

# Pushbacks of Migrants in the Mediterranean: Reconciling Border Control Measures and the Obligation to Protect Human Rights

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# PUSHBACKS OF MIGRANTS IN THE MEDITERRANEAN: RECONCILING BORDER CONTROL MEASURES AND THE OBLIGATION TO PROTECT HUMAN RIGHTS

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*This paper explores the practice of pushback operations in the Mediterranean Sea in the last decade, observing it both through the prism of states' security interests and through their obligations under human rights law. Analysis of the content of some of the basic human rights – in particular the right to life, the prohibition of refoulement and the prohibition of collective expulsions – and their applicability in the context of pushback operations reveals that it is virtually impossible to reconcile pushbacks as a means of safeguarding states' borders and states' human rights obligations. It seems that the Mediterranean states and the European Union have come full circle – from the Italian pushback programme in 2009, through the condemnation of the practice by the European Court of Human Rights in the landmark decision of Hirsi Jamaa v. Italy and the subsequent replacement of the practice of pushbacks with the practice of pullbacks, to renewed systemic hot returns. A viable solution at the European Union level needs to be found or otherwise the states which are on the front line of migratory flows will continue to prioritise their own security interests over their human rights obligations.*

**Keywords:** pushbacks; sea migration; interception; non-refoulement; collective expulsions; right to life; human rights; Mediterranean Sea; European Court of Human Rights.

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## 1. INTRODUCTION

Irregular migration in the Mediterranean has been a pressing issue for years now. Although the climax of the migrant crisis occurred in 2015, reports continue to come on migrants travelling across the Mediterranean in unseaworthy vessels to reach European soil, most often in the context of the unfortunate loss of migrant lives.<sup>1</sup> Due to such events, migrants are often perceived as victims, who expose themselves to precarious conditions, in order to reach a better place than the one they left behind, and are perceived as those in need of protection. But the issue of migrants is often associated with another, quite contradictory, perception. They are also often perceived as a threat to states' national security interests. In that context, states undertake different measures to safeguard their borders against irregular migration, one of them being the pushback of migrants. The practice of pushbacks is aimed at the expulsion of migrants from the state's territory, should they manage to enter it, or at preventing migrants from even reaching the state's territory, in cases where they have not yet done so, without any screening of the personal status of persons who are being pushed back.<sup>2</sup> These practices are often characterised by brutality against migrants and excessive use of force. The COVID-19 pandemic made this problem even worse, making pushbacks more frequent and more brutal.<sup>3</sup>

<sup>1</sup> UN officials estimate that in 2021 around 1,600 migrants lost their lives in the Mediterranean Sea. See: Ritter, K., 1,600 Migrants Lost at Sea in Mediterranean This Year, *ABC News*, 25 November 2021, available at: <https://abcnews.go.com/International/wireStory/1600-migrants-lost-sea-mediterranean-year-81396561> (23 December 2021).

<sup>2</sup> The European Centre for Constitutional and Human Rights defines pushbacks as "a set of state measures by which refugees and migrants are forced back over a border – generally immediately after they crossed it – without consideration of their individual circumstances and without any possibility to apply for asylum or to put forward arguments against the measures taken", available at: <https://www.ecchr.eu/en/glossary/push-back/> (16 October 2021). A more comprehensive definition, though, is the one proposed by Special Rapporteur on human rights of migrants, Felipe González Morales. He described pushbacks as "various measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of *non-refoulement*", thus not limiting pushbacks to situations where migrants have already crossed a state border. Special Rapporteur on the human rights of migrants, Call for Inputs for the Special Rapporteur's Report on Pushback Practices and Their Impact on the Human Rights of Migrants, available at: <https://www.ohchr.org/en/special-procedures/sr-migrants/report-means-address-human-rights-impact-pushbacks-migrants-land-and-sea> (16 October 2021).

<sup>3</sup> Tondo, L., Revealed: 2,000 Refugee Deaths Linked to Illegal EU Pushbacks, *The Guardian*, 5 May 2021, available at: <https://www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks> (17 October 2021).

Opinions on the legality of pushbacks are not equivocal. Some find them absolutely illegal and contrary to a number of human rights guarantees. Others, on the other hand, perceive them as legitimate measures aimed at protecting states' vital security interests. No doubt, reconciling the two goals – one of protecting migrants' human rights and the other of safeguarding states' borders – is a challenging task and no simple solutions are likely to solve the problem. In any case, it must be borne in mind that states' right to control their borders and monitor who enters their territory must not be in contravention of states' obligations arising from human rights law.

The present paper aims at exploring the practice of pushback operations in the context of human rights obligations.<sup>4</sup> Due to the limited scope of the paper, special emphasis will be put on the principle of *non-refoulement*, the prohibition of collective expulsions of aliens and the right to life, although some other human rights, such as the right to liberty or the right to an effective remedy, may likewise be violated in pushback operations. Further, the paper will focus specifically on pushbacks conducted in the Mediterranean Sea, although pushbacks take place in other maritime areas, such as off the coast of Australia and in the English Channel, as well as at land borders.<sup>5</sup>

## 2. THE PRACTICE OF PUSHBACKS: A REGULAR FORM OF TREATING MIGRANT BOATS IN THE MEDITERRANEAN?

In order to control the migrant influx from Africa and the Middle East, Mediterranean states have been undertaking various measures over the years. At first, these measures were undertaken unilaterally, primarily by Italy, Greece and Spain. Starting from 2005, they were supplemented by measures conducted under the auspices of Frontex – first established as the European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union, and later transformed into the European Border and Coast Guard Agency.

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<sup>4</sup> The problem of sea migration is a very extensive one and covers a wide range of issues, observed from different perspectives. It covers search and rescue at sea, compliance with the obligations under the law of the sea, state responsibility for pushback operations, the closed ports issue, and others. The aim of this paper is not to cover all of these aspects but to reflect specifically on pushback practice, as a state policy, and to correlate it with some of the states' basic human rights obligations.

<sup>5</sup> Pushbacks have been reported from Poland to Belarus, from Hungary to Croatia and Serbia, from Croatia to Serbia and Bosnia and Herzegovina, and others.

The first unilateral initiative aimed at controlling borders by indiscriminately returning migrants to states of departure was the Italian pushback programme, which lasted from 2009 to 2012. It is no surprise that Italy was the first state to initiate such a programme, since it was affected the most by the large number of migrants travelling through the so-called Central Mediterranean route. In 2009, the Italian government under Prime Minister Berlusconi introduced an open policy of “no tolerance” to irregular migration, which in practice meant that migrant boats heading towards southern Italy would be intercepted and diverted towards states from which they had departed, most often towards Libya.<sup>6</sup> While conducting such operations, Italian coast guards made no screening to see whether some of the migrants were entitled to the status of refugee or were in need of protection on some other grounds.<sup>7</sup>

Italy and Libya concluded a number of bilateral agreements on cooperation, which, *inter alia*, included migration control. After the conclusion of a bilateral agreement on the fight against terrorism, organised crime and illegal immigration in 2000, which came into force in 2002, and the two Protocols of 2007, which were not implemented, the Treaty of Friendship, Partnership and Cooperation was concluded in 2008 and entered into force in 2009. It was agreed in the Treaty that mixed patrols would operate along the Libyan coast and that Libyan land borders would be controlled by a satellite detection system jointly financed by Italy and the European Union.<sup>8</sup> Within the agreed cooperation, Italy started to conduct an interdiction and return policy, which seriously brought into question respect of human rights of migrants. The Italian practice of pushbacks was condemned by the European Court of Human Rights in the landmark decision of *Hirsi Jamaa and Others v. Italy*.<sup>9</sup>

After the decision in *Hirsi Jamaa*, Italy generally ceased to conduct pushback operations. However, in 2017, the two states – Italy and Libya – again concluded a memorandum of understanding, by which Italy provided support to the Libyan Coast Guard in intercepting migrant boats trying to cross from Libya to Italy, and

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<sup>6</sup> Borelli, S.; Stanford, B., *Troubled Waters in the Mare Nostrum: Interception and Pushbacks of Migrants in the Mediterranean and the European Convention on Human Rights*, *Review of International Law and Politics*, vol. 10 (2014), no. 37, p. 37.

<sup>7</sup> *Pushed Back, Pushed Around – Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers*, Human Rights Watch, available at: [https://www.hrw.org/sites/default/files/reports/italy0909web\\_0.pdf](https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf) (27 September 2021).

<sup>8</sup> Ronzitti, N., *The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?* *Bulletin of Italian Politics*, vol. 1 (2009), no. 1, p. 130.

<sup>9</sup> *Hirsi Jamaa and Others v. Italy*, GC, App. No. 27765/09 (ECtHR, Judgement of 23 February 2012).

in returning them to Libya.<sup>10</sup> Instead of conducting the practice of pushbacks, Italy supported the practice of “pullbacks”. This practice is based on an “agreement between countries that migrants will be retained on one side, usually in exchange for financial or other economic incentives given to the retaining country”.<sup>11</sup> In the course of conducting pullback operations, an incident occurred in which the Libyan Coast Guard interfered with the attempt of the NGO Vessel Sea-Watch 3 to rescue migrants from a sinking boat, which resulted in some of them dying at sea, and others being returned to Libya and subjected to ill-treatment.<sup>12</sup> Following the incident, an application was filed before the European Court of Human Rights against Italy.<sup>13</sup> Italian authorities have been accused of “outsourcing to Libya what they are prohibited from doing themselves, flouting their human rights obligations”.<sup>14</sup> It remains to be seen how the European Court of Human Rights will reason in this case and if it will attribute to Italy responsibility for what happened.

For some years, Italy was the state criticised the most for conducting pushback operations. However, recently, systematic pushbacks have mostly been associated with Greece. To divert migrants travelling from Turkey, Greece has developed an interception and pushback programme in the Aegean Sea, which on a number of occasions has resulted in migrants being left to die at sea or being maltreated by members of the Hellenic Coast Guard.<sup>15</sup> The UN High

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<sup>10</sup> Pijnenburg, A., *From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?* *European Journal of Migration and Law*, vol. 20 (2018), no. 4, p. 397.

<sup>11</sup> *Pushback Policies and Practice in Council of Europe Member States*, Report of Committee on Migration, Refugees and Displaced Persons, Rapporteur Ms Tineke Strik, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/20190531-PushbackPolicies-EN.pdf> (25 October 2021).

<sup>12</sup> *Legal Action before the ECtHR against Italy over Its Coordination of the Libyan Coast Guard Pull-backs Resulting in Migrant Deaths and Abuse*, Human Rights at Sea, 8 May 2018, available at: <https://www.humanrightsatsea.org/legal-action-ecthr-against-italy-over-its-coordination-libyan-coast-guard-pull-backs-resulting> (25 October 2021).

<sup>13</sup> *S.S. and others v. Italy*, App. No. 21660/18.

<sup>14</sup> Violeta Moreno-Lax, Legal Advisor, on Behalf of the Applicant in the Present Case – the Global Legal Action Network, available at: <https://sea-watch.org/en/legal-action-against-italy-over-its-coordination-of-libyan-coast-guard/> (3 November 2021).

<sup>15</sup> *Greece: Investigate Pushbacks, Violence at Borders*, Human Rights Watch, 6 October 2020, available at: <https://www.hrw.org/news/2020/10/06/greece-investigate-pushbacks-violence-borders> (5 November 2021); *Greece: Investigate Pushbacks, Collective Expulsions*, Human Rights Watch, 16 July 2020, available at: <https://www.hrw.org/news/2020/07/16/greece-investigate-pushbacks-collective-expulsions> (5 November 2021); *Greece: Violence against Asylum Seekers at Borders*, Human Rights Watch, 17 March 2020, available at: <https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border> (5 November 2021).

Commissioner for Refugees expressed concern over the practice of summary returns to Turkey and urged Greece to refrain from such practice.<sup>16</sup>

Although pushbacks occurred throughout the 2010s, it was not until 2020 that they became a “standard for the Greek coastguard”.<sup>17</sup> At the beginning of 2020, the Turkish president announced that Turkey would no longer prevent migrants from crossing the border to the EU, as was agreed in the 2016 EU-Turkey Statement.<sup>18</sup> Greece responded by violently pushing back migrants. The NGO Legal Centre Lesvos filed a suit against Greece at the European Court of Human Rights for its role in an incident in October 2020, in which Greek officers allegedly used violence against migrants intercepted at sea, leaving them without essential means to survive.<sup>19</sup> In addition to allegations concerning pushbacks by the Greek coastguard, Frontex was also accused of tolerating such conduct.<sup>20</sup>

It appears that pushbacks of migrants, which are conducted without any assessment of whether the individuals in question enjoy protection on any account, have become standard practice at Europe’s southern borders. For the Mediterranean states which are mostly exposed to migrant flows, they have become “a part of national policies rather than incidental measures”.<sup>21</sup> States conducting pushbacks tend to deny such practices, which results in an inadequate

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<sup>16</sup> UNHCR Calls on Greece to Investigate Pushbacks at Sea and Land Borders with Turkey, 12 June 2020, available at: <https://www.unhcr.org/news/briefing/2020/6/5ee33a6f4/unhcr-calls-greece-investigate-pushbacks-sea-land-borders-turkey.html> (11 November 2021).

<sup>17</sup> McKernan, B., Greece Accused of “Shocking” Illegal Pushbacks against Refugees at Sea, *The Guardian*, 26 April 2021, available at: <https://www.theguardian.com/world/2021/apr/26/greece-accused-of-shocking-pushback-against-refugees-at-sea> (13 November 2021).

<sup>18</sup> Cortinovis, R., Pushbacks and Lack of Accountability at the Greek-Turkish Borders, CEPS Paper in Liberty and Security in Europe, available at: [https://www.ceps.eu/wp-content/uploads/2021/02/LSE2021-01\\_Pushbacks-and-lack-of-accountability-at-the-Greek-Turkish-border.pdf](https://www.ceps.eu/wp-content/uploads/2021/02/LSE2021-01_Pushbacks-and-lack-of-accountability-at-the-Greek-Turkish-border.pdf) (10 January 2022). See also: Ferstman, C., Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent “Irregular” Migration: European Union and United Kingdom Support to Libya, *German Law Journal*, vol. 21 (2020), special no. 3, pp. 459-489.

<sup>19</sup> New Case Filed against Greece in European Court for Massive Pushback Operation of over 180 Migrants Caught in Storm near Crete, available at: <https://reliefweb.int/report/greece/new-case-filed-against-greece-european-court-massive-pushback-operation-over-180> (12 January 2022).

<sup>20</sup> Frontex Launches Internal Inquiry into Incidents Recently Reported by Media, available at: <https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-internal-inquiry-into-incidents-recently-reported-by-media-ZtuEBP> (12 January 2022).

<sup>21</sup> Council of Europe, Parliamentary Assembly, Pushback Policies and Practice in Council of Europe Member States, Resolution 2299 (2019), available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28074> (15 January 2022).

examination of the problem, a lack of monitoring and a failure to create prevention strategies.

The European Union, for its part, sought to address the issue of its external border control in various ways. By extending Frontex's mandate, the Union transformed it into the European Border and Coast Guard, so as to ensure European integrated border management.<sup>22</sup> It further issued the Sea Border Regulation, governing control of external sea borders, but also emphasising the importance of respecting the principle of *non-refoulement*.<sup>23</sup> The same guarantee was confirmed in the 2020 New Pact on Migration and Asylum.<sup>24</sup> In order to better monitor the extent of compliance with human rights, the European Union Agency for Fundamental Rights issued a report on the observance of human rights in the course of border control actions, stressing the problem of pushbacks, primarily on land borders, but also at sea.<sup>25</sup>

Finding a common response to address the issue of border control remains a challenge for the European Union. This challenge will also include finding an appropriate scheme of cooperating with third states. As confirmed in the New Pact on Migration and Asylum, such cooperation is considered necessary for tackling migration flows, but the experience of cooperating primarily with Libya and Turkey has shown practical problems which must be addressed in the future.

### 3. HUMAN RIGHTS CONSIDERATIONS

#### 3.1. Jurisdictional Issues: Extraterritorial Application of Human Rights

The practice of pushbacks affects a number of human rights of migrants. However, for migrants to enjoy human rights guaranteed by the human rights treaties, it must first be established whether they are under the jurisdiction of a particular state. It is not disputed that such jurisdiction exists if migrants find themselves in the territorial sea of the state in question. Pushbacks, however, may occur in situations where migrants have not yet reached the territorial sea

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<sup>22</sup> Regulation 2016/1624, 14 September 2016.

<sup>23</sup> Regulation 656/2014, 15 May 2014.

<sup>24</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC\\_3&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC_3&format=PDF) (20 January 2022).

<sup>25</sup> European Union Agency for Fundamental Rights, *Fundamental Rights Report 2020*, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-fundamental-rights-report-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-report-2020_en.pdf) (22 January 2022).



of the coastal state and the very purpose of pushbacks is that they never do. This is why it is necessary to establish whether migrants are entitled to enjoy human rights in situations where they find themselves on the high seas or in the waters under the jurisdiction of third states.

As we shall mainly focus on the European Convention on Human Rights in the present analysis, the starting point in determining the operation of the guaranteed human rights is Article 1 of the Convention, which reads: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.<sup>26</sup> Therefore, the crucial issue regarding the state’s human rights obligations is to determine the realm of the state’s jurisdiction.

The approach of the European Court of Human Rights with regard to establishing the meaning of “jurisdiction” has “not been distinguished by either the clarity of its reasoning, or its consistency”.<sup>27</sup> In *Banković*, the Court took a narrow view regarding the state’s jurisdiction, limiting it primarily to a territorial one.<sup>28</sup> The Court, however, did not exclude the possibility of a state exercising extraterritorial jurisdiction. It found that “international law does not exclude a State’s exercise of jurisdiction extra-territorially”, but that “suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States”.<sup>29</sup> In addition to the mentioned instances of extraterritorial jurisdiction, the Court found in *Al Skeini* that a state’s jurisdiction may extend to cases in which the state exercises effective control over an area of territory abroad, or when its agents exercise effective control over an individual abroad.<sup>30</sup> If the personal model of jurisdiction, confirmed in *Al Skeini*, complements the spatial model, it seems that the state’s jurisdiction, according to the European Court of Human Rights, is not as narrow as might have been derived from *Banković*.

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<sup>26</sup> European Convention on Human Rights and Fundamental Freedoms, 1950, Article 1, available at: [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) (10 October 2021).

<sup>27</sup> Borelli, S.; Stanford, B., *supra* note 6, p. 41.

<sup>28</sup> *Banković and Others v. Belgium and Others*, App. No. 52207/99 (ECtHR, Decision on Admissibility of 12 December 2001), para. 59.

<sup>29</sup> *Banković*, para. 59.

<sup>30</sup> *Al Skeini and Others v. The United Kingdom*, GC, App. No. 55721/07 (ECtHR, Judgement of 7 July 2011), paras. 133-140. See also *Öcalan v. Turkey*, GC, App. No. 46221/99 (ECtHR, Judgement of 12 May 2005), para. 91.

The European Court of Human Rights is not the only body confirming the personal model of jurisdiction. The Human Rights Committee, monitoring the implementation of the International Covenant on Civil and Political Rights, has taken the same stance. In its General Comment No. 31, the Committee observed that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”.<sup>31</sup> In its General Comment No. 36, the Committee complemented the personal model with an impact approach,<sup>32</sup> and, referring specifically to the right to life, stated that a state’s jurisdiction extends to “persons located outside any territory effectively controlled by the state, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner”.<sup>33</sup>

In the context of exercising jurisdiction over ships on the high seas, the application of the personal model of jurisdiction seems to be undisputed in the practice of the European Court of Human Rights. In the case of *Medvedyev v. France*, the Court dealt with the issue of jurisdiction over a foreign ship on the high seas. The Court found that France “exercised full and exclusive control” over the Cambodian ship *Winner* and its crew, “from the time of its interception...until they were tried in France” and that “the applicants were effectively within France’s jurisdiction for the purposes of article 1 of the Convention”.<sup>34</sup>

Two years later, in 2012, the Court reached a landmark decision in *Hirsi Jamaa v. Italy*. In that case, the Court dealt with the interception of a migrant ship by the Italian warship off the coast of Lampedusa, on the high seas, within the Maltese search and rescue area of responsibility. Migrants were taken on board the Italian ship and were returned to Libya, from where they had departed. Italian authorities did not try to identify individuals on board the ship, nor did they inform them of the destination towards which they were heading. The Court concluded that “in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities,

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<sup>31</sup> Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 1326, 29 March 2004.

<sup>32</sup> Papastavridis, E., *The European Convention of Human Rights and Migration at Sea: Reading the “Jurisdictional Threshold” of the Convention under the Law of the Sea Paradigm*, *German Law Journal*, vol. 21 (2020), special no. 3, p. 423.

<sup>33</sup> Human Rights Committee, General Comment No. 36: Article 6: Right to Life, CCPR/C/GC/36, 03 September 2019. See *infra* notes 42 and 43.

<sup>34</sup> *Medvedyev and Others v. France*, GC, App. No. 3394/03 (ECtHR, Judgement of 29 March 2010), para. 67.

the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities”.<sup>35</sup>

In both *Medvedyev* and *Hirsi Jamaa*, the Court found that the jurisdiction of France and Italy respectively existed in situations in which individuals were taken on board the vessels which conducted an interception action. However, the question arises about whether the same reasoning could be applied in cases where an interception does not include boarding vessels of the intercepting states. The Court dealt with this in *Xhavara and Others v. Italy and Albania*. This case dealt with an incident in which the Albanian applicants were trying to enter Italy illegally when their boat sank after a collision with an Italian warship, whose crew was attempting to board and search the vessel. Although the Court dismissed all the claims against both Italy and Albania, it did not contest the jurisdiction of Italy and the applicability of the European Convention on Human Rights.<sup>36</sup>

In all of the above cases, there was some kind of physical contact between the vessel carrying migrants and the intercepting vessel. However, what if there is no contact at all between the two? What if a warship safeguards the state border without intervening or acquiring any contact with the migrant vessel? The situation is less clear in such cases. Some authors suggest that there is not much difference between migrants drowning in the territorial sea of a particular state or outside that territorial sea if in both cases drowning is the result of that state’s policy and the way in which border controls are carried out.<sup>37</sup> Such a standpoint is problematic in the sense that state responsibility may not be invoked every time something happens as a result of a state’s policy. Nevertheless, it seems that there is a general tendency in international jurisprudence to subsume under the state’s jurisdiction acts which are caused by state actions, even if there is no physical contact between state agents and the vessels concerned. To that effect, we may recall the *M/V Norstar* judgment of 2019, in which the International Tribunal for the Law of the Sea, while discussing the freedom of navigation, found that “acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation” and that “acts falling short of enforcement action on the high seas could be relevant in terms of breach

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<sup>35</sup> *Hirsi Jamaa*, para. 81.

<sup>36</sup> *Xhavara and Others v. Italy and Albania*, No. 39473/98 (ECtHR, Decision on Admissibility of 11 January 2001), Information Note No. 26 on the Case-law of the Court, available at: [https://www.echr.coe.int/documents/clin\\_2001\\_01\\_26\\_eng\\_815318.pdf](https://www.echr.coe.int/documents/clin_2001_01_26_eng_815318.pdf) (8 March 2022).

<sup>37</sup> Spijkerboer, T., *Moving Migrants, States and Rights*, *Human Rights and Migrant Deaths, Law and Ethics of Human Rights*, vol. 7 (2013), no. 2, p. 226.

of...[freedom of navigation], if such acts produce some ‘chilling effect’”.<sup>38</sup> It further added that “any act which subjects activities of a foreign ship on the high seas to the jurisdiction of the states other than the flag state constitutes a breach of the freedom of navigation, save in exceptional circumstances provided for in the Convention or in other international treaties”.<sup>39</sup> The Tribunal thus found that an act producing a “chilling effect” may trigger a state’s jurisdiction. If such reasoning applies in the context of pushbacks, any “stopping or the diversion of the vessel”, as well as “placing the warship at its route”, may be considered an act producing a chilling effect and may consequently trigger the state’s jurisdiction.<sup>40</sup>

The same tendency of attributing to states responsibility for actions not involving physical contact may be observed in the 2021 Human Rights Committee decision in *A.S., D.I., O.I. and G.D. v. Italy and Malta*. The case involved a migrant vessel located on the high seas, within Malta’s search and rescue area, which made a distress call to the Italian Maritime Rescue Coordination Centre. Although an Italian navy ship was in the vicinity of the migrant vessel at that time, Italy tried to pass responsibility to Malta and it intervened only after Malta’s request many hours later, when the migrant vessel had already capsized and many passengers had drowned. Italy and Malta each claimed lack of jurisdiction, but the Human Rights Committee, on the contrary, found that the vessel was within the jurisdiction of both states. The Committee noted that, although none of the violations occurred on board a vessel hoisting Malta’s flag, Malta did exercise effective control over the rescue operation, since the incident occurred in its search and rescue area of responsibility.<sup>41</sup> In relation to Italy, the Committee found that “a special relationship of dependency had been established between the individuals on the vessel in distress and Italy”, and that “the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities”.<sup>42</sup> For these reasons, the Committee concluded that both Malta and Italy had jurisdiction in the given case, even if there was no physical contact at the time of the incident between their vessels and the migrant vessel.

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<sup>38</sup> *M/V Norstar (Panama v. Italy)*, Case No. 25 (ITLOS, Judgment of 10 April 2019), paras. 222-223.

<sup>39</sup> *M/V Norstar*, para. 224.

<sup>40</sup> Papastavridis, E., *supra* note 32, p. 429.

<sup>41</sup> The complaint was, however, found inadmissible for the failure to exhaust domestic remedies. Human Rights Committee, Decision adopted by the Committee under the Optional Protocol, concerning Communication No. 3043/2017, CCPR/C/128/D/3043/2017, 27 January 2021, para. 6.7, 6.9.

<sup>42</sup> Human Rights Committee, Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No. 3042/2017, CCPR/C/130/D/3042/2017, 27 January 2021, para. 7.8.

### 3.2. The Principle of *Non-refoulement*

Any discussion involving the issue of the human rights of migrants inevitably departs from the principle of *non-refoulement*, that is, the prohibition of returning migrants to states in which they might be subjected to ill-treatment,<sup>43</sup> irrespective of whether the danger of fundamental rights violations emanates from state or non-state actors.<sup>44</sup>

Offering sanctuary to refugees who are in danger of deportation is not new, at least from a moral point of view.<sup>45</sup> However, in the 20<sup>th</sup> century it gained recognition through a number of legal instruments. The 1951 Convention Relating to the Status of Refugees provides in its Article 33(1): “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.<sup>46</sup> The only exception to this guarantee is a situation where there are “reasonable grounds for regarding [a refugee] as a danger to the security of the country” or if he “constitutes a danger to the community of ...[a] country” due to the fact that he has been “convicted by a final judgement of a particularly serious crime”.<sup>47</sup> In addition to the Refugee Convention, the prohibition of refoulement is contained in the Convention against Torture, which in its Article 3 provides: “No State Party shall expel, return (“refouler”) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture”.<sup>48</sup> In the same manner, the principle is implicit in Article 7 of the International Covenant on Civil and Political Rights,

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<sup>43</sup> This may include deprivation of life, cruel punishment, or child recruitment and participation in hostilities, regardless of whether the danger to the person is based on a discriminatory ground or not. See: Rodenhäuser, T., *The Principle of Non-refoulement in the Migration Context: 5 Key Points*, available at: <https://reliefweb.int/report/world/principle-non-refoulement-migration-context-5-key-points> (25 November 2021).

<sup>44</sup> If a danger emanates from persons or a group of persons who are not public officials, “it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection”. *H.L.R. v. France*, App. No. 24573/94 (ECtHR, Judgment of 29 April 1997), para. 40.

<sup>45</sup> Costello, C.; Mann, I., *Border Justice: Migration and Accountability for Human Rights Violations*, *German Law Review*, vol. 21 (2020), special no. 3, p. 316.

<sup>46</sup> Convention Relating to the Status of Refugees, 1951, Article 33(1), available at: <https://www.unhcr.org/3b66c2aa10> (27 November 2021).

<sup>47</sup> Refugee Convention, art. 33 (2).

<sup>48</sup> Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984, Article 3, available at: <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx> (27 November 2021).

which guarantees that “no one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment”.<sup>49</sup> This obligation refers equally to returning the person to the country in which he might be mistreated, as well as to any other country to which he subsequently may be returned and in which he might face the same treatment (so-called indirect or chain refoulement).<sup>50</sup>

Apart from these universal treaties, *non-refoulement* is guaranteed by a number of regional instruments, such as the European Convention on Human Rights,<sup>51</sup> the American Convention on Human Rights,<sup>52</sup> and the Convention Governing Specific Aspects of Refugee Problems in Africa.<sup>53</sup> At the European Union level, the principle of *non-refoulement* has been adopted in the Charter of Fundamental Rights of the European Union.<sup>54</sup> Today, it is commonly accepted that the principle of *non-refoulement* has acquired the status of customary international law.<sup>55</sup>

The field of application of the *non-refoulement* principle is broad and goes way beyond the protection of refugees alone. While the Convention on Refugees refers specifically to persons entitled to refugee status, other instruments, such as the Torture Convention or the European Convention on Human Rights, broaden the scope of the beneficiaries of this right to all persons who are in danger of

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<sup>49</sup> International Covenant on Civil and Political Rights, 1966, Article 7, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (30 November 2021).

<sup>50</sup> Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, para. 9.

<sup>51</sup> The principle of *non-refoulement* is implicit in the prohibition of torture. European Convention on Human Rights, 1950, Article 3, *supra* note 26. See also the case of *Hirsi Jamaa*, in which the Court found that Article 3 of the Convention implies the obligation of a state not to expel an individual to another state in which that individual might be subjected to ill-treatment. *Hirsi Jamaa*, para. 114.

<sup>52</sup> American Convention on Human Rights, 1969, Article 22(8), available at: [https://www.oas.org/dil/treaties\\_b-32\\_american\\_convention\\_on\\_human\\_rights.pdf](https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf) (22 November 2021).

<sup>53</sup> Convention Governing Specific Aspects of Refugee Problems in Africa, 1969, Article II(3), available at: [https://au.int/sites/default/files/treaties/36400-treaty-0005\\_-\\_oau\\_convention\\_governing\\_the\\_specific\\_aspects\\_of\\_refugee\\_problems\\_in\\_africa\\_e.pdf](https://au.int/sites/default/files/treaties/36400-treaty-0005_-_oau_convention_governing_the_specific_aspects_of_refugee_problems_in_africa_e.pdf) (22 November 2021).

<sup>54</sup> Charter of Fundamental Rights of the European Union, 2000, Articles 18 and 19, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT> (25 November 2021). See also: Directive 2013/32/EU; Regulation No. 656/2014.

<sup>55</sup> UNHCR, *The Principle of Non-refoulement as a Norm of Customary International Law, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, available at: <https://www.refworld.org/docid/437b6db64.html> (30 October 2021).

torture or other degrading treatment or punishment.<sup>56</sup> Since the prohibition of torture is a *jus cogens* norm, the prohibition of refolement “trumps not only national immigration laws, but also contradicting international obligations, such as under extradition treaties”.<sup>57</sup> Such legal regulation guarantees that the application of *non-refoulement* does not depend on the legal status of individuals, but rather on their vulnerabilities.<sup>58</sup>

The issue of the observance of *non-refoulement* arises in the context of push-back operations, when migrant boats are being diverted from reaching the territorial seas of particular coastal states. It must be emphasised here that observance of this principle does not mean that states are not entitled to control their borders or even to deport irregular immigrants.<sup>59</sup> They are not under an obligation to grant asylum either.<sup>60</sup> However, their treatment of migrants must conform to their human rights obligations, the principle of *non-refoulement* being one of them.<sup>61</sup> In practice, this means that “States should ensure admission of asylum-seekers, at least on a temporary basis, in order to carry out a fair and effective procedure to determine their status and protection needs”.<sup>62</sup>

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<sup>56</sup> *Supra* notes 47 and 50.

<sup>57</sup> Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Human Rights Council, A/HRC/37/50, 26 February 2018, p. 12.

<sup>58</sup> Note on Migration and the Principle of *Non-refoulement*, *International Review of the Red Cross*, 2018, available at: <https://international-review.icrc.org/sites/default/files/irrc-904-19.pdf> (25 November 2021).

<sup>59</sup> Borelli, S.; Stanford, B., *supra* note 6, p. 46.

<sup>60</sup> Article 14 of the Universal Declaration on Human Rights provides that “everyone has the right to seek and to enjoy asylum”. Universal Declaration of Human Rights, available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (2 December 2021). The 1967 Declaration on Territorial Asylum reproduces the content of Article 14 UDHR, providing further that “[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum”. Declaration on Territorial Asylum, available at: [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/2312\(XXII\)](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2312(XXII)) (2 December 2021). It derives from both of these documents that an individual possesses the right to “seek” asylum and not necessarily to be granted it. The granting of asylum remains under the discretionary power of each state.

<sup>61</sup> With respect to this, see the Schengen Border Code, which provides in its Article 3 that it shall apply “to any person crossing the internal or external borders of Member States, without prejudice to... the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*”. 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), *Official Journal of the European Union*, 2016, L 77/1.

<sup>62</sup> Note on Migration, *supra* note 55.

As outlined in the previous chapter, the jurisdiction of a state may extend to actions occurring outside its territory. It is therefore beyond doubt that a state is bound by the *non-refoulement* principle not only if it expels migrants from its own territory, but also if it “knowingly exposes an individual under or within its jurisdiction to a risk of violations of his or her fundamental rights at the hands of another state”.<sup>63</sup> In support of this understanding is the textual interpretation of the Refugee Convention. The French word “refouler”, as distinct from some other similar words, such as “return” or “expulsion”, was chosen with the intention of covering a broad range of situations, including those of rejection of migrants at borders.<sup>64</sup> The extraterritorial application of the *non-refoulement* principle has also been affirmed by the Committee against Torture, which found that “the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law”<sup>65</sup> and that such an interpretation of jurisdiction refers to all the provisions of the Torture Convention.<sup>66</sup> It seems that today the prevailing understanding of the *non-refoulement* principle is the one meaning “non-rejection at the border”, regardless of whether the attempted entry of migrants is legal or illegal.<sup>67</sup>

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<sup>63</sup> Borelli, S.; Stanford, B., *supra* note 6, p. 47. Some domestic courts have adopted a narrow approach to jurisdiction, limiting it to a territorial one. See: *Sale v. Haitian Centers Council*, in which the US Supreme Court found that Article 33(2) of the Refugee Convention implied *non-refoulement*, guaranteed in Article 33(1), did not have an extraterritorial effect. If it were not so, “an absurd anomaly” would, according to the Court, be created, in the sense that “dangerous aliens in extraterritorial waters would be entitled to 33.1’s benefits because they would not be in any ‘country’ under 33(2), while dangerous aliens residing in the country that sought to expel them would not be so entitled”. *Sale, Acting Commissioner, Immigration and Naturalization Service et al. v. Haitian Centers Council, Inc. et al.*, 509 U.S. 155 (1993), p. 156.

<sup>64</sup> Moreno-Lax, V., Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees, *European Journal of Migration and Law*, vol. 10 (2008), no. 3, p. 333; Oudejans, N.; Rijken, C.; Pijnenburg, A., Protecting the EU External Borders and the Prohibition of Refoulement, *Melbourne Journal of International Law*, vol. 19 (2018), no. 2, p. 618.

<sup>65</sup> Committee Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2.

<sup>66</sup> *J.H.A. v. Spain*, CAT/C/41/D/323/2007, UN Committee Against Torture, 21 November 2008, available at: <https://www.refworld.org/casesCAT4a939d542.html> (3 December 2021).

<sup>67</sup> Trevisanut, S., The Principle of *Non-refoulement* and the De-territorialization of Border Control at Sea, *Leiden Journal of International Law*, vol. 27 (2014), no. 3, pp. 673–674.



In a situation where migrants are intercepted at a state border, it needs to be assessed whether each of those individuals faces a risk of maltreatment in the country they are being returned to. Assessing the possibility of such treatment depends on various factors. The question arises about whether the general situation in that particular country, such as the existence of a state of war or internal disturbances, suffices for proving a real risk of ill-treatment. In addition, the question is whether individuals must prove that they will certainly be maltreated upon their return, or is it enough to prove that they will likely or possibly be maltreated?

It appears that with regard to assessing the grounds for *non-refoulement*, both personal circumstances and the general situation in the country of deportation must be taken into consideration.<sup>68</sup> While the European Court of Human Rights found that the mere possibility of ill-treatment “on account of an unsettled situation in the receiving country does not give rise to a breach of Article 3 [of the European Convention on Human Rights]”,<sup>69</sup> the existence of such a situation should nevertheless be taken into consideration.<sup>70</sup> In addition to the assessment of the general situation, personal circumstances should be taken into account as well. It is, therefore, required that the risk of ill-treatment be “foreseeable, personal, present and real”.<sup>71</sup> This means that circumstances, such as age, gender, psychological conditions, affiliation to a political party or other organisations are relevant factors in making the assessment.<sup>72</sup> Specifically, if an individual proves that he is a member of a group that is systematically exposed to ill-treatment, no further special distinguishing features need to be established.<sup>73</sup>

Even though both the general situation in the receiving state and the personal circumstances of an individual must – in principle – be taken into consideration, the Court has not “excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention”.<sup>74</sup> The Court has emphasised, however, that such an approach would be adopted “only in the most extreme cases of general violence, where

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<sup>68</sup> *Hirsi Jamaa*, para. 117.

<sup>69</sup> *Saadi v. Italy*, GC, App. No. 37201/06 (ECtHR, Judgment of 28 February 2002), para. 131.

<sup>70</sup> *Saadi v. Italy*, para. 130.

<sup>71</sup> General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, Committee against Torture, CAT/C/GC/4, 4 September 2018, available at: [https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4\\_EN.pdf](https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf) (5 December 2021).

<sup>72</sup> Borelli, S.; Stanford, B., *supra* note 6, p. 49.

<sup>73</sup> *Saadi v. Italy*, para. 132.

<sup>74</sup> *NA v. the United Kingdom*, App. No. 25904/07 (ECtHR, Judgment of 17 July 2008), para. 115.

there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return”.<sup>75</sup>

A person claiming to be jeopardised in the country of return is entitled to an effective remedy – a right that is provided by a number of human rights instruments.<sup>76</sup> In the context of *non-refoulement*, this means that persons claiming to be in danger upon return to a particular country have the right to have their claim examined before an independent body. An effectiveness requirement here does not imply a favourable outcome for the applicant.<sup>77</sup> It only means that a fair and effective procedure needs to be carried out to determine the status and protection needs of that individual.<sup>78</sup> Until a final decision is reached, the person’s return must be suspended.<sup>79</sup>

### 3.3. The Prohibition of Collective Expulsions

Apart from *non-refoulement*, another similar yet distinct issue came to the fore, and that is the prohibition of collective expulsions, provided by Article 4 of Protocol 4 to the European Convention on Human Rights. The very short provision of the said Article 4 merely states that “collective expulsion of aliens is prohibited”.<sup>80</sup>

Collective expulsion is considered to be “any measure compelling aliens, as a group, to leave the country, except where such a measure is taken based on a reasonable and objective examination of the particular case of each individual alien of the group”.<sup>81</sup> Collective expulsion, therefore, takes place if an individual forming part of a group has not been given an opportunity to challenge his expulsion before the competent authorities. If, however, the individual has been given that opportunity, the fact that a number of aliens have been issued with similar decisions does not constitute collective expulsion.<sup>82</sup>

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<sup>75</sup> *NA v. the United Kingdom*, para. 115.

<sup>76</sup> Several human rights instruments provide the right to an effective remedy. See, for instance, ICCPR, Article 2(3), or ECHR, Article 13.

<sup>77</sup> *Hirsi Jamaa*, para. 197.

<sup>78</sup> Note on migration, *supra* note 55, p. 10.

<sup>79</sup> Rodenhäuser, T., *supra* note 42.

<sup>80</sup> For more on the prohibition of collective expulsions, see: Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of Collective Expulsions of Aliens, 31 August 2021, available at: <https://www.refworld.org/cases,CAT,4a939d542.html> (3 December 2021).

<sup>81</sup> *Khlaifia and Others v. Italy*, GC, App. No. 16483/12 (ECtHR, Judgment of 15 December 2016), para. 237.

<sup>82</sup> *Alibaks and Others v. the Netherlands*, Application No. 14209/88.

The difference between the prohibition of collective expulsions and the prohibition of *non-refoulement* lies in the former being a bar against a state returning aliens without appropriate procedural guarantees, regardless of who the aliens are and what their prospects are upon return. On the other hand, *non-refoulement* is a safeguard against the return of an individual who might be ill-treated upon his return to the country of departure or to the country to which he may subsequently be returned. Therefore, the prohibition of collective expulsion represents a procedural right, while the prohibition of *non-refoulement* is a material right, with a substantive content.<sup>83</sup>

In *Hirsi Jamaa*, the European Court of Human Rights was faced for the first time with the task of determining the existence of collective expulsion in a situation where the removal took place on the high seas, that is, outside the state's territory. The Court thus had to determine whether "expulsion" referred exclusively to expulsions from the national territory, or whether a collective expulsion could be considered a form of extraterritorial exercise of jurisdiction. Although the Court affirmed that most usually expulsions are conducted from the state's territory, it found that exceptionally a state may conduct collective expulsion by exercising its jurisdiction extraterritorially. This is precisely what happened in the given case. The applicants, who were intercepted on the high seas by an Italian vessel, were returned to Libya without being given the opportunity to challenge the decision on their removal before the competent authorities of Italy. Italy was thus found responsible for a breach of Article 4 of Protocol 4 to the European Convention on Human Rights.

The Court has confirmed its conclusions from *Hirsi Jamaa* in its subsequent decisions, in particular in *Sharifi and Others v. Italy and Greece*, in *Khlaifia and Others v. Italy*, and in *N.D. and N.T. v. Spain*. The latter case, although different from *Hirsi Jamaa* because the acts in question took place on Spanish territory, was particularly important in interpreting Article 4 of Protocol 4 with regard to situations in which migrants "attempt to enter a Contracting State in an unauthorized manner by taking advantage of their large numbers".<sup>84</sup> In *N.D. and N.T. v. Spain*, after the Chamber of the European Court of Human Rights found Spain responsible for a violation of Article 4 of Protocol 4, the case was referred to the Grand Chamber, which in its judgement of 2020 ruled that no such violation occurred. The Grand Chamber did not contest that the actions against the migrants constituted collective expulsions and that no examinations of individual cases took

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<sup>83</sup> Trevisanut, S., *supra* note 64, p. 342.

<sup>84</sup> *N.D. and N.T. v. Spain*, GC, App. Nos. 8675/15, 8697/15 (ECtHR, Judgment of 13 February 2020), para. 78.

place. However, it found that the lack of such examinations was due to the personal conduct of the migrants. According to the Court, Spain could not be held responsible for a violation of Article 4 of Protocol 4, since there was “a lack of active cooperation with the procedure for conducting an individual examination of the applicants’ circumstances”.<sup>85</sup> A state, for its part, has to prove that it had provided “genuine and effective access to means of legal entry, in particular border procedures”.<sup>86</sup> In the case at hand, the Court was of the opinion that such procedures did exist. If, however, an individual did not use these procedures, “it has to be considered whether there were cogent reasons not to do so which were based on objective facts for which the state was responsible”.<sup>87</sup> The given decision, thus, removes the focus from the protection that needs to be granted to migrants, to proving state responsibility. The “guilty conduct” exclusionary clause implies that migrants will be excluded from the scope of the protection of the Convention if “for some circumstances not directly attributable to the state, they did not have the possibility of accessing the legal channels for entering”, even if the migrants themselves were not responsible for those circumstances either.<sup>88</sup> The Court has created a dangerous precedent by reasoning this way. It failed to take into consideration the objective practical difficulties that migrants face when entering a particular state.<sup>89</sup> It narrows down their protection and makes it possible for migrants to be excluded from “the scope of protection of the Convention for the mere fact of having committed the administrative offence of attempting to enter Spain without authorization”.<sup>90</sup>

The *N.D. and N.T. v. Spain* decision, as expected, had an impact on other bodies. In its Working Group report, Frontex asked the European Commission how to reconcile the above judgment with other existing legal provisions,<sup>91</sup> that

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<sup>85</sup> *N.D. and N.T. v. Spain*, para. 200.

<sup>86</sup> *N.D. and N.T. v. Spain*, para. 209.

<sup>87</sup> *N.D. and N.T. v. Spain*, para. 201.

<sup>88</sup> Sanz, L. A., Deconstructing Hirsi: The Return of Hot Returns, *European Constitutional Law Review*, vol. 17 (2021), no. 2, p. 346.

<sup>89</sup> Wissing, R., Push Backs of “Badly Behaving” Migrants at Spanish Border are not Collective Expulsions (but Might still be Illegal Refoulements), 25 February 2020, available at: <https://strasbourgobservers.com/2020/02/25/push-backs-of-badly-behaving-migrants-at-spanish-border-are-not-collective-expulsions-but-might-still-be-illegal-refoulements/> (10 December 2021).

<sup>90</sup> Sanz, L. A., *supra* note 85, p. 348.

<sup>91</sup> Specific reference was made to Regulation (EU) 656/2014; special circumstances following the agreement between the EU and Turkey (on the readmission of persons residing without authorisation) of 2014 and the EU-Turkey statement of 2016. See: Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Final Report of

is, when may it refuse access to individual asylum claims when people move collectively?<sup>92</sup> In addition, the Grand Chamber decision had an impact on the Spanish Constitutional Court ruling on the constitutionality of the reform of the Immigration Act, which legalised pushbacks of aliens who attempt to cross the borders of Ceuta and Melilla in an unauthorised manner. Relying on the *N.D. and N.T. v. Spain* decision, the Constitutional Court found that the disputed act is not in contradiction with the Constitution if certain requirements, such as the existence of a border crossing point and the possibility of applying for international protection, are met.<sup>93</sup>

### 3.4. The Right to Life

States' obligations while tackling border control situations and irregular migration include the protection of yet another essential right of migrants – the right to life, which is guaranteed by various international documents, such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Charter of Fundamental Rights. The right to life has both positive and negative aspects. As provided by Article 2 of the European Convention on Human Rights, deprivation of life is forbidden, “save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”.<sup>94</sup> But the right to life also “lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction”.<sup>95</sup> In the same vein, the Human Rights Committee, interpreting the right to life, as provided by the International Covenant on Civil and Political Rights, highlighted that the protection of the right to life “requires that states adopt positive measures”.<sup>96</sup> So what does this positive obligation entail?

First of all, under the law of the sea, each state has an obligation to assist persons in distress at sea. Under the Law of the Sea Convention, this obligation is twofold: on the one hand, masters of ships flying a flag of a particular

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the Frontex Management Board Working Group, 1 March 2021, available at: [https://frontex.europa.eu/assets/Key\\_Documents/MB\\_Documents/Agenda\\_Point\\_WG\\_FRaLO\\_final\\_report.pdf](https://frontex.europa.eu/assets/Key_Documents/MB_Documents/Agenda_Point_WG_FRaLO_final_report.pdf) (15 December 2021).

<sup>92</sup> Keady-Tabbal, M.; Mann, I., “Pushbacks” as Euphemism, 14 April 2021, available at: <https://www.ejiltalk.org/pushbacks-as-euphemism/> (17 December 2021).

<sup>93</sup> Sanz, L. A., *supra* note 85, p. 349.

<sup>94</sup> Art. 2 para. 1 ECHR.

<sup>95</sup> *Öneryilzid v. Turkey*, App. No. 48939/99 (ECtHR, Judgment of 30 November 2004), para. 71.

<sup>96</sup> UN Human Rights Committee, General Comment No. 6, 1982, para. 5.

state are required to render assistance to persons found at sea and in danger of being lost, provided they can do so without endangering their ship, crew or passengers, and, on the other hand, states are required to establish search and rescue services regarding safety at sea.<sup>97</sup> Similar obligations are provided by the SOLAS Convention and the SAR Convention, as well as its 2004 amendments.<sup>98</sup> Legal rules aimed at safeguarding lives at sea, therefore, do exist, although they are in some respects insufficiently clear. Even where they do not lack clarity, their application in the context of the Mediterranean has been subject to criticism.<sup>99</sup>

The protection of the right to life has also been observed in the context of suppressing the smuggling of migrants. In that respect, the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, firstly places an obligation on states to criminalise the smuggling of migrants and other acts committed with the purpose of enabling such smuggling, and in addition requires that states parties take all appropriate measures to preserve and protect the rights of persons who have been the object of criminalised conduct, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.<sup>100</sup>

It is most usually the case that migrant lives are in jeopardy as soon as they embark on a vessel heading for Europe. Travel conditions are unsafe, boats are overcrowded, life jackets are lacking, supplies of fuel, water and food are limited, and there might be no navigation and communication tools. Given such conditions, it is no surprise that incidents during sea crossings may end with

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<sup>97</sup> United Nations Convention on the Law of the Sea, 1982, Article 98, available at: [https://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) (17 December 2021).

<sup>98</sup> International Convention for the Safety of Life at Sea (SOLAS), 1974, Annex, Regulation V/33, V/7, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201184/volume-1184-I-18961-English.pdf> (17 December 2021); International Convention on Maritime Search and Rescue (SAR), 1979, Annex, Chapter 2, 2.1.10, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf> (17 December 2021).

<sup>99</sup> Hidden Emergency: Migrant Deaths in the Mediterranean, Human Rights Watch, 16 August 2012, available at: <https://www.hrw.org/news/2012/08/16/hidden-emergency> (20 December 2021).

<sup>100</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000, Articles 6 and 16, available at: [https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM\\_Protocol\\_English.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf) (20 December 2021).

fatal consequences.<sup>101</sup> But it is not only due to these conditions that migrants might lose their lives. Incidents resulting in death may occur during rescue operations as well, especially when migrants are being transferred to the rescue vessel.<sup>102</sup> As for the coast guard members or other officers conducting the rescue operations, they are required to use lethal force against migrants only “in the most extreme situations”, to protect lives.<sup>103</sup>

#### 4. CONCLUDING REMARKS

For almost two decades, states, scholars and judicial bodies have intensively been discussing problems arising from migratory flows on the Mediterranean and have sought how to best reconcile border control measures with human rights imperatives. States mostly affected by sea migration, such as Italy, Greece, Malta and Spain, along with the European Union, have undertaken numerous rescue operations resulting in saving the lives of migrants. But they have also taken even more measures to prevent migrant boats from reaching their territory. Encouraged by the fact that states themselves have discretionary power to decide on who enters their territory, they have conducted pushback operations, achieving what they aimed for – a reduced number of sea crossings.

After the *Hirsi Jamaa* decision, it seemed that pushbacks would stop. But they did not. States have continued to undertake them, and have also found alternative ways of performing them. By concluding agreements with third states and providing those states with financial and operational means, they replaced pushbacks with pullbacks – which are the other side of the coin.

Despite the fact that it was widely known, and often reported by various actors, mostly by NGOs, that pushbacks were being conducted, the states involved in such practices tended to deny them. Such denial prevented proper investigations and was thus negative, but it signified the awareness of states that pushbacks are harmful and illegal. What is worrisome, though, is that currently there are tendencies by certain European Union Member States to legalise pushbacks,

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<sup>101</sup> Fundamental Rights at Europe’s Southern Sea Borders, European Union Agency for Fundamental Rights, available at: [https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13\\_en.pdf](https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf) (21 December 2021).

<sup>102</sup> Fundamental Rights at Europe’s Southern Sea Borders, *supra* note 98.

<sup>103</sup> Wauters, E.; Cogolati, S., Crossing the Mediterranean Sea: EU Migration Policies and Human Rights, in: Mitsilegas, V.; Moreno-Lax, V.; Vavoula, N. (eds.), *Securitising Asylum Flows*, Brill-Nijhoff, Leiden /Boston, 2020, p. 108.

justifying such incentives by the need to adapt to “new realities”.<sup>104</sup> Should this happen, it would mean neglecting a number of human rights to which states are bound either by treaties to which they are parties, or by customary international law. However, preventing the legalisation of pushbacks should be just the first step, not the final goal. Viable solutions for reconciling border control measures with human rights obligations should further be sought. Until these solutions are found, pushbacks will continue to be a part of states’ policies, either openly or covertly.

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**Sažetak:**

**ODVRAĆANJA MIGRANATA NA SREDOZEMNOM MORU –  
IZMEĐU MJERA ZAŠTITE DRŽAVNIH GRANICA I OBVEZE  
POŠTOVANJA LJUDSKIH PRAVA**

*U radu se analizira praksa odvracanja migranata na Sredozemnom moru u posljednjih desetak godina, i to kroz prizmu, s jedne strane, zaštite sigurnosnih interesa država i, s druge strane, obveze država na zaštitu ljudskih prava. Analiza sadržaja nekih temeljnih ljudskih prava – u prvom redu prava na život, zabranu refoulementa te zabranu kolektivnih protjerivanja stranaca – i njihova primjenjivost u kontekstu operacija odvracanja na moru ukazuje na to kako je praktički nemoguće provoditi operacije odvracanja, a da se istodobno postupa u skladu sa standardima zaštite ljudskih prava. Čini se kako su države Sredozemlja, kao i Europska unija, napravile puni krug – od talijanskog programa odvracanja iz 2009. godine, preko odluke Europskog suda za ljudska prava u predmetu Hirsi Jamaa protiv Italije te naknadne prakse zamjene operacija odvracanja operacijama povlačenja (pullbacks), do ponovnih sustavnih odvracanja migranata. Potrebno je i dalje tražiti na razini Europske unije zadovoljavajuće i održivo rješenje jer dokle god se to ne postigne, države koje su na prvoj liniji priljeva migranata zasigurno će dati prednost svojim sigurnosnim interesima, nauštrb zaštite ljudskih prava.*

**Ključne riječi:** *odvracanja; migracije na moru; uzapćenje; non-refoulement; kolektivna protjerivanja stranaca; pravo na život; ljudska prava; Sredozemno more; Europski sud za ljudska prava.*