finally, Chapter IV concludes by summarizing the findings and highlighting key insights derived from the study.

II. — Mobility (Restrictions) in Niger and West Africa

This chapter aims to answer the first research question by outlining the key mobility barriers in Niger that restrict migrants to travel to Libya and Algeria. To do so, the first subsection portrays the migration landscape in West Africa and Niger before the enactment of Law 36/2015. Against this illustrated background, the second subsection will examine this law in depth, along with its implementation in practice, demonstrating how this law has altered previously existing migration patterns, and has ultimately affected the mobility of migrants.

A. — *Contextualization of the Mobility Restrictions: Migration in West Africa and Niger*

Today, intra and intercountry migration continues to be a central feature of African life. (20) In general, migrants from and within the subregion include temporary cross-border workers, professionals, clandestine workers, and refugees and are essentially intra-regional, short term and male dominated. (21) Flahaux and De Haas indeed confirm that out of the five African regions they have studied, intra-continental emigration tend to be the highest in West Africa, due to several factors. (22) Firstly, the presence of numerous smaller countries in terms of both population and land surface facilitates migration spilling over national borders. (23) Secondly, the existence of multiple ethnic groups dispersed across West African countries

(20) B. Chelsea Mina, F. Oluyemi Oyenike and A. Mayowa Gbenga, "Cross Border Movement and Language Barriers in West Africa", (2018) 11(1) *Acta Universitatis Danubius. Relationes Internationales*, 126, 127.

(21) A. Adepoju, "Migration in West Africa - A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration" (Global Commission on International Migration, September 2005) 1 <https://www.iom.int/sites/g/files/tmzbdl486/files/2018-07/RS8.pdf> accessed 8 July 2023.

(22) M.-L. Flahaux and H. de Haas, "African migration: trends patterns, drivers" (2016) 4(1) *Comparative Migration Studies* 9.

(23) *Ibid*.

fosters strong network connections. Another influential factor is the establishment of robust migration patterns during the colonial era. Lastly, the visa-free movement between ECOWAS countries serves as a further facilitator of migration within the region. (24)

Niger, a land-locked country between sub-Saharan Africa and the Maghreb, is the largest country in West Africa. The desert occupies a significant part of its territory, with the Saharan and Sahelian zones representing 80% of the country. (25) Despite a subsoil rich in uranium, Niger is one of the poorest countries on earth, with a GDP of 533 USD per capita (26) and is ranked 189 out of 191 on the UN Development Programme Human Development Index. (27) Due to its location, the country has long been a crossroads for trans-Saharan migration that linked the Mediterranean to Africa. The city of Agadez, often described as "*porte de sortie de l'Afrique subsaharienne*", (28) has for centuries been an important hub for both commercial trade and migration between West and North Africa. (29)

Brachet notes that migration from the Sahel to northern Africa is a long-standing phenomenon, triggered by labour demands in Libya, droughts in the Sahel and severe food shortages in the 1970s and 1980s. (30) By the end of the 1990s, hundreds of thousands of migrants passed through Agadez each year on their way to North Africa. (31) It has been estimated that 20 per-

(24) *Ibid.*, 10.

(25) Présidence de la République du Niger, "Le Niger" <https://www.presidence.ne/niger/histoire> accessed 3 August 2023.

(26) The World Bank Data, "Niger" <https://data.worldbank.org/country/NE> accessed 7 July 2023.

(27) UNDP, "Human Development Insights" <https://hdr.undp.org/data-center/country-insights#/ranks> accessed 19 July 2023.

(28) J. Fontaine, "Julien BRACHET, Migrations transsahariennes: vers un désert cosmopolite et morcelé (Niger)" (Insaniyat 2011) <https://journals.openedition.org/insaniyat/12832> accessed 11 July 2023.

(29) Xchange, "Agadez: Voices from a Historical Transit Hub – Niger Report 2019 (Part One)" 6 <http://xchange.org/reports/NigerReport2019.html> accessed 10 July 2023.

(30) J. Brachet, "Manufacturing Smugglers: From Irregular to Clandestine Mobility in the Sahara" (2018) 676(1) *The Annals of the American Academy of Political and Social Science* 16, 19 (Brachet, "Manufacturing Smugglers'). Migration from West Africa to North Africa has been reported during the eleventh century, principally for religious reason as Muslim pilgrims have made the journey to Mecca, via the North African trade route (Tripoli, Benghazi and Egypt), see A. Balamoan, *Peoples and Economics in the Sudan 1884 to 1956* (Harvard University Center for Population Studies 1976), 156. In addition, Niger held an important position within the trans-Saharan trade route, which lasted more than a millennium from the arrival of Islam in the southern Sahara and Sahel in the eight and ninth centuries to the consolidation of European colonial control in the interbellum, see A. Usman and T. Falola, "Migrations in African History: An Introduction", in T. Falola (ed), *Movements, Borders, and Identities in Africa*, Boydell & Brewer, September 2012, 6.

(31) A. Bensaâd, "Agadez, carrefour migratoire sahélo-maghrébin" (2003) 19(1) *Revue Européenne Des migrations Internationales* <https://journals.openedition.org/remi/336> accessed 8 July 2023. S. Moretti, "Transit Migration in Niger - Stemming the Flows of Migrants, but at What Cost?" (2020) 3(1) *Migration and Society* 80, 8; OECD, *Regional Challenges of West African Migration* (n 3), 201; Mixed Migration Centre, "Navigating borderlands in the Sahel: border security governance and mixed migration in Liptako-Gourma" (Mixed Migration Centre Research Report, November 2019)

cent of all migrants on the trajectory between West Africa and North Africa intend to travel to Europe, with "the remainder of trans-Saharan migration constituting a circular and temporary intra-African livelihood protection strategy". (32) In addition, migration from West Africa to Libya was fuelled by Qadhafi's policy of pan-Africanism which resulted in an open door policy whereby African nationals were allowed to enter Libya without visas between 1998 and 2007. (33)

In a 2003 article, Bensaâd portrayed the dynamics of migration in Niger during that period, a phenomenon that continued until the implementation of Law 36/2015, which transformed the following reality overnight:

> "The migratory movement is not organised by States; it is structured at grassroots level, and some migrants play a role in this structuring, reinvesting their experience of mobility. The ambiguity that characterises the legal status of this immigration means that it is both tolerated and left to the informal sector. The ambiguity is blatantly obvious in Niger, the hub of this traffic, which is legal in the eyes of the authorities but above all vital for this country, one of the poorest in the world, where the journey to emigrate illegally is organised legally. It is from the bus station that lorries depart, in public and under police control, in which more than 100 people are crammed, under the guise of "travel agencies" that are well established and duly registered as transporting migrants to the Maghreb countries. In principle, the police keep accounts of these flows, however clandestine they may be, since the passage of migrants, taxed, has become a source of revenue. As far as the official discourse is concerned, this is nothing more than legal transit for legal African nationals, where the final destination is ignored. For the prefect of Agadez, interviewed during our field survey, everything is perfectly legal: "these are African nationals who have every right to transit through Niger. The rest is their responsibility". So there is no illegal emigration!". (34)

This reality above is what Brachet described as the "professionalization in people transport from Agadez", which took form after the armed rebellion of 1990-1995 in Niger. (35) During the late 1990's, there was a growing number

33 <https://mixedmigration.org/wp-content/uploads/2019/12/083_navigating_borderlands.pdf> accessed 11 July 2023 (MMC, "Navigating Borderlands").

(32) F. Molenaar and F. El Kamouni-Janssen, "Turning the tide - The politics of irregular migration in the Sahel and Libya" (Clingendael Institute, February 2017) <https://www.clingendael.org/sites/default/files/pdfs/turning_the_tide.pdf> accessed 11 July 2023.

(33) A. Malakooti, "Mixed Migration: Libya at the crossroads - Mapping of Migration Routes from Africa to Europe and Drivers of Migration in Post-revolution Libya" (Altai Consulting, November 2013) 72 <https://www.refworld.org/pdfid/52b43f594.pdf> accessed 19 July 2023; Migration Policy Centre, Team "MPC - Migration Profile Libya" 1 (June 2013) <https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/unpd_ws_201509_libya.pdf> accessed 19 July 2023.

(34) *Ibid*. According to Bolouvi in 2009, a journalist covering the West-African region, the prevailing discourse regarded travel from Agadez to the North as a legitimate activity, emphasizing that Niger adhered to and enforced the ECOWAS principle of free movement of people, see OECD, *Regional Challenges of West African Migration* (n 3), 201.

(35) From 1990 to 1995 there was an armed conflict between different Tuareg groups and the Nigerien government, motivated by the desire of Tuaregs for greater political autonomy and development funds for Niger's northwestern regions, inhabited by the Tuaregs.

of migrants travelling via Agadez, which created a significant demand for transportation and related services. (36) The former rebels returned to Agadez after the peace agreement in 1995. According to Brachet, "[u]nemployed and eager to make money, these former rebel soldiers [...] put their detailed knowledge of the central Sahara to use, knowledge that they had acquired as migrants, smugglers of goods, tour guides, or during the rebellion itself". (37) The government, in order to discourage them from further armed activity or banditry, allowed them to open the first official trans-Saharan travel agencies, specializing in carrying migrants to Algeria and Libya. (38)

Before the implementation of Law 36/2015 in mid-2016, migration routes were well-defined and standardized; they were known to everyone, military vehicles escorted weekly convoys of busses with migrants travelling between towns and villages in northern Niger, to finally reach Libya. (39)

A variety of actors used to support and be supported by migration in Niger. "*Passeurs*" are often local individuals who know migratory routes well enough to coordinate the migrants' overall journey. (40) "*Coxeurs*" (or recruiters) are employed by "*passeurs*" and are responsible for the recruitment of migrants and/or who meet migrants once they arrive in Agadez to further guide them along their way. (41) The "*Yan Tchaga*" has the responsibility to cast around migrants on the command of the ghetto owner, in order to provide them with a place (known as a "ghetto") based on their nationality or language. (42) They are followed by members of the "*agences de courtage*" and those involved in transportation (next to the "*passeurs*"), *i.e.* bus drivers, couriers, vehicle owners and guides. (43) Furthermore, there are the sellers of jerry cans, turbans and other products needed for the journey through the Sahara. (44) Moreover, there exists a multitude of service providers dedicated to assisting migrants: managers of internet and phone cafés, money transfer services, communication services, restaurants and lastly traders who buy

(36) Brachet, "Manufacturing Smugglers" (n 30), 20.

(37) *Ibid*.

(38) *Ibid*.

(39) E. Golovko, "Players of many parts: The evolving role of smugglers in West Africa's migration economy" (Mixed Migration Centre Briefing Paper May 2019) 20 <https://mixedmigration.org/resource/players-of-many-parts/> accessed 20 July 2023; J. Tubiana, C. Warin and G. M. Saeneen, "Multilateral Damage - The impact of EU migration policies on central Saharan routes" 16 (Clingendael Institute, September 2018) 23 <https://www.clingendael.org/pub/2018/multilateral-damage/> accessed 19 July 2023 (Tubiana *et al.*, "Multilateral Damage").

(40) Molenaar, "Irregular migration and human smuggling networks in Niger" (n 2), 20; Golovko (n 39), footnote 45.

(41) Molenaar, "Irregular migration and human smuggling networks in Niger" (n 2), 20; Golovko (n 39), 22.

(42) A. Hamani and A. Bontiant, "Agadez, un nœud de la migration internationale au Niger" (2015) 270 *Les Cahiers d'Outre-Mer* 99, 196 <https://journals.openedition.org/com/7427?lang=fr> accessed 20 July 2023.

(43) *Ibid*.

(44) *Ibid*.

back from migrants the things they want to get rid of before crossing the desert. (45)

Considering that approximately 100.000 migrants passed through Niger each year, (46) the scope and significance of this branch of the informal economy becomes clear. (47) According to the World Bank, more than 60 percent of Niger's GDP is generated in the informal sector. (48) Prior to the implementation of the 2015 law, it was estimated that migration offered direct jobs for more than 6.000 people in Agadez. (49) In early 2017, the Agadez Regional Council estimated that 6.000 to 7.000 inhabitants were directly employed in migration, and 100.000 persons, about a fifth of the city's population, indirectly benefitted from migration-related activities. (50)

In spite of what preceded, the importance of the "the drama of the women of Kantché" should be underscored. (51) In October 2013, 92 people died (52 children, 33 women and 6 men) in the Nigerien desert after being abandoned by smugglers, around ten kilometres from the Algerian border. (52) Amidst the public outcry, the government took two measures: (1) to identify all those involved in supplying and maintaining these criminal networks and to punish them, and (2) the closure of the ghettos in Agadez. (53) According to the Nigerien authorities, this drama, and its wish to implement the Migrant Smuggling Protocol, led to the adoption of Law 36/2015. (54) How-

(45) *Ibid*.

(46) Molenaar, "Irregular migration and human smuggling networks in Niger" (n 2), 4.

(47) From September 2016, the application of Law 26/2015 on the smuggling of migrants put largely an end to these practices. According to the IOM, since the implementation of Law No 36/2015, the revenues in Agadez alone were reduced around 117 million dollars a year. See J. Ruhfus, "Niger: Europe Migration" *Al Jazeera* (10 January 2019) <https://www.aljazeera.com/program/people-power/2019/1/10/niger-europe-migration> accessed 20 July 2023.

(48) World Bank, "Republic of Niger - Priorities for ending poverty and boosting shared prosperity" (28 November 2017) §4 <https://documents1.worldbank.org/curated/en/998751512408491271/pdf/NIGER-SCD-12012017.pdf> accessed 20 July 2023.

(49) A. Hoffmann, J. Meester and H. Manou Nabara, "Migration and Markets in Agadez Economic alternatives to the migration industry" (Clingendael Institute, October 2017) 4 <https://www.clingendael.org/sites/default/files/2017-10/Migration_and_Markets_Agadez.pdf> accessed 20 July 2023.

(50) Tubiana *et al.*, "Multilateral Damage" (n 39), 28.

(51) Kantché refers to the name of the canton of the victims, located in the south-east of the country, see A. Dauchy, "La loi contre le trafic illicite de migrantes au Niger. État des lieux d'un assemblage judiciaire et sécuritaire à l'épreuve de la mobilité transnationale" (2000) 51 *Antropologie & développement* 121, 122 and 126.

(52) "Les cadavres de 92 migrants retrouvés dans le désert au Niger" *Le Monde* (31 October 2013) <https://www.lemonde.fr/afrique/article/2013/10/30/87-cadavres-de-migrants-nigeriens-retrouves-dans-le-desert-pres-de-l-algerie_3505703_3212.html> accessed 20 July 2023.

(53) "Après la mort de 92 migrants, le Niger ordonne la fermeture de camps de clandestins" *Franceinfo* (1 November 2013) <https://www.francetvinfo.fr/monde/afrique/apres-la-mort-de-92-migrants-le-niger-ordonne-la-fermeture-de-camps-de-clandestins_449332.html> accessed 20 July 2023.

(54) G. Maimouna Gazibo, "Rôle du Niger dans la lutte contre la traite des personnes es et le trafic illicite de migrants and Report of the Special Rapporteur on the human rights of migrants on Niger" 6 <http://archive.ipu.org/splz-e/valletta17/gazibo.pdf> accessed 15 July 2023.

ever, it was reported that the ghettos were only temporarily closed (55) and the measures taken by the government remained fragmented. (56) According to some scholars, it was not until 2015, when the national narrative came into contact with the narrative of the EU, that the field of migration came into the realm of public action, and eventually led to the adoption of Law 36/2015 which criminalised migrant smuggling. (57)

The implementation of Law 36/2015 significantly changed the pre-existing paradigm concerning migration in Niger. The implementation led, *inter alia*, to the arrest of at least 282 facilitators of migration and the confiscation of at least 300-350 vehicles used to transport migrants through the desert. (58)

An important anecdote mentioned in *The New York Times* is telling:

> "One of Niger's biggest bus companies, Rimbo, used to send four migrant-filled buses each day from the country's capital in the south, Niamey, to the northern city of Agadez, a jumping off point for the trip to the Libyan border. Now, the company has signed a two-year contract with the I.O.M. to carry migrants the other way, so they can be repatriated". (59)

Brachet notes that this is the first time in Niger's history that people have been jailed for smuggling activities. (60) During a field study in Agadez, the researcher observed the dissatisfaction among the local population: "Here in Agadez, people have always welcomed travellers, forever. And we have always travelled too, to Algeria, to Libya, like our fathers, our grand-fathers. Why is it a problem now?". (61)

Intermediate Conclusion

Several elements are key for understanding the impact of Law 36/2015. To begin with, Niger has historically served as a crucial transit State within two significant migratory pathways: intra-regional migration within West Africa, and the trans-Saharan migration, connecting Sub-Sahara Africa to North Africa. These flows have contributed to the emergence of a unique,

(55) MMC, "Navigating Borderlands" (n 31) 38; F. Boyer, B. Ayouba Tinni and H. Mounkaila, "L'externalisation des politiques migratoires au Niger. Une action publique opportuniste?" (2020) 51 *Anthropologie & développement* 103, 107 <https://journals.openedition.org/anthropodev/986> accessed 20 July 2023.

(56) Boyer, Tinni and Mounkaila (n 55), 107 <https://journals.openedition.org/anthropodev/986> accessed 20 July 2023.

(57) *Ibid*.

(58) F. Molenaar, J. Tubiana and C. Warin, "Caught in the middle: A human rights and peace-building approach to migration governance in the Sahel" 15 (Clingendael Institute, December 2018) <https://www.clingendael.org/pub/2018/caught-in-the-middle/> accessed 20 July 2023.

(59) J. Penney, "Europe Benefits by Bankrolling an Anti-Migrant Effort. Nigers Pays a Price" *The New York Times* (25 August 2018) <https://www.nytimes.com/2018/08/25/world/africa/niger-migration-crisis.html#:~:text=Anti%2DMigrant%20Effort.-,Niger%20Pays%20a%20Price.,economy%20and%20raised%20security%20concerns.> accessed 20 July 2023.

(60) Brachet, "Manufacturing Smugglers" (n 30), 17.

(61) *Ibid*., 16.

localized industry in Niger: the "profession of people transport", driven by local residents to earn a livelihood by facilitating this migratory journey.

B. — *Mobility Restrictions in Niger Since Law 36/2015*

This contribution further examines the theoretical framework of Law 36/2015, along with its implementation in practice, to detail the primary mobility constraints affecting migrants in Niger, all within the context provided earlier in the research. (62)

1. *Law 36/2015 on Migrant Smuggling*

On 26 May 2015, Niger adopted Law 36/2015, which has three objectives: it strives to prevent and combat migrant smuggling; to protect the right of people who are the object of migrant smuggling; and to promote national and international cooperation to prevent and combat migrant smuggling. (63) The law defines migrant smuggling as "seeking to effect the illegal entry into a state of a person who is neither a national nor a permanent resident of that State, with a view to direct or indirect financial or other material advantage". (64)

The law criminalizes individuals who intentionally engage in specific activities for the purpose of obtaining a financial or other material benefit. These activities include migrant smuggling, (65) the fabrication, procurement, provision or possession of a false travel or identity document, (66) and assistance with irregular stay. (67) An attempt to commit these offences is also criminalized. (68) These offences are punishable by prison terms of two to ten years or fines of 500.000 up to 5.000.000 francs CFA (approximately 762 euros to 7.700 euros). Niger's income per capita is 377 euros per year. (69)

(62) The importance of studying the practice has been highlighted in the first important study on the right to leave, conducted by the UN Sub-Commissioner on Prevention of Discrimination and Protection of Minorities in 1963. Ingles stated that "it is hardly ever possible to deduce solely from the perusal of legal texts the extent to which this right is enjoyed by the nationals of a country. One must rather examine searchingly the practices in vogue in the country – the actual *de facto* situation prevailing there – before drawing any conclusions about discrimination in respect of this right", see United Nations, "Study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country" (1963) UN Doc E/CN.4/Sub.2/220/Rev.1 (Ingles study).

(63) Article 1 Law 26/2015.

(64) Article 3 Law 36/2015.

(65) Article 10 Law 36/2015.

(66) Article 11 Law 36/2015.

(67) Article 12 Law 36/2015.

(68) Article 13 Law 36/2015.

(69) The World Bank Data, "Niger" <https://data.worldbank.org/country/NE> accessed 21 July 2023.

The core Article of this law, Article 10, which criminalizes migrant smuggling, deserves further attention. Article 10 stems from the Migrant Smuggling Protocol, which obliges States Parties to criminalize migrant smuggling. (70) The Protocol defines migrant smuggling as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident". (71) As Perrin noted, Law 36/2015 incorporates this definition into its Article 3, and then redefines the offence in Article 10 to also include the "illegal exit" (72):

> "Any person who, intentionally and for the purpose of obtaining, directly or indirectly, a financial or other material benefit, provides for the illegal entry into or exit from Niger of a person who is neither a national nor a permanent resident of Niger, shall be liable to imprisonment for a term of 5 to less than 10 years and a fine of 1.000.000 to 5.000.000 CFA francs". (73)

Consequently, this Article criminalizes the facilitation of the illegal exit of migrants, when the assistance is provided for a financial or other material benefit. This Article effectively criminalized the wide variety of actors that were involved in "the profession of people transport in Niger": *passeurs*, *coxeurs*, drivers, ghetto owners, *agences de courtage et cetera*. Consequently, Article 10 has to be considered as an important restriction which affects the mobility of migrants, since they have no longer access to an array of essential services that were previously instrumental in facilitating their journey.

Secondly, Spijkerboer identified Article 20 as significantly preventing nationals of Sub-Saharan countries from reaching the Mediterranean. (74) Article 20 prescribes that:

> "Any commercial carrier who fails to verify that each passenger is in possession of the identity and/or travel documents required for entry into the State of destination and any State of transit, commits an offence punishable by a fine of 1.000.000 to 3.000.000 francs".

The Migrant Smuggling Protocol, of which Law 36/2015 is the implantation in Nigerien law, obliges commercial transportation companies to ascertain

(70) Article 6(1)(a) Migrant Smuggling Protocol.

(71) Article 3(a) Migrant Smuggling Protocol.

(72) D. Perrin, "Smuggling of migrants: The misused spirit of the Palermo Protocol, in light of the Nigerien experience" (Faculty of Law Blogs University of Oxford, 25 May 2020) <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/05/smuggling> accessed 20 July 2023.

(73) Free translation from original document in French, see Republique du Niger, "Loi n° 2015-36 du 26 mai 2015 relative au trafic illicite de migrants" <http://www.justice.gouv.ne/images/lois/pdfs/loi_relative_au_trafic_illicite_de_migrants.pdf> accessed 15 August 2023. Subsequent references to Law 36/2015 are also presented as unofficial translations.

(74) 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, 5149-50.

that all passengers are in possession of the required travel documents required for entry into the receiving State. (75) Article 20 Law 36/2015 replaced the term *receiving State* by the term *State of destination* or *transit*. According to Spijkerboer and other scholars, Article 20 introduces carrier sanctions on domestic transport. (76) This is because the law does not require that the trip on which a person is embarking must cross international borders, (77) since it can be conceived that Niger itself functions as a transit State. (78) Consequently, the transport company is obliged to verify that every passenger is in possession of identity and/or travel documents for Niger. (79)

The carrier sanctions on domestic transportation have to be regarded as a key provision in curbing irregular migration, as Spijkerboer already observed. (80) First, it must be noted that since most migrants enter Niger irregularly, (81) they are barred from domestic transportation. Secondly, this provision is significant when considering the prior reality in which regular convoys of busses carrying migrants would travel between towns and villages in Northern Niger to Libya. (82) Accordingly, this analysis pinpoints Article 20 as a second crucial mobility restriction.

2. *Extortion and Interdiction at Checkpoints*

In 2019, the African Commission on Human Rights (African Commission) published the study "Migration and Respect for Human Rights: Focus on the Responses Provided by Niger", (83) in which the results a field survey of 400 migrants in Niger were published, revealing that "non-Nigerien migrants (including those from the ECOWAS region) are subject to the systematic payment of money before crossing checkpoints within the country, while Nigeriens are not subject to any payment". (84) This practice is called

(75) Article 11(3) Migrant Smuggling Protocol.

(76) SPIJKERBOER (n 74), 50. Spijkerboer owed this insight to Florence Boyer and Harouna Mounkaila (footnote 10 in the cited work).

(77) *Ibid.*

(78) *Ibid.*

(79) *Ibid.*

(80) SPIJKERBOER (n 74), 49.

(81) MOLENAAR, "Irregular migration and human smuggling networks in Niger" (n 2), 15; T. BENATTIA, F. ARMITANO and H. ROBINSON, "Irregular Migration between West Africa, North Africa and the Mediterranean" 20 (Altai Consulting, November 2015) <https://rodakar.iom.int/sites/g/files/tmzbdl696/files/Altai%20Consulting-Free%20Movement%20and%20Migration%20in%20West%20Africa-Final%20Report....pdf> accessed 25 July 2023.

(82) GOLOVKO (n 39), 20 and J. TUBIANA *et al.*, "Multilateral Damage" (n 39), 23.

(83) African Commission, "Pilot Study on migration and respect for Human Rights focus on the responses provided by Niger" (25 November 2019) <https://achpr.au.int/en/node/900> accessed 3 August 2023. For more information on studies conducted by the African Commission, see footnote 200.

(84) *Ibid.*, 28.

"extortion", which is defined as "the act of getting something, especially money, by force or threats". (85)

The systematic practice of extortion on the route between Niamey and Agadez, and beyond, has been confirmed by a variety of actors, such as NGOs, (86) academic researchers, (87) research institutes, (88) actors of international (89) and regional organisations, (90) and news media (91). In an article of 2018 by Hamadou, (92) the author stated that he made the trip to verify the alleged harassment on the road and reported the following: "At the end of this long journey, we were able to observe nine police checkpoints from Niamey to Agadez. And at each checkpoint, non-nationals are brought down for questioning and possibly to ask them for sums of money". (93) Raineri confirmed this as well in a study of 2018, based on his personal observations conducted in the bus from Niamey to Agadez: "At the entrance of every village on the way to Agadez, checkpoints manned by different security forces force migrants to disembark. 'Informal' fees are then levied [...]. Those who are unable to pay are sometimes abused, and often prevented from continuing their journey". (94) When migrants do not pay, they are

(85) Cambridge Dictionary, "extortion" <https://dictionary.cambridge.org/dictionary/english/extortion> accessed 7 August 2023.

(86) I. Ngueuleu, "Niger: 'The law aims to combat migrant trafficking, yet it actually benefits criminal gangs who exploit migrants'" (OMCT, 25 November 2019) <https://www.omct.org/en/resources/blog/niger-law-migrant-trafficking-benefits-criminal-gangs-exploit-migrants> accessed 3 August 2023; OMCT, "The Torture Roads" (15 December 2021) 35 <https://www.omct.org/site-resources/files/The-Torture-Roads.pdf> accessed 1 August 2023.

(87) A. Hamadou, "La gestion des flux migratoires au Niger entre engagements et contraintes" (2018) 14 *Revue des droits de l'homme* 10, §58 <https://journals.openedition.org/revdh/4378> accessed 22 June 2023.

(88) T. Munsch, W. Powell and S. Joly, "Before the Desert" (Mixed Migration Centre, 6 December 2017) 11 <https://mixedmigration.org/resource/before-the-desert/> accessed 1 August 2023; Molenaar, Tubiana and Warin, (n 58) 22; Molenaar and El Kamouni-Janssen, (n 32) 37; H. Lucht and L. Raineri, "EU pressure on Niger to stop migrants is reshaping cross-border economies" (*Danish Institute for International Studies*, 11 December 2019) <https://www.diis.dk/en/research/eu-pressure-on-niger-to-stop-migrants-is-reshaping-cross-border-economies> accessed 1 August 2023.

(89) Special Rapporteur visit to Niger (n 12), §32; UNHCR and MMC, "ON THIS JOURNEY, NO ONE CARES IF YOU LIVE OR DIE" (20 July 2023) 13 <https://www.unhcr.org/media/journey-no-one-cares-if-you-live-or-die-abuse-protection-and-justice-along-routes-between-0> accessed 1 August 2023.

(90) See report of African Commission discussed in footnote 83. A study of UNODC confirms that even refugees and migrants who have valid travel documentation may be forced to pay bribes, see UNODC, "Smuggling of Migrants in the Sahel" (23 March 2023) 12 and 20 <https://www.unodc.org/documents/data-and-analysis/tocta_sahel/TOCTA_Sahel_som_2023.pdf> accessed 3 August 2023.

(91) E. Reidy, "Destination Europe: Frustration" *The New Humanitarian* (28 June 2018) <https://www.thenewhumanitarian.org/special-report/2018/06/28/destination-europe-frustration> accessed 1 August 2023.

(92) Hamadou (n 87).

(93) *Ibid.*, 14 and 23.

(94) According to Raineri, at the entrance of every village on the way to Agadez, checkpoints are manned by different security forces (including the national police, customs and the gendarmerie) who force migrants to disembark. "Informal fees are then levied [...] Those who are unable to pay are sometimes abused, and often prevented from continuing their journey.", see L. Raineri,

subjected to "interdiction", which is "the act of stopping something or of not allowing something", in this case, it means the halting of the further passage of migrants by Nigerien authorities. (95)

The increase of police checkpoints due to the implementation of Law 36/2015 on the country's main mobility axes has been confirmed by the Nigerien authorities too. (96) It is reported that in 2017, police checkpoints were extended to all the country's major asphalted roads. (97)

Consequently, it follows that the practice of extortion and interdiction at checkpoints is the third major impediment to the mobility of migrants aiming to enter Libya and Algeria.

Intermediate Conclusion

This chapter has responded to the first subquestion: "What are the main mobility restrictions preventing migrants in Niger to travel to Algeria and Libya?". The findings of this analysis reveal that three restrictions have significantly affected the mobility of migrants: (1) the criminalization of facilitation of illegal exit of migrants, based in Article of 10 Law 36/2015; (2) the criminalisation of carriers transporting irregular migrants in Niger, stemming from Article 20 of Law 36/2015; (3) practice of extortion and interdiction at checkpoints.

III. — The Right to Leave a Country

This chapter turns to the second research question of this study, which is to examine whether the identified mobility restrictions are in accordance with the right to leave a country. First, an in-depth examination of the right to leave within the multi-layered human rights regime is provided. Secondly, the identified restrictions are assessed in light of this legal framework.

A. — *The Right to Leave in International Human Rights Law*

This part provides illustrates how the right to leave has been ensured at the UN level, as well as in the three regional human rights systems: African, Inter-American and European.

"Human smuggling across Niger: State-sponsored protection rackets and contradictory security imperatives" (2018) 56(1) *Journal of Modern African Studies* 63, 69.

(95) Cambridge Dictionary, "interdiction" <https://dictionary.cambridge.org/dictionary/english/interdiction> accessed 2 August 2023.

(96) More specifically, by the Nigerien Agency for the Fight against Human Trafficking, see G. Maimouna Gazibo (n 54), 12.

(97) A. Dauchy, "La loi contre le trafic illicite de migrantes au Niger. État des lieux d'un assemblage judiciaire et sécuritaire à l'épreuve de la mobilité transnationale" (2020) 51 *Anthropologie & développement* 121, 131; MMC, "Navigating Borderlands" (n 31), 33.

1. *The UN Human Rights Regime*

In the United Nations system, human rights are guaranteed at two levels. (98) First, this contribution addresses the right to leave a country in the context of treaty-specific monitoring mechanisms. In addition, the right to leave is examined in the context of the Charter-based mechanisms which are based in the Human Rights Council and include the Universal Periodic Review, the Special Procedures and a complaint procedure. (99)

Firstly, it is essential to address the legal character of the instruments mentioned in the following discussion. The output of the human rights treaty bodies and the UN Human Rights Council (including the work of the Special Rapporteurs), such as General Comments, Communications, thematic/country reports and Concluding Observations are not legally binding, (100) as they are considered to be soft law. (101) However, the International Court of Justice (ICJ) has attached great weight to the output of the United Nations Human Rights Committee (HRC). In *Diallo*, the ICJ held that "it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled". (102) By analogy, this reasoning can be extended to other UN treaty bodies which have been established to supervise the application of their respective treaties.

Treaty-specific monitoring mechanisms

Article 13 of the Universal Declaration of Human Rights (UDHR) proclaimed that: "Everyone has the right to leave any country, including his own and to return to his country". The right to leave has never been an absolute right. Article 29(2) UDHR states that: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". The right to leave has been prescribed in four instruments among the nine

(98) United Nations Human Rights Office of the High Commissioner, "Instruments & mechanisms" <https://www.ohchr.org/en/instruments-and-mechanisms> accessed 7 August 2023.

(99) *Ibid*.; E. Brems, "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration" (2014) (4) *European Journal of Human Rights* 447, 452.

(100) N. S. Rodley, "Institutions and Actors", in D. Shelton (ed), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, 631.

(101) R. Kuusipalo, "Soft Law", in C. Binder, M. Nowak, J. A. Hofbauer and P. Janig (eds), *Elgar Encyclopedia of Human Rights*, Edward Elgar Publishers, 2022, 290.

(102) *Ibid*.

core human rights conventions that followed the UDHR. (103) The right to leave is also widely considered a norm of customary international law. (104)

Article 5(d)(ii) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (105) contains a prohibition on racial discrimination in the exercise of the right to leave one's country: "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (ii) The right to leave any country, including one's own, and to return to one's country;"

The ICERD should be distinguished with other conventions that address the right to leave. Article 5(d)(ii) of the ICERD contains a prohibition on racial discrimination in relation to the exercise of the right to leave one's country, while the other conventions more generally assure the right to leave. Given this distinction, this contribution will not delve into the obligations arising from the ICERD.

Article 12(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR) (106) holds that: "Everyone shall be free to leave any country, including his own". According to Article 12(3) ICCPR, the right to leave can only be restricted if such limitations are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant. The right to leave is not one of the non-derogable rights in the ICCPR. (107)

The UN Human Rights Committee (HRC) is the only international treaty body established under its respective regime, *i.e.* the ICCPR, (108) that has substantially examined the right to leave through its General Comment, (109)

(103) UN, "The Core International Human Rights Instruments and their monitoring bodies" <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies> accessed 15 August 2023.

(104) Chetail has substantially examined this, see V. Chetail, "The transnational movement of persons under general international law – Mapping the customary law foundations of international migration law", in V. Chetail and C. Bauloz (eds), *Research Handbook on International Law and Migration*, Edward Elgar Publishing, 2014, 20-27 (with further references); H. Lambert, "Customary Refugee Law", in C. Costello, M. Foster and J. McAdam (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press, 2021, 242.

(105) International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969). Niger ratified the CERD in 1967 without declaration or reservation.

(106) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976). Niger acceded to the ICCPR in 1986 without declaration or reservation.

(107) Article 4(2) ICCPR.

(108) Article 28 ICCPR.

(109) General Comments are a guidance to States regarding the application of specific provisions or issues relating to the treaty, V. Sancin, "General Comments and Recommendations", in

Communications (110) and Concluding Observations (111). While the HCR has addressed the right to leave in numerous instances, this contribution does not structurally organize those cases. (112) It will only highlight cases which are relevant to the case study of this work.

In 1999, the HRC published General Comment No 27 on the freedom of movement foreseen in Article 12 ICCPR (113). (114) This General Comment has to be regarded as an authoritative interpretation of the treaty, as it has been endorsed by the African Court of Human and Peoples' Rights, (115) the Inter-American Court of Human Rights (116) and the European Court of Human Rights. (117)

Over time, the HRC has released a total of 15 Communications addressing the right to leave a country. (118) These cases involve restrictions on this right due to passport confiscation and non-issuance of passports, (119)

C. Binder, M. Nowak, J. A. Hofbauer and P. Janig (eds), *Elgar Encyclopedia of Human Rights*, Edward Elgar Publishers, 2022, 312.

(110) Communications illustrate how the right to leave has been interpreted in cases where individuals allege breaches of the legal obligations of States under the ICCPR.

(111) Concluding Observations address a particular State party after the consideration of the report the State has submitted on its compliance with the treaty's provisions, V. Sancin, "General Comments and Recommendations", in C. Binder, M. Nowak, J. A. Hofbauer and P. Janig (eds), *Elgar Encyclopedia of Human Rights*, Edward Elgar Publishers, 2022, 313

(112) However, after the analysis of 557 available Concluding Observations, some clear trends became visible on the implementation of the right to leave by States. In the years 1990 until 2000, States frequently hindered their citizens from obtaining passports, and they also imposed visa requirements on individuals seeking to leave the country (see *e.g.* HRC, "Consideration of Reports submitted by States Parties under Article 40 of the Covenant - Comments of the Human Rights Committee" (3 August 1994) UN Doc CPPR/C/79/Add.38.). In recent years, the HRC has addressed the right to leave frequently in the context of travel bans for human rights advocates and political opposition figures, see *e.g.* HRC, "Concluding observations on the third periodic report of Tajikistan" (22 August 2019) UN Doc CCPR/C/TJK/CO/3, §35. and HRC, "Concluding observations on the second periodic report of Turkmenistan" (20 April 2017) UN Doc CCPR/C/TKM/CO/2, §28.

(113) Article 12(1) prescribes the liberty of movement and freedom to choose residence. The right to leave is enlisted in paragraph 2. Paragraph 3 addressed the restrictions on the two aforementioned rights, and article 4 states the right to enter one's own country.

(114) HRC, "General Comments Adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights" (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 ** (HRC, General Comment No 27).

(115) African Court, *Anudo Ochieng Anudo v United Republic of Tanzania*, Application no 012/2015 (2018), §98; African Court, *Kennedy Gihana and Others v Rwanda*, Application no 017/2015 (2019), §106.

(116) IACtHR, *Ricardo Canese v Paraguay* (31 August 2004), §§115-117.

(117) ECtHR, *Riener v Bulgaria*, Application no 46343/99 (23 May 2005), §83.

(118) 15 decisions on merits and one inadmissibility decision. In two cases, the claimant invoked a violation of Article 12(2) ICCPR, without substantiating the allegation; HRC, *Primo José Essono Mika Miha v Equatorial Guinea*, Communication No 414/1990 (10 August 1994) and HRC, *Ivanka Kohoutek v The Czech Republic*, Communication No 1448/2006 (2 September 2008); HRC, *Moses Solo Tarlue v Canada*, Communication No 1551/2007 (28 April 2009).

(119) HRC, *Carlos Varela Nuñez v Uruguay*, Communication No 108/1981 (22 July 1983); HRC, *Samuel Lichtensztejn v Uruguay*, Communication No 77/1980 (31 March 1983); HRC, *Mabel Pereira Montero v Uruguay*, Communication No 106/1981 (31 March 1983); HRC, *Angel N. Oló Bahamonde v Equatorial Guinea*, Communication No 468/1991 (11 June 1991); HRC, *Lauri Peltonen v Finland*,

arrest warrants,(120) and criminal charges for leaving the country without permission.(121)

In the 2019 Concluding Observation on Niger,(122) the HCR expressed "its concern about Act No. 2015-36 [...] which reportedly resulted in a *de facto* ban on travel north of Agadez, thus forcing migrants to go underground and face conditions that expose them to many forms of abuse and human rights violations".(123) Unfortunately, the HCR did not elaborate on the impact of these restrictions on the right to leave.

The right to leave is also enshrined in the 1989 Convention on the Rights of the Child (CRC).(124) Article 10(2) provides that: "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention".

The Committee on the Rights of the Child, the monitoring body of the CRC(125) has only addressed the right to leave once(126), in the context of gender equality.(127)

Article 8(1) of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)(128)

Communication No 492/1992 (29 July 1994); HRC, *Sophie Vidal Martins v Uruguay*, Communication No R.13/57 (23 March 1982); HRC, *Loubna El Ghar v Socialist People's Libyan Arab Jamahiriya*, Communication No 1107/2002 (15 November 2004); HRC, *Farag El Dernawi v Libyan Arab Jamahiriya*, Communication No 1143/2002 (31 August 2007).

(120) HRC, *Miguel Gonzolez del Rho v Peru*, Communication No 263/1987 (28 October 1992); HRC, *Lazaros Petromelidis v Greece*, Communication No 3065/2017 (24 August 2022).

(121) HRC, *Batyrova Zoolfia v Uzbekistan*, Communication No 1585/2007 (21 August 2009).

(122) HRC, "Concluding observations on the second periodic report of the Niger" (16 May 2019) UN Doc CCPR/C/NER/CO/2.

(123) *Ibid*., §38.

(124) Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990). Niger ratified the CRC in 1990 and made no declaration or reservation.

(125) Article 43 CRC.

(126) All the following documents have been examined for the Committee on the Rights of the Child: annual/sessional reports, decisions, outcome reports of the days on general discussion, general comments, individual communications and inquiry procedures.

(127) Committee on the Rights of the Child, "Report on the sixth (special) session" (16 May 1994) UN Doc CRC/C/29.

(128) 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). Niger acceded to CMW in 2009, without declaration or reservation.

provides that: "Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention".

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the monitoring body of the CMW, (129) has only (130) addressed the right to leave in in its Concluding Observations. (131) The Committee has urged certain countries that have criminalized the irregular exit of migrants to respect the right to leave, (132) as well as countries who require migrants to obtain "exit permits" when leaving the country, (133) or impose "exit bans" on migrants who committed administrative offenses (such as irregular entry) (134) until they fulfill administrative penalties. (135)

As highlighted by the Council of Europe Commissioner for Human Rights, the uniformity of the wording concerning the right to leave a country in all human rights conventions underscores the significance of this right and the shared objective among states to achieve coherence in its interpretation and application. (136)

(129) Article 72 CMW.

(130) For this research, the annual reports, general comments and statements in the context of "days of general discussions" have been examined. At the time of writing, the inter-State communications procedure and the individual complaint mechanism were not yet in force.

(131) Article 74(1) CMW.

(132) One report on Algeria in 2010, see Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Consideration of reports submitted by States parties under article 74 of the Convention" (19 May 2010) UN Doc CMW/C/DZA/CO/1, and one in 2018, see Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding observations on the second periodic report of Algeria" (25 May 2018) UN Doc CMW/C/DZA/CO/2. A report on Morocco in 2013, see Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding observations on the initial report of Morocco adopted by the Committee at its nineteenth session (9–13 September 2013)" (8 October 2013) UN Doc CMW/C/MAR/CO/1. A report in 2017 for Indonesia, see Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding observations on the initial report of Indonesia" (19 October 2017) UN Doc CMW/C/IDN/CO/1.

(133) One report in 2008 on Ecuador, see UNGA, "Report of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families" (2008) 63rd Session UN Doc Supp No 48 (A/63/47).

(134) This is the case for Cabo Verde in 2022, see Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding observations on the combined initial to third periodic reports of Cabo Verde" (2 June 2022) UN Doc CMW/C/CPV/CO/1-3.

(135) A report in 2015 on Guinea, see Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding observations on the initial report of Guinea" (8 October 2015) UN Doc CMW/C/GIN/CO/1. A report on Azerbaijan in 2021, see Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding observations on the third periodic report of Azerbaijan" (2 November 2021) UN Doc CMW/C/AZE/CO/3.

(136) Council of Europe Commissioner for Human Rights, "The right to leave a country" (2013) Issue Paper by the Council of Europe Commissioner for Human Rights, 15 <https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510#:~:text=The%20

Charter-based mechanisms

In 1963, the Special Rapporteur of the UN's Sub-Commission on Prevention of Discrimination and Protection of Minorities (137) published the "study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country". (138) This work examined the implementation of the right to leave a country by States in light of various discrimination grounds, such as race or colour, and analysed how this related to permissible limitations on the right to leave. Ingles noted that Governments hardly ever refused foreigners the right to leave the country of their sojourn, and they did everything possible to facilitate their exit. (139) However, the current situation in Niger contrasts significantly, as only foreigners are now restricted from leaving the country (to enter Libya or Algeria). Further, the study provided for the "draft principles on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country", aiming for adoption as a UN declaration. (140) The Sub-Commission submitted the report and the draft principles to the Commission on Human Rights, but the Commission did not take any substantive measures. (141)

Due to the UN's inaction following the Ingles study and increasing denial of emigration rights by countries like the Soviet Union, NGOs organized an international colloquium on the right to leave and return in Uppsala in 1972, bringing together a group of distinguished scholars and jurists (142). (143) The colloquium, organized outside the UN framework, adopted a Declaration on the Right to Leave and the Right to Return, based on the draft principles

starting%20place%20in%20respect,given%20specific%20form%20in%20Article> accessed 28 July 2023.

(137) In 1999, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter "the Sub-Commission") was renamed the "UN Sub-Commission on the Promotion and Protection of Human Rights", which was the main subsidiary body of the former UN Commission on Human Rights. Pursuant to General Assembly resolution 60, all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the Sub-Commission, were assumed as of 19 June 2006 by the Human Rights Council. See O. DE SCHUTTER, *International Human Rights Law*, Cambridge University Press, 2010, 855.

(138) Ingles study (n 62).

(139) *Ibid*., 19.

(140) *Ibid*., 64.

(141) UN Economic and Social Council, "Working paper on the right to freedom of movement and related issues prepared by Mr. Volodymyr Boutkevitch in implementation of Decision 1996/109 of the Sub-Commission" (29 July 1997) UN Doc E/CN.4/Sub.2/1997/22, §46.

(142) Prominent colloquium speakers were Special Rapporteur Ingles, Stig Jägerskiöld and Maurice Cranston. For more information on the colloquium see G. MARQUES PEDRO, *The Human Right to Leave: But Whereto?*, PhD thesis, Upssala University, 2022, 119.

(143) H. HANNUM, *The Right to leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, 1987, 14.

from the Ingles study, outlining the procedures, norms, and permissible limitations for exercising these rights. (144)

In 1982, the Sub-Commission appointed Mubanga-Chipoya as Special Rapporteur to prepare "an analysis of current trends and developments in respect of the right to leave", (145) and requested him in 1985 to present a final report (146) on the right to leave any country, the extent and effect of restrictions under Article 12(3) ICCPR and the possibility to enter another country, as well as a preliminary draft declaration on the right of everyone to leave a country. (147) In June 1988, the Special Rapporteur released his final report, (148) along with a draft declaration on the right of everyone to leave a country, including his own, and to return to his country. (149)

In this study, the Special Rapporteur was mandated to address the issue of the "core conundrum of international migration law", (150) which refers to the fact that the right to leave is not accompanied by a general right to enter any country in international law. (151) In the scholarly literature, this conundrum has been approached in various ways. According to Juss, this is therefore "half" a right. (152) Contrastingly, and Stoyanova held that the absence of a right to enter another country is one of its important strengths, as the right to leave is a right in and of itself, and is therefore not dependent

(144) "The Right to Leave and the Right to Return: A Declaration Adopted by the Uppsala Colloquium, Sweden, June 21, 1972" (1973) 7(1) *International Migration Review* 114. Similarly, in November 1986, a meeting of experts on the right to leave and return was convened by the International Institute of Human Rights in Strasbourg (outside the UN framework). The participants adopted a Declaration on the Right to Leave and Return, which was largely based on the work of Ingles and the Uppsala Colloquium, see H. Hannum, "The Strasbourg Declaration on the Right to Leave and Return" (1987) 81(2) *American Journal of International Law* 432.

(145) J. Hantke, "The 1982 Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities" (1983) 77(3) *The American Journal of International Law* 651, 654.

(146) It was "final" insofar it finished the investigation in 1960 by the Special Rapporteur José Ingles.

(147) UN Economic and Social Council, "Report of the Sub-Commission on prevention of Discrimination and Protection of Minorities on its thirty-eight session" (4 November 1985) UN Doc E/CN.4/1985/57, 16.

(148) UN Commission on Human Rights "Analysis of the current trends and developments regarding the right to leave any country including one's own, and to return to one's own country, and some other rights or considerations arising therefrom - Final report prepared by Mr. C.L.C. Mubanga-Chipoya" (20 June 1988) UN Doc E/CN.4/Sub.2/1988/35 (Final report Mubanga-Chipoya). In the part on the right to leave of this report, the Special Rapporteur addressed the legal content of the right to leave as contained in the UDHR and ICCPR, the implementation and legal developments regarding the right to leave and the extent and effect of the restrictions under Article 12(3) ICCPR.

(149) The draft declaration is currently unavailable on the United Nations website. The author was able to retrieve the Draft Declaration in E. Lawson, *Encyclopedia of Human Rights*, 2nd edn, Taylor & Francis, 1996, 545.

(150) V. Chetail, *International Migration Law*, Oxford University Press, 2019, 92.

(151) For an analysis of the report of Mubanga-Chipoya, see G. Marques Pedro, *The Human Right to Leave: But Whereto?*, PhD thesis, Upssala University, 2022, 125.

(152) S. Juss, "Free Movement and the World Order" (2004) 16(3) *International Journal of Refugee Law* 289, 293.

on any right to enter a specific country. (153) Chetail provided a different perspective, asserting that this conundrum constitutes the roots of illegal migration. (154) He argued that while international law ensures the right to leave a country, this right is hollowed out at the level of national immigration laws of the State of destination, which criminalize the exercise of this right to leave, by entering this State. (155)

In an attempt address this issue, the Special Rapporteur boldly argued in the final report that "it should be within the ambit of that international law to make the right to leave more meaningful by imposing an identical duty vis-a-vis entry to any country subject only to the restrictions provided in the Covenant and the Universal Declaration indicated above". (156) Consequently, in Article 7 of Draft Declaration prepared by Mubanga-Chipoya, it was stated that: "No restrictions may be imposed on the right to leave any country including one's own *or to enter any country* except those which are provided by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and consistent with internationally recognized human rights and other international legal obligations" [own emphasis]. (157) This provision was fiercely criticized by States (158) and even by NGOs, (159) thereby maintaining the *status quo* of international law on this issue.

Finally, in 1999 the Human Rights Committee adopted General Comment No 27, thereby finishing the work of Ingles and other lawyers which started in the sixties with the goal to produce an authoritative interpretation of the right to leave a country.

(153) E. Guild and V. Stoyanova, "The Human Right to Leave Any Country: A Right to Be Delivered", in W. Benedek and others (eds), C. Strohal and S. Kieber, *European Yearbook on Human Rights 2018*, Intersentia, 2018, 375.

(154) V. Chetail, "Migration, droits de l'homme et souveraineté: le droit international dans tous ses états", in V. Chetail, M.-C. Caloz-Tschopp, P. R. Dasen (eds), *Mondialisation, migration et droits de l'homme*, Bruylant, 2007, 74.

(155) *Ibid*.

(156) UN Economic and Social Council, "Analysis of the current trends and developments regarding the right to leave any country including one's own, and to return to one's own country, and some other rights or considerations arising therefrom: Final report prepared by Mr. C.L.C. Mubanga-Chipoya" (20 June 1988) UN Doc E/CN. 4/Sub. 2/1988/35, §322.

(157) See footnote 149.

(158) For example, Germany stated that it is opposed to creating a right of entry as proposed by the Special Rapporteur, see UN Economic and Social Council, "Report of the Secretary-General prepared pursuant to Sub-Commission resolution 1988/39" (24 July 1989) UN Doc E/CN.4/Sub.2/1989/44/Add. 4, §3.

(159) UN Economic and Social Council, "Written statement submitted by the International league for Human Rights, a non-governmental organization in consultative status (category II)" (20 August 1990) UN Doc E/CN.4/Sub.2/1990/NGO/24, §8.

2. *African Human Rights System*

Article 12(2) of the African Charter on Human and Peoples' Rights (African Charter or ACHPR),(160) provides that: "Every individual shall have the right to leave any country, including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".

In 2019, the African Commission on Human and Peoples' Rights (African Commission),(161) adopted the "Migration and Respect for Human Rights: Focus on the Responses Provided by Niger".(162) This study was conducted under Article 45(1)(a) of the African Charter which authorizes the Commission to "undertake studies and research on African problems in the field of human and peoples" and is categorized as a "soft law" document of the African Commission. The study assessed the mobility restrictions migrants encounter in Niger from two different perspectives. First, it examined the matter through the lens of the right to non-discrimination and equality. The findings confirmed that non-Nigerien migrants, including those from the ECOWAS region, face a systematic requirement to pay money before crossing security barriers at borders and within the country.(163) Subsequently, the study evaluated the right to freedom of movement. In this regard, the Commission simply stated that "the various rackets, threats and violence at Niger's checkpoints as reported by the field study are likely to discourage the free movement of people", without further elaboration.(164)

The African Commission has addressed the issue of the right to leave in the context of cases of discrimination in the issuance of passports and identity documents regarding minority groups, such as the Nubian community in Kenya(165) and the Dioula community in Burkina Faso.(166) Additionally, the Commission has also tackled travel restrictions imposed on political opposition figures.(167)

(160) African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986). Niger ratified the Charter on 21 July 1986.

(161) Article 30 African Charter.

(162) African Commission, "Pilot Study" (n 83).

(163) *Ibid*., 28.

(164) *Ibid*., 41.

(165) African Commission, *The Nubian Community in Kenya v The Republic of Kenya*, Communication 317/06 (2015). The Nubian community comprises descendants of ex-Sudanese forcefully conscripted into the colonial British King's African Rifles Regiment in the early 1900s. The Nubians originally occupied the Nuba mountains in the Republic of The Sudan. As a result of the conscription, the Nubians were taken to various parts of British East Africa, including present day Kenya, to assist the British in their military expeditions (see paragraph 3 of the judgment).

(166) African Commission, *Open Society Justice Initiative v Côte d'Ivoire*, Communication 318/06 (2015).

(167) African Commission, *Movement burkinabé des droits de l'Homme et des peuples v Burkina Faso*, Communication 204/97 (2001) and African Commission, *Jawara v The Gambia*, Communications 147/95 and 149/96 (2000).

As for the contentious procedure, (168) the African Court has only addressed the right to leave once in a judgment concerning the arbitrarily revocation of passports. (169) Moreover, in this judgment, the African Court also referred to General Comment No 27 of the HRC. (170)

3. *Inter-American Human Rights System*

Article 22(2) of the American Convention on Human Rights (American Convention or ACHR). (171) holds that: "Every person has the right to leave any country freely, including his own". Article 22(3) ACHR states that: "The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others".

Two thematic reports published by the Inter-American Commission on Human Rights (the Inter-American Commission or IACHR) are relevant for this research. Thematic reports serve to systemize the standards of the Inter-American system of human rights. (172) While these reports are not inherently binding sources of obligations under international law, they offer valuable guidance and clarification regarding these obligations. (173)

In the rapport titled "Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System," the IACHR interpreted the scope and restrictions on the right to leave, drawing from the UN General Comment No 27 and the case-law of the Inter-American Court of Human Rights (IACtHR) on the right in question. (174)

In the report "Forced Migration of Nicaraguans to Costa Rica", the IACHR conducted an evaluation of the rights of Nicaraguans who were compelled to flee their homeland due to the serious human rights crisis affecting Nicaragua as a result of the state sponsored repression of protests that began on 18 April

(168) This encompasses both individual and inter-State cases. However, to date, no inter-State case has been submitted to the African Court. F. Viljoen, "A Procedure Likely to Remain Rare in the African System: An Introduction to Inter-State Communication Under the African Human Rights System" (*Völkerrechtsblog*, 27 April 2021) <https://voelkerrechtsblog.org/a-procedure-likely-to-remain-rare-in-the-african-system/> accessed 30 July 2023.

(169) African Court, *Kennedy Gihana and Others v Rwanda*, Application no 017/2015 (2015).

(170) *Ibid*., §106.

(171) American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978).

(172) F. Piovesan and J. Cortez da Cunha Cruz, "Inter-American Commission on Human Rights (IACHR)", in C. Binder, M. Nowak, J. A. Hofbauer and P. Janig (eds), *Elgar Encyclopedia of Human Rights*, Edward Elgar Publishers, 2022, 78.

(173) *Ibid*.

(174) IACHR, "Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System" (31 December 2015) 119-121.

2018. (175) Similarly to the case in Niger, Nicaraguans were confronted with a series of obstacles, such as military checkpoints at strategic exit points, to leave their country and to access regular and secure migratory routes. (176) Against this background, the IACHR briefly reiterated the scope and permissible restrictions on the right to leave a country enshrined in Article 22(2) ACHR, without evaluating these conditions in light of this case. Furthermore, the IACHR held that right to leave any country is closely related to the right to seek and receive asylum and argued that an arbitrary restriction on this right may characterize a violation of Article 22.7 (right to seek and receive asylum) of the ACHR. (177)

The IACHR has dealt with the issue of the right to leave covering various situations in its petition and case system. (178) These include instances such as a travel ban pending an arrest warrant, (179) denial of authorities to issue a passport, (180) intimidation by customs agent at the airport accusing an individual of having a falsified visa and passport, (181) refusal of Cuban authorities to grant individuals permission to leave the State, (182) and the enforcement of a travel ban exceeding the period specified in the judgment. (183)

A particular case, which has been not addressed in literature on the right to leave in the context of migration control, is *Victims of the Tugboat "13 de Marzo" v Cuba* of 1996. (184) On 13 July 1994, 72 Cuban nationals who were attempting to leave the island for the USA put out to sea from the port of Havana in an old tugboat named "13 de Marzo". (185) Eyewitnesses reported that four Cuban boats, armed with tanks and water hoses, launched an attack on it. (186) The boat sank, with a toll of 41 dead. (187) Later, the Cuban Coast Guard arrived and rescued 31 survivors. (188) Fidel Castro, the leader of that time, claimed that the four boats chased the old tugboat to prevent the migrants from stealing it: "The workers' behavior was exemplary, there's no denying it, because they tried to stop them from stealing the boat. What are we to say to them now, let them steal the boats, their livelihood?". (189) The IACHR held that "the acts that caused the sinking prevented the 72 people

(175) IACHR, "Forced Migration of Nicaraguans to Costa Rica" (7 September 2019) 9.
(176) *Ibid.*, 55.
(177) *Ibid.*, 56.
(178) For this contribution, all petitions in the merits stage have been examined.
(179) IACHR, *Salvador Jorge Blanco v Dominican Republic*, Report No 15/89 (1989).
(180) IACHR, *Juan Raul Ferreira v Uruguay*, Report No 8/53 (1983).
(181) IACHR, *Carlos Ranferí Gómez López v Guatemala*, Report No 29/96 (1996).
(182) IACHR, *Yoani María Sánchez Cordero v Cuba*, Report No 297/21 (2021); IACHR, *Oswaldo Jose Payá Sardiña and Others v Cuba*, Report No 83/23 (2023).
(183) IACHR, *Ángel Pedro Falanga v Argentina*, Report No 460/21 (2021).
(184) IACHR, *Victims of the Tugboat "13 de Marzo" v Cuba*, Report No 47/96 (1996).
(185) *Ibid.*, §12.
(186) *Ibid.*, §13.
(187) *Ibid.*, §14.
(188) *Ibid.*, §15.
(189) *Ibid.*, §29.

on board from freely leaving Cuba. The Inter-American Commission considers the method used by said individuals irrelevant in the present case, as the laws in force, the ruling political system and the critical situation of human rights in that country forced them to take desperate measures to achieve their main objective: to flee Cuba". (190) Consequently, the IACHR ruled that the Cuban State violated their right to leave a country. (191)

The individuals fleeing Cuba were accused of stealing an old tugboat, allegedly in a very poor condition with one leak, and departing at night amidst rough seas. (192) This case is interesting because, as previously stated, the IACHR ruled that the manner in which the victims attempted to leave Cuba was irrelevant. It can be inferred that, according to the IACHR, the prevention of crime cannot be invoked to justify restrictions on the right to leave in this context.

The Inter-American Court of Human Rights (IACtHR or Inter-American Court) ruled on the right to leave a country in four cases, all of which involved the prohibition of leaving the country during criminal proceedings. In two of these cases, the State contented that the individuals were at flight risk. (193) The remaining two cases dealt with travel restrictions imposed as precautionary measures. (194)

4. *European Human Rights System*

In this section, it will be established how the right to leave a country is protected within the framework of the Council of Europe. The right to leave a country has been inscribed in three treaties of the Council of Europe: Article 2(2) of Protocol No 4 to the Convention for the Protection of Human Rights, (195) Article 4(1) of the European Convention on the Legal Status of Migrant Workers (196) and Article 18(4) of the European Social Charter. (197)

(190) The IACHR referred to the fact that Cuban legislation does not recognize an individual's right to leave a country, since to do so, citizens must have a permit that is granted by administrative authorities on a discretionary basis, see *ibid.*, §91.

(191) *Ibid.*, §107.

(192) *Ibid.*, §§29 and 30. These statements of the Cuban State were not refuted by the victims.

(193) IACtHR, *Liakat Ali Alibux v Suriname* (30 January 2014); Inter-American Court, *Álvarez Ramos v Venezuela* (30 August 2019).

(194) IACtHR, *Andrade Salmón v Bolivia* (1 December 2016); Inter-American Court, *Ricardo Canese v Paraguay* (n 116).

(195) Protocol 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 (adopted 16 September 1963, entered into force 2 May 1968). Greece and Switzerland have not signed this protocol. Türkiye and the United Kingdom have yet to ratify it.

(196) European Convention on the Legal Status of Migrant Workers (adopted 16 September 1963, entered into force 1 May 1983). It has been ratified by Albania, France, Italy, Netherlands, Norway, Portugal, Moldova, Sweden, Türkiye and Ukraine.

(197) European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999).

Article 2(2) of the Protocol No 4 to the Convention for the Protection of Human Right (Protocol No 4 ECHR) states: "Everyone shall be free to leave any country, including his own".

Article 2(3) of the European Convention provides that: "No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

In its case-law, the European Court of Human Rights (ECtHR or European Court), just like the African Court (198) and the Inter-American Court, (199) endorsed the interpretative framework laid out by the Human Rights Committee in its General Comment No 27. (200)

The ECtHR has addressed the right to leave in numerous judgments, encompassing a wide range of circumstances. These include restrictions on the right to leave due to the criminal conviction of an applicant until such time he had been rehabilitated, (201) pending bankruptcy proceedings, (202) refusal to pay customs penalties, (203) failure to pay taxes, (204) failure to pay judgment debts to private persons, (205) knowledge of State secrets, (206) failure to comply with military service obligations, (207) and court orders prohibiting minor children from being removed to a foreign country. (208)

In two very recent cases, the ECtHR held that refusal to issue travel documents for foreign nationals, one being a refugee (209) and the other a beneficiary of subsidiary protection, (210) violated the right to leave a country, as provided in Article 2(2) Protocol No 4 ECHR.

(198) African Court, *Anudo Ochieng Anudo v United Republic of Tanzania*, Application no 012/2015 (2018), §98.

(199) IACtHR, *Ricardo Canese v Paraguay* (n 116), §§115-117.

(200) ECtHR, *Riener v Bulgaria* (n 117), §83.

(201) ECtHR, *Nalbantski v Bulgaria*, Application no 30943/04 (10 February 2011).

(202) ECtHR, *Luordo v Italy*, Application no 32190/96 (17 July 2003).

(203) ECtHR, *Napijalo v Croatia*, Application no 66485/01 (13 November 2003).

(204) ECtHR, *Riener v Bulgaria* (n 117).

(205) ECtHR, *Ignatov v Bulgaria*, Application no 50/02 (2 July 2009); ECtHR, *Gochev v Bulgaria*, Application no 34383/03 (26 November 2009); ECtHR, *Khlyustov v Russia*, Application no 28975/05 (11 July 2013).

(206) ECtHR, *Bartik v Russia*, Application no 55565/00 (21 December 2006); ECtHR, *Soltysyak v Russia*, Application no 4663/05 (10 February 2011).

(207) European Commission of Human Rights, *Peltonen v Finland*, Application no 19583/92 (20 February 1995). Originally, the monitoring system under the European Convention consisted of a non-permanent European Commission on Human Rights (EComHR) and a non-permanent ECtHR. In 1998, the EComHR was abolished and the part-time ECtHR was replaced by a permanent ECtHR.

(208) ECtHR, *Roldan Texeira and Others v Italy*, Application no 40655/98 (26 October 2000); ECtHR, *Diamante and Pelliccioni v San Marino*, Application no 32250/08 (27 September 2011).

(209) ECtHR, *S.E. v Serbia*, Application no 61365/16 (11 July 2023).

(210) ECtHR, *L.B. v Lithuania*, Application no 38121/20 (14 June 2022).

The case of *Stamose v Bulgaria* is of particular importance as it related to a travel ban imposed on account of a breach of the immigration rules of another country. (211) The applicant, a Bulgarian national, was deported in 2003 from the US to Bulgaria for overstaying his visa. (212) The Bulgarian authorities imposed a two-year travel ban on him. (213) The Court noted that the objective of the Bulgarian law was to discourage and prevent breaches of the immigration laws of other States, and thus reduce the likelihood of those States refusing other Bulgarian nationals entry to their territory, or toughening or refusing to relax their visa regime in respect of Bulgarian nationals. (214). The European Court held that since the travel ban did not take into account the individual circumstances of the applicant, it therefore failed the "necessary in a democratic society" test and its implicit requirement of proportionality. (215)

Another notable case of the ECtHR is *Xhavara and Others v Italy and Albania*. (216) The case concerned the interception of a vessel with Albanian migrants by an Italian navy ship – against the backdrop of a naval blockade set up by Albania and Italy and an agreement that authorized Italian authorities to board and search Albanian vessels. (217) Following a collision, the boat sank and fifty-eight migrants died. (218) In this case, however, the Court considered that the measure was aimed at preventing the migrants from entering Italy and not from leaving Albania. (219) Thus, it held that Article 2(2) Protocol No 4 ECHR did not apply. (220)

In a publication of 2013, the Commissioner for Human Rights (221) studied the impact of EU externalisation of border control policies on the right to leave a country. (222) This report should be considered as an authoritative source for interpreting the right to leave a country, as the ECtHR has relied on it. (223) According to the Commissioner, "measures of externalisation of EU border controls on persons are carried out in conjunction with the state authorities of those territories in which the controls take place. Thus the authorities of third states change their rules, regulations and practices in

(211) ECtHR, *Stamose v Bulgaria*, Application no 29713/05 (27 November 2012).
(212) *Ibid*., §8.
(213) *Ibid*., §10.
(214) *Ibid*., §32.
(215) *Ibid*.
(216) ECtHR, *Xhavara and Others v Italy and Albania*, Application no 39473/98 (11 January 2001).
(217) *Ibid*., §2.
(218) *Ibid*.
(219) *Ibid*., §3.
(220) *Ibid*.
(221) The Commissioner for Human Rights is an independent and impartial non-judicial institution established in 1999 by Council of Europe to promote awareness of and respect for human rights in its Member States.
(222) Council of Europe Commissioner for Human Rights, (n 136), 15.
(223) *E.g.* ECtHR, *S.E. v Serbia*, Application no 61365/16 (11 July 2023) 11.

order to assist the EU in its objectives regarding controls on persons". (224) The Commissioner assessed four main types of externalisation measures in light of the right to leave a country: visas, carrier sanctions, readmission agreements and push-backs. (225) After evaluating these measures, the Commissioner concluded that EU states need to reassess their border and immigration control law and policies to ensure they do not create incentives for other States to infringe upon the right of all people leave the country they are currently in. (226)

Article 18 of the European Social Charter (ESC) asserts that: "With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake: [...] 4 the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties". Article 31 of ESC holds that that Article 18(4) can be constrained, but only when the limitations are "prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals".

The European Committee of Social Rights, the monitoring body of the ESC, addressed the right to leave a country in one case, concerning a complaint that the required compulsory service for medical doctors in the armed forces breached the right to leave as upheld in the ESC. (227)

B. — *The Right to Leave Applied*

The three identified mobility restrictions will be systematically evaluated in light of the comprehensive legal framework provided above. First, it will be examined whether the personal scope of the right to leave covers migrants in Niger. Secondly, it will be considered whether the three identified mobility restrictions interfere with the right to leave. Lastly, it is analysed if the restrictions are permissible.

1. *Ratione Personae*

This subsection evaluates the personal scope of the right to leave in the context of Niger's mobility restrictions, treating the three mobility restrictions collectively as they all affect non-Nigerien nationals, predominantly

(224) *Ibid.*, 55.
(225) *Ibid.*
(226) *Ibid.*, 65.
(227) European Committee of Social Rights, *European Federation of Public Service Employees (EUROFEDOP) v Greece*, Complaint no 115/2015 (29 January 2018).

migrants who arrive irregularly (228) from Mali, Guinea, Nigeria, Senegal and Gambia (229).

First and foremost, it must be established that Niger bears duties under the right to leave regarding the migrants present in its territory. This follows from Article 2(1) of the ICCPR which states that: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". Also, General Comment No 27 holds that the right to leave a country imposes obligations on the State of residence, (230) which, *in casu*, is Niger.

The ICCPR, the American Convention, the African Charter and the European Convention all affirm that "everyone" (231) has the right to leave "any" country. Based on wording of the legal provisions, it can be deduced that the scope of the right to leave is defined in especially broad terms. This has been further clarified in the HRC's General Comment No 27 on Article 12(2) ICCPR, which states that the right to leave applies to anyone, citizens and non-citizens, including persons who are not lawfully present in a State's territory. (232)

The broad scope of the right to leave a country, insofar it is guaranteed to non-nationals, has also been safeguarded in soft law documents, (233) such as the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, adopted in December 1985 by the UN General Assembly, (234) and in literature. (235) This is also confirmed in case-law from the Human Rights Commission. (236)

(228) Molenaar, "Irregular migration and human smuggling networks in Niger" (n 2), 15; Benattia, Armitano and Robinson (n 81) 20.

(229) Benattia, Armitano and Robinson (n 81) 26; IOM, "Migration trends from, to and within the Niger 2016-2019" 18 <https://publications.iom.int/system/files/pdf/iom-niger-four-year-report.pdf> accessed 6 August 2023.

(230) HRC, General Comment No 27 (n 114), §9.

(231) The Inter-American Convention speaks of "every person".

(232) HRC, General Comment No 27 (n 114), §8.

(233) Resolutions of the General Assembly are considered to be soft law, see Rina Kuusipalo, "Soft Law" in C. Binder, M. Nowak, J. A. Hofbauer and P. Janig (eds), *Elgar Encyclopedia of Human Rights*, Edward Elgar Publishers, 2022, 288.

(234) Article 5(2)(a) UNGA Res 40/144 (13 December 1985).

(235) Moreno-Lax held that "the legal status of the person concerned under national law is irrelevant" and further substantiated this by referring to Article 27 Vienna Convention on the Law of the Treaties which expressly denies that a State may invoke its internal norms as justification not to perform its obligations under a treaty. See V. Moreno-Lax, *Accessing Asylum in Europe*, Oxford University Press, 2017, 357.

(236) *Ismet Celepli v Sweden* is perhaps the clearest example. The petitioner, a Kurdish individual from Türkiye, was residing in Sweden. After his application for refugee status was denied, he was subjected to an order for expulsion. The order was not carried out because of the non-refoulement principle. Due to concerns of national security, the author could not leave or change his town of residence without prior permission from the police. Even though the HRC agreed that the national security restrictions did not violate Article 12 ICCPR, it can be implicitly confirmed

Concludingly, the personal scope of the right to leave includes migrants in Niger who have entered the country irregularly.

2. *Ratione Materiae*

This section explores the potential interference of the three mobility restrictions with the right to leave a country. Before delving into the separate scrutiny of each restriction, this section addresses first a fundamental question that is pertinent to all three constraints: do these restrictions interfere with migrants' right to leave a country, if they still have the possibility to travel to other States; or if they have the possibility return to their own country (237)?

(1) Alternative destinations or return to country of origin

It can be contended that, even when migrants in Niger are restricted from traveling to Libya or Algeria, they still have the option to travel, for instance, to its other five neighbouring countries. Thus, one might argue that their right to leave has not been infringed.

Several scholars argue that a complete inability to leave a State's territory is not required to trigger the right to leave. (238) This seems to be confirmed in General Comment No 27, in which the HRC asserted that "the right of the individual to determine the State of destination is part of the legal guarantee". (239) Moreover, case-law of the HRC and the ECtHR seem to confirm this. The HRC applied Article 12(2) ICCPR in a case where the author, a Finnish national, was able to travel to other Nordic countries, but could not travel to other countries beyond that region. (240) Additionally, the ECtHR considered the alleged violation of the right to leave in a case in which a court prohibited a child to go to one specific country. (241)

that the personal scope of the right to leave extends to migrants in irregular stay, as the HRC did not declare the case inadmissible *ratione personae*. See HRC, *Ismet Celepli v Sweden*, Communication No 456/1991 (26 July 1994). A similar case is HRC, *Salah Karker v France*, Communication No 833/1998 (30 October 2000).

(237) Article 12(4) ICCPR: "No one shall be arbitrarily deprived of the right to enter his own country". Article 12(2) African Charter: "Every individual shall have the right to […] return to his country". Article 22(5) ACHR: "No one can be […] deprived of the right to enter it [the State of which he is a national]". Article 3(2) Protocol No 4 ECHR: "No one shall be deprived of the right to enter the territory of the state of which he is a national".

(238) V. Stoyanova, "The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law" (2020) 32 *International Journal of Refugee Law* 403, 413. N. Markard, "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries" (2016) 27(3) *European Journal of International Law* 591, 596.

(239) HRC, General Comment No 27 (n 114), §8.

(240) HRC, *Lauri Peltonen v Finland*, Communication No 492/1992 (23 December 1991). Another example is *Loubna el Ghar v Socialist People's Libyan Arab Jamahiriya* (n 119), discussed below.

(241) The ECtHR considered the alleged violation of the right to leave in a case in which a court prohibited a child to go to one specific country. See ECtHR, *Diamante and Pelliccioni v San Marino* (n 208).

Another plausible argument could be that since migrants in Niger can exercise their right to return to a country, which stems from Article 12(4) ICCPR, their right to leave has not been infringed. First, jurisprudence from the HRC (242) and IACHR (243) affirm that the availability of the option to return to the country of origin does not preclude the triggering of the right to leave. Equally, the assertion that "the right of the individual to determine the State of destination is part of the legal guarantee" is important for this scenario. (244) Furthermore, it can be raised that within the group of migrants who are prevented to leave northwards, there are migrants who are seeking international protection, and can therefore not return to their country of origin as this would amount to the principle of *non-refoulement*, (245) which has been confirmed by the HRC in the context of the right to leave. (246) Second, with regard to migrants who are not seeking international protection, the HRC explained that that freedom to leave the territory of a State may not be made dependent on any specific purpose; (247) consequently, it could be argued that the purpose of seeking international protection is irrelevant for exercising the right to leave. Moreover, it should be raised that the right to return to one's own country does not imply an obligation upon the individual to return; rather, the obligation is upon the State of nationality to admit. (248)

In sum, as argued on the basis of case law, soft law and literature, it should be considered that the possibility to travel to other countries, including their own country, does not hinder the activation of the right to leave a country when migrants are prevented to travel northwards.

(242) A Libyan student residing in Morocco sought the issuance of a passport from the Libyan authorities. Libya issued a *laissez-passer* to travel back to her home country, but as her intention was to travel to France, she insisted that she wanted a passport. The HRC held that the refusal of the Libyan authorities to provide the applicant with a passport, violated Article 12(2) ICCPR insofar the author was prevented from travelling to France to continue her studies. See HRC, *Loubna El Ghar v Socialist People's Libyan Arab Jamahiriya* (n 119).

(243) The IACHR determined that there was a breach of the right to le avewhen Uruguay declined to renew the passport of one of its nationals living in the USA. Although the Uruguayan government argued that this did not infringe upon the individual's right to leave (since a passport is not required to return to Uruguay), the IACHR disagreed, see IACHR, *Juan Raul Ferreira v Uruguay* (n 180).

(244) HRC, General Comment No 27 (n 114), §8.

(245) The principle of non-refoulement prohibits States from transferring or removing individuals from their jurisdiction of effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations, see OHCHR, "The principle of non-refoulement under international human rights law" <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> accessed 10 August 2023.

(246) In a case concerning the violation of the right to leave, the HRC held that the author cannot reasonably be expected to return to his country of origin, see HRC, *Farag El Dernawi v Libyan Arab Jamahiriya*, Communication No 1143/2002 (15 August 2002), §6.3.

(247) HRC, General Comment No 27 (n 114), §8.

(248) Guild and Stoyanova (n 153), 407.

(2) Restrictions' interference with the right to leave

For each identified mobility restriction, an assessment is made whether the restriction interferes with the right to leave a country. The author has deliberately selected the sequence in which the restrictions are assessed, as this arrangement aids in the clarity and logic of the legal reasoning presented.

a. Extortion and interdiction at checkpoints

The HRC's General Comment No 27 identifies various barriers to the right to leave a country, which include forms of harassment such as physical intimidation or arrest. (249) In this context, it can be argued that extorting migrants constitutes a similar form of harassment, thus infringing upon their right to leave.

Likewise, Article 4(b) of the 1972 Uppsala Declaration (250) emphasizes that: "Every state shall ensure that no person or his family is subjected to private or other unofficial reprisals or harassment for seeking to exercise or for exercising his right to leave a country". Article 5(c) of the Uppsala Declaration holds that: "No special fees, taxes, or other exactions shall be imposed for exercising the right to leave a country". Cambridge Dictionary defines exaction as "the act of demanding and getting something, sometimes using force or threats", (251) which is a synonym to extortion. Extortion of migrants can be seen both as unofficial reprisals or harassment, as well as a form of exaction. These exact provisions have been restated in the 1986 Strasbourg Declaration on the Right to Leave and Return. (252) In a similar vein, the African Commission held that "when re-entry points become sites of frequent harassment and arrest, freedom of movement is infringed". (253) In that case, the African Commission addressed re-entry points in the context of the right to return to a country. By analogy, it can be argued that when exit points become the sites of frequent harassment, freedom of movement is infringed too.

Moreover, in its Concluding Observation on Equatorial Guinea, the HRC held that the State should guarantee the freedom of movement recognized in Article 12 of the Covenant (254) by doing away all military roadblocks or

(249) HRC, General Comment No 27 (n 114), §17.

(250) Uppsala Declaration (n 144).

(251) Cambridge Dictionary, "exaction" <https://dictionary.cambridge.org/dictionary/english/exaction> accessed 2 August 2023.

(252) Article 3(a) Strasbourg Declaration (n 144): "No person shall be subjected to any sanction, penalty, reprisal or harassment for seeking to exercise or for exercising the right to leave a country". Article 4(g): "No fees, taxes or other exactions shall be imposed for seeking to exercise or exercising the right to leave a country".

(253) African Commission, *Huri-Laws v Nigeria*, Communication no 225/98 (2000), §50.

(254) The HRC did not specify which exact provision of Article 12 ICCPR has been infringed. The HRC concluded that the "State party should […] guarantee the freedom of circulation recognized in article 12 of the Covenant by doing away with all military roadblocks or taking steps to prevent their being used as a means of extortion, by repealing the requirement to obtain a visa

taking steps to prevent them being used as a means of extortion. (255) From this, we can infer that checkpoints in and of themselves do not violate the right to leave, unless they are exploited as instruments of extortion.

An argument can be made that obstructions to the right to leave stem from interdiction and harassment at borderland checkpoints, as they directly prevent this right. Consequently, actions at Niger's central mobility axes checkpoints might be seen as directly restricting the freedom of movement, and only indirectly impeding the right to leave. However, referencing General Comment No 27, the HRC enumerated several barriers that indirectly limited the right to leave too, for instance, restrictions on family members travelling together, harassment of applicants, for example by loss of employment or expulsion of their children from school or university. (256) Accordingly, even if extortion at a checkpoint in the centre of Niger does not result directly in the hindrance of the migrants' right to leave Niger – which could be debated – it certainly indirectly impedes this right. Since the HRC has identified barriers which indirectly interfere with the right to leave, extortion at checkpoints in the centre of the country can be deemed to infringe this right as well.

Moreover, the IACHR noted in its report on "Forced Migration of Nicaraguans to Costa Rica" that "military checkpoints at various points of departure from the State of Nicaragua" interfere with the right to leave. (257) However, the IACHR did not specify further where these checkpoints are located. One could argue that if migrants depart from Agadez (the final town where migrants reside before crossing the desert to leave Niger), then checkpoints in this area can be considered as "checkpoints at points of departure", even though Agadez is centrally situated in Niger.

Furthermore, Guild and Stoyanova deduced that restrictions on the right to leave presuppose some form of physical contact between the affected migrants and agents. (258) In this way, the causal relationship between these measures and any harm sustained by migrants (not being allowed to leave) is tangible. (259) It is evident that there is physical contact between the migrants and agents at checkpoints. Consequently, from this angle, the first restriction can fit within the category of existing restrictions on the right to leave.

to leave the country and by abolishing the practice of internal political exile". According to the author, these three restrictions all intervene with the right to leave, as guaranteed under the broader concept of freedom of movement, see HRC, "Concluding observations on the situation of civil and political rights in Equatorial Guinea" (3 August 2004) UN Doc CCPR/CO/79/GNQ, §13.

(255) *Ibid*.

(256) HRC, General Comment No 27 (n 114), §17.

(257) IACHR (n 200) §106.

(258) Guild and Stoyanova (n 153), 375.

(259) *Ibid*.

From the reasoning above, it follows that extortion at borderland and inland checkpoints interfere with the right to leave. If extortion at checkpoints obstructs the right to leave, then this is *a fortiori* the case for interdiction at checkpoints.

b. Article 20 Law 36/2015: carrier sanctions on domestic transport

The first paragraph of Article 20 Law 26/2015 holds that: "Any commercial carrier, individual or legal person, responsible for the operation of a commercial transport activity that fails to verify that each passenger is in possession of the identity and/or travel documents required for entry into the State of destination and *any State of transit* [own emphasis] commits an offense [...]".

Spijkerboer and other scholars argued that Article 20 Law 36/2015 provided for the criminalisation of domestic transportation. (260) This is done through replacing the term *receiving state* from the Migrant Smuggling Protocol by the term *State of destination and any State of transit* in Article 20 Law 26/2015. (261) As a result, even Niger can serve as a State of transit, which implies that the journey on which a person is embarking, does not have to cross borders.

On two occasions, the HRC suggested that carrier sanctions fall within the ambit of the right to leave. Firstly, in General Comment No 27 it held that:

> "The practice of States often shows that legal rules and administrative measures adversely affect the right to leave [...]. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3 [permissible limitations]. States parties should also include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country". (262)

In the *travaux préparatoires* of the General Comment, (263) the Chairman of the Working Group stated that this provision was "intended to alert States to the need to report on any measures that created sanctions which made it more difficult for people to leave their own countries, such as the fines imposed on airlines for transporting persons not possessing the necessary travel documents. The sentence did not say that such measures could not

(260) Spijkerboer (n 74).

(261) *Ibid*.

(262) HRC, General Comment No 27 (n 114), §10.

(263) Just as *travaux préparatoires* serve as a secondary source for interpreting treaties (Articles 31-33 of the Vienna Convention on the Law of Treaties), they can also be utilized for interpreting the General Comment.

be instituted, but that they had to be shown to conform to article 12, paragraph 3 of the Covenant". (264)

Secondly, in its Concluding Observation on Austria, (265) the HCR expressed its concern on "sanctions against passenger carriers [...] that may affect the rights of any person to leave any country". (266)

Moreover, the Council of Europe Commissioner of Human Rights (267) and several scholars in academic literature, (268) have also noted that carrier sanctions interfere with migrants' right to leave.

It is important to note that these instances highlight the interference of carrier sanctions on the right to leave, insofar it concerns international transportation. International carrier sanctions can directly be considered to interfere with the right to leave, since there is the element of crossing borders. According to the author, a strong case can be made to assert that carrier sanctions on domestic transportation do also fall within the scope of the right to leave. It has been contended that indirect limitations on the right to leave also interfere with the right in question. As mentioned earlier, the HRC argued that when applicants face harassment for exercising their right to leave, through for example the loss of employment or expulsion of their children from school or university, this also restricts their right to leave. The crucial point is that is not necessary that migrants are directly prevented from leaving; indirect restrictions suffice, such as exclusion from domestic transportation. Additionally, the factual situation in Niger merits attention. Migrants mostly arrive in Niger without their own means of transport. (269) Considering that Niger is the largest country in West Africa, (270) migrants largely depend on domestic transportation for transit through the vast country and its desert, as traveling by foot is extremely difficult. However, given that most migrants entered Niger irregularly, (271) this provision excludes

(264) HRC, "Sixty-fourth session - SUMMARY RECORD OF THE 1709th meeting" UN Doc CCPR/C/SR.1709 (28 October 1998), §6.

(265) HRC, "Concluding observations of the Human Rights Committee Austria" (19 November 1998) UN Doc CCPR/C/79/Add.103.

(266) *Ibid*., §11. In this report, the specific law has not been mentioned. However, according to a report of the European Council on Refugees and Exiles, this concern has been raised on Law 1997 Aliens Act, see ECRE, "Carriers" Liability - Country up-date on the application of carriers' liability in European States' <https://www.refworld.org/pdfid/3c02740b4.pdf> accessed 27 July 2023.

(267) Council of Europe Commissioner for Human Rights (n 136), 64.

(268) Guild and Stoyanova (n 153) 375; V. Moreno-Lax, "Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees" (2008) 10(3) *European Journal of Migration and Law* 315, 362.

(269) See for example DW Documentary, "Migrants in Niger" 6:50 <https://www.youtube.com/watch?v=-A8qdoRJbPI> accessed 11 August 2023.

(270) ACHRP, "Republic of the Niger" <https://achpr.au.int/en/member-states/niger#:~:text=Niger%20covers%20a%20land%20area,largest%20country%20in%20West%20Africa.> accessed 9 August 2023.

(271) Molenaar, "Irregular migration and human smuggling networks in Niger" (n 2), 15; Benattia, Armitano and Robinson (n 81).

them from domestic transportation, and makes it accordingly extremely difficult for them to leave the country. Therefore, it can be contended that domestic carrier sanctions interfere with the right to leave of migrants in Niger.

Considering the reasoning provided above, and by acknowledging the widely accepted principle that human rights treaties are living instruments requiring interpretation in light of contemporary circumstances, (272) it is arguable that preventing migrants from accessing domestic transportation significantly impedes their ability to leave the country, and thus their corresponding right.

c. Article 10 Law 36/2015: assistance in the illegal exit

Article 10 Law 36/2015 states that: "Any person who, intentionally and for the purpose of obtaining, directly or indirectly, a financial or other material benefit, *provides for the illegal* entry into or *exit from Niger* [own emphasis] of a person who is neither a national nor a permanent resident of Niger, shall be liable to imprisonment [...]".

This provision criminalizes the intentional assistance, for compensation, in the illegal exit of a person who is neither a national nor a permanent resident of Niger. For that reason, it becomes more challenging for migrants to leave the country, as they can no longer rely on the wide variety of services which were available before. As a result, migrants can only rely on assistance for humanitarian or family reasons. (273) Considering that migrants often travel alone, their primary source of support when leaving a country is humanitarian aid. This inherently narrows their avenues for assistance, which is crucial to travel through the desert. Therefore, it can be reasonably assumed that this provision interferes with migrants' right to leave.

Both literature and case law from UN treaty bodies and regional bodies have not yet addressed such a provision in the context of the right to leave a country. However, this restriction is very similar to carrier sanctions (domestic or international). The underlying restriction in both instances is that third parties (persons or commercial carriers) are prohibited to facilitate the journey of migrants. Hence, if carrier sanctions interfere with the right to leave, then, by analogy, the same can be asserted for the provision concerning the criminalization of assistance in the illegal exit of migrants.

(272) Acknowledged recently in HRC, *Ailsa Roy v Australia*, Communication No 3585/2019 (10 July 2023), §8.14.

(273) This follows from the *travaux préparatoires* of the Protocol, which asserts that "the reference to 'a financial or other material benefit' as an element of the definition in subparagraph (a) was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties" see UNGA, "Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto" UN Doc 1/55/383Add.1 (3 November 2000), §88.

Building up on the insights of Guild and Stoyanova, who suggest that restrictions related to the right to leave typically entail some form of physical interaction between migrants and agents, (274) the criminalization of assistance in the illegal exit of migrants can fit in the category of existing restrictions on the right to leave. This physical interaction becomes evident when considering prevalent practices in Niger. For instance, ghetto owners have been prosecuted for housing migrants under this provision. (275) When police step in to curb such practices within the ghetto, it is likely that direct physical interaction between the migrant and the agent occurs. Similarly, when police stop a person driving with a migrant in Niger, (276) direct contact ensues between the migrant and the agent.

While there is no case law explaining the impact of such provisions on the right to leave, this contribution has provided persuasive arguments suggesting that Article 10, insofar it criminalizes aid to a migrant's illegal exit, impedes the right to leave of migrants.

Intermediate Conclusion

In light of the absence of conclusive case law establishing whether the three restrictions curtail the right to leave, this subsection has aimed to present arguments in favor of the interference of these three mobility restrictions with the aforementioned right.

3. *Limitations*

Certain conditions may justify restrictions on the right to leave. Article 12(3) ICCPR, Article 2(4) Protocol No 4 ECHR, Article 12(2) African Charter and Article 22(3) American Convention lay out that restrictions must be provided by law and must be necessary to protect one of the following grounds: national security, public order, public health or morals. (277) Moreover, the HRC and the regional bodies have asserted that restrictions must conform to the principle of proportionality. (278) General Comment No 27 requires that restrictions on the right to leave may not impair the

(274) Guild and Stoyanova (n 153), 381.

(275) Brachet, "Manufacturing Smugglers" (n 30), 26; Molenaar, "Irregular migration and human smuggling networks in Niger" (n 2), 13.

(276) Perrin (n 72).

(277) Article 2(4) Protocol No 4 ECHR and Article 22(3) ACHR provide additionally the "prevention of crime" as a justification ground. Article 12(2) ICCPR, Article 22(3) American Convention and Article 2(3) Protocol No 4 ECHR add the rights and freedoms of others. The contribution does not cover these grounds, as they are not cited as justification ground in the current case study. Moreno-Lax observed that, within the realm of pre-border controls, national security and public order are the grounds most commonly put forward, see Moreno-Lax (n 235), 357.

(278) HRC, General Comment No 27 (n 114), §14; ECtHR, *Riener v Bulgaria* (n 117), §128; African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication nos 279/03-296/05 (27 May 2009); IACtHR, *Canese v Paraguay* (n 116), §123.

essence of the right;(279) must be appropriate to achieve their protective function;(280) and to be least intrusive instrument amongst those which might achieve the desired result.(281)

To evaluate the limitations imposed by these mobility restrictions, this contribution references the ICCPR and General Comment No 27. This approach is adopted because the three regional courts have endorsed General Comment No 27.

(1) Legality

The first step in analyzing permissible restrictions on the right to leave is ensuring that these restrictions are provided for by law, thus satisfying the legality requirement. This implies that the law itself has to establish the conditions under which the rights may be limited.(282) Furthermore, the laws providing the restrictions must meet certain standards, such as the requirement that it should use precise criteria and may not confer unfettered discretion on those charged with their execution.(283) From this, it follows that the notion "provided for by law" has two components: firstly, the formal requirement of legality, implying the existence of a legal basis for such restrictions, and secondly, substantive requirements that pertain to the quality of the law. The HRC holds that restrictions which are not provided for by law violate the right to leave.(284)

The legal framework concerning immigration in Niger consists of several instruments.(285) Ordonnance No 81-40 of 29 October 1981(286) (Ordonnance 81/40) and its implementing Decree No 87-076/PCMS/MI/MAE/C(287) (Implementing Decree 87/076) are the two main legal texts that define the conditions of entry and residence of foreigners in Niger, as well as their rights and obligations, and notably, the measures applicable to foreigners in an irregular situation.(288) Law no 97-016 of 20 June 1997 on refugee status(289) and its implementing Decree No 98-382/PRN/MI/AT/SP/CNE

(279) HRC, General Comment No 27 (n 114), §13.
(280) *Ibid*., §14.
(281) *Ibid*.
(282) *Ibid*., §12.
(283) *Ibid*.
(284) *Ibid*.
(285) For a comprehensive overview of the Nigerien legal framework on immigration until 2010, see D. Maiga, "Le cadre juridique général des migrations de, vers et à travers le Niger" (2010) Robert Schuman Centre for Advanced Studies CARIM - AS 2010/76.
(286) Republique du Niger, "Ordonnance n° 81-40 du 29 octobre 1981 Relative à l'entrée et au séjour des Étrangers au Niger".
(287) Republique du Niger, "Décret n° 87-076/PCMS/MI/MAE/C du 18 juin 1987 réglementant les conditions d'entrée et de séjour des étrangers au Niger".
(288) Republique du Niger, "Ordonnance N° 2010-86 du 16 décembre 2010 relative à la lutte contre la traite des personnes".
(289) Republique du Niger, "La Loi n° 97-016 du 20 juin 1997 portant statuts des Réfugiés".

of 24 December 1998 (290) set out the conditions for refugee status, as well as the rights and obligations for status holders. In 2010 and 2015, this legal framework was extended by the implementation of the Palermo Protocols (which supplement the UN Convention against Transnational Organized Crime): Ordonnance No 2010-86 of 16 December 2010 on the fight against human trafficking in persons (291) implements the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, (292) and Law 36/2015 implements the Migrant Smuggling Protocol. (293)

a. Extortion and interdiction at checkpoints

In light of the legal framework mentioned above, the provisions that can be relevant to assess extortion and interdiction practices at checkpoints will be highlighted. (294)

Article 3 Ordonnance 81/40 asserts that: "All foreigners must, in order to enter Niger, be in possession of the documents and visas required by the international conventions to which Niger is a party, and by the regulations in force". Similarly, Article 2 of the Implementing Decree No 87/074 provides that: "To enter Niger, all foreign nationals must be in possession of a national passport, or travel document in lieu thereof, and a Nigerien visa. They must also carry an international vaccination certificate". (295)

Article 4 of Ordonnance 81/40 holds that: "Foreign nationals who do not comply with the provisions of article 3 above will be subject to deportation by the police at the border post at which they arrive, in accordance with the procedures laid down in the decree implementing this Ordonnance". Article 30 of the Implementing Decree 87/074 further establishes that: "Any foreigner who does not present any of the documents provided for in article 2 of this decree will be subject to a refoulement measure taken by police officers at the border post through which he wishes to enter Niger, in accordance with the provisions of article 4 of order no. 81-40 of 29 October 1981".

Article 16 of Ordonnance 81/40 provides that: "Expulsion is ordered by a decree of the Minister of the Interior if the foreign national's presence in Niger is likely to constitute a threat to public order or [*le crédit public*]. In

(290) Republique du Niger, Decret n° 98-382/PRN/MI/AT du 24 décembre 1998 Déterminant les modalités d'application de la Loi n° 97-016 du 20 juin 1997 portent statuts des Réfugiés".

(291) Republique du Niger, "Ordonnance N° 2010-086 du 16 décembre 2010 relative à la lutte contre la traite des personnes au Niger".

(292) Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003). Niger ratified the Protocol in 2004.

(293) See footnote 72.

(294) The legal provisions, originally written in French, have been freely translated by the author.

(295) Due to the ECOWAS treaties, passports and visas are, in theory, no longer required for ECOWAS nationals.

an emergency, the police authorities may decide to expel a foreign national, on condition that they report immediately to the Minister of the Interior".

Regarding the question of whether the law provides for checkpoints as such, Article 10 of the Implementing Decree 87/074 might be relevant, as it holds that foreign nationals have to present their documents at the request of any official. Given the broad wording, one could argue that checkpoints serve as a mechanism for officials to verify the documents of foreign nationals in accordance with this article.

As one could presume, extortion at checkpoints does not have a legal basis.

Article 4 of Ordonnance 81/40 and Article 30 of the Implementing Decree 87/074 are important for assessing interdiction at checkpoints. Although the two provisions do not mention "interdiction", they do provide for "refoulement". To send migrants back (i.e. refoulement), it stands to reason that they are first halted from continuing their journey, thus subjecting them to interdiction. It can be derived from these provisions that interdiction has a legal ground based on these two provisions, insofar it occurs at checkpoints at the borders "at which they arrive" (296) or "through which he wishes to enter Niger" (297). Hence, it serves not as a legal basis for interdiction at checkpoints in the country's main mobility axes, or in the borderland of Niger and Libya/Algeria.

More generally, Article 16 of Ordonnance 81/40 provides for the expulsion of irregular migrants but cannot constitute a legal basis for interdiction at checkpoints for a number of reasons. First, contrary to what the provision requires, interdictions do not take place by virtue of a decree of the Minister and happen without the individual assessment of a threat to public order/"*le crédit public*". The provision states that during an emergency, the police can directly expel the person. Nevertheless, it cannot be considered an emergency given the systematic and prolonged use of this practice.

In sum, interdiction and extortion practices at checkpoints throughout the country lack a legal basis, with the only exception being checkpoints in border regions where migrants arrive. Therefore, these actions can be viewed as potential violations of migrants' right to leave.

b. Article 20 Law 36/2015: carrier sanctions on domestic transport

The restriction concerning carrier sanctions, as well as the subsequent one, emerge from the law itself, making it evident that the formal criteria of legality have been satisfied for both restrictions. Yet, the "provided by law" standard also includes substantive requirements. According to the HRC, in order to be characterized as a "law",(298) the norm must be for-

(296) Article 4 Ordonnance 81/40.
(297) Article 30 Implementing Decree 87/074.
(298) HRC, "General Comment No. 34" (12 September 2011) UN Doc CCPR/C/GC/34e, §25.

mulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. (299) Lastly, a law may not confer unfettered discretion on those charged with their execution. (300)

Article 20 Law 36/2015 criminalises commercial transport companies who fail to verify that every passenger is in possession of the identity and/or travel documents required for the entry in the State of destination as well as in all the transit States.

Considering that "transit State" was not prescribed in the foundational legal instrument providing for carrier sanctions (*i.e.* the Migrant Smuggling Protocol), it is regrettable that Law 36/2015 has not explained this notion, which seems to conflict with the HRC's quality standards of law, such as the requirement that the norm must be formulated with sufficient precision. (301)

c. Article 10 Law 36/2015: assistance in the illegal exit

Article 3(a) of the Migrant Smuggling Protocol defines "smuggling of migrants" as the "procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident". Nigerien law incorporates this definition in Article 3 Law 36/2015, and then widens the offence in Article 10 Law 36/2015 to also include the "illegal exit". As a result, Article 10 Law 36/2015 states that: "Any person who [...] provides for the illegal entry into or exit from Niger [...] shall be liable to imprisonment [...]". Interestingly, Article 13 of Ordonnance 81/40 already prescribed that: "Any individual [...] wilfully facilitates or attempts to facilitate the unauthorised entry, movement or residence of a foreigner in Niger will be liable [...]". Thus, Article 10 Law 36/2015 merely introduced the criminalization of assisting the illegal exit of an irregular migrant into the existing legal framework.

Given that Nigerien legislation defines "illegal entry" on three separate occasions, (302) the absence of a definition for "illegal exit" is troubling since it restricts migrants' right to leave, and especially in light of its inconsistency with the Migrant Smuggling Protocol. Considering that "illegal exit" constitutes a defining element of smuggling in this law, the lack of clarity on this notion is again problematic in light of the HRC's stipulation that "the law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly". (303)

(299) *Ibid*.

(300) HRC, General Comment 17 (n 114), §13.

(301) *Ibid*.

(302) Article 3 Ordonnance 81/40, Article 2 of its Implementing Decree 87/076, as well in Article 3 Law 36/2015.

(303) HRC, "General Comment No. 34" (12 September 2011) UN Doc CCPR/C/GC/34e, §25.

Intermediate Conclusion

The assessment of the legality requirement has demonstrated that the practices of extortion and interdiction at checkpoints throughout the country, with the exception for interdiction in the border region where migrants arrive, lack a legal basis and therefore are not provided by law. Concludingly, it is reasonable to assume that such practices violate migrants' right to leave.

While Articles 10 and 20 of Law 36/2015 evidently meet the formal requirement, their consistency with the substantive standards arising from the legality requirement is contested and open to debate. (304) Therefore, this study will further scrutinize the constraints imposed by those Articles in light of potential justification grounds.

(2) Legitimate aims

As argued earlier, the ICCPR and the regional conventions allow limitations only for specific aims, such as national security, public order, public health or morals. (305) In light of the text of Law 36/2015 and a presentation from the Nigerien National Agency to Combat Trafficking in Persons, it appears that the objectives pursued with Law 36/2015 are twofold: to combat migrant smuggling, (306) and to prevent loss of life in the desert. (307) According to the UN Special Rapporteur on Migrants' Rights and academic literature, Law 36/2015 has a third objective insofar it aims protect the immigration laws of European countries by preventing illegal entry in Libya or Algeria. (308)

The first two objectives can potentially fall under the grounds "public order" and "national security", as has been widely established in academic literature. (309)

(304) For example, the ECtHR opens an avenue for debate as it holds that "the level of precision required for domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed", see ECtHR, *Kudrevičius and Others v Lithuania*, Application no 37553/05 (15 October 2015), §110.

(305) HRC, "General Comment No. 34" (12 September 2011) UN Doc CCPR/C/GC/34e, §25.

(306) Article 1 Law 36/2015 states that the objective of the law is to prevent and fight migrant smuggling.

(307) G. Maimouna Gazibo (n 54), 12.

(308) The Special Rapporteur holds that: "The law allegedly is an attempt to prevent loss of life in the desert, combat activities of smugglers of migrants and respond to pressure from destination countries to halt migration to the north". See Special Rapporteur, visit to Niger (n 13), §29; Hamadou (n 87), §46.

(309) According to Hamadou, the fight against smuggling and irregular migration are elements in maintaining the public order and national security in Niger, see Hamadou (n 87), §55. More generally, Moreno-Lax held that in the context of pre-border controls, these two grounds are most usually invoked, which is also confirmed by Guild and Stoyanova, and by Den Heijer. See Moreno-Lax (n 235), 357; Guild and Stoyanova (n 153), 388; D. Heijer, *Europe and Extraterritorial Asylum*, Hart Publishing, 2012, 63.

To determine the validity of the third objective, the case of *Stamose v Bulgaria* could be relevant, (310) in which Bulgaria issued a travel ban on its national as a sanction for having previously breached the immigration laws of the USA. Bulgaria justified that the ban was "designed to discourage and prevent breaches of the immigration laws of other States". (311) The ECtHR declared that such measure could potentially be accepted to pursue the legitimate aim of maintenance of public order or the protection of the rights of others". (312) Therefore, it can be argued in this case, that the objective to protect the immigration laws of European countries can fall under the maintenance of public order or the protection of the rights of others. (313) In sum, all three invoked objectives can potentially be justified under public order, national security or the protection of the rights of others.

Even if restrictions do have a legitimate state aim, they must also satisfy the principles of necessity and proportionality. (314) In order to assess these principles, the HRC established a threefold proportionality analysis (315): the restrictive measures must be appropriate to achieve their protective function ("appropriateness"); they must be the least intrusive instrument amongst those which might achieve the desired result (least intrusive instrument); and they must be proportionate to the interests to be protected (proportionality *stricto sensu*). (316) Moreover, the HRC has subjected restrictions to two additional constraints: they must not impair the essence of the right, (317) and the limitation must be compatible with all other Covenant rights and with the fundamental principles of equality and non-discrimination. (318)

(310) ECtHR, *Stamose v Bulgaria* (n 367).

(311) *Ibid*., §32.

(312) *Ibid*.

(313) Despite the reasoning of the ECtHR, Zieck argued that restricting the right to leave in order to assist other States in controlling undocumented movement cannot be justified on the basis of public order, see M. Zieck, "Refugees and the Right to Freedom of Movement: From Flight to Return" (2018) 39 *Michigan Journal of International Law* 19, 31 and 54-55.

(314) In General Comment No 27, the HRC held that "is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality", §14.

(315) Y. Arai-Takahashi, "Proportionality", in D. Shelton (ed), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, 461. The author demonstrated that this threefold proportionality test is also implemented by regional courts.

(316) These three grounds are listed in HRC, General Comment No 27 (n 114), §14. Since the HRC has not discussed the limitations on the right to leave in detail in its Communications, the author drew upon the HRC's Communication in a case concerning restriction on the freedom of movement, which is subjected to the same limitations grounds as the right to leave a country. According to the HRC, "to meet the test of necessity any restriction […] must be shown to be appropriate to achieve its protective function; must be the least intrusive instrument among those which might achieve their protective function; and must be proportionate to the interests to be protected", see HRC, *Pavel Kozlov v Belarus*, Communication No 1986/2010, UN Doc CCPR/C/111/D/1986/2010 (2014), §7.6.

(317) HRC, General Comment No 27 (n 114), §13.

(318) *Ibid*., §§2 and 18; Article 12(3) ICCPR.

The ensuing passage will first address whether the three objectives represent legitimate aims *in casu*. If they do, the study will then evaluate whether the restrictions adhere to the principles of necessity and proportionality.

a. Combat migrant smuggling

In literature, there are two conflicting interpretations regarding the impact of the objective to combat migrant smuggling on migrants' right to leave. Perruchoud argued that that the Protocol "requires States to prevent migrants from leaving their territory by unauthorized or irregular means [...] while criminal liability of smuggled migrants is excluded, this dot not authorize migrants to leave their country by irregular means". (319) In contrast, Harvey and Barnidge concluded that "restrictions on the movement of the smuggled person will have to be justified within the terms of article 12(3) [ICCPR]. The state must demonstrate that these restrictions meet the tests of legality and necessity, are consistent with the other provisions of the ICCPR, and come under one of the listed grounds. A state must be in a position to argue that any direct or indirect restrictions are for the purpose of tackling the pressing problem of smuggling and trafficking". (320) This contribution draws upon the last interpretation, as it is endorsed by fellow scholars. (321) It follows that migrant smuggling is a legitimate aim.

i. Article 20 Law 36/2015: carrier sanctions on domestic transport

The Migrant Smuggling Protocol obliges States Parties to adopt legislative or other appropriate measures to prevent commercial transport from being used for migrant smuggling. (322) In particular, Article 11(3) Migrant Smuggling Protocol held that:

> "Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State".

This article of the Migrant Smuggling Protocol provides for the adoption of carrier sanctions insofar as it concerns international transportation, because of the stipulation "required for entry into the receiving State". However, due to prescription of "State of transit", Niger has criminalized the domestic transportation of irregular migrants, insofar it is conceived that Niger

(319) R. Perruchoud, "State Sovereignty and Freedom of Movement", in Opeskin, Perruchoud and Redpath-Cross (eds), *Foundations of International Migration Law*, Cambridge University Press, 2012, 139.

(320) C. Harvey and R. P. Barnidge Jr., "Human Rights, Free Movement, and the Right to Leave in International Law" (2007) 19(1) *International Journal of Refugee Law*, 14.

(321) A. T. Gallagher and F. David, *The International Law of Migrant Smuggling*, Cambridge University Press, 2014, 154; Markard (n 238), 607.

(322) Article 11(2) Migrant Smuggling Protocol.

itself functions as a transit State. It is questionable whether this provision aligns with the intent to combat migrant smuggling, especially since smuggling entails unauthorized border crossings. (323) Concludingly, the author considers that the contested provision cannot be appropriate to achieve the protective function of combatting migrant smuggling.

ii. Article 10 Law 36/2015: assistance in illegal exit

It can be argued that the criminalization of assistance in the illegal exit of migrants cannot be considered to protect the objective of combatting migrant smuggling, since the definition of migrant smuggling in Article 2 Law 36/2015, as well in Article 3(a) Migrant Smuggling Protocol do not prescribe this. While the definition of migrant smuggling covers only the assistance in illegal entry, Article 10 Law 36/2015 criminalizes also assistance in the illegal exit from Niger. Therefore, this article goes beyond combatting migrant smuggling, rendering the restriction inappropriate to achieve the legitimate aim.

b. Prevent loss of life

The prevention of loss of life can be considered as a legitimate aim. (324) Nevertheless, there are strong doubts as whether the two restrictions be deemed appropriate to achieve this aim.

Due to these two restrictions, irregular migrants are barred from using domestic transportation in Niger, and they cannot rely on aid from others during their journey through the country, except for strictly humanitarian reasons. The author finds no plausible scenarios where exclusion from transportation and denial of assistance could feasibly lead to the prevention of loss of life. Instead, these restrictions have increased the danger to migrants' lives. First, these policies are resulting in migrants frequently being forced to journey through the desert unaccompanied. Second, even when migrants do receive assistance, such as transportation from others, the situation remains precarious. For instance, some drivers, upon hearing of an impending police patrol, choose to abandon their passengers. The IOM has explicitly attributed the rise in instances of death and abandonment of migrants to drivers fleeing from Nigerien security forces. (325) According to

(323) According to Article 3(a) Migrant Smuggling Protocol, "smuggling of migrants' is defines that the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident". Article 3(b) defines "illegal entry" as "crossing borders without complying with the necessary requirement for legal entry into the receiving State".

(324) GUILD and STOYANOVA (n 153), §388.

(325) IOM, "Rapport de mission sur l'évaluation des routes migratoires du 19-25 Juillet" (8 August 2017) <https://www.iom.int/news/un-migration-agency-search-and-rescue-missions-sahara-desert-help-1000-migrants> accessed 14 August 2023.

a study of Clingendael Institute based on IOM data, the number of recorded deaths in the Nigerien desert rose from 95 in 2016 (326) to 427 in 2017. (327)

In light of the foregoing, it should be held that these restrictions are certainly not appropriate to achieve the prevention of loss of life.

c. Protect the immigration laws of other countries

Already in 1948, the British Delegation in the UN Commission on Human Rights proposed that the right to leave may be restricted in order to help neighbouring states to fight illegal immigration. (328) However, it is not clear whether the protection of immigration laws of other countries is a legitimate aim and could therefore justify restrictions on this right. The ECtHR deliberated in *Stamose v Bulgaria* on this matter:

> "[T]he Court might be prepared to accept that a prohibition on leaving one's own country imposed in relation to breaches of the immigration laws of another State 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". (329)

While the ECtHR has not given a definitive stance on the matter, it has delineated conditions under which such an objective could potentially be justified. First, it noted a standard of "compelling situations", which, as Guild and Stoyanova noted, (330) appears to be a very high one. Furthermore, the ECtHR held that measures neglecting individual circumstances of the person involved cannot be deemed necessary in a democratic society. (331)

In 2008, the European Court of Justice (ECJ) addressed a similar situation, but within the framework of EU free movement law. (332) A Romanian citizen was prohibited from travelling to Belgium, on the ground that he had previously been repatriated from the latter State on account of his illegal residence there. (333) The ECJ held that "a measure limiting the exercise of the right of free movement must [...] be adopted in light of considerations pertaining to the protection of public policy or public security in the Member State imposing the measure. [...] That does not however rule out the

(326) Note that the implementation of Law 36/2015 started in mid-2016, see IOM, "Migration trends from, to and within the Niger 2016-2019" (2020) 1 <https://publications.iom.int/system/files/pdf/iom-niger-four-year-report.pdf> accessed 6 August 2023.

(327) Tubiana *et al.*, "Multilateral Damage" (n 39), 25.

(328) UN Economic and Social Council, "Report of the Third Session of the Commission on Human Rights" (28 June 1948) UN Doc E/800, 26.

(329) ECtHR, *Stamose v Bulgaria* (n 367), §36.

(330) Guild and Stoyanova (n 153) 389.

(331) The HRC, too, requires measures to be necessary in a democratic society, see HRC, General Comment (n 114)

(332) *Ibid*.

(333) ECJ, *Ministerul Administraţiei şi Internelor – Direcţia Generală de Paşapoarte Bucureşti v Gheorghe Jipa*, Case C-33/07 (10 July 2008), §9.

possibility of [...] [other Member States interests] being taken into account in the context of the assessment which the competent national authorities undertake for the purpose of adopting the measure restricting freedom of movement". (334) This suggests that the State of origin can consider other Member States' interests when restricting the freedom of movement of its nationals. Nevertheless, the ECJ held that there "was no specific assessment of his personal conduct and no reference to any threat that he might constitute to public policy or public security". (335) When analogously applied to the right to leave, individual circumstances should always be considered, as was also suggested by the ECtHR.

Considering the ECtHR's ruling, it appears that the protection of immigration laws of third countries is unlikely to serve as a legitimate aim to restrict the right to leave through domestic carrier sanctions and the criminalization of assistance in illegal exit of migrants, since these restrictions do not provide in a possibility of an examination *in concreto* of each individual case.

Intermediate Conclusion

This contribution found that the restrictions flowing from Articles 10 and 20 of Law 36/2015 cannot serve the objectives of combatting migrant smuggling and saving lives. Moreover, the justification ground of protecting the immigration laws of other countries is likely to fail too, since regional human right courts require a consideration of individual circumstances.

IV. — Conclusion

Since 2015, Niger has become the gatekeeper of Europe. This country, that once was a central hub for migration, has been pressured to criminalize migrant smuggling. In mid-2016, Niger started to implement Law 36/2015 on migrant smuggling, which resulted in a dramatic decrease of migrants entering Libya and Algeria from Niger.

This contribution aimed to answer two questions. First, it wanted to identify the main mobility restrictions preventing migrants in Niger from traveling to Libya and Algeria. Secondly, it evaluated whether these restrictions were in accordance with the right to leave a country.

In order to pin down the main migration containment policies, this work has first outlined the context in which transit migration took place in Niger prior to the implementation of Law 36/2015, thus clarifying the way in which mobility of migrants was facilitated at that time. Accordingly, this study analyzed how the implementation of Law 36/2015 altered certain

(334) *Ibid.*, §25.
(335) *Ibid.*, §27.

mechanisms that were previously vital for migrants to leave the country. This way, the three following measures were identified: (1) the criminalization of assisting in the illegal exit of migrants, (2) domestic carrier sanctions, and (3) extortion and interdiction at checkpoints.

To assess their conformity with the right to leave, it was firstly confirmed that migrants fall within the personal scope of the right to leave a country, as explicitly held by the HRC. Secondly, after having established that the possibility of migrants to travel to other countries does not preclude the activation of this right, it was determined whether the three restrictions interfere with the right to leave. This was the most challenging part of the study, as there is no existing case law on the right to leave regarding these restrictions. By providing a series of legal arguments, this contribution held that compelling grounds exist to contend that all three restrictions impede the exercise of the right to leave.

Furthermore, as the right to leave is not absolute, the last step in this study was to assess whether the restrictions of the right to leave could be justified. In human rights law, a restriction is considered to be permissible when it is provided by law and serves a legitimate aim, such as public order and national security. The legality requirement consists of two components, a formal requirement which implies the existence of a legal basis for such restrictions, and substantive requirements that pertain to the quality of the law. For each of the three restrictions, the fulfilment of the legality requirement remains questionable. However, it can be definitively stated that extortion and interdiction at checkpoints do not meet this condition, as they lack a legal basis. Since the attainment of the substantive requirements can be a subject of debate, this contribution proceeded to assess the criminalization of assistance in the illegal exit, and domestic carrier sanctions in light of plausible legitimate aims.

This work identified three objectives, relating to maintaining public order, national security and the rights and freedoms of others, that could be pursued by these restrictions: (1) combatting migrant smuggling, (2) saving lives, and (3) protecting the immigration interests of other countries. To begin with, it was held that these restrictions cannot be considered appropriate to combat migrant smuggling and saving lives. First, migrant smuggling entails by definition the crossing of borders. Therefore, domestic carrier sanctions are not suited to serve this aim. Secondly, since the definition of migrant smuggling only refers to the facilitation of illegal entry of migrants, the facilitation of illegal exit equally falls outside the scope of this objective. Furthermore, the argument that these restrictions are intended to save human lives is not sustainable. After all, these two restrictions force migrants to traverse the country with its vast desert independently and under dangerous conditions, resulting in a sharp increase of the number of migrants who have died during their journey. Lastly, the protection of immigration laws of other countries

is not likely to be a legitimate aim either. Regional human right courts, such as the ECtHR, held hat restrictions in this context must always consider the individual circumstances of the persons who are subjected to the restriction. Since the nature of these restrictions do not allow in an examination *in concreto*, this objective cannot be invoked.It follows that there are strong arguments to suggest that the three mobility restrictions violate the right to leave a country.

This work contributes to the literature on the right to leave on three levels. First, by providing a comprehensive legal framework, this work tackled fragmentation as it synthesized the jurisprudence and soft law on this right stemming from the United Nations, African, Inter-American and European human rights regimes. Secondly, by engaging in this exercise, this study identified relevant cases from regional human rights bodies which were not previously discussed in literature on the right to leave in the context of migration control policies, for instance the case of *Victims of the Tugboat "13 de Marzo" v Cuba* by the Inter-American Commission. Lastly, this work is the first to assess the right to leave from the perspective of interdiction and extortion at checkpoints, the criminalization of assistance in illegal exit and domestic carrier sanctions.