

Nigerien Law 2015-36: How a New Narrative in the Fight Against Smugglers Affects the Right to Leave a Country

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Abstract

In 2015, the Republic of the Niger adopted an anti-migrant smuggling law (Law 2015-36) with direct involvement of the European Union (EU). Since then, concerns have been raised that this law constitutes a *de facto* travel ban for anyone moving northwards from Niger.

Rather than addressing the involvement of the EU, this article will focus on the direct obligations of Niger, including those set by regional human rights agreements, as the country where the so-called cooperative migration control takes place. People on the move towards Libya will be a special focus as the most affected by the Nigerien law. First, the Nigerien law and its provisions will be described, in order to then assess whether the law and its application infringe the human right to leave any country including one's own. Drawing from the findings of non-governmental organizations and the United Nations Special Rapporteur on the Human Rights of Migrants, this article argues that Law 2015-36 renders it impossible for non-Nigerien nationals to leave the country without risking their life and safety. Thus, Law 2015-36 infringes the right to leave. The third part explores possible justifications for the law with a focus on the interests of people on the move, the interests of bordering States, and national interests. It finds that Law 2015-36 is disproportionate and, in fact, impairs the essence of the right to leave, resulting in an unjustified interference. The concluding fourth part contains recommendations for possible amendments to the law.

A. Introduction: Setting the Scene

“Saving the lives of innocent people is the number one priority. But saving lives is not just about rescuing people at sea. It is also about stopping the smugglers and addressing irregular migration.”¹ This was said in 2015 by Donald Tusk, then President of the European Council, in the context of an affirmation of European efforts in preventing illegal migration flows through increasing its support to the Republic of “Niger [(Niger)] among others, to monitor and control the land borders and routes [as well as to] reinforce [its] political cooperation [...] in order to tackle the cause of illegal migration and combat the smuggling [...] of human beings”.²

This narrative of a fight against smugglers was the backdrop against the adoption of Niger’s anti-migrant smuggling law in 2015³, with the involvement of the European Union Capacity Building Mission in Niger during the drafting process and financial support from the European Union Emergency Trust Fund for Africa.⁴ Since then, concerns have been raised both in Niger and internationally, inter alia by the Special Rapporteur on the Human Rights of Migrants, that this law constitutes a *de facto* travel ban for any foreign nationals moving northwards from Niger.⁵

- 1 European Council, ‘Special Meeting of the European Council, 23 April 2015’ (2015), available at <https://www.consilium.europa.eu/en/meetings/european-council/2015/04/23/> (last visited 11 February 2024).
- 2 European Council, ‘Special Meeting of the European Council, 23 April 2015 – Statement’ (2015), available at <https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/> (last visited 11 February 2024).
- 3 Republic of the Niger, *Loi No. 2015-36 du 26 Mai 2015 Relative au Trafic Illicite de Migrants*, Law 2015-36, available at <https://www.refworld.org/docid/60a505e24.html> (last visited 11 February 2024).
- 4 J. Brachet, ‘Manufacturing Smugglers: From Irregular to Clandestine Mobility in the Sahara’, 676 *The ANNALS of the American Academy of Political and Social Science* (2018) 1, 16, 25; A. Dauchy, ‘La loi Contre le Trafic Illicite de Migrant-es au Niger: État des Lieux d’un Assemblage Judiciaire et Sécuritaire à l’Épreuve de la Mobilité Transnationale’, 51 *Anthropologie & Développement* (2020), 121, para. 1, 29; for a detailed account of the involvement of the EU, see T. Spijkerboer, ‘The New Borders of Empire: European Migration Policy and Domestic Passenger Transport in Niger’, in P. E. Minderhoud, S. Mantu & K. Zwaan (eds), *Caught in Between Borders: Citizens, Migrants and Humans* (2019), 49, 51-55 [Spijkerboer, ‘The New Borders of Empire’].
- 5 Global Detention Project, ‘Niger, Submission to the Universal Periodic Review, 38th Session of the UPR Working Group: Issues Related to Immigration Detention’ (2021), para. 1.8, available at <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=8644&file=EnglishTranslation> (last visited 11 February 2024); Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger, Report of the Special*

Rather than addressing the involvement of the European Union (EU), this article will focus on the direct obligations of Niger, including those set by regional human rights agreements, as the country where the so-called cooperative migration control takes place.⁶ People on the move towards Libya will be a special focus as the most affected by the Nigerien law.⁷ It will examine whether the law violates the fundamental human right to leave any country, including one's own. First, a closer look will be taken at the Nigerien law and its provisions (B.), in order to then assess whether it creates an unjustifiable infringement of the aforementioned right (C.). This article will conclude by recommending possible amendments to the law (D.).

B. The Nigerien Law 2015-36

According to its Article 1, the purpose of Law 2015-36 is to prevent and combat migrant smuggling, to protect the rights of smuggled migrants, and to promote national and international cooperation to that effect, as defined in its origin, the *Protocol against the Smuggling of Migrants by Land, Sea, and Air*.⁸ The penalty for smuggling under this law is five to thirty years of incarceration, a fine of up to 30 million CFA francs (\$49,350; Articles 10, 17, 18 of Law 2015-36) and the confiscation of the vehicle used to transport the migrants (Article 19 of Law 2015-36).

This paper will mainly focus on Article 10 of Law 2015-36, in which the offense of migrant smuggling is characterized more broadly than in the

Rapporteur on the Human Rights of Migrants, UN Doc A/HRC/41/38/Add.1, 16 May 2019, para. 32 [Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*]; M. Wali, "‘Es ist, als hätte man uns die Luft abgeschnürt.’: Perspektiven der Jugend in Agadez auf die Auswirkungen der Europäischen Migrationspolitik in Niger" (2018), *Brot für die Welt*, 10-11, available at https://www.brot-fuer-die-welt.de/fileadmin/mediapool/blogs/Fischer_Martina/2018_niger_studie.pdf (last visited 11 February 2024); Human Rights Committee, *Concluding Observations on the Second Periodic Report of the Niger*, UN Doc CCPR/C/NER/CO/2, 16 May 2019, para. 38.

6 For more information on this *topographical approach*, see N. F. Tan & T. Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control', 21 *German Law Journal* (2020) 3, 335.

7 S. Gabriël & B. Rijks, 'Migration Trends From, to and Within the Niger: 2016-2019' (2020), International Organization for Migration, 11, available at <https://publications.iom.int/system/files/pdf/iom-niger-four-year-report.pdf> (last visited 11 February 2024).

8 *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507 [Smuggling Protocol].

definition given in the Smuggling Protocol. The latter defines smuggling in its Article 3(a) 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” (emphasis added). Whereas the Nigerien law incorporates this definition under Article 3 as a general provision, its Article 10 further criminalizes the action of procuring the *illegal exit* from Niger and is limited to migrants who are neither Nigerien nationals nor permanent residents of that State territory. This criminalization of the *procurement of illegal exit* has similarly been adopted in Algerian, Mauritanian, and Egyptian law.⁹ Interestingly, there is no definition of the term within Law 2015-36, even though it is a crucial element of the definition of smuggling given under Article 10. Article 3 of Law 2015-36 only defines the term *illegal entry*, in line with Article 3(b) of the Smuggling Protocol, as the crossing of borders without complying with the necessary requirements for legal entry into the receiving State. With regard to the definition of *illegal exit*, it can be assumed that, in the case of a landlocked country like Niger, any illegal entry into a bordering country constitutes an illegal exit from Niger.¹⁰

C. The Right to Leave

This section will analyze how the criminalization of smuggling under Law 2015-36 affects the right to leave the country, with a special emphasis on the prohibition of illegal exit contained in Article 10. In this regard, the right to leave and its significance in codified law and customary international law will be introduced (I.). In order to prove the thesis that the Nigerien law violates international human rights guaranteed under the *International Covenant on Civil and Political Rights* (ICCPR),¹¹ as well as the *Universal Declaration of Human Rights* (UDHR),¹² the *African Charter on Human and Peoples' Rights* (ACHPR),¹³

9 D. Perrin, ‘Smuggling of Migrants: The Misused Spirit of the Palermo Protocol, in the Light of the Nigerien Experience’ (2020), available at <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/05/smuggling> (last visited 11 February 2024).

10 *Ibid.*

11 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 1057 [ICCPR]. Niger acceded on 7 March 1986.

12 *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc A/810, 10 December 1948 [UDHR].

13 *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 [ACHPR]. Niger ratified on 15 July 1986.

and customary international law, the scope of the right to leave and the resulting obligations for Niger will be determined (II.). Following this, the existence of an infringement of Niger's duties regarding the right to leave will be assessed (III.). Finally, the permitted restrictions on the right to leave will be examined, so as to demonstrate that Law 2015-36 does not fall under such restrictions (VI.).

I. General Background

The right to leave any country, as an integral part of the fundamental freedom of movement,¹⁴ is an indispensable prerequisite for the free development of an individual¹⁵ as well as the enjoyment of a variety of other human rights.¹⁶ These include, in particular, the right to international protection from torture, inhuman or degrading treatment, or punishment,¹⁷ which is why it is also referred to as the right to flee from persecution and other severe human rights violations.¹⁸

On the basis of Article 13(1) of the UDHR, the right to leave became universally binding through Article 12(2) of the ICCPR.¹⁹ On the regional level, it is further protected by Article 12(2) of the ACHPR. A comparison of these

14 N. Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', 27 *European Journal of International Law* (2016) 3, 591, 594.

15 Human Rights Committee, *CCPR General Comment No. 27: Freedom of Movement (Article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 1 [HRC, *CCPR General Comment No. 27*]; G. S. Goodwin-Gill, 'The Right to Leave, the Right to Return and the Question of a Right to Remain', in V. Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (1994), 62, 65.

16 Council of Europe Commissioner for Human Rights, 'The Right to Leave a Country' (2013), 5, available at https://www.coe.int/t/commissioner/source/prems/prems150813_GBR_1700_TheRightToLeaveACountry_web.pdf (last visited 11 February 2024) ['The Right to Leave a Country']; R. Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (2019), 325.

17 'The Right to Leave a Country', *supra* note 16, 5.

18 V. Chetail, 'The Transnational Movement of Persons Under General International Law – Mapping the Customary Law Foundations of International Migration Law', in V. Chetail & C. Bauloz (eds), *Research Handbook on International Law and Migration* (2014), 1, 10; F. Ouguergouz, *La Charte Africaine des Droits de l'Homme et des Peuples* (1993), para. 55; Markard, *supra* note 14, 594; V. Stoyanova, 'The Right to Leave Any Country and the Interplay Between Jurisdiction and Proportionality in Human Rights Law', 32 *International Journal of Refugee Law* (2020) 3, 403, 437.

19 E. Klein, 'Movement, Freedom of, International Protection', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), para. 3; W. A. Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary*, 3rd ed. (2019), 309; Markard, *supra* note 14, 594.

provisions indicates that they are similar in substance, differing only slightly in wording and scope, which shows a consistent interpretation and application by States and a common understanding of the importance of the right.²⁰

This common understanding of the right to leave also supports the presumption of it being a norm of customary international law.²¹ Even though some scholars question the existence of a sufficient consensus,²² the number of international, regional, and domestic implementations of the right to leave speaks in favor of its status as a customary norm, which has been acknowledged by a wide range of scholars.²³ Ultimately, the question of whether the normative scope of the customary right to leave exceeds the aforementioned human rights instruments can remain unanswered if Law 2015-36 already falls within the scope of the latter.

II. The Scope of the Right to Leave

Article 12(2) of the ICCPR and Article 12(2) of the ACHPR, treaties to which Niger is a State party, guarantee the right of all persons to leave any country, including their own, with the same scope.²⁴

This right is not limited to citizens of the State of departure²⁵ nor to individuals residing lawfully within the territory of that State.²⁶ Likewise, it is

20 ‘The Right to Leave a Country’, *supra* note 16, 15; Klein, *supra* note 19, para. 3; Schabas, *supra* note 19, 301.

21 Chetail, *supra* note 18, 20-21.

22 H. Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’, 25 *Georgia Journal of International and Comparative Law* (1996) 1, 287, 346; Goodwin-Gill, *supra* note 15, 66; Klein, *supra* note 19, para. 2.

23 Special Rapporteur on Analysis of Current Trends and Developments in Respect of the Right of Everyone to Leave Any Country Including His Own and to Return to his Country, *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 Consideration Arising Therefrom*, UN Doc E/CN.4/Sub.2/1988/35, 20 June 1988, 7, para. 33; K. Hailbronner, ‘Comments on: The Right to Leave, the Right to Return and the Question of a Right to Remain’, in Gowlland-Debbas, *supra* note 15, 73, 73; for a detailed account and further discussion, see notably Chetail, *supra* note 18, 20-27.

24 Ouguergouz, *supra* note 18, para. 55; Schabas, *supra* note 19, 309.

25 Schabas, *supra* note 19, 300; Hailbronner, *supra* note 23, 73; Human Rights Committee, *CCPR General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13, 26 May 2004, 4, para. 10 [HRC, *CCPR General Comment No. 31*].

26 Unlike Art. 12(1) ICCPR; cf. HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 8; Schabas, *supra* note 19, 310.

the right of the individual to freely decide upon the destination State towards which he or she is leaving the country.²⁷ Nevertheless, it rests upon the State of destination to determine the conditions of admission of those seeking to enter the country²⁸ since no right of entry and residence exists for non-nationals.²⁹ The right to leave is granted under Article 12(2) of the ICCPR regardless of the specific purpose or duration of the individual's stay outside the country.³⁰ Therefore, in cases which are not subject to the possible restrictions permitted by international law, Niger must respect the freedom of non-nationals being unlawfully within its territory to leave towards Libya for the purpose of fleeing persecution, as well as to work periodically in Libya or to cross Libya and try to travel further e.g., to Europe in order to emigrate or work there for some time.³¹

Both positive and negative obligations for the State of residence and the State of nationality can be derived from the freedom to leave and emigrate.³² The State of nationality must facilitate the exercise of the right to leave,³³ i.e., by issuing or renewing travel documents.³⁴ The State of residence's primary obligation consists in avoiding interference with the freedom to leave the country, i.e., not preventing the departure.³⁵

III. Interference With the Right to Leave

The offense defined by Article 10 of Law 2015-36 focuses exclusively on the actions of smugglers, whereas the smuggled person remains unpunished.

27 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 8.

28 *Ibid.*, para. 8; Markard, *supra* note 14, 595; Schabas, *supra* note 19, 300; Klein, *supra* note 19, para. 1; Goodwin-Gill, *supra* note 15, 66.

29 Klein, *supra* note 19, para. 1; Ouguergouz, *supra* note 18, para. 59.

30 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 8; Schabas, *supra* note 19, 309.

31 Brachet, *supra* note 4, 19; Klein, *supra* note 19, para. 5.

32 Human Rights Committee, *Samuel Lichtensztejn v. Uruguay*, Communication No. 77/1980, UN Doc CCPR/C/18/D/77/1980, 31 March 1983, para. 6.1. [HRC, *Lichtensztejn v. Uruguay*]; HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 9.

33 Schabas, *supra* note 19, 310.

34 Human Rights Committee, *Vidal Martins v. Uruguay*, Communication No. 57/1979, UN Doc CCPR/C/15/D/57/1979, 23 March 1982, paras 7, 9, 10; HRC, *Lichtensztejn v. Uruguay*, *supra* note 32, paras 8.2-8.3.

35 Schabas, *supra* note 19, 312; Klein, *supra* note 19, para. 5; F. Mégret, 'Nature of Obligations', in D. Moeckli, S. Shah & S. Sivakumaran (eds), *International Human Rights Law*, 2nd ed. (2014), 96, 102; African Commission on Human and Peoples' Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/ 02, 15 May 2006, para. 152 [AfCHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*].

Therefore, the law does not pose in itself any direct legal restrictions on the illegalized departure.³⁶ However, it must be asked whether Niger, by enforcing Law 2015-36, prevents the departure of non-nationals towards Libya in a manner which infringes its obligation to respect the right to leave (1.). The second part of this analysis will examine whether Niger failed to take the necessary steps to prevent its State organs from infringing upon this right, thereby neither protecting nor promoting it adequately (2.).

The conduct under assessment is attributable to Niger, since the legislature as well as the law enforcement agencies and the judiciary are State organs pursuant to Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (ASR)³⁷, working within their official capacity.³⁸

1. Obligation Not to Prevent Departure

The following section will analyze if Niger, by enforcing Law 2015-36, infringes upon its primary obligation under the right to leave, i.e., not to prevent people's departure. As this includes allowing non-Nigerien nationals that are legally expelled from Niger to freely choose their country of destination, subject to the agreement of that State,³⁹ Niger does not fulfil its obligation by sending intercepted migrants back to their countries of origin.⁴⁰ An interference of the

36 Perrin, *supra* note 9.

37 Appended to GA Res. 56/83, UN Doc A/RES/56/83, 12 December 2001.

38 J. Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (2019), 527-533; O. Dörr, 'Völkerrechtliche Verantwortlichkeit', in K. Ipsen (ed.), *Völkerrecht: Ein Studienbuch*, 7th ed. (2018), 644-645.

39 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 8; Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, UN Doc HRI/GEN/1/Rev.9 (Vol. I), 11 April 1986, para. 9.

40 C. Jakob, 'Endstation Agadez: Wie Niger die Fluchtrouten Dichtmacht', die Tageszeitung (18 December 2017), available at <https://taz.de/Wie-Niger-die-Fluchtrouten-dichtmacht/!5468121/> (last visited 11 February 2024). This applies all the more to individuals facing persecution, torture or inhuman or degrading treatment or punishment in their country of origin, as their deportation is not permitted under the different prohibitions on refoulement. See *Convention Relating to the Status of Refugees*, 28 July 1951, Art. 33, 189 UNTS 137 [*Refugee Convention*] (Niger acceded on 25 August 1961); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 June 1987, Art. 3, 1465 UNTS (Niger acceded on 5 October 1998); T. Gammeltoft-Hansen & J. C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', 53 *Columbia Journal of Transnational Law* (2015) 2, 235, 237-239; Hailbronner, *supra* note 23, 76; see generally J. C. Hathaway, *The Rights of Refugees Under International Law*, 2nd ed. (2021), 313-464.

right to leave does not require a total inability to leave the country – excluding only certain countries suffices.⁴¹ It is therefore critical to question to what extent the criminalization of smuggling affects the overall possibility of non-nationals to leave Niger towards Libya.

a. Criminalizing Irregular Mobility

In order to analyze the impact of Law 2015-36 on the mobility options of people, it is essential to look at the mobility in Niger before its implementation. The country has a long-standing history as a key transit country for people seeking temporary work in Maghreb States and in Europe.⁴² As Niger is a member of the Economic Community of West African States (ECOWAS), nationals of other member States are in principle allowed to travel inside the country without a visa, as long as they are carrying national identification documents.⁴³ However, mobility and migration in Niger have predominantly taken place through irregular means. This is mostly due to the obstacles that hinder legal travel. In Sub-Saharan Africa, only 46% of births are registered⁴⁴ and even those who are registered may not necessarily be able to afford travel documents.⁴⁵ In addition, there is widespread distrust in institutions and

41 Markard, *supra* note 14, 596.

42 Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 4; L. Yuen, 'Overview of Migration Trends and Patterns in the Republic of the Niger, 2016-2019', in P. Fargues & M. Rango (eds), *Migration in West and North Africa and Across the Mediterranean: Trends, Risks, Development and Governance* (2020), 77; J. Black, "'No One Talks About What it's Really Like" – Risks Faced by Migrants in the Sahara Desert', in P. Fargues & M. Rango (eds), *Migration in West and North Africa and Across the Mediterranean: Trends, Risks, Development and Governance* (2020), 149, 150.

43 See *The Revised ECOWAS Treaty*, 24 July 1993, Art. 59, 35 ILM 660 and *Protocol Relating to Free Movement of Persons, Residence and Establishment*, 29 May 1979, Art. 3, A/P.1/5/79; D. Breen, "'On This Journey, no one Cares if you Live or Die": Abuse, Protection, and Justice Along Routes Between East and West Africa and Africa's Mediterranean Coast' (2020), 13, available at https://mixedmigration.org/wp-content/uploads/2020/07/127_UNHCR_MMC_report-on-this-journey-no-one-cares-if-you-live-or-die.pdf (last visited 11 February 2024); Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 9.

44 UNICEF, 'Percentage of Children Under Five Years of Age Whose Births Are Registered, by Region 2011-2020' (2021), available at <https://data.unicef.org/topic/child-protection/birth-registration/> (last visited 11 February 2024).

45 Spijkerboer, 'The New Borders of Empire', *supra* note 4, 51; K. Arhin-Sam *et al.*, 'The (In) Formality of Mobility in the ECOWAS Region: The Paradoxes of Free Movement', 29 *South African Journal of International Affairs* (2022) 2, 187, 194.

authorities, which is why many West Africans usually travel irregularly, without identification or with falsified documents.⁴⁶ Moreover, changes in immigration policy have rendered most people unable to obtain the necessary documents to legally enter Maghreb countries such as Libya.⁴⁷ It is thus all but impossible to leave Niger towards Libya without the help of smugglers.⁴⁸

In response to this need, the task of *smuggling* in the Sahara has traditionally been taken on by traders who were familiar with the desert and picked up people on their way for a small fee.⁴⁹ This form of mobility has changed with time and increasing demand. Local structures were formed, some of which were run professionally, like the *agences de courtage*, which were legally registered companies that paid taxes,⁵⁰ while others were operated by individuals and often limited to contacts between two points.⁵¹ For over half a century, this form of irregular mobility was tolerated by national authorities and there was no criminal offense for smugglers.⁵² “In other words, migration through the Sahara was irregular but not clandestine.”⁵³

This changed with the implementation of Law 2015-36. Since the aforementioned mobility offers are intended to bring people across the border, whether they have the necessary documents to render them legal or not, in exchange for payment, they inevitably fall under the offense of smuggling as stipulated in Article 10 of Law 2015-36. However, additional factors have contributed to the *de facto* emergence of a travel ban. Due to the element of illegal exit, the law enforcement agencies have focused on the exit from Niger. This particularly affects the routes passing through the desert from Agadez, which lies about 350 kilometers from Niger’s border with Libya.⁵⁴ The controls did not only take place at the border, but from Agadez and even further inside the country.⁵⁵ This is due to the fact that Article 13 of Law 2015-36 also criminalizes attempted smuggling.⁵⁶

46 Perrin, *supra* note 9.

47 Black, *supra* note 42, 150.

48 Breen, *supra* note 43, 13.

49 Black, *supra* note 42, 154; Brachet, *supra* note 4, 17.

50 *Ibid.*, 21.

51 Perrin, *supra* note 9; see also Wali, *supra* note 5, 11.

52 Black, *supra* note 42, 17; Brachet, *supra* note 4, 29.

53 *Ibid.*, 20.

54 Wali, *supra* note 5, 7.

55 Gabriël & Rijks, *supra* note 7, 5; Jakob, *supra* note 40.

56 Perrin, *supra* note 9; Brachet, *supra* note 4, 26; M. Müller, ‘Migrationskonflikt in Niger: Präsident Issoufou Wagt, der Norden Verliert’, in A. Koch, A. Weber & I. Werenfels (eds), *Migrationsprofiteure? Autoritäre Staaten in Afrika und das Europäische*

While in principle this is also provided for in the Smuggling Protocol under Article 6(2)(a), the comprehensive criminalization of previously tolerated acts is due to the rigorous enforcement of Law 2015-36.⁵⁷ This is particularly evident in the jurisprudence of the *Tribunal de Grande Instance* (TGI) of Niamey.⁵⁸ The court qualifies movements as attempted smuggling even when the objective of crossing the border cannot be clearly established. It is for this reason that most of the judgments only refer to the transport of foreigners within Niger and confirm the criminal offense of smuggling without proving a link to an upstream or cross-border network, merely because the person provided part of the alleged journey, e.g., from the south to Agadez.⁵⁹

The combination of the extensive criminalization under Law 2015-36, its rigorous enforcement by law enforcement authorities, and the broad and often misguided interpretation of the crime by the judiciary⁶⁰ thus “makes it possible to penalize mobility on Nigerien territory whose irregularity is presumed by the use of secondary roads”.⁶¹ Any kind of irregular and informal mobility, in effect all forms of mobility towards the north, are assumed to fall under the definition of smuggling under Law 2015-36. Transportation means, mainly trucks, were confiscated by the police and carriers were incarcerated.⁶² Locals, being well-versed in crossing the desert, became afraid of being charged for smuggling and stopped taking non-nationals with them along the way. This led to a great decline of transportation and mobility options, making it all but impossible for non-Nigerien nationals to leave the country.

b. A Shift Towards Clandestine Smuggling

While the strict enforcement of Law 2015-36 did lead to a decline in informal transportation options for people on the move, it did not lead to an overall decline in the number of persons wishing to go to Libya.⁶³ In response

Migrationsmanagement (2018), 36, 41; Spijkerboer, ‘The New Borders of Empire’, *supra* note 4, 50.

57 Wali, *supra* note 5, 10.

58 Perrin, *supra* note 9.

59 Wali, *supra* note 5, 10; *Ministère Public v. Kamparin Djabwanga*, Case 18/2019 (TGI of Niamey), as cited by Perrin, *supra* note 9; Brachet, *supra* note 4, 26.

60 Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 31.

61 Perrin, *supra* note 9; see also Brachet, *supra* note 4, 25.

62 Gabriël & Rijks, *supra* note 7, 5; Jakob, *supra* note 40.

63 Gabriël & Rijks, *supra* note 7, 1, 8.

to this demand, and as crossing the desert on one's own is impossible,⁶⁴ new mobility practices arose.⁶⁵

These emerging actors began to use bypass routes to evade intensified controls by defense and security forces, exposing people on the move to increased risks and dangers such as breakdowns on remote tracks and bandit attacks. Smugglers sometimes even abandon their passengers in the middle of the desert when they fear arrest. As these unofficial routes pass through isolated and perilous areas of the desert, control and data collection are impaired, and consequently protection and potential rescues through existing infrastructures are rendered difficult or even impossible.⁶⁶ "According to many observers, [...] 'the Sahara may be as deadly as the Mediterranean' [...]. The recorded deaths may represent only the tip of the iceberg."⁶⁷

Law 2015-36 thus led to significant changes in smuggling networks in Niger, making it all but impossible to leave the country without risking one's life and safety.

c. Considering the Factual Effect of Law 2015-36

The preceding analysis leads to the conclusion that the criminalization of smuggling affects foreigners' overall possibility of leaving Niger towards Libya to an extent that amounts to a *de facto* travel ban. Such effects must be taken into account when assessing an infringement of human rights as the International Court of Justice (ICJ) has confirmed in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁶⁸

64 Black, *supra* note 42, 153-154.

65 Brachet, *supra* note 4, 29; Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 33; Wali, *supra* note 5, 12.

66 Gabriël & Rijks, *supra* note 7, 6; Brachet, *supra* note 4, 27-28; Black, *supra* note 42, 152-153, 155-156; Yuen, *supra* note 42, 79-80; Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 32; Jakob, *supra* note 40; Wali, *supra* note 5, 12-13; Border Forensics, 'Investigation Report: Mission Accomplished? The Deadly Effects of Border Control in Niger' (2023), 65, 70, available at https://www.borderforensics.org/app/uploads/2023/05/Report_Sahara_EN.pdf (last visited 11 February 2024) ['Sahara Investigation Report'].

67 Brachet, *supra* note 4, 28; Breen, *supra* note 43, 14; Black, *supra* note 42, 152.

68 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 [ICJ], *Advisory Opinion of 9 July 2004*; discussed in F. Becker, 'IGH-Gutachten Über »Rechtliche Konsequenzen des Baus Einer Mauer in den Besetzten Palästinensischen Gebieten«, 43 *Archiv des Völkerrechts* (2005) 2, 218; A. Orakhelashvili, 'International Public Order and the International Court's Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied

In this Advisory Opinion, the ICJ addressed the effect caused by the construction of a wall by the State of Israel, a substantial part of which was built on the territory of the Palestinian people.⁶⁹ The court concluded that the wall amounted to a *de facto* annexation of the enclaved Palestinian territory in violation of the right to self-determination of the Palestinian people.⁷⁰ In particular, the ICJ noted that the inhabitants of the Palestinian enclaves could only leave under strict control and were thus cut off from workplaces, educational and health facilities, and elements of civilized care in the broadest sense.⁷¹ The wall and the regime associated with it had created a *fait accompli*, with the potential to become permanent. This *de facto* annexation “severely impedes the exercise by the Palestinian people of its right to self-determination and is therefore a breach of Israel’s obligation to respect that right”.⁷²

It follows that the creation of a factual situation can lead to a violation of public international law. Consequently, as in the Advisory Opinion, in which the *de facto* annexation of Palestinian territory resulted in a violation of the Palestinian people’s right to self-determination, the *de facto* impossibility of leaving Niger towards Libya for non-Nigerien nationals results in a violation of their right to leave. Whereas, in the Wall Advisory Opinion, the *de facto* situation was affirmed “on the basis of what, irrespective of the probabilities involved, amounts to possibilities of annexation”,⁷³ the effects of Law 2015-36 have already been observed since its entry into force, allowing a concrete assessment of its *de facto* impact on the right to leave, as has been shown. Thus, Niger fails to comply with its primary obligation to respect the right to leave and not to prevent the departure of persons on the move.

Furthermore, the State infringed upon its obligation to fulfil⁷⁴ and promote⁷⁵ the right to leave by failing to adopt implementation measures that

Palestinian Territory’, 43 *Archiv des Völkerrechts* (2005) 2, 240; J.-F. Gareau, ‘Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’, 18 *Leiden Journal of International Law* (2005) 3, 489.

69 ICJ, *Advisory Opinion of 9 July 2004*, *supra* note 68, 136, para. 67.

70 *Ibid.*, paras 121-122.

71 *Ibid.*, para. 133.

72 *Ibid.*, paras 121-122.

73 Gareau, *supra* note 68, 514.

74 AfCHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, *supra* note 35, para. 152.

75 Mégret, *supra* note 35, 103; AfCHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, *supra* note 35, para. 152.

ensure its full exercise.⁷⁶ While it conducted trainings for the law enforcement agencies, aiding them to identify conduct constituting smuggling under Law 2015-36,⁷⁷ it should have further trained them with respect to the protection of the human rights of migrants.⁷⁸ This obligation is also laid down in Article 14(1) in conjunction with Article 19(1) of the Smuggling Protocol.⁷⁹

2. Obligation to Prevent Law Infringements

Prior to Niger's obligation to adopt human rights-conscious implementation measures, it was its responsibility not to enact laws that violate the right to leave in the first place.⁸⁰ This duty of the legislature was reaffirmed in Article 16(1) of the Smuggling Protocol.⁸¹ While it is the State's obligation to amend its domestic law or practice *ex post* to meet the standards imposed by the right to leave,⁸² it can also *a fortiori* be required of the State, when drafting new laws, to ensure that they do not even *de facto* violate human rights.

When drafting a national law, it is therefore imperative that the State has analyzed the potential consequences on human rights before enactment, e.g., by conducting an *ex ante* human rights impact assessment (HRIA).⁸³ This applies regardless of the fact that the Smuggling Protocol allows for a

76 HRC, *CCPR General Comment No. 31*, *supra* note 25, para. 7; Schabas, *supra* note 19, 32-33; Murray, *supra* note 16, 23; Mégret, *supra* note 35, 103.

77 Perrin, *supra* note 9.

78 Murray, *supra* note 16, 28.

79 P. Oberoi, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence* (2010), 75.

80 Murray, *supra* note 16, 24; Schabas, *supra* note 19, 32-33; HRC, *CCPR General Comment No. 31*, *supra* note 25, paras 3-4.

81 T. Spijkerboer, 'Moving Migrants, States, and Rights: Human Rights and Border Deaths', 7 *The Law & Ethics of Human Rights* (2013) 2, 213, 228-229 [Spijkerboer, 'Moving Migrants, States, and Rights'].

82 HRC, *CCPR General Comment No. 31*, *supra* note 25, para. 13; Murray, *supra* note 16, 20.

83 J. Harrison, 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment', 3 *Journal of Human Rights Practice* (2011) 2, 162, 164, 166; for further information on the HRIA process, read E. Felner, 'Study on Human Rights Impact Assessments: A Review of the Literature, Differences With Other Forms of Assessments and Relevance for Development' (2013), available at <https://documents1.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIA-Web.pdf> (last visited 11 February 2024).

broader criminalization by setting only the minimum requirements.⁸⁴ Rather, an assessment of the potential human rights impact of a proposed law is all the more necessary when the State, in implementing an international treaty such as the Smuggling Protocol, criminalizes acts not mentioned in the source document and its legislative guide. Moreover, the Smuggling Protocol explicitly states in its Article 19 that its regulatory content must not affect the human rights of migrants. In order not to undermine the right to leave in its application, the legislator would have had to adapt the law to the circumstances of people on the move in the respective country. The lack of involvement of key stakeholders during the drafting process was also criticized by local elected officials in Niger.⁸⁵ It would also have been possible for the government to react to the numerous reports attributing the emergence of a *de facto* travel ban to Law 2015-36⁸⁶ after its entry into force. Niger has thus violated its obligation not to enact laws infringing human rights or to amend them accordingly.

Niger therefore infringes the right to leave, not only under its negative obligation to refrain from preventing departure, or its positive obligation to train its law enforcement authorities regarding human rights, but also by failing to ensure that its legislature does not enact laws that inherently lead to a violation of human rights.

IV. Justifying Law 2015-36

Neither the right to leave enshrined in Article 12(2) of the ACHPR nor in Article 12(2) of the ICCPR are absolute.⁸⁷ The restrictions to which the right may be subject are formulated, which deserves to be emphasized regarding the ACHPR, with a clarity and rigor not shared by any of the other limitation clauses in this Charter. They are only possible if they are provided for by law and necessary to protect “national security, law and order, public health or morality”.⁸⁸ Article 12(3) of the ICCPR allows for similar limitations of the right

84 United Nations Office on Drugs and Crime, ‘Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto’ (2004), 351, para. 58, available at https://www.unodc.org/documents/congress/background-information/Transnational_Organized_Crime/Legislative_guide_E.pdf (last visited 11 February 2024).

85 Wali, *supra* note 5, 12.

86 In particular Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 32.

87 Schabas, *supra* note 19, 312; Ouguergouz, *supra* note 18, para. 60.

88 *Ibid.*, para. 60.

to leave and further stipulates that they must be consistent with all other rights recognized in the Covenant.⁸⁹

A decisive criterion when assessing the permissibility of the restriction is its necessity for the protection of the pursued purpose.⁹⁰ In this regard, “[e]very interference [...] requires a precise balancing between the right to freedom of movement and those interests to be protected by the interference”, taking into account its severity and intensity.⁹¹ This principle of proportionality must be respected by both the law providing for the restriction and the administrative and judicial authorities applying it.⁹² The principle entails the consideration of three aspects: first, the restrictive measure must be appropriate to achieve the legitimate protective function; second, it must constitute the least intrusive means to safeguard the protected interest;⁹³ and, finally, it must be proportionate to the interest to be protected.⁹⁴ “In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”⁹⁵ Thus, the restriction of the right to leave must be an exception and may not become the rule.⁹⁶

Applying the legal criteria outlined above, the following section will balance the right to leave, to which persons are entitled notwithstanding their attempt to be smuggled,⁹⁷ with the purpose of Law 2015-36 to protect the interests of people on the move (1.), the interests of bordering States (2.), or the national interest of Niger (3.). A derogation, even though possible,⁹⁸ is not to be assumed.

89 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 11.

90 HRC, *CCPR General Comment No. 31*, *supra* note 25, para. 6; HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 14.

91 Schabas, *supra* note 19, 317; O. de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 2nd ed. (2014), 378.

92 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 15.

93 Eighth Colloquium on Challenges in International Refugee Law, ‘The Michigan Guidelines on Refugee Freedom of Movement’, 39 *Michigan Journal of International Law* (2018) 1, 5, para. 5.

94 Schabas, *supra* note 19, 317; HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 14; De Schutter, *supra* note 91, 368-369; Murray, *supra* note 16, 337.

95 HRC, *CCPR General Comment No. 31*, *supra* note 25, para. 6.

96 Schabas, *supra* note 19, 317; HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 13.

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

98 Schabas, *supra* note 19, 303; T. Buergenthal, ‘Human Rights’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), para. 17.

1. In the Interest of People on the Move: Saving Lives

By adopting Law 2015-36, Niger could argue that their interference was justified because it aimed to protect the lives and safety of people on the move who potentially fall victim to exploitative smugglers.⁹⁹ While this is a legitimate aim, and to pursue and criminalize the action at the source of the danger seems appropriate at first glance, studies show that “policies that reduce the number of active smugglers in the area are likely to raise the mean exploitation in the market”. This is presumed to be caused by the rise in risks and costs for smugglers, which drives non-exploitative smugglers out of the market.¹⁰⁰ The Special Rapporteur concludes that the associated “recourse of migrants to riskier routes [further] raises questions as to the effectiveness of the law as a means to protect the life of migrants and prevent deaths in the desert”.¹⁰¹

A less intrusive but more efficient means to secure the lives of people on the move would be to enhance the dissemination of information about the risks of travelling through the desert. Niger could therefore support non-governmental organizations, such as Afrique-Europe-Interact and Alarme Phone Sahara, which distribute illustrated information flyers advising people on the move about the risks of desert crossing, as well as their rights and available protection measures in case of emergency.¹⁰² Their educational work, which they carry out with the aim of enabling people to make autonomous informed decisions, could be combined with the training of law enforcement officers working in transit towns such as Agadez, where a large number of persons on the move begin their journey through the desert.

The measure is thus ineffective at saving the lives of people; rather, it increases the risks, as demonstrated above. It is also not the least intrusive means to achieve this aim. Moreover, if a person wishes to leave Nigerien territory on

99 R. Piotrowicz & J. Redpath-Cross, ‘Human Trafficking and Smuggling’, in B. Opekin, R. Perruchoud & J. Redpath-Cross (eds), *Foundations of International Migration Law* (2012), 234, 247-249; Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 29; Stoyanova, *supra* note 18, 404; Jakob, *supra* note 40.

100 A. Triandafyllidou & T. Maroukis, *Migrant Smuggling: Irregular Migration From Asia and Africa to Europe* (2012), 11.

101 Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 33.

102 Alarme Phone Sahara, ‘Advice to Migrants When Crossing the Desert’, available at https://alarmephonesahara.info/system/refinery/resources/W1siZiIsIjIwMTkvMTAvMjMvMXg5bnI6ZncwbF9mbHllcl9lbi5wZGYiXV0/flyer_en.pdf (last visited 11 February 2024).

the basis of a free and autonomous decision, Niger, as “the state of departure may not lawfully restrict the right to leave on the basis of concerns about risk to the individual’s life or safety during the process of leaving or traveling”.¹⁰³

2. In the Interests of Bordering States: Preventing Illegal Entry Into Libya

The definition of smuggling entails the illegal entry into the receiving State. By its criminalization, Law 2015-36 could thus aim at preventing violations of Libya’s immigration laws. While this is undoubtedly a Libyan public order interest,¹⁰⁴ it is Niger’s own interest that is of relevance for the justification as it triggered the violation of the right to leave.¹⁰⁵ The Nigerien criminalization of smuggling can therefore not be justified under the purpose of protecting Libya’s immigration laws.¹⁰⁶

This is all the more valid as the right to seek asylum and the principle of *non-refoulement*, affirmed in Article 19(1) of the Smuggling Protocol and binding on Libya as a customary norm,¹⁰⁷ would otherwise be frustrated. According to Article 31 of the Refugee Convention, the illegal entry of refugees shall not be criminalized. This acknowledges that refugees may find themselves in the situation of entering a country not having the required documents. Together with the right to leave and the principle of *non-refoulement*, this creates “a limited right of (at least) temporary admission for asylum seekers to access fair and effective refugee status determination procedures”.¹⁰⁸ Even though this is not the case for persons that are not entitled to any protection or only to subsidiary protection, “a potential protection status must be immaterial at departure”. It cannot be up to Niger as the departure State to determine migrants’ protection status and thus decide who is allowed to leave its territory.¹⁰⁹ It is its duty “not to frustrate the exercise of [the right to leave to seek asylum]” by imposing “intentional policies and practices of containment without protection”.¹¹⁰ This duty cannot be absolved by arguing that the refugees can seek asylum in Niger,

103 Eighth Colloquium on Challenges in International Refugee Law, *supra* note 93, para. 6.

104 Schabas, *supra* note 19, 319.

105 Eighth Colloquium on Challenges in International Refugee Law, *supra* note 93, para. 7; Markard, *supra* note 14, 603, 606.

106 Schabas, *supra* note 19, 321.

107 G. S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 4th ed. (2021), 515.

108 *Ibid.*, 477, 746.

109 Markard, *supra* note 14, 603, 606.

110 Goodwin-Gill, *supra* note 15, 66 (emphasis omitted).

since refugees have a certain choice in which State they want to request asylum, regardless of whether they could have received *de jure* or *de facto* protection in a previous transit country of their flight.¹¹¹

With regard to its bordering countries, Niger could argue that it intended to counter transnational criminal networks. While Articles 6 and 9 of Law 2015-36 encourage the transnational prosecution of smuggling, the elements of transnationality and organized crime are not included in Article 10. In fact, the law is mostly applied to cases that do not involve border crossing, let alone a transnational network. Its concrete manifestation is therefore neither suitable nor the least intrusive means.

3. In National Interests: Prevention of Crime

The main purpose of Law 2015-36 is to combat the activities of smugglers, in other words the prevention of crime,¹¹² falling under Niger's interest of *ordre public*.¹¹³ Its suitability could be derived from the provision of Article 6(1)(a) of the Smuggling Protocol. However, it is questionable whether Niger's sovereignty and security concerns, based on the fear that actions of smugglers interfere with orderly migration,¹¹⁴ are being met appropriately by Law 2015-36.

First, the extent to which the criminalization of small-scale and self-organized activities constitutes a protection to Niger's public order must be questioned.¹¹⁵ Second, it cannot be assumed that the State's failure to act against this socially rooted and tolerated form of mobility would be understood as a threat to the security of its citizens.¹¹⁶

Yet, given that smuggling activities are considered criminal, a suitable measure would need to address, in particular, the demand for clandestine

111 United Kingdom: High Court (England and Wales), *R v. Uxbridge Magistrates' Court and Another Ex Parte Adimi*, (2001) QB 667, 678 [*Adimi*]; supported by: UNHCR, *Conclusions on International Protection Adopted by the Executive Committee 1975-2017*, No. 15 (XXX): Refugees Without an Asylum Country (1979), para. (h), HCR/IP/3/Eng/REV.2017, available at <https://www.refworld.org/docid/5a2ead6b4.html> (last visited 11 February 2024); see also Goodwin-Gill & McAdam, *supra* note 107, 495-496.

112 Stoyanova, *supra* note 18, 430-431; Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 29.

113 Schabas, *supra* note 19, 319.

114 A. Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', 23 *Human Rights Quarterly* (2001) 4, 975, 976.

115 Stoyanova, *supra* note 18, 430.

116 Piotrowicz & Redpath-Cross, *supra* note 99, 247.

movement.¹¹⁷ This demand stems from the lack of opportunities for lawful mobility. It has already been established that people on the move in Sub-Saharan Africa often lack personal identification documents. There is also widespread distrust in State institutions and authorities. Law 2015-36, however, does not address these reasons for the demand for smugglers. It is therefore not a suitable measure to respond to Niger's sovereignty and security concerns.

While Law 2015-36 can neither be understood as suitable nor as the least intrusive means due to its criminalization beyond the Smuggling Protocol and its arbitrary enforcement,¹¹⁸ its proportionality is also questionable.¹¹⁹ When assessing the proportionality of Law 2015-36, the severity and intensity of the interference, which also depend on its duration,¹²⁰ play a decisive role.¹²¹ In the case at hand, there is no prospect for the affected people to have the *de facto* travel ban lifted, as it finds its origin in Law 2015-36, which would have to be annulled for this purpose. The duration of the interference to their right to leave is therefore unlimited.

The indefinite nature of the restriction is exacerbated in its effect by the fact that Law 2015-36 presents the holders of the right to leave with a *fait accompli*. To circumvent the restrictive effect of Law 2015-36 and cross the border to Libya, non-Nigerien nationals would have to obtain travel documents and use legal routes instead of seeking out smugglers. However, the obstacles in this regard have already been highlighted, making it all but impossible to leave Niger towards Libya without the help of smugglers. Law 2015-36 thus deprives people on the move of any possibility to influence its restricting effect and therefore completely disregards their vulnerability, let alone assesses their individual situation.¹²² In the case of the established permissible restrictions, such as that the affected person is currently undergoing legal proceedings and has to appear in court, has unpaid debts, has to perform military or alternative service, or is serving a prison sentence,¹²³ the reason for the restriction always lies with the person seeking to leave the country. The restriction of the right to leave by Law 2015-36, in contrast, affects non-nationals in a general and abstract way, without the reason being a duty they must fulfil or another condition depending

117 Stoyanova, *supra* note 18, 430.

118 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 13; Murray, *supra* note 16, 337.

119 Markard, *supra* note 14, 609.

120 *Ibid.*, 596.

121 Schabas, *supra* note 19, 317.

122 Markard, *supra* note 14, 609.

123 Schabas, *supra* note 19, 311, 318, 320; Harvey & Barnidge, *supra* note 97, 9.

on them personally. There is no way for them to escape the *de facto* ban on leaving the country, thereby making Law 2015-36 a particularly severe restriction.

Regarding its severe nature, the procedures following the adoption of Law 2015-36 are especially decisive.¹²⁴ It has already been established that Niger infringed upon its obligation to assess the consequences of Law 2015-36 and to give due consideration to concerns raised with regard to the infringing and arbitrary nature of the law's enforcement. In this respect, the lack of effective remedies for people whose rights have been violated¹²⁵ by Law 2015-36 is concerning. This finding leads to the conclusion that "the authorities have not acted with the requisite caution in interfering with the right"¹²⁶ to leave, thus violating the requirement of proportionality.

Taking all these factors into account, with special consideration for both its indefinite nature as well as the impossibility for people on the move to escape the restrictive effect of the law and to leave the country by other means, it can be concluded that the law impairs the essence of the right to leave in its implementation. Niger thus violates the principle that "the relation between right and restriction, between norm and exception, must not be reversed".¹²⁷

D. Conclusion

In conclusion, the enforcement of Law 2015-36 represents an unjustified interference in the right to leave of non-Nigerien nationals. Among its many consequences, such as economic decline and the lack of prospects for young people in the Agadez region,¹²⁸ the shift in the smuggling business towards exploitative and life-threatening mobility services to the north of Agadez is particularly worrisome. This development has not only been increasingly criticized by the local population in recent years, but also by the UN Special Rapporteur who, in his report on a 2019 visit to Niger, has also seen reason to identify the consequences of Law 2015-36 in detail and to call on Niger to take action. The report recalls how the Smuggling Protocol emphasizes¹²⁹

124 De Schutter, *supra* note 91, 371.

125 HRC, *Concluding Observations on the Second Periodic Report of the Niger*, *supra* note 5, para. 39; Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 72.

126 De Schutter, *supra* note 91, 369.

127 HRC, *CCPR General Comment No. 27*, *supra* note 15, para. 13.

128 Wali, *supra* note 5, 7.

129 United Nations Office on Drugs and Crime, 'Model Law Against the Smuggling of Migrants' (2010), 57, available at https://www.unodc.org/documents/legal-tools/Model_

“that migration is not a crime and migrants in irregular situations should not be treated as criminals or deprived of their liberty and security”. The Special Rapporteur further calls on Niger to amend the law to conform to the guidelines and standards of international human rights as well as ECOWAS’ principle of freedom of movement.¹³⁰

The present analysis of the law with regard to the right to leave leads to the conclusion that the element of *illegal exit* in Article 10 of Law 2015-36 should be removed. In particular, the law should not merely apply the element of an organized criminal group as an aggravating circumstance (Article 16 of Law 2015-36) but should integrate it as a mandatory requirement for the offense of smuggling. Such an amendment would arguably target a more limited set of interactions¹³¹ and thus account for the regional context of mobility in Niger. In addition, the judiciary must be encouraged not to affirm the crime of smuggling on the basis of assumptions without proper proof. After the amendment of the offense, the prosecutor should have to prove intent to cross the border and participation in a smuggling network before people are sentenced to prison. It is also recommended that the Nigerien government draft any amendment to the law in cooperation with civil society stakeholders and those potentially affected by the law. While this process should focus on the protection of human rights, it is especially true for the implementation of the law that, in some situations, “protecting the rights of irregular migrants may require non-enforcement of anti-smuggling measures”.¹³²

Finally, it can be said that the intensive involvement of the EU¹³³ in the implementation of the law should be viewed critically. In view of human rights violations within its sphere of influence, further involvement of the EU, especially through development aid,¹³⁴ should be linked to a comprehensive

Law_Smuggling_of_Migrants.pdf (last visited 11 February 2024).

130 Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, paras 34, 72.

131 C. M. Ricci, ‘Criminalising Solidarity? Smugglers, Migrants and Rescuers in the Reform of the ‘Facilitators’ Package’, in V. Mitsilegas, V. Moreno-Lax & N. Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (2020), 34, 43.

132 Oberoi, *supra* note 79, 68.

133 Crawford, *supra* note 38, 537-538; ‘Sahara Investigation Report’, *supra* note 66, 71; for a detailed discussion on the EU’s involvement in Niger, see Spijkerboer, ‘The New Borders of Empire’, *supra* note 4, 51-55.

134 Special Rapporteur on the Human Rights of Migrants, *Visit to the Niger*, *supra* note 5, para. 38.

impact assessment of its actions that are detrimental to human rights.¹³⁵ The conclusions drawn in this article will be of particular interest for the discussion on the European practice of externalizing migration control¹³⁶, as well as for an analysis of the EU's responsibility¹³⁷ under the rules of attribution and joint responsibility laid down in the ASR with regard to the violation of the right to leave through the organizational and financial support of the implementation of Law 2015-36.

135 For HRIAs within the framework of human rights activities and project management cycles of the EU, see European Commission, *Communication From the Commission to the Council and the European Parliament*, 8 May 2001, COM(2001)252, Annex 2, 28; the human rights dimension of impact assessments as a fundamental part of Better Law-Making within the EU has been affirmed by European Parliament, Council of the European Union, European Commission, *Interinstitutional Agreement Between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making*, 13 April 2016, OJ 2016 L 123/1, paras 6, 12-18; European Commission, *Communication From the Commission on Impact Assessment*, 5 June 2002, COM(2002) 276, Annex 2, 15.

136 Spijkerboer, 'The New Borders of Empire', *supra* note 4, 56-57; Markard, *supra* note 14, 610-614; for an analysis of the impact on the ECOWAS principle of freedom of movement, see Arhin-Sam *et al.*, *supra* note 45, 191-192, 194-195, 198-199.

137 For an analysis of the international responsibility of EU member states for supporting third countries in preventing departure at sea in violation of international norms, see Markard, *supra* note 14, 614-616.