" Pushback-ovi" kao postupanja na granicama suprotna međunarodnom i europskom pravu

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PUSHBACKS AS BORDER PRACTICES CONTRARY TO INTERNATIONAL AND EUROPEAN UNION LAW

Master Thesis

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Authenticity statement

I, *Lana Trampuž*, declare that my master thesis named "Pushbacks as Border Practices Contrary to International and European Union Law" is an original result of my own work and that no sources other than the ones cited in my thesis have been used in writing it.

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SAŽETAK

Pushback je nepravni pojam čiju korelaciju pronalazimo u kolektivnom protjerivanju koje je apsolutno zabranjeno europskim i međunarodnim pravom. Pushback obuhvaća različite državne mjere koje su usmjerene na udaljavanje stranaca sa državnog teritorija, te ih se na takav način onemogućava u ostvarivanju njihovih prava propisanih relevantnim odredbama. Najveća opasnost koja se povezuje s pushback-om je opasnost od refoulement-a. Europski sud za ljudska prava počeo je razvijati praksu u smjeru relativizacije apsolutne zabrane kolektivnog protjerivanja, navodeći da je kolektivno protjerivanje dozvoljeno pod točno određenim uvjetima.

Ključne riječi: Pushback – Kolektivno protjerivanje – Načelo non-refoulement zaštićeno europskim i međunarodnim pravom – Europski sud za ljudska prava – Granična postupanja

SUMMARY

Pushback is a non-legal term for collective expulsion which is absolutely prohibited under EU and International law. The term entails a variety of state measures aimed at forcing aliens out of their territory while obstructing access to an applicable legal and procedural framework. The highest risk associated with pushbacks is the risk of refoulement. The recent case law of the European Court of Human Rights has turned the absolute prohibition into a relative one by suggesting that collective expulsion can be legal in certain circumstances and under the conditions prescribed by the Court

Keywords: Pushback - Collective expulsion - Principle of non-refoulement protected by EU and International law - European Court of Human Rights - Border practices

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1. INTRODUCTION

The number of third-country nationals who are trying to reach the borders of the European Union (EU) is rising globally. The third-country nationals fall under the group in which they have only a limited set of rights by EU law.[1] They are not considered Union citizens which have an extensive set of free movement rights.[2] The migration of third-country nationals into the EU is only partly harmonized at the EU level. This policy area is still under strong national influence and regulatory powers, with considerable regulatory differences among the EU Member States.[3] High standards for human rights are mandated under EU legislation. In EU primary law in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU), it is stated: "the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 Relating to the status of refugees and other relevant treaties."[4] Also Article 18 of the Charter of Fundamental Rights of the European Union[5] (The Charter) and its secondary legal acts, are providing a legally binding commitment to respect the Geneva Convention. Migration law in the EU involves the interaction of EU Member States' national laws, EU regional law, and international law.

Approximately 258 million people, or roughly 3% of the world's population, live

[1] Goldner Lang, Iris, The European Union and Migration: An Interplay of National, Regional and International Law, American Journal of International Law (AJIL) Unbound, *vol.* 111, 2018, p. 509.
[2] *Ibid.*
[3] *Ibid.*, p. 511.
[4] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012.
[5] The Charter of Fundamental Rights of the European, Union, Official Journal, 2012/C 326/02.

outside their State of the origin or habitual residence.[6] As noted in the UNHCR's report: "While the vast majority of migrants move through safe and regular pathways, increasingly restrictive and obstructive migration laws, policies and practices of States have pushed growing numbers of migrants outside official immigration and admission procedures and towards irregular routes and methods marked by lack of transparency and oversight, corruption, violence, and abuse."[7] The EU Member States employed a variety of methods to prevent migrants and refugees from entering their territories or from pursuing the asylum process. One example is strict visa regimes, but for irregular migrant arrivals, they even started to physically prevent those arrivals whether through border closures, fences, or pushback operations. Irregular migrants experience increased uncertainty, violence, danger, and abuse, including an escalating prevalence of torture and ill-treatment by State officials and non-State actors.[8]

The main hypothesis of this paper is that despite the fact that EU law and international law have an absolute ban on collective expulsion, the recent case law of the European Court of Human Rights (the Court) has turned the absolute prohibition into a relative one by suggesting that collective expulsion can be legal in certain circumstances and under the conditions prescribed by the Court.

What is collective expulsion and how is it connected to term pushback? What does the practice of pushbacks entail? Do the Geneva Convention, ECHR, and EU law allow collective expulsion? This master thesis will analyse EU primary and secondary law, the Geneva Convention as the most important international law document related to the protection of

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[6] UNHRC, Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, A/HRC/37/50, 26 February 2018, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiQtKXhkbL6AhV1hP0HHedoC4oQFnoECA0QAQ&url=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2FHRBodies%2FHRC%2FRegularSessions%2FSession37%2FDocuments%2FA_HRC_37_50_EN.docx&usg=AOvVaw3G8XB-32lvvm3x6fEKJdmY> accessed 22 September 2022, para. 6

[7] *Ibid.*, para. 8

[8] *Ibid.*, para. 9

refugees, and relevant provisions of the European Convention on Human Rights (ECHR). It will argue what the case law of the Court is saying in its judgements prior to case *N.D. and N.T. v Spain* and subsequent to it.

The thesis will be divided into five sections. Following the introduction, the second section will explain general terms connected to this thesis and give an overview of two legal orders which are regulating pushbacks. First, the references to EU law are presented through the relevant provisions of the Charter of Fundamental Rights and other important provisions related to pushbacks in its primary and secondary law. Second, references to the Council of Europe legal system are primarily related to the ECHR. Also, an overview of the main Geneva Convention provisions will be discussed. The third section will explain what all Member States have committed themselves and how it is connected with the deterioration of human rights standards and Member State's practices connected to pushbacks. In the fourth section, attention will be given to the case law of the European Court of Human Rights and how the Strasbourg Court ruled in cases concerning pushbacks prior to and subsequent to the judgment in case *N.D. and N.T. v Spain*. The concluding section will end with a summary of the main findings.

2. PUSHBACKS IN THE EUROPEAN AND INTERNATIONAL LEGAL FRAMEWORK

2.1. Legal Term for Pushback

EU law and international law do not have provisions concerning pushback. Pushback is a non-legal term, which entails a variety of state measures aimed to force refugees and migrants to go out of their territory while obstructing access to applicable legal and procedural frameworks.[9] As noted in the report of Ms. Tineke Strik "(…) refusals of entry and expulsions without any individual assessment of protection needs have become a documented phenomenon at Europe's borders, as well as on the territory of Member States further inland. As these practices are widespread, and in some countries systematic, these "pushbacks" can be considered as part of national policies rather than incidental actions".[10]

As pushback cannot be found under EU law and international law, the question is what is the legal term for pushback? It is collective expulsion.

Collective expulsion is absolutely prohibited by all major international human rights treaties, and this ban is considered to have acquired the status of customary international law, which made it binding for all states.[11] It is also prohibited by EU law. The absolute prohibition will be demonstrated later in the text's subchapter "Legal structure". There is no defining provision of collective expulsion, therefore we need to rely on the case law of the European Court of Human Rights to provide an explanation for the term. Collective expulsion is to be

[9] European Center for Constitutional and Human Rights, Term Pushback, <https://www.ecchr.eu/en—/glossary/push-back/> accessed 20 June 2022

[10] Council of Europe, Parliamentary Assembly, Pushback policies and practice in Council of Europe member States, Doc. 14909, 8 June 2019, para. 1

[11] Giljević, Teo; Holjevac, Tatjana; Kovač, Anamarija; Lalić Novak, Goranka; Tučkorić, Lana; Vergaš, Mirjana; Pravo na pristup sustavu azila i zaštita temeljnih prava migranata, Zagreb, 2020, p. 9

understood in accordance with the Court's case law as "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group."[12] The word "expulsion" should be interpreted "in the generic meaning, in current use (to drive away from a place)."[13] It also includes "refusal of entry with removal."[14] Expulsion can happen when a person is on the territory or before entering the state territory[15] and even on the high seas in the context of interception by the authorities of a State in the exercise of their sovereign authority.[16]

Expulsion will be collective in all cases where the personal circumstances of all persons are not truly and individually taken into account when dealing with them. This prohibition is a due process right that protects migrants against arbitrary collective expulsion.[17] It offers the bare minimum of procedural protections that permit every foreigner to file claims against their expulsion, including the right to legal assistance, translation, and appeal.[18] The chapter "Judicial reactions and interpretation of the legal framework" will go into more detail regarding how collective expulsion is interpreted.

2.1.1. Reason for Prohibition of Collective Expulsion

The explanation behind the prohibition of collective expulsion is associated with several human rights breaches, the most significant being the risk of refoulement.[19] The non-

[12] *Khlaifia and Others v. Italy*, ECtHR, Application no. 16483/12, 15 December 2016, para. 237
[13] *Hirsi Jamaa and Others v. Italy*, ECtHR, Application no. 27765/09, 23.February 2012, para. 174
[14] *Khlaifia and Others v. Italy*, *op. cit.* (footn. 12) para. 243
[15] *Sharifi and Others v. Italy and Greece*, ECtHR, Application no. 16643/09, 21 October 2014, para. 210-213
[16] *Hirsi Jamaa and Others v. Italy*, *op. cit.* (footn. 13), para. 180
[17] Brackx Mathilde, The Prohibition of Collective Expulsion in European Human Rights Law in a Comparative Perspective, Diss. (Ghent University 2021), p.10
[18] Riemer, Lena, The Prohibition of Collective Expulsion in Public International Law, Ph.D. diss. (Freien Universität Berlin 2020). p 167
[19] Brackx Mathilde, *op. cit.* (footn. 17), p. 11

refoulement principle is the cornerstone of refugee protection.[20] The given definition is no more than a summary of indications of what the principle is about.[21] As it is noted, "Non-refoulement is a concept, which prohibits states from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion".[22]The subchapter "Legal framework" has more information about the protection of refugees and the way they are related to pushback.

Independently, these two rights are separated, and they have different scopes. A migrant may raise any objection to his or her removal under the prohibition of collective expulsion, and non-refoulement is merely one of the various reasons.[23] It can also include other claims, such as the right to family life. The non-refoulement concept is not always dependent on the prohibition of collective expulsion, as states may violate the former principle by returning any person (not just those who have expressed fear for their life) to a dangerous place.[24] In the case of *Sharifi and Others v. Italy and Greece*, the Court emphasized the connection between these two principles and how they should be interpreted in the light of each other.[25]

2.2. Legal Framework

As previously stated, the prohibition of pushback cannot be found under EU law and international law because provisions solely refer to legal concepts. In this part, an overview of

[20] Tsirli, Marialena; O'Flaherty, Michael, Handbook on European law relating to asylum, borders and immigration Luxembourg, 2020, p. 104
[21] *Ibid.*
[22] Lauterpacht, Elihu; Bethlehem, Daniel, The Scope and Content of the Principle of *Non-Refoulement*: Opinion, Cambridge University Press, 2003, p. 89
[23] *Ibid.*
[24] Riemer, Lena, *op. cit.* (footn. 18), p. 251
[25] *Sharifi and Others v. Italy and Greece op. cit.* (footn. 15), para. 211

the main provisions connected to collective expulsion will be given. Migration law in the EU involves the interaction of the EU Member State's national laws, EU regional law, and international law. In this thesis, the European legal order regulating migration is separated into two legal systems. First, it is presented through relevant provisions of the Treaties, regulations, and directives and the provisions of the Charter interpreted in the case law of the Court of Justice of the EU (CJEU). Second, the European framework prohibiting collective expulsion is approached by looking at the legal system of the Council of Europe, primarily related to the ECHR and the case law developed by the Court. Finally, the thesis analyses the 1951 Geneva Convention.

2.2.1. EU Law Regulating Pushbacks

2.2.1.1. EU Primary Law

Article 2 of the Treaty on the EU (TEU) it is stated that "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."[26] Article 6 provides that the EU recognises the rights, freedoms, and principles set out in the Charter which shall have the same legal value as the Treaties[27] and the fundamental rights, as guaranteed by the ECHR.[28] The EU law stipulates in primary law the right to apply for asylum and the right to international protection.[29] Also, Article 19 of the Charter provides for the prohibition of collective expulsion

[26] Consolidated Version of the Treaty on European Union (2012), OJ C 326/13
[27] *Ibid.*
[28] *Ibid.*
[29] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012, art. 78 and the Charter of Fundamental Rights of the European Union, Official Journal, 2012/C 326/02 art. 18

and states that "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[30] This constitutes the non-refoulement principle. The Preamble of the Charter reaffirms the connection to the ECHR and the case law of the Court.

European Union Migration Policy

European Union Member States are determined to preserve a certain level of national control over migration to their respective national territories.[31] EU migration policy is part of a wider policy area that falls under the title "Area of Freedom, Security and Justice" (AFSJ) together with asylum, visa, external border control policies, police cooperation, and judicial cooperation in civil and criminal matters.[32] Some of the objectives of AFSJ are: "1. Union shall constitute an area of freedom, security, and justice with respect for fundamental rights (…) 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. Stateless persons shall be treated as third-country nationals."[33] As they touch the foundation of national sovereignty, the AFSJ is viewed as being of the utmost national importance.[34] EU shares its competence with its Member States. Since this policy area continues to be heavily influenced and regulated at the national level, regulatory disparities remain among different Member States.[35]

[30] The Charter of Fundamental Rights of the European Union, Official Journal, 2012/C 326/02
[31] Goldner Lang, Iris, op. *cit.* (footn. 1), p. 511
[32] Fact Sheets on the European Union, European Parliament, An area of freedom, security and justice: general aspects, 2022, <https://www.europarl.europa.eu/factsheets/en/sheet/150/an-area-of-freedom-security-and-justice-general-aspects>, accessed 20 June 2022
[33] Consolidated version of the Treaty on the Functioning of the European, (2012) OJ C 326, art. 67
[34] Goldner Lang, Iris, op. *cit.* (footn.1), p. 511
[35] *Ibid.*

2.2.1.2. EU Secondary Law

As a part of the EU secondary law, the Asylum Procedures Directive is also important in this field. It only applies from the moment an individual has arrived at the border, including territorial waters and transit zones.[36] It sets minimum requirements on the procedures in a Member State for how a refugee status is granted and revoked in a Member State. Member State shall ensure that a person who applied for international protection, has an effective opportunity to lodge an asylum application as soon as possible.[37] Therefore, other authorities which are likely to receive applications for international protection such as the police, border guards, or immigration authorities need to inform applicants as to where and how applications for international protection may be lodged.[38] Additionally, if there are signs that a person might want to apply for asylum, authorities are obligated to inform them about their possibilities.[39] In Article 9 of this Directive, we can find the principle of non-refoulement. Extradition of a person to a third country can be done only if it will not result in refoulement.[40]

Regarding the third-country nationals who are staying illegally on the territory of a Member State,[41] the Return Directive (2008/115/EC) sets out the standards and procedures governing their return, "in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations".[42]In Article 5 of the Return Directive it is provided that when the Member States

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[36] Directive 2013/32 of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Official Journal of the European Union, L 180/60, 29 June 2013, art.3 (1)
[37] *Ibid.* art. 6
[38] *Ibid.*
[39] *Ibid.*, art 8
[40] *Ibid.*, art. 9 (3): "A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect *refoulement* in violation of the international and Union obligations of that Member State. ".
[41] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Official Journal of the European Union, L 348/98, 24 December 2008, art. 2
[42] *Ibid.* art. 1

are implementing this Directive, they shall respect the principle of non-refoulement.[43]

The Qualification Directive 2004/83/EC sets the conditions for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection. The principle of non-refoulement is also guaranteed here, but not in an absolute sense. Articles 17 and 21 allow refoulement of a refugee under exceptional circumstances. For example, if the person represents a danger to the security of the host country.[44]

Under EU law, the Schengen Borders Code[45] provides the rules governing border control of persons crossing the external EU borders of the EU Member States. It requires that EU external borders need to be crossed only at designated border-crossing points. To prevent unauthorized entrance while upholding fundamental rights, EU Member States are expected to maintain an efficient border surveillance system.[46] The CJEU has defined the expression "irregular crossing of a border" as a crossing that does not fulfil "the conditions imposed by the legislation applicable in the Member State in question" and which must be considered "irregular" within the meaning of Article 13(1) of the Dublin III Regulation.[47] The implementation of this requirement presupposes the existence of a sufficient number of such crossing points.[48] This Regulation respects fundamental rights and adheres to the values

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[43] Directive 2008/115/EC, *op. cit.* (footn. 41), art. 5
[44] Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Official Journal of the European Union, L 304/12, 2004, art. 17, 21
[45] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) Official Journal of the European Union L 77/1, art. 4: "When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union, relevant international law, including the Convention Relating to the Status of Refugees ('the Geneva Convention'), obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis. "
[46] *Ibid.*, art. 4 and 13
[47] *Jafari*, CJEU, C-646/16, 26 July 2017, para. 74
[48] *N.D. and N.T. v Spain*, ECtHR, Nos. 8675/15 and 8697/15, 13 February 2020, para. 209

emphasized, in particular, by the Charter. It should be applied in compliance with the Member States' commitments regarding non-refoulement and international protection.[49]

2.2.2. Legal System of the Council of Europe

ECHR represents an important mechanism for the protection of migrants, asylum seekers, and refugees on the territory of Europe. The mentioned categories enjoy the protection of rights according to the provisions of ECHR when they are under the jurisdiction of the contracting states.[50] Although, the ECHR is not an instrument for the protection of migrants *per se*[51], the Court has developed extensive practice on the rights of migrants, asylum seekers, and refugees. As the ECHR is considered the "living instrument" therefore it needs to be interpreted in the light of today's socio-political circumstances.[52] For this reason, it is necessary to consider the case law of the Court.

At least 174 states are bound by regional and international treaty law to respect the prohibition of collective expulsion.[53] It can be concluded that the same provision can be found under Article 4 of Protocol No. 4 to the ECHR[54] and Article 19 of the Charter.[55] Article 3 of ECHR provides the prohibition of torture. In the *Soering v. UK*[56] case from 1989, the Court interpreted Article 3 of the ECHR to include the notion of non-refoulement.[57]

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[49] Schengen Borders Code, *op. cit.* (footn. 45), pt. (36)
[50] European Convention on Human Rights, as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, Rome, 4. November 1950, art. 1
[51] Giljević, Teo *et. al*, *op. cit.* (footn. 11), p. 23
[52] *Ibid.*
[53] Riemer, Lena, *op. cit.* (footn. 18), p. 14
[54] European Convention on Human Rights, *loc. cit.*
[55] Charter of Fundamental Rights of the European Union, *loc. cit.*
[56] *Soering v. the UK*, ECtHR, Application no. 14038/88, 1989, para. 88.
[57] Brackx Mathilde, *op. cit.* (footn. 17), p. 11

2.2.3. Convention Relating to the Status of Refugees

Convention Relating to the Status of Refugees (Geneva Convention)[58] is a specialised international treaty regulating the rights of refugees,[59] and it applies only to refugees. It has been expressly incorporated into the ECHR and EU law.[60]As stated in its preambular paragraphs, the object of the 1951 Geneva Convention is to endeavour to assure refugees the widest possible exercise of their fundamental rights and freedoms.[61]

The 1951 Geneva Convention defines, who will qualify as a refugee, provides them with protections including the non-refoulement principle, and forbids the arbitrary expulsion of refugees who are residing in a state legally.

The refugee is "a person who is owning well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and outside his or her country of origin is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[62] This definition does not cover internally displaced persons, climate refugees, economic migrants, or anyone fleeing from war, gang violence, or hardship.[63]

Once a person meets the requirements outlined in the definition, he is considered a refugee. This would inevitably take place before his refugee status is formally determined. Recognition of his refugee status does not, therefore, make a person refugee but declares him

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[58] Convention and Protocol Relating to the Status of Refugees, <https://www.unhcr.org/3b66c2aa10> accessed 22 September 2022.
[59] Tsirli, Marialena; O'Flaherty, Michael, *loc. cit.*
[60] Consolidated version of the Treaty on the Functioning of the European, *op. cit.* (footn. 29), art. 78
[61] Universal Declaration of Human Rights, 10 December 1948, <https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf> accessed 22 September 2022, preambular para. 1 and 2
[62] Convention and Protocol Relating to the Status of Refugees, *op. cit.* (footn. 58), art. 1 A (2)
[63] Riemer, Lena, *op. cit.* (footn. 18), p. 2

to be one.[64] The CJEU specified that "the fact that being a 'refugee' (…) is not dependent on formal recognition thereof through the granting of 'refugee status' (…), which states that a 'refugee' may (…) be refouled 'whether formally recognised or not."[65]

Refugees are protected in Article 33(1) of the Geneva Convention against expulsion or return ("refoulement"). The exemptions to the principle of non-refoulement can be found under Article 33(2).[66]

In Europe, international protection may take the form of refugee status or subsidiary protection. As it is mentioned above, refugee status is governed by the 1951 Geneva Convention. A State may decide to provide subsidiary protection if it believes that the migrant should be protected for grounds that are not specified in the Geneva Convention.[67] If there is a real improvement in the situation in their country of origin, individuals with international protection may lose their status.[68]

2.2.4. Concluding Remarks

Related to the Geneva Convention, a refugee is protected from refoulement and cannot be expelled, because that would lead to collective expulsion. Non-refoulement does not only avail to those who have been formally recognized as refugees.[69] The same problem can arise with a person who cannot be considered a refugee because he does not fulfill the prescribed

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[64] Lauterpacht, Elihu; Bethlehem, Daniel, *op. cit.* (footn. 22), p. 116

[65] *M. v. Ministerstvo vnitra, X and X v. Commissaire général aux réfugiés et aux apatrides*, CJEU, *Joined Cases C-391/16, C-77/17 and C-78/17*, 14 May 2019, para. 90

[66] Convention and Protocol Relating to the Status of Refugees, *op. cit.* (footn. 58), art. 33(2): " The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.''

[67] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, hereinafter: Qualification Directive, 2011/95/EU, art.18

[68] *Ibid.*, art. 11 and 16

[69] Lauterpacht, Elihu; Bethlehem, Daniel, *op. cit.* (footn. 22), p. 116, para. 89

requirements. Independently, we are unable to discuss the category of migrants because they were expelled before or while they entered the state's territory. Whether a person meets the conditions to be considered a refugee or is an irregular migrant, and whether a person has applied for asylum or not, pushback is a term that includes all these categories. Also, this action does not give migrants the opportunity to apply for asylum or enable state authority to consider the circumstances of the case on individual bases. If someone is pushed back by the state authorities, authorities do not know where that individual will end up or whether refoulement would occur. States need to act in accordance with the ban on collective expulsion.

States that are unwilling to provide asylum to individuals who have a legitimate fear of being persecuted must seek an alternative course of action that does not lead to refoulement. Removal to a safe third country or some other solution, such as temporary protection may be necessary for this situation.[70]

[70] *Ibid.*, p. 113, para. 76

3. DETERIORATION OF HUMAN RIGHTS STANDARDS

Although EU asylum law is designed to provide a high level of protection of human rights and harmonize the national asylum laws between the EU Member States, there are significant deficiencies in the Common European Asylum System that call into question the human rights principles and values on which the EU is based.[71] Commitments made by all Member States were to adhere to EU primary and secondary law and to properly implement EU policies. This obligation has its legal basis in the principle of loyal or sincere cooperation, as stipulated by Article 4(3) TEU.[72] Additionally, the obligations of EU Member States towards all categories of migrants are derived from both EU law and a variety of international conventions that all Member States have ratified. The obligations of states for non-refoulement and international protection derive from all the aforementioned provisions. When the Member States incorrectly implement or do not apply EU asylum rules, human rights standards deteriorate.[73] The migration crisis that Europe has witnessed has exposed a number of flaws in the EU system. Some of the existing rules showed to be inadequate to respond to the situation which Europe has experienced.[74] EU Member States tend to circumvent EU rules in any area of EU law where these rules come into play with national interests and priorities.[75] Migration and asylum rules are considered to be national interests. [76]

Pushbacks are part of states' border practices regardless of provisions that prohibit

[71] Goldner Lang, Iris, *op. cit.* (footn. 1), p. 512
[72] Consolidated Version of the Treaty on European Union, *op. cit.* (footn. 26), art.3(2): " Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.''
[73] Goldner Lang, Iris, *loc. cit.*
[74] *Ibid.*
[75] Goldner Lang, Iris, No Solidarity Without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?, European Journal of Migration and Law, *vol.* 22, no. 1, 2020, p.6
[76] *Ibid.*

collective expulsion. The countries that protect the external borders of the EU are faced with large migration flows and most commonly perform pushbacks.[77] The reports of pushbacks were also recorded in EU countries that are not external borders of the EU, like Serbia to North Macedonia.[78]

There are numerous reports of pushback practices but in this thesis, Protecting Rights At Borders (PRAB) and a report by a Norwegian nongovernmental organization (NGO) will be considered. According to the PRAB report, civil society organizations in 6 different countries gathered testimonies of 2162 pushback cases between January and April 2021, including chain pushbacks over multiple countries.[79] The number of pushbacks in practice is way higher than the one recorded by PRAB partners, as pushbacks frequently go undetected.[80] The violation of rights was recorded at different borders in Italy, Greece, Serbia, Bosnia and Herzegovina, North Macedonia, and Hungary.[81]

According to the data from a report by the Norwegian NGO Aegean Boat Report in 2021, irregular migrant pushbacks in Greece increased by 97% compared to the previous year.[82] The Non-governmental organization (NGO) reported "629 pushback cases in the Aegean Sea, involving 15803 children, women and men who tried to reach safety in Europe", adding that a third of them, entered the state territory and were then sent back to sea and left drifting in lifeboats.[83]

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[77] European Parliamentary Research Service, Pushbacks at the EU's External Borders, Anja Radjenovic, EPRS Briefing, March 2021 <https://www.statewatch.org/media/2013/ep-briefing-pushbacks-at-external-borders.pdf> accessed 22 September 2022

[78] Protecting Rights at Border (PRAB), Pushing Back Responsibility. Rights Violations as a "Welcome Treatment" at Europe's borders, April 2021, <https://drc.ngo/media/mnglzsro/prab-report-january-may-2021-_final_10052021.pdf> accessed 22 September 2022

[79] *Ibid.*

[80] *Ibid.*

[81] *Ibid.*

[82] Daily Sabah, Greek pushbacks up 97% in 2021, Norwegian NGO says, 7 February 2022, <https://www.dailysabah.com/politics/eu-affairs/greek-pushbacks-up-97-in-2021-norwegian-ngo-says> accessed 22 September 2022

[83] *Ibid.*

These reports show that some EU Member States are not upholding their legal commitments under EU and international law. When the Member States violate their human rights EU-based obligations, the EU institutional reaction is carried out through infringement proceedings.[84] If the CJEU finds that Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the CJEU. If it fails to do so, it is open to the Commission to take further action under Article 260 TFEU. The Court may ultimately impose a fine, in the form of a lump sum, penalty payment, or both.[85]

The Commission did not take any concrete actions to stop such practices connected to pushbacks other than against Hungary. In *Commission v. Hungary*, Case C-808/18, 17 December 2020, CJEU found that Hungary has failed to fulfil its obligations under the Return Directive[86], in so far as the Hungarian legislation allows for the removal of third-country nationals who are staying illegally in the territory without prior compliance with the procedures and safeguards provided for in the Return Directive. According to the CJEU forced deportation is equivalent to removal, within the meaning of the Return Directive.[87] Third-country nationals staying illegally in the territory and falling within the scope of the Return Directive must be the subject of a return procedure in compliance with the substantive and procedural safeguards[88] established by Return Directive. Once the illegality of the stay has been established, the competent national authorities must adopt a return decision.[89] Return decisions must be taken following a fair and transparent procedure.[90] When the competent national authority is contemplating the adoption of a return decision, it must, on the one hand, observe the principle of non-refoulement and take due account of the best interests of the child, family life, and the

[84] Consolidated version of the Treaty on the Functioning of the European Union, *op. cit.* (footn. 29), art. 258
[85] *Ibid.*, art. 260
[86] *European Commission v. Hungary*, CJEU, Case C-808/18, 17 December 2020
[87] *Ibid.*, para. 255
[88] *Ibid.*, para 253
[89] *Ibid*., para. 249
[90] *Ibid*., para. 250

state of health of the third-country national concerned and, on the other hand, hear the person concerned on that subject.[91] Return Directive also lays down the formal requirements for return decisions.[92] Once the return decision has been adopted, the third-country national must still, be given time to leave a country voluntarily.[93] Forced removal can take place only as a last resort.[94]

Coexistence of deterrence practices and opposing legal norms is also encouraged by the incapacity of the European Commission and other EU institutions to respond by using political and legal means, such as infringement procedures, thus tacitly approving and authorising such behaviour, while formally maintaining their commitment to EU asylum and human rights standards.[95] Infringement proceedings are insufficient to stop or change Member States' violations of EU migration and asylum rules, including those that violate the human rights of migrants and asylum seekers.[96] The reason why this happens is that these proceedings take years to be resolved, and during that time, without any consequences, Member State can continue human rights violations.[97]

In accordance with international obligations towards refugees, the European Court of Human Rights cannot examine whether or not the refusal or withdrawal of refugee status under the 1951 Geneva Convention or the refusal of subsidiary protection under the Qualification Directive is contrary to the ECHR.[98] The Court can evaluate whether or not an alien's removal would put them at a serious risk of treatment that is against Article 3 of the ECHR or other

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[91] *Ibid.*
[92] *Ibid.*, para. 251
[93] *Ibid.*, para. 252
[94] *Ibid.*
[95] Goldner Lang, Iris and Nagy, Boldizsar, Changing the EU's Constitutional Fabric by Defecting from Non-Refoulement, European Constitutional Law Review, *vol.* 17, no. 3, 2021, p. 10
[96] *Ibid.*
[97] *Ibid.*
[98] Tsirli, Marialena; O'Flaherty, Michael, *op. cit.* (footn. 20), p. 84

specific ECHR provisions.[99] As already mentioned, ECHR is considered as the "living instrument" therefore the absolute prohibition of collective expulsion of aliens and the non-refoulement principle need to be interpreted in the light of today's socio-political circumstances.[100]

[99] *Ibid.*
[100] *Ibid.*

4. JUDICIAL REACTIONS AND INTERPRETATION OF THE LEGAL FRAMEWORK BY THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights interprets the provisions of the ECHR. As stated in subchapter "2.2.2. Legal system of the Council of Europe" the ECHR is not an instrument for the protection of migrants per se,[101] but the Court has developed extensive practice on the rights of migrants, asylum seekers, and refugees. Article 4 of Protocol No. 4 prohibits collective expulsion. However, an explicit ban on refoulement cannot be found under the ECHR. There is no defining provision of collective expulsion, therefore we need to rely on the case law of the Court to provide an explanation for the term. The prohibition of inhuman or degrading treatment, enshrined in Article 3 of the ECHR, as stated in the case law of the Court "is one of the most fundamental values of democratic societies." [102] It is also "a value of civilisation closely bound up with respect for human dignity, which is the part of the very essence of the Convention."[103] The prohibition of torture is absolute, and no exceptions or derogations can be made.[104]

The EU law and international law have not changed. However, the Court has recently begun to apply a different interpretation to the same provision, suggesting that collective expulsion can be legal in certain circumstances and under the conditions prescribed by the Court.

[101] Giljević, Teo *et. al., loc. cit.*
[102] *M.K. and Others v. Poland*, ECtHR, Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, para. 166
[103] *Ibid.*
[104] *Ibid.*

4.1. Hirsi Jamaa and Others v. Italy

In connection with the absolute prohibition of collective expulsion of aliens, this case provides the explanation of how expulsion should be interpreted, who are the aliens to whom the Article refers, and whether this Article applies when the removal took place outside national territory. The Grand Chamber of the Court found on 23 February 2012 that in the case of *Hirsi Jamaa and Others v. Italy*, the state of Italy exposed the migrants to the risk of ill-treatment which amounted to collective expulsion.[105]

Eleven Somali nationals and thirteen Eritrean nationals were part of a group of about two hundred individuals who left Libya[106] and were travelling to Italy. They were intercepted on the high seas by three ships from the Italian Revenue Police (Guardia di finanza) and the Coastguard.[107] Passengers on the boats were transferred by Italian military vessels to Tripoli, Libya, where they were handed over to local authorities.

The applicants alleged that during that voyage the Italian authorities did not inform them of their real destination and did not identify them.[108]

The Italian Minister of the Interior stated that the operation to intercept the vessels on the high seas and to push the migrants back to Libya was the consequence of bilateral agreements concluded with Libya and stated that more than 471 irregular migrants had been intercepted on the high seas and transferred to Libya, in accordance with those bilateral agreements and the

[105] *Hirsi Jamaa and Others v. Italy*, *op. cit.* (footn. 13), art. 3. Conclusion: violation (unanimously).
[106] *Ibid.*, para. 9
[107] *Ibid.*, para. 10
[108] *Ibid.*, para. 11

principle of cooperation between States.[109]

Before the Court, the applicants complained that they had been exposed to the risk of torture or inhuman or degrading treatment by being sent back to Libya (Somalia or Eritrea, their countries of origin).[110] They relied on Article 3 of the ECHR.[111] They alleged that they had been the victims of arbitrary refoulement. There was no procedure to identify the intercepted migrants.[112] The applicants also put forward complaints before the Court, stating that they had been subject to collective expulsion having no basis in law.[113] The applicants submitted that Italy's interceptions of persons on the high seas were not in accordance with the law and were not subject to a review of their lawfulness by a national authority, so they had been deprived of any opportunity of lodging an appeal against their return to Libya and alleging a violation of Article 3 of the ECHR and Article 4 of Protocol No. 4.[114]

The Grand Chamber of the Court reached a unanimous conclusion. Firstly, the Grand Chamber found that the applicants fell within the jurisdiction of Italy according to Article 1 of the ECHR. Secondly, the Grand Chamber found that two violations had been made of Article 3 of the ECHR, as the applicants had been exposed to a risk of ill-treatment in Libya and the risk of repatriation to the countries of Eritrea and Somalia. Thirdly, Article 4 of Protocol No. 4 had been violated. Finally, the Grand Chamber also found that Article 13 ECHR on the right to an effective remedy had also been violated when taken in conjunction with Article 3 ECHR and Article 4 of the aforementioned protocol.[115]

Case Hirsi Jamaa and Others v. Italy put the question before the Court to interpret whether Article 4 of Protocol No. 4 applied when the removal took place outside the national territory,

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[109] *Ibid.*, para. 13
[110] *Ibid.*, para. 83
[111] European Convention on Human Rights, *op. cit.* (footn. 50), art. 3
[112] *Hirsi Jamaa and Others v. Italy*, *op. cit.* (footn. 13) para. 85–87
[113] *Ibid.*, para. 159
[114] *Ibid.*, para. 188
[115] *Ibid.*

namely on the high seas.[116] The Court's judgment establishes that even when individuals are intercepted in international waters, government authorities are obliged to abide by international human rights law. The wording of Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extraterritorial application.[117]

According to the Committee of Experts, the aliens to whom the Article refers are not only those lawfully resident on the territory but "all those who have no actual right to nationality in a State, whether they are passing through a country, reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality. "[118]

Also, the Court stated that the word "expulsion" should be interpreted "in the generic meaning, in current use (to drive away from a place). "[119]

An individualized procedure must be made available to anyone who is intercepted as well as remedies to challenge the decision to return him/her to their country of departure. The Court considers removals operated outside the national territory as collective expulsion.

4.2. N.D. and N.T. v. Spain

In contrast to the case *Hirsi Jamaa and Others v. Italy* where the proceedings were conducted in relation to the prevention of illegal entry of migrants across the sea border, the case *N.D. & N.T. v. Spain* was the first case related to the prevention of illegal entry at the land border. For this reason, it is important to present in detail the circumstances of the case which have led to this judgment. The Court has turned the absolute prohibition of collective expulsion

[116] Council of Europe, European Court of Human Rights, Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights - Prohibition of collective expulsions of aliens, 31 August 2022, para 5
[117] *Hirsi Jamaa and Others v. Italy*, *op. cit.* (footn. 13), para 173
[118] *Ibid.*, para 174
[119] *Ibid.*

into a relative one by establishing a new standard "own culpable conduct".

N.D. & N.T. were nationals of Mali and Côte d'Ivoire. N.D. stated that he had left Mali on account of the armed conflict there in 2012 and stayed in the migrants' camp on Mount Gurugu, close to the border with Melilla.[120] The autonomous city of Melilla is a Spanish enclave located on the North Coast of Africa and surrounded by Moroccan territory.[121] N.T. arrived in Morocco at the end of 2012 and also stayed in the migrants' camp.[122] They attempted to enter Spanish territory from Morocco by climbing the fences surrounding Melilla, with a large group of around 600 migrants.[123] As they reached Spanish ground, they were apprehended by the Spanish police, who handcuffed them and handed them over to the Moroccan authorities, without undertaking any identification procedure and without enabling N.D. and N.T. to explain their personal circumstances or to be assisted by lawyers or interpreters.[124]

Relying on Article 4 of Protocol No. 4, the applicants maintained that they had been subjected to a collective expulsion without an individual assessment of their circumstances and in the absence of any procedure or legal assistance.[125] They specified that the present applications did not concern the right to enter the territory of a State but rather the right to an individual procedure to be able to challenge an expulsion.[126] They complained of a systematic policy of removing migrants without prior identification, which, in their view, had been devoid of legal basis at the relevant time. Relying on Article 13 (right to an effective remedy) taken in conjunction with Article 4 of Protocol No. 4, they complained of the lack of an effective remedy

[120] *N.D. and N.T. v Spain*, *op. cit.* (footn. 48), para. 22. and 23.
[121] *Ibid.*, para. 15
[122] *Ibid.*, para. 23
[123] *Ibid.*, para. 24
[124] *Ibid.*, para. 25
[125] *Ibid.*, para. 123
[126] *Ibid.*

with suspensive effect by which to challenge their immediate return to Morocco.[127]

The Court decided that the immediate return of N.D. and N.T. from Spain to Morocco, without an individualised removal procedure, did not violate either Article 4 of Protocol No. 4. or Article 13 ECHR, as it was the consequence of the applicants' own conduct.[128]

The Court noted that Spanish law had afforded the applicants several possible means of seeking admission to the national territory.[129] They could have applied for a visa or international protection, not only at the border crossing point, but also at Spain's diplomatic and consular representations in their respective countries of origin or transit or elsewhere in Morocco. They had not made use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen area's external borders.[130]

In so far as the Court had found that the lack of an individualised procedure for their removal had been the consequence of the applicants' own conduct in placing themselves in an unlawful situation by crossing the Melilla border protection structures on the 13 August 2014 as part of a large group and at an unauthorised location, it could not hold the respondent State responsible for the absence of a legal remedy in Melilla enabling them to challenge that removal.[131]

It can be seen that collective expulsion can be justified if it is the consequence of the applicant's own conduct. The Court set out a two-tier test to determine compliance with Article 4 of Protocol No. 4 in cases where individuals cross a land border in an unauthorised manner and are expelled summarily.[132] The first one is whether the state provides genuine and effective

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[127] *Ibid.*, para. 233
[128] *Ibid.*, para 231
[129] *Ibid.*, para 212
[130] *Ibid.*, para 231
[131] *Ibid.*, para 242
[132] Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, *op. cit.* (footn. 116), para. 11

access to means of legal entry, in particular border procedures for those who have arrived at the border. The second one is whether there is an absence of cogent reasons why the applicant did not make use of official entry procedures, which were based on objective facts for which the respondent state was responsible.[133] The respondent State has the responsibility to prove that the applicants did have real and effective access to procedures for legal entrance.[134]

The Court stated that there is no minimum number of persons required for pushback to be considered collective[135] Moreover, the decisive criterion for an expulsion to be characterised as "collective" has always been the absence of "a reasonable and objective examination of the particular case of each individual alien of the group" [136]

The most important is that this case sends a signal to the EU Member States that if certain conditions are met, under the ECHR it is legal to push back third-country nationals who try to enter the EU territory without individually assessing their status and knowing whether they are refugees or economic migrants.[137] It remains unclear how the Spanish authorities could have known that their conduct would not result in refoulement.[138] This judgment opens a lot of questions, but that does not mean that Member States do not have their obligations based on EU law and the Geneva Convention. They need to respect the principle of non-refoulement.

4.3. M.K. and Others v. Poland

After the judgment concerning the illegal way of entering state territory and the adoption of the new standard "own culpable conduct", this case refers to the legal way of entering the state

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[133] *N.D. and N.T. v Spain*, ECtHR 13. February 2020., Nos. 8675/15 and 8697/15
[134] Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, *op. cit.* (footn. 116), para 12
[135] *N.D. and N.T. v Spain*, *op. cit.* (footn. 48), para 194
[136] *Ibid.*, para. 203
[137] Goldner Lang, Iris and Nagy, Boldizsar, *op. cit.* (footn. 95), p. 16
[138] *Ibid.*

territory by using the asylum application procedure that should have been available to the applicants under domestic law.[139]

On 23 July 2020, the Court reached its judgment in *M.K. and Others v Poland* (Application Nos. 40503/17, 42902/17, 43643/17) concerning the removal of Russian families to Belarus, after they had repeatedly and unsuccessfully tried to lodge asylum applications at the Polish border.[140]

The case originates from three applications brought by Russian nationals of Chechen origins. While the first application concerns a single person, the other two involve two families: married couples with five and three children.[141] All 13 applicants travelled from Belarus to Poland, reaching the border crossing of Terespol and making multiple attempts to apply for international protection.

The first applicant submitted that each time that he had visited that border crossing he had stated a wish to apply for international protection. On at least several of those occasions, he had presented that application in written form.[142] He expressed fears for his safety.[143] On each occasion that the applicant presented himself at the border crossing, the border guards turned him away and forced him to return to Belarus on the grounds that he was not legally entitled to enter Poland and had not applied for international protection.[144]

Something very similar happened to other applicants. They expressed a wish to lodge an application for international protection and their fears concerning their safety. The applicants

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[139] Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, *op. cit.* (footn. 116), para 21

[140] European Database of Asylum law, M.K. and Others v Poland: Repeated refusal to accept asylum applications amounted to collective expulsion, 23 July 2020, <https://www.asylumlawdatabase.eu/en/content/mk-and-others-v-poland-repeated-refusal-accept-asylum-applications-amounted-collective > accessed 26 May 2022

[141] Case *M.K. and other v. Poland*, ECtHR, application Nos. 40503/17, 42902/17, 43643/17, 23 July 2020, para. 1

[142] *Ibid.*, para 10

[143] *Ibid.*, para 12

[144] *Ibid.*, para 13

complained that they had been exposed to the risk of torture or inhuman or degrading treatment in Chechnya, and that their treatment by the Polish authorities had amounted to degrading treatment in accordance with Article 3 of the ECHR.[145] As the Court has stated on many occasions, "Article 3 of the ECHR enshrines one of the fundamental values of a democratic society and in absolute terms prohibits torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[146] They also complained that there has been a violation of Article 4 of Protocol No. 4 because the refusal to examine their applications amounted to a collective expulsion.[147]

The applicants furthermore complained that no effective remedies against these violations were provided, which violated Article 13 ECHR.[148] Lastly, the applicants complained that the Polish government had failed to comply with the interim measures indicated by the Court in the applicants' cases. They relied on Article 34 of the Convention.[149]

The Court unanimously held that there had been a violation of Article 3 on account of the applicants being denied access to the asylum procedure and being exposed to a risk of inhuman and degrading treatment and torture in Chechnya. Moreover, the Court concluded that the decision to turn away the applicants without proper regard to individual situations amounted to a collective expulsion contrary to Article 4 Protocol No. 4.[150] The Court added that the applicants did not have access to effective remedies to challenge the refusal of entry amounted to a violation of Article 13 ECHR in conjunction with Article 3 and Article 4 Protocol No. 4.[151] Furthermore, the Court found that Poland had failed to discharge its obligations under Article

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[145] *Ibid.*, para. 150
[146] *Ibid.* para. 166
[147] *Ibid.*, para. 188
[148] *Ibid.*, para. 212
[149] *Ibid.*, para. 221
[150] Case *M.K. and other v. Poland*, *loc. cit.*
[151] European database of Asylum Law, M.K. and Others v Poland: Repeated refusal to accept asylum applications amounted to collective expulsion, *loc. cit.*

34 of the ECHR.[152]

The applicants had done all that could be expected from them to enter Poland legally.

If we compare this case with the case of *N.D. and N.T. v Spain*,[153] we can see that in *N.D. and N.T. v. Spain* a large group of migrants tried to cross the border fence ilegally. The crucial factor distinguishing the two cases, therefore, lies in the way the applicants tried to cross the borders and in the respective existence of lawful paths to enter in order to seek protection.[154] The prohibition of collective expulsion as such cannot be assumed to exist absolutely without restriction, irrespective of the subjective contribution of the parties.

4.4. Shahzad v. Hungary

According to the applicant, he had been repeatedly ill-treated by members of Pakistan military forces and he left Pakistan in 2008 and stayed in Greece until 2011. He tried to enter other European countries but was allegedly pushed back.[155] He claimed to have attempted to apply for asylum in Krnjača camp and Subotica but was refused both times without having his asylum claims examined.[156] The applicant also tried to enter Hungary irregularly but was apprehended by the Hungarian police and immediately sent back to the external side of the border fence.[157]

In August 2016 a group of twelve Pakistani nationals, including the applicant, entered

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[152] Case *M.K. and other v. Poland*, *op. cit.* (footn. 141), para 238
[153] *N.D. and N.T. v Spain*, *loc. cit.*
[154] EU Immigration and Asylum Law and Policy, Droit et Politique de l'Immigration et de l'Asile de l'UE, *A human right to seek refuge at Europe's external borders: The ECtHR adjusts its case law in M.K. vs Poland, 11 September 2020,* <https://eumigrationlawblog.eu/a-human-right-to-seek-refuge-at-europes-external-borders-the-ecthr-adjusts-its-case-law-in-m-k-vs-poland/> accessed 27 May 2022
[155] *Shazad v. Hungary*, ECtHR, Application no. 12625/17, 8 October 2021, para 5
[156] *Ibid.*, para 6
[157] *Ibid.*, para 7

Hungary irregularly by cutting a hole in the border fence between Hungary and Serbia.[158] They walked for several hours, and in the end were intercepted by Hungarian police officers and subjected to the "apprehension and escort" measure under section 5(1a) of the State Borders Act.[159] They were transported in a van to the nearest border fence and further escorted by officers through the gate to the external side of the fence into Serbia. They had asked repeatedly for asylum, but were told that they could not claim it. The applicant, who had been injured, went to a reception centre in Subotica, Serbia, and from there was taken to a nearby hospital.[160]

The Court found that these acts violated the prohibition of collective expulsion, as well as the right to an effective remedy under Article 13 of the ECHR.[161]

This case cannot be compared to the situation in *N.D. and N.T.* The way of entering the state territory was also irregular but the main reason for which it cannot be compared is that there was no effective access to a means of legal entry.[162] The only possibilities for the applicant to legally enter Hungary were the two transit zones, located forty kilometres or more away.[163] The applicant argued that he had had no realistic chance of entering the transit zones and making his request for international protection.[164] Although the applicant could physically reach the area surrounding the transit zones, there were problems with waiting lists.[165] Therefore, there was an obstacle to legal entry. Access was limited and there was no formal procedure accompanied by appropriate safeguards governing the admission.[166]

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[158] *Ibid.*, para 8
[159] *Ibid.*, para 47
[160] *Ibid.*
[161] *Shazad v. Hungary*, *loc. cit.*
[162] *Shazad v. Hungary*, *op. cit.* (footn. 155), para. 63-67
[163] *Ibid.*, para 63
[164] *Ibid.*
[165] *Ibid.*
[166] Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, *op. cit.* (footn. 116),para 12

4.5. *M.H. v. Croatia*

M.H. v Croatia is another important case that concerns the death of a six-year-old Afghan child, the lawfulness and conditions of the applicants' placement in a transit immigration centre, the applicants' alleged summary removals from Croatian territory, and the respondent State's alleged hindrance of the effective exercise of the applicants' right of individual application.[167]

The case is about a family of 14 Afghan citizens (a man, his two wives, and their eleven children).[168] In 2016 the family left Afghanistan, traveling through Pakistan, Iran, Turkey, Bulgaria, and Serbia before arriving at the Croatian border.[169] The applicant and her six children entered Croatia from Serbia together with one adult man.[170] The other applicants remained in Serbia.[171] The Croatian police officers approached them and the group told police officers that they wished to seek asylum, but the officers ignored their request and ordered them to return to Serbia.[172] At the border, the police officers told them to go back to Serbia by following the train tracks. The group started walking and after several minutes, while they were in Serbia (some 200 meters from the border with Croatia)[173] a train passed and hit one of the children, Madina Hussiny.[174] The police officers with whom they had previously been speaking had taken them to the Tovarnik railway station where a doctor established that Madina Hussiny had died. The group then returned to Serbia.[175]

Croatian authorities conducted an investigation, which claimed that the family had never entered Croatia, or talked to police officers, nor attempted to seek asylum, denying any

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[167] *M.H. and others v. Croatia*, ECtHR, Nos. 15670/18 and 43115/18, 18 November 2021, para. 1
[168] *Ibid.*, para. 5
[169] *Ibid.*, para 6
[170] *Ibid.*, para 7
[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*, para 151
[174] *Ibid.*
[175] *Ibid.*

responsibility for the girl's death.[176]

Four months after the applicants' returned to Serbian territory, they irregularly crossed back into Croatian territory. The Croatian police caught the applicants clandestinely crossing the Serbian-Croatian border and took them to Vrbanja Police Station.[177] The applicants did not have any identification documents with them. They signed a statement on their personal identification information and expressed a wish to seek international protection.[178] Afterwards, the police restricted their freedom of movement and placed them in a transit immigration centre in Tovarnik for an initial period of three months.[179] They had not had any identification documents and their freedom had been restricted in order to verify their identities.[180] The family (including children) was held in detention for months and was prevented from accessing their lawyer.

Relying on Article 2 of the Convention (right to life), the applicants complained that the State had been responsible for the death of Madina and that the investigation into her death had been ineffective.[181] They complained that their placement in the Tovarnik centre had been in breach of Articles 3, 5 (right to liberty and security)[182] and 8 (right to respect for private and family life).[183] The applicants submitted that in the Tovarnik centre they had been kept in prison-like conditions.[184] The children had not been allowed to use the playroom or any toys.[185] Towards the end of their stay, the regime had slightly changed, but there had still been

[176] *Ibid.*, para. 8
[177] *Ibid.*, para. 28
[178] *Ibid.*
[179] *Ibid.*, para 29
[180] *Ibid.*
[181] *Ibid.*, para. 125
[182] *Ibid.*, para. 214
[183] *Ibid.*, para. 338
[184] *Ibid.*, para. 173
[185] *Ibid.*

no means of structuring their time.[186] The general principles applicable to the treatment of persons held in immigration detention were set out in the case of *Khlaifia and Others v. Italy* [187] but this case also concerns minors who are considered extremely vulnerable and have specific needs related in particular to their age and lack of independence, but also to their asylum-seeker status.[188] Under Article 4 of Protocol No. 4. they complained that they had been subject to summary removals from Croatia to Serbia.[189] They also complained of discrimination under Article 14 (prohibition of discrimination) taken in conjunction with Articles 3, 5 and 8 and Article 4 of Protocol No. 4., and Article 1 of Protocol No. 12 (general prohibition on discrimination). [190]

In November 2021, the Court decided that there had been a violation of Article 2 as concerned with the investigation into the death of Madina. The Court found that the material conditions in the Tovarnik centre had been satisfactory and that they had been provided with medical and psychological assistance but that there was an inadequacy in the centre for housing children.[191] The children had spent almost two months without any organised activities to occupy their time. As their detention had lasted for a protracted period, namely two months and fourteen days, the Court thus found a violation of Article 3 in respect to the applicant's children but did not find that there had been a violation regarding the adults.[192] There was a violation of Article 5 because the authorities failed to take all the necessary steps to limit, as far as possible, the detention of the family. There was also a violation of Article 4 of Protocol No. 4 and a violation of the applicants' right of individual petition under Article 34.[193]

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[186] *Ibid.*
[187] *Khlaifia and Others v. Italy, loc. cit.*
[188] *M.H. and others v. Croatia, op. cit.* (footn. 167) para. 184.
[189] *Ibid.*, para. 262
[190] *Ibid.*, para. 338
[191] *Ibid.* para 199
[192] *Ibid.* para 247
[193] *Ibid.*

It can be concluded that this case is also about crossing a land border in an unauthorised manner as in *N.D. and N.T. v Spain* and *Shazad v. Hungary.* Consequently, the test from *N.D. and N.T. v Spain* should be applied. The burden of proof for showing that the applicants did have genuine and effective access to procedures for legal entry was on the respondent state.[194] The Government did not give particular information at the appropriate time on the asylum procedures at the Serbian border.[195] The absence of convincing evidence can lead to the responsibility of the state, which cannot pass the mentioned test. If the state proves that genuine and effective access to procedures exists, but the applicant did not use it, violation of Article 4 Protocol 4 can be excluded with a new standard of "own culpable conduct".

4.6. A.A and Others v. North Macedonia

The Court in this case expanded the exception from the prohibition of collective expulsions created in *N.D. and N.T. v Spain* and found the applicants culpable of circumventing legal pathways, ignoring that these were clearly not available in practice.

The applications (nos. 55798/16 and 55808/16, 55817/16, 55820/16 and 55823/16) against the Republic of North Macedonia were lodged with the Court under Article 34 of the ECHR by five Syrian nationals, two Iraqi nationals, and one Afghan national.[196] The cases concerned the applicants' complaints, under Article 4 of Protocol No. 4 and Article 13, about their immediate return to Greece after having illegally crossed into the territory of North Macedonia in March 2016, and the alleged lack of an effective domestic remedy.[197]

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[194] Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, *op. cit.* (footn. 116), para. 12
[195] *Ibid.*
[196] *A.A and Others v. North Macedonia*, ECtHR, Applications nos. 55798/16 and 4 others, 5 July 2022
[197] *Ibid.*, para 1.

In application no. 55798/16 the applicants were a Syrian family from Aleppo. They left Syria in late 2015 and in February 2016 they arrived in Greece, where a camp had been set up for refugees. They alleged that in March 2016 they joined a large group of refugees around 1,500 in what became known as "the March of Hope", crossed the border wading across a river, and entered Macedonian territory. After a short walk, they reached a point where at least 500 refugees, were allegedly surrounded by military personnel of North Macedonia.[198] They spent the night in the open air. The applicants alleged that at 5 a.m. the next morning, soldiers of North Macedonia threatened the refugees and themselves with violence, unless they returned to Greece. The applicants walked for three to four hours and arrived back in Idomeni, Greece.[199]

The other four applications were Afghan, Iraqi, and Syrian nationals. They also joined "the March of Hope", crossed a river, and entered the territory of the respondent State. They were intercepted and surrounded by soldiers of North Macedonia, who told those gathered that if they failed to turn off their cameras and phones, they would confiscate them. The soldiers then separated and arrested activists, journalists, and volunteers (who were accompanying the refugees on "The March"), which prevented the ensuing actions of the State officials from being documented.[200] The applicants were ordered to cross the fence to the Greek side of the border.[201] The applicants argued back that the soldiers were acting against human rights rules. The Ministry of the Interior of North Macedonia informed the public that about 1,500 migrants had illegally crossed the State border with Greece and that another group of about 600 people, intending to cross illegally, had also been intercepted at the border.[202] A report by the Office of the United Nations High Commissioner for Refugees (UNHCR) issued in August 2015

[198] *Ibid.*, para. 8
[199] *Ibid.*
[200] *Ibid.*, para. 9
[201] *Ibid.*
[202] *Ibid.*, para. 13

indicated a number of challenges in the implementation of the relevant legislation in North Macedonia, such as a limited capacity of the border officials to identify people with international protection needs, including asylum-seekers, and a lack of interpretation.[203]

The Court decided to examine these applications jointly in a single judgment because of their similar subject matter.[204] The applicants asserted that their summary deportation without an examination of their personal circumstances and without a possibility to oppose these measures violated the prohibition of collective expulsion and the right to an effective remedy.[205]

The Court considered that even though this case could be compared to the circumstances in *N.D. and N.T.*, where the applicants were apprehended during an attempt to cross the land border *en masse* by storming the border fences, in the present case there has been no use of force.[206] The ECHR does not prevent States, in the fulfilment of their obligation, to control borders. They may refuse entry to their territory to aliens, including potential asylum-seekers, if they are seeking to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers.[207] There is nothing in the case file to suggest that potential asylum-seekers were in any way prevented from approaching the legitimate border crossing points and lodging an asylum claim. [208] The applicants indicated that they had indeed not been interested in applying for asylum in the respondent State but had rather only been interested in transiting through it.[209]

The Court classified the situation as a collective expulsion but then applied the 'own culpable conduct' exception carved *in N.D. and N.T.* and excluded a violation of Article 4 Protocol 4,

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[203] *Ibid.*, para. 17
[204] *Ibid.*, para. 50
[205] *Ibid.*
[206] *Ibid.*, para. 114
[207] *Ibid.*, para. 115
[208] *Ibid.*, para. 121
[209] *Ibid.*

stating that: "it was in fact the applicants who placed themselves in jeopardy by participating in the illegal entry into Macedonian territory on 14 March 2016, taking advantage of the group's large numbers. (…) The lack of individual removal decisions can be attributed to the fact that the applicants, if they indeed wished to assert rights under the ECHR, did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct. Accordingly, the Court considered that there had been no violation of Article 4 of Protocol No. 4. "[210] The respondent State's officers had been aware of the fact that they had apprehended migrants and that they were expelling them to Greece to conditions which prima facie put them at risk of a violation of Article 3.[211] Macedonian law provided a possibility of appeal against removal orders but the applicants themselves were also required to abide by the rules for submitting such an appeal against their removal.[212] It follows that the lack of a remedy in respect of the applicants' removal does not in itself constitute a violation of Article 13.[213]

The judgment in *N.D and N.T.*, as explained above, was widely criticised as a "historical disappointment", lacking factual basis and clarity. In addition, it was criticised that it is undermining the essence of the non-refoulement and the prohibition of collective expulsion.[214] The exception that is made in *N.D and N.T.* about their 'own culpable conduct' is extended in this case *A.A and Others v. North Macedonia*. As in *Shazad*,[215] there was no use of force, but the question, in this case, was: if whether by crossing the border irregularly, the applicants circumvented an effective procedure for legal entry. As we can see based on what the Court said, this interpretation would mean that 'own culpable conduct' would no longer be an

[210] *Ibid.*, para. 123
[211] *Ibid.*, para. 126
[212] *Ibid.*, para. 128
[213] *Ibid.*, para. 131
[214] Wriedt, Vera, Strasbourg Observers, Expanding Exceptions? AA and Others V North Macedonia, Systematic Pushbacks and The Fiction of Legal Pathways, 30. May 2022, <https://strasbourgobservers.com/2022/05/30/expanding-exceptions-aa-and-others-v-north-macedonia-systematic-pushbacks-and-the-fiction-of-legal-pathways/>, accessed 20 July 2022
[215] *Shazad v. Hungary*, *loc. cit.*

exception to the prohibition of collective expulsion, but its main application.[216] Furthermore, the Court's assessment of access to legal routes turns 'own culpable conduct' into a presumption that needs to be disproven.[217] The joint governmental decision about closing the border was brought up one week preceding the "March of Hope". This decision to close legal pathways was clearly acknowledged in the Court's judgment itself.[218] The people found themselves trapped in intolerable conditions. The evidence clearly demonstrated the absence of legal routes at the material time. The Court nevertheless asserts that "there is nothing in the case file to indicate that it was no longer possible to claim asylum at the border crossing."[219] With this judgment, the Court risks turning the 'own culpable conduct' exception to Article 4 of Protocol 4 into its main application at European borders.[220] What is important for the Court is whether there was genuine and effective access to legal avenues.[221] The path followed by the Court shows us that if refugees are crossing irregularly, and it is well known that they usually face obstacles arising from the country of departure which impede them from regular entry, they are considered guilty of 'own culpable conduct' and that they do not fall under the scope of Article 4 Protocol 4. Moreover, Article 31 of the Refugee Convention implicitly acknowledges that refugees should not be penalised on account of their illegal entry or presence.[222] Exclusions from access to rights created in *N.D. and N.T.* are now expanded into *A.A. and Others v. Macedonia* and thus the Court limited the applicability of human rights.

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[216] Wriedt, Vera, Expanding Exceptions? AA and Others V North Macedonia, Systematic Pushbacks and The Fiction of Legal Pathways, *loc. cit.*
[217] *Ibid.*
[218] *A.A and Others v. North Macedonia*, *op. cit.* (footn. 196), para. 7.
[219] *Ibid.*, para. 119
[220] Wriedt, Vera, Expanding Exceptions? AA and Others V North Macedonia, Systematic Pushbacks and The Fiction of Legal Pathways, *loc. cit.*
[221] *A.A and Others v. North Macedonia*, *loc. cit.*
[222] Convention and Protocol Relating to the Status of Refugees, *op. cit.* (footn. 58), art. 31.

5. CONCLUSION

In the years following World War II, the problems and sufferings of people who have been returned in collective expulsions of foreigners to those territories where there was a genuine risk for their lives or inhuman and degrading treatment, forced the international community to start solving such actions of state authorities.

Article 4 of Protocol No. 4 to the ECHR put this state' actions outside of what is allowed under international law. Nevertheless, the practical interpretation of such a general and brief legal provision which refers to the prohibition of collective expulsion should have been determined by the case law of the European Court of Human Rights.

After the ruling in *N.D. and N.T.* the Court has turned the absolute prohibition of collective expulsion into a relative one by suggesting that collective expulsion can be legal if it is the consequence of the applicant's "culpable conduct ". The Court set out a two-tier test to determine compliance with Article 4 of Protocol No. 4 in cases where individuals cross a land border in an unauthorised manner and are expelled summarily.[223] The first one is whether the state provides genuine and effective access to means of legal entry**.** The second one is whether there is an absence of cogent reasons why the applicant did not make use of official entry procedures, which were based on objective facts for which the respondent state was responsible.[224] This judgment can be interpreted in a narrow or broad way. The broad interpretation would mean that anyone crossing irregularly can be returned without an individualised procedure, as long as there were legal means of entry available.[225] According to

[223] Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, *op. cit.* (footn. 116), para. 11
[224] *Ibid.*
[225] Brackx, Mathilde, *op. cit.* (footn. 17), p. 21

restrictive reading the "culpable conduct exception" would only be applicable in the particular situation where “the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large number and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety”.[226] Scenarios, where small groups of migrants enter the country illegally without using violence. would not fall within the exception.[227] The Court emphasised that the finding of non-violation of Article 4 Protocol 4 does not affect the obligation of contracting states to protect their borders in a manner that is in accordance with the obligation of non-refoulement.

In case *A.A and Others v. North Macedonia* the Court expanded the exception from the prohibition of collective expulsions created in *N.D. and N.T. v Spain.* In the former case, there was no use of force. The Court avoided the cumulative requirements for applicability, relying solely on the unauthorised character of the border crossing as a sufficient condition.

From all of the above, it can be concluded that the European Court of Human rights relativized the absolute ban on collective expulsion, and the question is if the CJEU will follow the case law of the European Court of Human Rights? The CJEU can always provide a higher standard than the Strasbourg court, but it should not provide a lower one.

[226] *Ibid.*
[227] *Ibid.*

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