



MIGRANT PUSHBACK OPERATIONS - A HUMANITARIAN APPROACH BASED ON A REPORT ON WAYS TO ADDRESS THE IMPACT OF MIGRANT PUSHBACK OPERATIONS BY LAND AND SEA ON HUMAN RIGHTS

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Abstract:

Utilizing a humanitarian approach, migrant pushback operations represent policies and measures that undermine the international protection afforded to migrants, including refugees, and breach international principles and obligations as established by international human rights and refugee laws. These operations typically involve the forced return of migrants to their countries or regions, or out to sea, and are marked by their rapid execution without providing access to judicial recourse due to the summary procedures employed.

Keywords: *Concept of Pushback, Violation of International Obligation, Human Rights of Migrants, Refugee Rights.*

INTRODUCTION:

All migrants are entitled to the protection stipulated by international human rights law, without discrimination. Nations are obligated to promote and safeguard the rights of all individuals within their jurisdictions, including migrants, irrespective of their immigration status. International human rights treaties provide the legal framework essential for addressing the challenges of human rights in the management of borders and immigration regulation.

A significant challenge in upholding human rights at international borders is the prevalent use of pushback operations, which unequivocally infringe upon the rights of migrants and contravene the obligations that states hold under international law. In response, receiving countries often attempt to legitimize these operations by adopting laws, making decisions, and issuing executive orders.

The severe human rights violations stemming from these pushback operations have prompted the Special Rapporteur on the human rights of migrants, Felipe González Morales, to raise concerns and underscore the critical need to terminate these practices. He advocates for managing immigration and border governance in a manner that primarily upholds the human rights of all migrants, including those without documentation.

This study underscores the necessity of defining the concept of pushback as a strategy employed by numerous countries to regulate and manage their borders through a humanitarian lens. This approach encompasses various forms of severity in the deportation of migrants, driven by a general punitive and deterrent policy of the host country. Moreover, it exposes the consequent human rights violations and humanitarian repercussions for migrants, including asylum seekers.

In this context, we address the following question: **What is the concept of pushback operations, and what impact do they have on the human rights of migrants and asylum seekers?**

To tackle the problem presented in this study and to articulate a definition of pushback operations through a humanitarian perspective, the study is structured into two main themes. In the first theme, we explore the concept of pushback by defining it and distinguishing it from related concepts, and by detailing its implications. In the second theme, we analyze the resulting effects and consequences on international human rights principles and obligations.

Throughout this study, we employ a descriptive methodology, delineating unlawful practices that characterize elements of pushback operations to differentiate them from other border management measures.



First Section: The Concept of Pushback Operations

Amid the global imposition of stringent restrictions on regular migration routes, many individuals find themselves compelled to embark on journeys by illegal means. In response to this, destination countries have formulated and implemented a variety of laws and policies, including pushback operations, aimed at tightening border controls and curtailing the influx of undocumented migrants.

These measures necessitate a delicate balance between providing international protection to migrants, as outlined in international human rights and refugee laws, and the sovereign rights of states to devise solutions for managing migration challenges and governing their borders effectively.

First- The Concept of Pushback Operations from a Humanitarian Perspective:

Various terms are used to describe the departure of a foreigner from the territory of a state, whether voluntarily or forcibly. This has simultaneously created overlaps in the meanings of these terms. In an effort to unravel this confusion, legal experts have introduced "pushback" as a new concept that necessitates a clear definition and distinction from previous concepts used in the field of state border management and immigration regulation.

1. Definition and Content of Pushback Operations from a Humanitarian Perspective:

The term "pushback" specifically refers to the forced or voluntary departure of a foreigner from the territory of the state in which they are located.¹ This term has also led to semantic overlap with related concepts, prompting legal scholars to seek clarity.

In their efforts, these experts have introduced "pushback" as a distinct concept necessitating a clear definition and differentiation from previous terms associated with the management of state borders and immigration regulation.

Owing to divergent views between countries experiencing significant migrant inflows, who often perceive pushback operations merely as a collection of lawful measures aimed at combating illegal immigration, and legal experts along with international organizations, who view these operations as involving serious human rights violations due to the arbitrary nature of their implementation, it has proven challenging to achieve an international consensus on the definition of pushback operations.

In this discourse, we adopt the definition put forward by the Special Rapporteur: Pushback operations consist of a series of summary measures and procedures involving third countries or other entities. These operations result in the deportation of migrants through expulsion and forced return not only to their country of origin or a previous transit country but also out to sea, all without any individual assessment of their human rights needs. Such actions encompass many practices that are prohibited by international law.²

The Special Rapporteur on human rights identifies pushback operations as fraught with numerous unlawful practices and in contradiction to the principles and obligations of international law due to the arbitrary nature of deportations to various potentially unsafe destinations.

These operations not only involve other entities beyond the state conducting the pushback but are also executed within or outside the territorial borders or at sea, without any individual assessment of the migrants' humanitarian needs.

Therefore, the essence of pushback operations involves deporting migrants, including refugees, based on arbitrary procedures that fail to consider each case individually, thereby denying migrants access to justice due to the employment of summary procedures that facilitate rapid return or

¹From a security perspective, pushback operations are defined as a set of procedures and measures taken by the host state, a third state, or other entities within the framework of international cooperation to address illegal migration and organized crime, aiming to regulate migration and manage international borders.

²See Report on Ways to Address the Impact of Pushback Operations on Land and Sea on Human Rights, Human Rights Council, Session 47, May 12, 2021, p. 5, A/HRC/47/30.



redirection to other locations based on a general strategy, in collaboration with other entities involved in border management.

1.1- Arbitrary Deportation of Migrants, Including Refugees:

Migrant pushback operations are characterized by arbitrary measures within the deportation processes, employing summary procedures and lacking individual case assessments. These operations encompass expulsion, forced return, exclusion, and denial of entry into the state's territory, all executed without due regard for national and international procedural safeguards.

The use of summary procedures invariably results in migrants and refugees being deprived of the opportunity to have their situations thoroughly evaluated and verified according to their specific circumstances, potentially endangering their lives, especially when they are deported to unspecified destinations where they may face detention under inhumane conditions.³

The Committee on Enforced Disappearances has noted that when pushback operations lead to the deprivation of migrants' freedom and the obscurity of their fate or whereabouts, they amount to enforced disappearances. This is further aggravated by the seizure or destruction of migrants' personal belongings, documents, and phones, culminating in the loss of contact with their families and challenges in locating them.

The lack of individual assessment of migrants is a natural outcome of using summary procedures, such as the deployment of new and emerging technologies at borders⁴, along with the installation of physical barriers and advanced monitoring and deterrence systems, aimed at tightening security surveillance on international borders and preventing any attempts by migrants and asylum seekers to enter, whether by land or sea. This approach inevitably criminalizes all migrants, obstructing their access to justice and the benefits of legal frameworks and procedural safeguards, thus placing them outside the protection of the law.

Furthermore, the absence of individual evaluations poses significant risks to refugees by potentially compromising their right to life and physical safety, as administrative and judicial authorities fail to consider each migrant's case individually, according to international legal standards, and assess whether there is a risk to the life and safety of the migrant being pushed back to a third country.

This lack of assessment often leads destination countries to circumvent their obligations under the principle of non-refoulement of asylum seekers, trapping these individuals in first arrival or transit countries with relatively less capacity to provide appropriate protection or process asylum claims according to international law.⁵

1.2 - Involvement of Various Entities in Pushback Operations:

The execution of pushback operations is not limited to public forces such as regular police, border police, specialized units, and military and security elements, but may also include private entities acting with their permission or support, such as paramilitary groups, transportation companies, operators of commercial vessels, private security personnel, and others⁶.

This involvement signifies the state's reliance on the private sector to carry out its border management activities, potentially secretly, which may increase the risk of serious human rights violations of migrants due to the use of force and detention by these private entities. Moreover, the growing participation of military and security companies has transformed immigration services

³See paragraph 35 of General Comment No. 1 (2023) on enforced disappearance in the context of migration, Committee on Enforced Disappearances, Document No. CED/C/GC1, dated October 26, 2023.

⁴Report on Human Rights Violations at International Borders, Trends, Prevention, and Accountability, Human Rights Council, Session 50, July 8, 2022, p. 6, Document No. A/HRC/50/31.

⁵Report on the Impact of the Use of Private Military and Security Services in Managing Migration and Borders on the Protection of Migrant Rights, Human Rights Council, Session 45, October 2, 2020, p. 7, Document No. A/HRC/45/9.

⁶Report on Ways to Address the Impact of Pushback Operations on Land and Sea on Human Rights, Human Rights Council, Session 47, 2021, p. 5, A/HRC/47/30.



and border management into profitable economic activities⁷ where humanitarian considerations are often disregarded.

In the context of participating in pushback operations, border monitoring has extended beyond the territorial borders of destination countries by involving countries of arrival, transit, or departure in intercepting undocumented migrants before they reach their destinations, similar to the actions of the Libyan Coast Guard in intercepting migrants as part of agreements and cooperation between Italy, the European Union, and the Libyan government⁸ to reduce the arrival of migrants to Europe, facilitated by the Frontex agency.

This Italian-Libyan coordination and cooperation also included secret agreements criticized by the United Nations and human rights advocates⁹, through which destination countries seek to evade and withdraw from humanitarian standards related to protecting migrants attempting to reach their territories.

The concept of a "safe third country" as a practice and strategy has become increasingly used recently, allowing the return of asylum seekers to a third country deemed safe because it supposedly provides legal and procedural guarantees and suitable conditions for accommodating them, creating an impression of good intentions.

However, this process inherently constitutes a pushback of migrants and violates the principles of non-collective expulsion and non-refoulement, as well as international human rights obligations. In this framework, numerous legislations and government orders have been enacted, and several agreements¹⁰ have been signed, designating a third country that lacks the minimum conditions for protection or the capability to process asylum claims, thereby facilitating the return of migrants to it as part of a general strategy related to state border management.

2 - Distinguishing the Concept of Pushback from Related Concepts:

The need to crystallize the concept of pushback arises from its association with several concepts used in border management and migration regulation, which may sometimes converge or diverge, creating confusion and ambiguity in distinguishing between them. This section aims to clarify the following elements:

2.1 - Distinguishing Pushback from Entry and Residence Denial:

The aim of pushback operations is rapid return and prevention of a migrant or refugee from entering or landing on the territory of the state at its ports of entry. In this case, pushback closely resembles the concept of entry denial, which is a measure states take to regulate the entry of foreigners into their territory based on the conditions of each country or reasons related to the foreigner themselves.¹¹

⁷Report on the Impact of the Use of Private Military and Security Services in Managing Migration and Borders on the Protection of Migrant Rights, Human Rights Council, Session 45, October 2, 2020, p. 8, Document No. A/HRC/45/9.

⁸This includes the Memorandum of Understanding between Libya and the European Commission on addressing the phenomenon of illegal migration dated May 22, 2006, the Memorandum of Understanding between Libya and the European Union on borders, mobility, and migration dated July 2, 2007, the Friendship Treaty between Libya and Italy on issues including combating migration and securing borders dated August 30, 2008, and the Memorandum of Understanding on cooperation in development, combating illegal migration, human trafficking, smuggling, and enhancing border security between Libya and Italy dated February 2, 2017.

⁹Mustafa Abdellah Abu Al-Kasim Khushaim, The Impact of Illegal Immigration on Italian-Libyan Relations, International Politics, Volume 53, Issue 212, April 2018, p. 60.

¹⁰For more details, see Report on Human Rights Violations at International Borders, Trends, Prevention, and Accountability, Human Rights Council, Session 50, July 8, 2022, Document No. A/HRC/50/31, p. 14 and following.

¹¹Mohamed Boujana, Treatment of Foreigners under the Provisions of Contemporary International Law, Ph.D. thesis, Ben Yousef Ben Khedda University, Algiers, Faculty of Law, 2015/2016, p. 203.



A foreigner cannot enter the territory of the state without satisfying the conditions and procedures set by state law. However, pushback differs in that it is broader and more comprehensive, as its procedures extend inside the territory of the state, preventing the migrant from reaching its judicial jurisdiction, or preventing them from landing or continuing travel, or expelling them outside its territory by de facto order and without relying on legislative or regulatory text.

If such texts are available, they serve to camouflage this operation, whereas entry denial is based on a legislative text carried out by the state alone without the participation of any other entity, as is the case in pushback operations. Additionally, the prohibition of residence applies to foreigners or citizens as a secondary or supplementary penalty under the jurisdiction of the judicial authority, whereas the pushback procedure applies to non-resident migrants or refugees, excluding citizens.

2.2 - Distinguishing Pushback from Expulsion and Expatriation

Expulsion pertains to the forced removal from a state's territory of a resident, whether an individual or a group, in exceptional circumstances such as in wartime.¹² Expulsion is carried out by a decision from the competent administrative authority, based on a specific legislative text¹³, and its reasons are linked to the person being expelled, for example, for violating public order.

Although both pushback and expulsion result in the forced removal of a foreigner from the state's territory, they differ in that pushback operations occur at the state's borders and may extend to the borders of another state in the case of cooperative enforcement of these measures. Additionally, pushback operations can be executed at sea or other locations as a security measure unrelated to the person's characteristics since this measure does not allow for individual assessment of the migrants to determine the reasons behind it.

Expatriation is similar to expulsion in that it affects a resident foreigner, but they differ in that expulsion is considered a discretionary security measure, which aligns it more closely with pushback since both are considered immediate measures within the scope of security measures, yet pushback does not target residents.

Ultimately, while pushback may share some similarities in meaning with the aforementioned concepts, it stands apart in its procedures from other measures related to deportation, expulsion, and denial of entry. These other measures involve legitimate practices based on legislation or executive orders in general, whereas pushback is considered an illegitimate practice that may involve camouflage to legitimize it through a legislative text or the issuance of a governmental executive order.¹⁴

Second - The Concept of Pushback Operations from a Security Perspective

The increasing flow of migrants and refugees poses a significant burden on many states, particularly on the external borders of the European Union. To address this issue, states have implemented pushback operations as part of a general policy aimed at deterring or punishing migrants after enacting legislation that criminalizes undocumented migrants.

Pushback operations have been used purely as a security measure in border management at the expense of protecting the human rights of migrants. In this vein, most countries have sought to legitimize these practices. Accordingly, this section will focus on the security perspective of pushback operations in managing the external borders of the European Union in light of the massive migrant flows.

1- Implementing Pushback as a Deterrent and Criminal Measure

¹²Hussam Eldin Fathi Nasser, *The Legal Status of Foreigners*, Second Edition, Dar Al-Nahda Al-Arabiya, 1966, p. 37.

¹³Amani Abdel Maksoud Saud, *Deportation of Foreigners in Light of Recent International Changes*, Volume 10, Issue 74, December 2020, p. 1254.

¹⁴ Report on Human Rights Violations at International Borders, Trends, Prevention, and Accountability, Human Rights Council, Session 50, July 8, 2022, Document No. A/HRC/50/31, p. 8.



In recent years, many countries have enacted laws that criminalize illegal immigration, along with arbitrary detention and rapid deportation operations, and have also criminalized organizations and individuals providing humanitarian aid to migrants in search and rescue operations¹⁵, known as "the crime of solidarity."

Here, those providing aid to migrants at passages and crossings face convictions under the name of "assisting in the illegal entry and residence of foreigners"¹⁶, " despite international ethics and human solidarity dictating that life-saving operations and humanitarian aid cannot be criminalized or legally pursued, as they are simply a human necessity and a requirement of human rights.

This has led the United Nations High Commissioner for Human Rights to express concerns about the use of anti-smuggling laws in several European countries to criminalize migrants and their helpers, urging the enhancement of safe pathways for regular migration to address the issue of migrant smuggling.¹⁷

Europe, through its border management measures, has criminalized irregular migration as a criminal threat that justifies international cooperation at the level of global security forces, which provides ample scope for implementing pushback operations.

To this end, the European Parliament enacted Directive 115/2008/EC¹⁸, which included common rules and procedures among all EU countries regarding the return of undocumented migrants, who are detained as criminals for a period of 6 months, raising significant concerns among many experts from the Human Rights Council, pointing out that undocumented migrants are not criminals.¹⁹

The European Union has further strengthened its joint border monitoring through the European Border and Coast Guard Agency (Frontex), which has established a complete European network of border security patrols and conducted joint operations with other countries in West Africa and the Mediterranean to halt migration flows towards the Canary Islands and the Italian island of Lampedusa²⁰. The agency's powers were expanded under the New Pact on Migration and Asylum of 2020, allowing it to carry out joint maritime, land, and air operations to control migration movements and forced returns²¹.

From the above, it is evident that the European Union, through its implementation of pushback operations, has prioritized responding to migration pressures primarily to secure its borders and deter and suppress unwanted migrants, which can lead to serious violations of the rights of migrants, including asylum seekers.

¹⁵Report on the Impact of the Use of Private Military and Security Services in Managing Migration and Borders on the Protection of Migrant Rights, Human Rights Council, Session 45, October 2, 2020, p. 7, Document No. A/HRC/45/9.

¹⁶Claude Calame, *Stigmatization and Exclusion of Migrants and Refugees: A New Form of Racism?* Communications, Year 2020, 107, p. 118.

¹⁷ This concern was expressed by the United Nations High Commissioner for Human Rights following the trial of 24 human rights defenders after their involvement in rescuing migrants at risk at sea, all members or volunteers in a Greek non-governmental organization known as the International Emergency Response Center, which helped more than 1,000 people reach safety and provided medical assistance and other aid in Lesbos, Greece between 2016 and 2018. See more at <https://www.ohchr.org/ar/press-releases/2023/01/trial-human-rights-defenders-greece-helping-migrants>.

¹⁸Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals.

¹⁹Azzouz Kerdoun, op-cit, p. 98.

²⁰Azzouz Kerdoun, op-cit, p. 99.

²¹Idil Atak Ndeye Dieynaba Ndiaye, *Frontex Agency: The European Border Police Challenged by the Respect for Human Rights of Migrants*, Quebec Journal of International Law, Year 2020, H-S p. 369.



2- Legitimizing Pushback Operations

Many European countries have sought to legitimize pushback operations, whether through readmission agreements in the form of bilateral return agreements to countries of origin or safe third country agreements, which may not actually be safe and may lack a legal system. In this context, the European Court of Human Rights has ruled that these agreements cannot be relied upon to justify unlawful practices against migrants.²²

Legitimization of pushback operations has also been pursued through national legislation, such as the UK's initiative with the Nationality and Borders Bill in 2021, which explicitly legitimized pushback operations by violating international obligations under international human rights law and refugee law²³.

Amid significant criticism from international UN organizations and human rights organizations, the bill received royal assent on April 28, 2022, to become law. Additionally, emergency measures have been imposed by many countries as a pretext for conducting pushback operations, such as along the EU's external borders with Belarus, similar to the government orders issued in Hungary since 2016 to address the migrant crisis, and the governmental order issued by the Minister of Interior in Lithuania instructing border guards to deny entry to all Belarusian migrants and push them back.²⁴

Second Section: The Consequences of Pushback Operations on International Principles and Obligations

Pushback operations directly affect the human rights of migrants due to the arbitrariness in deportation processes, undermining the obligations imposed by both international human rights law and refugee law on the host state when managing its maritime and land borders. The increased use of force, instances of torture, and harsh treatment, in addition to failing to aid migrants at sea and leaving them to certain death, constitute significant violations of international rules and standards.

First - Violation of International Law Principles Related to Migrants and Refugees:

The principles of non-collective expulsion and non-refoulement are fundamental to both international human rights law and refugee law, prohibiting all forms of arbitrary deportation such as mass expulsion without an objective assessment of each migrant or transferring any individual under circumstances that might endanger their life and physical safety.

1 - Violation of the Principle of Non-Collective Expulsion:

Pushback operations revive an old issue of reconciling the right to expel, as an inherent right of sovereignty, with the requirements of international law, which allows the state the right to regulate the entry and exit of foreigners, also giving it the right to expel as a principle of international law rarely disputed.²⁵

On the other hand, national legislations, international judiciary, and jurisprudence agree that this right is not absolute for the state, as it should not be exercised arbitrarily and must be subject to

²²The court issued a decision in the case of *Hirsi Jamaa and Others v. Italy*, ruling that Italy violated Articles 3, 4, and 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms by returning Somali and Eritrean migrants who traveled by sea to Libya, despite arguments presented by the Italian government regarding bilateral agreements between Italy and Libya on readmission. However, the decision, which was in favor of the asylum seekers and included compensation, indicated that bilateral agreements cannot be used to justify practices that conflict with human rights. See the report by the Special Rapporteur on the Human Rights of Migrants, François Crépeau, Human Rights Council, Session 29, Document No. A/HRC/29/36, dated May 8, 2015, p. 11.

²³Report on Human Rights Violations at International Borders, Trends, Prevention, and Accountability, Human Rights Council, Session 50, July 8, 2022, Document No. A/HRC/50/31, p. 9.

²⁴*Ibid.*, pp. 9 and 10.

²⁵Preliminary report on the expulsion of foreigners, submitted by Maurice Kamto, Special Rapporteur, International Law Commission, Session 57, April 4, 2005, Document No. A/CN.4/554, p. 4.



the authority of international law.²⁶ While this applies to individual expulsion exercised by states against foreigners who violate public order or national security as generally accepted reasons for expulsion²⁷, mass expulsion operations are considered prohibited acts under international law as stipulated by numerous international human rights conventions.

Hence, while each state retains the right to regulate immigration to its territory, it must also adhere to the commitments it has made in global and regional international conventions, which explicitly prohibit collective expulsion²⁸. However, the current landscape of migration management and international border control²⁹ often sees a prevalence of pushback operations, both on land and at sea. These operations entail the mass expulsion of thousands of migrants without any individual assessment, thus contravening the principles outlined in international conventions.

This has led the Special Rapporteur on the rights of migrants, Felipe González Morales, to express in his report deep concern about these operations representing a serious violation of the principle against collective expulsion, as seen on the Greek-Turkish land and maritime borders with the militarization and implementation of cooperation measures with the Frontex agency, which resulted in preventing the entry and collectively expelling tens of thousands of migrants and asylum seekers through summary and collective procedures.

Despite the widespread occurrence of mass expulsion operations at the maritime and land borders of the European Union in a frightening and life-threatening manner, this phenomenon is also prevalent in many African countries, where thousands of migrants were collectively expelled from Libya to Chad, Egypt, and Sudan in 2020. Similarly, Mexico and Guatemala in the Americas returned groups of Honduran migrants in caravans without individual assessment procedures³⁰.

2 - Violation of the Principle of Non-Refoulement:

While the International Convention on the Protection of Refugee Rights in 1951³¹ does not explicitly recognize the right of asylum as national constitutions might, it emphasizes in Article 33, Paragraph 1, the principle of non-refoulement, which prohibits the expulsion or return of any person to areas

²⁶Ibid., p. 9.

²⁷Richard Perruchoud, Mass Expulsion of Foreigners, French Yearbook of International Law, Year 1988/34, p. 679.

²⁸The prohibition of collective expulsion of migrant workers and their families, requiring an assessment in each case, was emphasized in Article 22 of the International Convention on the Protection of All Migrant Workers and Members of Their Families, and the Human Rights Committee stressed that Article 13 of the International Covenant on Civil and Political Rights is incompatible with laws and resolutions that stipulate collective expulsion, recommending that the Committee on the Elimination of Racial Discrimination ensure that non-nationals are not collectively expelled. See: Report on Ways to Address the Impact of Pushback Operations on Land and Sea on Human Rights, Human Rights Council, Session 47, May 12, 2021, p. 6, A/HRC/47/30. p. 6.

²⁹Although the prohibition in regional international conventions is accompanied by an exception that may represent an argument generally used by states in carrying out mass expulsion operations, Article 9/22 of the American Convention on Human Rights of 1969 prohibits mass expulsion of foreigners. However, based on Article 1/27, a state can circumvent this prohibition during a war or a general emergency or "another exceptional circumstance threatening the independence or security of the state." The same provision is included in Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, where Article 4 prohibits mass expulsion of foreigners and Article 15 of the Convention allows non-compliance with obligations in the event of a national security threat.

³⁰For more details, see: Report on Ways to Address the Impact of Pushback Operations on Land and Sea on Human Rights, Human Rights Council, Session 47, May 12, 2021, Document No. A/HRC/47/30, p. 12.

³¹The 1951 United Nations Refugee Convention is the first to stipulate the principle of non-refoulement in Article 33(1), as does the International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984 in Article 3, and the International Convention for the Protection of All Persons from Enforced Disappearance in Article 16.



where their life and freedom would be threatened, internationally recognizing the right to asylum³².

However, exceptions allow states to disregard the principle of non-refoulement for inherent security reasons or threats to the country³³, but these exceptions must be interpreted narrowly and limitedly, considering that even if included in the rules of international refugee law, international human rights law absolutely prohibits it, implying that the latter will oppose the transfer of a refugee even if international refugee law allows it³⁴.

Despite the principle of non-refoulement being a fundamental principle of both international human rights law and refugee law, prohibiting all forms of deportation and transfer of any individual when there are substantial reasons to believe that the individual would be at risk to their life or freedom, pushback operations involve various measures that collectively lead to the deportation of migrants, including asylum seekers, forcing them into involuntary return.

These measures are taken in cooperation with other countries, either openly in the form of circumventing agreements on the principle of non-refoulement through safe third country agreements, which allow for the forced return of refugees to such countries.

Examples of these agreements include the bilateral agreement between Germany and Greece in 2018, which allows for the immediate return of asylum seekers from the German-Austrian border to Greece without individual risk assessment or consideration of the deficiencies in the Greek asylum system, deemed illegal by the Munich Administrative Court in 2021³⁵, or they may take a secretive form without a bilateral agreement between the countries, like the actions of Austrian authorities routinely forcing the return of migrants in cooperation with Slovenian authorities to Croatia, then to Bosnia and Herzegovina, considered a violation of the principle of non-refoulement by the Austrian Administrative Court in 2021³⁶.

Second- Pushback Operations as a Violation of International Obligations:

Pushback operations entail violations of international obligations under human rights law, including the right to life and physical safety due to the use of force during interception and summary return, impacting their lives and health during transit without the possibility of accessing justice and redress, not to mention the violations of search and rescue obligations at sea.

1 - Violation of International Human Rights Obligations for Migrants

Pushback operations exacerbate the decline in respect for human rights at international borders, leaving many humanitarian consequences, whether related to the violation of basic rights of migrants such as the right to life and physical safety, or violating their right to asylum and justice.

1.1- Violation of the Right to Life and Physical Safety:

The International Covenant on Civil and Political Rights of 1969, along with numerous other international charters, asserts that the right to life and physical safety are fundamental rights that all states must observe and uphold. States are expected to automatically fulfill the provisions outlined in these documents by taking a series of formal steps in the realms of legislation and social policies to ensure their realization.³⁷

³²Azzouz Kerdoun, Irregular Immigration in the Euro-Mediterranean Space and the Protection of Fundamental Rights, *Quebec Journal of International Law*, Year 2018, 31-1, pp. 104-105.

³³Article 33, Paragraph 2 of the Convention.

³⁴Memorandum on Migration and the Principle of Non-Refoulement, Reports and Documents, Selections from the International Review of the Red Cross 2018, DOI: 10.1017/S1816383118000152, p. 4.

³⁵Ibid., p. 18.

³⁶Report on Human Rights Violations at International Borders, Trends, Prevention, and Accountability, Human Rights Council, Session 50, July 8, 2022, Document No. A/HRC/50/31, p. 17.

³⁷Article 2 of the International Covenant on Civil and Political Rights, 1966.



Moreover, torture is prohibited through the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Vienna Declaration and Programme of Action of 1993 consider torture one of the most grievous violations of human dignity, resulting in the destruction of dignity and impairing individuals' ability to continue their lives and activities.³⁸

While international human rights conventions emphasize the prohibition of any actions that violate the right to life and physical safety, pushback operations involve the use of force in ways that blatantly infringe upon these rights through practices like beating, electric shocks, and stripping migrants of their clothing in adverse weather conditions, along with physically invasive searches that disregard gender sensitivities.

The intent of these practices is to subject migrants to torture and other forms of cruel, inhuman, or degrading treatment. Migrants arriving in large groups are often targeted with indiscriminate use of chemical irritants, water cannons, and kinetic impact projectiles to prevent their entry, disperse them, and break them up, resulting in serious injuries and loss of life.³⁹

Statistics indicate that among the million migrants who reached the European Union in 2015, 3,771 lost their lives attempting to cross the Mediterranean from Gibraltar to the eastern Aegean islands, particularly in the deadly area between Libya and Sicily. In 2018, while the number of arrivals dropped to less than 142,000, the number of dead and missing reached 2,277, a more than twenty-fold increase compared to 2015.⁴⁰

The reasons for the decrease in migrant numbers with a rise in deaths and missing persons are attributed to increased inspection operations by the police and military under the auspices of the Frontex agency and the suppression of non-governmental organizations managing rescue operations.⁴¹

1.2- Violation of the Right to Asylum and Justice

Global and regional charters recognize the right to seek justice as a fundamental human right, such as Article 8 of the Universal Declaration of Human Rights⁴², Article 14(1) of the International Covenant on Civil and Political Rights, and Article 7(1) of the African Charter on Human and Peoples' Rights.

This right is dual in nature, being a fundamental right guaranteed to every person under the jurisdiction of the state without discrimination based on nationality or immigration status, and a principle imposing a set of obligations on states under international human rights law, including the provision of rights beneficial to all migrants as components of this right.

These include the right to legal assistance and representation, the right to consular assistance, the right to access information and the use of an interpreter, and the right to access justice and a fair trial, which are of utmost importance⁴³ in determining refugee status and preventing the return of individuals to places where their lives and freedom might be at risk.

The realization of the right to seek justice necessitates that migrants have access to and the ability to enter the territory of the state, which is not facilitated by the summary procedures employed in pushback policies, depriving migrants of legal protection under international human rights law and preventing individual case assessments based on procedural guarantees.

³⁸Lea Levin, *Human Rights Questions and Answers*, Sixth Edition, Loon Morocco Press, 2006, p. 158.

³⁹Report on Ways to Address the Impact of Pushback Operations on Land and Sea on Human Rights, Human Rights Council, Session 47, May 12, 2021, Document No. A/HRC/47/30, p. 12.

⁴⁰Claude Calame, *op-cit*, p. 115.

⁴¹Claude Calame, *op-cit*, p. 115.

⁴²Article 8 states: Everyone has the right to appeal to the competent national courts for effective remedy against acts that violate the fundamental rights granted him by the constitution or the law.

⁴³Memorandum by the Secretary-General on Human Rights of Migrants, General Assembly, Session 73, dated September 25, 2018, p. 6, Document No. A/73/178/Rev.1.



2- Violation of Search and Rescue Obligations at Sea:

Captains of ships are obligated to offer assistance to those in danger at sea regardless of their nationality, status, and the circumstances they are in, as mandated by the United Nations Convention on the Law of the Sea of 1982⁴⁴, and the International Convention for the Safety of Life at Sea of 1974⁴⁵. These conventions, along with the International Convention on Maritime Search and Rescue of 1979, impose duties on state parties to ensure communication arrangements and coordination for distress situations within their areas of jurisdiction and to rescue those distressed at sea near their shores⁴⁶.

Furthermore, international ethical principles can be applied without detracting from a state's right to manage its borders, in treating undocumented migrants, it is an international ethical duty to conduct rescue operations and provide assistance to undocumented migrants facing drowning and death in territorial waters or off its coasts, and to respond to distress calls related to this matter.⁴⁷ Conversely, maritime disasters and the staggering number of migrant deaths at sea due to increasing interceptions by coast guards in their pushback operations and the significant decrease in rescue operations conducted by private commercial vessels have occurred. Additionally, the sinking of boats due to malfunctions as migrants choose maritime routes to reach the other shore and their transit via fishing boats carrying large numbers of them at once, up to 150 people in a single boat, has been documented.⁴⁸

The number of deaths during crossings in the central Mediterranean Sea, particularly the deadly route from Libya to Italy and Malta, was alarmingly high, with at least 2,239 migrants perishing between 2019-2020 while attempting to cross the sea. Migrants who traverse this route account for 69% of all Mediterranean migrant deaths⁴⁹.

Conclusion:

Drawing from the discussions detailed in this research paper, several conclusions can be distilled as follows:

- The concept of pushback operations is defined as those unlawful measures taken against migrants and asylum seekers, characterized by summary procedures that lack individual assessment and deny access to justice.
- Non-state actors, in secret or public collaboration with host countries, participate in pushback operations. These entities include private organizations or a third country within the framework of what is known as a safe third country, where asylum seekers are resettled, or a third country that collaborates in repelling migrants outside the territorial borders of the host state.
- Host countries enact legislation, issue governmental orders, or enter into bilateral and multilateral agreements as legal tools to circumvent their international obligations, thereby legitimizing their pushback practices.

⁴⁴See Article 98, Paragraph 1 of the United Nations Convention on the Law of the Sea, 1982.

⁴⁵See Regulation 33(1) from Chapter VII of the International Convention for the Safety of Life at Sea, 1974.

⁴⁶See: A Guide to Principles and Practices Applicable to Migrants Rescued at Sea, accessed on February 19, 2024, available at <https://www.unhcr.org/sites/default/files/legacy-pdf/5358a7ac6.pdf>

⁴⁷Dr. Hassan Hassan Imam Sayed Al-Ahl, *Combating Illegal Immigration in Light of International Responsibility and the Laws of the International Law of the Sea*, First Edition, Dar Al-Fikr Al-Jamie, Alexandria, 2014, p. 235.

⁴⁸Mohamed Saeed Al-Sabah, *The Crime of Smuggling Migrants (A Comparative Study)*, Legal Books House, Dar Al-Shatat for Software Publishing, Egypt, 2013, p. 32.

⁴⁹Thematic Report, *Lethal Disregard: Search and Rescue and Protection of Migrants in the Central Mediterranean*, United Nations High Commissioner for Human Rights, May 2021, p. 3, available at <https://www.ohchr.org/sites/default/files/2023-12/lethal-disregard-ar.pdf>



- Many countries adopt a purely security-oriented approach to border management, criminalizing undocumented migrants and even those who assist them, without establishing legal migration pathways. This approach facilitates the expansion of pushback operations and increases the violation of the rights of migrants and refugees.
 - Pushback operations have profound effects on the fundamental rights of migrants and refugees, particularly the right to life, as hundreds of thousands lose their lives due to obstacles in the rescue and assistance processes at sea, and exposure to all forms of violence and torture. Additionally, their right to seek justice is compromised through the summary procedures adopted in these practices.
- In light of these conclusions, the paper offers suggestions focused on two primary aspects:
- **Preventive Aspect:** Encouraging states to humanize the management of borders and the regulation of migration by creating new pathways for legal migration and establishing developmental programs in countries of origin, instead of bypassing international obligations and resorting to unlawful practices that deepen humanitarian violations and circumvent international principles and obligations, thereby preventing a solution to the underlying problem.
 - **Deterrent Aspect:** It is imperative to classify pushback operations as international crimes that could amount to crimes against humanity, in order to address all attempts to legitimize pushback practices carried out by host countries, transit countries, or safe third countries. Consequently, international responsibility should be assigned to all participants in pushback operations—states and private organizations alike—for all international violations of the principles and obligations related to migrants and refugees.

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