İSTANBUL UNIVERSITY PRESS

Public and Private International Law Bulletin

DOI: 10.26650/ppil.2022.42.1.927100
http://ppil.istanbul.edu.tr/tr/_

Public and Private International Law Bulletin

Submitted: 24.04.2021
Revision Requested: 18.08.2021
Last Revision Received: 03.12.2021
Accepted: 19.01.2022
Published Online: 04.04.2022

RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The *Refugee* in Law and Practice: In the Face of Western States' Pushback Policies

Batılı Devletlerin Geri İtme Politikaları Karşısında Hukuk ve Uygulamada *Mülteci*

Ekin Deniz Uzun*

Abstract

The present Article revisits the refugee definition and the *non-refoulement* principle in the context of some western states' pushback policies under international law. Recent incidents have shown that some western states have pushed back refugees by employing a nativist approach for political ends. In addition, mentioned western states in many situations have made references to produced false narratives about refugees to justify their *illicit actions*. By bringing the refugee definition of international law to light, this Article aims to set forth the illegality of these states' goal of manipulating the existing legal definitions. To this end, the Article first explains what a refugee is in international law, freeing it from the above-mentioned false narratives. Second, the analysis establishes the illegality of refugees' pushback under international law, which contradicts the *non-refoulement* principle.

Furthermore, potential solutions to suppress the states' illegal actions within the scope of pushbacks will be discussed separately by this Article. Finally, to conclude, the Article points that states find ways to create legal loopholes by ignoring the recognized rights of refugees. But it also underlines that being determined to find solutions that will deactivate pushback policies is essential to ensure that *every alien has the right to seek asylum*.

Keywords

Refugee, non-refoulement, international law, pushback policies, western states

Öz

Bu makale, bazı batılı devletlerin geri itme politikaları bağlamında uluslararası hukuk kapsamında mülteci tanımını ve *geri göndermeme* ilkesini yeniden gözden geçirmektedir. Son olaylar, bazı batılı devletlerin siyasi amaçlar için ulusun yerli halkının hak ve çıkarlarını gözeten bir yaklaşım kullanarak mültecileri geri ittiğini göstermiştir. Birçok durumda adı geçen batılı devletler, yasadışı eylemlerini haklı çıkarmak için mülteciler hakkında yanlış anlatılara atıfta bulunmuşlardır. Bu makale, uluslararası hukukun mülteci tanımını gün ışığına çıkararak, bu devletlerin mevcut yasal tanımları manipüle etme hedefinin hukuka aykırılığını ortaya koymayı amaçlamaktadır. Bu yönde, ilk olarak, makale uluslararası hukukta mültecinin ne olduğunu, yukarıda belirtilen yanlış anlatılardan bağımsızlaştırarak açıklamaktadır. Devam eden analiz, ikinci olarak, mültecilerin uluslararası hukuka göre geri itilmesinin yasadışı olduğunu ve bu durumun *geri göndermeme* ilkesiyle çeliştiğini tespit etmektedir.

Devletlerin geri itme kapsamında hukuka aykırı eylemlerinin bastırılmasına yönelik olası çözümler makale kapsamında ayrıca ele alınacaktır. Nihayetinde, makale sonuç olarak, devletlerin mültecilerin haklarını görmezden gelerek, yasal boşluklar yaratma yollarını bulabileceğine işaret eder. Ancak, makale -*her yabancının sığınma hakkı olduğundan emin olunması için*- devletlerin geri itme politikalarını devre dışı bırakacak çözümlerde ısrar edilmesinin önemli olduğu hususunun da altını çizmektedir.

Anahtar Kelimeler

Mülteci, uluslararası hukuk, geri itme politikaları, batılı devletler

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To cite this article: Uzun ED, "The Refugee in Law and Practice: In the Face of Western States' Pushback Policies" PPIL. Advanced online publication. https://doi.org/10.26650/ppil.2022.42.1.927100

I. Introduction

This Article argues/addresses the following two primary concerns:

- In what ways and why have the *western/wealthy-democratic* states[1] embraced/implemented pushback policies against refugees?
- In what ways and why do international law's refugee definition and the *non-refoulement* principle have direct links?

The analysis of this Article draws on examples that include pushback of refugees conducted mainly by the European Countries, particularly Greece. However, the Article also presents relevant incidents from Australia and the United States of America (USA).

Understandably, states adopt policies that would serve their sovereign interests the best. However, one step further, some western states' asylum policies breed in a nativist approach which shapes a negative collective memory in the societies about refugees. As a side note, this Article uses the terminology of nativism as a *proxy* for other ideologies and discourses, including racism, nationalism, xenophobia, and populism. Riedel and Newth underline that nativism encapsulates a dangerous and aggressive ideology rooted in the mentioned terms.[2]

Moreover, recent incidents -detailed in Part II of this Article- will show that exemplified western states have been persistently employing illegal pushback *tactics* to prevent refugees from reaching their borders. These tactics render both the meaning/spirit of the refugee definition and the *non-refoulement* principle ineffective. Considering that international law has established protection mechanisms for refugees, refusal of refugees disarms the means for protection. Therefore, the scope of protection

1 Western states, in the context of this Article, is used to define democratic-wealthy states that include the USA, the UK, Australia and the European Union countries:

> "What the West means in a given context, therefore, depends entirely upon who is invoking the term and for what purpose. But it is fair to say that virtually all definitions of Western civilisation drew a line somewhere across Europe, placing Germany (at times), Poland and Eastern Europe (at times), and Russia and the Balkans (at all times) beyond the pale of Western civilisation."

William H. McNeil, 'What We Mean by the West' Western Civ in World Politics 514.

Cambridge Dictionary defines western as follows: *"relating to countries in the west part of the world, especially North America and countries in the west of Europe"*. Cambridge Dictionary, 'Western Adjective (Also Western)' <https://dictionary.cambridge.org/dictionary/english/western> accessed 20 August 2021.

Lexico Dictionary defines the western world as follows: *"Europe, North America, and other (often relatively wealthy) countries with populations of mainly European ancestry; the culture and civilisation of these regions; the West."* Lexico Dictionary, 'Western World Pronunciation /ˌwɛst(ə)n ˈwɜːld/' <https://www.lexico.com/definition/western_world> accessed 20 August 2021.

Please see Matthew J Gibney and Randall Hansen, 'Asylum Policy in the West: Past Trends, Future Possibilities' (UNU World Institute for Development Economics Research, 2003) 10 <https://www.wider.unu.edu/sites/default/files/dp2003-068.pdf> accessed 23 August 2021.

2 Its origins and essence show that nativism uses *"populist tactics and offers a masking clothing to the ideology of nationalism"*. Rafał Riedel, 'Nativism versus nationalism and populism - bridging the gap' (2018) 2 Central European Papers 18. Further see George Newth, 'Rethinking "Nativism": Beyond the Ideational Approach' [2021] Taylor & Francis Identities Global Studies in Culture and Power 1-20 <https://www.tandfonline.com/doi/epub/10.1080/1070289X.2021.1969161?needAccess=true> accessed 25 December 2021.

sitting on the *non-refoulement* principle must be implemented in practice according to the refugee definition regulated by the Convention Relating to the Status of Refugees (the 1951 Refugee Convention).[3]

For the stated reasons, this Article intends to re-examine the international legal definition of a refugee. The goal of developing a discussion on the refugee definition under international law is to prove the vital importance of the *non-refoulement* principle and how some states have been depriving refugees of their internationally recognized rights.

Ongoing discussion proceeds in two main parts as follows:

The first part of this Article divides its analysis into two sections. The first section explains the refugee term in a philosophical sense. Then, in reference to Gordenker, the discussion describes how refugees find themselves in a position of *"unaccepted where they are, unable to return whence they came"*.[4]

This explanation expands its scope to include manipulative refugee definitions promoted by some politicians. There are different referrals about refugees, such as economic migrants, illegal immigrants, boat people, invading horde, terrorists, or opportunists. For example, Italy's former Interior Minister Maroni, in 2011, alleged that terrorists and Al- Qaeda affiliates and ordinary criminals were using the confusion about refugees to enter Europe.[5] This way of *"overly formalistic bad faith approach to interpreting international legal [regulations]"* is referred to as *hyper-legalism* by Daniel Ghezelbash.[6]

Ghezelbash explains hyper-legalism as the interpretation of a treaty in a way *"what it doesn't say"*.[7] Especially under the influence of the mass media, the ongoing security and migration issues, some Western refugee receiving states have been in alignment with *anti-refugee propaganda*. Described resistance against refugees has been exposed/expressed through name-calling, categorizing, and othering refugees, primarily by politicians and the mass media. As a result, international law refugee definition has lost its meaning through a lousy/bad faith interpretation. In other words, misleading descriptions have overshadowed the long-established legal meaning of refugee by international law and created an impression that refugees' rejection at the frontier by the designated states have happened because of the reasons stemming from

3 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.

4 Leon Gordenker, *Refugees in International Politics* (Beckenham: Croom Helm 1987) 213.

5 Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23 Int'l J Refugee L 449.

6 Daniel Ghezelbash, 'Hyper-legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' (2020) American Journal of Comparative Law 481.

7 ibid 485.

refugees. The illegality of states' policies against the principle of *non-refoulement* is thus seemingly neutralized. For instance, Dummett argues that continuous propaganda of government employees claims that asylum seekers are merely economic migrants. This tactic of states can be defined as obfuscation and carries one purpose: to convey that *"the motive of those claiming asylum trivial and unworthy"*.[8] As is stated by Dummett, refugees' motive of claiming asylum is questioned and approached with suspicion as a result.

It is vital to purge the refugee term from the definitional dilemma/quagmire created by the overtly pessimistic nativist approach against refugees. Because, as a term of art, refugee imports a variety of different legal consequences – including *"non-refoulement, non-rejection at the frontier, temporary refuge or asylum, and treatment after entry"*.[9] If the lousy/bad faith approach towards refugees is invalidated, the obligations of states will be much more meaningful. For this reason, the second section of Part I of this Article looks at how the refugee is defined under international law, regardless of manipulative discourse. The assessment in this section also brings a critical view to the refugee definition in international law, considering relevant challenges and shortcomings.

Following this, Part II of this Article devotes its analysis to the principle of *non-refoulement* in international law. Its first section explains the necessity of states to adhere to the principle of *non-refoulement* under all circumstances. Türk and Dowd underline that *"states interpret and implement their obligations under the 1951 Convention, both in terms of determining who comes within their scope and the rights and entitlements of recognized refugees"*.[10] Adding to this comment, this Article posits that states' interpretation of the refugee definition that comes to the surface through the nativist discourse aims to revise the existing international legal regulations that define refugees and establish the *non-refoulement* principle. The 1989 United Nations High Commission for Refugees (UNHCR) Executive Committee's General Conclusion on International Protection concerning the exercise of the 1951 Convention and its Protocol[11] called on states for effective implementation. It is recommended that the state parties employ a positive and humanitarian approach for the *"implementation of the provisions of the Convention and Protocol in a manner fully compatible with the object and purposes of these instruments"*.[12] But as is discussed, states' continuing disregard of humanitarian/good faith approach to interpreting the 1951 Refugee Convention and

8 Michael Dummett, *On Migration and Refugees* (Routledge 2001) 44.

9 Guy Goodwin-Gill, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 49.

10 Volker Türk and Rebecca Down, 'Protection Gaps' in Elena Fiddian Qasmiyeh, Gil Loescher and Katy Long et al. (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford Handbooks Online, 2014) 280.

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

12 UNHCR, 'Provision on International Protection Including Through Complementary Forms of Protection' Executive Committee of The UNHCR Programme Conclusions on International Protection (2005) 56th Session 274 < https://www.refworld.org/type,EXCONC,UNHCR,,5a2ead6b4,0.html> accessed on 24 May 2021.

its 1967 Protocol has lowered the standard of protection.[13] The Article explains this aspect by drawing upon the incidences that infringe the *non-refoulement* principle.

The second section of Part II considers possible solutions to eliminate pushback practices. Since the argued incidents in this part of the Article mainly focus on the EU countries and Greece, the discussion considers the European Court of Human Rights' (ECtHR) relevant case law. To this end, the arguments pose whether this supranational court may have a lasting effect to discourage states from actualizing pushbacks. In addition, activists' impact upon states' asylum procedures (positively) is briefly mentioned. Finally, the analysis posits that criticized states in this Article have *invented legal* ways to silence activists and rescuers, such as through sanctions.

The overall analysis, as is understood, shows the variety in understandings on the refugee definition and the *non-refoulement* principle with links to existing pushback policies. The findings conclude the illegality of pushback tactics that some western states have employed over the years. The analysis also looks for possible solutions to eliminate these pushback policies *at all costs.*

II. The Refugee in Law and Practice

This part examines *being a refugee* in two sections. The first section discusses in what ways the perception towards refugees is adversely affected by the nativist discourse. The analysis asserts that false narratives on refugees overshadow the existing refugee definition of international law. In the second section, the definition of refugee in international law is explained briefly, with its pearls and pitfalls, to put confusing referrals about refugees aside.

A. The Refugee Person: *The Black sheep*

1. Refugees under the Shadow of Misleading Narratives

Haddad defines the state of being a refugee as *"a breakdown in the state-citizen relationship within a sustaining political community"*.[14] This breakdown is fed mainly by misleading narratives developed against refugees *within the community*. Mentioned narratives can be prescribed as prejudices too.

Prejudices often emerge because of a combination of different factors, including *"xenophobia and racism, or perceptions of demographic pressure, economic inequality, and the specter of terrorism"*.[15] Mainly, racism, xenophobia, and

13 Türk and Down (n 10) 280.

14 Emma Haddad, 'Who Is (Not) a Refugee?' *The Refugee in International Society: Between Sovereigns* (Cambridge University Press 2008) 24.

15 Filiz Garip, Shannon Gleeson and Mathew Hall, *How the State Criminalizes Immigrants and to What Effect: A Multi-Disciplinary Account* (Cornell University 2019) 1.

social fragmentation affect how refugees are perceived (negatively) in a society. These factors grow out as a trend fed by different perceptions about *foreignness* and eventually *foreigners*. Foreignness refers to the country of origin, ancestry, or birthplace of refugees. However, as a side note, foreignness does not leave all the nationals vulnerable in equal terms.[16] In that, the vulnerability continues to function in connection with racial divisions.

In his book *The Nature of Prejudice,* Gordon Allport defines prejudice as *"thinking ill of others without sufficient warrant."*[17] Rich bases his explanation about prejudice on the cognitive account of prejudice, and he concludes that this phenomenon *"is well-positioned to support a broad understanding of the beliefs and attitudes that may provoke discriminatory behavior"*.[18] For instance, xenophobia and discrimination against refugees are the typical results of prejudices. Achiume defines this aspect of the discussion in question as *"explicit prejudice-based xenophobic discrimination"* [19]—*this* Article in the following analyses these aspects of prejudice -*xenophobia and discrimination*- orchestrated against refugees. The aim here is to add a concrete dimension to how xenophobia marginalizes refugees and thus exposes them to discrimination as an extension of the nativist approach. In other words, the purpose is to give examples of the areas where nativism functions.

2. Prejudice-Based Xenophobia and Discrimination against Refugees

This sub-section explains prejudice-based xenophobia and discrimination as the products that take their tools from states' nativist policies and affect societies' collective memory. This discussion aims to reveal how xenophobia and discrimination -based on prejudices- normalize pushback policies of states.

Although xenophobia and discrimination are two different concepts, this section discusses both due to their relation to the idea of prejudice. This discussion explains that the prejudices developed against refugees or fed by the states can lead to xenophobia and discrimination. Eventually, we can see the mentioned results in the states' asylum policies. While prejudices can lead to xenophobia or discrimination, discrimination and xenophobia can also happen simultaneously. For example, in many countries, *"race or national descent are invoked as grounds to deny or withdraw citizenship leaving individuals stateless and stripped of the enjoyment of their human rights"*.[20]

16 Tendayi Achiume, 'Beyond Prejudice: Structural Xenophobic Discrimination against Refugees' (2014) 45 Georgetown Journal of International Law 329.

17 Gordon W Allport, *The Nature of Prejudice* (25th Anniversary Edition, Addison -Wesley Publishing Company 1954) 6.

18 Stephen M Rich, 'Against Prejudice' (2011) 80-1 Geo Wash L Rev 6.

19 Achiume (n 16) 326.

20 UNHCR, 'Guidance on Racism and Xenophobia How UNHCR Can Address and Respond to Situations of Racism and Xenophobia Affecting Persons under Its Mandate' (2020) 19 <https://www.unhcr.org/5f7c860f4.pdf> accessed 21 August 2021.

Xenophobia defines the following state: *"a strong feeling of dislike or fear of people from other countries"*.[21] Take, for example, under the influence of national self-image and states' asylum policies/politics, societies initially show resistance against the idea of welcoming refugees. Resistance emerges at both societal and political levels to this end. As a result, societal views and political standpoints on refugees by influencing each other actualizes othering refugees or classifying them as hostile outsiders or opportunists. This analysis defines prejudice-based discrimination, for example. These factors further (may) normalize pushback policies of states.

Yakushko details xenophobic attitude against refugees with links to Eugenics or the science of racial betterment:

> "All foreigners who were perceived as arriving from supposedly "uncivilized" countries (i.e., China, India) or, in Emma Lazarus' terms "the wretched refuse of your [civilized superior countries] teeming shore" (i.e., Jews from Germany), represented an evolutionary threat."[22]

Eugenics policies of the states -specifically developed states- tend to elevate their citizens to an elite level in the world's conjuncture. Because of that, refugees, who flee from failed states, are seen as failed beings.[23] Moreover, refugees as *failed beings* are further fictionalized. For example, a refugee is often described as a brown-skinned woman having her children by her side, waiting for their admission at the state's border. However, while they are on the move, refugees are embodied as a no-name, pernicious males.

Further, a society may assume that refugees appear in fund-raising campaigns because they already imagine them as inferior and needy. Even though the international community shows compassion towards people on the move, this understanding seems to fade away once the state's interest comes into play. This situation is risky in both ways. Because, as Hudson draws upon scholarly analysis, categorizing individuals (in this case refugees) based on their vulnerability may lead to their exploitation. This claim is justified in the following:

> "As Aultman and others warn, to assign individuals to a particular group in this way can itself lead to exploitation and harm, as those who are labelled as vulnerable risk being stigmatized and becoming subject to 'paternalistic protections' that are 'premised on the assumption that the vulnerable are incapable of protecting themselves'."[24]

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21 Oxford Learner's Dictionaries, 'Xenophobia' <https://www.oxfordlearnersdictionaries.com/definition/english/xenophobia> accessed 20 August 2021.

22 Oksana Yakushko, *Modern-Day Xenophobia Critical Historical and Theoretical Perspectives on the Roots of Anti-Immigrant Prejudice* (Palgrave Macmillan 2018) 38.

23 Anna Carastathis and Myrto Tsilimpounidi, *Challenging Migration Studies - Reproducing Refugees_ Photographia of A Crisis* (Rowman Littlefield 2020) 18.

24 Ben Hudson, 'Migration in the Mediterranean: Exposing the Limits of Vulnerability at the European Court of Human Rights' (2018) 4 Maritime Safety and Security Law Journal 29.

The state's interest plays a central role in the admission and non-admission of people reaching its borders. Most of the time, refugees are stereotyped to justify states' non-admission decisions. For example, there is overall negativity towards immigrants in the USA -specifically refugees- because of their foreignness. They are configured *"as costing jobs of native-born individuals, as being criminal, as refusing to learn English, as being a significant social burden, as being terrorists, as well as being uneducated and sick"*.[25] For instance, former president of the USA, Donald J. Trump, portrayed China and Chinese people as the source of Covid-19. He was criticized as having an intention of creating an image attached to Chinese identity to describe them as a threat to the health of the people of the USA.[26] For instance, in 2005, Lou Dobbs stated the following: *"The invasion of illegal aliens is threatening the health of many Americans"*. He was referring to leprosy as one such threat back at the time.[27]

The resistance that has settled in societies and infused in states' asylum agendas overtime against refugees seems confusing at first. In that, isn't it the freedom to travel and seek asylum to escape from persecution every human's birth right? In theory, for instance, the Universal Declaration of Human Rights (UDHR)[28] confirms everyone's equality by underlining the importance of protection from any form of discrimination. Moreover, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[29] in its article 1(1) prohibits discrimination based on foreignness. In practice, however, as any stateless and refugee person would confirm, universal and inalienable human rights are non-sense, especially regarding the right to leave one's country to enter another without facing any restrictions.[30]

Prejudice-based xenophobic discrimination makes a travesty of fundamental rights by classifying human beings depending on their citizenship. For example, Chomsky argues that *"Americans and Europeans currently assume that freedom to travel is their birth right"*.[31] She explains this as a privilege that is reserved for the ones who are in control. With links to Chomsky's analogy, Mercier brings a different perspective about the privilege that some individuals *possess*, as follows:

25 Yakushko (n 22) 46.

26 Yi Zheng, Edmund Goh, and Jun Wen, 'The Effects of Misleading Media Reports About COVID-19 on Chinese Tourists' Mental Health: A Perspective Article' (2020) 31 Anatolia Taylor & Francis Online 337-340 <https://www.tandfonline.com/doi/full/10.1080/13032917.2020.1747208?casa_token=Kd6DUS3ByegAAAAA%3AEKQAWfirdTvSpGlp968hiaLt9aSPHCRJPjIQBsX5t-D4XcCq9W7PcfjO1CScX5ZCeryP9bZq6RW-gw> accessed 24 November 2021.

27 David Leonhardt, 'Truth, fiction, and Lou Dobbs' (*The New York Times*, 30 May 2007) <https://www.nytimes.com/2007/05/30/business/30leonhardt.html> accessed 6 April 2021.

28 Universal Declaration of Human Rights (adopted 10 December) 1948 UNGA Res 217 A(III) (UDHR), arts 1 and 2.

29 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.

30 Hannah Arendt, *The origins of totalitarianism* (Harcourt Publishing, 1976) 276.

31 Aviva Chomsky, *Undocumented How Immigration Became Illegal* (MA: Beacon Press 2014) 23.

> "Looking at historical situations, we can see that some groups of people were forced into humility more than others, that is, humiliated, and therefore wronged; We see that some groups of people are considered as deserved to be honored, and therefore given more rights."[32]

Indeed, everyone has recognized fundamental rights. But they are governed by the power dynamics between the western nations and the rest. Etienne Balibar details power dynamics in his national-social state analysis. Balibar evaluates the results of two World Wars. He states that welfare states rose out of the ashes of World Wars. But this process happened with an awareness: damaged economies of the European states and the subsequent crisis were healed by pacifying class struggles. The downside of this process emerged once these welfare states granted social rights for their citizens *only*. Citizens of these states were conditioned to make their nation-states successful in the global competition by excluding and othering non-citizens. If borders were open, allowing all newcomers to enjoy social rights entirely as much as citizens of these welfare states do, the viability of the European welfare models would have been threatened.[33] We can apply Balibar's approach, drawing upon the post-World War periods to today's world conjuncture. For instance, Morocco does not have a welfare state structure, and it did not perceive refugees as a threat for an extended period. But *Viktor Orban's "authoritarian rule"*[34] in Hungary or "*xenophobic campaign"*[35] of Brexit in the UK proved that these welfare states did not want refugees and migrants. Racist ideology also finds ways of dwelling due to undying narcissistic urges embedded in the idea of the national-social state. For example, if PVV (Partij Voor de Vrijheid/ The Party for Freedom) leader Geert Wilders comes to power, in that case, one of his priorities will be to expel Syrian refugees in his country immediately and prevent immigration from Muslim countries to the Netherlands. Wilders revealed his intentions as an election promise.[36]

Ongoing analysis sets forth those legal affirmations that do not guarantee universal protection for refugees to seek asylum without exposure to life-threatening

32 Andre Mercier, 'İnsan Haklarının Temelleri', in Ioanna Kucuradi (eds), *İnsan Haklarının Felsefi Temelleri* (4th edn, Türkiye Felsefe Kurumu 2009) 27.

33 Etienne Balibar, *We, The People of Europe? Reflections on Transnational Citizenship* (Princeton University Press 2004) 78.

34 Adam Fabry, 'Neoliberalism, Crisis and Authoritarian–Ethnicist Reaction: The Ascendancy of the Orbán Regime' (2019) 23 Sage Journals 2, 166 <https://journals.sagepub.com/doi/full/10.1177/1024529418813834?casa_token=wNSc9zaWsAYAAAAA%3A5MZ4Kjix_-gfD_AcBv26eHVDelECiTNSW5CppIt_kDc7c-u5QcGuv57y5ySC6Fpow59zhWYQn9xJ> accessed 23 November 2021.

35 This Article refers Brexit with links to *xenophobic campaign*, based on the findings of a research that was published in 2017. The details of this research can be found in the following. Agnieszka Golecde Zavala, Rita Guerra, and Cláudia Simão, 'The Relationship between the Brexit Vote and Individual Predictors of Prejudice: Collective Narcissism, Right Wing Authoritarianism, Social Dominance Orientation' [2017] Frontiers in Psychology 1-14 <https://www.frontiersin.org/articles/10.3389/fpsyg.2017.02023/full> accessed 21 August 2021.

36 Yusuf Özkan, 'Hollanda'da aşırı sağcı lider Wilders'in seçim vaadi 'Suriyelileri sınır dışı etmek' (BBC News Türkçe, 17 January 2021) <https://www.bbc.com/turkce/haberler-dunya-55695686> accessed 4 April 2021.

"Austrian Chancellor Sebastian Kurz said he opposes the arrival of new Afghan refugees after the Taliban's takeover of Afghanistan." Enis Günaydın, 'Avusturya Başbakanı Kurz: Benim Dönemimde Afgan Mülteci Almayacağız' *Euronews* (22 August 2021) <https://tr.euronews.com/2021/08/22/avusturya-basbakan-kurz-benim-donemimde-afgan-multeci-almayacag-z> accessed 23 August 2021.

circumstances. It means that in practice, *"the word itself and the phrase 'right of asylum' have lost much of their pristine simplicity"*.[37] Because international law tells us that the process of being granted asylum constitutes just turning up anywhere by boat and demand and get it.[38] However, modern-day examples worldwide prove us the opposite: people on the move just cannot take a boat, turn up anywhere and demand asylum. Even if they do, they are either pushed back or detained for an extended period in most cases. The restrictive measures imposed by some western states (exemplified within the context of this Article) towards refugees can be summarized as *"mandatory detention, denial of support, denial of access to procedures, to legal advice and representation and to appeals, and government-to-government agreements on removals"*.[39]

Moreover, regardless of how states respond to refugees' arrivals, states often portray refugees as *"illegal immigrants"* to make their policies of *not accepting refugees* reasonable. Part II of this Article further explains the states' mentioned approach with links to relevant modern-day practices. However, before moving into the details of pushback policies, it may be helpful to understand how states justify their illegal actions, as follows.

3. States' Way of Justifying Their Illicit Actions Resulting in Refugees' Pushback

Seeking asylum to escape from persecution – *which is the fundamental reason why someone becomes a refugee*- does not make anyone *illegal*. Refugees, before their departure, most of the time, are not able to gather necessary documentation, including their identification cards, passports, and visas for entry.[40] Therefore, as a result of not having entry documents to a state, refugees should not be referred to as *illegals*, as this has no explanation in a legal sense.

On the other hand, through the Westphalian sovereignty principle, the state practice of referring refugees as illegals may find a *reasoning*, not justification per se. Thus, the Westphalian sovereignty principle may be helpful to understand the process of how legally false referrals coupled with othering mentality against refugees can quickly be echoed upon states' policies resulting in justification of refugees' expulsion. However, this does not change the essence of the Westphalian principle of state sovereignty as having fundamental challenges and shortcomings.

37 Goodwill-Gill (n 9) 355.

38 Guy S Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 Int'l J Refugee L 653.

39 Guy S Goodwin-Gill, 'Forced Migration: Refugees, Rights and Security' in Jane McAdam (eds), *Forced Migration, Human Rights and Security* (Hart Publishing 2008) 7.

40 1951 Refugee Convention (n 3) art 31(1) states the following:

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

Benhabib understands the Westphalian sovereignty as the supreme power of state sovereignty with a dominant and political authority by having jurisdiction over a definite territory. In this respect, states' rights constitute political independence, territorial integrity; the freedom to ensure the security of its population; the right to regulate its domestic affairs, including the admission to its territory of non-citizens.[41] In addition, states have the ultimate power to control their borders, which is the primary metric of state sovereignty.

But this model of efficacy, as Benhabib analyses, faces some challenges. Benhabib summarizes these challenges given in the following: global economy as a result of free markets in the capital, finance, and labor; the increasing information technologies; and the emergence of highly engaged cultural and electronic networks.[42]

In a modern/developed world, human beings encounter new economic opportunities every day. The countries with these opportunities might appeal to people who would like to move into those countries to settle in these places. In this case, we see examples of economic migrants who move by choice. However, prejudice-based xenophobia against refugees comes into play at this point too. Refugees are reflected as opportunists. Supposedly they come to the western states by using the danger of persecution as an *excuse* to benefit from the economic opportunities of these states in question.[43] This conclusion creates an impression that there are grey areas around the definitions of a refugee, illegal immigrant, and economic migrant as terms of art. The grey areas in this context mean that states have the space to use mentioned legal terms interchangeably.

The Westphalian sovereignty principle relies on such *illusionary* grey areas and undefined parameters. Unsettled definitions, legal limbos, and scholarly debates on -what is what and what is not what- help western states to categorize *outsiders*. States do that by employing a bad faith approach to interpret people's motives on the move. Thus, by othering and categorizing refugees, states turn a blind eye to the fact that not every person leaves their homeland only to benefit from the welfare of other developed states. Some individuals leave their homes due to having unmitigated irremediableness of *need/necessity* to leave. Across the world, some families escape from their countries due to impoverishment; and some women, men, girls, and boys become victims of sexual exploitation and violence. Children are recruited as child soldiers or kidnapped for street begging. They often have no choice but to find a way out: they are forced

41 Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (1st edn, Cambridge University Press 2004) 71.

42 ibid 71.

43 As a side note, in some cases states' asylum systems may be misused or abused by 'bogus refugees' who have socio economic motivations. Bogus in this context is used to describe a claim which is not real or genuine. For detailed analysis please see Susan E Zimmermann, 'Reconsidering the Problem of "Bogus" Refugees with "Socio-Economic Motivations" for Seeking Asylum' (2011) 6 Mobilities 335-352 <https://www.tandfonline.com/doi/citedby/10.1080/17450101.2011.590034?scroll=top&needAccess=true> accessed 23 August 2011.

to flee. Many individuals find it unbearable to stay in conflict areas hoping for better days to come. Given examples show two aspects of the same issue: on the one hand, *"there is a grey area between extreme categories";* on the other hand, people move from one place to another due to reasons other than economic-related factors.[44]

To this end, the following section conducts a brief analysis of what refugee means under international law. Then, as a term of art, it sets forth legal responsibilities for the states.

B. International Law Definition of Refugee: With Its Pearls and Pitfalls

The first part of this Article has discussed the manipulative narratives that blur the refugee definition. This section aims to clarify in a *legal setting* what refugee means.

"There are more refugees in the world than ever since the end of the Second World War", states the UNHCR. UNHCR recorded that 79,500,000 people on the move have been displaced due to persecution and armed conflict in 2020.[45] German newspaper Der Tagesspiegel catalogued 33,293 people who died between 1993 and 2017. They were all fleeing from war, poverty, and oppression, which happened/occurred/prevailed in their own countries.[46]

Albert Cohen in 1949 stated that *"it is obvious from all this that if there is any human being who needs protection it is the refugee"*.[47] Cohen's statement pictures the hardship of refugees escaping from persecution during World War II. During that period, people crossed borders due to the dangers of war rather than targeted persecution.[48] For this reason, once the 1951 Refugee Convention came into existence, its scope defining the status of refugees was limited. The protection of refugees involved only the situations

44 Michelle Foster, *International Refugee Law and Socio-Economic Rights Refuge from Deprivation* (Cambridge University Press 2007) 5.

45 Richard Skretteberg, '79.5 Million People Displaced In The Age Of Covid-19 A Global Overview Of Displacement Crises In 2019' (*NRC Global Figures*) <https://www.nrc.no/shorthand/fr/79.5-million-people-displaced-in-the-age-of-covid-19/index.html> accessed 30 March 2021; UNHCR, 'Figures at a Glance' (18 June 2021) <https://www.unhcr.org/figures-at-a-glance.html> accessed 19 August 2021.

46 Tagesspiegel, 'Liste von 33.293 registrierten Asylsuchenden, Geflüchteten und Migrantinnen, die aufgrund der restriktiven Politik der Festung Europas zu Tode kamen' (*Tagesspiegel*, 15 June 2017) <https://www.tagesspiegel.de/downloads/20560202/3/listeentireberlinccbanu.pdf> accessed 6 April 2021.

47 Albert Cohen, 'The Aims of The International Refugee Organization as Regards Legal and Political Protection' (Speech at IRO and Voluntary Organizations Conference, Geneva 18–21 January 1949), Wiener Library, London, Its Digital Archive, 6.1.1/82509659#1, accessed 6 April 2021.

48 Definitional scope of persecution is going to be discussed further down in this Article. Beforehand, it is important to note the following regarding the scope of persecution:

> "There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion, or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution."

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' (*The UNHCR Handbook,* 2019) 21 <https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> accessed 25 May 2021.

pre-1951. However, after the Protocol of 1967 came into force, the 1951 Refugee Convention became much more meaningful. We now know that all refugees will be protected, irrespective of any time and geographic limitation. The 1967 Protocol expanded the borders of the 1951 Refugee Convention so that it ripped off the fixated character of this document stuck in a specific historical timeline. From then on, the 1951 Refugee Convention has been welcomed as a human rights instrument, having a humanitarian character, addressing human rights abuses directed against people who have been persecuted and forced to leave.

As is understood, persecution is the central theme of why people become refugees. Persecution is also the only means differentiating refugees from other related and confused phenomena, such as economic migrants.

As a side note, as is mentioned in the previous section, legally speaking, refugees are not economic migrants, even though there are overlapping aspects between refugees and economic migrants. Both refugees and economic migrants intermingle with pernicious incidences leading to physical and emotional harm on treacherous roads. The difference is that, as Betts and Collier state, refugees are *"not moving for gain but because they have no choice. Migrants hope for honeypots; refugees need havens"*.[49] This approach settles the difference between economic migrants and refugees on the idea of *voluntariness*. Indeed, history proves that individuals have moved because of wanderlust and desire for new experiences. However, as analyzed by the above-mentioned two Oxford professors, the desire to discover new opportunities does not define why refugees leave their homes. Then how do we draw a line around *absoluteness* to distinguish refugees as people who need humanitarian assistance? In other words, the question is, what is that *absolute* when it comes to establishing a definition for being a refugee who is forced to leave - not left by their choice.[50]

Indeed, in today's world, it is not easy to draw a definitive line around absoluteness with links to motivations/intentions as a driving force for people on the move. Individuals, especially in comparative history, mostly have relocated their homes and families to new lands to find better economic opportunities, seek religious freedom, or escape from socially traumatizing events, such as wars.[51] These hurdles/rigors include natural disasters, famine, extreme poverty, or structural violence. Indeed, considering the 1951 Refugee Convention, not *any reason* that compels people to leave their homes would eventually qualify them as refugees. But we should remember that refugees leave their homes because their country or society threatens their human security. In this regard, the persecution differentiates refugees from the rest. Considering the

49 Alexander Betts and Paul Collier, *Refugee: Rethinking Refugee Policy in a Changing World* (Oxford: Oxford University Press 2017) 30.

50 ibid 20.

51 Yakushko (n 22) 34.

critical importance of persecution as a term -sitting at the center of the 1951 Refugee Convention- the following paragraphs explain its meaning under international law. But, as will be established, persecution as a vague concept is often used interchangeably with the discrimination phenomenon, even though persecution and discrimination are not equivalent terms. These aspects are also considered before moving to the next stage, where refugee definition is settled under international law.

1. Persecution

The 1951 Refugee Convention sets a definition in determining what refugee is 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 habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The central concept of the 1951 Refugee Convention is grounded on the phenomenon of a well-founded fear of *persecution*. The Convention's definition dictates a particularized inquiry if the person in question or a group to which s/he belongs is subject to a focused threat of persecution.[52] But a straightforward answer to this inquiry cannot be given, considering that under international law, persecution stands as a vague concept to begin with. In other words, persecution as a term of art has not been defined by international law indefinitely *yet*. For example, in cases of generalized violence, it can be challenging to prove the threat of persecution directed against an individual by their home state.[53] Considering vagueness of persecution as a term under international law, this Article examines it through the interpretation of the UNHCR, in comparison, to the concept of discrimination.

The UNHCR, in its commentary, expressed that persecution may comprise: *a threat to life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion, or serious violations of human rights.* We should consider the scope of persecution in this regard on a *case-by-case basis.* The definitive

52 David Martin, 'The New Asylum Seekers' in David A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s The Ninth Sokol Colloquium on International Law International Studies in Human Rights* (Springer Science Business Media, B V 2014) 3.

Please note that the exceptionality approach considers that *"the 1951 Refugee Convention and the 1967 Protocol do not cover persons fleeing armed conflicts or civil wars or situations of "generalized violence".* It means that according to the exceptionality approach in cases of widespread violence, such as wars, violence is not considered as cruelty reaching the limits of persecution but is accepted as the usual outcome of war. Hugo Storey and Rebecca Wallace, 'War and Peace in Refugee Law Jurisprudence' (2001) 95 The American Journal of International Law 2, 350.

Exceptionality approach *"sees persons fleeing armed conflict to fall outwith Article 1(A)2 unless they are special cases".* Hugo Storey, 'Armed Conflict in Asylum Law: The "War-Flaw"' (2012) 31 Refugee Survey Quarterly 8.

53 Sara E Davies, *Legitimising Rejection International Refugee Law in Southeast Asia* (Martinus Nijhoff Publishers 2008) 6.

aspect of a *well-founded fear of being persecuted* also indicates that the threat of persecution is determined subjectively, considering the person's view, who has been the recipient of the event. However, the events in question must also be appreciated objectively to be found as *well-founded* enough, drawing from the definition of the 1951 Refugee Convention.

The vagueness of persecution as a term is often defined and associated with the phenomenon of discrimination. Persecution seems to surface as a catch-all term involving motivation and induction to discriminate. But discrimination and persecution do not walk hand in hand in a way, as if they come into existence like an ouroboros. Lord Hope of Craighead best describes the relationship between discrimination and persecution as in the following:

> "Persecution is not the same thing as discrimination. Discrimination involves the making of unfair or unjust distinctions to the disadvantage of one group or class of people as compared with others. It may lead to persecution, or it may not. And persons may be persecuted who have not been discriminated against. If so, they are simply persons who are being persecuted."[54]

Drawing upon the analysis of Lord Hope of Craighead, we can conclude that even though persecution is the central theme of the convention grounds, how these grounds meet with the means to actualize discriminatory acts amounting to persecution is not limited. Thus, for instance, the UNHCR, in its Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook), states that *"it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status"*.[55]

In order to connect discrimination to persecution, discrimination must be *severe or serious*, extending the limits of *mere*. Severity in this instance would mean that a one-time event of discrimination may not effectuate persecution.

The concept of protection best explains persecution. As being the opposite end of the spectrum, protection negates persecution. If the states reasonably assure protection of the 1951 Refugee Convention, only then the effects of persecution can be restored. Protection within the context of 1(A) of the 1951 Refugee Convention is understood with links to five merits (not a closed list): *"willingness to protect; ability to protect; effectiveness; accessibility; and non-temporary durability"*.[56] Willingness to protect is the first step for refugee protection. But as has been discussed before, states manipulate the 1951 Refugee Convention's refugee definition to limit the understanding of a *refugee persona*. The following paragraphs clarify refugee definition in a legal sense with that in mind.

54 Rebecca Dowd, 'Dissecting Discrimination in Refugee Law: An Analysis of Its Meaning and Its Cumulative Effect' (2011) 23 Int'l J Refugee L 34.

55 UNHCR, 'UNHCR Handbook' (n 48) 21.

56 James C Hathaway and Hugo Storey, 'What Is the Meaning of State Protection in Refugee Law - A Debate' (2016) 28 Int'l J Refugee L 481.

2. The Meaning of Refugee as a Term of Art

The refugee term is often categorized under the general heading of forced migration. However, forced migration can be associated with different reasons, causing displacement of people, including environmental disasters, armed conflict, and famine. It is suggested that referring refugees as forced migrants may result in definitional confusion, i.e., links to Internally Displaced Persons (IDPs). Indeed, both refugees and IDPs may be *forced* to move due to the same external factors. But what distinguishes refugees from the IDPs is their crossed border movements.

It is also suggested that the usage of the forced migrant to refer refugees may create helplessness in them. Because forced *"presents a kind of obstacle that traps him as an eternal 'refugee'"*.[57] As a result, many refugees try to replace it with a new term - newcomer.[58] Indeed the newcomer may have a healing effect, considering that the refugees face various obstacles linked to belonging and integration.

Ripping off the forced, from the forced migration formulation, migration, in specific terms, does not define the scope of refugee movement according to the UNHCR either:

> "Migrants choose to move not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons. Unlike refugees who cannot safely return home, migrants face no such impediment to return. If they choose to return home, they will continue to receive the protection of their government."[59]

What defines refugees, then? The 1951 Refugee Convention sets enumerated Convention grounds for the refugee status determination procedure. However, even though the 1967 Protocol takes off the place and the time limitation, today's changing conditions still leave the 1951 Convention incapacitated if the Convention's text is considered verbatim. For this reason, the UNHCR interprets the 1951 Refugee Convention in a broader perspective, stemming from the ordinary usage of refugees. This usage encapsulates a straightforward and more expansive definition of the refugee term: *a person in flight*. They *seek "to escape conditions or personal circumstances found to be intolerable"*.[60] We understand the stance of the UNHCR in defining refugees from how it designates asylum seekers per se: *"[a]n individual who is seeking international protection"*.[61] It means that the country that receives the claim by an

57 Basem Mahmud, 'Refugees and Asylum Seekers' Views of Legal Recognition and Its Consequences for Their Integration' (*Refugee Law Initiative*, 6 October 2020) <https://rli.blogs.sas.ac.uk/2020/10/06/refugees-and-asylum-seekers-views-of-legal-recognition-and-its-consequences-for-their-integration/> accessed 6 April 2021.

58 ibid.

59 *Adrian Edwards*, 'UNHCR viewpoint: 'Refugee' or 'migrant' – Which is right?', (UNHCR, 11 July 2016) <https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> accessed 3 April 2021.

60 Goodwill-Gill (n 9) 15.

61 UNHCR, 'Glossary' (*UNHCR*, 30 June 2006) <https://www.unhcr.org/449267670.pdf44> accessed 24 February 2021.

asylum seeker has not finalized the asylum application process yet. For this reason, every refugee initially is an asylum-seeker:

> "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition…He does not become a refugee because of recognition but is recognized because he is a refugee."[62]

We can establish the link between the condition of being a refugee and states' obligation of ensuring protection to refugees. Definitions matter because, without definitions, refugees cannot be identified and eventually protected. The protection starts with the willingness (or duty if they are already refugees before the recognition) of the state in question to accept refugees into its territory. Individualized assessments must come after that once refugees have arrived. Only then, even if it is decided that the person seeking refuge will be deported to a safe third country, it must be ensured that they will not face the risk of direct or indirect refoulement.

The following analysis considers how the state must *respond* to the refugees who have made it to its borders. If the state forcibly repatriates refugees to a country where they would have a well-founded fear of persecution, then it is accepted as refoulement and contrary to international law.[63] Article 33 of the Refugee Convention elevates the responsibility of states to admit refugees to the level of *de facto duty*. But recent incidents have shown that refugees have been deprived of the internationally recognized protection mechanisms by some western states due to their pushback policies. If refugees have no guarantee of protection against refoulement, then where it leaves the *non-refoulement* principle today? This question is discussed as follows.

III. The Pushbacks in Law and Practice

International law has established that everyone has the right to seek asylum. However, in order to seek asylum, people -escaping from persecution or armed conflict- must cross the international border(s) and reach the *destination country/designated state*. Even though international law regulates the *non-refoulement* principle, the process with links to this principle has complications. Because international law does not impose a special obligation on states to grant asylum, some states have manipulated this legal loophole. In other words, some western states have exploited existing gaps, such as lack of definitive explanation to right to asylum, in the refugee protection regime.[64] These states, however, seem to forget that they are distancing themselves

62 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 (1992) para 28.

63 Goodwill-Gill (n 9) 233.

64 Ghezelbash (n 6) 481.

from a voluntaristic view by ignoring their *moral duty*[65] to assist refugees at their borders.[66]

The *non-refoulement* principle, thus, has a crucial role in protecting refugees, considering that this principle/provision *"translates into an effective right to remain in a host state"*.[67] It is formed by the 1951 Refugee Convention and further guaranteed by the 1967 Protocol. Mentioned treaties are the groundworks among the international legal instruments that ensure refugees' protection.

In the presence of one or more of the Convention grounds, stated under the 1951 Refugee Convention and the 1967 Protocol, the person who will face danger, if returned, is safeguarded from refoulement. It is formulated under Article 33 of the 1951 Refugee Convention, 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."[68]

Under Article 33, the *non-refoulement* principle stands as

> "a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion."[69]

The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 OAU Convention)[70] and the Cartagena

65 As a side note, the following two aspects should be separated/not confused: First, whether states have a moral obligation to promote the good of all individuals in the world, regardless of their citizenship; Second, whether states have a moral obligation to comply with international law. Even though these two premises indicate different dimensions, *ideally*, we may expect that states should abide by the two of them. But if they did, Posner concludes that they would comply with *"international law in the same rough sense that individuals must comply with laws issued by a good government"*. Eric A Posner, 'Do States Have a Moral Obligation to Obey International Law' 56 Stan L Rev 1901, 1915. On the other hand, we should note that there might not be a core existential relationship between a rule and its moral dimension. But still, states' obligations to implement and obey existing international legal regulations can be considered with links to states' moral obligations to comply with them. Hart explains the latter claim as follows: *"A rule may exist because it is convenient or necessary to have some clear fixed rule about the subjects with which it is concerned, but not because any moral importance is attached to the particular rule"*. H L A Hart, *The Concept of Law* (Penelope A Bulloch and Joseph Raz eds, Clarendon Press 1994) 229.

66 Tally Kritzman-Amir and Thomas Spijkerboer, 'On the Morality and Legality of Borders: Border Policies and Asylum Seekers' (2013) 26-1 Harvard Human Rights Journal 10.

67 Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 The Mod L Rev 596.

68 The 1951 Refugee Convention (n 3) art 33.

69 Erika Feller, Volker Türk and Frances Nicholson (edn), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 89.

70 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1001 UNTS 45) done 10 September 1969, entered into force 20 June 1974.

Article II (3) of the 1969 OAU Convention reads: *"No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras. 1 and 2"*.

Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America (1984 Cartagena Declaration on Refugees)[71] further incorporated the *non-refoulement* principle within their texts. Additionally, the Bangkok Principles on the Status and Treatment of Refugees in explicit terms sets forth the following, under its article III:

> "Such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion."[72]

The *non-refoulement* principle is also referred to as the *"entry point for all subsequent rights that may be claimed under the 1951 Refugee Convention. Without this, little else matters"*.[73] For instance, the International Organization for Migration (IOM) refers the *non-refoulement* as the *"[p]rinciple of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened."*[74] Number of different reasons, grounds for the *non-refoulement* principle, are also set forth by major human rights treaties. Protection of a refugee from refoulement is essential; otherwise, most likely, they would encounter the following consequences: torture, cruel, inhuman, or degrading treatment or punishment; arbitrary deprivation of life; the risk of enforced disappearance; the death penalty; being tried by a special or ad hoc court; flagrant denial of justice; underage recruitment and participation in hostilities.[75]

International human rights law recognizes that all the rights addressed, accepted, and declared by relevant treaties apply to the individuals, irrespective of their status in a country. Thus, for instance, the Human Rights Committee, in reference to the International Covenant on Political and Civil Rights,[76] concludes in its General Comment No. 15 the following: *"... each State party must ensure the rights in the Covenant to all individuals within its territory and subject to its jurisdiction"*.[77]

71 Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America (22 November 1984) OAS Doc OEA/Ser L/V/II 66/doc 10.

In section III (5) of the 1984 Cartagena Declaration states the following: *"To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees..."*.

72 Asian-African Legal Consultative Organization (AALCO), 'Bangkok Principles on the Status and Treatment of Refugees (Bangkok Principles)', (*UNHCR*, 31 December 1966) Article III <https://www.refworld.org/docid/3de5f2d52.html> accessed 8 April 2021.

73 Thomas Gammeltoft, *Access to Asylum International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2013) 44.

74 International Organisation for Migration, *Glossary on Migration, International Migration Law Series No. 25* (2nd edn, IOM 2011) 68.

75 International Review of the Red Cross, 'Note on Migration and the Principle of Non-Refoulement' (2018) <https://international-review.icrc.org/sites/default/files/irrc-904-19.pdf> accessed 22 April 2021.

76 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

77 Office of the High Commissioner for Human Rights, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant* (Twenty-seventh session of the Human Rights Committee, 11 April 1986) <https://www.refworld.org/pdfid/45139acfc.pdf> accessed 7 April 2021.

Drawing upon relevant international legal regulations, most scholars agree that the *non-refoulement* principle has a *non-derogable* nature. For example, judges of the International Criminal Court (ICC)[78] and some leading scholars referred to the *non-refoulement* as *"the peremptory norm"*.[79] The non-derogable nature of the *non-refoulement* principle is explained by a study conducted by Eli Lauterpacht and Daniel Bethlehem, for instance. This study was backed by the UNHCR too.[80] Lauterpacht and Bethlehem cover the *non-refoulement* principle as customary international law norm, based on the following evaluation. *"[E]vident lack of expressed objection by any state to the normative character of the principle of non-refoulement."*[81] The Executive Committee of UNHCR also has observed that *"the principle of non-refoulement . . . was progressively acquiring the character of a peremptory rule of international law"*.[82] The Asylum Procedures Directive (2013/32/EU) states that refugees *"should be disembarked on land and have their applications examined"*.[83]

As a varying opinion/argument[84], for instance, Hathaway analyses the approach of accepting the *non-refoulement* principle as a jus cogens norm as *leveraging asylum*. He asserts the following: *"there is no duty of non-refoulement that binds all states as a matter of customary international law, and it is not the case that all persons entitled to claim protection against refoulement of some kind are ipso facto entitled to refugee rights."*[85] In his discussion, he proceeds to analyze the elements of customary international law to prove his claim.

Hathaway examines the components of customary international law in two folds: a general and consistent practice of states and the practice of states stemming from a sense of legal obligation. Hathaway states that the tricky part in this angle emerges due to inconsistent states' practices being contradictory with the *non-refoulement* principle. In most cases, as Hathaway observes, states often make claims about people who seek protection as not being refugees or that the political cost of their security is too high.[86] Hathaway summarizes states' persistent rejection of the right to asylum in the next debate:

78 *Prosecutor v Katanga et al* [2013] International Criminal Court (ICC) ICC-01/04 - 01/07 para 30.

79 Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 International Journal of Refugee Law 533.

80 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) 87.

81 ibid 216.

82 UNHCR Executive Committee Conclusion No 25 XXXIII (1982) para (b).

83 European Union Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast) [2013] OJ L 180 60-94.

84 Schabas, for example, concludes that *"it is difficult to extend the principle of non-refoulement under customary international law. There is no broad protection against refoulement on the grounds listed in the Refugee Convention for individuals who are not refugees".* William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021) 253.

85 James C Hathaway, 'Leveraging Asylum' (2010) 3-45 Tex. Int'l L J 506.

86 ibid 518.

> "In essence, under the first claim, the protection of refugees against refoulement ceases to be a matter of treaty-based entitlement. Under the second claim, the specific treaty-based entitlements of refugees are deemed applicable to all beneficiaries of the duty of non-refoulement, whether refugees or not. Taken together, the two claims amount to an assertion that there is today a legally binding and universally applicable right to asylum for all seriously at-risk persons. In short, the right to asylum has been leveraged through scholarly analysis despite its express rejection by states."[87]

Indeed, Hathaway's evaluation rightly points out states' covert denial of the *non-refoulement* principle by producing false accusations about refugees. However, none of the states bluntly refuses the *non-refoulement* principle. Even though, on the one hand, some incidents constitute persistent pushback practices some western states employ, particularly Greece. On the other hand, wealthier states are aware of the symbolic *"importance of appearing to remain engaged with the global refugee regime"*.[88] The problems arise due to interpretations by western states not embracing a good faith approach in the implementation of the international refugee law regiment.

At the core, as a living mechanism, the *non-refoulement* principle prohibits the forcible transfer of a person from the receiving state to another authority where it is believed that the person would be subjected to violations of certain fundamental rights. Considering this, the legal concept of the *non-refoulement* principle as a general heading encapsulates the practices attached to the refoulement of refugees, including expulsion, deportation, and rejection at the border. The given explanation means that the refoulement of refugees in practice covers the situations that include non-entrée of refugees at the point of departure, international zones, especially in airports and on the high seas. We see systematic examples of interception at high seas and on land in the implementation methods of Australia's asylum policies.

Since 2001, as a state party to the 1951 Refugee Convention, the Australian government has accepted that it is bound by the *non-refoulement* obligations[89], only with an *exception*. *This* principle would not cover the refugees intercepted outside Australia's territorial waters for the Australian state. The reasoning of Australia sounds at first legally justifiable to some degree. But this policy is nothing but absurd/farcical. In 2001, Australia accepted certain parts of Australian territory *as* not part of Australia for immigration purposes. It meant that refugees who arrived at these specific locations could not apply for asylum in Australia. These refugees were transferred to the offshore detention centers instead. In 2012, refugees *"who arrived by boat*

87 ibid 506.

88 Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Colum J Transnat'l L 240.

89 Australia acceded to the 1951 Refugee Convention and the 1967 Protocol. For that reason, Australia is bound by the standards for refugee protection outlined within them. Australia integrated some of its obligations on refugee protection into its domestic legislation – please see the Migration Act 1958. Australia Federal Register of Legislation, 'Migration Act 1958' (1958) <https://www.legislation.gov.au/Series/C1958A00062> accessed 24 November 2021.

anywhere in Australia without authorization were barred from applying for asylum and liable to be transferred to Nauru or Papua New Guinea".[90]

Indeed, incidents have shown that some western states have found ways to actualize the non-entrée of refugees. For example, as detailed below, practices from *"simple diplomatic agreements to full-scale joint migration control operations"*[91] have been deployed.

The following paragraphs examine how states find/create *black holes*[92] in law to infringe the *non-refoulement* principle in every way possible.

A. Modern-Day Incidents of Some Western States' Pushback Policies

The previous section established that once a person escaping from persecution reaches the asylum state, the *non-refoulement* principle must be triggered. Thus, upon the arrival of a refugee, receiving state must act on its obligation to initiate the refugee status determination process. Because the 1951 Refugee Convention obliges states parties not to *"expel or return ('refouler') a refugee in any manner whatsoever"*.[93]

But some western states have been doing the opposite of what is obliged by the 1951 Refugee Convention.[94] For instance, one of Australia's methods of preventing refugees from coming to its lands has emerged as bilateral agreements with other countries. For example, the Government in Australia has been sending refugees who have arrived by boat to its offshore detention centers located in Manus Island, Nauru, and *Papua New Guinea*.[95] Australia made a refugee deal with Malaysia in 2011 too. Malaysia is not a signatory to the 1951 Refugee Convention and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

90 Ghezelbash (n 6) 489.

91 Gammeltoft-Hansen and Hathaway (n 88) 283.

92 As a side note, in his article titled, 'Maritime Legal Black Holes', Itamar Mann detailly evaluates the terminological content of maritime black holes. Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29 The European Journal of International Law 347-372.

93 Allain (n 79) 533.

94 ibid 535.

95 In 2016, Papua New Guinea Supreme Court ruled in its *Namah v Pato* case that the amendment to the Constitution effected the liberty of a person. It thus failed to meet the requirements of Section 38 of the Constitution which was found by the Court as unconstitutional. Therefore, the Court reached a conclusion that establishment of the Refugee Detention Centre as unconstitutional. In its decision, the Supreme Court stated the following:

> "The contention of the referrers is that to treat those required to remain in the relocation centre as prisoners irrespective of their circumstances or their status save as asylum seekers, is to offend that qualification and hence the Minister's powers and by extension those of the Administrator do not extend to the imposition of mandatory detention irrespective of flight risk or other relevant considerations which might justify detention." *Namah v Pato* [2016] Papua New Guinea [In the Supreme Court of Justice] SCA No 84 of 2015 SC1497 para 117.

Eventually, the Australian and Papua New Guinean (PNG) governments concluded a joint arrangement to end offshore immigration and refugee processing by the end of 2021. The Hon Karen Andrews MP, 'Joint Media Release with the Hon. Westly Nukundj MP - Finalisation of the Regional Resettlement Arrangement' (*Australian Government*, 6 October 2021) <https://minister.homeaffairs.gov.au/KarenAndrews/Pages/finalisation-of-the-regional-resettlement-arrangement.aspx> accessed 26 November 2021.

(the Torture Convention).[96] The deal comprised an agreement that Australia would send 800 refugees arriving by boat out to Malaysia. In return, Australia would accept 4000 people certified as refugees. Considering that Malaysia is not a signatory to any human rights treaties protecting refugees, the international community criticized Australia's move to sign a treaty with Malaysia on refugees. Further, the High Court in Australia declared the swap of people under above-the mentioned agreement as illegal in the end.[97]

Italy and Libya also signed an agreement, both in 2009 and 2017. The countries declared that their common goal was to *fight against illegal immigration*. In reality, however, Italy's coastguards deported refugees under the discourse of *illegal immigrants* back to Libyan shores while *"skipping procedures for filing potential asylum applicants"*.[98] Recently, the UN Human Rights Committee has found that "*Italy failed to protect the right to life of more than 200 migrants who were on board a vessel that sank in the Mediterranean Sea in 2013"*.[99] The committee member Hélène Tigroudja added that considering the Italian authority's international legal responsibility to support the search and rescue mission to save the lives of the refugees, Italy's action resulted in the loss of hundreds of lives.[100]

The abovementioned examples may give the impression that states' persistent practices in violation of the *non-refoulement* principle may weaken this norm. On the contrary, however, violations strengthen the norm of *non-refoulement*. States search for reasons to justify their illicit conduct. If states act in a contradictory way with a non-derogable /peremptory rule of international law, they will always seek exceptions and reasons to justify their misconduct.[101] For example, we often see the torturous

96 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 3.

Article 3(1) of the Torture Convention states the following: *"No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"*.

97 In its decision the Australia High Court ruled the following: *"Declare that the declaration made by the "Instrument of Declaration of Malaysia as a Declared Country under subsection 198 A (3) of the Migration Act 1958" dated 25 July 2011 was made without power and is invalid". Plaintiff M70/2011 v Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] Australia: High Court 2011] HCA 32, 2 <https://www.refworld.org/cases,AUS_HC,4e5f51642.html> accessed 25 November 2021. Further see Tamara Wood and Jane McAdam, 'Australian Asylum Policy All At Sea: An Analysis Of "Plaintiff M70/2011 V Minister For Immigration And Citizenship" And The Australia-Malaysia Arrangement' 61 The International and Comparative Law Quarterly 274-300.

For example, in the *John Doe et al v Canada* case, the agreement between Canada and the USA aiming to send back refugees to their first arrival place was considered contrary to the American Declaration of Human Rights. *John Doe et al v Canada*, Report N. 78/11 - Case 12.586 (*Inter-American Commission on Human Rights*, 21 July 2011) <https://www.refworld.org/cases,IACHR,502b61572.html> accessed 6 April 2021.

98 Dawn Chatty, 'Has the Tide Turned? Refuge and Sanctuary in the Euro-Mediterranean Space' (*Revistaidees.cat, Borders, Migrations, Asylum and Refuge*, 16 October 2020) <https://revistaidees.cat/en/has-the-tide-turned-refuge-and-sanctuary-in-the-euro-mediterranean-space/> accessed 7 April 2021.

99 UNHRC, 'Italy failed to rescue more than 200 migrants, UN Committee finds' (*UNHRC*, 27 January 2021) <https://www.ohchr.'org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26691&LangID=E> accessed 9 April 2021.

100 ibid.

101 Allain (n 79) 541.

pushbacks conducted by Greece through the news media and research papers. Greece bases the above-mentioned summary returns and refugees' pushback on the 2016 agreement, completed with Turkey.[102] Turkey is a state party to the 1951 Refugee Convention and thus considered a safe third country. Therefore, refugees can register their claims in Turkey, and the EU countries can return them to Turkey in case of attempting border crossings towards Europe. Taking strength from this argument, Greece has rendered refugees at its door as 'inadmissible,' even if scholars have criticized pushbacks as reaching the limits of torture.[103] Thus, Greece's methods have no legal and moral justification considering how pushbacks are conducted.

In most cases, after the arrival of refugees to the territory of Greece, they are mostly detained and sent back: refugees *are "placed in a life raft with no means of propulsion, towed into the middle of the Aegean Sea and then abandoned"*.[104] The given description is the first form of pushback tactic employed by Greece. Greece orchestrates the second form of pushback by blocking dinghies travelling through the Mediterranean Sea or directly from Turkey. Finally, the Greek government expelled refugees coming through the Aegean Sea by sailing them back to the edge of Greek territorial water on inflatable life rafts. They were abandoned there[105] in these rafts, which symbolize refugees' misery, accompanied by continuous torture. Forensic Architecture also observed the following:

> "For years, migrants and refugees crossing the Evros/Meriç River from Turkey to Greece have testified to being detained, beaten, and 'pushed back' across the river to Turkey, by unidentified masked men, in full secrecy, at night, and without being granted access to asylum procedures."[106]

Inaction and action of Greece resulting in inhuman and torturous treatment against refugees are not surprising. The seeded growing resentment toward refugees over the years in Greece has been seen on every level possible. For example, a statesman declared *"foreigners coming to Greece as cockroaches" with no hesitations*.[107] It is an abrupt public incitement that can reach the limits of an international crime – a similar method was employed and orchestrated in the Rwandan genocide, with the same language used

102 For details see Damla B Aksel and Ahmet İçduygu, 'Borders and the Mobility of Migrants in Turkey' (CEASEVAL Research on The Common European Asylum System, 2019) 1-58 <http://ceaseval.eu/publications/32_WP4_Turkey.pdf> accessed 25 October 2021.

103 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 2 February 2021).

104 Nick Waters, Emmanuel Freudenthal and Logan Williams, 'Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks' (*Bellingcat,* 23 October 2020) <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/> accessed 6 April 2021.

105 Patrick Kingsley and Karam Shoumali, 'Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea' (*New York Times*, 15 August 2020) <https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html> accessed 6 April 2021.

106 Forensic Architecture, 'Pushbacks Across the Evros/Meriç River: Situated Testimony' (*Forensic Architecture,* 19 October 2020) <https://forensic-architecture.org/investigation/evros-situated-testimony> accessed 4 April 2021.

107 Judith Sunderland and Hugh Williamson, 'Xenophobia in Greece' (*Human Rights Watch,* 13 May 2013) <https://www.hrw.org/news/2013/05/13/xenophobia-greece> accessed 7 April 2021.

- *cockroaches*. In confirmation of the growing resentment towards refugees, a German judge recently concluded that refugees would face *"extreme material hardship"* if they were returned to Greece. In this case, the applicant applied for international protection in Germany in 2018. The Federal Office for Migration and Refugees rejected the applicant's asylum application. Therefore, the Office issued a deportation order against him to Greece. The applicant first appealed to the Administrative Court, then appealed to the Higher Administrative Court. The Higher Administrative Court ruled its decision based on article 33(2)(a) of the Asylum Procedures Directive.[108] The judge stated that the Directive is transposed into domestic law, and the domestic law prohibits the rejection of an application for international protection as inadmissible under the following conditions. If an applicant has refugee status or subsidiary protection in another (EU) Member State, the applicant can still apply for international protection only under certain circumstances. If the living conditions in that Member State would expose him to a severe risk of inhuman or degrading treatment, then the country where the applicant has made the latter application cannot return him. The Court thus applied this analysis in its case and found that the asylum application could not be rejected as inadmissible. If he were returned to Greece, the applicant would face a severe risk of inhuman or degrading treatment.[109]

The Greek Government's persistent illegal actions, in a similar fashion, were conducted by some other European states against refugees who have *tried* to reach the European Continent through the Mediterranean Sea. Indeed, the Mediterranean Sea has witnessed hot returns of refugees from war-torn-refugee-producing states such as Syria, Afghanistan, and some African countries, mainly originating in Eritrea and Somalia. Thus, looking at the 21st century's tragic incidents subject to refugees, it is apparent that the Mediterranean Sea has turned into a place of purgatory from being the *Mare Nostrum* (Our Sea).

Reportedly, at the beginning of 2021, a boat capsized in the Mediterranean Sea, resulting in the loss of life for 43 refugees, for instance. The incident happened just a few hours after embarking from Libyan city because of bad sea conditions and the stop of the engine.[110] Similar tragic incidents occur on the high seas because refugees, primarily travelling by boat to reach designated states, are left unprotected and vulnerable by the international community and the European states. One of the

108 Directive 2013/32/EU (n 83).

109 *11 A 1564/20A* (Oberverwaltungsgericht NRW, 21 January 2021) <https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2021/11_A_1564_20_A_Urteil_20210121.html> accessed 25 November 2021.

Further see European Database of Asylum Law, 'Germany: Higher Administrative Court Cancels Removal of International Protection Beneficiary to Greece' (21 January 2021) <https://www.asylumlawdatabase.eu/en/content/germany-higher-administrative-court-cancels-removal-international-protection-beneficiary> accessed 25 November 2021.

110 Francesco Malavolta, 'UN calls for resumption of Mediterranean rescues, after 43 die in Libya shipwreck' (*UN News,* 20 January 2021) <https://news.un.org/en/story/2021/01/1082582> accessed 7 April 2021.

main reasons for this result is the EU Council Directive 2001/51/EC of 28 June.[111] The goal of this Directive was set to *"harmonize law on carrier sanctions by air, sea and coach"* by *"rejecting the transport of any individual without documentation or entry visa"*.[112] Unfortunately, this Directive left refugees with no choice but to cross the Mediterranean Sea by boats to request asylum, which human smugglers organize.

For this reason, for example, the IOM and the UNHCR called states to end *"returns to unsafe ports, establishing a safe and predictable disembarkation mechanism"*.[113] Indeed, if states make sure that refugees are safely embarked, this will protect refugees from smugglers and traffickers. In other words, if these criminals know that the designated state will cover refugees, they will have second thoughts even to establish their 'networks' to begin with. As a side note, considering the strict border measures of many European states, recently, refugees from the Global South, rather than attempting a journey to cross the Mediterranean Sea, have been taking the risk of going to the Canary Islands through the Atlantic. Unfortunately, however, these refugees are oblivious to the dangers of taking a perilous voyage to the waters of the Atlantic Ocean in an overcrowded dinghy. As a result, the IOM stated that many people on the move, aiming to reach the Canary Islands, have died, or gone missing in 2020.[114]

Drawing upon ongoing analysis, the stance of European states, particularly those that are part of the European Union (EU), regarding the arrival of refugees is rather disappointing. Over the years, the EU's policy towards refugees has fallen negative. The EU as a political unit, in 2012, received the Nobel Peace Prize because the EU was considered the source of peace, reconciliation, democracy, and human rights in Europe. Indeed, on the one hand, we see examples of rescue operations named *Operation Mare Nostrum* launched by the Italian Government in 2013, the European Border and Coast Guard Agency/Frontex funded *Operation Triton* in 2015, and the Operation Themis succeeded the Operation Triton. But on the other hand, the operations and willingness to rescue refugees have been short-lived. At the beginning of the refugee/Syrian humanitarian *crisis* in 2015,[115] Europe seemed to have a will to welcome refugees, following the leadership of Angela Merkel. However, over the years, the EU has taken the position of more of a conservative/closed border stance towards the refugee 'flow'.

111 Council of the European Union, Council Directive Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985 [2001] 2001/51/EC.

112 Chatty (n 98).

113 Malavolta (n 110).

114 IOM UN Migration, 'Alarming Loss of Life on Way to Canaries Worsens in 2021' (24 September 2021) <https://www.iom.int/news/alarming-loss-life-way-canaries-worsens-2021> accessed 25 November 2021.

115 Crisis is emphasised with links to refugees and Syrian war. This Article criticizes crisis narrative and its usage to describe movement of people who are escaping from persecution, including armed conflict. But western states in particular use crisis discourse to create an impression that *refugees create crisis*, not the other way around.

Moreover, the EU has chosen a different direction over the years, making the ongoing *Operation Themis* questionable: how can the EU sea patrol agents protect refugees from the risks of a perilous journey if there is no door left open?[116]

The EU countries have also made agreements with states outside the EU to keep refugees out. For example, the EU has made agreements with Turkey, Sudan, and Eritrea to block refugee arrivals with the help of these countries. Deals included promises such as new investments and the prospect of membership in the EU. However, to avoid the possibility that the states may not comply with the agreement, the EU has thrown threats by indicating possible results which would contain sanctions, such as withdrawal of their support from educational and health care programs.[117]

Incidences further prove that the EU countries have created an unwelcome, insecure, and unsanitary environment for refugees, e.g., refugee camps. They have intended to send a clear message that refugees are not welcome. Persistent violence, Covid pandemic, and the continued harmful policies of containment on the islands of Greece *"have led to several breaking points and eventually to the fires that have destroyed Moria"*.[118] The Frontex condoned the unlawful acts of Greece and announced that it launched an investigation into these charges that took place at the external borders of Greece. However, considering the silence of Frontex against Greece's pushback actions, it is also debatable how impartially it will carry out that inquiry. Bellingcat, Lighthouse Reports, Der Spiegel, ARD, and TV Asahi, through investigations, proved the partiality of the Frontex. These investigations developed upon extracted footage which proved that Frontex personnel stopped an overcrowded dinghy. Frontex personnel did not rescue refugees in the end. Instead, they made waves to push the dinghy away. This incident tells us that Frontex and Greece are, in fact, partners in crime, committing illegal pushbacks against refugees.[119] This *partnership* is referred to as "*The EU's dirty hands"*.[120] Similarly, a 1,500-page *Black Book* -compiled by the watchdog organization Border Violence Monitoring Network (BVMN)- documented hundreds of illegal pushbacks against refugees by authorities on Europe's external borders.[121] Recently, the EU lawmakers refused to sign off on

116 Emmanuel Jackson Foltz, 'The Frontex Paradox: Operation Themis in Historical Context' (*Penn Political Review*, 16 May 2020) <https://pennpoliticalreview.org/2020/05/the-frontex-paradox-operation-themis-in-historical-context/> accessed 7 April 2021.

117 Frances Webber, 'Europe's unknown war Race and Class' (2017) 59 Sage Journals 1, 36.

118 Lorenzo Tondo, 'Journeys of hope: what will migration routes into Europe look like in 2021?' (*The Guardian,* 14 January 2021) <https://www.theguardian.com/global-development/2021/jan/14/journeys-of-hope-what-will-migration-routes-into-europe-look-like-in-2021> accessed 7 April 2021.

119 Waters, Freudenthal and Williams (n 104).

120 Human Rights Watch, 'The EU's Dirty Hands Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' (2011) <https://www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf> accessed 5 April 2021.

121 Lorenzo Tondo, 'Black book of thousands of illegal migrant pushbacks presented to EU' (*The Guardian,* 23 December 2020) <https://www.theguardian.com/global-development/2020/dec/23/black-book-of-thousands-of-migrant-pushbacks-presented-to-eu> accessed 3 February 2021.

a budget of the Frontex due to allegations of rights violations, hiring failures, and harassment by senior Frontex staff.[122]

Drawing upon relevant incidents, in Europe, the biggest problem appears as not having a shared *burden* among the European states in the face of arriving refugees - especially considering the hotspot refugee camps in Italy and Greece. The hotspot approach represents an architected deterrence, and they are nothing but a political calculation, resulting in a political failure.[123] In September 2020, the European Commission presented its *New Pact on Migration and Asylum*[124] to resolve related problems and establish a working asylum and migration policy.[125] Allegedly, the New Pact will ensure solidarity and fair sharing of responsibility among member states. Yet as is criticized on many occasions by human rights activists and scholars, the Pact is set to benefit member states, not the refugees primarily. For instance, the Pact would generalize the hotspot approach already established in Greece and Italy. In addition, the Pact creates new areas where people who made entrance to the EU irregularly would be detained and stay there if necessary.[126] The New Pact also proves to us that new rules set by the Pact are in alignment with the ongoing intentions of the EU states when it comes to their *dealings* with refugees: creating new legal avenues that cause more hurdles for refugees.

States invented such hurdles by either creating black holes or abusing existing legal loopholes. But decision-makers forming the states' policies on asylum must refrain from taking advantage of ambiguities embedded in the international legal regulations. For example, states should follow a *good faith approach*[127] that considers international legal treaties' object and purpose.[128] Unfortunately, as explained in Part I of this Article, some states meticulously employ a narrower approach towards identifying refugees. This approach creates a quagmire surrounding the question of *what a refugee is*.

122 Al Jazeera, 'EU Refuses to Approve Frontex's Budget over Human Rights Concerns' (*Al Jazeera,* 23 March 2021) <https://www.aljazeera.com/economy/2021/3/23/eu-refuses-to-sign-off-on-frontex-budget-over-human-rights-issues> accessed 7 April 2021.

123 Raymond K Da-Boi, 'Origins, political, economic, and discursive contexts of Europe's "refugee crisis," and the 2020 Moria camp disaster' (2021) 282 Academia Letters 2.

124 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.

125 European Commission, 'A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity' (23 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706> accessed 4 April 2021.

126 Francesca Spinelli, 'United against the Pact: The Fatal Flaws in the EU's Plans to Reform its Asylum System' (*Green European Journal,* 17 March 2021) <https://www.greeneuropeanjournal.eu/united-against-the-pact-the-fatal-flaws-in-the-eus-plans-to-reform-its-asylum-system/> accessed 7 April 2021.

127 See the Vienna Convention (n 85) art 26. Article 26 *"Pacta Sunt Servanda"* of the Vienna Convention states the following: *"Every treaty in force is binding upon the parties to it and must be performed by them in good faith".* Please note that the rules of the 1969 Vienna Convention cannot be directly applied to the 1951 Refugee Convention unless a regulation within the context of the Convention has reached the level of the customary legal rule.

128 Türk and Down (n 10) 280.

Identification is the first step to move the process to the other necessary stages for refugees' protection.[129] First, states must process refugees' individual applications to establish whether they have been subjected to persecution. Second, they must consider whether refugees will be in danger of persecution if returned to their home countries or a safe third country. However, some western states do not consider individually whether the applicant would qualify for refugee status.

Considering the ongoing analysis of the recent incidents, the following paragraphs look for ways to prevent states from employing/embracing pushback policies against refugees.

B. Possible Solutions to Eliminate Pushback Policies: Left Inconclusive by States?

The previous section has shown some wealthier democratic states' undying obsession with establishing strict border control measures. States maintain such standards because, as *sovereigns*, they get away with their deeds - even if they commit them in a dehumanizing, degrading way. As is explained by this Article, in Part I specific, in recent years, some western states, while conducting their pushback policies, have employed an attitude that sends a message that refugees create the crisis, which leaves them with no choice but to develop ways to protect their borders and the public health and safety *from* refugees. Gammeltoft-Hansen and Hathaway criticized this mindset as a *schizophrenic attitude* towards international refugee law.[130] It seems most western countries have been successful enough to discourage refugees from their attempts to reach their shores. Even if refugees are not pushed back and let to enter the state in question, they are in many cases still treated inhumanly, such as in refugee camps or in the areas where refugees wait without shelter for their misery to end. For instance, in north-western Bosnia and Herzegovina, hundreds of refugees *"struggle in freezing weather conditions, with little access to safe shelter, basic medicine, heating or electricity"*.[131] For example, in Greek island Lesvos, refugees have been facing abusive treatments, which make them regret seeking refuge in Europe in the first place. This incident shows us that these people have escaped from war zones only to struggle with *"xenophobic, and Islamophobic migration policies ... during the coronavirus pandemic"* in Europe.[132] The numbers show that new arrivals to Europe have continued to decrease over the years.[133] These statistics also prove what western

129 ibid 12.

130 Gammeltoft-Hansen and Hathaway (n 88) 282.

131 Elisa Oddone, 'A refugee crisis brews in Bosnia's bitter winter', (*Al Jazeera,* 13 Jan 2021) <https://www.aljazeera.com/news/2021/1/13/hundreds-of-migrants-face-icy-struggle-in-former-bosnia-camp> accessed 7 April 2021.

132 Nabiha Islam, 'As a doctor in a European refugee camp, I found deep neglect and xenophobia' (*The New Humanitarian*, 1 March 2021) <https://www.thenewhumanitarian.org/opinion/first-person/2021/3/1/on-greece-lesvos-refugees-battle-neglect-and-xenophobia?mc_cid=ec55b85fbf&mc_eid=0cd57908d5> accessed 1 March 2021.

133 UNHCR, 'UNHCR warns asylum under attack at Europe's borders, urges end to pushbacks and violence against refugees' (*UNHCR,* 28 January 2021) <https://www.unhcr.org/news/press/2021/1/601121344/unhcr-warns-asylum-under-attack-europes-borders-urges-end-pushbacks-violence.html?mc_cid=64a74e7aab&mc_eid=0cd57908d5> accessed 7 April 2021.

states *intentionally* forget: *"it is not some paradise at the other end which [refugees] seek, but merely an escape from the hell in which they live"*.[134]

Considering ongoing discussion, is there any way to prevent (western) states from their hostile mindset and attitude enforced by their asylum policies then?

The international community has enforced two intergovernmental compacts to resolve migration-related problems: the Global Compact on Refugees (GCR)[135] and the Global Compact for Safe, Regular, and Orderly Migration (GCM).[136] The goal of the GCR and GCM is to end *"widespread and increasingly systematic human rights violations committed against migrants by state officials, traffickers, and other criminals"*.[137] In other words, the international community desired to overcome *"one of the greatest human tragedies of our time"* through the mentioned regulations.[138]

The GCR is only concerned with refugees and stands as a separate document from the GCM. The GCM was developed to overcome challenges emerging from cross-border mobility. It is expected that the challenges will be tackled/resolved by the international community in a collaborative manner. The GCR was developed to respond to growing numbers of displaced persons because of violence, human rights violations, armed conflict, and forms of persecution. The GCR aims to ease the pressures on host countries through greater development cooperation. Its framework focuses on the ways to strengthen national and local infrastructures. By doing that, the GCR targets to meet the needs of both refugees and their host communities.[139]

But tragedies never end, as human history is the mere proof of it. Today, with the increasing concern regarding the Covid-19, the current tragedy of our time, states have manipulated such circumstances to invoke new border control measures. These measures have opened ways for states to escape from their international legal responsibilities to protect refugees. States have controlled their borders to justify the Covid-19 by imposing limitations, derogations, and reservations on international human rights treaties in which they are either parties or signatories. The rights protected under these Conventions are non-derogable rights that must always be protected. Legally speaking, resorting to these methods would not make pushbacks or closed border policies justifiable.

134 Kuhlman Tom, *Towards A Definition of Refugees* (Oxford: Refugee Studies Centre, 1991) 8.

135 Global Compact on Refugees, UN doc A/73/12 (Part II) (2 August 2018).

136 Global Compact for Safe, Orderly and Regular Migration, UN doc A/RES/73/195 (19 December 2018).

137 Pia Oberoi, 'Words Matter. But Rights Matter More' (2018) 11 Anti-Trafficking Review 129-132.

138 Human Rights Council Report of the Special Rapporteur on Torture and Other Cruel, Inhuman Degrading Treatment or Punishment A/HRC/37/50 para 64(a).

139 Volker Türk, 'The Promise and Potential of the Global Compact on Refugees' (2018) 30 International Journal of Refugee Law 575-583.

The Article argues that supranational courts' decisions that establish a prohibition on pushback of refugees may prevent states from actualizing such policies. Considering that this Article primarily draws examples from the European states' actions, the following paragraphs look at one recent decision of the European Court of Justice (the ECJ). Further, the analysis looks at relevant delivered case decisions of the European Court of Human Rights (the ECtHR/the Court/the Strasbourg Court). The analysis aims to understand these Courts' attitudes towards refugees' border crossings in this context. Finally, the discussion shows that a firm stance taken by supranational courts in safeguarding refugees' rights would send an explicit message to the states that policies that disregard legal rules are not tolerated.

It should be noted that these courts do not have incontestable powers over sovereign states. It is the states which recognize the powers of supranational courts. However, the established case law of supranational courts may have a deterrence effect over states' pushback policies. This is detailed in the following paragraphs.

C. Supranational Courts' Decisions and Pushback Policies

This Article has explained how some western states reflected their nativist approach to their asylum policies. About the given example of Hungary's governmental practice towards refugees in Part I, the recent case of the ECJ is a positive affirmation that international law refugee protection exists and must be respected by states. The following analysis explains the importance of that mentioned case.

In the face of refugee *influx* erupted after the Syrian humanitarian *crisis* in 2015, Hungary provided *"for the creation of transit zones within which asylum procedures are to be conducted."*.[140] Furthermore, Hungary forced applicants to remain in the transit zones for the duration of the procedure. The ECJ considered this as constituting a detention measure.

Further, the ECJ stated that third-country nationals who claim asylum in Hungary *"in practice were confronted with the virtual impossibility of making their application"*[141] because of national legislation, which made starting the asylum procedure from the *created* transit zone mandatory. The goal of Hungary, in fact, by employing such an administrative practice was to limit the number of people who would be allowed to enter these areas.

The ECJ concluded the following. The Member States must

> "ensure that the persons concerned are able to exercise in an effective manner the right to make an application for international protection, including at their borders, as soon as they declare

140 C-808/18 *European Commission v Hungary* [2020] EU:C:1029, para 45.

141 ibid para 118.

their wish of doing so, so that that application is registered and can be lodged and examined in effective observance of the time limits".[142]

Thus Hungary *"has failed to fulfil its obligation to ensure effective access to the procedure for granting international protection"*, the ECJ stated in its press release.[143] Contrary to the clear message sent by the ECJ, it is reported that Hungary continued to push refugees back into Serbia, in violation of the Court's ruling.[144]

On the other hand, the ECtHR has taken a confusing stance in its collective expulsion cases. Indeed, the Court stands as the protector of the human rights and rights of refugees. In this regard, the Court has decisions that have affirmed the internationally protected rights of refugees. But the ECtHR also has delivered some criticized decisions. These decisions have fallen in contradiction with the vision embraced and represented since its creation. At first, concerning the outstanding decisions of the Court, we should refer to its *Khlaifia and Others v. Italy* case. In this case, the Court considered that if everyone's case is not examined sufficiently, this amounts to a collective expulsion.[145] Likewise, in its *Amuur v. France* case, the ECtHR considered that this constitutes detention if asylum seekers are held at an international airport for 20 days.[146]

As a side note, beginning with the Mediterranean *crisis* of 2015, almost all states have practiced detention procedures for immigrants, which has created a global carceral web.[147] Detention of refugees happens in different ways, as being held in overcrowded detention centers or modern super-max prisons. Once detained, refugees are allocated an identification number and forced to obey arbitrary rules and excessive force. They are distanced from legal protections during their incarceration. Refugees often lack knowledge; they have little or no political voice.[148] In the meantime, the meaning of detention still is understood as only being restrained within a confined place. For instance, people wait for years to be recognized as a refugee. This limbo would likely create a feeling of entrapment too. The sense of entrapment happens in the resignation syndrome, spreading among refugee children residing in the urban areas of Sweden, the ones kept in Australian offshore detention centers, and some others in Greece refugee camps. The effects of escaping from persecution and life-

142 *European Commission v Hungary* (n 140) para 106.

143 Court of Justice of the European Union Press Release, 'Hungary Has Failed to Fulfil Its Obligations under EU Law in the Area of Procedures for Granting International Protection and Returning Illegally Staying Third-Country Nationals' (2020) Press Release 161/20, 2 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200161en.pdf> accessed 25 May 2021.

Further, see European Commission v Hungary (n 140) para 315.

144 Nikolaj Nielsen, 'Frontex suspends operations in Hungary' (*EU Observer,* 27 January 2021) <https://euobserver.com/migration/150744> accessed 7 April 2021.

145 *Khlaifia and Others v. Italy* App no 16483/12 (ECHR, 15 December 2016) para 237.

146 *Amuur v France* 19776/92 (European Court of Human Rights, 1996) para 44.

147 Lucy Fiske, *Human Rights, Refugee Protest and Immigration Detention* (Palgrave Macmillan 2016) 5.

148 ibid 5.

threatening circumstances come to the surface once they are in the asylum state, waiting for their asylum application process to end. In most cases, either the arrival of the notice of deportation or the long waiting process for the final decision of asylum application makes them gradually withdraw from any activity until they finally have closed themselves off completely - detaching from the world around them.[149]

In another collective expulsion case, the *Hirsi Jamaa and Others v. Italy*,[150] the Court had followed a victim-centered approach by invoking the extraterritorial application of the European Convention on Human Rights (ECHR)[151] and its Protocol No 4, Article 4. [152] The Court was not interested in how refugees behaved and how they should have behaved. Instead, the Court looked at the extent to which Italian authorities complied with the Convention and Protocol No 4 Article 4, irrespective of bilateral agreements on implementing a pushback policy on refugees, concluded between Italy and Libya in 2009.

On the other hand, one of the worst decisions of the ECtHR[153] makes it questionable: whether the Court's traditional support for international legal rights of refugees was suspendable. In *N.D. & N.T. v. Spain* case,[154] the incident took place in Melilla, a Spanish enclave located on the North Coast of Africa and surrounded by Moroccan territory. The applicants N.D. and N.T. "*had left the Mount Gurugu camp that day and tried to enter Spain together with their group, scaling the outer fence with other migrants"*.[155] Two fences -outer and inner-protect Melillan Spanish borders. At the time of the incident, some refugees could reach the top of the inner wall. But *"only a few came down the other side and landed on Spanish soil"*.[156] The members of the Guardia Civil met the ones who successfully landed. The remaining refugees strangled on top of the inner fence. *"The Guardia Civil officials helped them to climb down with the aid of ladders"* and escorted them back to Moroccan territory.[157] Even though refugees including N.D. and N.T. were returned afterwards by Spanish border police to Morocco, the Court did not consider this act was constituting a breach of Article 4 of Protocol No. 4. Thus, the Court rejected the complaint of two migrants and issued its decision on 13 February 2020.

149 Rachel Aviv, 'The Trauma of Facing Deportation' (*The New Yorker*, 27 March 2017) <https://www.newyorker.com/magazine/2017/04/03/the-trauma-of-facing-deportation> accessed 2 December 2020.

150 *Hirsi Jamaa and Others v Italy* App no. 27765/09 (ECHR, 23 February 2012) paras 81-82.

151 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.

152 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.

153 Strasbourg Observers, 'The Best and Worst ECtHR judgments of 2020 are…' (*Strasbourg Observers,* 5 March 2021 <https://strasbourgobservers.com/2021/03/05/the-best-and-worst-ecthr-judgments-of-2020-are/> accessed 5 March 2021.

154 *N D & N T v Spanish* App nos 8675/15 and 8697/15 (ECHR, 13 February 2020).

155 ibid para 24.

156 ibid para 24.

157 ibid para 24.

The Court, in this case, positioned refugees, who had made collective efforts to enter the territory of the state concerned, in a place to be classified as hostile ones. Because the ECtHR established its decision based on *culpable conduct exception*. The Court stated that applicants *"crossed the border in an unauthorized manner (in this instance taking advantage of their large numbers and using force)"*, … *"justifying the fact that the Spanish border guards did not identify them individually"*. Spanish border guards' failure was *"regarded as the consequence of the applicants' conduct"* by the Court.[158] The Court's conclusion is summarized in the following sentence. *"The Government further alleged that the applicants' removal had been the consequence of their own "culpable conduct' for the Court's settled case-law"*.[159] On the ground of own culpable conduct exception, the ECtHR established the following reasoning. *"[T]he Government could not be held responsible for the fact that no such [individual] examination was carried out"* if there is *"unauthorized and disruptive means of attempting to enter the State's territory."*[160] This evaluation of the Court calls for an inquiry. First, we must ask whether culpable conduct exception or any other form of exceptions should be applied in the cases where refugees had put their lives at stake to reach the shores of the designated state at all. This article claims that culpable conduct exception distances refugees from emergency response which would offer immediate relief upon arrival in the asylum state. This exception introduces more of a state-centered approach, considering that the Court believes refugees are disruptive and they use force as means for their entry to the state's territory in question. But in the end, it is unclear what kind of force could be used when refugees try to surpass wired fences during their struggle to overcome such a hurdle?

In the *N.D. and N.T. v Spain* case, the evaluation of the Court gives the impression that refugees' rights, which are recognized by international law, are subject to the host states' assessment of their security interests. Thus, respecting refugees' rights will be determined depending on the conclusions from their behavioral analysis at the state's border. Whereas, in its *Chahal v. the United Kingdom* case (1996), in answering the question of whether the applicant should be expelled to his country of origin, where he would potentially face torture,[161] the Court concluded that even though the applicant was considered a *danger to society in the UK*[162], the *non-refoulment* principle would still apply.

As detailed in Part I of the Article, refugees are already narrated as villains and victims in conservative rhetoric. This formulated discourse condemns the refugees to be left in an endless cycle of misery. Such depiction also has the power of leading

158 ibid para 211.

159 ibid para 204.

160 ibid para 200, 201.

161 *Chahal v The United Kingdom* App no 22414/93 (ECHR, 15 November 1996) paras 76, 89, 103, 107, 112, 128.

162 ibid paras 75, 143, 153.

individuals in society into thinking that if refugees *"have no state to claim them or to advocate for their release,"* why would *we* endure their *burden*, considering their ulterior opportunist motives?[163] Reflecting on this villain/victim paradox, in the *N.D and N.T. v Spain* case, the Strasbourg Court adopted an attitude that can quickly shift into aligning with this conservative narrative. The stance of the Court is concerning because this result can be taken as a baseline by states which are willing to implement oppressive policies against refugees. In other words, in the face of ongoing pushback policies of some western states, the Court seems to affirm the adverse conjuncture of refugees today. It looks like the Court also uses a *profiling technique for* refugees under the shadow of *European identity*. In this regard, *N.D. & N.T. v. Spain* case decision of the ECtHR ignores two primary facts:

- Refugees often and most of the time cannot gather necessary documentation, including identification card, passport, and visa for entry before their departure.
- Many European countries actively seek ways to reject refugees once they arrive at their shores.

Another concerning side-effect of this case is also observable in the Court's other judgment, delivered on 24 March 2020 in *Asady and Others v. Slovakia* case.[164] Although the Court did not specifically evaluate the issue according to its own so-called culpable conduct test, we could see features of willingness towards establishing a set of rules that would regulate the *conduct of refugees* at the state's border. The Court commented on short-duration interviews as follows: *"may be a consequence of the applicants not stating anything that would require a more thorough examination"*.[165] The same approach can also be observed in the *M.K. and Others v. Poland* case of the Court.[166] The Court, in this case, made its assessment based on how the applicants approached the borders of the designated state in question. For example, one of the applicants as a *well-behaving* individual

> "in the period from July 2016 until 8 June 2017 … travelled to the Polish-Belarusian border crossing at Terespol on approximately thirty occasions. He submitted that each time that he had visited that border crossing he had expressly stated a wish to lodge an application for international protection; on at least several of those occasions, he had presented that application in written form (a copy of this document was submitted to the Court)".[167]

163 Fiske (n 147) 7.

164 *Asady and others v Slovakia* App no 24917/15 (ECHR, 24 March 2020).

165 ibid paras 64. See also para 66, which states that *"it may be presumed that the details of their journey might have been similar as well, since they [the applicants] had been travelling as a group"*.

See para 64 with respect to circumstances of the interview, the Court concludes that *"not in itself sufficient to justify the applicants' view that the interviews were not conducted on an individual basis"*.

166 *M K and Others v Poland* App no 40503/17, 42902/17 and 43643/17 (ECHR, 23 July 2020).

167 ibid para 10.

This time the Court stated that the *non-refoulement* principle *"aim[s] at providing all asylum seekers effective access to the proper procedure by which their claims for international protection may be reviewed."*[168] Considering several attempts of the applicants to submit asylum applications, the Court concluded that the refusal of Polish authorities constituted systematic and deliberate practice reaching the limits of collective expulsion. However, the *N.D. and N.T. v. Spain* case was different according to the Court. The applicants attempted to enter the Spanish territory of Melilla, only to face immediate return upon their arrival. In the eyes of the Court, their employed *conduct* to pass border crossing put the Spanish authorities in a position to defend their territories in the face of *ill-behaved invaders*.[169]

Considering that refugees experience double victimization in many ways, the ECtHR' decisions are worrying. The Court contradicts itself because it has also delivered essential safeguarding decisions that reminded states that refugees' rights must be recognized and protected. For example, in its *Khlaifia and Others v. Italy* case, the Grand Chamber of the ECtHR stated that *"an increasing influx of migrants cannot absolve a State of its obligations"*.[170] In the *M.A. and Others v. Lithuania* case, a judge reprehended Lithuanian authorities for returning refugees without executing any individual application process while delivering his dissenting opinion. The judge concluded his argument with a comment on Lithuania's conduct as follows; *"[m]igrants are not cattle that can be driven away like this"*.[171]

States' practices criticized above do not make the *non-refoulement* principle and refugees' rights ineffective. On the contrary, *"the maximum of effectiveness should be given to [an instrument] consistent with the intention – the common intention – of the parties"*.[172] Thus, even though some states have not fulfilled their legal responsibilities, the ECtHR must remind them that they are *watched* and implement their asylum policies by following relevant human rights standards.

The Article leaves the debate with a question mark. Today, according to the belief contended by the mainstream public opinion, western states have reached the highest point humanity can ever reach in terms of civilization. Yet if the notion of *being a civilized democratic state* lies at the very foundation of hospitality and xenia, we can then rely on the transmission of the *"Homeric concept of xenia"*[173] in *Odyssey*. With links to Odyssey's narrative, we can ask whether some western states have

168 ibid para 181.

169 ibid paras 105-110.

170 *Khlaifia and Others v Italy* (n 145) para 184.

171 *M A and Others v Lithuania* App no 59793/17 (ECHR, 11 December 2018) para 29.

172 Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons, Ltd.; New York: Frederick A. Praeger, 1958) 229.

173 John Harris, 'Xenia: Refugees, Displaced Persons and Reciprocity' (2020) 29 Cambridge Quarterly of Healthcare Ethics 9-17.

tricked us into believing that they are the most civilized ones. For example, in 2018, Hungary's parliament passed laws that criminalized any individual or group helping an *illegal immigrant* claim asylum.[174] In Italy, after four years-long investigations, Italian prosecutors recently charged rescuers, who have saved thousands of people from drowning in the Mediterranean, accusing them of collaborating with people smugglers. Rescuers were from charities including Save the Children and Médecins Sans Frontières.[175] Drawing upon given incidents, we can again turn our attention to the Homeric concept of xenia which was transferred through a short narrative by Emily Wilson in the introduction of her translation of the *Odyssey*:

> "Before approaching the island of the Cyclopes, Odysseus tells his men that he has to find out ...whether the inhabitants are "lawless aggressors," or people who welcome strangers... the willingness to welcome strangers is figured enough, in itself, to guarantee that a person or culture can be counted as law-abiding and 'civilized'."[176]

IV. Conclusion

Every alien is entitled to seek asylum over the whole territory, including a state's territorial waters, irrespective of whether they are under the designated state's authority other than their own. This acceptance takes its roots from the core international legal system that has been discussed/analyzed by this Article.

Despite the fundamental principles established by the international legal regulations, still, some western states impose restrictive, hostile, and repressive measures on refugees. In many incidents, refugees are denied support, receive no legal advice, or face mandatory detention. As explained in Part I of this Article, these measures have been justified either by the threat of terrorism or *them* (refugees) being culturally misfit or taking away the job opportunities from the host state's citizens.

Indeed, the *non-refoulement* principle is about not returning refugees, and it does not constitute the legal obligation of granting asylum by the designated state. But it requires that states must *process* individual applications of refugees to decide about the asylum. The logic of this process lies behind the idea of protecting people who are possibly escaping from persecution, such as torture or other forms of life-threatening violence. Many refugees' lives thus rely on the mere act of admittance by the state.

174 See Court of Justice of the European Union, 'EU Law Precludes a National Supreme Court, Following an Appeal in the Interests of the Law Brought by the Prosecutor General, from Declaring a Request for a Preliminary Ruling Submitted by a Lower Court Unlawful on the Ground That the Questions Referred Are Not Relevant and Necessary for the Resolution of the Dispute in the Main Proceedings' (Court of Justice of the European Union, 23 November 2021) Press Release No: 207/21 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210207en.pdf> accessed 26 November 2021.

175 Lorenzo Tondo, 'Refugee rescuers charged in Italy with complicity in people smuggling' (*The Guardian,* 4 March 2021) <https://www.theguardian.com/global-development/2021/mar/04/refugee-rescuers-charged-in-italy-with-complicity-in-people-smuggling?mc_cid=ec55b85fbf&mc_eid=0cd57908d5> accessed 4 March 2021).

176 Emily Wilson (tr), *The Odyssey* (WW Norton and Company Ltd 2018) 23.

Under international law: states must take *"all reasonable precautionary steps to protect life and prevent excessive violence"*.[177] However, considering states' sovereign interests, it is not an easy road to ensure that every state is reliable in actualizing its international legal obligations. As is settled in the last section of this Article, the supranational courts can guide states and shape their asylum policies. But as can also be understood, the problem is deeper and more confusing than it can be resolved through the case-law of mentioned courts.

The existence of push-back policies constitutes the most striking example of states' failure to fulfil their obligations to protect the rights of refugees. The pushback is the reason why the expression *refugee in law and practice* is used in the title of this Article. Instead, states leave refugees in limbo. The abandonment is reflected in the language of how state officials defend their asylum policies to justify their pushbacks.

The mainstream media reconciled the concepts of crisis and refugee. The leading role of states in crises is not even included in the reports published on refugees. The events related to the concept of pushback were given in detail within the scope of this Article to show readers that states produce crisis, not the other way around. It was also necessary to set forth relevant incidents because we do not have accurate data showing how many people have lost their lives due to starvation, dehydration, or no life-saving treatment due to pushback operations. [178] We do not know how many of them have died from despair.[179] These figures show/tell very little about the perpetrators -who are supposed to help and rescue refugees- including the security officials, the Frontex, and the border guards. The statistics do not detail how armed groups force people to leave their homes and how/why these people seek help from human smugglers to cross international borders. Instead, we keep reading arising problems due to the influx of refugees coming from conflict areas. Sometimes, we see incidents of burnt refugee camps, a pregnant woman who set herself on fire, and a father charged with his son's death on their journey to Greece. We see a refugee persona presented as a hysteric, delusional, and opportunist human being. We have been conditioned to disregard why people become refugees. We thus are made to lose our wisdom by not calling people who are forced to leave their homes due to persecution and seeking protection elsewhere by their proper names.[180] As long as states choose to ignore the necessity of adopting asylum policies that are designed to protect humans' lives, it is true that refugees will remain in limbo, only wishing if they will receive any form

177 United Nations General Assembly Human Rights Council, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Right to Life and the Use of Force by Private Security Providers in Law Enforcement Contexts' (2016) A/HRC/32/39, para 75 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/092/21/PDF/G1609221.pdf?OpenElement > accessed 28 May 2021.

178 United Nations General Assembly, 'Unlawful death of refugees and migrants Note by the Secretary-General', Seventy-second session, Item 73 (b) of the provisional agenda, A/72/335, 2 (15 August 2017) <https://reliefweb.int/sites/reliefweb.int/files/resources/N1725806.pdf> accessed 5 January 2021.

179 ibid 2.

180 *"The beginning of wisdom is to call things by their proper name."* — Confucius.

of protection. It seems there is no ultimate way to eliminate brutal state policies that undermine humans' security and dignity. But even though this situation appears like an impossibility, it can also be reversed if the supranational courts, international community, and activists keep declaring that *every alien has the right to seek asylum*.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Grant Support: The author declared that this study has received no financial support.

Hakem Değerlendirmesi: Dış bağımsız.
Çıkar Çatışması: Yazar çıkar çatışması bildirmemiştir.
Finansal Destek: Yazar bu çalışma için finansal destek almadığını beyan etmiştir.

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