



Pushback of Refugees Under International Law: A Conceptual Analysis

Ekin Deniz Uzun* 

Abstract

Pushback describes measures and actions taken by state authorities to intercept refugees from seeking asylum as they enter or attempt to enter the state's territorial boundaries. There is no precise international law definition to help grasp pushback's scope and consequences. Scholars and refugee activists have evaluated the term pushback with links to collective expulsion, torture, and crimes against humanity. This Article charts relevant international legal regulations on the mentioned legal terms. The aim is to reveal whether a legal explanation can be brought to the term pushback through these concepts. From a legal perspective, this Article points out that pushback operations conflict with the non-refoulement principle and the prohibition on collective expulsion. The analysis further explains that certain elements must come together for the term pushback to be considered in a structure that will fall within the scope of international criminal law in its operational dimension. Keeping in mind the aspects described earlier, this Article will evaluate legal ways to make sense of a vague concept.

Keywords

Pushback, International Law, Collective Expulsion, Torture, Crimes Against Humanity

* **Corresponding Author:** Ekin Deniz Uzun (Asst. Prof. Dr.), Ankara Yıldırım Beyazıt University, Faculty of Law, Department of International Law, Ankara, Türkiye. E-mail: eduzun@ybu.edu.tr ORCID: 0000-0002-9757-0223

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I. Introduction

A. The Research Question

The Mediterranean refugee *crisis* erupted in 2015.¹ The mentioned crisis is a protection crisis that defines how refugees were left alone, ignored, and othered. About 1 million migrants and refugees arrived in the European Union (EU) that year.² Since then, refugees who have fled from persecution and armed conflict have dominated the human rights watchdogs' reports on the *non-entrance* practices of states³ and violence directed against refugees who have intended to cross international borders.⁴ Confusing misinterpretations have also emerged about the movement of refugees and their intentions/motivations. Refugees were questioned about why some have chosen to flee towards *democratic-wealthy states* in the first place.⁵ As a result, the refugee has begun to be perceived under the influence of xenophobic rhetoric—for example, refugee as a term evoked images of people escaping from the Syrian war. Syrian refugees were depicted as illiterate and innumerate opportunists who were undeserving of protection.⁶ But what was *not* seen was that they were only

- 1 Encamacion Gutierrez-Rodriguez, 'The Coloniality of Migration and the "Refugee Crisis" On the Asylum Migration Nexus, the Transatlantic White European Settler Colonialism- Migration and Racial Capitalism' (2018) 34 *Refugee* 1, 15-25.
"From a European perspective, the "Mediterranean migration crisis" was, in the first instance, a Greek crisis." Philippe Fargues, 'Four Decades of Cross-Mediterranean Undocumented Migration to Europe A Review of the Evidence' (International Organization for Migration, 2017), 11
<https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf> accessed 17 September 2021.
- 2 Al Jazeera, '2016: Refugee Arrivals Fall as Deaths Hit Record' (26 October 2016)
<<https://www.aljazeera.com/news/2016/10/26/un-2016-mediterranean-refugee-deaths-hit-record-3800>> accessed 6 September 2021.
- 3 Human Rights Watch, 'Human Rights Watch Submission to the Special Rapporteur's Report on Pushback Practices and Their Impact on the Human Rights of Migrants' (*Human Rights Watch*, 1 February 2021)
<<https://www.hrw.org/news/2021/02/01/human-rights-watch-submission-special-rapporteurs-report-pushback-practices-and>> accessed 9 August 2021.
- 4 The crisis narrative continues to this day. In the face of rising numbers of Afghan refugees, French President Emmanuel Macron made a statement about both the need to "protect those who are in the greatest danger" and "protect [themselves] against large migratory flows". Charlotte McDonald-Gibson, 'Europe Sees a Migration Crisis in the Making in Afghanistan. Have the Lessons of the 2015 Surge Been Learned?' *Time* (18 August 2021) <<https://time.com/6091084/afghanistan-taliban-europe-migration/>> accessed 27 August 2021.
Further, "Bulgaria announced on August 26 that it will bolster its border with Greece and Turkey with between 400 and 700 soldiers amid growing concern in Europe over an influx of migrants from Afghanistan." Radio Free Europe, 'Bulgaria Sends Troops to Border as EU Braces for Afghan Migrant Flows' (27 August 2021) <https://www.rferl.org/a/bulgaria-border-migrants-afghanistan-/1430530.html?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.
"EU countries vowed Tuesday to dole out an unspecified amount of funds to significantly beef up financial support for Afghanistan's neighbors to manage the refugee crisis at their borders." Hans Von Der Burchard, 'EU Plans Big Cash Offer for Afghanistan's Neighbors to Host Refugees' *Politico* (31 August 2021) <<https://www.politico.eu/article/eu-plans-afghanistan-neighbors-host-refugees/>> accessed 6 September 2021.
- 5 This Article mainly focuses on the European Union (EU) countries' asylum policies with links to pushback. Wealthy democratic state is used as a general heading to include the United States of America (USA), the United Kingdom (UK), Canada, Australia, and the EU countries. For further analysis on the wealthy democratic states' asylum policies please see Daniel Ghezelbash, 'Hyper-legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' [2020] *American Journal of Comparative Law* 2.
An analysis on "why are rich countries democratic" can also be found here: Ricardo Hausmann, 'Why Are Rich Countries Democratic?' (*Harvard Kennedy School Mossavar-Rahmani Center for Business and Government*, 26 March 2014) <<https://www.hks.harvard.edu/centers/mrcbg/programs/growthpolicy/why-are-rich-countries-democratic>> accessed 14 September 2021.
- 6 Georgina Ramsay and Lucy Fiske, 'Election Factcheck: Are Many Refugees Illiterate and Innumerate?' *The Conversation* (18 May 2016) <<https://theconversation.com/election-factcheck-are-many-refugees-illiterate-and-innumerate-59584>> accessed 2 September 2021.

human beings, in the millions, fleeing persecution and armed conflict. Indeed, as the United Nations Refugee Agency's United Nations High Commissioner for Refugees (UNHCR) noted, by the end of 2014, Syria had become the World's top source of refugees, overtaking Afghanistan.⁷

In the face of growing numbers of refugees, however, the EU states, for example, have started to show resistance by narrating the current situation as a *crisis* brought by refugees. Since then, the wealthy democratic states have looked for ways to end the refugees' *flow towards their countries*. But offered solutions have had the potential to create more complicated problems. Thus, for example, the New EU Pact on Migration⁸ deepens the continuing resistance of the EU countries against refugees, as it is designed "*to harden and formalize the 'Fortress Europe'*". Therefore, "*migrants and refugees [are] to be kept out of Europe at all costs.*"⁹

Since the beginning of the *wickedly conceptualized refugee crisis*, it seems that the international community has forgotten the root causes of why refugees have been moving across borders. Humanitarian calamities contribute to instability, which in turn, leads to a range of negative consequences. Human beings are left with no choice and are forced to flee for various reasons, including armed conflict or violence reaching the limits of persecution. But knowing the brutality of strict border control measures, refugees, in most cases, choose unconventional paths to overcome visible and invisible border walls of the destination states. Upon their arrival in the designated state, refugees mostly face ill-treatment and are detained in unsanitary, inhuman conditions.¹⁰ This unfair/abusive treatment upon the arrival of refugees leads to double victimisation.

As is understood, the wealthy democratic states in specific EU countries have adopted new ways to *tackle emerging numbers of refugees* arriving in their territories. For example, refugees were left at state authorities' discretion and kept in inhuman conditions, especially in refugee camps, such as Moria in Greece¹¹ and Calais Jungle in

7 See UNHCR, 'World at War - Forced Displacement in 2014' (UNHCR Global Trends, 2015) <<https://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html>> accessed 6 September 2021. Please note that "*Thousands of people are scrambling to flee Afghanistan after the Taliban seized back control of the country, almost two decades after they were ousted by a US-led coalition*". The Visual Journalism Team, 'Afghanistan: Where Will Refugees Go after Taliban Takeover?' *BBC News* (26 August 2021) <<https://www.bbc.com/news/world-asia-58283177>> accessed 26 August 2021.

8 European Commission, 'Migration and Asylum Package: New Pact on Migration and Asylum Documents Adopted on 23 September 2020' (23 September 2020) <https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en> accessed 26 August 2021.

9 Dawn Chatty, 'Has the Tide Turned? Refuge and Sanctuary in the Euro-Mediterranean Space' (Borders, Migrations, Asylum and Refuge, 06 October 2020) <<https://revistaidees.cat/en/has-the-tide-turned-refuge-and-sanctuary-in-the-euro-mediterranean-space/>> accessed 25 January 2021.

10 Madeleine Joung, 'What Is Happening at Migrant Detention Centers? Here's What to Know' (12 July 2019) <<https://time.com/5623148/migrant-detention-centers-conditions/>> accessed 2 September 2021.

11 "*Four Afghan asylum-seekers have been sentenced to 10 years in prison for their part in a fire that destroyed the Moria migrant camp in Greece last year.*" Al Jazeera, 'Greece: Four Afghan Migrants Jailed over Moria Camp Fire' *Al Jazeera* (13 June 2021) <https://www.aljazeera.com/news/2021/6/13/afghans-jailed-in-greece-over-moria-migrant-camp-blaze?mc_cid=12f8feb197&mc_eid=0cd57908d5> accessed 15 June 2021.

France. Moria was destroyed by fire, leaving 13,000 people without shelter in 2020.¹² The first closed refugee camp in Samos, Greece, which human rights organizations see as a *punishment policy*, opened almost one year later.¹³ The punishment policy criticism results from a comparison of the refugee camp in Samos with a prison - considering that the base is “surrounded by military-grade fencing, watched over by police and located in a remote valley”.¹⁴ As a result, it “has been likened by critics to a jail or a dystopian nightmare”.¹⁵ The Calais Jungle, where up to 9,000 people lived, on the other hand, was dismantled. Refugees in this area are now thrown into disarray; most of them live on the outskirts of Calais.¹⁶

Contrary to the non-refoulement principle,¹⁷ Hellenic Coast Guard pushed heavily loaded dinghies carrying men, women, and babies back onto the high seas.¹⁸ In addition, we have read how refugees from Libya have drowned because of not receiving protection from any states in the middle of the Mediterranean Sea.¹⁹ In its *Hirsi Jamaa v Italy* case, the European Court of Human Rights (ECtHR/ The Court/ Strasbourg Court) concluded that Italian authorities’ interception - forcibly returning refugees to Libya - was contrary to the state’s obligation of human rights protection. Because refugees were under the “continuous and exclusive de jure and de facto control of the Italian authorities”.²⁰ The ongoing tragedy resulted in the deaths of hundreds of people. They drowned in the Mediterranean Sea. This incident also

12 Barbara Wesel, ‘Turkey Migration Deal a “Stain on EU Rights Record”’ *DW Made for Minds* (17 March 2021) <<https://www.dw.com/en/turkey-migration-deal-a-stain-on-eu-rights-record/a-56903392>> accessed 16 June 2021.

13 Euronews, ‘Yunanistan’da Cezaevine Benzetilen Mülteci Kampı Açılıyor, STK’lar Tepkili’ (18 September 2021) <[https://tr.euronews.com/2021/09/18/yunanistan-da-cezaevine-benzetilen-multeci-kamp-ac-l-yor-stk-lar-tepkili?utm_source=newsletter&utm_medium=%\\$%7Btemplate_locale%7D&utm_content=yunanistan-da-cezaevine-benzetilen-multeci-kamp-ac-l-yor-stk-lar-tepkili&_open=eyJndWlkjoiODNjMGNjMzdiM2lzZjgyZDBlNDg3YmE2N2U5MDQxMjAifQ%3D%3D](https://tr.euronews.com/2021/09/18/yunanistan-da-cezaevine-benzetilen-multeci-kamp-ac-l-yor-stk-lar-tepkili?utm_source=newsletter&utm_medium=%$%7Btemplate_locale%7D&utm_content=yunanistan-da-cezaevine-benzetilen-multeci-kamp-ac-l-yor-stk-lar-tepkili&_open=eyJndWlkjoiODNjMGNjMzdiM2lzZjgyZDBlNDg3YmE2N2U5MDQxMjAifQ%3D%3D)> accessed 18 September 2021.

14 Helena Smith, ‘Why Greece’s Expensive New Migrant Camps Are Outraging NGOs’ *The Guardian* (19 September 2021) <<https://www.theguardian.com/world/2021/sep/19/why-greeces-expensive-new-migrant-camps-are-outraging-ngos>> accessed 20 September 2021.

15 *ibid.*

16 For further information please see Diana Taylor, ‘French police clear migrant camp at launch point for Britain’ *The Guardian* (29 September 2020) <<https://www.theguardian.com/world/2020/sep/29/french-police-clear-calais-migrant-camp-launch-point-britain>> accessed 25 January 2021.

17 The non-refoulement principle is regulated under the 1951 Refugee Convention Article 33 as follows:

“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.

2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention) art 33.

18 Patrick Kingsley and Karam Shoumali, ‘Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea’ *The New York Times* (27 April 2021) <<https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html>> accessed 3 May 2021.

19 UN News and Global perspective Human stories, ‘Libya Shipwreck Claims 130 Lives despite SOS Calls, as UN Agencies Call for Urgent Action’ (23 April 2021) <<https://news.un.org/en/story/2021/04/1090462>> accessed 21 June 2021.

20 *Hirsi Jamaa and Others v Italy* App no. 27765/09 (ECHR, 23 February 2012) para 81.

highlighted the failings in European immigration policy and the resistance against the idea of *welcoming refugees*.²¹

As a side note, pushback incidents should not be considered as only Greece or Italy's asylum policy.²² The idea of pushback lies in the notion that refugees would be prevented from arriving in the destination state or seeking asylum there. For example, Australia used its motto of *fighting against smugglers* to overshadow the brutality of its offshore processing of refugees. As it turns out, nine years later, this policy was described as nothing but "*cruel, costly and ineffective*".²³ Australia has been transferring refugees to third states to have their claims processed.²⁴ Since 2014, Australia has pursued "*maritime pushbacks despite the availability of offshore processing*."²⁵ As is seen, states may prevent already 'trying to arrive refugees' from triggering the asylum application process immediately. They can also discourage future refugees by exposing the ones, e.g., in the offshore processing detention centres, to abuse and mistreatment.

The Australian model influenced the EU states. As a result, the EU countries have started to employ sea patrol operations. For example, boats have been intercepted and returned/pushed back on high seas (such as the Mediterranean Sea) under the watch of the European Border and Coast Guard Agency/Frontex.²⁶ Sadly enough, the United Kingdom (UK), for example, has shown interest in replicating a similar process in its asylum policy. For instance, the Nationality and Borders Bill, Bill 14 of 2021-22,²⁷ was introduced in the UK,²⁸ and Priti Patel serving as Home Secretary in the UK during that time prepared to push back small boats carrying refugees in the Channel.²⁹ Recently, Denmark also passed a law allowing for the offshore detention of refugees.³⁰ In addition, the Greek authorities are preparing a bill that

21 Al Jazeera, 'Deaths at Sea Highlight Failings in Europe Immigration Policy' (4 May 2021) <<https://www.aljazeera.com/news/2021/5/4/deaths-at-sea-highlight-failings-in-europe-migration-policy>> accessed 21 June 2021.

22 Amnesty International, 'Greece: Pushbacks and Violence against Refugees and Migrants Are de Facto Border Policy' (23 June 2021) <<https://www.amnesty.org/en/latest/press-release/2021/06/greece-pushbacks-and-violence-against-refugees-and-migrants-are-de-facto-border-policy/>> accessed 26 August 2021.

23 Madeline Gleeson and Natasha Yacoub, 'Policy Brief 11 Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia' (Kaldor Centre for International Refugee Law 2021) Policy Brief 11,2 <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf> accessed 16 August 2021.

24 *ibid.*

25 *ibid.*

26 Frontex European Border and Coast Guard Agency <<https://frontex.europa.eu>> accessed 16 June 2021.

27 United Kingdom Government, 'Nationality and Borders Bill 2021' <<https://publications.parliament.uk/pa/bills/cbill/58-02/0141/210141.pdf>> accessed 31 August 2021.

28 Megan Specia, 'U.K. Proposes Moving Asylum Seekers Abroad While Their Cases Are Decided' *The New York Times* (6 July 2021) <<https://www.nytimes.com/2021/07/06/world/europe/uk-migration-priti-patel.html>> accessed 16 August 2021.

29 Rajeev Syal, 'Priti Patel to Send Boats Carrying Migrants to UK Back across Channel' *The Guardian* (9 September 2021) <https://www.theguardian.com/uk-news/2021/sep/09/priti-patel-to-send-boats-carrying-migrants-to-uk-back-across-channel?utm_term=.16547debe68d2f1e930f736c93bc1661&utm_campaign=GuardianTodayUK&utm_source=es_p&utm_medium=Email&CMP=GTUK_email&mc_cid=a4d0f45d8c&mc_eid=0cd57908d5> accessed 16 September 2021.

30 BBC News, 'Denmark Asylum: Law Passed to Allow Offshore Asylum Centres' (3 June 2021) <<https://www.bbc.com/news/world-europe-57343572>> accessed 16 August 2021.

imposes fines on non-governmental organisations (NGOs) that carry out efforts to rescue migrants at sea.³¹

As seen from the ongoing examples and discussions, this Article aims to build its debate on democratic wealthy countries' resistance against refugees not welcoming them to their lands.

The analysis carried out within the scope of the Article focuses on pushbacks employed by some of the said states. Pushback is not defined by international law, albeit states practice it. This referral -pushback- has been invented by refugee advocates due to high levels of malicious activities of some states, aiming to prevent refugees' arrivals to their territories or process their asylum applications. Pushbacks violate refugees' rights regulated under international law and infringe on their fundamental human rights. For example, the UN Special Rapporteur explained the legal aspect of rights violation with links to refugees' pushback as in the following:

“In the absence of an individualized assessment for each migrant concerned and other procedural safeguards, pushbacks are a violation of the prohibition of collective expulsion and heighten the risk of further human rights violations, in particular refolement.”³²

Furthermore, since no international legal regulation defines pushback, this Article charts existing legal avenues to describe this phenomenon.

In this light, this Article questions the following: Which international legal rules can be linked to explain the pushback phenomenon?

To address the issues detailed above and resolve the research question, this Article conducts a legal analysis of the phenomenon of pushback, employing comparative and socio-legal methods, and considers both law and practice as necessary. But a brief note should be included about the methodology of this Article. The following paragraphs explain the mentioned note on the research methods.

A legal mindset³³ would want to explain the relevance of pushback operations and the crime of torture through legal regulations. Based on established legal rules, it would ask whether pushbacks comply with the non-refolement principle, whether

31 Euronews, ‘Avrupa Konseyi’ nden Yunanistan’a: Göçmenleri Sınır Dışı Etme Yasa Tasarısını Değiştir’ (4 September 2021) <[https://tr.euronews.com/2021/09/04/avrupa-konseyi-nden-yunanistan-a-gocmenleri-s-n-r-d-s-etme-yasa-tasar-s-n-degistir?utm_source=newsletter&utm_medium=%\\$%7Btemplate_locale%7D&utm_content=avrupa-konseyi-nden-yunanistan-a-gocmenleri-s-n-r-d-s-etme-yasa-tasar-s-n-degistir&_ope=eyJndWlkjoiODNjMGNjMzdiM2IzZjgyZDBiNDg3YmE2N2U5MDQxMjAifQ%3D%3D](https://tr.euronews.com/2021/09/04/avrupa-konseyi-nden-yunanistan-a-gocmenleri-s-n-r-d-s-etme-yasa-tasar-s-n-degistir?utm_source=newsletter&utm_medium=%$%7Btemplate_locale%7D&utm_content=avrupa-konseyi-nden-yunanistan-a-gocmenleri-s-n-r-d-s-etme-yasa-tasar-s-n-degistir&_ope=eyJndWlkjoiODNjMGNjMzdiM2IzZjgyZDBiNDg3YmE2N2U5MDQxMjAifQ%3D%3D)> accessed 6 September 2021.

32 United Nations Human Rights Office of the High Commissioner, ‘Deadly Practice of Migrant “Pushbacks” Must Cease - UN Special Rapporteur’ (23 June 2021) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27200&LangID=E>> accessed 14 September 2021.

33 *Legal mindset* analysis is inspired by Mann’s approach in the following article: Itamar Mann, ‘Attack by Design: Australia’s Offshore Detention System and the Literature of Atrocity’ [2021] *European Journal of International Law* 429 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787661> accessed 14 April 2021.

state prevention methods are lawful, and whether it is actualised inhumanely. But the legal mindset may also overlook the *consequences/impacts* of the mighty and impenetrable profoundness of interception policies which are the products of politicians.³⁴ However, refugees endure hardship and put out all their energy to reach the designated state, only to be left without humanitarian assistance.³⁵

For this reason, the approach to refugees' journey should require an exhaustive analysis of the *time spent* searching for an asylum state. This thorough analysis demands specific means to look at the issue from different angles, including political, social, and psychological aspects. The legal mindset thus, instead of asking whether the refugee loses their personality in seeking asylum, asks whether there is any evidence that would prove the actualised abuse. For this reason, to bring an in-depth dimension to the legal analysis, it is necessary to recourse to the victims' and witnesses' testimony. This method will eventually help us understand how *abuse* is seemingly justified through the pushback operations of states. Therefore, this Article's author has reviewed several reports, journals, newspaper articles and books to reveal the refugees'/victims' voices. Thus, although this Article sits at the junction with international refugee and international criminal law, by employing a perspective from a philosophical evaluation, the analysis also brings a critical dimension to the moral side of the issue.

The following section gives a preliminary idea about the necessity of bringing a legal and moral explanation to pushback along with the structure of this Article.

B. The Structure of the Article

This Article operates in five main parts. In the introductory part, the Article analysed the background of the research question exhaustively. The discussion established some western democratic states' reluctance to welcome refugees. As the given examples detailed, the opposition has turned to deterrence practices that include pushback. Pushback thus has become a contemporary phenomenon. Even though it exists in the context of states' border control measures, legally, there is no legal formulation that grasps the phenomenon of pushback thoroughly. This Article thus charts relevant international law regulations that allow us to capture the scope of pushback. To this end, this Article further proceeds as follows.

34 For example, there are examples discussed in this Article that destination states target refugees and systematically prevent them from arriving at their shores. A legal mindset in these incidents may not question whether the refugee would turn into the Agamben's Muselmann. As it happens to Muselmann, refugees too may lose "all consciousness and all personality" in cases that include fighting against artificial waves in dinghies on the high seas, for example. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press 1998) 71.

35 Of course, this does not necessarily mean that refugees are *not* receiving any kind of assistance from states at all. In a recent incident for instance, "Italian military vessels ... aided a decrepit fishing boat crammed with 539 migrants that was approaching the tiny southern Italian island of Lampedusa". Euronews, 'Fishing Boat Crammed with over 500 Migrants Arrives in Lampedusa' (28 August 2021) <https://www.euronews.com/2021/08/28/fishing-boat-crammed-with-over-500-migrants-arrives-in-lampedusa?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.

Part II explains why there should be a legally conceptualised analysis of the term pushback. Without defining the problem, we cannot protect the people who suffer the consequences of the issue. Hence, the necessity to bring a conceptual analysis to a vague concept lies in the foundation of protecting refugees.

Part III underlines that not every interception measure amounts to pushback by relating some states' deterrence practices. The analysis carried out within the scope of this part gives an idea about *what does not constitute pushback* in the states' deterrence practices. The following paragraph details this claim a little bit more to provide a background for Part III herein.

The non-entrée practices translate into resistance in the broader perspective and declare that "*the refugee shall not access our community*".³⁶ Forms of non-entrée methods, apart from the pushback operations, may include the unwillingness of a state to grant asylum, thus, e.g., returning refugees to a third country.³⁷ Take, for instance, a rising common trend among states to build border walls. Its intended goal is to create a deterrence effect on refugees. But building border walls does not constitute pushback. The walls simply imply *resistance/re reluctance* of states towards accepting refugees or *outlanders* to their lands in general. Therefore, it is necessary to distinguish the prevention of refugees' arrival to the country of asylum from the non-entrée method that results in actional interference against refugees' arrival in the state in question.

After clarifying the reason for the legal explanation of the term pushback and its place among the deterrence practices of states, this Article now begins to examine the term pushback through the eyes of international law.

Part IV considers available legal avenues in which pushback can find an explanation. Therefore, the first step asks whether collective expulsion and pushbacks have the same legal meaning. Next, this Article considers the European Convention of Human Rights (ECHR)³⁸ and the case law of the Strasbourg Court because the ECHR and the case law of the ECtHR bring specific explanations and analysis on the collective expulsion incidents.

Drawing upon ongoing analysis, in the second step, this Article continues its investigation to understand whether pushbacks reach the limits of the crime of torture because pushbacks that involved risking the lives of human beings were considered,

36 James C Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 *Refugees* 40.

37 UNHCR, 'Legal Considerations Regarding Access to Protection and a Connection between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries' (UN High Commissioner for Refugees, 2018) <<https://www.refworld.org/docid/5acb33ad4.html>> accessed 30 September 2021.

38 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), amended by Protocols nos 11 and 14, 4 November 1950, ETS 5. The Protocol 4 Article 4 states the following: "*collective expulsion of aliens is prohibited*". Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto 16 September 1963, ETS 46.

by some scholars, as crossing the boundaries of “*severe mental and physical suffering*” that constituted torture.³⁹ There is no legal regulation/indication guiding us to formulate pushbacks as a form of torture.

In the third step, this discussion examines whether pushbacks can be linked to crimes against humanity. In this context, assuming there is an accountability gap regarding pushbacks due to unresolved definitional issues, this Article figures whether international criminal law can or should fill it.⁴⁰ It has been claimed that the International Criminal Court (ICC) is an influential institution.⁴¹ Thus, involving the ICC to eliminate pushbacks may help to reach constructive results -elimination of pushback practices. However, an international crime must have been committed for international criminal law to hold perpetrators accountable. Therefore, to deter states from pursuing pushback policies, this Article considers whether pushback reaches the threshold of crimes against humanity.

Finally, Part V is reserved for the conclusion. Here the Article conducts a brief review of its analysis of pushback. Therein it concludes that even though states as sovereigns are not *tamed/ dominated* by international legal rules and definitions *all the time*, explanations, descriptions, and clarifications on highly practised vague concepts may help eliminate further damage.

II. The Necessity to Address Pushback Phenomenon Legally

*“Where there is law and principle, there is strength and the capacity to oppose. Where there are merely policies and guidelines, everything, including protection, is negotiable, and that includes refugees”.*⁴²

This Article is designed to answer the following question: How can we identify pushback within a legal context? Driven by this question, this Article looks at ways to describe pushback under the light of relevant international law regulations.

Given incidents throughout this Article show us that refugees are precluded from invoking their internationally recognised rights -precisely the right to seek asylum-because of pushbacks. The right to seek asylum is a combination of rights: the right to leave and apply for asylum in another country.

39 Itamar Mann and Niamh Keady-Tabbal, ‘Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean How Summary Expulsions From Greece Have Continued With Impunity’ (Just Security, 26 October 2020) <<https://www.justsecurity.org/72955/torture-by-rescue-asylum-seeker-pushbacks-in-the-aegean/>> accessed 25 January 2021.

40 Itamar Mann, ‘The Right to Perform Rescue at Sea: Jurisprudence and Drowning’ [2020] German Law Journal 609.

41 “*The data suggest that the ICC drives sustained curiosity about human rights, which may signal a broader ability to contribute to long-term social and ideational change.*” Geoffrey Thomas Dancy, ‘The Hidden Impacts of the ICC: An Innovative Assessment Using Google Data’ (2021) 34 Leiden Journal of International Law 729 <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/hidden-impacts-of-the-icc-an-innovative-assessment-using-google-data/ED6494135812ADADBE6DBD01FCACD932>> accessed 26 August 2021.

42 Guy Goodwin-Gill, ‘Refugee Identity and Protection’s Fading Prospects’ in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 220.

International law recognises the right to leave in several documents, including the Universal Declaration of Human Rights (UDHR)⁴³ and the International Covenant on Civil and Political Rights (ICCPR).⁴⁴ However, considering that the right to leave “*is not matched by a state duty of admission*”, we can conclude that it is an *incomplete* right.⁴⁵

Indeed, in this scene, minimum to zero care and intolerance frequently surface against refugees due to deterrence practices. Further, how they are treated tells a lot about what goes wrong during their journey. For example, torturous actions taken against refugees have caused damage for refugees, and “[r]efugees themselves have lost confidence in the regime that is supposed to be protecting and finding solutions for them”.⁴⁶

How do we protect refugees, then? First, we must consider the legal mechanisms and international organisations protecting refugees in answering this question. In that way, we can reason with the claim that refugees have lost confidence in the refugee protection regime.

First, we may point to the UNHCR as a quick response for refugee protection. But the UNHCR is appearing as a less independent body -more and more in the modern era. The UNHCR also relies on states for its budget.⁴⁷ For this reason, the UNHCR is regarded as a non-binding lawmaker.⁴⁸ As a result, Crisp and Maple concluded that refugees “*who meet the criteria for refugee status simply prefer not to make contact*

43 Universal Declaration of Human Rights GA Res 217 A (III), UN GAOR, 3rd Sess., 183rd plen mtg, UN Doc A/810,10 December 1948 (UDHR).

44 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Article 12 of the ICCPR states the following:

“Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”

Article 13 of the ICCPR further states that

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

45 Jane McAdam, ‘An Intellectual History of Freedom of Movement in International Law: The Right to Leave as A Personal Liberty’ (2011) 12 Melbourne Journal of International Law 2.

Moreover, the incomplete right -right to leave- seems to remain as such, considering “*at a time when neoliberals, cosmopolitans [, and] humanitarians . . . fantasize a world without borders, . . . nation-states, rich and poor, exhibit a passion for wall building*”. Wendy Brown, *Walled States, Waning Sovereignty* (2010) 20.

46 Jeff Crisp and Nicholas Maple, ‘Relevant or Redundant? The Future of the International Refugee Protection Regime’ (*Refugee Law Initiative Blog on Refugee Law and Forced Migration*, 22 July 2021)

<<https://rli.blogs.sas.ac.uk/2021/07/22/relevant-or-redundant-the-future-of-the-international-refugee-protection-regime/>> accessed 4 August 2021.

47 James C Hathaway, ‘Is ‘Ageing Gracefully?’ An Ageist Critique?’”

<https://rli.sas.ac.uk/resources/podcasts?utm_source=Refugee+Law+Initiative&utm_campaign=107851ca13-EMAIL_CAMPAIGN_2017_10_03_COPY_01&utm_medium=email&utm_term=0_304c0b75a9-107851ca13-581066909> accessed 5 August 2021.

48 *ibid.*

with UNHCR and its partners.”⁴⁹ Moreover, considering the UNHCR has a weak role in combatting violence against refugees today, it is not surprising that Greece, for instance, does not take the agency’s warnings seriously to “refrain from such practices” in its referrals to pushback operations.⁵⁰

Secondly, we may refer to the 1951 Refugee Convention regarding refugees’ protection. On the other hand, the Convention has also been criticised as an instrument “showing its age”⁵¹ because it fails to address internally displaced persons, climate refugees, and different dynamics leading to the persecution of human beings.⁵² Goodwin-Gill further states that

“Although updated by one protocol in 1967, no other international instrument has emerged in the past 70 years, despite increasing numbers of refugees travelling farther and farther in search of refuge, the protracted and intractable nature of displacement, the lack of formal ‘distribution’ mechanisms, whether in relation to people or financial responsibility, the institutionalisation of protection rights at the individual level, and the complexity of causes and drivers.”⁵³

Of course, this does not necessarily mean that the 1951 Refugee Convention lacks regulations on refugee protection. One of the most critical rules established by the Convention regarding refugee protection is the non-refoulement principle. We can explain its importance with links to pushback incidents. Once refugees are pushed back, they are most likely sent to a place where they will face persecution or some other form of abuse. Thus, the non-refoulement principle, formulated under Article 33(1) of the 1951 Refugee Convention, applies in pushback cases because Article 33(1) explicitly uses the terms “*expel[ling] or return[ing]*”, including the frontiers of territories.⁵⁴ This article details why the individual must be protected from expelling and returning. As stated by article 33, prohibition exists for a reason because otherwise, refugees’ “*life or freedom would be threatened*”.⁵⁵ Refugees most probably would face a life-threatening circumstance -if they are pushed back because they flee due to the reasons that make them a refugee: “*on account of race, religion, nationality, membership of a particular social group or political opinion.*”⁵⁶

49 Jeff Crisp and Nicholas Maple (n 46).

50 UNHCR, ‘UNHCR Concerned by Pushback Reports, Calls for Protection of Refugees and Asylum-Seekers’ (*UNHCR The UN Refugee Agency*, 21 August 2020) <<https://www.unhcr.org/gr/en/16207-unhcr-concerned-by-pushback-reports-calls-for-protection-of-refugees-and-asylum-seekers.html>> accessed 5 August 2021.

51 Stewart M Patrick, ‘The U.N. Refugee Convention Is Under Pressure—and Showing Its Age’ (*World Politics Review*, 9 August 2021) <https://www.worldpoliticsreview.com/articles/29869/the-un-refugees-regime-is-under-pressure-and-showing-its-age?mc_cid=b1f8cb11c9&mc_eid=0cd57908d5> accessed 16 August 2021.

52 *ibid.*

53 Guy Goodwin-Gill, ‘The international refugee regime and the challenges today’ (*Kaldor Center for International Refugee Law*, 27 August 2021) <<https://www.kaldorcentre.unsw.edu.au/publication/international-refugee-regime-and-challenges-today>> accessed 31 August 2021.

54 1951 Refugee Convention (n 17) art 33(1).

55 *ibid.*

56 *ibid.*

The non-refoulement principle thus should explain to us in what ways pushbacks contradict with a customary international law norm.⁵⁷

We can debate how narrowly or broadly pushbacks should be viewed from different perspectives. But it is inevitable that pushbacks precisely demonstrate how the right to seek asylum is left dangling in the air. Refugees are pushed back and left in limbo without caring about their destinies. Although the frustration and uncertainty leave refugees and the international community at stake, refugees may be pushed back without subjecting them to any form of abuse that reaches the threshold of malicious activities in the sense of torture. Still, the pushback of refugees would contradict the non-refoulement principle and collective expulsion. But if refugees are pushed back utilising the methods that can be put to the limits of the crime of torture, then we must consider the incident through the lens of international criminal law.

In each incident, if states know that there are defined parameters surrounding pushback linked to torture and crimes against humanity, they will be more reluctant to pursue pushback. As a result, obligations to protect refugees would be implemented more effectively, especially considering the importance of respecting refugees' rights. For example, if pushbacks are recognised as an international crime, this would also encourage states not to tolerate pushbacks committed by their neighbouring state. Additionally, the ICC could take a stance in the future about matters that include violations of refugees' rights and their human rights in a general sense.

III. Deterrence Practices: What is *not* Pushback?

The 1951 Refugee Convention⁵⁸ and its 1967 Protocol⁵⁹ define the refugee. The UNHCR, through its Statute⁶⁰ and relevant regulations,⁶¹ has tremendously enhanced the meaning of refugee and protection mechanisms attributed to this status.⁶²

57 Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non- Refoulement' in UNHCR (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003), 149-163 <<https://www.refworld.org/docid/470a33af0.html>> accessed 16 September 2021.

58 The 1951 Refugee Convention sets a definition in determining refugee status under its article 1, as follows: "...owing to a 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." 1951 Refugee Convention (n 17).

59 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (The 1967 Protocol).

60 Statute of the Office of the United Nations High Commissioner for Refugees 1950 (A/RES/428(V)).

61 Frances Nicholson and Judith Kumin, 'A Guide to International Refugee Protection and Building State Asylum Systems Handbook for Parliamentarians N° 27, 2017' (UNHCR, 2017), 15-32 <<https://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html>> accessed 26 August 2021.

Further see UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (UNHCR, 2019), 13-14 <<https://www.unhcr.org/publications/legal/5ddfcd47/handbook-procedures- criteria-determining-refugee-status-under-1951-convention.html>> accessed 25 May 2021.

62 UNHCR *ibid* 42.

Specifically, the UNHCR defined the need for protection on a broader spectrum. Now we understand the meaning of the refugee and protection paradigm in legal terms: “*It is no longer the quality of ‘refugee,’ however defined, that entitles one to protection. It is the need for protection that entitles one to treatment as a refugee.*”⁶³

Despite the established protection mechanism mentioned above, refugees are seen as potential threats in modern times rather than people needing protection.⁶⁴ In contemporary times, the refugee person began to be regarded as the opposite of a *typical* refugee. The refugee, protected under the 1951 Refugee Convention after WWII, was “*white, male and anti-communist—which clashed sharply with individuals fleeing the Third World*”.⁶⁵ But later, the 9/11 terrorist attacks, the cold war era, and the armed conflicts that erupted in Iraq and Syria have shaped the collective memory of societies about refugees. For example, war refugees were considered weak-hearted ones who did not *stay* to fight for their countries.⁶⁶ Being mischaracterised as potential terrorists, greedy economic immigrants, queue-jumpers, or opportunists have categorised refugees as *invaders*. Refugees are thus hurt/victimised by certain misconceptions and thought practices around the concept of *potential national threat*.⁶⁷ People/institutions blame/discriminate against them for being aliens or for things they did/had to do while crossing the state borders.

States thus have built walls,⁶⁸ strengthened their policies, and brain-washed their citizens to protect their economies and *settled* social fabric. As a result, states—specifically democratic wealthy states—have employed tactics to keep refugees out due to seeing them from a pre-conditioned perspective. Apart from the pushback policies, tactics in the context of this section refer to deterrence practices, such as non-entrée, non-arrival, and front-door policies.⁶⁹ In specific, we can look at, for example, the European states’ deterrence measures, which have been shaped over the years through the following means:⁷⁰

63 See Jerzy Sztucki, ‘Who Is a Refugee? The Convention Definition: Universal or Obsolete?’ in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities* (Cambridge University Press 1999) 55.

64 Obiora Chinedu Okafor, *Refugee Law After 9/11 Sanctuary and Security in Canada and The United States* (UBC Press 2020) 3-10.

65 Bhupinder S Chinni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11 *Journal of Refugee Studies* 4, 351.

66 Patrick Strickland, ‘Why Is the World Afraid of Young Refugee Men?’ *Al Jazeera* (20 June 2016) <<https://www.aljazeera.com/features/2016/6/20/why-is-the-world-afraid-of-young-refugee-men>> accessed 6 October 2021.

67 United Nations Meetings Coverage and Press Releases, ‘Refugees, Migrants Branded “Threats”, Dehumanized in Campaigns Seeking Political Gain, High Commissioner Tells Third Committee, Appealing for Return to Dignity’ (31 October 2018) <<https://www.un.org/press/en/2017/gashc4247.doc.htm>> accessed 27 August 2021.

68 Joanna Plucinska and Kacper Pempel, ‘On the EU’s Eastern Border, Poland Builds a Fence to Stop Migrants’ *Reuters* (26 August 2021) <https://www.reuters.com/world/europe/eus-eastern-border-poland-builds-fence-stop-migrants-2021-08-26/?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.

Please also note that “*Greece has installed a 40km (25-mile) fence and surveillance system on its border with Turkey amid concern over a surge of migrants from Afghanistan*”. BBC News, ‘Greece Erects Fence at Turkey Border amid Warnings of Afghan Migrant Surge’ (21 August 2021) <https://www.bbc.com/news/world-europe-58289893?mc_cid=d22ade97d4&mc_eid=0cd57908d5> accessed 31 August 2021.

69 Angel Sanchez Legido, ‘The Walls of Fortress Europe: Externalization of Migration Control and the Rule of Law’ (2019) 23 *The Spanish Yearbook of International Law* 345, 346.

70 *ibid* 346.

- European countries expect migrants and refugees to obtain a visa before their arrival.
- European countries aim to establish cooperation between the origin, transit, and neighbouring countries to contain migration flows.
- Some states have embraced a so-called mission of fighting against ‘illegal immigration and human smugglers’. As a result, Malta and Italy detained rescue vessels, and activists with accusations of being involved in human trafficking.⁷¹
- European countries whose land borders were affected by crossings of migrants and refugees have constructed *migration fences*. Some have even gone to the extreme. For example, Greece created high-tech sound cannons to deter migrants from crossing into the EU from Turkey.⁷²
- European states have embraced offshoring strategies such as expanding areas and territories, i.e., ports and airports.⁷³
- State-led search and rescue (SAR)⁷⁴ operations shifted the burden of search and rescue operations onto large merchant ships. However, these ships are ill-fitted to conduct such operations. The EU allegedly creates this situation. Agencies and policymakers know that rescue operations performed by large merchant ships may result in loss of life in shipwrecks. For example, in 2015, over 800 people died “when a migrants’ vessel sank after a mis-manoeuvre led it to collide with a cargo ship that had approached to rescue its passengers”.⁷⁵ This indirect expulsion tactic is - “death by rescue” - one of the outcomes of “E.U.’s policy of non-assistance”.⁷⁶
- The EU and its member states have signed agreements with third countries, which have turned these states into the border guards of Europe. This process was referred to as border externalisation, which means that *people moving* towards Europe were stopped before they ever reached Europe’s shores.⁷⁷ To this end, new detention facilities have been constructed in these third countries, and correctional officers have been employed.⁷⁸

71 Laura Lynott, “I’m Not a Hero but I’m Not a Criminal” - Trinity Graduate Sean (24) Returns Home after 100 Days in Greek Jail’ *INDEPENDENT.IE* (16 December 2018) <<https://www.independent.ie/irish-news/im-not-a-hero-but-im-not-a-criminal-trinity-graduate-sean-24-returns-home-after-100-days-in-greek-jail-37631116.html>> accessed 31 August 2021.

72 Antonia Noori Farzan, ‘As Greece Installs “Sound Cannons” on Border, Denmark Passes Law Allowing Asylum Seekers to Be Sent Overseas’ [2021] *The Washington Post* <<https://www.washingtonpost.com/world/2021/06/05/greece-denmark-migrants/>> accessed 16 June 2021.

73 Daria Davitti, ‘Why Offshore Processing of Refugees Bound for Europe Is Such a Bad Idea’ *The Conversation* (28 July 2017) <<https://theconversation.com/why-offshore-processing-of-refugees-bound-for-europe-is-such-a-bad-idea-81695>> accessed 27 August 2021.

74 Eugenio Cusumano and Matteo Villa, ‘Over Troubled Waters: Maritime Rescue Operations in the Central Mediterranean Route’ (IOM) <<https://publications.iom.int/system/files/pdf/ch16-over-troubled-waters.pdf>> accessed 26 August 2021.

75 Death by Rescue, ‘Death by Rescue the Lethal Effects of The EU’s Policies of Non-Assistance’ <<https://deathbyrescue.org/>> accessed 25 September 2021.

76 *ibid.*

77 Mark Akkerman, ‘Outsourcing Oppression How Europe Externalises Migrant Detention Beyond Its Shores’ (Niamh Ni Bhriain and Josephine Valeske eds, *Transnational Institute and Stop Wapenhandel*, 2021), 15 <<https://www.tni.org/files/publication-downloads/outourcingoppression-report-tni.pdf>> accessed 7 October 2021.

78 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) <https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf> accessed 13 August 2021.

Departing from the last point made above, as is stated, third countries/non-EU states have become the guard of Europe's borders⁷⁹ through bilateral agreements concluded over the years. For example, Italy and Libya agreed in 2003 under the regime of Gaddafi. The agreement constituted "*Italy's provision of border security equipment*" and "*funding for detention centres and deportation flights*".⁸⁰ After the fall of the Gaddafi regime in 2011, the newly formed Libyan Government sealed another deal with Italy in 2012. According to the latter agreement, detention centres would be upgraded. Indeed, not after some time passed did the Libyan Government begin constructing a new detention camp bordering Algeria in Ghat.⁸¹ Since then, detention centres have been built, fluctuating between 17 to 35. People captured in Libya or *en route* to Europe from Libya are put in detention centres.⁸² Reportedly, in Libyan detention centres, abuse amounting to torture and inhuman and degrading treatment have occurred due to several tactics employed by guards and officials. For example, Médecins Sans Frontières (Doctors Without Borders) stated in 2019 that detention centre guards sold detainees. The spokesperson of Médecins Sans Frontières described this as a form of exploitation.⁸³ Detainees were starved and beaten to death.⁸⁴ Global Detention Project⁸⁵ and the United Nations stated that women and girls were raped and sexually assaulted.⁸⁶ The given incidents have happened on the watch of the EU, which means that the EU countries have funded Libyan detention centres with the full knowledge that detainees will be held in inhumane conditions.⁸⁷ The EU justifies its ongoing support by claiming that detention staff is trained on human rights or suggests that so-called voluntary repatriation programs are an alternative protection regime.⁸⁸

The given examples herein constitute deterrence practices, but they omit pushbacks. Any deterrence practice, in a general sense, will not equate to pushback.

79 Amnesty International, 'The Human Cost of Fortress Europe Human Rights Violations Against Migrants and Refugees at Europe's Borders' (2014) <https://reliefweb.int/sites/reliefweb.int/files/resources/EUR%20050012014_%20Fortress%20Europe_complete_web.pdf> accessed 26 August 2021.

80 Akkerman (n 77) 25.

81 *ibid.*

82 Nadia Al-Dayel, Aaron Anfinson, and Graeme Anfinson, 'Captivity, Migration, and Power in Libya' [2021] *Journal of Human Trafficking*, 8 <<https://www.tandfonline.com/doi/pdf/10.1080/23322705.2021.1908032?needAccess=true>> accessed 18 May 2021.

83 Médecins Sans Frontières, 'Out of Sight, out of Mind: Refugees in Libya's Detention Centres' (12 July 2019) <<https://www.msf.org/out-sight-out-mind-refugees-libyas-detention-centres-libya>> accessed 18 May 2021.

84 United Nations, 'Detained and Dehumanised: Report on Human Rights Abuses Against Migrants in Libya' (Office of the United Nations High Commissioner for Human Rights, 2016) <https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> accessed 18 May 2021. Kaamil Ahmed, 'Violence towards refugees at Libyan detention centers forces MSF to pull out' (*The Guardian*, 24 June 2021) <https://www.theguardian.com/global-development/2021/jun/24/violence-towards-refugees-at-libyan-detention-centres-forces-msf-to-pull-out?mc_cid=107ec98c57&mc_eid=0cd57908d5> accessed 5 August 2021.

85 The Global Detention Project (*The Global Detention Project*) <<https://www.globaldetentionproject.org/>> accessed 27 August 2021.

86 The Global Detention Project, 'Country Report. Immigration Detention in Libya: "A Human Rights Crisis" (2018), 6 <<https://www.globaldetentionproject.org/wp-content/uploads/2018/08/GDP-Immigration-Detention-Libya.pdf>> accessed 18 May 2021.

87 Akkerman (n 77) 23.

88 *ibid.*

But of course, regarding differing pushbacks from the other non-entrée methods, we must understand the distinguished character traits embedded in pushbacks. The following analysis, conducted in the rest of this Article, precisely explains that.

IV. How Can Pushbacks Legally be Explained?

As stated in this Article's introduction, the Article aims to provide a legal explanation for the term pushback, which exists in real life but is not legally defined. In a legal context, the pushback phenomenon may be easily used for collective expulsion because collective expulsion incidents are also designed to keep refugees out of designated states or interrupt the process of triggering asylum applications. The following analysis looks at the legal understanding of collective expulsion to determine whether it can be used interchangeably with the pushback phenomenon. First, this Article posits that collective expulsion encompasses pushback, not the other way around. The reason for this claim is explained in the following section. Then, after completing the mentioned analysis, this Article evaluates pushback linked to torture and crimes against humanity.

A. Pushbacks and Collective Expulsion

As a deterrence practice, pushbacks aim to prevent refugees' asylum applications. Thus, pushbacks happen before or immediately after the arrival of refugees to the state's territory, or they are operated on the high seas.

Pushbacks often involve practices linked to the removal of non-nationals from the territory of a state, which leads to collective expulsion.⁸⁹ Collective expulsion violates several rules under international and EU Law. For example, the Charter of Fundamental Rights of the EU (CFREU)⁹⁰ and the International Covenant on Civil and Political Rights (ICCPR)⁹¹ prohibit collective expulsion in explicit terms. Furthermore,

89 Special Rapporteur on the human rights of migrants, Felipe González Morales, describes pushbacks as "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 crossed an international border."

Felipe González Morales, 'Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea' (UN Human Rights Council Forty-seventh session, 21 July 2021), 4 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/106/33/PDF/G2110633.pdf?OpenElement>> accessed 18 September 2021.

90 Charter of Fundamental Rights of The European Union [2012] 326/02 395, art 19.

91 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Article 12 of the ICCPR states the following:

"Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant."

Article 13 of the ICCPR further states that

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

even under an emergency, states are prohibited from obtaining derogations that will amount to collective expulsion.⁹² Again, based on the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁹³ collective expulsion violates the right to equal treatment before the law on all levels.⁹⁴ Further, we see a more detailed and comprehensive approach/explanation in the Guide on Article 4 of Protocol No 4 to the European Convention of Human Rights (ECHR)⁹⁵ and the case law of the ECtHR. The Guide on Article 4 of Protocol No 4 to the ECHR explains the core purpose of this provision as

“to prevent States from being able to remove a certain number of aliens without examining their circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority.”⁹⁶

Generally, collective expulsion cases sit on four pillars: the large number of refugees who face the same fate; a de facto policy employed by the designated state to expel refugees; deportation orders; and the difficulty in triggering the legal process and contacting a lawyer for refugees.⁹⁷ At first, for an expulsion to be considered collective, the Court does not set a specific requirement on the *number* of persons.⁹⁸ Ideally, every person among several aliens should be allowed to claim asylum. Therefore, there must be an objective examination of each person’s request.⁹⁹ The ECtHR states that if the state conducts a reasonable and objective assessment of the case of each alien of the group, “*the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4.*”¹⁰⁰

Furthermore, in collective expulsion cases, states deprive refugees of effective remedies. In the process, refugees may also be detained in conditions that fall under

92 UN Human Rights Committee (HRC), ‘CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency’ 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 13(d) <<https://www.refworld.org/docid/453883fd1f.html>> accessed 9 September 2021.

93 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force on 4 January 1969) 660 UNTS 195 (CERD).

94 CERD Article 5(a) states the following: “*The right to equal treatment before the tribunals and all other organs administering justice*”.

95 ECtHR guideline defines collective expulsion as “*any measure compelling aliens, as a group, to leave a country, except where such a measure is taken based on a reasonable and objective examination of the particular case of each alien of the group*”. Council of Europe/European Court of Human Rights, ‘Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights’ (31 August 2022), 5 <https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf> accessed 19 October 2022.

96 European Court of Human Rights, ‘Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of Collective Expulsions of Aliens’ (Council of Europe, 30 April 2021) 5-8 <https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf> accessed 17 June 2021.

97 Jaya Ramji-Nogales, ‘Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights’ (*American Society of International Law*, 4 January 2016) <<https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights>> accessed 27 August 2021.

98 *N D & N T v Spanish* App nos 8675/15 and 8697/15 (ECHR, 13 February 2020) para 193-199.

99 Council of Europe/European Court of Human Rights (n 94) 5.

100 *Conka v Belgium* App no 51564/99 (ECHR, 5 February 2002) para 59.

the prohibition of illegal arrest or detention of a person regulated by Article 5(1)(f) of the ECHR.¹⁰¹ In the *Khlaifia and Others v Italy* case -which concerned the unlawful detention of refugees, the Court concluded that “no one should be arbitrarily dispossessed of such liberty”.¹⁰²

Prohibition on collective expulsion encapsulates extraterritorial application of human rights protection of aliens too. In its *Hirsi Jamaa and others v. Italy* case, for example, the Court stated that “[t]he prohibition of refoulement is not limited to the territory of a State, but also applies to extraterritorial State action, including activities occurring on the high seas”.¹⁰³ The Court, in this case, examined the applicability of Article 4 Protocol No 4 in the case of interception on the high seas. In its reasoning, the ECtHR stated the following:

“the Italian border control operation of “pushback” on the high seas, coupled with the absence of an individual, fair and effective procedure to screen asylum-seekers, constitutes a serious breach of the prohibition of collective expulsion of aliens and consequently of the principle of non-refoulement.”

Considering the above-mentioned *collective expulsion* usage by the Court, pushbacks occur as a *state practice* -which may happen on the high seas or on land. Therefore, considering the above-given reasoning of the Court, the formulation of collective expulsion is the combination of the operation of pushback and the absence of an individual and effective procedure. This process is explained by the UN Special Rapporteur on the human rights of migrants as follows: “Pushbacks result in human rights violations such as forced returns without individual assessment and often collective expulsions with a high risk of refoulement, including chain refoulement.”¹⁰⁴

As described above, pushback defines a procedural aspect that abruptly ends the effort of seeking asylum. For example, either the refugee is immediately put on a dinghy or a boat and cut adrift, or they are detained and sent back to where they came from without considering their well-being. Eventually, refugees are not allowed to seek asylum anymore. Refugees are pushed back through the measures taken by the state authorities. As mentioned earlier, the nature of the measures tells us under what kind of treatment refugees are pushed back. This article determines the legal nature of the term pushback around the measures taken.

In this regard, Keady-Tabbal and Mann conclude that “[t]he probability of extreme ill-treatment does not have to be 100% for an asylum seeker to have been considered

101 Article 5(1)(f) states the following: “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.” ECHR (n 38).

102 *Khlaifia and Others v Italy* App No 16483/12 (ECHR, 15 December 2016) para 64.

103 *Hirsi Jamaa and Others v Italy* (n 20) para 64.

104 González Morales (n 89) 1.

“*pushed back*”.¹⁰⁵ To explain this claim, they give the example of the Southeastern European countries’ treatment of refugees and the extreme, consistent indifference by these countries towards refugees. Since the pandemic, the authors posit Southeast Europe has displayed “*an indifference to whether an asylum seeker is “back” or is simply left to die*”.¹⁰⁶ Keady-Tabbal and Mann, drawing from the Southeastern European countries’ abusive treatment, argue that the pushback phenomenon cannot explain or capture the means and consequences of such degrading treatment.

The Article claims that pushbacks carry an indifference towards refugees. State authorities do not care if refugees will reach a safe harbour or die on the high sea. Pushback operation encompasses all of that with one purpose: to break the will of refugees, ultimately, to seek asylum in their countries. To this end, it does not matter whether refugees return to the state in question to seek asylum repeatedly. Repetitively seeking asylum at different times in the same country does not relate to whether *they may still maintain some human integrity*. It only means that people are desperate to find a place other than *the hell* they are escaping from.

This Article agrees with Keady-Tabbal and Mann’s approach of treating carefully, not referring to every border violence as pushback.¹⁰⁷ As this Article resolved previously, not every deterrence practice constitutes pushback. However, this Article also adds that state authorities conduct the action -as pushback- through brutal treatment in most cases. Of course, every pushback incident may not reach the level of torture - even though many pushback operations are carried out with a violence that reaches the level of the mentioned crime. Hence the example given by Mann and Keady-Tabbal regarding not explaining “*the egregiousness of unabated violations at the South-eastern border of Europe*”¹⁰⁸ within the realm of pushback should be treated carefully. European and international non-governmental groups have reported abuses against refugees in the southeastern edge of Europe. The violence has been conducted before and during some countries’ pushbacks, including in Bulgaria, Croatia, Cyprus, Greece, Hungary, and Malta.¹⁰⁹ In these incidents, for example,

“Border officials used force and violence, pummelling people with fists and kicking them. They sometimes directed violence at women and children. In addition, border officials abandoned migrants in remote border areas, and in some cases forced them to cross freezing streams at the border with Bosnia and Herzegovina, which is outside the EU external frontier.”¹¹⁰

105 Niamh Keady-Tabbal and Itamar Mann, “‘Pushbacks’ as Euphemism” <https://www.ejiltalk.org/pushbacks-as-euphemism/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 14 April 2021.

106 *ibid.*

107 Keady-Tabbal and Itamar Mann (n 105).

108 *ibid.*

109 Human Rights Watch, ‘Frontex Failing to Protect People at EU Borders Stronger Safeguards Vital as Border Agency Expands’ (2021) <<https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders>> accessed 17 September 2021.

110 *ibid.*

The given incidents, of course, cannot be referred to as simply there have been *refugees pushed back*. The brutality and malice of employed actions may explain an international crime if the elements of crime come together. But this does not mean that the measures taken to prevent refugees' arrival cannot be considered within the realm of pushback. Refugees are prevented from reaching the designated states by utilising pushback. The critical aspect here is the methods that dominate the pushback operations. Methods tell us how refugees are pushed back, which also may direct us to the place of international criminal law. Therefore, discussing the practices/ measures that coexist with pushback is vital. The goal is to understand in what cases pushback may amount to torture and even crimes against humanity due to employed methods during the operation. The following sections further detail this argument.

B. The Relevance of Pushback to International Crimes

“How are we to make sense of systemic violence against unarmed migrants and refugees by numerous state actors in Western democratic countries?” asks Kalir.¹¹¹

This section of this Article argues a very similar question to that which Kalir poses. How can we describe systematic violence dressed as pushbacks against unarmed refugees by wealthy democratic states? Of course, violence and pushback often coexist to actualise the non-admittance of refugees. But the violence as a method to push refugees back may elevate the pushback to the international crime category. This Article looks for legal avenues to explain this process in the realm of torture and crimes against humanity.

To this end, the anatomy of torture crime is described considering relevant international law regulations. Then, the link between pushback and the crime of torture is established. Finally, it is also questioned whether pushback as the crime of torture reaches the limits of crimes against humanity.

1. Torture Crime and Crimes Against Humanity¹¹² with Links to Pushbacks

a. Background

The analysis so far has settled that pushback is the act of interference to prevent refugees' entrance. The methods employed by, e.g., border guards in pushback, define whether these methods reach torture limits. In some cases, the mentioned actions may even be considered within the meaning of crimes against humanity, regulated under the Rome Statute of the International Criminal Court (ICC).¹¹³

¹¹¹ Barak Kalir, 'Deapartheid: The Draconian Governance of Illegalized Migrants in Western States' (2019) 5 Conflict and Society: Advances in Research 19.

¹¹² Legal Centre Lesvos, 'Crimes Against Humanity in the Aegean' (2021) <<http://legalcentrelesvos.org/wp-content/uploads/2021/02/Collective-Expulsions-in-the-Aegean-LCL-01.02.2021-1.pdf>> accessed 17 May 2021.

¹¹³ Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

Crime against humanity has been explained through Normative theories.¹¹⁴ For instance, Bassiouni considers crimes against humanity grievous enough to “*shock the conscience of mankind*”.¹¹⁵ Similarly, Luban evaluates crimes against humanity as targeting the identity of persons as political subjects.¹¹⁶ The crimes that fall under the category of this international crime can threaten international peace and security. The acts committed in the context of crimes against humanity endanger *trust* in the first place-Trust for each other and faith in humankind to embrace the World as a safe place. While refugees are being pushed back, if state officials apply a torturous method, the consequences of this process may have the impact of shocking the conscience of societies. Its effect may be felt not only on its victim but also its future victims. In that way, international peace and security would be threatened irredeemably.

Against this backdrop, the following paragraphs will explain torture and crimes against humanity under international law. Relevant contemporary world examples will also be presented to show readers how pushbacks are conducted through torture. Then we will discuss whether such torturous acts employed in pushback operations also may reach the limits of crimes against humanity.

b. The Legal Reasoning

International ad hoc tribunals have been confronted with various crimes extending to torture and inhuman, cruel, and degrading treatment. For example, in the Statute of the ICTY, torture was enumerated as one of the crimes against humanity¹¹⁷ and one of the war crime provisions of grave breaches.¹¹⁸ Through the analysis of ad hoc tribunals and the case law of the ECtHR,¹¹⁹ the definition of torture as an international crime and its distinctive features from the other forms of treatment have become more precise.¹²⁰

114 Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 53.

115 M Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligation Erga Omnes’ (1996) 59 *Law and Contemporary Problems* 4, 69.

116 David Luban, ‘A Theory of Crimes Against Humanity’ (2004) 29 *Yale Journal of International Law* 85.

117 Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 2 February 2008, 32 *ILM* 1192. Article 5 of the Yugoslav Statute, entitled Crimes Against Humanity reads:

“The International Tribunal shall have power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) *torture*; (g) rape; (h) persecutions on political, racial, and religious grounds; (i) other inhumane acts.”

118 Article 2 of the Yugoslav Statute, entitled Grave Breaches of the Geneva Conventions of 1949 reads *inter alia*:

“The International Tribunal shall have power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Convention: (a) wilful killing; (b) torture or inhumane treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health.”

119 In their decisions, tribunals made references to the cases of Strasbourg Court. Olivier de Frouville, ‘The Influence of the European Court of Human Rights’ Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment’ (2011) 9 *Journal of International Criminal Justice* 637, 639.

120 The judgment of ICTY also recognised rape “*as a form of torture and accepted the specific test identified by the ECtHR in the Ribitsch case for persons held in detention or any vulnerable situation*” *ibid* 637.

International law principles have established the duty not to inflict specific harms, including genocide, war crimes, crimes against humanity, ethnic cleansing, forced expulsion,¹²¹ excessively sadistic torture and dehumanisation.¹²² The duty to prevent and eliminate specific harms in this regard aims to protect humankind from unimaginable atrocities that shock the conscience of generations.¹²³

These crimes are the mere definition of a “*violation of the highest order*”.¹²⁴ Under international law, torture stands as a *jus cogens norm*, enjoying a higher rank in the international law hierarchy than treaty law and even ordinary customary rules.¹²⁵ Torture “*is considered an international crime under the treaty and customary international law*”.¹²⁶ Therefore, torture cannot be justified whatever the case is, “*permitting torture means permitting torturers*”.¹²⁷

Two primary international legal documents define the crime of torture. The first is the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Declaration against Torture).¹²⁸ The second is the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).¹²⁹

Article 1 of the UN Declaration against Torture defines the crime of torture as follows:

“1. For this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”

121 Michael Doyle and Audrey Macklin, ‘Responsibility Sharing and the Global Compact on Refugees’, *Experts Meeting on the Global Compact on Refugees* (2017) 1-6.

122 Christopher W Tindale, ‘The Logic of Torture a Critical Examination’ (1996) 22 *Social Theory and Practice* 3, 349-374.

123 William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (New York, Oxford University Press, 2012) 1-25.

124 Hannah Perce, ‘An Examination of the International Understanding of Political Rape and the Significance of Labelling it Torture’ (2003) 14 *International Journal of Refugee Law* 4, 547.

125 *Prosecutor v Furundlija* IT-95-17/1-T (ICTY, 10 December 1998) 139.

126 Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 61.

127 Jessica Wolfendale, ‘Training Torturers: A Critique of the “Ticking Bomb” Argument’ (2006) 32 *Social Theory and Practice* 270.

128 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 3452 (XXX), Annex, 9 Dec 1975 (UN Declaration Against Torture).

129 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 39/46, Annex, 10 Dec 1984 (UNCAT).

The above-given definition sets the scope of the crime of torture based on three dimensions: the infliction of *severe* pain or suffering, the status of the perpetrator, and an explicit purpose. The UNCAT brings a more comprehensive definition of this crime. Its meaning reduces the restriction on the statutes of the perpetrator in article 1, as follows:

3. For this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

4. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”

We can understand that constitutive elements of torture include the following: severe pain or suffering, intentionality, purposefulness, and powerlessness.¹³⁰ Considering the above-given definition, we should also consider how international criminal law regulates torture.

Suppose we base ourselves on the Rome Statute. In that case, article 7 of the Rome Statute states that “*crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] torture.* Article 7(2)(e) of the Rome Statute further defines torture as follows:

“‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”¹³¹

Article 7(1)(f) of the Elements of Crimes of the Rome Statute formulates the elements of the crime of torture:

5. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

6. Such person or persons were in custody or under the control of the perpetrator.

¹³⁰ Darius Rejali, *Torture and Democracy* (Princeton University Press, 2009) 446.

¹³¹ Rome Statute (n 113) art 7(2)(e).

7. Such pain or suffering did not arise only from and was not inherent in or incidental to lawful sanctions.
8. The conduct was committed as part of a widespread or systematic attack directed against civilians.
9. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”¹³²

In the context of crimes against humanity with links to torture, we must ensure that the following can be proven -intent, knowledge, and attack.¹³³ We can formulate this characterisation through the Elements of Crime of the ICC as “*the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons*”.¹³⁴ The attack also must be systematic and widespread.¹³⁵ The employed method should have the capacity to carry such gravity uniquely considered for crimes against humanity.¹³⁶

As can be understood from the definitions set by the UN Declaration against Torture, the Convention Against Torture, and the Rome Statute, the infliction of pain lies at the very core of torture crimes. But the Rome Statute, in conformation with the Elements of Crime, does not seek a specific purpose: “[i]t is understood that no specific purpose needs to be proved for this crime”.¹³⁷ In the meantime, the infliction of pain or suffering must be intentional: “an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture”.¹³⁸ Furthermore, the General Introduction of the Rome Statute asserts that “the existence of intent and knowledge can be inferred from relevant facts and circumstances”.¹³⁹

We must carefully analyse the incident to identify torture and crimes against humanity in pushback operations. The analysis thus expands its argument through contemporary examples of pushbacks in the following section. As a side note, the

132 International Criminal Court (ICC), ‘Elements of Crimes’ (2011) <<https://www.refworld.org/docid/4ff5dd7d2.html>> accessed 26 August 2021.

133 “Taken literally, no physical violence is necessary for an attack, but merely multiple instances of any conduct on the list, pursuant to a state policy.” Gerald L Neuman, ‘What Counts as a Crime Against Humanity?’ (*Harvard International Law Journal*) <<https://harvardilj.org/2019/01/what-counts-as-a-crime-against-humanity/>> accessed 2 September 2021.

134 *ibid* arts 7(1)(f) and 8(2)(a)(ii)-1, 7 - 14.

135 Article 7 of the Rome Statute states that “crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (f) torture”. Rome Statute (n 113).

136 Rome Statute Article 17, Issues of admissibility, states the following: “(d) The case is not of sufficient gravity to justify further action by the Court.” (Emphasis added). Rome Statute (n 113). The scope and the content of gravity in international crimes is controversial, and beyond the topic of this Article. However, for further analysis, the following paper can be read: Margaret M deGuzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2008) 32 *Fordham International Law Journal* 1400 <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2162&context=ilj>> accessed 19 August 2021.

137 Rome Statute (n 113).

138 M Cherif Bassiouni, *Crimes Against Humanity Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 418.

139 Rome Statute (n 113) General Introduction.

incidents outlined in the next section are focused on and around the Greek State's pushback operations. In that, the relevant procedures employed by Greek officials during pushbacks carry elements that can be evaluated with links to torture.

C. Pushbacks in Law and Practice

We can draw from several relevant incidents and circumstances that the abusive treatment refugees have faced in the process of pushback may have reached the limits of the crime of torture that can be considered in the context of crimes against humanity.

The crime of torture, in the simplest terms, can be defined as “*the intentional infliction of a suffusive panic*”.¹⁴⁰ As a result, victims of torture would probably feel and realise that they are entirely at the mercy of their tormentors.¹⁴¹ This Article claims that if pushbacks are conducted with brutal prevention methods, state officials intentionally inflict a suffusive panic on refugees. As a result, refugees are put at the mercy of state officials. This analysis, for example, can be seen in an incident in 2006 in Greece. Greek coast guards tied a group of refugees up in “*plastic handcuffs and abandoned them, resulting in the drowning of six of their number*.”¹⁴² As is seen in this case, refugees could find themselves in chaotic helplessness, which is one of the results of torture. For example, Rejali demonstrates that torture occurs “*where policing is so intense that life approaches that of a prison*.”¹⁴³

In pushback operations, helplessness and suffusive panic may be in the air for a prolonged time. Even though pushback happens to detract refugees from the state's border, refugees may have already been exposed to inhuman conditions before they were pushed back. For example, South Asian migrants stuck in Bosnian camps spent nights in squashed barracks without enough food, water, and medical supplies. The fear increased with the uncertainty of possible incidents awaiting them when and if they attempted to cross the EU Border into Croatia. In 2020, one refugee from this camp reported the following: “*Croatian police split us into groups of five people after we crossed the border. They forced us to lie down and beat us mercilessly before forcing us back to Bosnia*”.¹⁴⁴ It has been alleged that refugees on the Balkan

140 Jacob Bronsther, ‘Criminal Law Torture and Respect’ (2019) 109 *The Journal of Criminal Law & Criminology* 3, 428.

141 David Sussman, ‘What’s Wrong with Torture?’ (2005) 33 *Philosophy and Public Affairs* 1.

The crime of torture “*craves the abrogation of our capacity to imagine others’ suffering, dehumanizing them so much that their pain is not our pain*” Ariel Dorfman, ‘The Tyranny of Terror Torture Inevitable in Our Century and Beyond?’ in Sanford Levinson (ed), *Torture A Collection* (Oxford University Press, 2004) 26.

142 FRA European Union Agency for Fundamental Rights, ‘Fundamental Rights at Europe’s Southern Sea Borders’ (2013), 46 <https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf> accessed 17 September 2021.

143 Rejali (n 130) 37.

144 Arafatul Islam, ‘South Asian Migrants Accuse Croatian Police of Brutal Beatings at Border’ *DW Made for Minds* (26 October 2020) <<https://www.dw.com/en/south-asian-migrants-accuse-croatian-police-of-beatings/a-55400222>> accessed 13 August 2021.

route were “*whipped, robbed and, in one case, sexually abused by members of the Croatian police*”.¹⁴⁵ Pushback, in this instance, occurs as the end of the continuum - the continuum of ongoing abuse.

As a result of pushbacks that happen under the shadow of humiliating conduct, refugees endure physical and emotional pain. They face uncertainty and fear. This scenario creates terrorizing effects on the current and future refugees, as explained previously in this Article.¹⁴⁶ In the cases of pushbacks, the crime of torture encapsulates the psychological and physical damage of wicked acts conducted against refugees, which aims at scaring or teaching future refugees *a lesson*. We see a similar situation in hate crimes; for instance: the goal is creating fear that will travel far.¹⁴⁷ In these cases, refugees are pushed away without considering their well-being or the possible dangers they may face on the sea. For example, Greek officials insulted refugees when they stripped them for a naked search. As a result, refugees were beaten and sent back in their attempt to cross the land border.¹⁴⁸ This example also explains why Greece employs harsh tactics to frustrate/intimidate already present and future refugees: terrorise them through pushbacks and prevent future attempts to reach its shores.¹⁴⁹ But establishing a terrorising effect may hurt refugees and the international community. The lack of respect and humiliation towards refugees can potentially diminish the “*security, self-determination, dignity and identity, environmental orientation, emotional rapport, and communal trust*” between refugees and designated states’ societies.¹⁵⁰

We can look at another example with links to the ongoing discussion. *Pushback* was the word that a Palestinian woman, Aisha, used to describe what happened to a group of refugees who arrived in Greece from Turkey only to be sent back again. Aisha travelled with her children from Turkey to Samos with a group of refugees. Aisha hid in the mountains with her children, after reaching Samos. She found out later that “*others had been caught and deported back to Turkey*”. Aisha added, “*I made up my mind to stay on the island at any cost and even live on water for many*

145 Lorenzo Tondo, ‘Croatian Police Accused of “Sickening” Assaults on Migrants on Balkans Trail’ *The Guardian* (21 October 2020) <<https://www.theguardian.com/global-development/2020/oct/21/croatian-police-accused-of-sickening-assaults-on-migrants-on-balkans-trail-bosnia>> accessed 13 August 2021.

146 As is stated in the recent Report of the UN Special Rapporteur on Torture (24 February-20 March 2020) infliction of pain is recognised by the Committee Against Torture, the European Court of Human Rights, the Human Rights Committee, the Inter-American Court, and the other mechanisms. Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Human Rights Council Forty-third session, 24 February-20 March 2020 Agenda item 3, 12.

147 Karima Bennoune, ‘Terror/Torture’, Rutgers School of Law-Newark Research Papers Series Paper 032, 17.

148 Ayse Dicle Ergin, ‘What Happened at the Greece-Turkey Border in Early 2020? A Legal Analysis’ (*VerfBlog*, 30 September 2020) <<https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/>> accessed 7 September 2021.

149 Bennoune (n 147) 16.

150 United Nations (n 84) 12.

days.”¹⁵¹ Similar incidents happened in 2020. For example, upon their arrival in Greece, refugees were met by a team of Hellenic Coast Guard (HCG) officers. They were put on a bus. Refugees were informed by the guards that they would be taken to a camp. Instead, the bus drove to the north of the island for a couple of hours and stopped. People were taken off the bus; their phones were collected. They were beaten heavily and forced to get on “*a big coast guard boat with something like a cannon in the front side*” that took them out to sea. They were eventually pushed back to Turkey.¹⁵² In the same year, Farhad, from Afghanistan, narrated his take on Greek pushbacks. Farhad described an inflatable boat carrying five masked men approaching from the Greek side to stop their dinghy. Farhad explained what those five men did to them in the blink of an eye: “*One was steering, two hit us with sticks, one destroyed our boat and our engine with a knife. The fifth just watched.*”¹⁵³ In similar cases, refugees were squeezed in dinghies with no water and food, without considering any of their medical conditions.¹⁵⁴

As is seen, leaving refugees in overcrowded dinghies in the middle of the sea or creating artificial waves to make the boats - carrying women and children - go away from the shores is more significant than only a persistent prevention act. For example, Greece has employed forcible/brutal pushbacks as an informal/de facto state policy against people who have entered Greece through its border at Turkey’s Evros river, on the EU’s watch.¹⁵⁵ In many incidents, even if refugees have managed to arrive on Greek soil, they have still been put in detention centres -where they faced inhuman and degrading conditions- to be sent back towards Turkish borders. Survivors’ testimonies have made clear that there were incidents documented with reports showing “*physical violence, including beatings, use of weapons, batons, choking, and throwing people from the deck of the HCG boat onto life rafts.*”¹⁵⁶ It does not end there. As a state party to the ECHR, Greece has denied the right to due process attributed to the refugees. Therefore, Greece infringed on the right to liberty and security under Article 5 of the ECHR.¹⁵⁷

151 Katty Fallon, ‘Greece Accused of Refugee “Pushback” after Family Avoid Being Forced off Island’ (29 June 2021) <<https://www.theguardian.com/global-development/2021/jun/29/greece-accused-of-refugee-pushback-after-family-avoid-being-forced-off-island>> accessed 13 August 2021.

152 Kostas Kallergis, ‘Pushbacks: Migrants Accuse Greece of Sending Them Back out to Sea’ *BBC News* (12 December 2020) <<https://www.bbc.com/news/world-europe-55231203>> accessed 13 August 2021.

153 Birgitta Schulke-Gill and Julia Bayer, ‘Greece: Refugees Attacked and Pushed Back in the Aegean’ *DW Made for Minds* (29 June 2020) <<https://www.dw.com/en/greece-refugees-attacked-and-pushed-back-in-the-aegean/a-53977151>> accessed 13 August 2021.

154 Malcolm Brabant and Daphne Tolis, ‘Migrants Left Adrift at Sea after Boat Pushback from Greek Coast Guard’ *PBS News Hour* (22 July 2021) <<https://www.pbs.org/newshour/show/migrants-left-adrift-at-sea-after-boat-pushback-from-greek-coast-guard>> accessed 13 August 2021.

155 Human Rights Watch, ‘Greece: Violence Against Asylum Seekers at Border Detained, Assaulted, Stripped, Summarily Deported’ (17 March 2020) <<https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border>> accessed 26 August 2021.

156 Legal Centre Lesbos (n 112).

157 ECHR (n 38) art 5.

Considering the given analysis herein, throughout the pushback operations, refugees remain under the control of state officials, who also happen to be the perpetrators. As a side note, contrary to the UN Declaration against Torture, the Rome Statute's definition does not specify that torturer would have to be a public official to conclude that torture has been committed. A torturer might be a state or a non-state actor. For instance, Rejali discussed "*the activity of some non-state actors as torture under specific circumstances*".¹⁵⁸ But the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kunarac Trial Judgement* did not look for such specific circumstances regarding the actor of torture crime; "*the act committed rather than in the status of the person who committed it*".¹⁵⁹

On that note, indeed, the police and the border guards are law enforcers. They act on behalf of the state. If we consider pushbacks as a consequence of the state's asylum policy, the state, in this case, authorises violence. The police and the border guards are empowered to the extent that they usually brutally use deadly force and harassment during pushbacks because the state officials "*enjoy impunity concerning their actions*".¹⁶⁰ The target of state officials, for example, in pushbacks is the refugees who happen to be foreigners. The police, thus, in another dimension, "*engage in state violence*" and "*state racism*" in the pushback operations.¹⁶¹

There is a shared responsibility falling on Greece and the EU concerning border violence¹⁶² because of pushback, infringing the fundamental rights of human beings.¹⁶³ However, Greece and the EU did not hold individuals responsible for the crimes committed in pushback operations. Moreover, neither party have accepted any of the allegations. Similarly, it has been claimed that Greece has developed and embraced pushback as a state policy. But Greece has also denied the mentioned accusations on that matter.¹⁶⁴

Greek authorities are unwilling to investigate any misconduct committed during pushback operations. On the international law level, if we associate pushback with

158 Rejali (n 130) 35

159 *Prosecutor v Kunarac, Kovac and Vukovic Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para 542 (Kunarac Trial Judgement).

160 Myisha Cherry, 'State Racism, State Violence, and Vulnerable Solidarity' in Naomi Zack (ed), *The Oxford Handbook of Philosophy and Race* (2017), 4 <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190236953.001.0001/oxfordhb-9780190236953-e-3>> accessed 2 September 2021.

161 *ibid* 5.

162 Lorenzo Tondo, 'Revealed: 2,000 Refugee Deaths Linked to Illegal EU Pushbacks' *The Guardian* (5 May 2021) <<https://amp.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks>> accessed 26 August 2021.

163 See Christos Zois, 'Frontex' Involvement in Illegal Pushbacks and EU's Possible International Responsibility' (Jean Monnet Project EURIS, 17 March 2021) <<https://www.jm-euris.eu/frontex-involvement-in-illegal-pushbacks/>> accessed 19 October 2022.

164 Amnesty International, 'Greece: Violence, Lies, and Pushbacks Refugees and Migrants Still Denied Safety and Asylum at Europe's Borders' (2021) 12 <https://www.amnesty.gr/sites/default/files/new_edited_22_jun_greece-violence_lies_and_pushbacks2_eur25-4307-2021_002_002.pdf> accessed 6 September 2021.

the crime of torture, we may evaluate whether the ICC would be able to prosecute it in consideration of the Rome Statute's ruling. Considering Rome Statute's Article 15(3), "[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected."¹⁶⁵ But only having a reasonable basis to proceed with an investigation would not be enough to carry the case further. Under Article 17 of the Rome Statute, the complementarity test must also be satisfied to decide whether the case would be admissible before the ICC. The Prosecutor thus shall consider the following: the jurisdiction, admissibility utilizing complementarity and gravity, and "*the interests of justice*".¹⁶⁶

On the other hand, it is also not easy to be optimistic about whether the ICC (the Prosecutor) would investigate pushbacks. For example, an independent MP for Clark, Andrew Wilkie, reached out to the Office of the Prosecutor (OTP) of the ICC about worrying concerns over such treatment of Australian policymakers towards refugees and asylum seekers in detention centres. The claim was that the abuse against refugees in offshore detention centres amounted to crimes against humanity. In its response, although the OTP confirmed that Australian policy in these centres amounts to cruel, inhuman, or degrading treatment, the OTP declined to open a preliminary examination because the Prosecutor considered that the Australian Government's policies were not deliberate. Furthermore, the asylum seekers were not lawfully present in the area of deportation.¹⁶⁷

We, thus, must be realistic. We do not have a precise legal regulation that would ignite the ICC to investigate a case that includes pushback. Refugees are pushed back as part of some states' asylum policies in the meantime.

However, something may become more powerful than any legal regulations - the power that lies within the anger of seeing the injustice of some states' asylum policies. The inequity has the potential to cause irritation that can have a butterfly effect across the World. The anger then may show itself in action as rage. That is why

¹⁶⁵ Rome Statute (n 112) art 15(3).

¹⁶⁶ Article 53 of the Rome Statute (n 112) states the following:

"The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.

The case is or would be admissible under article 17; and

Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."

¹⁶⁷ International Criminal Court the Office of the Prosecutor, (Ref OTP-CR-322/14/001, 12 February 2020) <[https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_\(1\).pdf](https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_(1).pdf)> accessed 21 May 2020.

activists and refugees rage against injustice.¹⁶⁸ But the purpose of wrath is neither to make people and the international community feel guilty nor to create violence and conflict. Instead, the rage enforces the value of refugees' rights, because, in this context, anger is not demonstrated as an act that is antithetical to love.¹⁶⁹

Anger would be expressed because of having a yearning for a better world. Therefore, we must ensure that the international community knows about refugees' human rights violations. That way, there would be a sense of control over the current time.

As for the future, if legal loopholes are eradicated, and protection mechanisms are enhanced through well-defined terms and consequences, we can guard refugees against the brutal state systems that embrace pushbacks in their asylum policies.

V. Conclusion

This Article has looked for legal avenues under international law to describe the pushback phenomenon. As has been mentioned throughout this Article's text, there exists no international legal regulation that defines the term -pushback-. However, pushback operations have prevailed over the years. Even though the measures taken against refugees to prevent their arrival seem to belong to contemporary times, "*the turning away of ships full of hopeful immigrants has been occurring for decades, with catastrophic results*".¹⁷⁰ For example, during the Holocaust, 907 German Jews fled persecution aboard the ocean liner *St. Louis*. First, they were stopped by Cuba, and in response, the Cuban Government did not recognise their entrance visas.¹⁷¹

Further, the USA dispatched a gunboat to prevent refugees from swimming ashore. Canada, too, claimed that "*the passengers of St. Louis were not a Canadian problem*".¹⁷² Jewish refugees were eventually denied entry and sent to Europe with the full knowledge that they would die in the gas chambers and crematoria of the Third Reich.¹⁷³

In modern times, refugees are still pushed back in the full knowledge that they will die from exhaustion, starvation, dehydration, or some form of persecution awaiting them in their homelands.

168 David James, 'Listening to the Refugee: Valeria Luiselli's Sentimental Activism' (2021) 67 MFS - Modern Fiction Studies 390. <https://research.birmingham.ac.uk/portal/files/132120716/David_James_Luiselli_MFS_67.2_2021_AAM.pdf> accessed 7 September 2021.

169 Cherry (n 160).

170 Lily Rothman, 'The Long, Sad History of Migrant Ships Being Turned Away From Ports' *Time* (9 June 2015) <https://time.com/3914106/history-migrant-ships-st-louis/?utm_medium=email&utm_source=sfmc&utm_campaign=newsletter+history+default+ac&utm_content=+++20210917+++body&et rid=87563062> accessed 21 September 2021.

171 James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 280.

172 *ibid* 280.

173 *ibid* 280.

The consistency of pushback has become our reality and has normalised how refugees' rights and human rights have been ignored. But no matter how states approach pushbacks or whether they employ pushbacks as state policy; it does not change the fact that pushbacks are illegal. The non-refoulement principle and the prohibition on collective expulsion explain the reasons for such illegality. Therefore, even though we can identify why and how pushbacks conflict with the mentioned norms and international legal regulations, the international community needs firm rules and formulations to combat this growing phenomenon. For that reason, this Article has mapped relevant international law regulations that either can explain pushback or pushback can be placed within the context of the term in question.

Initially, this Article introduced the research question based on contemporary world examples, including resistance of wealthy democratic states against welcoming refugees into their lands. As noted, a *democratic wealthy state* indicates industrialised and economically prosperous countries. This Article has discussed that the USA, Australia, the UK, and the EU countries -as democratic wealthy states- have embraced and developed asylum policies that would approve their ulterior motives. As was resolved, even though there are several tactics within the context of deterrence practices of states, pushbacks draw apart from them. In what ways pushbacks are unique from the other deterrence practices have been explained in three ways by this Article.

First, deterrence practices were outlined. The goal was to position pushbacks within the context of deterrence practices and underline that not every deterrence tactic constitutes pushback. What turns the non-entrée practice into pushback is the current action taken by the state in question. For example, the state employs an interception method to prevent refugees' arrival. The action taken by the state now constitutes pushback. For example, members of the German nongovernmental group Sea-Watch filmed Libya's coastguard chasing a crowded migrant boat and shooting in its direction to stop it from crossing the Mediterranean Sea to Europe.¹⁷⁴ This incident merely constitutes a classic example of pushback.

On the other hand, French authorities have intentionally frustrated people from seeking protection by not providing them with housing/shelter.¹⁷⁵ This state policy might constitute a form of deterrence practice. But French authorities' intentional and indirect harm to refugees does not include pushback.

174 Al Jazeera, 'Caught on Camera: Libyan Coastguard Shoots at Migrant Boat' *Al Jazeera* (1 July 2021) <<https://www.aljazeera.com/news/2021/7/1/caught-on-camera-libyan-coast-guard-shoots-at-migrant-boat>> accessed 3 August 2021.

175 Sophie Stuber, 'What's behind the Housing Crisis for Asylum Seekers in France?' (The New Humanitarian, 27 April 2021) <https://www.thenewhumanitarian.org/news-feature/behind-the-housing-crisis-for-asylum-seekers-in-france?utm_source=The+New+Humanitarian&utm_campaign=4422c95286-EMAIL_CAMPAIGN_2020_12_11_Weekly_COPY_01&utm_medium=email&utm_term=0_d842d98289-4422c95286-75551421&mc_cid=ba47bfa97d&mc_eid=0cd57908d5> accessed 17 May 2021.

Second, collective expulsion was set forth under international law to find a legal explanation for the pushback. As was detailed in part four of this Article, collective expulsion is actualised by utilising pushbacks.

Third, the analysis set forth pushbacks as being conducted through measures that change the colour of the employed operation by state authorities. In this regard, this Article discussed two significant aspects of the issue.

Initially, the analysis argued that pushback as a term must carefully be used and should not be abused to describe *any incident* that constitutes interceptions of refugees either on the high seas or on land. Pushbacks should not be considered a crime under international law without carefully examining the elements of the crime in question. It means that even though the action taken conflicts with the non-refoulement principle in the first place, this does not necessarily imply that pushback constitutes a crime of torture. However, the methods employed change the character of pushback operations. The brutality of state authorities' actions gives a new dimension to the pushback. In this scene, pushbacks may reach the limits of a crime of torture.

Since torture can be classified within the limits of crimes against humanity, the pushback was evaluated in alignment with this international crime. Certain elements must come together for a crime to be considered a crime against humanity. Pushbacks have the potential to be included in this context. But even if pushback is not officially defined under a legal text, still the ICC can pursue an investigation on that matter to see if there has been an international crime committed. However, since pushback is a politically motivated action executed by state authorities, a reluctance on both sides -states and the ICC- is foreseeable.

In the end, in the legal sense, pushback can be specified in the context of collective expulsion; it can be formalised within the meaning of a torture crime. Therefore, pushback can be understood as reaching the limits of crimes against humanity under certain conditions. However, considering there is currently no legal explanation for the pushback, this Article recommends the following. First, pushbacks must be engaged as a growing global concern; second, pushbacks should thus be confronted as severe border control measures infringing and disrespecting all the rights refugees have.

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Bibliography

- Agamben G, *Homo Sacer: Sovereign Power and Bare Life*. (Daniel Heller-Roazen tr, Stanford University Press 1998).
- Ahmed K, 'Violence towards refugees at Libyan detention centers forces MSF to pull out' (*The Guardian*, 24 June 2021) <https://www.theguardian.com/global-development/2021/jun/24/violence-towards-refugees-at-libyan-detention-centres-forces-msf-to-pull-out?mc_cid=107ec98c57&mc_eid=0cd57908d5> accessed 5 August 2021.
- Amnesty International, 'Greece: Violence, Lies, And Pushbacks Refugees and Migrants Still Denied Safety and Asylum at Europe's Borders' (2021) 12 <https://www.amnesty.org/sites/default/files/new_edited_22_jun_greece-violence_lies_and_pushbacks2_eur25-4307-2021_002_002.pdf> accessed 6 September 2021.
- Al-Dayel N, Anfinson A, and Anfinson G, 'Captivity, Migration, and Power in Libya' [2021] *Journal of Human Trafficking* <<https://www.tandfonline.com/doi/pdf/10.1080/23322705.2021.1908032?needAccess=true>> accessed 18 May 2021.
- Al Jazeera, '2016: Refugee Arrivals Fall as Deaths Hit Record' (26 October 2016) <<https://www.aljazeera.com/news/2016/10/26/un-2016-mediterranean-refugee-deaths-hit-record-3800>> accessed 6 September 2021.
- Al Jazeera, 'Caught on Camera: Libyan Coastguard Shoots at Migrant Boat' *Al Jazeera* (1 July 2021) <<https://www.aljazeera.com/news/2021/7/1/caught-on-camera-libyan-coast-guard-shoots-at-migrant-boat>> accessed 3 August 2021.
- Al Jazeera, 'Deaths at Sea Highlight Failings in Europe Immigration Policy' (4 May 2021) <<https://www.aljazeera.com/news/2021/5/4/deaths-at-sea-highlight-failings-in-europe-migration-policy>> accessed 21 June 2021.
- Al Jazeera, 'Greece: Four Afghan Migrants Jailed over Moria Camp Fire' *Al Jazeera* (13 June 2021) <https://www.aljazeera.com/news/2021/6/13/afghans-jailed-in-greece-over-moria-migrant-camp-blaze?mc_cid=12f8feb197&mc_eid=0cd57908d5> accessed 15 June 2021.
- Akkerman M, 'Outsourcing Oppression How Europe Externalises Migrant Detention Beyond Its Shores' (Niamh Ni Bhriain and Josephine Valeske eds, Transnational Institute and Stop Wapenhandel, 2021) <<https://www.tni.org/files/publication-downloads/outsourcingoppression-report-tni.pdf>> accessed 7 October 2021.
- Amnesty International, 'Greece: Pushbacks and Violence against Refugees and Migrants Are de Facto Border Policy' (23 June 2021) <<https://www.amnesty.org/en/latest/press-release/2021/06/greece-pushbacks-and-violence-against-refugees-and-migrants-are-de-facto-border-policy/>> accessed 26 August 2021.
- Amnesty International, 'The Human Cost of Fortress Europe Human Rights Violations Against Migrants and Refugees at Europe's Borders' (2014) <https://reliefweb.int/sites/reliefweb.int/files/resources/EUR%20050012014_%20Fortress%20Europe_complete_web.pdf> accessed 26 August 2021.
- Bassiouni C M, *Crimes Against Humanity Historical Evolution and Contemporary Application* (Cambridge University Press 2011).
- Brown W, *Walled States, Waning Sovereignty* (2010).
- Bennoune K, 'Terror/Torture', Rutgers School of Law-Newark Research Papers Series Paper 032.
- BBC News, 'Denmark Asylum: Law Passed to Allow Offshore Asylum Centres' (3 June 2021) <<https://www.bbc.com/news/world-europe-57343572>> accessed 16 August 2021.

- BBC News, 'Greece Erects Fence at Turkey Border amid Warnings of Afghan Migrant Surge' (21 August 2021) <https://www.bbc.com/news/world-europe-58289893?mc_cid=d22ade97d4&mc_eid=0cd57908d5> accessed 31 August 2021.
- Burchard H, 'EU Plans Big Cash Offer for Afghanistan's Neighbors to Host Refugees' *Politico* (31 August 2021) <https://www.politico.eu/article/eu-plans-afghanistan-neighbors-host-refugees/?mc_cid=7346867e83&mc_eid=0cd57908d5> accessed 6 September 2021.
- Brabant M and Tolis D, 'Migrants Left Adrift at Sea after Boat Pushback from Greek Coast Guard' *PBS News Hour* (22 July 2021) <<https://www.pbs.org/newshour/show/migrants-left-adrift-at-sea-after-boat-pushback-from-greek-coast-guard>> accessed 13 August 2021.
- Bronsther J, 'Criminal Law Torture and Respect' (2019) 109 *The Journal of Criminal Law & Criminology* 3.
- Bassiouni M C, 'International Crimes: Jus Cogens and Obligation Erga Omnes' (1996) 59 *Law and Contemporary Problems* 4.
- Chatty D, 'Has the Tide Turned? Refuge and Sanctuary in the Euro-Mediterranean Space' (Borders, Migrations, Asylum and Refuge, 06 October 2020) <<https://revistaidees.cat/en/has-the-tide-turned-refuge-and-sanctuary-in-the-euro-mediterranean-space/>> accessed 25 January 2021.
- Charter of Fundamental Rights of The European Union [2012] 326/02 395.
- Cherry M, 'Anger Can Build a Better World' *The Atlantic* (25 August 2020) <<https://www.theatlantic.com/ideas/archive/2020/08/how-anger-can-build-better-world/615625/>> accessed 2 September 2021.
- Cusumano E and Villa M, 'Over Troubled Waters: Maritime Rescue Operations in the Central Mediterranean Route' (IOM) <<https://publications.iom.int/system/files/pdf/ch16-over-troubled-waters.pdf>> accessed 26 August 2021.
- Conka v Belgium* App no 51564/99 (ECHR, 5 February 2002).
- Chimini B S, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 *Journal of Refugee Studies* 4.
- Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention).
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), amended by Protocols nos 11 and 14, 4 November 1950, ETS 5.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 39/46, Annex, 10 Dec 1984 (UNCAT).
- Crisp J and Maple N, 'Relevant or Redundant? The Future of the International Refugee Protection Regime' (*Refugee Law Initiative Blog on Refugee Law and Forced Migration*, 22 July 2021) <<https://rli.blogs.sas.ac.uk/2021/07/22/relevant-or-redundant-the-future-of-the-international-refugee-protection-regime/>> accessed 4 August 2021.
- Cherry M, 'State Racism, State Violence, and Vulnerable Solidarity' in Naomi Zack (ed), *The Oxford Handbook of Philosophy and Race* (2017) <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190236953.001.0001/oxford-hb-9780190236953-e-3>> accessed 2 September 2021.
- Dancy G T, 'The Hidden Impacts of the ICC: An Innovative Assessment Using Google Data' (2021) 34 *Leiden Journal of International Law* 729 <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/hidden-impacts-of-the-icc-an-innovative-assessment-using-google-data/ED6494135812ADADBE6DBD01FCACD932>> accessed 26 August 2021.

- Davitti D, 'Why Offshore Processing of Refugees Bound for Europe Is Such a Bad Idea' *The Conversation* (28 July 2017) <<https://theconversation.com/why-offshore-processing-of-refugees-bound-for-europe-is-such-a-bad-idea-81695>> accessed 27 August 2021.
- Death by Rescue, 'Death by Rescue the Lethal Effects of The EU's Policies of NonAssistance' <<https://deathbyrescue.org>> accessed 25 September 2021.
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 3452 (XXX), Annex, 9 Dec 1975 (UN Declaration Against Torture).
- Dorfman A, 'The Tyranny of Terror Torture Inevitable in Our Century and Beyond?' in Sanford Levinson (ed), *Torture A Collection* (Oxford University Press, 2004).
- Doyle M and Macklin A, 'Responsibility Sharing and the Global Compact on Refugees', *Experts Meeting on the Global Compact on Refugees* (2017).
- European Court of Human Rights, 'Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of Collective Expulsions of Aliens' (Council of Europe, 30 April 2021) <https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf> accessed 17 June 2021.
- European Commission, 'Migration and Asylum Package: New Pact on Migration and Asylum Documents Adopted on 23 September 2020' (23 September 2020) <https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en> accessed 26 August 2021.
- Euronews, 'Yunanistan'da Cezaevine Benzetilen Mülteci Kampı Açılıyor, STK'lar Tepkili' (18 September 2021) <https://tr.euronews.com/2021/09/18/yunanistan-da-cezaevine-benzetilen-multeci-kamp-ac-l-yor-stk-lar-tepkili?utm_source=newsletter&utm_medium=%7Btemplate_locale%7D&utm_content=yun%20anistan-da-cezaevine-benzetilen-multeci-kamp-ac-l-yor-stk-lar-tepkili&_ope=eyJndWlkIjoiODNjMGNjMzdiM2IzZjgyZDBlNDg3YmE2N2U5MDQxMjAifQ%3D%3D> accessed 18 September 2021.
- Euronews, 'Fishing Boat Crammed with over 500 Migrants Arrives in Lampedusa' (28 August 2021) <https://www.euronews.com/2021/08/28/fishing-boat-crammed-with-over-500-migrants-arrives-in-lampedusa?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.
- Euronews, 'Avrupa Konseyi'nden Yunanistan'a: Göçmenleri Sınır Dışı Etme Yasa Tasarısını Değiştir' (4 September 2021) <https://tr.euronews.com/2021/09/04/avrupa-konseyinden-yunanistan-a-gocmenleri-s-n-r-d-s-etme-yasa-tasar-s-n-degistir?utm_source=newsletter&utm_medium=%7Btemplate_locale%7D&utm_content=avrupa-konseyi-nden-yunanistan-a-gocmenleri-s-n-r-d-s-etme-yasa-tasar-s-n-degistir&_ope=eyJndWlkIjoiODNjMGNjMzdiM2IzZjgyZDBlNDg3YmE2N2U5MDQxMjAifQ%3D%3D> accessed 6 September 2021.
- Ergin A D, 'What Happened at the Greece-Turkey Border in Early 2020? A Legal Analysis' (*VerfBlog*, 30 September 2020) <<https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/>> accessed 7 September 2021.
- Fargues P, 'Four Decades of Cross-Mediterranean Undocumented Migration to Europe A Review of the Evidence' (International Organization for Migration, 2017), 11 <https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf> accessed 17 September 2021.
- Farzan NA, 'As Greece Installs "Sound Cannons" on Border, Denmark Passes Law Allowing Asylum Seekers to Be Sent Overseas' [2021] *The Washington Post* <<https://www.washingtonpost.com/world/2021/06/05/greece-denmark-migrants/>> accessed 16 June 2021.

- Fallon K, 'Greece Accused of Refugee "Pushback" after Family Avoid Being Forced off Island' (29 June 2021) <<https://www.theguardian.com/global-development/2021/jun/29/greece-accused-of-refugee-pushback-after-family-avoid-being-forced-off-island>> accessed 13 August 2021.
- Frontex European Border and Coast Guard Agency <<https://frontex.europa.eu>> accessed 16 June 2021.
- Frouville O, 'The Influence of the European Court of Human Rights' Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment' (2011) 9 Journal of International Criminal Justice.
- FRA European Union Agency for Fundamental Rights, 'Fundamental Rights at Europe's Southern Sea Borders' (2013), 46 <https://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf> accessed 17 September 2021.
- Ghezelbash D, 'Hyper-legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' [2020] American Journal of Comparative Law 2.
- Gleeson M and Yacoub N, 'Policy Brief 11 Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia' (Kaldor Centre for International Refugee Law 2021) Policy Brief 11 <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_11_Offshore_Processing.pdf> accessed 16 August 2021.
- Gutierrez-Rodriguez E, 'The Coloniality of Migration and the "Refugee Crisis" On the Asylum-Migration Nexus, the Transatlantic White European Settler Colonialism- Migration and Racial Capitalism' (2018) 34 Refugee 1.
- Guzman M M, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 Fordham International Law Journal <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2162&context=ilj>> accessed 19 August 2021.
- Goodwin-Gill G, 'Refugee Identity and Protection's Fading Prospects' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999).
- Guy Goodwin-Gill, 'The International Refugee Regime and the Challenges Today' (*Kaldor Center for International Refugee Law*, 27 August 2021) <<https://www.kaldorcentre.unsw.edu.au/publication/international-refugee-regime-and-challenges-today>> accessed 31 August 2021.
- Hathaway J C, 'Is 'Ageing Gracefully?' an Ageist Critique?'" <https://rli.sas.ac.uk/resources/podcasts?utm_source=Refugee+Law+Initiative&utm_campaign=107851ca13-EMAIL_CAMPAIGN_2017_10_03_COPY_01&utm_medium=email&utm_term=0_304c0b75a9-107851ca13-581066909> accessed 5 August 2021.
- Hathaway J C, 'The Emerging Politics of Non-Entrée' (1992) 91 Refugees 40.
- Hathaway J C, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 280.
- Hausmann R, 'Why Are Rich Countries Democratic?' (Harvard Kennedy School Mossavar-Rahmani Center for Business and Government, 26 March 2014) <<https://www.hks.harvard.edu/centers/mrcbg/programs/growthpolicy/why-are-rich-countries-democratic>> accessed 14 September 2021.
- Hirsi Jamaa and Others v Italy App no. 27765/09 (ECHR, 23 February 2012) para 81.
- Human Rights Watch, 'Human Rights Watch Submission to the Special Rapporteur's Report on Pushback Practices and Their Impact on the Human Rights of Migrants' (*Human Rights Watch*, 1 February 2021) <<https://www.hrw.org/news/2021/02/01/human-rights-watch-submission-special-rapporteurs-report-pushback-practices-and>> accessed 9 August 2021.

- Human Rights Watch, 'Greece: Violence Against Asylum Seekers at Border Detained, Assaulted, Stripped, Summarily Deported' (17 March 2020) <<https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border>> accessed 26 August 2021.
- 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) <https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf> accessed 13 August 2021.
- Human Rights Watch, 'Frontex Failing to Protect People at EU Borders Stronger Safeguards Vital as Border Agency Expands' (2021) <<https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders>> accessed 17 September 2021.
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
- International Criminal Court the Office of the Prosecutor, (Ref OTP-CR-322/14/001, 12 February 2020) <[https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_\(1\).pdf](https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_(1).pdf)> accessed 21 May 2020.
- International Criminal Court (ICC), 'Elements of Crimes' (2011) <<https://www.refworld.org/docid/4ff5dd7d2.html>> accessed 26 August 2021.
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
- International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force on 4 January 1969) 660 UNTS 195 (CERD).
- Islam A, 'South Asian Migrants Accuse Croatian Police of Brutal Beatings at Border' *DW Made for Minds* (26 October 2020) <<https://www.dw.com/en/south-asian-migrants-accuse-croatian-police-of-beatings/a-55400222>> accessed 13 August 2021.
- James D, 'Listening to the Refugee: Valeria Luiselli's Sentimental Activism' (2021) 67 *MFS - Modern Fiction Studies* 390 <https://research.birmingham.ac.uk/portal/files/132120716/David_James_Luiselli_MFS_67.2_2021_AAM.pdf> accessed 7 September 2021.
- Joung M, 'What Is Happening at Migrant Detention Centers? Here's What to Know' (12 July 2019) <<https://time.com/5623148/migrant-detention-centers-conditions/>> accessed 2 September 2021.
- Kalir B, 'Deapartheid: The Draconian Governance of Illegalized Migrants in Western States' (2019) 5 *Conflict and Society: Advances in Research* 19.
- Kingsley P and Shoumali K, 'Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea' *The New York Times* (27 April 2021) <<https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html>> accessed 3 May 2021.
- Kallergis K, 'Pushbacks: Migrants Accuse Greece of Sending Them Back out to Sea' *BBC News* (12 December 2020) <<https://www.bbc.com/news/world-europe-55231203>> accessed 13 August 2021.
- Keady-Tabbal N and Mann I, "'Pushbacks" as Euphemism' <https://www.ejiltalk.org/pushbacks-as-euphemism/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 14 April 2021.
- Khlaifia and Others v Italy* App No 16483/12 (ECHR, 15 December 2016).
- Lynott L, "'I'm Not a Hero but I'm Not a Criminal" - Trinity Graduate Sean (24) Returns Home after 100 Days in Greek Jail' *INDEPENDENT.IE* (16 December 2018) <<https://www.independent.ie/irish-news/im-not-a-hero-but-im-not-a-criminal-trinity-graduate-sean-24-returns-home-after-100-days-in-greek-jail-37631116.html>> accessed 31 August 2021.

- Legido A S, 'The Walls of Fortress Europe: Externalization of Migration Control and the Rule of Law' (2019) 23 *The Spanish Yearbook of International Law* 345.
- Luban D, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Journal of International Law*.
- Legal Centre Lesvos, 'Crimes Against Humanity in the Aegean' (2021) <<http://legalcentrelesvos.org/wp-content/uploads/2021/02/Collective-Expulsions-in-the-Aegean-LCL-01.02.2021-1.pdf>> accessed 17 May 2021.
- Mann I and Keady-Tabbal N, 'Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean How Summary Expulsions From Greece Have Continued With Impunity' (Just Security, 26 October 2020) <<https://www.justsecurity.org/72955/torture-by-rescue-asylum-seeker-pushbacks-in-the-aegean/>> accessed 25 January 2021.
- Mann I, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning' [2020] *German Law Journal* 609.
- Mann I, 'Attack by Design: Australia's Offshore Detention System and the Literature of Atrocity' [2021] *European Journal of International Law* 429 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787661> accessed 14 April 2021.
- Médecins Sans Frontières, 'Out of Sight, out of Mind: Refugees in Libya's Detention Centres' (12 July 2019) <<https://www.msf.org/out-sight-out-mind-refugees-libyas-detention-centres-libya>> accessed 18 May 2021.
- McAdam J, 'Australia and Asylum Seekers' (2013) 25 *International Journal of Refugee Law* 3.
- McAdam J, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as A Personal Liberty' (2011) 12 *Melbourne Journal of International Law* 2.
- McDonald-Gibson C, 'Europe Sees a Migration Crisis in the Making in Afghanistan. Have the Lessons of the 2015 Surge Been Learned?' *Time* (18 August 2021) <<https://time.com/6091084/afghanistan-taliban-europe-migration/>> accessed 27 August 2021.
- Morales F G, 'Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea' (UN Human Rights Council Forty-seventh session, 21 July 2021), 4 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/106/33/PDF/G2110633.pdf? OpenElement>> accessed 18 September 2021.
- ND & NT v Spanish* App nos 8675/15 and 8697/15 (ECHR, 13 February 2020).
- Neuman G L, 'What Counts as a Crime Against Humanity?' (*Harvard International Law Journal*) <<https://harvardilj.org/2019/01/what-counts-as-a-crime-against-humanity/>> accessed 2 September 2021.
- Nicholson F and Kumin J, 'A Guide to International Refugee Protection and Building State Asylum Systems Handbook for Parliamentarians N° 27, 2017' (UNHCR, 2017) <<https://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html>> accessed 26 August 2021.
- Okafor O C, *Refugee Law After 9/11 Sanctuary and Security in Canada and The United States* (UBC Press 2020) 3-10.
- Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto 16 September 1963, ETS 46.
- Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (The 1967 Protocol).

- Patrick S M, 'The U.N. Refugee Convention Is Under Pressure—and Showing Its Age' (*World Politics Review*, 9 August 2021) <https://www.worldpoliticsreview.com/articles/29869/the-un-refugees-regime-is-under-pressure-and-showing-its-age?mc_cid=b1f8cb11c9&mc_eid=0cd57908d5> accessed 16 August 2021.
- Plucinska J and Pempel K, 'On the EU's Eastern Border, Poland Builds a Fence to Stop Migrants' *Reuters* (26 August 2021) <https://www.reuters.com/world/europe/eus-eastern-border-poland-builds-fence-stop-migrants-2021-08-26/?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.
- Prosecutor v Kunarac, Kovac and Vukovic Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para 542 (Kunarac Trial Judgement).
- Prosecutor v Furundlija* IT-95-17/1-T (ICTY, 10 December 1998).
- Perce H, 'An Examination of the International Understanding of Political Rape and the Significance of Labelling it Torture' (2003) 14 *International Journal of Refugee Law* 4.
- Press Unit, 'Factsheet -Collective Expulsions of Aliens' (European Court of Human Rights, 2020) <https://www.echr.co.ee/Documents/FS_Collective_expulsions_ENG.pdf> accessed 17 May 2021.
- Radio Free Europe, 'Bulgaria Sends Troops to Border as EU Braces for Afghan Migrant Flows' (27 August 2021) <https://www.rferl.org/a/bulgaria-border-migrants-afghanistan-/31430530.html?mc_cid=14fd97bbdc&mc_eid=0cd57908d5> accessed 31 August 2021.
- Ramsay G and Fiske L, 'Election Factcheck: Are Many Refugees Illiterate and Innumerate?' *The Conversation* (18 May 2016) <<https://theconversation.com/election-factcheck-are-many-refugees-illiterate-and-innumerate-59584>> accessed 2 September 2021.
- Ramji-Nogales J, 'Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights' (*American Society of International Law*, 4 January 2016) <<https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights>> accessed 27 August 2021.
- Relief web, 'UN Human Rights Council: Ending Collective Pushbacks of Migrants at Borders' (28 June 2021) <<https://reliefweb.int/report/world/un-human-rights-council-ending-collective-pushbacks-migrants-borders>> accessed 31 August 2021.
- Rejali D, *Torture and Democracy* (Princeton University Press, 2009).
- Rothman L, 'The Long, Sad History of Migrant Ships Being Turned Away from Ports' *Time* (9 June 2015) <https://time.com/3914106/history-migrant-ships-st-louis/?utm_medium=email&utm_source=sfmc&utm_campaign=newsletter+history+default+ac&utm_content=+++20210917+++body&et rid=87563062> accessed 21 September 2021.
- Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.
- Sussman D, 'What's Wrong with Torture?' (2005) 33 *Philosophy and Public Affairs* 1.
- Sir Lauterpacht E and Bethlehem D, 'The Scope and Content of the Principle of NonRefoulement' in UNHCR (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003), 149-163 <<https://www.refworld.org/docid/470a33af0.html>> accessed 16 September 2021.
- SyalR, 'Priti Patel to Send Boats Carrying Migrants to UK Back across Channel' *The Guardian* (9 September 2021) <https://www.theguardian.com/uk-news/2021/sep/09/priti-patel-to-send-boats-carrying-migrants-to-uk-back-across-channel?utm_term=16547debe68d2f1e930f736c93bc1661&utm_campaign=GuardianTodayUK&utm_source=esp&utm_medium=Email&CMP=GTUK_email&mc_cid=a4d0f45d8c&mc_eid=0cd57908d5> accessed 16 September 2021.

- Specia M, 'U.K. Proposes Moving Asylum Seekers Abroad While Their Cases Are Decided' *The New York Times* (6 July 2021) <<https://www.nytimes.com/2021/07/06/world/europe/uk-migration-priti-patel.html>> accessed 16 August 2021.
- Smith H, 'Why Greece's Expensive New Migrant Camps Are Outraging NGOs' *The Guardian* (19 September 2021) <<https://www.theguardian.com/world/2021/sep/19/why-greeces-expensive-new-migrant-camps-are-outraging-ngos>> accessed 20 September 2021.
- Stuber S, 'What's behind the Housing Crisis for Asylum Seekers in France?' (*The New Humanitarian*, 27 April 2021) <https://www.thenewhumanitarian.org/news-feature/behind-the-housing-crisis-for-asylum-seekers-in-france?utm_source=The+New+Humanitarian&utm_campaign=4422c95286-EMAIL_CAMPAIGN_2020_12_11_Weekly_COPY_01&utm_medium=email&utm_term=0_d842d98289-4422c95286-75551421&mc_cid=ba47bfa97d&mc_eid=0cd57908d5> accessed 17 May 2021.
- Stahn C, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019).
- Sztucki J, 'Who Is a Refugee? The Convention Definition: Universal or Obsolete?' in Frances Nicholson and Patrick Twomey (eds) *Refugee Rights and Realities* (Cambridge University Press 1999).
- Schulke-Gill B and Bayer J, 'Greece: Refugees Attacked and Pushed Back in the Aegean' *DW Made for Minds* (29 June 2020) <<https://www.dw.com/en/greece-refugees-attacked-and-pushed-back-in-the-aegean/a-53977151>> accessed 13 August 2021.
- Schabas W, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (New York, Oxford University Press, 2012).
- Strickland P, 'Why Is the World Afraid of Young Refugee Men?' *Al Jazeera* (20 June 2016) <<https://www.aljazeera.com/features/2016/6/20/why-is-the-world-afraid-of-young-refugee-men>> accessed 6 October 2021.
- Stahn C, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019).
- Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 2 February 2008, 32 I.L.M 1192.
- Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Human Rights Council Forty-third session, 24 February-20 March 2020 Agenda item 3.
- Taylor D, 'French Police Clear Migrant Camp at Launch Point for Britain' *The Guardian* (29 September 2020) <<https://www.theguardian.com/world/2020/sep/29/french-police-clear-calais-migrant-camp-launch-point-britain>> accessed 25 January 2021.
- The Visual Journalism Team, 'Afghanistan: Where Will Refugees Go after Taliban Takeover?' *BBC News* (26 August 2021) <<https://www.bbc.com/news/world-asia-58283177>> accessed 26 August 2021.
- The Global Detention Project (*The Global Detention Project*) <<https://www.globaldetentionproject.org>> accessed 27 August 2021.
- The Global Detention Project, 'Country Report. Immigration Detention in Libya: A Human Rights Crisis' (2018) <<https://www.globaldetentionproject.org/wp-content/uploads/2018/08/GDP-Immigration-Detention-Libya.pdf>> accessed 18 May 2021.
- Tondo L, 'Revealed: 2,000 Refugee Deaths Linked to Illegal EU Pushbacks' *The Guardian* (5 May 2021) <<https://amp.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks>> accessed 26 August 2021.

- Tondo L, 'Croatian Police Accused of "Sickening" Assaults on Migrants on Balkans Trail' *The Guardian* (21 October 2020) <<https://www.theguardian.com/global-development/2020/oct/21/croatian-police-accused-of-sickening-assaults-on-migrants-on-balkans-trail-bosnia>> accessed 13 August 2021.
- Tindale C W, 'The Logic of Torture a Critical Examination' (1996) 22 *Social Theory and Practice* 3.
- UN News and Global Perspective Human Stories, 'Libya Shipwreck Claims 130 Lives Despite SOS Calls, as UN Agencies Call for Urgent Action' (23 April 2021) <<https://news.un.org/en/story/2021/04/1090462>> accessed 21 June 2021.
- UNHCR, 'World at War - Forced Displacement in 2014' (UNHCR Global Trends, 2015) <<https://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html>> accessed 6 September 2021.
- Universal Declaration of Human Rights GA Res 217 A (III), UN GAOR, 3rd Sess., 183rd plen mtg, UN Doc A/810, 10 December 1948 (UDHR).
- United Kingdom Government, 'Nationality and Borders Bill 2021' <<https://publications.parliament.uk/pa/bills/cbill/58-02/0141/210141.pdf>> accessed 31 August 2021.
- United Nations Human Rights Office of the High Commissioner, 'Deadly Practice of Migrant "Pushbacks" Must Cease - UN Special Rapporteur' (23 June 2021) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27200&LangID=E>> accessed 14 September 2021.
- UNHCR, 'Legal Considerations Regarding Access to Protection and a Connection between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries' (UN High Commissioner for Refugees, 2018) <<https://www.refworld.org/docid/5acb33ad4.html>> accessed 30 September 2021.
- UNHCR, 'UNHCR Concerned by Pushback Reports, Calls for Protection of Refugees and Asylum-Seekers' (*UNHCR The UN Refugee Agency*, 21 August 2020) <<https://www.unhcr.org/gr/en/16207-unhcr-concerned-by-pushback-reports-calls-for-protection-of-refugees-and-asylum-seekers.html>> accessed 5 August 2021.
- UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under The 1951 Convention and The 1967 Protocol Relating to the Status of Refugees' (UNHCR, 2019) <<https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>> accessed 25 May 2021.
- United Nations Meetings Coverage and Press Releases, 'Refugees, Migrants Branded "Threats", Dehumanized in Campaigns Seeking Political Gain, High Commissioner Tells Third Committee, Appealing for Return to Dignity' (31 October 2018) <<https://www.un.org/press/en/2017/gashc4247.doc.htm>> accessed 27 August 2021.
- United Nations, 'Detained and Dehumanised: Report on Human Rights Abuses Against Migrants in Libya' (Office of the United Nations High Commissioner for Human Rights, 2016) <https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> accessed 18 May 2021.
- UN Human Rights Committee (HRC), 'CCPR General Comment No. 29: Article 4: Derogations During a State of Emergency' 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 13(d) <<https://www.refworld.org/docid/453883fd1f.html>> accessed 9 September 2021.

Zois C, 'Frontex' Involvement in Illegal Pushbacks and EU's Possible International Responsibility' (Jean Monnet Project EURIS, 17 March 2021) < <https://www.jm-euris.eu/frontex-involvement-in-illegal-pushbacks/>> accessed 19 October 2022.

Wesel B, 'Turkey Migration Deal a "Stain on EU Rights Record"' DW Made for Minds (17 March 2021) <<https://www.dw.com/en/turkey-migration-deal-a-stain-on-eu-rights-record/a-56903392>> accessed 16 June 2021.

Wolfendale J, 'Training Torturers: A Critique of the "Ticking Bomb" Argument' (2006) 32 Social Theory and Practice 270.