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***OUT OF SIGHT OUT OF MIND: UNLAWFUL PUSHBACKS AT EU BORDERS –
A CRITICAL EXAMINATION OF HUMAN RIGHTS VIOLATIONS IN THE
MEDITERRANEAN***

*Dissertation to obtain a Master's Degree in Law, in the specialty of International and
European Law*

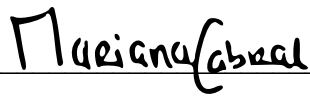
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Anti-plagiarism statement

I hereby declare that this dissertation is the result of my own independent research and work. All sources that have been referenced in the preparation of this dissertation have been properly acknowledged and cited. I am aware that plagiarism is a serious ethical and academic offense.



(Mariana Pais Neves Cabral da Silva)

Dedication

I would like to dedicate this dissertation to my parents, João and Filomena, and my sister, Mafalda. Your unwavering encouragement and belief in me have not only been pivotal throughout this journey but have guided me in all my endeavours. Thank you for always believing in me and giving me every opportunity to pursue my dreams, no matter the sacrifices and efforts you had to make along the way.

I also dedicate this work to all those who endure any form of mistreatment, violence, persecution, and war, and courageously seek to escape such hardships in pursuit of a better life for themselves and their loved ones. Despite the immense challenges they face, they hold onto hope of finding a new home. It is my compassion for these individuals, their resilience, and their dreams of a safe future that inspired me to pursue this topic with full commitment from the very beginning. This dissertation is for them, with the hope that one day, those facing such hurdle may come across this work and see their lives and rights being advocated for.

Acknowledgments

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I would also like to extend my appreciation to Professor Veronica Corcodel. Her teachings not only deepened my understanding of Refugee and Asylum Law but also made me realise that this is the field that truly resonates with me and the one I aspire to pursue professionally. I am equally thankful for the opportunity to work alongside the incredible Nova Refugee and Migration Clinic, an experience that further solidified my choice and commitment to this dissertation's topic.

I would also like to thank my friends, especially the ones I've made during this Master's. Their constant support, help, and belief in me have been invaluable and a source of joy, and I am deeply grateful for their companionship.

Lastly, I want to express my most heartfelt gratitude to my family for their unwavering love and support throughout this entire process. Their love, patience, advice, and constant presence have been a profound source of strength and inspiration, and I am profoundly grateful for their support at every step of this process.

Way of citation

All legal citations and references in this dissertation are formatted according to the OSCOLA (Oxford University Standard for Citation of Legal Authorities). The dissertation is written in British English.

List of abbreviations

AMMR – Asylum Migration Management Regulation

CAT – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

Frontex – European Border and Coast Guard Agency

Refugee Convention – Geneva Convention Relating to the Status of Refugees

ICCPR – International Covenant on Civil and Political Rights

IMO – International Maritime Organisation

IOM – International Organisation for Migration

LCG – Libyan Coast Guard

MoU – Memorandum of Understanding

NGOs – Non-Governmental Organisations

OHCHR – Office of the United Nations High Commissioner for Human Rights

Para. – Paragraph

RCC – Rescue Coordination Center

SAR – Search and Rescue

SAR Convention – International Convention on Maritime Search and Rescue

SOLAS Convention – International Convention for the Safety of Life at Sea

TFEU - Treaty on the Functioning of the European Union

UDHR – Universal Declaration on Human Rights

UN – United Nations

UNCLOS – United Nations Convention on the Law of the Sea

UNHCR – United Nations High Commissioner for Refugees

This dissertation contains a total of 141 853 characters.

'It was indeed my goal to save all those people (...)'

- *Aristides de Sousa Mendes,*
Portuguese diplomat who saved more than 30,000 lives from Nazi persecution
during the II World War

Resumo

Esta dissertação contribui para o debate atual sobre a resposta da União Europeia (UE) à crise humanitária que se tem desenrolado nos últimos anos no Mediterrâneo, identificando uma tendência preocupante centrada em duas práticas: a externalização do controlo das fronteiras e de processos de asilo para países terceiros e subsequentes *pushbacks* – práticas estas que vão contra o direito internacional.

Através de uma análise detalhada dos quadros jurídicos extraterritoriais concebidos para proteger os direitos dos migrantes e refugiados, este estudo salienta as graves implicações em termos de direitos humanos dos *pushbacks* enfrentados por aqueles que fogem de contextos de perseguição, conflito, guerra e outras situações desumanas. É argumentado que estas práticas, destinadas a dissuadir a migração irregular, refletem o incumprimento, por parte dos Estados-Membros da UE, das suas obrigações internacionais em matéria de direitos humanos e de direito dos refugiados.

A revisão de literatura, complementada por jurisprudência que oferece uma visão prática desta questão, revela que, embora os Estados tenham o direito de gerir as suas fronteiras, este direito não é absoluto, e estes não devem ignorar os seus compromissos para com o direito internacional. A dissertação sublinha que a interceção de indivíduos no mar e o seu retorno arbitrário a países terceiros com baixos níveis de direitos humanos, sem uma avaliação exaustiva das suas circunstâncias pessoais e negando-lhes o acesso a asilo ou a outras formas de proteção internacional, constitui uma violação do direito internacional, em particular do princípio de *non-refoulement*. Esta dissertação sublinha a importância de os Estados-Membros da UE cumprirem plenamente as suas obrigações legais ao abrigo do direito internacional enquanto gerem as suas fronteiras, salientando que uma abordagem humana para lidar com as chegadas às margens da UE deve fazer parte do recém-aprovado Pacto em matéria de Migração e Asilo da Comissão Europeia.

Em última análise, esta dissertação defende uma abordagem de controlo de fronteiras mais humanizada e em conformidade com os direitos humanos, através do reforço de partilha equitativa de responsabilidades e solidariedade não só entre os Estados-Membros, mas também relativamente à situação dos migrantes e refugiados, para garantir que os direitos humanos são respeitados e protegidos nas fronteiras externas da UE, preservando, simultaneamente, o sistema Europeu de direitos humanos.

Palavras-chave: Direitos Humanos; Refugiados; Migrantes; *Pushbacks*; Princípio de *Non-refoulement*; Mediterrâneo; Externalização de responsabilidade.

Abstract

This dissertation contributes to the ongoing debate on the European Union's (EU) response to the humanitarian crisis that has been unfolding for the past years in the Mediterranean, identifying a concerning trend focused on two practices: the externalisation of border control and asylum procedures to third countries, and the ensuing pushbacks – practices that are against international law.

Through a detailed analysis of the extraterritorial legal frameworks designed to protect the rights of migrants and refugees, this study highlights the severe human rights implications of pushbacks faced by those fleeing persecution, conflict, war, and other ill-treatment. It argues that these practices, intended to deter irregular migration, reflect a failure of the EU and its Member States to uphold their obligations under international human rights and refugee law.

The literature review, complemented by caselaw that offers practical insights into this issue, reveals that while States have the right to manage their borders, this right is not absolute, and States must not disregard their international commitments to human rights and refugee law. The dissertation emphasises that intercepting individuals at sea and arbitrarily returning them to third countries with low human rights records, without a thorough assessment of their personal circumstances and denying them access to asylum or other forms of international protection, constitutes a violation of international law, particularly the principle of *non-refoulement*.

This work underscores the importance of EU Member States fully adhering to their legal obligations under international law while managing their borders, highlighting that a humane approach to deal with the arrivals on the EU's shores must be part of the newly approved European Commission's Pact on Migration and Asylum.

Ultimately, this dissertation advocates for a more humane and human rights-compliant approach to border control, reinforcing solidarity not only among Member States but also in addressing the plight of migrants and refugees, to ensure that human rights are respected and protected at the EU's external borders, while preserving the European human rights system.

Keywords: Human Rights; Refugees; Migrants; Pushbacks; Principle of *Non-refoulement*; Mediterranean; Externalisation of responsibility.

Introduction

Crossing the sea in the hope of finding a newer, safer, and more dignified home is not a recent phenomenon¹. Every year, countless individuals attempt the dangerous journey to Europe from the shores of their origin countries where they can no longer pursue their lives with dignity or safety².

For decades, individuals driven by desperation have embarked on hazardous travels in unseaworthy vessels, some in pursuit of improved living conditions, others fleeing persecution, conflict, or grave threats to their safety and freedom³, hoping for international protection. Upon reaching land, they often face ill-treatment, abuse, and violence, many times, ending in loss of life⁴.

These individuals are often referred to as ‘irregular migrants’, which stems from the concept of irregular migration. According to Lisa-Marie Komp, this phenomenon was created by the restrictive policies that made regular migration unavailable to certain groups of people, through bans on migration from specific regions, strict visa requirements, bureaucratic barriers, and financial hardship to afford the migration costs⁵.

With legal pathways restricted or entirely blocked, those whose only option is to migrate, are left with no option but to turn to irregular avenues, arriving unannounced and undocumented at EU’s borders. As a result, the Mediterranean has become the most heavily traversed sea for irregular crossings by those attempting to reach the EU,

¹ Seline Trevisanut, “The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea” (2014) 27 Leiden Journal of International Law 661 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341012>.

² Jane Freedman, “Engendering Security at the Borders of Europe: Women Migrants and the Mediterranean ‘Crisis’” (2016) 29 Journal of Refugee Studies 568 <<https://academic.oup.com/jrs/article/29/4/568/2453266>>.

³ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, ‘Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants’ (8 May 2015) UN Doc A/HRC/29/36, para. 26 <<https://www.refworld.org/reference/countryrep/unhrc/2015/en/105634>> accessed October 27, 2023.

⁴ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, “Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea” (2021) A/HRC/47/30, para. 62 <<https://documents.un.org/doc/undoc/gen/g21/106/33/pdf/g2110633.pdf>> accessed November 18, 2023.

⁵ Lisa-Marie Komp, “Border Deaths at Sea under the Right to Life in the European Convention on Human Rights” in Mark Gibney, Thomas Gammeltoft and Bonny Ibhawoh (eds), *Routledge Studies in Human Rights* (Routledge 2023) 10

culminating in the large-scale refugee crisis in 2015⁶. This significant influx of migrants and refugees has placed immense pressure on EU Member States, particularly those closest to the EU's external borders⁷. However, it appears that many Member States have selectively interpreted relevant laws to advance their own interests and side-step accountability, often ignoring their international legal obligations under human rights and refugee law⁸.

This dissertation seeks to contribute to the ongoing debate on human rights violations at the EU's external borders, and how the EU can manage migration more humanely while achieving border governance goals. By offering a critical legal analysis grounded in a human rights perspective, this study aims to examine how the EU's current practices are in line with international human rights and refugee law, and if these are contributing to the protection of migrants and refugees or exacerbating their vulnerability. As such, the research question that will drive this study is the following: *Are EU Member States complying with their legal obligations under international human rights and refugee law?* To answer it, the dissertation is structured into five chapters, each fundamental for delving into the complexities of this legal issue.

The first chapter sets the context of the humanitarian crisis in the Mediterranean, providing an overview of its current situation and statistics to support it. It examines the shift in the EU's approach to the crisis, moving from a humanitarian focus to a more securitised, border-control-driven strategy aimed at deterring irregular migration by sea, with little to no regard for the protection of migrants' and refugees' human rights.

Chapter two begins by distinguishing two key terms in this dissertation – 'migrants' and 'refugees'. It then outlines the rights afforded to migrants and refugees under international human rights and refugee law, and the law of the sea, as well as EU law. Simultaneously, it delves into the jurisprudence on the extraterritorial applicability of human rights and the legal obligations that States must adhere to when implementing border control measures.

⁶ Elif Demirbas and Christina Miliou, "Looking at the EU-Turkey Deal: The Implications for Migrants in Greece and Turkey" in Richard Zapata-Barrero and Ibrahim Awad (eds), *Migrations in the Mediterranean* (Springer 2024) 11 <<https://link.springer.com/book/10.1007/978-3-031-42264-5>>.

⁷ European Parliament, "The EU Response to Migration and Asylum" (*European Parliament*, June 30, 2017) <<https://www.europarl.europa.eu/topics/en/article/20170629STO78629/the-eu-response-to-migration-and-asylum>> accessed April 6, 2024.

⁸ Jamal Barnes, "Torturous Journeys: Cruelty, International Law, and Pushbacks and Pullbacks over the Mediterranean Sea" (2022) 48 *Review of International Studies* 442 <<https://ro.ecu.edu.au/cgi/viewcontent.cgi?article=1427&context=ecuworks2022-2026>>.

Chapter three explores the concept of externalisation of border control and asylum procedures responsibilities to “safe” third countries, and how, in an attempt to curb irregular migration, EU Member States have turned to practices such as pushbacks and other unlawful actions, in breach of international law. To enlighten this externalisation of obligations to third countries, two specific bilateral agreements are addressed: the long-standing Italy-Libya deal and the newly approved Italy-Albania deal. This chapter aims to emphasise how the externalisation of obligations to third countries has severe human rights implications under international law, particularly regarding the principle of *non-refoulement* and the prohibition of collective expulsions.

With the intent of examining EU’s current practices, chapter four critically evaluates the recently approved New Pact on Migration and Asylum of the European Commission, assessing whether the reforms outlined in the pact offer practical solutions to prevent pushbacks and human rights violations at the EU’s external borders, or if they instead exacerbate the humanitarian crisis in the Mediterranean.

In chapter five, drawing on the research conducted for this dissertation, viable solutions and recommendations are proposed to prevent pushbacks and enhance the protection of migrants’ and refugees’ human rights during their asylum-seeking process in the EU. These proposed recommendations aim to address the shortcomings of current practices and policies implemented by EU Member States.

Finally, the conclusion synthesises the key findings of this dissertation, addressing the research question and reaffirming the imperative that is for the EU and its Member States to collectively adopt a more humane approach to migration management and border control while fully adhering to their international legal obligations under human rights and refugee law. It underscores that sending migrants and refugees back to places where they may have their human rights abused not only breaches international law but also exacerbates the ongoing humanitarian crisis in the Mediterranean. Ultimately, this work highlights the urgent need for Member States to fairly share responsibility, show solidarity with those at their doorstep, and tackle this crisis in a unified fashion.

Chapter 1: The humanitarian crisis in the Mediterranean and the EU's shift from a humanitarian approach to securitised policies

The year of 2015 marked the pinnacle of the migration crisis, with the Mediterranean Sea being the stage of a humanitarian catastrophe⁹. Since then, irregular migration has been a persistent challenge in the Mediterranean.

For the sake of this dissertation, the term “Mediterranean” will refer specifically to the Central Mediterranean route. This area encompasses the sea crossing from North African countries, such as Libya, to European States like Italy. This region has been selected due to its significance as a major corridor for migrants and refugees seeking asylum in the EU¹⁰, as well as the humanitarian and human rights challenges arising from border control in these waters.

Despite being the most dangerous and deadliest ever, the Central Mediterranean route has become a consistent gateway for migration. According to European Border and Coast Guard Agency (Frontex) data, in 2023, 158,000 individuals reached Europe through the Central Mediterranean route, 50% more than in 2022 and the largest number since 2016¹¹. Moreover, the International Organisation for Migration's (IOM) Missing Migrants Project found that 3,041 individuals lost their lives or went missing in the process of crossing the Mediterranean in 2023¹² (where more than half of the deaths were caused by drowning¹³), marking the first quarter of 2023 as the deadliest ever in the Mediterranean Sea¹⁴. Just this year, nearly 900 people have died in the

⁹ Stefania Panebianco, “The EU and Migration in the Mediterranean: EU Borders’ Control by Proxy” (2020) 48, 2022 *Journal of Ethnic and Migration Studies* 1398.

¹⁰ Henrique Miguel Alves Garcia, “A União Europeia e a Crise Migratória. O Terrorismo e o Conflito Sírio” (Master’s thesis, Universidade de Coimbra 2017) 8 <<https://estudogeral.uc.pt/handle/10316/85603>>.

¹¹ Frontex, “Frontex Annual Brief 2023” (2024) 1-2 <https://www.frontex.europa.eu/assets/Publications/General/Annual_Brief_2023.pdf> accessed March 10, 2024.

¹² “IOM Chief: Nearly 100 Disappeared or Dead in Mediterranean in 2024 Underscoring Need for Regular Pathways” (*IOM UN Migration*, January 29, 2024) <<https://www.iom.int/news/iom-chief-nearly-100-disappeared-or-dead-mediterranean-2024-underscoring-need-regular-pathways>> accessed March 3, 2024.

¹³ Anna Fleck, “More Than Half of Migrant Deaths Are From Drowning” (*Statista*, March 14, 2024) <<https://www.statista.com/chart/31911/estimated-number-of-dead-missing-refugees-worldwide/>> accessed July 30, 2024.

¹⁴ Maria Margarita Mentzelopoulou, “Lives Lost at Sea” (European Parliamentary Research Service 2023) PE 751.479 1 <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/751479/EPRS_ATA\(2023\)751479_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/751479/EPRS_ATA(2023)751479_EN.pdf)> accessed November 4, 2023.

Mediterranean¹⁵, and, given the persistent crisis and conflicts in the migrants' and refugees' countries of origin, the toll will likely continue to rise.

The large-scale refugee crisis unfolding in the Mediterranean in 2015, destabilised EU's cohesion, and revealed shortcomings in the EU's immigration and asylum legal frameworks¹⁶. The 2015 refugee crisis also served as a catalyst for populist parties to promote anti-migration narratives and restrictive policy agendas¹⁷. These narratives often portray migrants and refugees as a threat to national security¹⁸, and that many of those arriving in Europe are not in genuine danger and lack eligible asylum claims, thereby allegedly taking advantage of the EU's asylum system¹⁹. However, data shows that in 2024 the number of forcibly displaced people globally reached an all-time high²⁰, with over 110 million people displaced due to conflict, persecution, violence and human rights violations²¹, which challenges the narrative that most migrants and refugees are not under a genuine threat.

After the 'Black April' in 2015, when 1240 people died in the Mediterranean in one month, the EU acknowledged the need for a collective response guided by the principle of solidarity and fair sharing of responsibilities between Member States, as outlined in Article 80 of the Treaty on the Functioning of the European Union (TFEU)²². Following the Lampedusa tragedy, where nearly 400 people drowned just half a mile

¹⁵ Statista Research Department, "Number of Recorded Deaths of Migrants in the Mediterranean Sea from 2014 to 2024" (*Statista*, May 2024) <<https://www.statista.com/statistics/1082077/deaths-of-migrants-in-the-mediterranean-sea/>> accessed July 19, 2024.

¹⁶ Athina Economou and Christos Kollias, "The 2015 Refugee Crisis and Institutional Trust in European Countries" (2024) 173, *Social Indicators Research* 378 <<https://link.springer.com/article/10.1007/s11205-024-03348-1>>.

¹⁷ Athina Economou and Christos Kollias, "The 2015 Refugee Crisis and Institutional Trust in European Countries" (2024) 173, *Social Indicators Research* 377 <<https://link.springer.com/article/10.1007/s11205-024-03348-1>>.

¹⁸ Stefania Panebianco, "The EU and Migration in the Mediterranean: EU Borders' Control by Proxy" (2020) 48, *2022 Journal of Ethnic and Migration Studies* 1398.

¹⁹ Stefania Panebianco, "The EU and Migration in the Mediterranean: EU Borders' Control by Proxy" (2020) 48, *2022 Journal of Ethnic and Migration Studies* 1409

²⁰ European Civil Protection and Humanitarian Aid Operations, "Forced Displacement Refugees, Asylum-Seekers, and Internally Displaced Persons (IDPs)" (*European Commission*) <https://civil-protection-humanitarian-aid.ec.europa.eu/what/humanitarian-aid/forced-displacement_en#:~:text=As%20of%20May%202024%2C%20the,global%20figures%20for%20forced%20displacement> accessed February 29, 2024.

²¹ UNHCR, "Over 110 Million People Are Forcibly Displaced Globally" (*UNHCR*) <<https://www.unhcr.org/mid-year-trends#:~:text=At%20the%20end%20of%20June,events%20seriously%20disturbing%20public%20order>> accessed February 24, 2024.

²² Stefania Panebianco, "The EU and Migration in the Mediterranean: EU Borders' Control by Proxy" (2020) 48, *2022 Journal of Ethnic and Migration Studies* 1403-1404

from the island²³, and the signing of the Memorandum of Understanding (MoU) between Italy and Libya – which will be addressed in Chapter 3.2.1 – the humanitarian approach to the Mediterranean migration crisis – which had seen the launch of a rescue operation in Libya’s territorial sea²⁴ to assist individuals attempting to cross the Mediterranean – rapidly shifted to a more security-oriented approach based on the closing of EU borders and outsourcing of migration management²⁵. Since then, Member States, as a way of deterring irregular migration and controlling their borders, have been overshadowing the humanitarian dimension of this crisis, opting for the border control argument to protect their sovereignty and prevent migrants and refugees from entering their territories.

As part of this border control approach, States have been engaging in pushbacks as a way of externalising asylum procedures and border control responsibilities to “safe” third countries²⁶, which is in breach of international human rights and refugee law, especially the principle of *non-refoulement* – which will be addressed in Chapter 2.3. ‘Pushback’ is a term that lacks an internationally accepted definition. As described by the former Special Rapporteur on the human rights of migrants, pushbacks are ‘*various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or have crossed an international border*’²⁷. In other words, pushbacks involve the forced and arbitrary removal of non-nationals from a State’s territory, without a proper individual assessment of their personal circumstances, needs, and vulnerabilities, preventing them from accessing asylum procedures and legal

²³ Priscilla Oltean and Claudia Anamaria Iov, “Lampedusa Tragedy from October 2013 and the European Union Response: More Accessible or More Restrictive Migration Policies?” [2015] International Relations 58 <<https://www.rstjournal.com/?mdocs-file=1404>>.

²⁴ “Mare Nostrum Operation” (*Ministero Della Difesa Marina Militare*) <<https://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>> accessed November 30, 2023.

²⁵ Stefania Panebianco, “The EU and Migration in the Mediterranean: EU Borders’ Control by Proxy” (2020) 48, 2022 Journal of Ethnic and Migration Studies 1399

²⁶ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, “Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea” (2021) A/HRC/47/30, paras. 63-64 <<https://documents.un.org/doc/undoc/gen/g21/106/33/pdf/g2110633.pdf>> accessed November 18, 2023.

²⁷ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, “Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea” (2021) A/HRC/47/30, para. 34 <<https://documents.un.org/doc/undoc/gen/g21/106/33/pdf/g2110633.pdf>> accessed November 18, 2023.

protections guaranteed by international law. In general terms, pushbacks represent a State's refusal to respect its international obligations when it comes to protecting migrants and refugees²⁸. Under pushback policies, individuals are summarily removed to a third country²⁹ with which they have no ties or connection.

In this sense, the practice of pushbacks has become a norm in the domestic laws of Mediterranean countries³⁰, contributing to the perpetuation of human rights violations at the EU external borders.

²⁸ *ibid*, para. 33.

²⁹ *ibid*, para. 36.

³⁰ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, "Human rights violations at international borders: trends, prevention and accountability" (2022) A/HRC/50/31, paras. 27-39 <<https://documents.un.org/doc/undoc/gen/g22/328/57/pdf/g2232857.pdf>> accessed April 18, 2024.

Chapter 2: Human rights of migrants and refugees under international and EU law

The debate over how to reconcile human rights imperatives with border control efforts in the Mediterranean is an ongoing and recurrent issue³¹. For many years, States have held onto traditional notions of jurisdiction, asserting that they are not accountable for human rights violations occurring outside their borders, and in this way, not responsible for the occurrence of pushbacks³².

States have a duty to protect the human rights of irregular migrants within their territory or under their jurisdiction³³. To understand the human rights to which migrants and refugees are entitled under international human rights and refugee law, the Law of the Sea, and EU law, it is essential to determine which rights are relevant to sea migration.

2.1. Migrants and refugees: understanding the distinction

Before delving into the human rights to which migrants and refugees are entitled, it is crucial to be aware of the distinction between both terms.

Even though individuals who arrive at the EU's external borders without documentation are commonly termed as 'irregular migrants', such label is believed to be dehumanising³⁴, as it implies illegality. The United Nations (UN) General Assembly resolution 3449³⁵, advises against the use of the term 'illegal' to describe migrants in an irregular situation, advocating for more respectful and accurate terminology.

Although there is no definition of 'migrant' under international law, the IOM defines a migrant as *'(...) a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or*

³¹ Petra Perisic and Paulina Ostojic, "Pushbacks of Migrants in the Mediterranean: Reconciling Border Control Measures and the Obligation to Protect Human Rights" (2022) 61 Poredbeno Pomorsko Pravo 606 <<https://hrcak.srce.hr/file/419974>>.

³² Michael Garcia Bochenek, "The Persistent, Pernicious Use of Pushbacks against Children and Adults in Search of Safety" (2023) 12 Laws 4 <<https://www.mdpi.com/2075-471X/12/3/34>>.

³³ OHCHR, "Protecting the Rights of Migrants in Irregular Situations" 1 <<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/IrregularMigrants.pdf>> accessed April 30, 2024.

³⁴ Lisa-Marie Komp, "Border Deaths at Sea under the Right to Life in the European Convention on Human Rights" in Mark Gibney, Thomas Gammeltoft and Bonny Ibhawoh (eds), *Routledge Studies in Human Rights* (Routledge 2023) 6

³⁵ UN General Assembly 'Measures to ensure the rights of asylum seekers and refugees' (9 December 1975) UN Doc A/RES/3449.

*permanently, and for a variety of reasons.*³⁶, encompassing several legally recognised groups, such as smuggled migrants³⁷. Moreover, a migrant in an irregular situation is defined as *'A person who moves or has moved across an international border and is not authorised to enter or to stay in a State pursuant to the law of that State and to international agreements to which that State is a party.'*³⁸. For the sake of this dissertation, the term 'migrants' will reflect the definition of migrants in an irregular situation, as defined above.

Conversely, a refugee is defined in international law. According to Article 1 (A) (2) of the 1951 Geneva Convention relating to the Status of Refugees (Refugee Convention)³⁹, is someone who: *'(...) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and 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.'*⁴⁰

Similarly to the term 'migrant', the term 'asylum seeker' is not defined under international law. As such, the definition provided by the United Nations High Commissioner for Refugees (UNHCR) will be the one used in this dissertation. According to the UNHCR, an 'asylum seeker' is *'(...) someone who is seeking international protection. Their request for refugee status, (...) has yet to be processed, or they may not yet have requested asylum but they intend to do so.'*⁴¹. However, for the purpose of this dissertation, the focus will be on migrants and refugees.

2.2. Right to life

The perilous journeys migrants and refugees take to reach Europe are, most of the times, done in life-threatening conditions in rubber boats lacking sufficient life-saving equipment, essential supplies such as water, food, fuel, and medical equipment, as well

³⁶ IOM, "International Migration Law: Glossary on Migration" (2019) 132 <https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf> accessed January 7, 2024.

³⁷ *ibid*, 132.

³⁸ *ibid*, 133.

³⁹ Geneva Convention Relating to the Status of Refugees 1951

⁴⁰ *ibid*.

⁴¹ UNHCR, "Who We Protect Asylum-Seekers" (UNHCR) <<https://www.unhcr.org/asylum-seekers>> accessed January 11, 2024.

as proper navigation and communication devices⁴². Still, the risks to these individuals' lives do not end after navigating the oceans. Fatal incidents and human rights abuses can also occur during rescue efforts and upon disembarkation, putting their right to life at risk.

The right to life is a universal right that applies to everyone. Enshrined in numerous international treaties, such as in Article 3 of the Universal Declaration on Human Rights (UDHR)⁴³, Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR)⁴⁴ and Article 2 of the EU Charter of Fundamental Rights⁴⁵, the right to life mandates a positive and primary obligation of States to respect and protect the right to life through measures that safeguard the lives of individuals within their jurisdiction. According to Article 2 of the European Convention on Human Rights (ECHR):

1. *Everyone's right to life shall be protected by law. (...)*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
 - (a) *in defence of any person from unlawful violence;*
 - (b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
 - (c) *in action lawfully taken for the purpose of quelling a riot or insurrection.*

Lisa-Marie Komp divides Article 2 of the ECHR into four pieces⁴⁶. The first one is the obligation on States to refrain from the intentional and unlawful taking of life due to the use of force by its agents, which is particularly relevant given that many deaths at sea result from the use of force and coercive measures for border control⁴⁷. The second aspect is the obligation of States to protect the right to life by actively preventing loss of life. This includes both avoiding actions that put individuals' lives at risk but also taking positive and proactive measures to prevent the loss of life, a crucial consideration in the

⁴² Tullio Scovazzi, "Human Rights and Immigration at Sea" in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford 2014) 225 <<https://academic.oup.com/book/11474/chapter-abstract/160197419?redirectedFrom=fulltext>>.

⁴³ Universal Declaration on Human Rights 1948

⁴⁴ Covenant on Civil and Political Rights 1966.

⁴⁵ EU Charter of Fundamental Rights (2009) OJ C202/389.

⁴⁶ Lisa-Marie Komp, "Border Deaths at Sea under the Right to Life in the European Convention on Human Rights" in Mark Gibney, Thomas Gammeltoft and Bonny Ibhawoh (eds), *Routledge Studies in Human Rights* (Routledge 2023) 111.

⁴⁷ *ibid.*

context of migration deterrence policies⁴⁸. The third element mandates that States safeguard this right through the establishment of a legal framework⁴⁹. Finally, the fourth component requires an independent, prompt and thorough investigation and judicial remedies when a life is lost⁵⁰.

The European Court of Human Rights (ECtHR) has consistently held that States, when in a position to prevent harm, must take proactive measures to comply with their positive obligations to prevent the violation of Convention rights. For example, in *Osman v. the United Kingdom*, the ECtHR established that States have a positive obligation under Article 2 to safeguard human life of those under their jurisdiction and to take preventive measures to protect individuals whose lives are at risk if aware of that risk, even if the origin of the threat is unrelated to the State⁵¹. The Court further held that States and its agents can be held accountable for violating Article 2 of the ECHR if, aware of a threat to an individual, they fail to act within their powers to prevent or minimise the risk to life and it results in the loss of life⁵². As such, when a State engages in practices like pushbacks, endangering the lives of migrants and refugees, it can be considered in breach of its positive obligation to protect the right to life under Article 2 of the ECHR.

In the Global Compact for Safe, Orderly and Regular Migration⁵³, 181 countries have agreed to fairly share the responsibility of saving lives and preventing migrant deaths⁵⁴. In addition, according to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials⁵⁵, States have an obligation to prevent the unjustifiable use of force, being only justifiable when necessary and in proportion to the situation. However, when engaging in violent pushbacks and outsourcing their asylum responsibilities to “safe” third countries that lack human rights safeguards, States are creating scenarios that violate the right to life, instead of preventing the loss of it, as they are bound by international law. In fact, in 2021, the UN Human Rights Committee found

⁴⁸ Lisa-Marie Komp, “Border Deaths at Sea under the Right to Life in the European Convention on Human Rights” in Mark Gibney, Thomas Gammeltoft and Bonny Ibhawoh (eds), *Routledge Studies in Human Rights* (Routledge 2023) 111.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *Osman v. the United Kingdom* (1998) App. No. 23452/94 (Grand Chamber of the European Court of Human Rights), para. 115.

⁵² *ibid.*, paras. 115-116.

⁵³ UN General Assembly ‘Global Compact for Safe, Orderly and Regular Migration’ (19 December 2018) UN Doc A/RES/73/195.

⁵⁴ UN General Assembly ‘Global Compact for Safe, Orderly and Regular Migration’ (19 December 2018) UN Doc A/RES/73/195, para. 24.

⁵⁵ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990.

Italy in breach of its obligation to protect the right to life when failing to rescue a sinking vessel sank in the Mediterranean with over 200 refugees aboard⁵⁶.

Before proceeding to the next section, it is crucial to emphasise that when States fail to fully comply with customary international law and their primary obligation to protect the right to life, they pose a serious threat to the European human rights system.

2.3. The principle of non-refoulement and the prohibition of collective expulsions

Even though human rights belong to every individual, irrespective of their status or nationality⁵⁷, migrants and refugees further enjoy rights enshrined in international refugee law and EU asylum law.

As previously stated, States have the sovereign right to dictate who enters and remains within their borders. However, this right is not boundless, and according to Article 2 of the United Nations Charter⁵⁸ and Objective 7 of the Global Compact for Safe, Orderly and Regular Migration⁵⁹, States must respect and comply with their legal obligations under international law, notably the prohibition of *refoulement* and the prohibition of collective expulsions.

The principle of *non-refoulement* is a *jus cogens* norm firmly established in customary international law⁶⁰ and forbids the removal or deportation of individuals if there are strong reasons to believe they would face serious harm in the destination location or in a further third country they might be sent thereafter – a practice known as chain *refoulement*⁶¹.

This absolute prohibition under international law applies to all individuals falling under the Refugee Convention definition of ‘refugee’ but also, to asylum seekers whose

⁵⁶ No 3042/2017 (2021) CCPR/C/130/D/3042/2017 (Human Rights Committee).

⁵⁷ OHCHR, “Protecting the Rights of Migrants in Irregular Situations” 1 <<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/IrregularMigrants.pdf>> accessed April 30, 2024.

⁵⁸ Charter of the United Nations 1945 1 UNTS XVI, Article 2.

⁵⁹ UN General Assembly ‘Global Compact for Safe, Orderly and Regular Migration’ (19 December 2018) UN Doc A/RES/73/195, para. 23.

⁶⁰ Guy S. Goodwin-Gill, “The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*” (2011) 23 International Journal of Refugee Law 444 <<https://academic.oup.com/ijrl/article-abstract/23/3/443/1518677>>.

⁶¹ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, “Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea” (2021) A/HRC/47/30, para. 41 <<https://documents.un.org/doc/undoc/gen/g21/106/33/pdf/g2110633.pdf>> accessed November 18, 2023.

status is still undetermined⁶². The principle of *non-refoulement* is enshrined in the Refugee Convention, as follows:

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'⁶³.

As such, the principle of *non-refoulement* is the cornerstone of refugee and human rights law and of the international protection regime as it ensures that individuals will not be forced back into the persecution that drove them to flee in the first place⁶⁴. It applies with no geographical limitation⁶⁵, being on land or on the high seas, and no derogation is allowed when it comes to upholding it⁶⁶.

The principle of *non-refoulement* is applied based on individuals' vulnerabilities, rather than their legal status, regardless of whether they are entering the State regularly or irregularly⁶⁷. In *N.D. and N.T. v. Spain*, the Grand Chamber of the ECtHR asserted that any denial of entry of non-nationals must still adhere to the Convention's guarantees and protect them from *refoulement*⁶⁸. It further clarified that a 'refugee' encompasses not only those lawfully present in the expelling State, but anyone unlawfully present who has sought asylum⁶⁹. Moreover, the Court affirmed that everyone's circumstance must be carefully and fairly reviewed to consider all factors that might go against expulsion⁷⁰. Similarly, in *Sharifi and Others v. Italy and Greece*, the Court held that the removing State must ensure the destination country has an asylum procedure with adequate

⁶² "Access to Territory and Non-Refoulement" (2023) 2 <<https://emergency.unhcr.org/protection/legal-framework/access-territory-and-non-refoulement>> accessed January 15, 2024; and *N.D. and N.T. v. Spain* (2020) App. Nos. 8675/15, 8697/15 (Grand Chamber of the European Court of Human Rights), para. 181.

⁶³ Geneva Convention Relating to the Status of Refugees 1951

⁶⁴ Seline Trevisanut, "The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea" (2014) 27 Leiden Journal of International Law 663 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341012>.

⁶⁵ UNHCR, "Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach" EC/50/SC/CRP.17, para. 23 <<https://www.unhcr.org/sites/default/files/legacy-pdf/4963237411.pdf>> accessed January 17, 2024.

⁶⁶ *Furundzija case (Case IT-95-17/1)* (International Criminal Tribunal for the Former Yugoslavia), para. 144

⁶⁷ Seline Trevisanut, "The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea" (2014) 27 Leiden Journal of International Law 673-674 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341012>.

⁶⁸ *ibid.*

⁶⁹ *N.D. and N.T. v. Spain* (2020) App. Nos. 8675/15, 8697/15 (Grand Chamber of the European Court of Human Rights), para. 179.

⁷⁰ *ibid.*, paras. 124 and 138.

safeguards to prevent the return of the individual without a proper individual assessment of their circumstances and protection needs⁷¹.

The prohibition of *refoulement* is also enshrined in Articles 6 and 7 of the ICCPR. These prohibit the removal of individuals to a country where there are well-founded suspicions of irreparable harm to their right to life, including torture and other forms of inhuman or degrading treatment. This obligation extends to preventing any subsequent return to another country where they might face similar risks, thereby preventing chain *refoulement*⁷². Such prohibition is also indirectly reflected in Articles 2 and 3 of the ECHR, prohibiting the return of individuals to a place where they may be subjected to treatment contrary to those articles⁷³.

Similarly, Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibits the expelling, return or extradition of a person to another State when there are substantial grounds for believing that the individual can be subjected to torture⁷⁴.

Moreover, pushbacks may also amount to collective expulsions, which are also prohibited under general principles of international law⁷⁵.

Accordingly, collective expulsions are prohibited by Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens) to the ECHR⁷⁶. In *Khlaifia and Others v. Italy*, the ECtHR ruled that collective expulsions are ‘*any measures 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*’⁷⁷.

Thus, such prohibition reinforces the principle of *non-refoulement* as it ensures a possibility to challenge an expulsion order based on the risk of facing treatment contrary

⁷¹ *Sharifi and Others v. Italy and Greece* (2014) App. No. 16643/09 (Grand Chamber of the European Court of Human Rights), para. 210.

⁷² UN Human Rights Committee, “General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)” (1992) UN Doc CCPR/C/GC/20, para. 9 <<https://www.refworld.org/legal/general/hrc/1992/en/11086>>.

⁷³ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 114.

⁷⁴ Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984, Article 3.

⁷⁵ *N.D. and N.T. v. Spain* (2020) App. Nos. 8675/15, 8697/15 (Grand Chamber of the European Court of Human Rights), para. 7-11.

⁷⁶ Registry of the Council of Europe, “Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of Collective Expulsions of Aliens” (2024) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_4_protocol_4_eng> accessed June 21, 2024.

⁷⁷ *Khlaifia and Others v. Italy* (2016) App. No. 16483/12 (Grand Chamber of the European Court of Human Rights), para. 237.

to the ECHR, mandating that every person facing expulsion is entitled to an individualised assessment that considers their personal circumstances and is granted the opportunity to contest their expulsion order and prove that the receiving country is not safe for them⁷⁸. The Court has also determined that while waiting for international protection, States cannot refuse entry to an individual at a border checkpoint who claims they might be mistreated if they return to the neighbouring State⁷⁹.

As argued by Seline Trevisanut, while the prohibition of collective expulsions prohibits a State from returning individuals without ensuring procedural and individual safeguards before being returned, the principle of *non-refoulement* is a safeguard against the return of individuals who encounter the risk of harm upon their return⁸⁰. The first ensures fair processes, and therefore is a procedural right; the latter is a substantive right, aimed at protecting individuals from ill-treatment⁸¹.

Moreover, according to Article 13 of the ECHR and Article 2 (3) of the ICCPR, a person alleging risk of their human rights being violated upon return to their home country or to a third country has the right to obtain a fair and effective remedy and present his/her case before an impartial authority. Throughout this process, the Court has ruled that the removal decision must be automatically suspended pending a conclusive decision⁸².

EU primary law also upholds the prohibition of *refoulement* and collective expulsions in Articles 18 and 19 (1) and (2), respectively, of the EU Charter of Fundamental Rights⁸³, and Article 78 (1) of the TFEU which further requires Member States to ensure compliance with the principle of *non-refoulement*⁸⁴.

Such principle and prohibition is also established in EU secondary law. For example, the protection from *refoulement* is enshrined in Article 21 (1) and (2) of the

⁷⁸ *Ilias and Ahmed v. Hungary* (2017) App. No. 47287/15 (Grand Chamber of the European Court of Human Rights), para. 139-141.

⁷⁹ *M.K. and Others v. Poland* (2020) App. Nos. 40503/17, 42902/17 and 43643/17 (Grand Chamber of the European Court of Human Rights), para. 179.

⁸⁰ Seline Trevisanut, "The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea" (2014) 27 Leiden Journal of International Law 342 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341012>.

⁸¹ Seline Trevisanut, "The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea" (2014) 27 Leiden Journal of International Law 342 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341012>.

⁸² *M.S.S. v. Belgium and Greece* (2011) App. No. 30696/09 (Grand Chamber of the European Court of Human Rights), para. 293. and *M.K. and Others v. Poland* (2020) App. Nos. 40503/17, 42902/17 and 43643/17 (Grand Chamber of the European Court of Human Rights), paras. 142-148 and 212-220.

⁸³ EU Charter of Fundamental Rights (2009) OJ C202/389.

⁸⁴ Treaty on the Functioning of the European Union (2010) OJ C326/47.

Qualifications Directive⁸⁵, while Articles 1 and 5 of the Return Directive⁸⁶ provide that the entire process of returning an individual must be in accordance with fundamental rights and refugee protections, such as the principle of *non-refoulement*, and broader human rights obligations. Moreover, Articles 3 and 4 of the Schengen Borders Code⁸⁷, and Articles 9, 28, 35, 38 and 41 of the Asylum Procedures Directive⁸⁸ also ensure adherence to the rights of refugees, in particular, the principle of *non-refoulement* while implementing border control. Article 4 (1) of the Sea Borders Regulation⁸⁹ mandates that no person shall be handed over to the authorities of a country where there is a risk of infringement of the principle of *non-refoulement*. Moreover, Article 4 (2) (3) of the Sea Borders Regulation⁹⁰ also mandates the protection of fundamental rights and adherence to the *non-refoulement* principle in Frontex's operations in both land and sea, by specifying that prior to disembarkation, whether the individual is going to enter the Member State or be removed to a third country, Frontex and the Member States involved in the operation must conduct an individual assessment of each individual's particular circumstance. Moreover, according to these articles, Frontex must inform the individuals about their destination, and provide them with the chance to express any concerns that disembarkation at the suggested point would breach the principle of *non-refoulement*. Additionally, these articles further mandate Frontex and Member States involved to assess the overall situation in the disembarking country⁹¹. Moreover, Article 7 of the same regulation requires Frontex to create an independent and effective complaints mechanism to assess respect for fundamental rights in all its activities. In this context, when

⁸⁵ 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 (recast) (2011) OJ L 337/9.

⁸⁶ 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 (2008) OJ L 348/98.

⁸⁷ '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)' (2016) OJ L 77/1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0399>> accessed 13 April 2024.

⁸⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (2013) OJ L 180/60.

⁸⁹ 'Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union' (2014) OJ L 189/93 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0656&rid=1>> accessed 14 April 2024.

⁹⁰ *ibid.*

⁹¹ *ibid.*

international law is not respected and violations occur, Frontex is obligated, under Article 25 of the Sea Borders Regulation, to suspend or abort its activities or its funding in the Member State in question.

In conclusion, EU Member States are bound by international and EU law to respect and uphold the principle of *non-refoulement* and the prohibition of collective expulsions, ensuring that no individual under their jurisdiction is sent to a place where there are no human rights safeguards.

2.4. Right to asylum

The right to cross an international border and the right to migrate is not unlawful. The right to asylum exists and must not be criminalised, as enshrined in Article 5 of the 2000 Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the UN Convention Against Transnational Organised Crime (Migrants Protocol)⁹².

Even though States are not legally obliged to grant asylum to every individual who requires it, the right to asylum is reflected in several international treaties. Article 13 (2) of the UDHR, Article 12 (2) of the ICCPR and Article 2 (2) of Protocol No. 4 to the ECHR⁹³ provide that everyone has the right to leave any country, including their own, and to return to their home country. Article 14 (1) of the UDHR further affirms that ‘*everyone has the right to seek and enjoy in other countries asylum from persecution*’, and Article 31 (1) of the Refugee Convention provides that refugees should be granted international protection without being penalised for their unauthorised entry or stay if they come from a place where their life and freedom were at risk. Furthermore, in *Hirsi Jamaa and Others v. Italy*, the Court determined that the right to asylum does not mandatorily require a formal request or a desire conveyed in a specific way by the individual⁹⁴. As such, preventing an individual from seeking international protection may constitute a breach of international law.

The right to asylum and the right to international protection are also enshrined in EU primary law, more specifically, in Article 18 of the EU Charter of Fundamental

⁹² Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention Against Transnational Organized Crime 2000, Article 5.

⁹³ Protocol No. 4 to the European Convention on Human Rights 1963, Article 2

⁹⁴ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 133.

Rights⁹⁵. When it comes to the EU's legal framework for asylum and border management, Article 6 (2) of the EU Asylum Procedures Directive⁹⁶ mandates that anyone applying for international protection must be granted an effective opportunity to lodge their application. Additionally, Article 46 of the same directive provides that individuals must be able to challenge decisions denying their protection through an effective remedy with suspensive effect.

2.5. Duty to rescue people in distress at sea and disembark people in a place of safety

Member States have a humanitarian obligation to protect human life at sea⁹⁷. As such, it can be argued that the right to life and the duty to provide search and rescue (SAR) services under international law of the sea complement each other, as to prevent the loss of life, States are mandated to assist persons found in distress at sea. This obligation is a long-established maritime tradition enshrined in international law applying to all persons irrespective of their status or circumstances in which they are found⁹⁸.

This duty is enshrined in Article 98 (1) (duty to render assistance) of the United Nations Convention on the Law of the Sea (UNCLOS)⁹⁹, which places three obligations on the master of a ship: 1) to provide assistance to any person found in distress at sea at risk of being lost, irrespective of their legal status¹⁰⁰; 2) to rescue them with all possible speed if notified of their need for assistance, without jeopardising the safety of the ship, crew and passengers¹⁰¹; and 3) to conduct adequate and effective SAR missions to ensure maritime safety¹⁰².

Thus, when a State locates a distressed vessel and begins to fulfill its duty under Article 98 of UNCLOS, it starts to exercise jurisdiction over the distressed individuals¹⁰³.

⁹⁵ EU Charter of Fundamental Rights (2009) OJ C202/389.

⁹⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (2013) OJ L 180/60.

⁹⁷ Tullio Scovazzi, "Human Rights and Immigration at Sea" in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford 2014) 226 <<https://academic.oup.com/book/11474/chapter-abstract/160197419?redirectedFrom=fulltext>>.

⁹⁸ EU Agency for Fundamental Rights, "June 2023 Update - Search and Rescue Operations in the Mediterranean and Fundamental Rights" (2023) 10 <<https://fra.europa.eu/en/publication/2023/2023-update-ngo-ships-sar-activities>> accessed July 22, 2024.

⁹⁹ United Nations Convention on the Law of the Sea 1982, Article 98.

¹⁰⁰ *ibid*, Article 98 (1).

¹⁰¹ United Nations Convention on the Law of the Sea 1982, Article 98.

¹⁰² *ibid*, Article 98 (3).

¹⁰³ Efthymios Papastavridis, "The European Convention on Human Rights and Migration at Sea: Reading the 'Jurisdictional Threshold' of the Convention Under the Law of the Sea Paradigm" (2020) 21 *German*

As will be discussed further in Chapter 2.6., this jurisdiction is sufficient to trigger the applicability of the ECHR and the State's international obligations. In this context, the ECtHR has established that, once a distress signal is positively identified, and once the SAR units have arrived, States have the obligation under the ECHR to protect the rights of those in distress, especially their right to life¹⁰⁴.

The duty to render assistance to people found in distress at sea is provided in numerous international treaties. The obligation to provide prompt assistance to individuals in distress at sea is also enshrined in Chapter V, Regulation 33.1 of the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention)¹⁰⁵ and Chapter 2, Article 10 (1) of the International Convention on Salvage¹⁰⁶. Additionally, Regulation V/33.6 of the SOLAS Convention mandates the master of ships to treat the people who have embarked with humanity. Moreover, Article 2.1.10 of the 1979 International Convention on Maritime Search and Rescue (SAR Convention) requires States to assist any person in distress at sea, regardless of their nationality, status, or the circumstances in which that person is found¹⁰⁷. Article 18 (2) of UNCLOS further provides that when a vessel is proven to be in distress, even if the people on board are suspected of migration offences, the duty to assist remains in force.

Regarding the establishment of effective SAR services, Article 98 (2) of UNCLOS, Chapter V of the SOLAS Convention and Chapters 2.1.10 and 1.3.2. of the SAR Convention, further mandates State Parties to establish a SAR service within their designated SAR regions and coordinate them with neighbouring countries and regional bodies when necessary to ensure that SAR efforts facilitate timely and efficient responses to maritime emergencies. Additionally, according to Chapters 2.3.1 and 2.6.1 of the SAR Convention, States must set up Rescue Coordination Centers (RCCs) in their SAR regions, which must be properly equipped to handle and respond to distress signals. Chapter 4.3 of the same convention provides that if an RCC becomes aware of a distress outside its SAR region, it must promptly take action and notify the RCC entitled to that area. Therefore, if a human rights violation occurs in the SAR area of a State, that State

Law Journal 431 <<https://www.cambridge.org/core/journals/german-law-journal/article/european-convention-of-human-rights-and-migration-at-sea-reading-the-jurisdictional-threshold-of-the-convention-under-the-law-of-the-sea-paradigm/4EAFB6C224386882CD80C441F708E9B8>>.

¹⁰⁴ *Jaloud v. the Netherlands* (2014) App. No. 47708/08 (Grand Chamber of the European Court of Human Rights), para. 186.

¹⁰⁵ International Convention for the Safety of Life at Sea 1974

¹⁰⁶ International Convention on Salvage 1989

¹⁰⁷ International Convention on Maritime Search and Rescue 1979

is the one responsible for the violation¹⁰⁸, even if there was no physical interaction between the State and the individuals.

Additionally, in the 2004 amendments to the SOLAS and SAR Conventions adopted by the International Maritime Organisation (IMO), to which all Mediterranean countries adhered to except Malta¹⁰⁹, upon rescue, Member States have a corresponding duty to ensure that people rescued at sea are disembarked in a place of safety as quickly as possible¹¹⁰. A place of safety, according to the IMO Guidelines on the Treatment of Persons Rescued at Sea¹¹¹, is a location where the rescued individuals are no longer in peril, their basic human needs, like shelter, food, and medical care are met, and transportation plans can be made for their onward or final destination, considering the protection of their fundamental rights in compliance with the principle of *non-refoulement*¹¹². Disembarkation in places where individuals might face persecution, torture or other ill-treatment is contrary to international law and must be avoided¹¹³.

For border surveillance missions, Frontex is mandated to ensure that prompt disembarkation of the rescued individuals is done in a place of safety, in adherence to fundamental rights and the principle of *non-refoulement*¹¹⁴. Furthermore, Frontex is mandated to submit a yearly report on the practical application of the regulation and human rights compliance in its operations¹¹⁵.

¹⁰⁸ UN Human Rights Committee, ‘Decision adopted by the Committee under the Optional Protocol, concerning Communication No. 3043/2017’ (2021) UN Doc CCPR/C/128/D/3043/2017, paras. 6.7 and 6.9.

¹⁰⁹ EU Agency for Fundamental Rights, “June 2023 Update - Search and Rescue Operations in the Mediterranean and Fundamental Rights” (2023) 10 <<https://fra.europa.eu/en/publication/2023/2023-update-ngo-ships-sar-activities>> accessed July 22, 2024.

¹¹⁰ International Maritime Organisation, United Nations High Commissioner for Refugees, and International Chamber of Shipping, “Rescue at Sea. A Guide to Principles and Practice as Applied to Refugees and Migrants” (2015) 3 <<https://www.refworld.org/policy/opguidance/unhcr/2015/en/104994>> accessed June 25, 2024.

¹¹¹ IMO, “Guidelines on the Treatment of Persons Rescued at Sea” (2004) MSC 78/26/Add.2, Guideline 6.12 <[https://www.wcdn.imo.org/localresources/en/OurWork/Facilitation/Documents/MS.167%20\(78\).pdf](https://www.wcdn.imo.org/localresources/en/OurWork/Facilitation/Documents/MS.167%20(78).pdf)> accessed April 26, 2024. and Sea Borders Regulation 2014.

¹¹² *ibid.*

¹¹³ EU Agency for Fundamental Rights, “June 2023 Update - Search and Rescue Operations in the Mediterranean and Fundamental Rights” (2023) 10 <<https://fra.europa.eu/en/publication/2023/2023-update-ngo-ships-sar-activities>> accessed July 22, 2024.

¹¹⁴ ‘Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 Establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union’ (2014) OJ L 189/93 Article 2 (12) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0656&rid=1>> accessed 14 April 2024.

¹¹⁵ *ibid.*, Article 13.

Before proceeding to the next section, it is important to note that the rights migrants and refugees are entitled to are not limited to the ones enshrined in this chapter. There are other rights under international law that migrants and refugees can enjoy, such as the right to liberty and security under Article 5 of the ECHR, among others.

2.6. Extraterritorial applicability of human rights

Considering the extraterritorial nature of pushbacks, it is relevant to understand the extraterritorial applicability of the legal obligations States have under international human rights and refugee law when implementing border control measures.

Article 1 of the ECHR¹¹⁶ links the concept of jurisdiction with territorial boundaries, providing that State Parties must secure the rights enshrined in the Convention to everyone under their jurisdiction.

However, there may be exceptional cases where jurisdiction extends beyond borders. In *Bankovic and Others v. Belgium and Others*, the European Court of Human Rights (ECtHR) concluded that even though a State's jurisdiction primarily pertains to its territory, international law allows for extraterritorial jurisdiction of States¹¹⁷. Additionally, in *Al-Skeini and Others v. The United Kingdom*, the Court broadened the concept of jurisdiction to encompass situations where a State or its agents exercise *de facto* and *de jure* control over a foreign territory or its individuals¹¹⁸, as well as aboard vessels flying the flag of that State¹¹⁹. Hence, the Court concluded that when a State's agents exercise control over an individual, that State is under an obligation under Article 1 to secure the rights and freedoms protected by the ECHR¹²⁰. Similarly, the UN Human Rights Committee determined that a State party is mandated to uphold and guarantee the rights enshrined in the ICCPR to anyone under its jurisdiction, even if they are not physically within the State's borders¹²¹.

¹¹⁶ European Convention on Human Rights, Article 1: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

¹¹⁷ *Bankovic and Others v. Belgium and Others* (2001) App. No. 52207/99 (Grand Chamber of the European Court of Human Rights), para. 59.

¹¹⁸ *Al-Skeini and Others v. The United Kingdom* (2011) App. No. 55721/07 (Grand Chamber of the European Court of Human Rights), para. 133-140.

¹¹⁹ *Bankovic and Others v. Belgium and Others* (2001) App. No. 52207/99 (Grand Chamber of the European Court of Human Rights), para. 73.

¹²⁰ *Al-Skeini and Others v. The United Kingdom* (2011) App. No. 55721/07 (Grand Chamber of the European Court of Human Rights), para. 137.

¹²¹ General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant 2004, para. 10.

Regarding the applicability of the ECHR on the high seas, in *Medvedyev and Others v. France*, the Grand Chamber of the ECtHR established that a State can exercise jurisdiction over a foreign ship on the high seas without embarking the people on board, if it exercises *de jure* and *de facto* control over it and those on board¹²². In this specific case, from the moment France intercepted the ship and its crew and prosecuted them in national territory¹²³, the crew members (who were confined in the cabins of their own ship for 13 days¹²⁴) were under France's full and exclusive jurisdiction for the purpose of Article 1 of the ECHR¹²⁵.

However, it was in the *Hirsi Jamaa and Others v. Italy* case that, in terms of extraterritorial applicability of human rights on the high seas, the ECtHR made a landmark ruling. The case concerned Somali and Eritrean applicants who, along with approximately 200 other individuals, departed from Libya on vessels aiming to reach Italian soil¹²⁶. However, before reaching their destination, the applicants were intercepted by three ships from the Italian Revenue Police and Coastguard on the high seas, near Lampedusa, an island off the Italian coast within the SAR jurisdiction of Malta¹²⁷. Under the 2017 Italy-Libya MoU – which will be further discussed – the applicants were taken into Italian military ships, conveyed to the Libyan authorities, and summarily returned to Tripoli without being informed of their destination, without any assessment of their individual circumstances and needs, and without the opportunity to contest the removal decision¹²⁸. For this reason, the applicants alleged a violation of Article 3 (Prohibition of torture) of the ECHR, due to the risk of ill-treatment upon their return to Libya; Article 13 (Right to an effective remedy), as they were given no opportunity to contest their forced return to Libya; and Article 4 of Protocol No. 4 (Prohibition of collective

¹²² *Medvedyev and Others v. France* (2010) App. No. 3394/03 (Grand Chamber of the European Court of Human Rights), para. 67.

¹²³ *Medvedyev and Others v. France* (2010) App. No. 3394/03 (Grand Chamber of the European Court of Human Rights), para. 67.

¹²⁴ *Medvedyev and Others v. France* (2010) App. No. 3394/03 (Grand Chamber of the European Court of Human Rights), para. 66.

¹²⁵ *Medvedyev and Others v. France* (2010) App. No. 3394/03 (Grand Chamber of the European Court of Human Rights), para. 63-67.

¹²⁶ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 9.

¹²⁷ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 10.

¹²⁸ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 9-12.

expulsion) to the ECHR, contending that they had been subjected to a collective expulsion¹²⁹.

The key question to this case was whether collective expulsions could only occur within a State's borders or if extended to a State's extraterritorial exercise of jurisdiction¹³⁰. While reaffirming that expulsions usually occur within a State's borders, the Court recognised that, in exceptional circumstances, collective expulsions could occur through the exercising of extraterritorial jurisdiction, as was the case¹³¹. Therefore, the Court determined that Italy's action of intercepting and returning the applicants to Libya without assessing their individual situation or providing them with an opportunity to contest the decision of removal amounted to a breach of Article 4 of Protocol No. 4 to the ECHR¹³². Moreover, the Court noted that the Italian authorities were aware, or should have been, of the human rights context in Libya and that the applicants, when returned to Libya as 'irregular migrants' would not be given any kind of protection¹³³. Consequently, the Court concluded that the Italian authorities failed to protect the applicants as was expected of them, amounting to a violation of Article 3 of the ECHR¹³⁴.

The Court additionally referenced the principle of international law of the sea where a vessel navigating on the high seas falls under the exclusive jurisdiction of the State whose flag it is flying, further highlighting that if a State exercises control over another vessel, it has *de jure* control over the individuals on that vessel¹³⁵. In light of this, the Grand Chamber determined that during the period between boarding the Italian ship and being conveyed to Libyan authorities, the applicants were under the '*continuous and exclusive de jure and de facto control of the Italian authorities*'¹³⁶, holding Italy

¹²⁹ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 3.

¹³⁰ Petra Perisic and Paulina Ostojic, "Pushbacks of Migrants in the Mediterranean: Reconciling Border Control Measures and the Obligation to Protect Human Rights" (2022) 61 *Poredbeno Pomorsko Pravo* 602 <<https://hrcak.srce.hr/file/419974>>.

¹³¹ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 70-74.

¹³² *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 185.

¹³³ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 131.

¹³⁴ *ibid.*

¹³⁵ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 77.

¹³⁶ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 81.

responsible under the ECHR¹³⁷. It further asserted that as the incidents occurred entirely aboard Italian military vessels with crews consisting solely of the Italian military workforce, these are an extension of Italian territory¹³⁸ and, consequently the applicants brought aboard the vessels fell within Italian jurisdiction from the moment of boarding until handover to Libyan authorities¹³⁹. Furthermore, the Grand Chamber concluded that even if a State has entered into other legal commitments or agreements with third countries, it still must fully comply with its human rights obligations and not evade its responsibility under the Convention¹⁴⁰. Thus, the Court rejected Italy's claim that the applicants had been sent to Libya under the MoU between Italy and Libya, concluding that Italy cannot dodge its responsibility by referring to other international obligations¹⁴¹. Therefore, Italy had an obligation under Article 1 of the ECHR to protect the human rights of the applicants.

Ultimately, the Court concluded that several violations of the ECHR had occurred in this case. First, it found a breach of Article 3 of the ECHR, as the applicants were susceptible to the risk of being tortured or treated inhumanely in Libya, and of being arbitrarily returned to Somalia and Eritrea¹⁴². The Court further asserted that, in any circumstance, it is up to the authorities to assess the treatment and conditions the individuals will face after their return¹⁴³. Secondly, the Court determined a violation of Article 4 of Protocol No. 4, as Italy failed to consider the applicants' individual circumstances and needs, did not provide them access to an asylum procedure or other form of international protection, and denied them the opportunity to challenge the removal decision¹⁴⁴. Lastly, the ECtHR ruled that there was a breach of Article 13, when considered in conjunction with Articles 3 and 4 of Protocol No. 4, as the applicants were

¹³⁷ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 78.

¹³⁸ *ibid.*

¹³⁹ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 81.

¹⁴⁰ Annick Pijnenburg, "From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?" (2018) 20 *European Journal of Migration and Law* 400 <https://brill.com/view/journals/emil/20/4/article-p396_3.xml>.

¹⁴¹ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 177.

¹⁴² *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 178.

¹⁴³ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 133.

¹⁴⁴ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 129.

denied any means to present their complaints to a competent authority or receive a comprehensive assessment of their requests prior to expulsion¹⁴⁵.

Conclusively, the *Hirsi Jamaa and Others v. Italy* case marked the Court's position that the ECHR applies on the high seas whenever a State exercises *de facto* and *de jure* control over a vessel or the persons onboard. This control is evident when a vessel is boarded, and suspects are detained and handed over to the authorities of the boarding State bound by the ECHR, as in *Medvedyev and Others v. France*, or transferred to a third country, as in *Hirsi Jamaa and Others v. Italy*. Moreover, in *Women on Waves v. Portugal*, the Court further determined that the mere blocking of a vessel from moving forward through the presence of a military ship, is sufficient to trigger jurisdiction because it amounts to 'full and exclusive control'¹⁴⁶.

As such, whenever a State full and exclusive control over a vessel on the high seas or over the migrants and refugees on board, it has to adhere to their legal obligations under international human rights and refugee law, as enshrined in the previous chapters, especially the principle of *non-refoulement* and the prohibition of collective expulsions, as proved in the *Hirsi* case to apply extraterritorially¹⁴⁷.

Before proceeding to the next section, it is important to emphasise that when States act beyond their borders, they must consider and respect relevant international human rights and refugee law¹⁴⁸ enshrined in this chapter.

¹⁴⁵ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 205-206.

¹⁴⁶ *Women on Waves v. Portugal* (2009) App. No. 31276/05 (Grand Chamber of the European Court of Human Rights), para. 35.

¹⁴⁷ *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 186.

¹⁴⁸ Vienna Convention on the Law of Treaties 1969, Article 31 (3) (c).

Chapter 3: Human rights implications of pushbacks in the Mediterranean

As previously noted, given the large scale of migrants and refugees arriving at the EU's external borders from the Mediterranean, the EU and its Member States appear to be employing two main practices to manage these arrivals: externalising border control and asylum procedures to third countries, and the subsequent pushbacks resulting from bilateral agreements with these third countries.

3.1. Pushbacks as a way of externalising border control and asylum procedures

Externalisation of international protection is, according to the UNHCR, '(...) *measures taken by States – unilaterally or in cooperation with other States – which are implemented or have effects outside their own territories, and which directly or indirectly prevent asylum seekers and refugees from reaching a particular 'destination' country or region, and/or from being able to claim or enjoy protection there. Such measures constitute externalisation where they involve inadequate safeguards to guarantee international protection as well as shifting responsibility for identifying or meeting international protection needs to another State or leaving such needs unmet; making such measures unlawful*'¹⁴⁹. In other words, through externalisation, States evade their responsibility of safeguarding human rights and providing international refugee protection, by transferring it to a third state.

According to Steffen Angenendt and others, the externalisation of migration responsibilities has three primary purposes: 1) to discourage irregular migration and the pursuit of asylum in the EU; 2) to streamline the process of repatriation for those whose asylum claims are rejected; and 3) to demonstrate that restrictive measures are being implemented to deter irregular migration and the smuggling networks that benefit from it¹⁵⁰.

Despite being a significant ruling concerning the prohibition of *refoulement* and of collective expulsions, *Hirsi* was not enough to deter States from engaging in

¹⁴⁹ UNHCR, "UNHCR Note on the 'Externalization' of International Protection" (2021) <<https://www.refworld.org/policy/legalguidance/unhcr/2021/en/121534>> accessed November 30, 2023.

¹⁵⁰ Steffen Angenendt and others, "The Externalisation of European Refugee Protection: A Legal, Practical and Political Assessment of Current Proposals" [2024] SWP German Institute for International and Security Affairs 2 <https://www.swp-berlin.org/publications/products/comments/2024C13_EuropeanRefugeeProtection.pdf>.

pushbacks. In fact, these are becoming more streamlined in the Mediterranean and in the EU's external migration policy framework, overshadowing States' duty to protect the human rights of migrants and refugees¹⁵¹.

Pushbacks are a major threat to the fundamental human rights of an individual. Pushbacks reflect the States' negligence of their responsibilities to protect the human rights of migrants and refugees at their borders, and often lead to human rights violations contrary to international human rights and refugee law, especially concerning the principle of *non-refoulement* and the prohibition of collective expulsions. The Council of Europe's Commissioner for Human Rights has repeatedly stated that pushbacks not only fail to address the high volume of arrivals, but also exacerbate the vulnerability and suffering of migrants and refugees, alerting to the need for a human rights-based approach to manage migration in the Mediterranean¹⁵².

Moreover, the former Special Rapporteur on the human rights of migrants has repeatedly expressed concern over the violence that is perpetuated during pushbacks¹⁵³, highlighting that the beatings, electric shocks, inappropriate body searches, sexual abuse¹⁵⁴ (with women and children being the main victims¹⁵⁵), and use of chemical irritants not only result in severe injuries and even loss of life¹⁵⁶ but also amount to torture and other forms of cruel, inhuman or degrading treatment under Article 3 of the ECHR.

¹⁵¹ Protecting Rights at Borders, "Pushbacks at Europe's Borders: A Continuously Ignored Crisis" (2024) 2 <https://www.asgi.it/wp-content/uploads/2024/02/PRAB-Report-September-to-December-2023-_-final.pdf> accessed August 2, 2024.

¹⁵² Commissioner for Human Rights of the Council of Europe, "A Distress Call for Human Rights: The Widening Gap in Migrant Protection in the Mediterranean, Follow-up Report to the 2019 Recommendation by the Council of Europe Commissioner for Human Rights" (2021) 5 <<https://rm.coe.int/a-distress-call-for-human-rights-the-widening-gap-in-migrant-protection/1680a1abcd>> accessed May 25, 2024.

¹⁵³ *ibid*, para. 62.

¹⁵⁴ "Abduction, Torture and Rape Drives Exodus across the Mediterranean" (*Amnesty International*, January 27, 2020) <<https://www.amnesty.org.uk/libya-abduction-torture-rape-exodus-mediterranean>> accessed June 3, 2024.

¹⁵⁵ United Nations Support Mission in Libya and Office of the United Nations High Commissioner for Human Rights, "'Detained and Dehumanised' Report on Human Rights Abuses Against Migrants in Libya" (2016) 21 <https://www.ohchr.org/sites/default/files/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> accessed June 14, 2024.

¹⁵⁶ Adrian Edwards, "UNHCR Disappointed by Scenes of Violence at Idomeni" (Jonathan Clayton ed, *UNHCR*, April 11, 2016) <<https://www.unhcr.org/news/stories/unhcr-disappointed-scenes-violence-idomeni>> accessed June 14, 2024.

However, authorities usually deny their involvement in such violence, and allege that the injuries are a result of violence between the migrants and refugees¹⁵⁷ or blame the interference of NGOs and human rights defenders as the reason why lives are lost¹⁵⁸.

The EU has been, for many times, warned about the risks that such practices pose to the human rights of those on the move, being alerted by international organisations such as the UNHCR¹⁵⁹ and the IMO¹⁶⁰ to cease pushbacks, collective expulsions and border violence against migrants and refugees at its internal and external land and sea borders, in a prompt manner.

Alongside the shift towards a security-focused approach to managing migration, the EU and its Member States appear to have decreased their SAR efforts in the Mediterranean, with Non-Governmental Organisations (NGOs) stepping in to address the shortage¹⁶¹. The Parliamentary Assembly of the Council of Europe has highlighted that many of the incidents in the Mediterranean are inexcusable, given that it is one of the best-monitored seas, equipped with radars and satellite imagery¹⁶². Moreover, distress signals can now be rapidly transmitted to both onshore SAR authorities and nearby ships¹⁶³, enabling swift, coordinated rescue operations. In this context, the Office of the UN High Commissioner for Human Rights (OHCHR) has urged the EU to adopt a human rights-based approach for the prompt and safe rescue and disembarkation of those rescued at sea, and to avoid obstructing the rescue efforts of NGOs¹⁶⁴.

¹⁵⁷ Committee on Migration, Refugees and Displaced Persons, “Pushback Policies and Practice in Council of Europe Member States” (2019) Doc. 14909, para. 100 <<https://pace.coe.int/pdf/36bbc67600625a34b5a6ee7b3659c78d869652b6e1bcd494715e3114cce277de?title=Doc.%2014909.pdf>> accessed June 5, 2024.

¹⁵⁸ *ibid*, para. 9

¹⁵⁹ “UNHCR Warns Asylum under Attack at Europe’s Borders, Urges End to Pushbacks and Violence against Refugees” (January 28, 2021) <<https://www.unhcr.org/news/news-releases/unhcr-warns-asylum-under-attack-europes-borders-urges-end-pushbacks-and-violence>> accessed October 25, 2023.

¹⁶⁰ “IOM Calls for End to Pushbacks and Violence Against Migrants at EU External Borders” (*IOM UN Migration*, February 9, 2021) <<https://www.iom.int/news/iom-calls-end-pushbacks-and-violence-against-migrants-eu-external-borders>> accessed October 26, 2023.

¹⁶¹ Anja Radjenovic, “Search and rescue in the Mediterranean” (European Parliamentary Research Service 2021) PE 659.442 6

¹⁶² Parliamentary Assembly of the Council of Europe (PACE), “Resolution 1872 (2012) Lives Lost in the Mediterranean Sea: Who Is Responsible?” (2012) Doc. 12895, para. 155 <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18234&lang=en>> accessed October 30, 2023.

¹⁶³ International Maritime Organisation, United Nations High Commissioner for Refugees, and International Chamber of Shipping, “Rescue at Sea. A Guide to Principles and Practice as Applied to Refugees and Migrants” (2015) 2 <<https://www.refworld.org/policy/opguidance/unhcr/2015/en/104994>> accessed June 25, 2024.

¹⁶⁴ OHCHR, “‘Lethal Disregard’: Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea” (2021)

As alerted in the annual report of the Commissioner for Human Rights of the Council of Europe¹⁶⁵, the way migration is being managed in Europe demonstrates a progressively weakened rule of law, and the shifting of responsibility across borders only encourages other States to do the same, creating a dangerous precedent and weakening the European and global systems of international protection¹⁶⁶. As such, if more States view this approach as the only solution, international obligations to migrants and refugees will likely become narrower eventually deteriorating the international protection regime.

As established by the ECtHR in *Soering v. the United Kingdom*, States can be held accountable not only for directly violating human rights, but also for consciously placing individuals at risk of having their human rights abused by another State¹⁶⁷. Therefore, when States disregard international law and engage in pushbacks and return migrants and refugees to countries where they face human rights abuses, they may not be the ones directly committing the acts, but they are still responsible for the resulting violations.

It is, therefore, important to emphasise that if this externalised approach is adopted by all Member States as the sole solution to safeguard borders and deter irregular migration, it will not only undermine the European human rights regime and refugee protection framework but also make asylum increasingly inaccessible in the EU, leaving migrants and refugees vulnerable to the risk of being forcibly returned to the danger they are trying to escape. Until effective and humane solutions that reconcile border control measures with human rights safeguards are implemented, pushbacks are likely to persist.

The following chapter examines two bilateral agreements between EU Member States and non-EU Member States, illustrating how the externalisation of border control (enshrined in the Italy-Libya deal) and asylum procedures (enshrined in the Italy-

<<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf>> accessed August 20, 2024.

¹⁶⁵ Council of Europe, “In Few Areas Erosion of Rule of Law More Visible than in Approach to Migration Management, Says Commissioner Mijatović Presenting Her Annual Report” (*Council of Europe*, February 14, 2024) <<https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/-/in-few-areas-erosion-of-rule-of-law-more-visible-than-in-approach-to-migration-management-says-commissioner-mijatovi%C4%87-presenting-her-annual-report>> accessed February 15, 2024.

¹⁶⁶ Council of Europe, “Denmark: refocus on protection and integration in asylum policy and step up measures to improve the situation of persons with disabilities” (*Council of Europe*, November 16 2023) <<https://www.coe.int/en/web/commissioner/-/denmark-refocus-on-protection-and-integration-in-asylum-policy-and-step-up-measures-to-improve-the-situation-of-persons-with-disabilities>> accessed November 20, 2023

¹⁶⁷ *Soering v. the United Kingdom* (1989) App. No. 14038/88 (Grand Chamber of the European Court of Human Rights), para. 91.

Albania deal) can violate the human rights of migrants and refugees, and further exacerbate the humanitarian crisis in the Mediterranean.

3.2. EU cooperation with “safe” third countries on migration management

As mentioned earlier, the EU and its Member States have been outsourcing their migration responsibilities through the establishment of bilateral agreements with third countries, offering them financial and technical assistance to keep migrants and refugees outside their borders¹⁶⁸. Despite the EU and its Member States designating these third countries as “safe”, oftentimes they are sealing agreements with countries where the rule of law is weak, and basic human rights are frequently disregarded and consistently violated¹⁶⁹.

To grasp the discrepancy between the designation of these countries as “safe” and the reality of their conditions, it is essential to understand the concept of “safe third country”.

A few criteria must be met when designating a country as safe. The designated country must ensure the individual’s life and dignity are protected, including protection from *refoulement*, and there must be a meaningful link between the applicant and the country¹⁷⁰ to justify the individual’s resettlement there. In practice, however, these criteria are often ignored with migrants and refugees being arbitrarily sent to random third countries with which they have no connection, and without a proper assessment of the human rights situation in that said country. This exposes them to the risk of being subjected to torture and other ill-treatment, or being yet again *refouled* to another random country, preventing them from accessing asylum procedures (chain *refoulement*).

Evidence of this arbitrary selection of countries to host migrants and refugees is the strengthening of EU relations with third countries like Libya – a country with low human rights records – financing them to act as EU’s border guards and engage in

¹⁶⁸ Andrea Beck, “Italian and EU Funding of the Libyan Coast Guard: How Italian External Border Immigration Policies Have Created Crimes Against Humanity, Public Ignorance, and Legal Accountability Issues” (2024) 5 Immigration and Human Rights Law Review 2 <<https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1080&context=ihrlr>>.

¹⁶⁹ Giulia Raimondo, *The European Integrated Border Management: Frontex, Human Rights, and International Responsibility*, vol 120 (Hart 2024) 130.

¹⁷⁰ Council of the EU, “The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System” (December 20, 2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach-breakthrough-in-reform-of-eu-asylum-and-migration-system/>> accessed March 23, 2024.

unlawful practices¹⁷¹. In this context, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment alerted to the fact that entering bilateral agreements to address migration challenges should not be used to sidestep human rights obligations or to approve the arbitrary removal of migrants without assessing their individual circumstances and procedural protections intended to safeguard them, as it violates the prohibition of collective expulsions and the principle of *non-refoulement*¹⁷².

3.2.1. *Italy-Libya deal*

In 2009, under the Treaty of Friendship, Partnership, and Cooperation between Italy and Libya¹⁷³ aimed at curbing irregular migration to Europe, an indiscriminate interception and repatriation policy, known as the ‘no-tolerance’ policy, along the Libyan coastline was set¹⁷⁴. Under this policy, Italian authorities would intercept and divert all vessels with migrants and refugees to Libya, without a proper individual assessment of each person’s circumstances, and of their requests of international protection¹⁷⁵, raising concerns on migrants’ and refugees’ human rights.

After a visit to Italy, the European Committee on the Prevention of Torture concluded that the 2009 ‘no-tolerance’ policy did not meet the universal standards of human rights law¹⁷⁶, and advised the Italian government to assess the human rights

¹⁷¹ Zakariya El Zaidy, “EU Migration Policy towards Libya: A Policy of Conflicting Interests” (2019) 5 <<https://library.fes.de/pdf-files/bueros/tunesien/15544.pdf>> accessed June 25, 2024.

¹⁷² Human Rights Council, “Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (2018) A/HRC/37/50, para. 44 <<https://documents.un.org/doc/undoc/gen/g18/347/27/pdf/g1834727.pdf>> accessed March 27, 2024.

¹⁷³ “Law No. (2) of 2009 on Ratifying the Treaty of Friendship and Cooperation between the Great Socialist People’s Libyan Arab Jamahiriya and the Republic of Italy” (*Geneva Centre for Security Sector Governance*, 2009) <<https://security-legislation.ly/latest-laws/law-no-2-of-2009-on-ratifying-the-treaty-of-friendship-and-cooperation-between-the-great-socialist-peoples-libyan-arab-jamahiriya-and-the-republic-of-italy/>> accessed May 4, 2024.

¹⁷⁴ Natalino Ronzitti, “The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?” (2009) 1 Bulletin of Italian Politics 125 <https://www.gla.ac.uk/media/Media_126121_smxx.pdf>.

¹⁷⁵ Human Rights Watch, “Pushed Back, Pushed Around: Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers” (2009) 23 <<https://www.hrw.org/reports/italy0909webwcover.pdf>> accessed June 2, 2024.

¹⁷⁶ Council of Europe, “Council of Europe Anti-Torture Committee Publishes 2009 Report on Italy” (*Council of Europe*, April 28, 2010) <<https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-publishes-2009-report-on-italy>> accessed June 2, 2024.

condition and the potential risk of mistreatment in the home countries or other countries before returning individuals¹⁷⁷.

In 2011, due to the political and civil turmoil in Libya, the Treaty of Friendship, which caused the loss of many lives¹⁷⁸, was suspended. Nonetheless, Italy and Libya continue to carry out similar practices, having re-entered into a MoU on Cooperation on Development, Combatting Illegal Immigration, Human Trafficking and Smuggling and on Strengthening Border Security¹⁷⁹ in 2017, which was renewed in February 2023¹⁸⁰. Under this deal, Italy is to extend its support to the Libyan Coast Guard (hereinafter LCG), via financial incentives and training¹⁸¹, in intercepting migrant vessels attempting to cross Italy from Libya and returning them to Libyan territory¹⁸² - a practice perceived as pullbacks¹⁸³.

Pullbacks, while sharing the same intent of deterring irregular migration as pushbacks, differ in some key aspects. The primary difference is that pullbacks happen before migrants and refugees reach a border, intercepting them earlier in their journey to physically prevent them from leaving their country of origin or transit before they fall under the jurisdiction of their destination country¹⁸⁴. In this way, States can deter irregular migration without directly violating human rights law, as they outsource the interception and return process to third countries, such as Libya. States, particularly Italy, began engaging in pullbacks instead of pushbacks to avoid legal pressures stemming from the ECtHR's *Hirsi* ruling and their obligations under international law.

¹⁷⁷ Tullio Scovazzi, "Human Rights and Immigration at Sea" in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford 2014) 253 <<https://academic.oup.com/book/11474/chapter-abstract/160197419?redirectedFrom=fulltext>>.

¹⁷⁸ Forensic Architecture, "The Left-to-Die Boat" (*Forensic Architecture*) <<https://forensic-architecture.org/investigation/the-left-to-die-boat>> accessed June 10, 2024.

¹⁷⁹ Memorandum of Understanding on Cooperation in the fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic. 2017.

¹⁸⁰ Giulia Tranchina, "Italy Reups Funding to Force Migrants Back to Libya: Migrants, Asylum Seekers Face Murder, Torture, Enslavement in Libya" (*Human Rights Watch*, February 1, 2023) <<https://www.hrw.org/news/2023/02/01/italy-reups-funding-force-migrants-back-libya>> accessed June 9, 2024.

¹⁸¹ Charles Heller and Lorenzo Pezzani, "Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration Across the Mediterranean" (2018) 20 <<https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>> accessed June 12, 2024.

¹⁸² Annick Pijnenburg, "From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?" (2018) 20 *European Journal of Migration and Law* 397 <https://brill.com/view/journals/emil/20/4/article-p396_3.xml>.

¹⁸³ Committee on Migration, Refugees and Displaced Persons, "Pushback Policies and Practice in Council of Europe Member States" (2019) Doc. 14909, para. 43 <<https://pace.coe.int/pdf/36bbc67600625a34b5a6ee7b3659c78d869652b6e1bcd494715e3114cce277de?title=Doc.%2014909.pdf>> accessed June 5, 2024.

¹⁸⁴ *ibid*, para. 15.

Under the 2017 MoU, once migrants reach Libya, they are transported to detention centres¹⁸⁵ where they are arbitrarily detained in appalling conditions, with no opportunity to contest their detention and, oftentimes, with no access to food, water, and medical care¹⁸⁶. These centres operate far from the eye of the international community, allowing for the perpetuation of torture, massacres, violence¹⁸⁷, rape¹⁸⁸, racism, and other forms of ill-treatment¹⁸⁹ with impunity. Reports include refugees being left in the sun for hours in deserts¹⁹⁰, burned with cigarettes, hung from trees¹⁹¹ or ladders outside the LCG ships¹⁹² and subjected to slave auctions, where they are sold into exploitation and human trafficking, which the UN Secretary-General António Guterres has described as ‘the most egregious abuses of human rights’¹⁹³.

Regrettably, many incidents unfolded under this MoU. Allegations suggest that the Italian navy sometimes arrives first at the distress location but, instead of rescuing the individuals, informs the LCG to intercept them and return them to Libya¹⁹⁴. There are

¹⁸⁵ Alberto Barbieri and others, “The Torture Factory: Report on Human Rights Violations Against Migrants and Refugees in Libya (2014-2020)” (2020) 15 <https://mediciperidiritiumani.org/medu/wp-content/uploads/2020/03/report_medu_2020_ing_web.pdf> accessed June 22, 2024.

¹⁸⁶ OHCHR, “UN Human Rights Chief: Suffering of Migrants in Libya Outrage to Conscience of Humanity” (November 14, 2017) <<https://www.ohchr.org/en/press-releases/2017/11/un-human-rights-chief-suffering-migrants-libya-outrage-conscience-humanity>> accessed July 11, 2024.

¹⁸⁷ United Nations Support Mission in Libya and Office of the United Nations High Commissioner for Human Rights, “‘Detained and Dehumanised’ Report on Human Rights Abuses Against Migrants in Libya” (2016) 17 <https://www.ohchr.org/sites/default/files/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> accessed June 14, 2024.

¹⁸⁸ Sarah Chynoweth, “‘More Than One Million Pains’: Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy” (2019) 2 <<https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/Libya-Italy-Report-03-2019.pdf>> accessed July 10, 2024.

¹⁸⁹ Amnesty International, “Libya’s Dark Web of Collusion: Abuses against Europe-bound refugees and migrants” (2017) 35-37 <<https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE1975612017ENGLISH.pdf>> accessed July 18, 2024.

¹⁹⁰ Human Rights Watch, “Pushed Back, Pushed Around: Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers” (2009) 14-15 <<https://www.hrw.org/reports/italy0909webwcover.pdf>> accessed June 4, 2024.

¹⁹¹ Human Rights Watch, “No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya” (2019) 35 <https://www.hrw.org/sites/default/files/report_pdf/eu0119_web2.pdf> accessed July 18, 2024.

¹⁹² Annick Pijnenburg, “From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?” (2018) 20 *European Journal of Migration and Law* 405 <https://brill.com/view/journals/emil/20/4/article-p396_3.xml>.

¹⁹³ Richard Roth, “UN Chief: Libya Slave Auctions May Be Crimes against Humanity” *CNN* (November 20, 2017) <<https://edition.cnn.com/2017/11/20/africa/un-secretary-general-libya-slave-auctions/index.html>>.

¹⁹⁴ Alberto Barbieri and others, “The Torture Factory: Report on Human Rights Violations Against Migrants and Refugees in Libya (2014-2020)” (2020) 43 <https://mediciperidiritiumani.org/medu/wp-content/uploads/2020/03/report_medu_2020_ing_web.pdf> accessed June 22, 2024.

also reports of the LCG deliberately colliding or approaching the distressed vessel at high speed to intimidate people on board and destabilise the vessel¹⁹⁵.

In November 2017, a distress call was made to the Italian Maritime Rescue Coordination Centre from a sinking inflatable migrant boat carrying around 150 passengers that had departed from Libya¹⁹⁶. In response, Italian authorities instructed nearby vessels, including a Sea Watch rescue ship and a patrol vessel from the LCG, to assist the sinking boat¹⁹⁷. The LCG vessel – donated by Italy, with a crew trained by EUNAVFOR MED¹⁹⁸ - was the first to arrive at the distress location, causing water turbulence that led to several passengers being thrown overboard and drowning¹⁹⁹. According to the records, Italian authorities repeatedly signaled the Libyan crew to turn off their engines and coordinate the rescue operation with Sea Watch, but the LCG refused²⁰⁰ and hindered the NGO's rescue efforts by throwing objects at their vessel²⁰¹. The intercepted migrants were then confined on the LCG patrol vessel, which failed to provide life jackets and tied them up with ropes, threatening them with weapons²⁰², resulting in at least 20 deaths²⁰³. Even though Sea Watch rescued 59 people, 47 were pushed back to Libya, where they suffered severe human rights abuses in the detention camp they were detained, including beatings, starvation, rape and torture²⁰⁴.

¹⁹⁵ Amnesty International, "A Perfect Storm: The Failure of European Policies in the Central Mediterranean" (2017) 25 <<https://www.amnesty.org/en/documents/eur03/6655/2017/en/>> accessed June 24, 2024.

¹⁹⁶ *S.S. and Others v. Italy* (2018) App. No. 21660/18 (Grand Chamber of the European Court of Human Rights), para. 3.

¹⁹⁷ *ibid*, para. 4.

¹⁹⁸ A EU naval operation aimed at combatting illegal migration and human trafficking in the Mediterranean Sea, see EU External Action, "European Union Naval Force – Mediterranean Operation Sophia" (September 30, 2016) 1 <https://eeas.europa.eu/archives/docs/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf> accessed July 28, 2024.

¹⁹⁹ *S.S. and Others v. Italy* (2018) App. No. 21660/18 (Grand Chamber of the European Court of Human Rights), para. 6.

²⁰⁰ *ibid*, para. 7.

²⁰¹ Annick Pijnenburg, "From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?" (2018) 20 *European Journal of Migration and Law* 405 <https://brill.com/view/journals/emil/20/4/article-p396_3.xml>.

²⁰² *S.S. and Others v. Italy* (2018) App. No. 21660/18 (Grand Chamber of the European Court of Human Rights), para. 6.

²⁰³ Andreina De Leo, "S.S and Others v. Italy: Sharing Responsibility for Migrants Abuses in Libya" (*Public International Law and Policy Group*, January 6, 2020) <[https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya#:~:text=The%20Sea%20Watch%20was%20eventually,a%20captor%20who%20tortured%20them.](https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya#:~:text=The%20Sea%20Watch%20was%20eventually,a%20captor%20who%20tortured%20them.>)> accessed July 29, 2024.

²⁰⁴ *S.S. and Others v. Italy* (2018) App. No. 21660/18 (Grand Chamber of the European Court of Human Rights), para. 11.

The question that was posed was if Italy had jurisdiction over those migrants when its authorities “only” provided training and equipment to the Libyan authorities and did not establish tangible contact with the intercepted migrants as in *Hirsi Jamaa and Others v. Italy*²⁰⁵. As determined in *Al-Skeini and Others v. The United Kingdom* and in *Hirsi*, when a state exercises physical power and control over an individual through its agents, that individual is within the jurisdiction of that State, even if the act is performed extraterritorially²⁰⁶, and therefore the ECHR is applicable²⁰⁷. However, Italy supported the LCG financially and practically, making it harder to prove Italy’s *de facto* control over the migrants. Nonetheless, a relevant judgement from the ECtHR in *Ilascu and Others v. Moldova and Russia* challenged the traditional idea of effective control by ruling that even without direct control, a State still has a positive obligation under Article 1 of the ECHR²⁰⁸. Thus, if a State has the power to prevent violations and fails to act, it may still be held responsible under Article 1, even if it just exercised influence, and financial support can be enough to demonstrate this influence²⁰⁹. Consequently, one could argue that Italy failed to meet its positive obligations. As concluded in *Hirsi Jamaa and Others v. Italy*, despite entering bilateral agreements with non-State parties, State parties must respect their obligations under the ECHR²¹⁰. Nonetheless, the Court has not yet issued a ruling on Italy’s jurisdiction under the ECHR for its extraterritorial actions and cooperation with Libya in the *S.S. and Others v. Italy* case, but when it does, and if it condemns pullback practices, it will be as significant as *Hirsi*.

In relation to this case, the Commissioner for Human Rights of the Council of Europe has voiced her worry on the LCG’s ineffective and violent behaviour, and noted that the Member States involved were aware, or should have been, that the consequences

²⁰⁵ Anja Radjenovic, “Pushbacks at the EU’s external borders” (European Parliamentary Research Service 2021) PE 689.368 6.

²⁰⁶ “Refugee Law Initiative Declaration on Externalisation and Asylum” (2022) 34 International Journal of Refugee Law 116 <<https://academic.oup.com/ijrl/article/34/1/114/6619234>>.

²⁰⁷ *Al-Skeini and Others v. The United Kingdom* (2011) App. No. 55721/07 (Grand Chamber of the European Court of Human Rights), para. 136 and *Hirsi Jamaa and Others v. Italy* (2012) App. No. 27765/09 (Grand Chamber of the European Court of Human Rights), para. 81.

²⁰⁸ *Ilascu and Others v. Moldova and Russia* (2004) App. No. 48787/99 (Grand Chamber of the European Court of Human Rights), para. 331.

²⁰⁹ Andreina De Leo, “S.S and Others v. Italy: Sharing Responsibility for Migrants Abuses in Libya” (*Public International Law and Policy Group*, January 6, 2020) <[²¹⁰ *Hirsi Jamaa and Others v. Italy* \(2012\) App. No. 27765/09 \(Grand Chamber of the European Court of Human Rights\), para. 129.](https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya#:~:text=The%20Sea%20Watch%20was%20eventually,a%20captor%20who%20tortured%20them.> accessed July 29, 2024.</p>
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of their support would result in returns of individuals to contexts of severe human rights abuses, and that Member States must not take advantage of “grey” areas of jurisdiction to justify their hurtful actions towards human rights.²¹¹ The Commissioner further alerted that States must uphold the human rights commitments to which they agreed when ratifying the ECHR, even within the framework of collective efforts, including those of the EU.²¹² In this context, the Commissioner further recommended halting cooperation efforts with the LCG until comprehensive human rights safeguards are upheld²¹³, adding that no returns should be carried out without a thorough individual assessment of each applicant’s circumstances and needs²¹⁴. In a visit to Italy in November 2023, the Commissioner further expressed regret that Italian authorities consider cooperation with Libya as part of a broader effort to improve human rights and fundamental for controlling arrivals²¹⁵. However, as the Commissioner noted, no progress has been made on these goals, with the human rights situation in Libya worsening since 2017²¹⁶.

The EU and Frontex have also been accused of turning a blind eye to the occurrence of pushbacks to Libya²¹⁷, and funding the LCG through financial and technical incentives²¹⁸. This conduct is in breach of Article 14 (1) of the Frontex Regulation²¹⁹, which mandates the agency to ensure that fundamental rights and minimum European human rights benchmarks are upheld in its operations. However,

²¹¹ Commissioner for Human Rights of the Council of Europe, “A Distress Call for Human Rights: The Widening Gap in Migrant Protection in the Mediterranean, Follow-up Report to the 2019 Recommendation by the Council of Europe Commissioner for Human Rights” (2021) 25 <<https://rm.coe.int/a-distress-call-for-human-rights-the-widening-gap-in-migrant-protection/1680a1abcd>> accessed May 25, 2024.

²¹² *ibid*, 26.

²¹³ Commissioner for Human Rights of the Council of Europe, “Report Following Her Visit to Italy From 19 to 23 June 2023” (2023), para. 41 <<https://rm.coe.int/country-visit-report-on-italy-following-the-visit-from-19-to-23-june-2/1680adae5a>> accessed 17 July 2024.

²¹⁴ *ibid*, para. 95.

²¹⁵ *ibid*, para. 41.

²¹⁶ *ibid*.

²¹⁷ Nick Waters, Emmanuel Freudenthal and Logan Williams, “Frontex at Fault: European Border Force Complicit in ‘Illegal’ Pushbacks” (*Bellingcat*, October 23, 2020) <<https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-licit-in-illegal-pushbacks/>> accessed May 7, 2024.

²¹⁸ Andrea Beck, “Italian and EU Funding of the Libyan Coast Guard: How Italian External Border Immigration Policies Have Created Crimes Against Humanity, Public Ignorance, and Legal Accountability Issues” (2024) 5 *Immigration and Human Rights Law Review* 2 <<https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1080&context=ihrlr>>.

²¹⁹ ‘Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 Amending Council Regulation (EC) No 2007/2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union’ (2011) OJ L 304/1 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0001:0017:EN:PDF>> accessed 27 May 2024.

Frontex has generally taken a defensive stance, claiming that responsibility for the execution of border control operations lies solely with the competent authorities of each Member State, and that the agency is only mandated to provide technical and operational assistance²²⁰, distancing itself from these accusations²²¹.

Despite for its state of political turmoil, its non-membership in the ECHR or the Refugee Convention, the absence of a national asylum system²²², and well-documented human rights violations remaining unchecked²²³, Italy and the EU continue to rely on Libya when it comes to border control. This persists even after multiple warnings from the UNHCR that Libya is an unsafe location for disembarkation²²⁴. Similarly, after the UN and the International Criminal Court (ICC) identified the abuse and mistreatment of individuals in Libya as potential crimes against humanity and war crimes²²⁵, Italy and the EU have maintained their support for the MoU.

More worrying is that more Member States are considering such agreements as a model to emulate and the sole solution for managing migration in the Mediterranean. For example, in 2020, Malta formalised a MoU with Libya²²⁶, empowering the LCG, with the support of Frontex²²⁷, to return migrants and refugees to Libya.

Italy and the EU cannot evade their legal obligations under international human rights and refugee law by compelling Libya to act in a way that the Italian government

²²⁰ Anja Radjenovic, “Pushbacks at the EU’s external borders” (European Parliamentary Research Service 2021) PE 689.368 4.

²²¹ Silvia Borelli and Ben Stanford, “Troubled Waters in the Mare Nostrum: Interception and Push-Backs of Migrants in the Mediterranean and the European Convention on Human Rights” (2014) 10 *Uluslararası Hukuk Ve Politika – Review of International Law and Politics* 36 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2431658>.

²²² UNHCR, “Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights’ Compilation Report Universal Periodic Review: 3rd Cycle, 36th Session: Libya” (2019) 1 <<https://www.refworld.org/en/download/123102>> accessed July 22, 2024.

²²³ “Libya: Rights Violations Unchecked as Divisions Persist” (*Info Migrants*, January 11, 2024) <<https://www.hrw.org/news/2024/01/11/libya-rights-violations-unchecked-divisions-persist>> accessed August 27, 2024.

²²⁴ UNHCR, “UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea” (2020) <<https://www.refworld.org/policy/countrypos/unhcr/2020/en/123326>> accessed August 25, 2024.

²²⁵ Victoria Ceretti, “Italy-Libya Memorandum of Understanding: An Affront to the Fundamental Human Rights of Migrants, Refugees, and Asylum Seekers” (*Euro-Med Human Rights Monitor*, March 13, 2023) <<https://euromedmonitor.org/en/article/5561/Italy-Libya-Memorandum-of-Understanding:-An-affront-to-the-fundamental-human-rights-of-migrants,-refugees,-and-asylum-seekers#:~:text=Although%20the%20UN%20and%20the,hindering%20NGOs%20SAR%20operations%20>> accessed October 21, 2023.

²²⁶ Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of the Republic of Malta in the Field of Combatting Illegal Migration 2020.

²²⁷ Nissim Gasteli, “How Europe Allowed Malta to Hand Migrants over to Libyan Militia” *Le Monde* (December 11, 2023) <https://www.lemonde.fr/en/le-monde-africa/article/2023/12/11/how-europe-allowed-malta-to-hand-migrants-over-to-libyan-militia_6333670_124.html#>.

was prohibited by the ECtHR. Rather than making use of legal frameworks to develop safe migration routes, Italy and the EU are leveraging legal mechanisms that exacerbate the peril of migration pathways.

3.2.2. Italy-Albania deal

In February 2024, Italy and Albania ratified a MoU, allowing Italy to outsource the processing of thousands of asylum claims arriving in Italy to Albania, with Italian law being enforced throughout the process²²⁸. Under the five-year agreement, migrants rescued by Italian ships in international waters will be sent to two of the reception centres in Albania for initial screening, where they will be held while Italy fast-tracks their asylum applications and/or while their repatriation is arranged²²⁹. The centres were scheduled to be operational this summer, but construction delays have postponed its start²³⁰. Despite being located in Albania and therefore outside the EU, the centres will be operated under Italian jurisdiction by Italian authorities, meaning that they must comply with EU law standards throughout the process.

European Commission President, Ursula Von der Leyen, has demonstrated her support by describing this kind of bilateral agreement as an “out-of-the-box thinking” based on fair-sharing of responsibilities and fortifying EU’s external borders²³¹.

Nevertheless, the agreement has been criticised by several international organisations, NGOs and human rights experts, describing the deal as illegal and a *de facto* pushback practice violating the principle of *non-refoulement*²³². The Commissioner for Human Rights of the Council of Europe has likewise described the agreement as worrying to the human rights of migrants and refugees, and only adding to “*an ad hoc*

²²⁸ Fatos Bytyci, “Albanian Parliament Ratifies Migration Centres Deal with Italy” (*Reuters*, February 22, 2024) <<https://www.reuters.com/world/europe/albanian-parliament-ratifies-migration-deal-with-italy-2024-02-22/>> accessed February 25, 2024.

²²⁹ “UNHCR to Monitor Implementation of Italy-Albania Accord” (*Info Migrants*, August 19, 2024) <<https://www.infomigrants.net/fr/post/59214/unhcr-to-monitor-implementation-of-italyalbania-accord>> accessed August 29, 2024.

²³⁰ *ibid.*

²³¹ Lorne Cook, “Top EU Official Lauds Italy-Albania Migration Deal but a Court and a Rights Commissioner Have Doubts” *AP* (December 14, 2023) <<https://apnews.com/article/eu-italy-albania-migration-asylum-rescue-court-91a92ebe5a0ea0e4273609a7ad0eed47>>.

²³² “Italy: Deal to Detain Refugees and Migrants Offshore in Albania ‘Illegal and Unworkable’” (*Amnesty International*, November 7, 2023) <<https://www.amnesty.org/en/latest/news/2023/11/italy-plan-to-offshore-refugees-and-migrants-in-albania-illegal-and-unworkable/>> accessed May 12, 2024.

*extra-territorial asylum regime characterised by many legal ambiguities*²³³, alerting that disembarkation in Albania can cause delays in providing necessary assistance to the people rescued at sea²³⁴. Amnesty International also points out that the agreement is unlikely to achieve its intended goal of managing migration in an accelerated manner, and that its enforcement will likely harm human rights such as the right to asylum and to adequate legal remedy for those transferred to Albania²³⁵.

In this context and having considered possible human rights violations resulting from the deal, the UNHCR will monitor the execution of the deal during the first three months to ensure that the procedures followed are in compliance with relevant international human rights law and that migrants' human rights are protected²³⁶.

In light of this deal, it is important to emphasise that, in addition to the principle of *non-refoulement*, Article 5 (b) of the Return Directive²³⁷ requires that the return of an individual respects their family life. Thus, forcibly returning individuals to a third country, such as Albania, with which they have no ties or connection is a violation of EU law. Furthermore, the automatic transfer of migrants and refugees to reception centres, where they are detained until their asylum applications are assessed, amounts to arbitrary and prolonged detention without adequate judicial review, which is also in breach of international and EU law.

Moreover, the Italy-Albania agreement not only violates established human rights standards, but jeopardises established principles of sea rescue, such as Italy's obligation to render assistance to those in distress at sea and disembark them in a place of safety as promptly as possible, enshrined in Regulation 33, Chapter V of the SOLAS Convention, and Chapters 3 and 4 of the SAR Convention.

To conclude this chapter, it is crucial to emphasise that managing the large-scale migration in the Mediterranean should not involve making the system more dangerous so

²³³ Commissioner for Human Rights of the Council of Europe, "Report Following Her Visit to Italy From 19 to 23 June 2023" (2023), para. 54 <<https://rm.coe.int/country-visit-report-on-italy-following-the-visit-from-19-to-23-june-2/1680adae5a>> accessed 17 July 2024.

²³⁴ *ibid*, para. 52.

²³⁵ Amnesty International, "The Italy-Albania Agreement on Migration: Pushing Boundaries, Threatening Rights" (January 19, 2024) <<https://www.amnesty.org/en/documents/eur30/7587/2024/en/>> accessed August 6, 2024.

²³⁶ "UNHCR to Monitor Implementation of Italy-Albania Accord" (*Info Migrants*, August 19, 2024) <<https://www.infomigrants.net/fr/post/59214/unhcr-to-monitor-implementation-of-italyalbania-accord>> accessed August 29, 2024.

²³⁷ 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 (2008) OJ L 348/98.

that is perceived as not welcoming anymore. Despite Albania having higher human rights records than Libya, externalising asylum procedures beyond the bloc's borders – while breaching human rights and refugee protection commitments – cannot be considered a viable solution, far less a model for other Member States to replicate. It is imperative for the EU to intervene and assess whether such deals comply with Italy's obligations under international human rights and refugee law, as well as EU standards.

Chapter 4: The new migration pact and its challenges for the prevention of pushbacks

On 14 May 2024, the Council of the EU adopted the New Pact on Migration and Asylum. This pact, which will be enforced until 2026, aims to establish a common procedure for Member States to follow when individuals seek international protection in the EU.

Despite general acceptance and approval of the pact, there is some reluctance about whether it adequately addresses human rights safeguards and refugee protection. Many argue that it not only violates human rights standards and the right to asylum enshrined in EU law, but also proves to be ineffective in achieving the goals of migration management based on shared responsibility and protection-sensitive reforms for which it has been conceived²³⁸. Therefore, this chapter aims to deconstruct the pact and its measures to analyse whether they align with universal human rights standards and the frameworks that protect the rights of migrants and refugees in the EU.

4.1. What is new?

A total of ten legislative measures that reform the entire European framework for managing asylum and migration were adopted, with the two principal innovations of the pact being the implementation of a mandatory and fast-track border procedure, that should relieve some of the pressure of incoming asylum applications, and the introduction of a flexible solidarity mechanism to handle the distribution of migrants and refugees more fairly among EU Member States²³⁹. As such, once enacted, the pact aims for a new and more effective European asylum system to be born, fostering increased solidarity among Member States by redistributing the responsibilities more evenly, alleviating the burden on frontline countries.

This fair sharing of responsibility for examining asylum applications aims to stabilise the EU asylum system in a fairer way than under the Dublin system – which designates the first Member State of irregular entry as the one responsible for examining

²³⁸ Gaia Romeo, “The New Pact on Migration Is Not Only Harmful but Will Also Be Ineffective” (*Euractiv*, February 22, 2024) <<https://www.euractiv.com/section/migration/opinion/the-new-pact-on-migration-is-not-only-harmful-but-will-also-be-ineffective/>> accessed July 4, 2024.

²³⁹ Migration and Home Affairs, “Pact on Migration and Asylum: A Common EU System to Manage Migration” (*European Commission*, May 21, 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> accessed July 4, 2024.

an asylum application²⁴⁰. For this reason, the Asylum and Migration Management Regulation (AMMR) will replace the Dublin system²⁴¹. The AMMR is based on the idea that asylum applications should not have to be dealt by one single Member State, but by the EU, by specifying which Member State is responsible for reviewing applications for international protection by establishing a mandatory solidarity mechanism which is based on fair sharing of responsibility through voluntary contributions in various forms from all Member States²⁴².

However, despite this solidarity system being mandatory, it is also flexible. It ensures all Member States can assist the countries facing migratory burden, while allowing flexibility in how they provide their assistance, as they can contribute by relocating migrants and refugees, taking over responsibility for returning individuals ineligible of international protection, providing financial and operational funding to the frontline states or to third countries, or alternative measures like deploying personnel or helping with capacity-building efforts, among others²⁴³. In this sense, Member States have complete discretion in deciding their type of solidarity.

The Screening Regulation aims to tighten border controls and determine in a faster way the appropriate process for people entering the EU without documentation²⁴⁴ or disembarked after SAR operations at sea. As such, the Pact aims to employ a fast-tracked examination of asylum applications with mandatory border procedures so that decisions on return can be processed quickly – either back to the home country or to “safe” third countries, when people are deemed ineligible of international protection²⁴⁵. As part of the

²⁴⁰ EU, ‘Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)’ (2013) OJ L 180/1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02013R0604-20130629>> accessed 4 July 2024.

²⁴¹ Council of the EU, “The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System” (December 20, 2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach-breakthrough-in-reform-of-eu-asylum-and-migration-system/>> accessed July 4, 2024.

²⁴² Migration and Home Affairs, “Country responsible for asylum application (Dublin Regulation)” (*European Commission*) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en> accessed July 4, 2024.

²⁴³ Council of the EU, “The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System” (December 20, 2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach-breakthrough-in-reform-of-eu-asylum-and-migration-system/>> accessed July 4, 2024.

²⁴⁴ *ibid.*

²⁴⁵ Migration and Home Affairs, “Pact on Migration and Asylum: A Common EU System to Manage Migration” (*European Commission*, May 21, 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> accessed July 4, 2024.

Screening Regulation, the European Commission has also presented an independent fundamental rights border monitoring mechanism that all Member States must establish to oversee compliance with fundamental rights during border screenings, investigate reports of abuses, and provide annual recommendations to improve respect for fundamental rights.

The pact further introduces the Crisis and Force Majeure Regulation, which empowers Member States to temporarily deviate from certain EU laws and standards on border and asylum to manage exceptional circumstances and crises²⁴⁶.

4.2. Incompatibility with human rights safeguards and prevention of pushbacks

Under the AMMR, individuals must make their asylum applications in the first EU Member State they enter or legally reside in²⁴⁷. This first country of arrival is responsible for the claim for 20 years or for 12 months in cases of maritime entries²⁴⁸. These extended responsibility periods not only narrow individuals' right to choose where to seek and apply for asylum and their ability to relocate to States where they may have stronger links (e.g., family members) or better integration prospects, as it can also lead to the opposite intended effect of releasing the pressure on frontline States which are the first countries of arrival. In this context, frontline countries overwhelmed with the high volume of arrivals will continue to resort to unlawful practices such as pushbacks and to manage the pressure.

Moreover, the flexible solidarity mechanism is intended to alleviate the burden on frontline States from acting as the EU's gatekeepers. In fact, if Member States prioritised the relocation of migrants and refugees as an act of solidarity, it could ensure safer routes to Europe while advancing fair responsibility-sharing among Member States. However, the flexibility of this mechanism allows Member States' discretion. For example, economically stronger Member States might choose not to host migrants and refugees,

²⁴⁶ Anita Orav, "Crisis and force majeure regulation" (European Parliamentary Research Service 2024) PE 659.448 6.

²⁴⁷ Council of the EU, "The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System" (December 20, 2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach-breakthrough-in-reform-of-eu-asylum-and-migration-system/>> accessed July 4, 2024.

²⁴⁸ Council of the EU, "A New Asylum and Migration Management Regulation" (*Council of the EU*) <<https://www.consilium.europa.eu/en/policies/eu-migration-policy/eu-migration-asylum-reform-pact/asylum-migration-management/>> accessed July 9, 2024.

and instead, offer their solidarity by providing financial contributions, which elevate the migratory burden on poorer frontline States. Additionally, financial contributions to third countries can be problematic, as they may translate to more bilateral agreements with third countries lacking human rights safeguards, potentially resulting in more pushbacks and other unlawful practices.

The mandatory border procedure to be established under the pact, also raises significant concerns regarding human rights, as it allows for the detention of individuals. Additionally, a fast-track border procedure may lead to faster and shorter interviews, depriving individuals of a fair, thorough examination of their claims, circumstances and needs, and potentially restricted or no access to legal counselling, and scarcer opportunities to challenge expulsion orders²⁴⁹, based on safety concerns. Furthermore, the immediate return of individuals who were denied asylum undermines their ability to seek protection through other means under domestic laws and erodes important safeguards such as the principle of *non-refoulement*²⁵⁰.

Regarding the independent fundamental rights border monitoring mechanism that all Member States must establish to ensure compliance with human rights during border procedures, a crucial question remains: Will this tool be sufficient to prevent pushbacks? Although most Member States have independent monitoring entities, such as national Ombudsmen, tasked with overseeing human rights compliance at the border, it is still debated whether these mechanisms truly live up to their intended purpose. National authorities have considerable discretion in how these mechanisms are implemented, and effective and independent monitoring is often hindered by factors such as lack of resources, restricted mandates, inadequate scope, or impediment by authorities²⁵¹. Consequently, accountability for grave human rights violations, such as pushbacks, can be hard to achieve. While Article 7 (Monitoring of Fundamental Rights) of the Screening Regulation²⁵² can help improve the monitoring of rights violations at EU borders, it has

²⁴⁹ Katharine Woolrych, “The EU Pact on Migration and Asylum, Explained” (*HIAS*, February 13, 2024) <<https://hias.org/news/eu-pact-migration-and-asylum-explained/>> accessed July 12, 2024.

²⁵⁰ PICUM, “More Detention, Fewer Safeguards: How the New EU Pact on Migration and Asylum Creates New Loopholes to Ignore Human Rights Obligations” (2020) 2 <<https://picum.org/wp-content/uploads/2020/10/More-detention-fewer-safeguards-How-the-new-EU-Pact-on-Migration-and-Asylum-creates-new-loopholes-to-ignore-human-rights-obligations.pdf>> accessed July 14, 2024.

²⁵¹ Tineke Strik, “Pushbacks in the EU: How to End Impunity?” (*European Policy Centre*, December 16, 2020) <<https://www.epc.eu/en/Publications/Pushbacks-in-the-EU-How-to-end-impunity~3a6efc>> accessed July 14, 2024.

²⁵² EU, ‘Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU)

a limited scope. It applies only during the screening process, which may not effectively prevent pushbacks or monitor alleged fundamental rights violations, since most of such violations take place away from official border crossings or formal procedures²⁵³. By controlling only specific agreed locations, the mechanism may create many hidden areas where violations will continue unsupervised. In relation to this, it is argued that these mechanisms should be independent of national authorities²⁵⁴ and that international organisations and NGOs could contribute to the success of the independence of border monitoring processes²⁵⁵. However, the responsibility to ensure a transparent and genuinely inclusive process is on the Member States.

Also concerning from a human rights perspective is the fact that, while undergoing the screening process, which can last up to seven days²⁵⁶, individuals are not allowed to enter the State's territory and must remain at the screening location, being arbitrarily kept in facilities designed for the purpose. Despite seven days being humanely very challenging for people who were rescued at sea in precarious physical and mental health conditions, as evidenced before, the majority of these facilities and detention camps lack essential human rights safeguards, provide undignified living conditions, and fail to offer judicial aid to inform individuals of their rights and the next steps in the process – a right of theirs under international human rights law.

Moreover, the Crisis and Force Majeure Regulation, which allows for temporary derogations from the AMMR to ensure Member States can cope with mass influxes, can lead to a range of possible interpretations. The question is if such temporary measures might become normalised and overused, potentially leading to a permanent lowering of

2017/2226, (EU) 2018/1240 and (EU) 2019/817' (23 September 2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0612&from=EN>> accessed 15 July 2024.

²⁵³ Protecting Rights at Borders, "Pushbacks at Europe's Borders: A Continuously Ignored Crisis" (2024) 17 <<https://www.asgi.it/wp-content/uploads/2024/02/PRAB-Report-September-to-December-2023--final.pdf>> accessed August 2, 2024.

²⁵⁴ Human Rights Watch, "The Pact on Migration and Asylum: To Provide a Fresh Start and Avoid Past Mistakes, Risky Elements Need to Be Addressed and Positive Aspects Need to Be Expanded" (*Human Rights Watch*, October 8, 2020) <<https://www.hrw.org/news/2020/10/08/pact-migration-and-asylum>> accessed August 5, 2024.

²⁵⁵ Office for Democratic Institutions and Human Rights, "Border Police Monitoring in South-Eastern Europe: New Opportunities" (2023) 33 <https://www.osce.org/files/f/documents/0/5/556554_0.pdf> accessed August 11, 2024.

²⁵⁶ Council of the EU, "The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System" (December 20, 2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach-breakthrough-in-reform-of-eu-asylum-and-migration-system/>> accessed July 4, 2024.

fundamental rights standards in some Member States and, consequently, eroding human rights safeguards for migrants and refugees at EU borders.

In this sense, while the Pact makes numerous promises, it ultimately fails to address the necessary legal and operational responses to put an end to pushbacks at EU external borders and manage migration in an effective and human rights-based approach. If no action is taken to reverse the current situation, increasing human rights violations, border deaths, and humanitarian chaos will continue to take place at the EU's external borders, especially, in the Mediterranean Sea.

Chapter 5: Viable solutions and further recommendations to prevent pushbacks

It is widely agreed that finding a solution for the high volume of arrivals at the EU's external borders is of utmost urgency and importance. However, burden-shifting the “problem” and ignoring its negative effects will not lead to a viable solution.

In fact, there is no conclusive evidence that externalising asylum procedures, restricting refugee protection, or narrowing legal pathways successfully and effectively deters irregular migration²⁵⁷. These measures are not, and likely never will, stop people from attempting to reach the continent.

The EU and its Member States must instead implement humane and effective solutions to manage irregular migration in the Mediterranean and end the ongoing crisis. Throughout the writing of this dissertation, key recommendations to protect and promote human rights while advancing refugee protection at the EU's external borders were identified as follows:

- (1) The EU and its Member States shall act in good faith to fully meet their international legal obligations regarding human rights and refugee protection law, ensuring that human rights are honoured and upheld at the EU's external borders²⁵⁸.
- (2) Safe and legal migration pathways shall be established to prevent individuals from being forced into dangerous journeys in their quest for international protection²⁵⁹.
- (3) The EU and its Member States shall refrain from engaging in pushbacks and revoke any laws that allow for the occurrence of such practices²⁶⁰ or other unlawful actions that result in the forced return of migrants and refugees to

²⁵⁷ Steffen Angenendt and others, “The Externalisation of European Refugee Protection: A Legal, Practical and Political Assessment of Current Proposals” [2024] SWP German Institute for International and Security Affairs 7 <https://www.swp-berlin.org/publications/products/comments/2024C13_EuropeanRefugeeProtection.pdf>.

²⁵⁸ OHCHR, “Recommended Principles and Guidelines on Human Rights at International Borders” (2014) Recommended Principle II A 1 <https://www.ohchr.org/sites/default/files/2021-12/OHCHR_Recommended_Principles_Guidelines.pdf> accessed July 28, 2024.

²⁵⁹ Commissioner for Human Rights of the Council of Europe, “Report Following Her Visit to Italy From 19 to 23 June 2023” (2023), para. 18 <<https://rm.coe.int/country-visit-report-on-italy-following-the-visit-from-19-to-23-june-2/1680adae5a>> accessed 17 July 2024.

²⁶⁰ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, “Human rights violations at international borders: trends, prevention and accountability” (2022) A/HRC/50/31, para. 78 <<https://documents.un.org/doc/undoc/gen/g22/328/57/pdf/g2232857.pdf>> accessed April 18, 2024.

places where they face severe human rights abuses, fully adhering to the principle of *non-refoulement*²⁶¹.

- (4) The EU and its Member States shall ensure each person arriving at the EU's external borders undergoes an individual assessment of their circumstances, in line with the prohibition of collective expulsions²⁶².
- (5) The EU and its Member States shall refrain from establishing bilateral agreements with third countries that lack adequate safeguards in their domestic laws to properly protect migrants' and refugees' human rights²⁶³. Such agreements should include a comprehensive human rights assessment²⁶⁴. Additionally, these agreements should also be subject to international oversight to ensure compliance with international human rights standards²⁶⁵.
- (6) Independent human rights border monitoring should be implemented in collaboration with international bodies and civil society²⁶⁶.
- (7) Independent and effective investigations shall be carried out whenever evidence of human rights abuses²⁶⁷ or failure of States to comply with international obligations is found. Offenders should be prosecuted as appropriate, and measures should be taken to prevent recurrence²⁶⁸. Judicial review, legal aid, effective remedies and protection shall be provided for those harmed until the investigation is completed²⁶⁹.

²⁶¹ OHCHR, "Recommended Principles and Guidelines on Human Rights at International Borders" (2014) Recommended Principle II C 11 <https://www.ohchr.org/sites/default/files/2021-12/OHCHR_Recommended_Principles_Guidelines.pdf> accessed July 28, 2024.

²⁶² *ibid.*, Guideline 6.1.

²⁶³ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, "Human rights violations at international borders: trends, prevention and accountability" (2022) A/HRC/50/31, para. 81 <<https://documents.un.org/doc/undoc/gen/g22/328/57/pdf/g2232857.pdf>> accessed April 18, 2024.

²⁶⁴ *ibid.*

²⁶⁵ *ibid.*

²⁶⁶ OHCHR, "Recommended Principles and Guidelines on Human Rights at International Borders" (2014) Recommended Guideline 1.8. <https://www.ohchr.org/sites/default/files/2021-12/OHCHR_Recommended_Principles_Guidelines.pdf> accessed July 28, 2024.

²⁶⁷ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, "Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea" (2021) A/HRC/47/30, para. 107 (n) <<https://documents.un.org/doc/undoc/gen/g21/106/33/pdf/g2110633.pdf>> accessed August 18, 2024.

²⁶⁸ OHCHR, "Recommended Principles and Guidelines on Human Rights at International Borders" (2014) Recommended Principle II C 13 <https://www.ohchr.org/sites/default/files/2021-12/OHCHR_Recommended_Principles_Guidelines.pdf> accessed August 28, 2024.

²⁶⁹ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, "Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea" (2021) A/HRC/47/30, para. 107 (j) <<https://documents.un.org/doc/undoc/gen/g21/106/33/pdf/g2110633.pdf>> accessed August 18, 2024.

- (8) The EU and its Member States shall establish solid SAR efforts in the Mediterranean, ensuring swift and effective responses to distress calls and facilitating safe and timely disembarkation in places of safety in accordance with international human rights law, and law of the sea²⁷⁰. Additionally, the EU and its Member States should refrain from obstructing NGOs' rescue operations²⁷¹.
- (9) Any disproportionate use of force or acts of violence by authorities shall be investigated²⁷², and the use of detention as a tool for managing migration shall be used only as a last resort²⁷³.

²⁷⁰ OHCHR, "Recommended Principles and Guidelines on Human Rights at International Borders" (2014) Recommended Guideline 4.4. <https://www.ohchr.org/sites/default/files/2021-12/OHCHR_Recommended_Principles_Guidelines.pdf> accessed July 28, 2024.

²⁷¹ Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, "Human rights violations at international borders: trends, prevention and accountability" (2022) A/HRC/50/31, para. 80 <<https://documents.un.org/doc/undoc/gen/g22/328/57/pdf/g2232857.pdf>> accessed April 18, 2024.

²⁷² OHCHR, "Recommended Principles and Guidelines on Human Rights at International Borders" (2014) Recommended Guideline 2.11. <https://www.ohchr.org/sites/default/files/2021-12/OHCHR_Recommended_Principles_Guidelines.pdf> accessed July 28, 2024.

²⁷³ *ibid*, Guideline 8.1.

Conclusion

This dissertation sought to examine the critical need for States to respect and fulfil their international obligations under human rights and refugee law, and to advance fundamental human rights at the EU's external borders to ensure a humane, fair, and efficient asylum system.

To address the research question guiding this study – '*Are EU Member States complying with their obligations under international human rights and refugee law?*' – an overview of the Mediterranean refugee crisis was provided, highlighting the shift in the EU's approach from a humanitarian focus to a narrative increasingly centered on border control. This was followed, by an in-depth analysis of the rights afforded to migrants and refugees under international human rights law, refugee law, and the law of the sea, in an extraterritorial context. This analysis outlined key human rights applicable to sea migration, which States are required to uphold in the execution of their border control measures.

The literature review shed light on the ongoing debates surrounding the externalisation of asylum procedures and border control responsibilities to third countries, and consequent pushbacks, as the *modus operandi* of the EU and its Member States to handle the high influx of arrivals. However, supported by caselaw, primarily from the ECtHR, this dissertation emphasises the significance risks and human rights implications associated with this externalisation of legal obligations under international human rights and refugee law. In particular, it highlighted two bilateral agreements that raise serious concerns from a human rights perspective.

Building on these findings, this dissertation examined the New Pact on Migration and Asylum to evaluate its potential in preventing pushbacks and other human rights violations at the EU's external borders. While the Pact presents some promising practices, the study concludes that it falls short in addressing the issue of pushbacks. Instead, it reinforces the EU's overarching strategy of outsourcing migration management to third countries, further exacerbating the vulnerability of migrants and refugees.

The final discussion, alongside comprehensive research, brought light to some viable solutions and potential recommendations to prevent pushbacks and enhance the protection of human rights at the EU's external borders. These recommendations aim to provide the EU and its Member States a more humane approach to migration

management, while upholding their international legal obligations to safeguard and promote the human rights of migrants and refugees.

Ultimately, the answer to the research question posed above is negative. The EU and its Member States are failing to meet their international commitments as established under international human rights and refugee law. The outsourcing of international responsibilities to countries with poor human rights records, not only constitutes legal challenges but also endangers the lives, dignity, and rights of migrants and refugees. The practice of pushbacks and other unlawful actions that result in the forced return of individuals to “safe” third countries where they will be subject to torture and other ill-treatment, breaches not only the primary obligation of States to safeguard the right to life but the cornerstone of refugee protection that is the principle of *non-refoulement*. Moreover, it denies migrants and refugees their right to a fair asylum procedure, or to other form of international protection. This dissertation concludes that this exercise of power that has transboundary effects must come with responsibility and accountability.

This dissertation has contributed to the ongoing debate on human rights violations at the EU’s borders by reinforcing the need for States to uphold their legal commitments to international law. It aims to emphasise the role academia can have in the understanding of the broader context of sea migration and how restrictive border control policies can have severe human rights implications, proposing alternatives that may better protect the migrants and refugees’ rights while achieving border governance objectives. Nonetheless, it is important to acknowledge that this research does not extensively examines all aspects to be examine under these legal issues. Future studies should seek to further explore the human rights implications coming from the broadening of States’ compliance to their international legal obligations.

The conclusion is that, despite differing national interests among EU Member States when it comes to migration and asylum, the founding of a fair and efficient asylum and migration system that respects the human rights of migrants and refugees is of utmost urgency and must remain a key priority on the EU agenda. It is more crucial than ever for the EU to establish a higher standard and implement a safe, effective, and humane approach to asylum and migration that upholds the human rights of migrants and refugees and ensures that they are not sent back to a situation that is perilous by nature. To achieve this, Member States must engage in genuine cooperation and improve fair responsibility-sharing amongst themselves to collectively address the crisis unfolding at their doorstep.

The tragic daily reality of those trying to escape unbearable living conditions, only to lose their lives in the Mediterranean high seas, stands as a testament to how ineffective border and migration policies have been so far. Given the EU's foundational values, every individual, irrespective of their status or country of origin, should be entitled to human dignity, freedom, equality, solidarity, and the full respect of their human rights. Somali refugees fleeing civil war risking their lives in unstable rubber boats out of fear of being killed or tortured should, therefore, be able to enjoy their human rights and right to asylum just as Ukrainian refugees fleeing an unlawful war, who were largely welcomed into the EU, did.

In the end, migrants and refugees should not be the collateral damage of States' narrow interpretations of jurisdiction so they can evade their international obligations and commitments and advance their own agendas. States may not be solely liable for what happens once they transfer the "burden" to third countries, but they exercise a sufficient degree of effective control and therefore are liable, nonetheless. As pointed out by Lisa-Marie Komp, '(...) *it is much easier to request harsh measures and to maintain a good conscience, if one does not confront the negative effects of these decisions*'²⁷⁴. However, to pretend that the negative side of the story does not exist just because it remains unseen, should not be the solution. If the EU and its Member States are to uphold their international legal obligations under human rights and refugee law, human rights must be at the center of border governance efforts, with law being the only force capable of driving such reform.

²⁷⁴ Lisa-Marie Komp, "Border Deaths at Sea under the Right to Life in the European Convention on Human Rights" in Mark Gibney, Thomas Gammeltoft and Bonny Ibhawoh (eds), *Routledge Studies in Human Rights* (Routledge 2023) Preface.

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