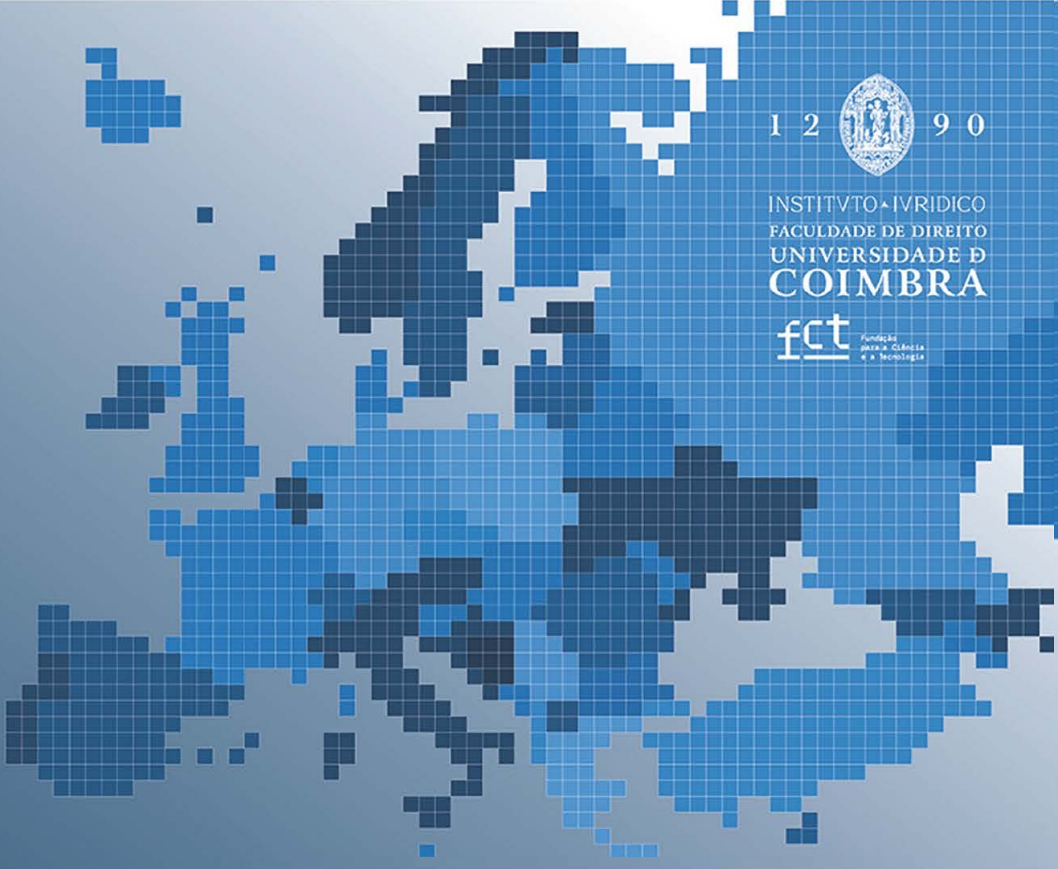

European Security, Borders, Crime and EU Law

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Pedro Caeiro
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European Security, Borders, Crime and EU Law

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Note from the editor

Borders: imaginary lines with very real consequences – legal, social, existential.

Crossing them entails risks, both for the resident population and for the foreigner. In Portuguese, *risco* denotes both risk and a line drawn on a surface, as, for instance, a dividing mark traced on the ground. Hence the expression *pisar o risco* (to step on the line), meaning imminent transgression (the crossing) that exposes the agent to risk. This linguistic peculiarity (I know of no other language in which this semantic overlap exists) is a vivid reminder that the border is more than a geopolitical device – it is also a calculation of exposure. Where a line is drawn, something is at stake – for the entitled and the *non-ayant droit* alike. The border becomes, for all parties, a symbolic locus of security (i.e., the successful management of risk), which, paradoxically, may drive them to adopt diametrically opposite behaviour: if need be, foreigners might be prepared to intrude illegally, whereas territorials might push them back illegally.

Borders are thus sites of power, vulnerability, crime and uncertainty. Over the last decade, the challenges they pose have grown more complex – empirically and normatively – prompting the Instituto Jurídico/UCILeR to host a seminar on the subject on 18 June 2024. We were privileged to welcome a distinguished group of scholars and practitioners, joined by invited guests and stakeholders, to explore topics such as: the outsourcing of border governance, public/private guilds, technocratic guilds (D. Bigo); the murky process of offshoring EU border anxiety to third countries (E. Guild); the several avenues used for criminalising migrants (V. Mitsilegas); the right to migrate as a human right (A. Gaudêncio) and the tensions between EU and (non-harmonised) domestic policies on integration (D. Lopes).

This e-book gathers the thoughtful papers presented at the seminar, followed by a brief epilogue of my own. I am deeply grateful to the authors for their engagement and generosity, and to the Coordination Board of the Instituto Jurídico for their unwavering support from the outset.

Caldas da Felgueira, 18 June 2025.

Border Crime and European Security: Legalising Measures to Prevent the Crossing of EU External Borders?

(DOI: https://doi.org/10.47907/EuropeanSecurityBordersCrimeandEULaw/02)

Elspeth Guild*

Abstract: The concept of European security is much discussed in policy and academic circles not least as an area which brings together diplomacy and interior ministry competences and their articulation within the EU. The discussion also determines the interface between crime and security with a particular focus on borders as places where the two are most intertwined. In this contribution I will look at the role of legality as regards the field of border crime in the form of irregular crossing of EU external borders and the policy of the EU to transform the lack of legality of EU border control measures (such as push backs of person in small boats to countries where they are not safe) into legal measures permitted by international law by reason of agreements with third countries. Where formal agreements recognised in international law are not available, this form of attempted legalisation is also taking place in form of MOUs, arrangements and other forms instruments between the EU, its agencies (in particular Frontex) and third states.

Keywords: EU border controls; Right to leave a country; Schengen; Fundamental rights

1. Introduction

This contribution focuses on the role of the international and European human right of any person to leave a country unless the state has a justified ground to prevent the person from doing so, such as pending criminal proceedings. Before addressing this key issue, I set out the background, and why, in the context of the European Union's (EU) border control activities, the right to leave a country has become so important to protect people from arbitrary action which prevents them from leaving a country where the destination appears or might be an EU state. The right to leave a country in international and European human rights law is not paired with a right to enter any country. Those persons who are exercising a right in international law to leave a country because they fear persecution may have a right to seek asylum somewhere but this right is separate from their right to leave. In this contribution, I will focus on the right to leave in the context

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of EU border controls, in particular examining the 2023 judgment of the European Court of Human Rights regarding EU-promoted exit controls applied to individuals in North Macedonia to prevent them leaving that country as the destination was towards the EU. Before moving to the main focus of this contribution, I will briefly set out the background to the EU's move away from carrying out controversial border controls through actions by its own agents through the astuce of contracting with third countries for their border agencies to prevent departure thus dispensing with the EU's need to carry out action on arrival.

There has been much criticism of the way in which the EU's common system of external border controls has been developed[1]. The establishment of an external border control body in 2004[2] predated the adoption of an EU law (in the form of a regulation) on the crossing of (most) EU external borders for the purposes of short or long stays[3]. Thus, the EU created a border control agency (generally known as Frontex)[4] with an increasingly coercive role and powers regarding border crossing when there was no EU law regarding what was a regular or irregular crossing of an external border. At that time, national law applied and this varied widely from Member State to Member State. Even with the adoption of an EU law on border crossing, the variations of what is a lawful border crossing are enormous and identifying who is a person seeking to cross an EU external border irregularly complex.

This is so because, under EU law, any third country national (any person without an EU citizenship) who holds a document which a Member States has issued to him or her and which either is in the common format set out in an EU regulation (which does not address content of the permit) or that Member State has notified to the Commission as a document which allows

[1] Elspeth Guild, «Frontex and access to justice: The need for effective monitoring mechanisms», *European Law Journal* 30 (2024) 136-148; Elspeth Guild, ed., *Monitoring Border Violence in the EU: Frontex in Focus*, London: Taylor & Francis, 2023; Jori Pascal Kalkman, «Frontex: A literature review», *International Migration* 59/1 (2021) 165-181.

[2] https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/frontex_en [accessed 23 July 2024]

[3] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) *OJ* L 105, 13.04.2006, 1–32. This version is no longer in force. The latest amendments are found in Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders PE/40/2024/REV/1 *OJ* L 2024/1717, 20.06.2024.

[4] The European Border and Coast Guard Agency (Frontex) is governed by Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard, *OJ* L 295, 14.11. 2019, 1.

admission at the external border without fulfilling the conditions of the regulation in principle, is not seeking to enter the EU irregularly[5]. Further, third country nationals with defined family relations with EU nationals who are exercising a free movement right in another Member State to that of their citizenship, are entitled to enter the EU even if they do not have a specific visa for that purpose so long as they are planning to join their EU national family member (and can document this)[6]. Thus, identifying who is a third country national seeking to enter the EU irregularly is by no means a simple matter in EU law as it engages both national law and EU law simultaneously and in a manner which is not far from opaque.

Frontex, as an EU agency, has the mission of the management of the EU's external borders and the fight against cross-border crime where the legal framework for the identification of what is an attempted irregular entry (which in many Member States may also be a cross border crime[7]) is complicated. Frontex has been given a very substantial budget[8], operational powers regarding external border controls, powers for their officers and seconded border guards to carry guns and the conditions for their use[9], but there is a substantial lack of clarity regarding the certainty in law of the identities of those persons against whom these powers can lawfully be exercised.

Instead of clarifying the law, the EU legislator has sought to differentiate border crossing and checks from border management and has provided extensive powers to Frontex outside of the border regulation to manage sea borders in particular[10]. The Border regulation requires border police to provide a written notice to every person to whom they are refusing entry at the external border. The individual is entitled to an appeal against the border police decision exercisable under Member States national law[11].

[5] Articles 2(16)(a) and (b), 6(1)(b) and (5) and 39, Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) *OJ* L 77, 23.03.2016, 1–52 (as amended in 2024).

[6] https://europa.eu/youreurope/citizens/travel/entry-exit/non-eu-family/index_en.htm – Arriving at the EU Border Without a Visa [accessed 30 July 2024].

[7] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-criminalisation-of-migrants-annex-0_en.pdf [accessed 30 July 2024].

[8] Michele Gigli, «The potential of budgetary discharge for political accountability: Which lessons from the case of Frontex?», *European Law Journal* 30 (2024) 238-252.

[9] Elspeth Guild, (ed.), *Monitoring Border Violence*, 30-45.

[10] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 PE/33/2019/REV/1 *OJ* L 295, 14.11.2019, 1–131 (Border Code).

[11] Article 14 Border Code.

However, where Frontex is carrying out border management actions, it is not applying the Borders Code but rather border management under a different regulation. While there are multiple references to the duties of Frontex and border guards to respect fundamental rights in the border management regulation, there are no explicit rights of notification or appeal for individuals who have been subject to adverse action which prevents them from crossing an EU external border against Frontex. The possibility of a legal remedy in respect of fundamental rights compliance in border operations coordinated by Frontex is even more unclear and undefined. Frontex's regulation relies on its internal Fundamental Rights Officer as the mechanism of redress, which has at its disposal access to national fundamental rights officers with powers in respect of border police but the identities of which are confidential. A 2021 report by the EU agency responsible for investigating suspicions of serious misconduct by EU staff and members of the EU institutions, OLAF, criticised Frontex management for the exclusion of the Fundamental Rights Officer from many investigations into complaints and the concerted effort of the senior management to marginalise the Fundamental Rights office and prevent the incumbent from carrying out activities consistent with her mandate[12]. The consequence was the departure of the then director of Frontex and a promise that the agency would clean up its fundamental rights record[13]. Sadly, these changes have not resulted in a diminution of complaints regarding failure of fundamental rights compliance by the agency[14].

For individuals adversely affected by Frontex actions, access to remedies is complex under EU law (and so far has not resulted in a successful conclusion for the individual)[15] leaving the alternative of seeking a remedy in European and international human rights law. In order to access human rights remedies, there must be an allegation of a breach of a human right. This may be, for instance, excessive use of force constituting torture,

[12] https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/ [accessed 30 July 2024].

[13] https://www.frontex.europa.eu/media-centre/news/news-release/statement-of-frontex-executive-management-following-publication-of-olaf-report-amARYy [accessed 30 July 2024].

[14] https://www.euronews.com/2023/03/28/a-collapse-of-the-rule-of-law-how-does-frontex-get-away-with-plain-murder [accessed 30 July 2024].

[15] See for instance Galina Cornelisse, «EU Boots on the Ground and Effective Judicial Protection against Frontex' Operational Powers in Return: Lessons from Case T600/21», *European Journal of Migration and Law* 26/3 (2024) 256-380; and Mariana Gkliati, «Shaping the Joint Liability Landscape? The Broader Consequences of WS v Frontex for EU Law», *European Papers – A Journal on Law and Integration* 9/1 (2024) 69-86.

inhuman or degrading treatment or punishment[16], or unlawful imprisonment (detention)[17], or unlawful refoulement[18], all of which are prohibited in European and international human rights law. In light of the move to engage third countries to prevent people leaving where their destination is assumed to be the EU, the right to leave a country, a right both in international and European human rights law has come into play.

There has been increasing documentation of Frontex actions and their legality under human rights law with numerous cases before different instances: national, EU, European Court of Human Rights (ECtHR) and UN Treaty Bodies. Not surprisingly, in the face of these tangles for the agency, alternative ways of operating which do not give rise to such litigation risks have been pursued. Following long standing practices by Spain with Morocco[19] and Italy with Libya,[20] and more recently with Albania[21] whereby the border and coast guards of the non-EU state take responsibility for preventing people from leaving their countries where they suspect that these people might not be welcome in the EU (bearing in mind the complexity of EU border control rules), Frontex began to search for accommodating partners in the Mediterranean (and elsewhere) to carry out this role more generally.

2. Exporting EU Border Anxieties

Before examining the human right to leave a country and its interpretation by the ECtHR, I shall briefly examine the 2023-2024 developments as regards this export of border control policies. On 6 November 2023 Italy and

[16] Mariana Gkliati, «Frontex before the Judge: The Road to the Judicial Accountability before the CJEU, the ECtHR and National Courts», in V. Pergantis, ed., *EU responsibility in the international legal order: Human rights – comparative approaches – special issues,* Vol. B, Athens / Thessaloniki: Sakkoulas Publishers, 2023, 121-147.

[17] Sevasti Kougioumtzi, *Humanitarianism and security: the critical case of Frontex and Greece*, Master's thesis, University of Macedonia, 2023, available at: <https://dspace.lib.uom.gr/handle/2159/29122>.

[18] Luisa Marin, «Frontex at the epicentre of a rule of law crisis at the external borders of the EU», *European Law Journal*, 30/1-2 (2024) 11-28.

[19] Alejandro Ruiz Díaz, *The bilateral Spanish-Moroccan relations, the dilemma over Ceuta and Melilla*, 2023, trabajo final de grado, Universidad Europea de Madrid, Madrid, España, available at: <https://hdl.handle.net/20.500.12880/8088>.

[20] Marta Fabris, *The third-country agreement policy as part of the European Union approach to asylum and migration. Case studies on the EU-Turkey Statement, the Italy-Libya Memorandum of Understanding and the Italy-Albania Agreement*, 2023/2024, Master's thesis, Università degli Studi di Padova, Padova, Italia, available at: <https://hdl.handle.net/20.500.12608/67921>.

[21] Matilde Rosina / Iole Fontana, «The external dimension of Italian migration policy in the wider Mediterranean», *Mediterranean Politics* (2024) 1-31, available at: <https://doi.org/10.1080/13629395.2024.2355033>.

Albania entered into an agreement the objective of which is the interception of boats on the high seas (mainly between Italy and Tunisia) and the transfer of their passengers to Albania to detention centres there for determination of their status and expulsion to Albania. Italian boats would take the passengers to Albania. The centres are planned to be under the exclusive jurisdiction of the Italian authorities and numbers capped (3,000 at any one time). No persons with vulnerabilities will be sent to Albania[22].

Leaving aside the issues in human rights law and international refugee law for the moment, it is not clear to what extent this agreement is consistent with EU law. The problem is that asylum is a field which has been an EU competence since 1999 and has been largely exercised. The existing EU asylum law, the Common European Asylum System (CEAS) which has gone through a major revision in 2024, prohibits sending asylum seekers to a country with which they have no link. This has led experts to consider that the agreement is not consistent with EU law[23]. In an attempt to deflect criticism, Italy has undertaken to apply equivalent standards to asylum applications as required by the Qualification Directive (the only part of the CEAS which is not limited to the EU territorial space). The Council of Europe Commission for Human Rights had few qualms about openly criticising the agreement[24].

The European Commission has yet to pronounce on the subject of the applicability of EU law to the Italian programme on the basis that it is studying the situation[25]. There is more than one source of potential EU legal engagement. The first is on grounds of the applicability of the CEAS, the general territorial limitations of the CEAS and the impact of that territorial limitation on the Charter, the scope of which is limited to that of EU law. However, there also exists an EU-Albania Stabilisation and Association Agreement which entered into force in 2009 and which covers asylum cooperation[26]. Article 80 states that the parties shall cooperate in the areas

[22] https://www.amnesty.org/en/wp-content/uploads/2024/01/EUR307587 2024ENGLISH.pdf [accessed 30 July 2024]; https://www.euractiv.com/section/politics/news/albania-italy-migrant-deal-moves-ahead-as-rome-publishes-tender-for-processing-centre/ [accessed 30 July 2024].

[23] http://www.sidiblog.org/2023/11/15/on-the-incompatibility-of-the-italy-albania-protocol-with-eu-asylum-law/ [accessed 30 July 2024].

[24] https://www.coe.int/en/web/commissioner/-/italy-albania-agreement-adds-to-worrying-european-trend-towards-externalising-asylum-procedures [accessed 30 July 2024].

[25] https://www.euronews.com/my-europe/2023/11/07/italy-albania-migration-deal-must-comply-with-eu-and-international-law-says-brussels [accessed 30 July 2024].

[26] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part – Protocols – Declarations *OJ* L 107, 28.04.2009, 166–502.

of visa, border control, asylum and migration and shall set up a framework for cooperation in the field of asylum on the implementation of national legislation to meet the standards of the 1951 Geneva Convention and the 1967 New York Protocol, thereby to ensure that the principle of non-refoulement is respected as well as other rights of asylum seekers and refugees. A Stabilisation and Association Council was charged with other joint efforts that can be made to prevent and control illegal immigration, including trafficking and illegal migration networks. According to the EU doctrine on internal and external aspects of EU law, the ERTA doctrine, "to the extent to which [Union] rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the [Union] institutions, assume obligations which *might affect those rules or alter their scope*" (emphasis added)[27]. It is difficult to see how the Italian authorities can justify that the establishment of their Albania programme does not affect or alter the scope of their CEAS obligations.

What is clear is that the Italian authorities will be responsible for preventing persons whom they have taken from the high seas from leaving Albania while any procedure is being undertaken regarding their status. They will also be responsible for taking them somewhere at the end of the procedure, either with the agreement of the individuals or not. In effect Italy will exercise Albania's power to expel someone from its country without the Albanian authorities ever having examined the individual's case.

While the EU has not pronounced on the Italy-Albania Agreement, it has moved forward as regards establishing new arrangements with Egypt and Mauritania in 2024 which cover migration. There is a substantial history of the EU's border agency, Frontex, entering into arrangements and other forms of accord with third countries' border police[28]. As mentioned above, the EU has also included in numerous trade agreements provisions on migration and asylum of which the Albania agreement is only one. The 2024 arrangements with Egypt and Mauritania, however, take the form of declarations, thus are not in themselves legally binding.

In the declaration with Egypt, the parties agree to the principles of partnership, shared responsibility and burden sharing between themselves. According to the declaration, Egypt and the EU adopt a holistic approach to migration governance. Getting to the practicalities, the EU undertakes

[27] *Commission v Council* ECLI:EU:C:1971:32; https://europeanlawblog.eu/2021/03/31/happy-birthday-erta-50-years-of-the-implied-external-powers-doctrine-in-eu-law/ [accessed 5 August 2024].

[28] Elspeth Guild / Didier Bigo, «The transformation of European border controls», in B. Ryan / V. Mitsilegas, eds., *Extraterritorial immigration control: legal challenges*, Leiden / Boston: Martinus Nijhoff Publishers, 2010, 252-273.

that it will provide the necessary financial support to assist Egypt on migration-related programs that entail developing a holistic approach to migration including legal migration pathways in line with national competences, and mobility schemes such as the Talent Partnerships, tackling the root causes of irregular migration, combating smuggling of migrants and trafficking in persons, strengthening border management, and ensuring dignified and sustainable return and reintegration. Both parties will continue to cooperate in order to support Egypt's efforts in hosting refugees and both sides are committed to the protection of the rights of migrants and refugees. The commitments here are fairly openly worded other than the commitment of funding by the EU.

The EU's 2024 declaration with Mauritania is similar to that it agreed with Egypt. It includes a commitment to step up efforts to prevent irregular migration, including by way of information and awareness-raising campaigns and border management measures, as a key element in the fight against migrant smuggling, and the protection of the most vulnerable. The parties agree to build the capabilities and capacities of the authorities responsible for border management, surveillance and control, including through enhanced cooperation between Mauritania and Frontex in accordance with the needs identified by Mauritania in this area, in particular in terms of equipment and training, and with due regard for its sovereignty.

3. Exporting Border Anxieties: EU Data sharing with Libya

Another form of engaging the sovereignty of third countries in coercive border control operation is through data sharing. This is particularly developed between Frontex and the Libyan Border Guard: where Frontex receives information about small boats in distress in the Mediterranean, it appears that it privileges the Libyan Border Guard in passing on that information to the detriment of rescue ships which may be in the region. The purpose is to engage the sovereignty of Libya so that any rescue undertaken is by their authorities. Disembarkation will be in Libya not in the EU thereby, in theory not engaging EU fundamental rights obligations. In respect of these practices, an NGO has begun legal proceedings against Frontex regarding the transmission of information. It commenced by serving legal notice pursuant to Article 265 TFEU requesting Frontex's director to partially terminate the Agency's aerial surveillance activities in the 'pre-frontier area' in the Central Mediterranean. The notice claims that to prevent asylum seekers fleeing crimes against humanity in Libya from reaching the EU, Frontex systematically and unlawfully transmits the geolocalisation of

refugee boats at high seas to the Libyan Coast Guard/Libyan Militia. It further claims that every day, Frontex allows for the systematic interception and pulling back of refugees to Libya, from where they have managed to escape by the skin of their teeth, and where they are subjected once more to crimes against humanity.

The action against Frontex cooperation with the Libyan Border Guard must be read in light of the volatile security situation in general and the particular protection risks for third-country nationals (including detention in substandard conditions, and reports of serious abuses against asylum-seekers, refugees and migrants). Since 2018, the United Nations Human Rights Committee (UNHCR) have formally stated that in its opinion Libya does not meet the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea. This remains the position of UNHCR.

There can be no doubt that the politics of exporting border controls on persons to third countries with the objective of encouraging them to determine who should not be permitted to leave their countries with an anticipated destination of an EU state is very expensive. It must also be acknowledged that this policy leaves the EU wide open regarding the 'instrumentalisation' of migrants by third countries for the purposes of pushing the EU towards policies which are in the interests of the third country. This was apparent in the April 2021 engagement between the EU and Turkey on border controls[29]. Using migrants to cause trouble in some EU states was also apparent in the 2021 Belarus-EU context of irregular border crossings in Lithuania, Poland and Latvia[30]. Further, it does nothing for the EU's reputation as a human rights compliant region. The ECtHR has found violations of the human rights of migrants in many cases which are related to this policy of exporting border controls[31]. Yet, the EU so far remains wedded to this policy, reiterated most recently in the 2024 revision of the CEAS where one of the new instruments includes a whole section on the "external components of the comprehensive approach" (to asylum) which is effective to push for more agreements and arrangements with third

[29] https://neighbourhood-enlargement.ec.europa.eu/news/statement-president-von-der-leyen-following-meeting-turkish-president-erdogan-2021-04-07_en [accessed 9 August 2024].

[30] https://www.bbc.co.uk/news/59233244 [accessed 9 August 2024].

[31] M.A. and Others v. Lithuania (app no. 59793/17), ECLI:CE:ECHR:2018:1211JUD005979317, Council of Europe: European Court of Human Rights, 11 December 2018, https://www.refworld.org/jurisprudence/caselaw/echr/2018/en/122430 [accessed 9 August 2024]. Regarding the Aegean see https://www.ecchr.eu/en/case/greece-before-the-european-court-of-human-rights/ [accessed 9 August 2024].

countries to prevent people from leaving[32]. However, this policy leads directly to a conflict with international and European human rights law in the form of the right to leave a country. In the next section I examine this right.

4. Leaving a Country as a Human Right

Leaving a country was first inscribed as a post WWII human right in Article 13 of the Universal Declaration of Human Rights 1948 (UDHR). While in the 21st century the UDHR is arguably becoming a legally relevant international standard in itself, in 1948 it was still seen as primarily an aspirational instrument[33]. Thus, in the 1966 International Covenant on Civil and Political Rights (ICCPR), a right to leave a country was included at Article 12(2) to give it legal effect through an instrument which had to be signed and ratified by states to be binding[34]. All EU States have ratified the ICCPR. According to Article 12(2) ICCPR, the right to leave a country belongs to the individual who is trying to leave[35]. The restrictions and the legality of such restrictions can be exercised only by the state from which the individual is leaving. This in essence means that the state of departure is required to justify obstacles on the basis that it has concerns of national security, public order (*ordre public*), public health or morals or the rights and freedoms of others regarding the individual's departure. The UNHRC, which is responsible for clarification of the ICCPR obligations, issued a

[32] Article 5 of Regulation 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, 32024R1351, 14 May 2024, https://www.refworld.org/legal/reglegislation/council/2024/en/148011 [accessed 9 August 2024].

[33] This approach found favour in particular among US scholars: Philip Harvey, «Aspirational law», *Buff. L. Rev.* 52 (2004) 701-726; James W. Nickel, *Making sense of human rights: Philosophical reflections on the universal declaration of human rights*, [S.l.]: Univ of California Press, 1987; Tai-Heng Cheng, «The Universal Declaration of Human Rights at sixty: Is it still right for the United States», *Cornell Int'l LJ* 41 (2008), 251-305.

[34] "(2) Everyone shall be free to leave any country, including his own. (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". Matthew Lippman, «Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights», *Cal. W. Int'l LJ* 10 (1980) 450-513; Egon Schwelb, «Entry into force of the international covenants on human rights and the optional protocol to the international covenant on civil and political rights», *American Journal of International Law* 70/3 (1976) 511-519.

[35] Jane McAdam, «An intellectual history of freedom of movement in international law: the right to leave as a personal liberty», *Melb. J. Int'l L.* 12 (2011) 27-56.

General Comment on Article 12 in 1999 which has not been revised and thus remains authoritative[36]. While General Comments are not binding as such on states, they are authoritative as regards the correct meaning of treaty provisions and are regularly taken into account when Treaty Bodies are considering complaints against states and in the UN's Universal Periodic Review of state compliance with human rights obligations. The General Comment on Article 12 states: "8. Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus travelling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee. As the scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State". As regards restrictions on the right to leave, the General Comment states that to be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the ICCPR itself. Several cases have come before the UNHRC on Article 12 but so far, they have not dealt with restrictions on departure related to the wishes of the anticipated destination state[37].

In the European regional framework, the right to leave a country was included in Protocol 4 Article 2 of the European Convention on Human Rights (ECHR) which states that everyone shall be free to leave any country, including his own. All (current) EU Member States have ratified Protocol 4. The Council of Europe has produced a detailed, though rather conservative guide including a descriptive review of the case law of the ECtHR regarding Article 2 including the right to leave a country[38]. As regards departure, the right to leave any country including one's own, does not preclude its exercise from being made conditional by state authorities of the country of departure on compliance with formal requirements such as obtaining a valid travel document (a passport) and/or a visa (or parent consent in

[36] http://hrlibrary.umn.edu/gencomm/hrcom27.htm [accessed 11 August 2024].

[37] Elspeth Guild / Vladislava Stoyanova, «The human right to leave any country: a right to be delivered», *European Yearbook on Human Rights* (2018) 373-394; Nora Markard, «The right to leave by sea: legal limits on EU migration control by third countries», *European Journal of International Law* 27/3 (2016) 591-616.

[38] https://ks.echr.coe.int/documents/d/echr-ks/guide_art_2_protocol_4_eng [accessed 11 August 2024].

respect of a minor)[39]. However, measures aimed at preventing illegal immigration are outside the scope of Article 2 according to the ECtHR. An interference with the right to leave any country takes place where an applicant is prevented from travelling to any country of his or her choice to which he or she may be admitted (which is a matter of the law of the destination state not the state of departure)[40]. Over the past 15 years, there has developed some case law of the ECtHR on Article 4(2) and the legality of obstacles to departure for a state which culminates in the October 2023 judgment. The decision in *Memedova and Others v. North Macedonia*, nos. 42429/16 and 2 others 24 October 2023 crystalises the relationship of the right to leave with the anxieties of countries which consider themselves to be destinations and the role of this human right in international relations[41].

The facts in the *Memedova* case are a good example of the EU's politics regarding pressure on neighbouring countries to prevent people (including their nationals) from leaving the country where there is concern that they might be planning to stay irregularly (or seek asylum, a right in international law) in an EU state. The main reason that Northern Macedonia put into place measures to prevent people leaving the country was in response to EU pressure to prevent what EU authorities considered to be unwanted arrivals in the EU. In this regard, it is important to bear in mind that nationals of Macedonia (who have biometric passports) do not require visas to travel to the EU. Thus there is no question of preventing the departure of Macedonians from their country towards the EU on the basis of the lack of an EU issued visa. As has been set out above, the grounds for individual's admission to the EU are a complicated and messy mix of EU and national law which makes it particularly difficult to determine when a third country national will be admitted or not. Yet, the EU statistics on refusal of admission, as published by Frontex, indicate that there is a very low risk that a person will be refused admission (under 0.005% for the last year of available statistics 2022)[42]. On 29 November 2014 the first applicant was prevented from leaving the country via Skopje Airport. After her passport had been checked, it was returned to her with a stamp that had

[39] S.E. v. Serbia, 2023, § 47; Ioviță v. Romania (dec.), 2017, § 74; Mogoș and Others v. Romania (dec.) 2004, or parental consent/court judgment authorising a minor's travel (Lolova and Popova v. Bulgaria (dec.), 2015, § 47; Șandru v. Romania (dec.), 2014, § 23.

[40] Baumann v. France, 2001, § 61; Khlyustov v. Russia, 2013, § 64; De Tommaso v. Italy [GC], 2017, § 104; Mursaliyev and Others v. Azerbaijan, 2018, § 29; L.B. v. Lithuania, 2022, § 79.

[41] ECLI:CE:ECHR:2021:0624JUD003101617.

[42] https://www.frontex.europa.eu/assets/Publications/General/ARA_2023.pdf [accessed 12 August 2024].

been crossed with two parallel lines, which meant that the entry or exit stamp had been cancelled. The reason given was that she posed a threat to public policy and to the State's relations with the Member States of the EU, and because she had not provided evidence of sufficient financial means for her planned length of stay, nor had she presented a return ticket or a formal letter of invitation or sponsorship. On 19 June 2014 the second applicant was prevented from leaving Northern Macedonia via Skopje Airport, on the grounds that she had not presented a credible letter of sponsorship and did not have sufficient funds (both of which are concerns of the destination state not the departure state). This applicant appealed against the refusal. The tribunal which reviewed the decisions found that she had not met the requirements set out in the Schengen Borders Code for entering an EU Member State. The case included five other applicants all of whom had been refused their right to leave the country on similar facts.

Having set out what it considered to be the relevant facts, the ECtHR commenced its consideration of the alleged violation with the agreed legal situation that the refusal of permission for the applicants to leave their own country amounted to an interference with their right to liberty of movement. It observed that the first two applicants held valid passports but were not allowed to leave the state because they allegedly lacked financial means, a letter of sponsorship and/or a return ticket. Here the ECtHR noted that in these two cases the domestic courts applied the (EU) Schengen Borders Code, which specified the entry requirements for third-country nationals travelling to EU Member States. In the case of the first applicant, the national courts merely referred to the Code without providing any explanation as to how it was regarded part of the domestic law. In the second applicant's case, they held that the applicability of the Borders Code derived from the EU-Macedonia Stabilisation and Association Agreement. The ECtHR did not consider that such construction was sufficiently clear nor was it clarified by the superior courts at the national level. The ECtHR also noted that this seemed to be in contradiction to the approach followed by the same courts in other cases, where it was clearly established that the Code was not part of the domestic law and, accordingly, was not legally binding on Northern Macedonia.

At this point in the reasoning the ECtHR makes something of an aside regarding the quality of law. It reviewed its settled case-law, according to which the expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects. As regards the requirement of foreseeability, the ECtHR noted that it had repeatedly held

that a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct, "they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable". The ECtHR found that while certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice, in other words, the requirement for foreseeability must also accommodate the possibility of the use of discretion by state authorities. This of course lets in through the side door the problem of scope of discretion and to what extent and under what conditions it may become arbitrary, which is the enemy of law according to the ECtHR.

Returning to the matter at hand, the ECtHR considered that the interference with the first and second applicants' right was not in accordance with domestic law (which had not incorporated the Schengen Borders Code in any event). The ECtHR then turn to the issue of the necessity of the interference. Specifically, it considered whether the interference was necessary in a democratic society. It highlighted that in the domestic proceedings there was nothing to indicate that either of the applicants appeared in any alerts or had participated in any activities suggesting that they posed a threat to national security or public safety or the maintenance of public order, or, indeed, met any other criteria Article 2(3) of Protocol 4. Indeed, the ECtHR noted that the first applicant had previously lawfully stayed abroad, a consideration which might be considered somewhat problematic if the right to leave is independent of the question of the destination. This question is widened by the ECtHR when it stated that "it might be prepared to accept that a prohibition on leaving one's own country imposed in relation to breaches of the immigration laws may in certain compelling situations be regarded as justified…" On the facts, however the ECtHR held that this was not the case here, not least as there was no justified necessity regarding the interference and thus it was not consistent with the democratic society test. Accordingly, the ECtHR found that Northern Macedonia had violated Article 2(2) Protocol 4 in these cases.

It is important to note that this finding is independent of the further findings of the ECtHR in the case regarding prohibited discrimination under Article 14 ECHR in conjunction with Article 2(2) Protocol 4. The discrimination issue is a separate head of allegation and finding of breaches is not central to the violation of Article 2(2) Protocol 4. Rather the violation of

Article 2(2) Protocol 4 is central to the breach also of Article 14. This clarification is important to dispel any confusion that the case is about prohibited discrimination rather than an interference with the right to leave independently of whether there is also prohibited discrimination at issue.

In terms of the applicability of this decision on the right to leave to the EU's promotion of the application of its border control anxieties by the authorities of states of departure there are a number of lessons. The first is that without clear and public legislation implementing a regional border control regime (the Schengen Borders Code) into national law the ECtHR will not consider that it is relevant to the assessment of an alleged violation of Article 2(2) Protocol 4. Secondly, all law claimed by a state to be applicable to a specific case must meet the requirement of foreseeability as regards its use. While the ECtHR did not apply this reasoning specifically to the Schengen Borders Code, it clearly indicated that this was relevant. The ECtHR noted that there must also be some scope for national discretion but did not develop on the extent. Thirdly, in the absence of any facts which are consistent with the grounds set out in Article 2(3) Protocol 4 as a justification for an interference with the right to leave a country, such an interference will constitute a breach of the ECHR. Fourthly, while irregular border crossing anxiety by neighbouring states might possibly be a relevant factor depending on the facts and the standard of a "compelling situation", any interference with the right to leave must be based on the grounds set out in Article 2(3) Protocol and will be tested against the necessity in a democratic society threshold of the ECtHR.

This judgment is of immediate relevance to all the West Balkan states which are not yet in the EU and Türkiye. They are all also members of the Council of Europe and the interpretation of the ECHR by the ECtHR is relevant to them. Nowhere is this more important than as regards Albania, which intends to permit the Italian authorities to prevent the departure of persons the Italians have collected on the high seas and incarcerated on Albanian territory. As regards the application of the ECtHR's interpretation of the right to leave, this is not binding on countries which are not parties to the ECHR such as Egypt, Mauritania or any other countries on the southern shores of the Mediterranean. However, the question which is likely to arise before long will be whether the UNHRC considers that the correct interpretation of Article 12(2) ICCPR is the same or similar to that of the ECtHR regarding Article 2(2) Protocol 4.

5. Conclusions

The political salience of border controls at the external borders of the EU to EU external relations with its neighbours has grown out of all proportion to the numbers of persons involved (as evidence by Frontex's own statistics). This has had the effect of making the EU particularly vulnerable to the border control activities of its neighbours and created the conditions for the use of border controls by neighbouring states to push the EU towards policies in other areas. As EU governments have allowed the question of arrivals of small boats carrying people who will probably be seeking international protection at the place where they arrive to become a matter of deep political disquiet, Member States and EU border agencies have been encouraged to become more active in preventing arrivals. This has resulted in numerous claims of human rights violations where people in small boats are not able to arrive at their destination.

In order to deflect the criticism of actions of EU border police, EU authorities have sought to engage the border control authorities of neighbouring countries to step in to prevent people who might be undesirable if they got to the EU from leaving their home state. However, the identification of such persons is far from straight forward as even the law in the EU itself is desperately unclear about who is desirable and who is not when they get to an EU external border. Hence, the whole policy is based on uncertainty, ambiguity and arbitrary action. When other countries try to anticipate who should be prevented from leaving their country to go to the EU extraneous and unclear decision making is in evidence. The lack of justification leads directly to these countries breaching their duty to allow everyone to leave their country.