universität wien

MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

„ Pushback of Migrants from Croatia to Bosnia and Herzegovina - a Human Rights Law Perspective “

verfasst von / submitted by

Antonia Obrvan Jakupi, LLB (Hons)

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Arts (MA)

Wien, 2021 / Vienna 2021

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	UA 992 884
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	Master of Arts in Human Rights
Betreut von / Supervisor:	Dr. Kevin Fredy Hinterberger

Table of Contents:

List of Acronyms and Abbreviations

1951 Convention/ Refugee Convention – Convention Relating to the Status of Refugees (adopted 14 December 1950, entered into force 22 April 1954) 189 UNTS 137

AIDA – Asylum Information Database

BiH – Bosnia and Herzegovina

CAT – 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

CoE – Council of Europe

CPT - European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

ECHR/The Convention – Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and No. 14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005

ECtHR – European Court of Human Rights

EU – European Union

EU Charter – Charter of Fundamental Rights of the European Union (2007) OJ C303/1

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

LITP - Law on International and Temporary Protection, Official Gazette NN 70/2015, 127/2017

UNOHCHR - United Nations Office of the High Commissioner for Human Rights

UNHCR – United Nations High Commissioner for Refugees

A. Introduction

In 2015 the 'Balkan route' opened for migrants travelling from the Middle East and African countries trying to reach western Europe. The reasons for their migration are various, such as escaping persecution, war, or poverty. This is the reason that the term 'migrant' as opposed to 'refugee' or 'asylum seeker' is used in this master thesis. It is considered that the term 'migrant' could encompass those who choose to move to improve the quality of their lives through better economic opportunities, but also those who flee war or persecution and could be considered as 'refugees', as defined in the 1951 Refugee Convention.[1] From 2015 to 2016, 650 thousand people passed through Croatia[2] when the migrant influx from the Middle East started due to the escalated conflicts in Syria, Afghanistan and Iraq.[3] However, once the Croatian, Slovenian and Macedonian authorities closed the Western Balkan route in March 2016,[4] Croatia reinforced its borders and has since been regularly accused of systematic practices of illegal pushbacks and police violence.[5] 'Pushback' is not a legal term, however it is used in this

---

[1] Convention Relating to the Status of Refugees (adopted 14 December 1950, entered into force 22 April 1954) 189 UNTS 137, Article 1(A)(2), as amended by the Protocol Relating to the Status of Refugees (adopted 16 December 1966, entered into force 4 October 1967) 606 UNTS 267, Article 1.

[2] S. Knezović, Dr and M. Grošinić, *Migration Trends in Croatia*, Zagreb, Hanns-Seidel-Stviftung, 2017, (accessed 1 March 2021), p. 17.

[3] W. Spindler, '2015: The year of Europe's refugee crisis', UNHCR, 8 December 2015, https://www.unhcr.org/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html, (accessed 1 June 2021);

L. Sly, '8 reasons Europe's refugee crisis is happening now', The Washington Post, 18 September 2015, https://www.washingtonpost.com/news/worldviews/wp/2015/09/18/8-reasons-why-europes-refugee-crisis-is-happening-now/, (accessed 1 June 2021).

[4] P. Kingsley, 'Balkan countries shut borders as attention turns to new refugee routes', The Guardian, 9 March 2016, https://www.theguardian.com/world/2016/mar/09/balkans-refugee-route-closed-say-european-leaders, (accessed 5 June 2021); Border Violence Monitoring Network, *Torture and Cruel, Inhumane, or Degrading Treatment of Refugees and Migrants in Croatia in 2019,* (website), https://www.borderviolence.eu/wp-content/uploads/CORRECTEDTortureReport.pdf (accessed 19 April 2021), p. 3.

[5] For example: AIDA, *Country Report: Croatia 2020 Update,* (website), https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-HR_2020update.pdf, (accessed 1 July 2021); AIDA, *Country Report: Croatia 2019 Update*, (website), https://asylumineurope.org/wp-content/uploads/2014/08/AIDA-

thesis because of its widespread use by different organisations when reporting on the situation in Croatia.[6] The term is used to describe 'informal cross-border expulsion'.[7]

The seriousness of the situation is also illustrated by the fact that, at the time of writing, there is a case pending in front of the European Court of Human Rights (ECtHR). The case consists of three different claims where applicants are alleging that they have been victims of summary pushbacks[8] to BiH by Croatian police, thus breaching their rights provided in the European Convention on Human Rights (ECHR).[9] More specifically, they are arguing that the Croatian police have violated the principle of non-refoulement under Article 3 ECHR by returning them summarily without any

---

HR_2019update.pdf, (accessed 1 July 2021); AIDA, *Country Report: Croatia 2018 Update*, (website), https://asylumineurope.org/wp-content/uploads/2014/08/AIDA-HR_2018update.pdf, (accessed 1 July 2021); AIDA, *Country Report: Croatia 2017 Update*, (website), https://asylumineurope.org/wp-content/uploads/2018/04/report-download_aida_hr_2017update.pdf, (accessed 1 July 2021); AIDA, *Country Report: Croatia 2016 Update,* (website), https://asylumineurope.org/wp-content/uploads/2017/04/report-download_aida_hr_2016update.pdf, (accessed 1 July 2021); AIDA, *Country Report: Croatia December 2015,* (website), https://asylumineurope.org/wp-content/uploads/2015/12/report-download_aida_hr_update.ii_.pdf, (accessed 1 July 2021).

[6] Ibid; Border Violence Monitoring Network, *Pushbacks and Police Violence – Legal Framework*, (website), https://www.borderviolence.eu/legal-framework/, (accessed 10 June 2021). It is recognised by the author that this term is also used more widely, even in the cases before the ECtHR regarding countries other than Croatia. E.g. *Hirsi Jamaa v. Italy,* para. 162: the term was used in the third-party interventions when explaining the practices as 'refusals of entry and expulsions without any individual assessment.' However, the ECtHR continued to use the term 'push-back' in the assessment without defining exactly what is meant by it. Therefore, the Border Violence Monitoring Network definition is used here because it is context specific and its use is widespread amongst the reporting actors, whose reports on the alleged practices provide the factual basis to this thesis as to what is allegedly happening on the Croatian borders.

[7] Border Violence Monitoring Network, *Pushbacks and Police Violence.* This definition is used to encompass all of the situations that are going to be analysed in the thesis, considering that the case scenarios that will be dealt with involve allegations of the migrants being brought to a point at or close to the green border of Croatia and BiH and being forced to walk across, without any record being made or lawful procedure being followed. Therefore, it is important to say that pushbacks are an informal practice.

[8] Summary pushbacks represent an informal cross-border expulsion of more than one individual. This is important to illustrate for the purposes of determining whether the expulsion in question was collective. This will be focused on in Chapter E.

[9] European Court of Human Rights, *S.B. v. Croatia and 2 other applications*, nos. 18810/19, 18865/19, 23495/19, Communicated on 26 March 2020; Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and No. 14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005.

assessment as to the dire conditions and a dysfunctional asylum system they would face in BiH.[10] Additionally, the applicants claim that they have been victims of collective expulsion, prohibited under Article 4 of Protocol 4 ECHR. This is because they have allegedly been returned together with groups of other foreigners without any assessment of their situation at all.[11] . There are various human rights in multiple human rights instruments that can be triggered by these practices. For example, in addition to the principle of non-refoulement and prohibition of collective expulsion, the ECtHR considered other rights in expulsion cases. These are the right to life enshrined in Article 2 ECHR, Article 6 ECHR the right to a fair trial and the right to an effective remedy, provided in Article 13 in different expulsion cases.[12]

However, for practical purposes of not being able to examine each of the rights sufficiently in the given formal requirements, this thesis will focus on examining the principle of non-refoulement, enshrined in Article 3 ECHR and the prohibition of collective expulsion, enshrined in Article 4 of Protocol No. 3 ECHR. More on the reasons why will be discussed in the Delineation part of the Introduction. Following this point, the literature used to form the arguments surrounding the aforementioned principles will be mainly the ECtHR cases regarding expulsions and the literature discussing these cases and principles.

Although there is substantive scholarship surrounding the main cases regarding expulsions, as well as Article 3 and Article 4 of Protocol 4 ECHR, while conducting the research, the author of this thesis found that there is a gap in the existing legal literature on discussing the alleged summary pushbacks of migrants from Croatia to Bosnia and Herzegovina focusing on the act of the informal removals and the human rights

---

[10] Ibid.

[11] Ibid.

[12] F.L. Gatta, 'The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: the Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights', in G.C. Bruno, F.M. Palombino and A. Di Stefano (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR, 2019, pp. 119-146, p.124. (a)

implications they may have. This is illustrated in more detail in the Literature Overview chapter.

.

A.1. Framing the research question

The research question to be answered by this thesis is *'Are the pushbacks of irregular migrants on the Croatian border breaching human rights law and how?'*. This is because pushbacks are by definition informal removals of migrants from a territory of a country. As such, they could potentially constitute a violation of the principle of non-refoulement. This is because each migrant needs to be given due process and individual assessment before being removed to a territory of another state to ensure that they are not in danger of being submitted to torture or inhuman or degrading treatment.[13] In addition, the prohibition of collective expulsion of aliens, as provided in Article 4 of Protocol 4 ECHR is also relevant. The reason for this is that the provision requires countries to provide due process to every migrant by individual assessment before removing them from a territory of one state to another.[14] This is to ensure that each migrant has the opportunity to request asylum and appeal the decision of removal.

These provisions apply regardless of the migrants' legal status and regardless of whether they are being removed to their country of origin or a third country, like BiH.[15] This assessment is especially necessary considering that Croatia is a signatory to the

---

[13] European Court of Human Rights, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17, 43643/17, 23 July 2020, para. 167.

[14] European Court of Human Rights, *N.D. and N.T. v. Spain*, nos. 8675/15, 8697/15, 13 February 2020, para 164.

[15]F. De Weck, *Non-refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT*, Leiden, Koninklijke Brill nv, 2014, p. 17.

ECHR, which creates the obligation to ensure that the migrants are given an individual assessment so they can be provided with international protection if needed, as well as to uphold the principle of non-refoulement.[16] In order to answer the research question through legal analysis, the author created two case scenarios based on the most common facts that appeared in different reports of the alleged pushbacks. This master thesis analyses the case studies based on the mentioned rights provided in the ECHR, as well as the relevant case-law of the ECtHR, to determine whether they would amount to a breach of the principle of non-refoulement and prohibition of collective expulsion of aliens. Based on this analysis, it can be argued what the outcome of the *S.B. v. Croatia* case should be.

A.2. Delineation

As was mentioned, this thesis will focus on examining the principle of non-refoulement and the prohibition of collective expulsion of aliens from the perspective of Article 3 ECHR and Article 4 of Protocol 4 ECHR respectively. The reasons why the focus is on the ECHR, while the research question more broadly asks about human rights law are explained below.

It is recognised that the principle of non-refoulement is the cornerstone of refugee law, stemming from Article 33 of the Convention Relating to the Status of Refugees (1951 Refugee Convention). As such, it protects refugees from being expelled or returned from a territory of a signature country to a territory of a country where their 'life or freedom would be threatened on account of (…) race, religion, nationality, membership of a particular social group or a political opinion.'[17] However, this is not examined in detail in this thesis because the aim is not to examine refugee law, but human rights law.

---

[16]Convention Relating to the Status of Refugees (adopted 14 December 1950, entered into force 22 April 1954) 189 UNTS 137, Article 31.

[17] Ibid, Article 33 (1).

Therefore, it is necessary to mention that the principle of non-refoulement is enshrined in various international and regional human rights treaties. For example, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) has the principle of non-refoulement contained in the prohibition on torture, cruel, inhuman, or degrading treatment or punishment.[18] On the other hand, Article 3(1) of the Convention Against Torture (CAT) has an express prohibition laid out. It says that

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.[19]

Regionally, the Charter of Fundamental Rights of the European Union (EU Charter) also explicitly prohibits refoulement in the provision of Article 19(2). It states that

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.[20]

Furthermore, the ECHR Article 3 prohibition of torture, inhuman or degrading treatment or punishment has the principle of non-refoulement enshrined in it. The definition of non-refoulement that will be used is the one provided by the ECtHR. In plain terms, it is a prohibition of removal in any sense of the word of anyone to a state where they face a serious risk of being subjected to the death penalty, torture, or other ill-treatment.[21] The migrants' legal status does not matter, and neither does it matter whether

---

[18] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 7.

[19] 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, Article 3 (1).

[20] Charter of Fundamental Rights of the European Union (2007) OJ C303/1, Article 19 (2).

[21] De Weck, p. 8.

the receiving country is the country of the migrant's origin or a third country.[22] The ICCPR and the EU Charter provisions provide similar protection to the ECHR in the sense of including all forms of ill-treatment, while the CAT only protects from torture.[23] However, the issues surrounding the enforcement of these treaties contributed to the decision that the ECHR is the focus of this thesis. This will be discussed in detail below.

Furthermore, the prohibition of collective expulsion is very closely tied to the prohibition of refoulement, although the two do not depend on each other. This is because collective expulsion is mainly prohibited to ensure that each migrant gets an individual assessment by state authorities before issuing a decision of expulsion.[24] Such assessment is also important in order to ensure that the principle of non-refoulement is not breached and that the migrants are able to appeal to the decision of expulsion. This is provided in Article 4 Protocol 4 ECHR, which plainly states that 'Collective expulsions are prohibited'. The same text can be found in the EU Charter Article 19(1). However, since the focus of this thesis is on the ECHR, the former provision is chosen to be analysed in this thesis.

Finally, the issue of enforcement is to be considered. Croatia is a state party to all the aforementioned international treaties, and provisions contained therein are binding to it, which makes them relevant when looking at the issue of the alleged pushbacks. However, the enforcement mechanisms in the treaties differ, which also impacts the enforceability of the individuals' human rights protection stated therein.

There are two UN monitoring bodies that deal with individual complaints regarding the principle of non-refoulement. These are the United Nations Human Rights

---

[22] Ibid, p. 98; N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights,* Srasbourg, Council of Europe Publishing, 2010, (accessed 5 April 2021), p. 25.

[23] De Weck, pp. 51 and 54.

[24] European Court of Human Rights, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of collective expulsion of aliens,* (website), https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf, (accessed 25 July 2021), paras. 1-2.

Committee (UNHRC), based on the ICCPR and its First Protocol,[25] and the Committee Against Torture, based on Article 22 CAT. However, the latter has been preferred by individuals threatened with refoulement, which is why the CAT Committee is considered as the most experienced UN human rights treaty body in assessing complaints regarding the principle of non-refoulement.[26] Nevertheless, since it is not a judicial body, it cannot issue binding decisions when examining individual complaints. The CAT Committee conducts communications and meetings to allow the parties to express their arguments. The proceedings are finalised by producing final views on the issue, which are communicated to the author of the complaint and the state party concerned. In this communication of the final views, the Committee invites the State to inform it on the actions taken to comply with its views.[27] Therefore, compliance with the human rights standards provided in the CAT seems to be left to the political will of the State Party concerned, which is often less effective than a legal obligation that stems from a binding judgment.[28]

Furthermore, there are some arguments regarding the Court of Justice of the European Union (CJEU) and its role in the enforcement of human rights principles. There have been arguments that the CJEU is becoming the new European adjudicator on human rights, creating its principles through judgments, separating itself from the ECHR and international human rights law.[29] An example of this is the *Kadi* case where the

---

[25] Optional Protocol to the International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 1.

[26] De Weck, 2015, p. 7.

[27] UNOHCHR, *Fact Sheet No.17, The Committee against Torture,* (website), https://www.ohchr.org/Documents/Publications/FactSheet17en.pdf, (accessed 1 May 2021).

[28] B. Çali, C. Costello and S. Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies', *German Law Journal*, vol. 21, 2020, pp. 355-384, (accessed 1 March 2021), p. 362.

[29] G. de Burca,'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', *MJ*, vol. 20, no.2, 2013, (accessed 25 June 2021), p. 172.

focus was the relevance of international human rights law in the EU legal order when a UN Security Council resolution sanction was transposed in EU regulation.[30] The EU Commission argued that the CJEU should not intervene because Mr Kadi had an acceptable opportunity to be heard within the UN legal system. However, on appeal the CJEU asserted the autonomy of EU law by holding that the issue at hand is whether the Union regulation was lawful, not the Security Council resolution.[31] In that respect, the CJEU held that the UN review procedure did not take Mr Kadi outside of the protection of EU law. Thus, the CJEU did not look into international law, but it focused on EU law completely by reviewing the regulation and the compatibility with the fundamental rights which form the basis of the EU legal order.[32] As such, it has been argued that the CJEU has defended the autonomy of EU law and undermined the international human rights law, which should have had primacy in analysing this issue. [33] On the other hand, Juliane Kokott and Christoph Sobotta argue that this dualist approach has to be considered in the context of the multilevel systems where 'it is possible that the level of protection of fundamental rights guaranteed by a higher level does not attain the level of protection the lower level has developed.'[34] Therefore, the dualist approach of EU law and international law was necessary because the UN level in this case provided

[30] Mungianu, p. 104-105.

[31] J. Kokott and C. Sobotta, 'Constitutional Core Values and International Law – Finding the Balance?', *EJIL*, vol.23, no. 4, 2012, (accessed 23 February 2021), p. 1016; Court of Justice of the European Union, C-402/05 and C415/05 [2008] ECR I-06351, *Yasin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 3 September 2008, para. 286.

[32] Ibid; *Kadi,* para 281 and 303.

[33] G. de Burca, 'The European Court of Justice and the International Legal Order After Kadi', *ILJ*, vol. 51, no. 1, 2010, (accessed 25 June 2021), p. 44.

[34] Kokott and Sobota, p. 1018.

insufficient protection.[35] This reasoning is similar to the *Solange I* and *II* approaches.[36] The *Solange I* decision of the CJEU's counterpart in 1970 stated that the EU action in question needs to be in conformity with national fundamental rights as long as it offered a higher standard of protection than the EU.[37] The *Solange II* decision complemented this by declaring that after twelve years, the EU standard of protection has been elevated, thus the conformity of EU action has to be assessed against the EU fundamental rights.[38] Therefore, the assertion of the autonomy of EU law from international law can be justified by saying that it is only in cases where a higher level of protection is provided by such an approach. However, it is still an open argument whether the 'CJEU, by emphasising the autonomy of EU law and its interpretation, is missing the opportunity of developing informed expertise in the field of human rights adjudication, and of ensuring that its standards of rights protection are at least as developed as the relevant regional and international standards.'[39]

On the other hand, the ECHR is considered to be the leading human rights instrument in Europe,[40] especially because of its monitoring body, the ECtHR. The ECtHR has been called the most efficient legal enforcement mechanism created by a

---

[35] Ibid.

[36]European Court of Justice, C-11/70 [1970] ECR I-01125, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany*, 17 December 1970 (Solange I); European Court of Justice, C-126/81 [1982] ECR I-01479, *Wünsche Handelsgesellschaft v Federal Republic of Germany. Reference for a preliminary ruling: Bundesverwaltungsgericht – Germany,* 6 May 1982 (Solange II); Kokott and Sobota, p. 1018.

[37] *Solange I.*

[38] *Solange II.*

[39] G. de Burca, 2013, p. 184

[40] M. Milanovic, 'Extraterritorial application of human rights treaties: Law, principles, and policy', *Oxford Monographs in International Law,* 2011, (accessed 5 April 2021), p.4: ECHR is often said to be one of the strongest human rights instruments in its ability to effectively ensure compliance.

human rights treaty.[41] There was always always had the right of individual application in the ECHR, found in Article 34 ECHR.[42] It provides that 'The Court may receive applications from any person, non-governmental organisation (NGO) or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties.'[43] Most importantly, the judgments of the Court are binding and have to be complied with by the Contracting Parties. The ECHR creates a follow-up mandate under Article 46, paragraph 2, where the Committee of Ministers oversees the execution of judgments by the states, creating additional political pressure to comply with the ECHR standards. There is also a special department within the Council of Europe (CoE) structure to make the execution process smooth by assisting the Committee of Ministers in its mandate, as well as cooperating with the states in order to support them in a full, effective and quick execution of the judgments they are a party to.[44] Because of these issues of enforceability with the enforcement mechanisms of the other treaties, the ECHR has been chosen as the sole treaty to be examined in detail in this thesis.

A.3. Introducing the structure

The Chapter on Literature Overview of the thesis introduces the main primary and secondary sources that the author found when researching the topic. Additionally, the chapter aims to introduce the reader with the gap in the academic scholarship that

---

[41] R. K. M. Smith, *International Human Rights Law,* Oxford, Oxford University Press, 2016, (accessed 5 April 2021), p.96.

[42] In the original text of the ECHR, the provision was in Article 25(1) but and it was only optional for the states to agree to it. This issue was resolved in 1998 by Protocol 11 entering into force, because it made the "individual application" provision automatic, and it renumbered the ECHR so the former Article 25(1) provision can now be found in Article 34 ECHR: Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 25 (1).

[43] ECHR, Art 34.

[44] CoE, *Department for the Execution of Judgments of the European Court of Human Rights,* (website), https://www.coe.int/en/web/execution/presentation-of-the-department, (accessed 1 July 2021).

was discovered during the research. For this reason, the literature overview contains academic and non-academic sources, such as legal sources, NGO reports and IGO reports, which formed an important part of the thesis.

Furthermore, for the purpose of better understanding the situation in Croatia by the reader, the second chapter briefly explains the relevant geo-political context that developed since 2015. This consists of a broad overview of what happened in relation to the allegations of pushbacks on the national level in Croatia. Namely, it aims to illustrate what was the Croatian approach towards the migration influx that started in 2015, how it developed and what were the main factors influencing the developments. The chapter will then move on to lay out the chosen case scenarios to be examined in further detail to see whether there is a breach of the principle of non-refoulement and prohibition of collective expulsion by the Croatian authorities.

The third chapter focuses on the principle of non-refoulement enshrined in Article 3 ECHR. It starts with laying down the theoretical framework to establish the definition of non-refoulement and the scope of protection, as developed by the ECtHR jurisprudence. This is necessary to determine whether the case scenarios fall under the scope of protection against refoulement under Article 3 ECHR. After establishing the applicability, the cases can be examined on their merits to see if the facts amount to a breach of Article 3, based on the existing ECtHR case law. Finally, the end of the chapter will focus on the case of *S.B. and Others v Croatia*, which is the application pending before the ECtHR alleging that the applicants' removal from Croatian territory to BiH by Croatian police breached Article 3 and Article 4 of Protocol 4 ECHR.[45] The facts of the applicants' alleged experience will be compared with the case scenarios and based on the analysis of the applicability and violation of the principle of non-refoulement, there will be a discussion as to what could be expected as the outcome of the *S.B.* case.

Furthermore, the fourth chapter proceeds to discuss the prohibition of collective expulsion set out in Article 4 of Protocol 4 ECHR. As in the previous chapter, firstly the

[45] *S.B. v. Croatia and 2 other applications*.

focus is on establishing the theoretical framework surrounding the article, to set the definitions and the scope. As explained, this is necessary to see whether the case scenarios fall under the scope of the article and if the discussion based on merit can continue. The analysis of the facts of the cases follows so that it can be established whether there is a violation of the prohibition of collective expulsion. Following the structure of the preceding chapter, here to the case of *S.B.* will be introduced in the last part of the chapter to discuss the expected outcome of the case.[46]

Lastly, the conclusion will summarise the main points and arguments raised in the thesis, to provide a quick overview to the reader as to what the answer to the research question was. The focus will thus be on chapters three and four, where the analysis of the case scenarios alongside the ECtHR jurisprudence surrounding the prohibition of refoulement and collective expulsions is conducted to illustrate whether the alleged pushbacks of migrants from Croatia to BiH breach international human rights law and explaining how.

[46] Ibid.

B. Literature Overview

This chapter provides an overview of the most prominent resources used in the development and the writing of the thesis. The aim is to provide an overview of the existing scholarship relating to the issue of pushbacks in Croatia and the applicability of the ECHR standards enshrined in Article 3 and Article 4 of Protocol 4.

The primary sources used in this dissertation are the ECHR itself and ECtHR case-law regarding Article 3, the principle of non-refoulement and Article 4 of Protocol 4, prohibition of collective expulsion. In order to be able to discuss and apply the case-law correctly, legal literature dealing with the most relevant cases is employed.

According to Rietiker,[47] expulsion and extradition cases are among the most frequent cases of the ECtHR. Through this case-law, the ECtHR established conditions and limitations for the expulsion of aliens, which enhanced the protection of migrants against the State's border practices.[48] This article focuses on Article 4 of Protocol 4 where it explores the definition of 'collective expulsion' and its legal basis. It also considers the cases dealt with by the ECtHR up to the point of the writing and explains that the ECtHR had to interpret the provision effectively and dynamically to deal with the cases regarding pushbacks.[49] He claims that the principle of effective interpretation was illustrated by the ECtHR when it stated that the ECHR guarantees rights that are practical and effective. In addition, the dynamic interpretation shows that the moment relevant for the interpretation of a provision is the moment of the ECtHR's judgment, thus

[47] D. Rietiker,'Collective Expulsion of Aliens: The European Court of Human RIghts (Strasbourg) as the Island of Hope in Stormy Times', *Suffolk Transnational Law Review,* vol. 39, no. 3, pp. 651 – 682, 2016, (accessed 5 April 2021), p. 652

[48] Gatta, 2019 (a), p.121.

[49] Rietiker, 2016, p. 654.

allowing the ECtHR to expand the scope of protection of the ECHR to correspond to the given needs and circumstances in time.[50]

Furthermore, Gatta argues in his chapter that securitisation and restrictive border management directly impacted migrants' human rights.[51] He points out that the ECtHR case-law strengthened the protection of aliens against expulsion, particularly when interpreting Article 3 ECHR in the context of non-refoulement.[52] This is illustrated by analysing the most important cases from *Soering* to *Hirsi Jamaa*. In addition, he discusses the prohibition of collective expulsion, as provided in Article 4 of Protocol 4, and similarly to Rietiker, concludes that the ECtHR adopted an effective and dynamic approach in its case-law and 'significantly expanded the protection of migrants' rights.'[53] In another article, he looks into the migration crisis and the rule of law crisis caused by the responses to the increased migratory flows in Europe.[54] In his brief analysis of the situation of pushbacks he maintains that the ECtHR clarified that 'States have and maintain their sovereign prerogatives but, at the same time, they have to ensure that these are consistent with the obligations arising from the Convention. Namely, the principle of non-refoulement and prohibition of collective expulsion.[55]

However, it has to be noted that these articles were written before the recent judgment of *N.D. and N.T. v. Spain,* which was brought in 2020. This is a very relevant observation to be made because this judgment was a turning point where the ECtHR arguably went from increasing migrant protection towards decreasing it. In this context,

---

[50] Rietiker, 2016, pp. 673-674.

[51] Gatta, 2019 (a), p. 120.

[52] Ibid, p. 121.

[53] Ibid.

[54] F.L., Gatta, 'Migration and the Rule of (Human Rights) Law: Two 'Crises' Looking in the Same Mirror', *CYELP*, vol. 15, 2019, pp. 99-133, (accessed 11 April 2021), p. 104. (b)

[55] Ibid, p. 115.

Lucia Alonso Sanz[56] claims that the *ND* case deconstructed the protection developed in the previous case law regarding expulsions of migrants and Article 4 of Protocol 4.[57] The particular point raised in support of this argument is the fact that the ECtHR shifted the focus from protecting the individual and having the state in question carry the burden of proof that the applicants' allegations are not true, towards looking into whether the treatment the applicants received was due to their own guilt.[58] Carrera also takes this critical approach in the analysis of the judgment.[59] He says that the judgment is 'peculiar in comparison to previous ECtHR jurisprudence' and filled with contradictions and inconsistencies.[60] In addition, 'shifting the focus towards the individual constitutes a clear example of another 'statist move''.[61] However, he maintains that the ruling does not allow pushbacks of migrants, which puts Croatia, amongst other states, under the spotlight.[62]

In addition, regarding the literature focusing more specifically on the principle of non-refoulement, Ristik's analysis of the principle of non-refoulement as complementary protection to asylum seekers was very helpful in grasping the different variations of the principle of non-refoulement which appear in different instruments. Nevertheless, the principle as such stems from the 1951 Refugee Convention and the human rights provisions, such as Article 3 provide complementary protection to this basic

---

[56] L. Alonso Sanz, 'Deconstructing Hirsi: The Return of Hot Returns. ECtHR 13 February 2020, Nos. 8675/15 and 8697/15, ND and NT v Spain', *ECLR*, vol. 17, 2021, pp. 335-352, (accessed 1 June 2021).

[57] Ibid, p. 336.

[58] Ibid, p. 340.

[59] S. Carrera, 'The Strasbourg Court Judgement *N.D. and N.T. v Spain* - A *Carte Blanche* to Push Backs at EU External Borders?', EUI Working Paper, RSCAS 2020/21, 2021, (accessed 20 February 2021), p. 2.

[60] Ibid.

[61] Ibid, p. 9.

[62] Ibid, p. 27.

principle in practice.[63] In addition, Hemme provided a deep analysis into the absolute character of the prohibition of refoulement.[64] Lastly, de Weck published a study comparing non-refoulement principle in the ECHR and CAT by analysing the decisions of those instruments' monitoring bodies.[65] As such, it provided a very comprehensive insight into the development of the principle of non-refoulement and how it was applied in different cases until 2014.

This shows that the legal literature is very well developed in terms of the principle of non-refoulement and the scope and level of protection that is provided in expulsion cases under Article 3 ECHR. It also shows the increasing relevance of Article 4 of Protocol 4 ECHR in the context of the protection of migrants. However, the majority of the literature focuses on the period before the recent key judgments relating to pushback practices. Namely*, ND and NT v Spain* and *MK and Other v Poland*. [66] The former case arguably introduced a change in the ECtHR dynamic approach towards expulsion cases and narrowed the scope of protection provided under Articles 3 and Article 4 of Protocol 4. However, the *MK* judgment shows how the *ND* case methodology can be applied in practice in a way that it still ensures the protection of migrants. However, the *MK* case had relatively straightforward facts and its application to the Croatian case is arguable and has not been discussed so far.

In the context of lacking literature that focuses on Croatia and issues with migration, such as the alleged pushbacks, the book written by Carrera and Stefan plays an important role.[67] This is because it seems to be the first piece of legal academic literature

---

[63] J. Ristik, 'The Right to Asylum and the Principle of Non-Refoulement Under the European Convention on Human Rights', *ESJ*, vol. 13, no. 28, 2017, pp. 108-120, (accessed 5 April 2021).

[64] B. Hemme,'In search for a fair balance. The absolute character of the prohibition of refoulement under Article 3 ECHR', *Leiden Journal of International Law,* vol. 22, no. 3, 2009, (accessed 1 July 2021).

[65] De Weck.

[66] *N.D. and N.T. v. Spain*; *M.K. and Others v. Poland*.

[67] S. Carrera, and M. Stefan, *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union,* Oxon, Routledge, 2020.

including a case study on Croatia and the alleged pushbacks to BiH.[68] As such, it provides a great starting point for the research. However, except for the help it provides in terms of academic support to validate the concerns raised by the human rights actors, it does not provide a substantial contribution to the legal analysis at hand, because the authors do not deal with human rights law, but with EU law. In addition, journal articles by Šabić have been used to illustrate how Croatia dealt with the growing influx of migrants and how its approach developed from being seemingly humanitarian, towards securitisation.[69] This illustrates the rare opportunity that the academic literature examining Croatia in the context of migration could have been used to support the substance of this thesis. Although she did not provide legal analysis, she gave a great contribution in terms of providing a broader context to the issues that Croatia is facing when managing migrations. She considers the recent history of Croatia and the current political scene to explain how it influenced the fact that the initial response by Croatia was humanitarian, until it stopped being merely a transit country and needed to take more responsibility for the migrants in question. The fear of the excessive economic burden and of the fear of the 'Other', combined with the wish to join the Schengen border area, resulted in the securitization of the management of the migrant flows.[70]

---

[68] Ibid, p. 246.

[69] (a) S. Šelo Šabić, 'The Impact of the Refugee Crisis in the Balkans: A Drift Towards Security', *Journal of Regional Security*, vol.12, no.1, 2017, (accessed 5 April 2021); (b) Šelo Šabić, 'Humanitarianism and its Limits: the Refugee Crisis Response in Croatia' in U. Klinger, Dr., M. Rhomberg, Prof.Dr., U. Rußmann, Prof. Dr. (eds.), *The Migrant Crisis: European Perspectives and National Discourses*, vol 13, Zürich, Lit Verlag BmbH & Co. KG Wien, 2017.

[70] The 'Other' is used in this context as a term explaining the fear of the predominantly white, catholic population of having their values and culture erased by the raising numbers of people with a different skin-colour, religion and culture. This is also supported in the research conducted in [70] G. Berc, 'Croatian Experience with the Refugee Crisis on the Balkan Route and Possible Implications for Social Work Practice and Education', *Journal of Human Rights and Social Work,* vol. 4, 2019, p. 68 (accessed 31 February 2021), p. 68. However, this is not the focus of this thesis and will not be examined further; Schengen area is the area of free movement, where the member states effectively abolished the existence of standard

The secondary sources used are the regular reports by various human rights actors about the allegations of illegal and violent pushbacks from Croatia into BiH. When talking about human rights actors, various NGOs and Initiatives are included, such as Are You Syrious? and Dobrodošli! (which translates into Welcome!). In addition, these local organisations are supported by international ones, such as Border Violence Monitoring Network, Danish Refugee Council, Amnesty International. The reports and news pieces that these organisations produce, provide the main evidence from the ground as to what is happening in terms of pushback practices and the conditions that the migrants are being sent to. Therefore, the author took a sample of the reports to create two case scenarios comprising the most common characteristics among the reported allegations of pushbacks. The allegations in the NGO reports have also raised the interest of the international human rights organisations, such as the CoE. However, when relying on these reports, there has to be awareness that the reporting is not objective, and the statistics are not official. Nevertheless, they remain one of the main points of reference, since official state statistics are lacking, there has been no impartial investigation about the allegations so far, and the academics have not tackled this issue yet to provide a more solid point of reference.

The yearly reports created by Asylum Information Database (AIDA) warrant special examination because they proved very useful in the writing of this thesis. The reports collected in one place developments regarding asylum in Croatia, which included, on the one hand, state official statistics regarding border management and explanations of the asylum system in Croatia. On the other hand, they also collected information about the alleged pushbacks, in terms of legal developments, reported the situation on the borders and in refugee camps in BiH. This also included the reactions from international human rights actors, such as the UN Special Rapporteur Tomaš Boček and the CoE Commissioner for Human Rights, Dunja Mijatović and the recommendations given to the Croatian state. To make their reports even more comprehensive, they

---

border crossing points between each other, to ensure free movement for their citizens and other individuals with travel documents entitling them to enter.

included reactions of the Croatian state to the allegations and statements made by officials regarding the alleged pushbacks. However, they do not provide legal analysis and application of the existing information to the issues of pushbacks. Thus, although the reports are not academic, it can be argued that they provide a solid source of the most objective information available.

In conclusion, this master thesis fits well with the gap of missing academic literature about the Croatian experience in the migrant crisis since 2015. It is not by any means intended that this thesis fills this gap. However, by consolidating available academic and non-academic sources and illustrating one way they could be applied in practice, this thesis aims at opening the door to the other academics and legal professionals into examining the prominent issues of the violations of human rights of migrants through denial of access to international protection and illegal pushbacks.

C. Pushbacks in Croatia

C.1. General Overview

Since the increase of migrant flows towards Europe, the countries gradually transferred their politics from a humanitarian approach to securitisation.[71] This resulted in the political shift where the countries started doing everything in their power to deter migrants from crossing into their territory claiming that they are merely enforcing EU law and protecting the external borders of the EU. Therefore, the EU border countries have become notoriously famous for the alleged illegal pushback practices of migrants from their territory towards the neighbouring third countries.[72]

At the beginning of the 2015 migration influx, the Croatian state authorities and political figures publicly presented a humanitarian approach towards the migrants.[73] They claimed that Croatia was the first country along the Balkan route that organised the migrants' transport and accommodation for free. In addition, it was very important for them to clarify how very little assistance was requested from the EU because Croatia

---

[71] Šabić, 2017 (a), pp. 51-74, p. 61.

[72] E.g. 'As migrants continue to reach Ceuta, Spanish pushback hardens', AlJazeera, 19 May 2021, https://www.aljazeera.com/news/2021/5/19/spain-moves-to-head-off-ceuta-migrant-and-refugee-crisis, (accessed 10 July 2021); 'Rome Court decision against Italy's illegal migrant pushbacks is a significant step', Euro-Med Human Rights Monitor, 26 January 2021, https://euromedmonitor.org/en/article/4120/Rome-Court-decision-against-Italy%E2%80%99s-illegal-migrant-pushbacks-is-a-significant-step, (accessed 10 July 2021); E. Zalan, 'EU launches migration cases against Croatia, Greece, Hungary, and Italy', EU Observer, 10 December 2015, https://euobserver.com/migration/131479, (accessed 1 March 2021); Committee on Migration, Refugees and Displaced Persons, *Pushback policies and practice in Council of Europe member States,*(website), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=27728&lang=en, (accessed 1 July 2021).

[73] Šabić, 2017(b), p 100.

understood it had to bear its share of responsibility.[74] Despite these claims, in a statement in 2015, the Prime Minister made it clear that, while Croatia is willing to uphold its obligations in aiding the migrants to transit smoothly through the country, '[t]he European Union must know that Croatia will not become a hotspot for migrants.'[75]

The initial humanitarian approach took a harsh turn in March 2016 after the formal closure of the EU borders in the Western Balkans.[76] Schengen membership[77] being the key strategic objective for Croatia contributed to the reduction of the number of migrants and applicants for international protection and the increase of border police capacity for stronger border control.[78] Since then the civil society groups became actively present on the Croatian borders with Serbia and Bosnia and Herzegovina, initially providing basic necessities to the stuck migrants. However, when the complaints of the pushback practices began, many of the organisations started monitoring practices of alleged human rights violations too. According to Amnesty International Europe office deputy director, Massimo Moratti, there have been 16 500 cases of pushbacks recorded

---

[74] Ibid.

[75] Župarić-Iljić, D. and M. Valenta, 'Opportunistic Humanitarianism and Securitization Discomfort Along the Balkan Corridor: The Croatian Experience', in M. Feiscmidt et al. (eds.), *Refugee Protection and Civil Society in Europe*, eds, Palgrave Macmillan US, 2018, p. 140; M. Weaver, 'Croatia 'will not become a migrant hotspot' says prime minister', The Guardian, 18 September 2015, https://www.theguardian.com/world/2015/sep/18/croatia-refugees-zoran-milanovic-migrant-hotspot, (accessed 1 June 2021).

[76] Šabić, 2017(a), pp. 51-74, p. 61.

[77] Regulation of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (2016) OJ L 77.

It is the secondary EU law that regulates how the EU internal and external borders are protected. Being a part of the Schengen area for Croatia means a free access to the other EU countries, which are a part of Schengen, without having to cross any internal borders, as is the case now with e.g. Slovenia.

[78] Republic of Croatia Ombudsman, *Annual Report of the Ombudswoman of Croatia for 2018*, (website), https://www.ombudsman.hr/en/download/annual-ombudsman-report-for-2018/?wpdmdl=6777&refresh=610821a18aca11627922849, (accessed 20 May 2021), p 294.

in 2020 and another 1 400 cases in the period of January-April 2021.[79] On the other hand, the Ministry of Interior reports 29,094 cases of illegal migration, mainly by people from Afghanistan, Bangladesh, Pakistan and Morocco.[80] Both numbers are very high, and it would be very interesting to have access to a more detailed breakdown of the Ministry of Interior statistics in order to see whether this is recorded just at official crossing points, or if migrants apprehended and returned from deeper in the territory are counted here too. This way the numbers given by the NGOs and the Ministry would be in a way comparable, while now their meaning is hard to assess and compare as they lack detail. It is also noteworthy that there is currently a case with three applicants pending at the ECtHR regarding the alleged pushback practices of the Croatian police[81] and there is also a complaint submitted to the UN HRC, which was communicated to Croatia in December 2020.[82] The application pending before the ECtHR represents the first time that the Croatian government has to respond to the allegations of pushbacks in front of a judicial body.[83] Furthermore, in 2019 a Swiss federal administrative court stopped deportation of a Syrian national to Croatia because the rising number of reports alleging pushbacks and police violence indicated that the applicant was in danger of

---

[79] T. Gabrić, 'Izvještaj Odbora Vijeća Evrope za sprečavanje mučenja potrebno je hitno objaviti', H-Alter, 1 June 2021, https://h-alter.org/ljudska-prava/izvjestaj-odbora-vijeca-evrope-za-sprecavanje-mucenja-potrebno-je-hitno-objaviti/, (accessed 15 June 2021); AIDA, 2020 Update, p. 23.

[80] Ministarstvo unutratnjih poslova, *COVID i kirminalitet u 2020. Komentar pokazatelja sigurnosti u Republici Hrvatskoj*, (website), https://mup.gov.hr/UserDocsImages/2021/04/Covid%20i%20kriminalitet%20u%202020%20-%20Komentar%20pokazatelja%20sigurnosti%20u%20Republici%20Hrvatskoj.pdf, (accessed 1 July 2021), p 41.

[81] *S.B. v. Croatia and 2 other applications*.

[82] European Center for Constitutional and Human Rights, *Push-backs in Croatia: Complaint before the UN Human Rights Committee,* (website), https://www.ecchr.eu/en/case/push-backs-croatia-complaint-un-human-rights-council/, (accessed 1 May 2021).

[83] AIDA, 2020 Update, p. 27.

facing chain refoulement and potentially ill-treatment by the Croatian police.[84] More recently, on 1st July 2021, an Austrian lower court in Styria ruled on a case of a migrant that was handed over to Slovenian officials by Austria. Then he was transferred to Croatia, after which he was transferred to BiH, without any assessment at any point. The court decided that a return of a migrant to the Slovenian border after they have asked for asylum was unlawful and a breach of the non-refoulement principle due to the failure to examine his individual circumstances and the danger of facing ill-treatment, even though the migrant did not have the necessary travel documents to cross into Austrian territory.[85] Additionally, the CPT did a rapid reaction visit in 2020 to Croatia, however the report has only been communicated to Croatia and not been published yet.[86]

The reaction from the national authorities in Croatia has been to deny the allegations, question the trustworthiness of the migrants and the organisations reporting about the treatment of migrants, thus avoiding addressing the allegations themselves.[87] The Ministry of Interior is the body dealing with anything relating to migration issues, which means that this is the body, which is allegedly responsible for the pushback practices. As an official part of the structure of the Croatian state, the responsibility of the Ministry of Interior equates to the Republic of Croatia being responsible. Furthermore, there is no external oversight over the operations executed by the Ministry of Interior

---

[84] European Database of Asylum Law, *Switzerland: Suspension of Dublin transfer to Croatia due to summary returns at border with Bosnia-Herzegovina,* (website), https://www.asylumlawdatabase.eu/en/content/switzerland-suspension-dublin-transfer-croatia-due-summary-returns-border-bosnia-herzegovina, (accessed 15 March 2021).

[85] 'Finally Some Visibility for Illegal Austrian Pushbacks!', transform!europe, 13 July 2021, https://www.transform-network.net/blog/article/finally-some-visibility-for-illegal-austrian-pushbacks/, (accessed 21 July 2021).

[86]'Council of Europe anti-torture Committee carries out rapid reaction visit to Croatia to examine treatment of migrants', CPT, 18 August 2020, https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-carries-out-rapid-reaction-visit-to-croatia-to-examine-treatment-of-migrants, (accessed 30 May 2021)..

[87] Gabrić, 2021.

officials, so any complaints that were raised nationally against the Croatian police were deemed to be grossly unfounded when the internal oversight procedure was carried out by the Ministry.[88] In addition, it has been reported that the Ministry of Interior has prevented access of the Croatian Ombudswoman to their files which she requested as a part of the investigation into the serious allegations of pushbacks. When asked about the allegations of pushbacks, the Croatian president at the time made a statement in 2019 during an interview with a Swiss TV station:

'Illegal push-backs? How do you mean illegal? We're talking about illegal people, people that are entering Croatia illegally, and the police is returning them back to Bosnia. I have spoken with the interior minister, the chief of police, and officers on the ground and they assured me they have not been using excessive force. Of course, a little bit of force is needed when doing a push-back, but you should see that terrain'[89]

This is a prominent example of the answer given by the Croatian authorities when asked about the alleged pushbacks. The illegality of the conducts of the Croatian police has also been repeatedly denied by the police and the Ministry of Interior.[90] In their view, the migrants are illegal[91] due to crossing into Croatia through the green border and not

---

[88] Ibid.

[89] I. Dikov, 'EU Border Guards Use 'a Little Bit of Force' to Push Migrants Back to Bosnia, Croatia's President Admits', European [views], 15 July 2019, https://www.european-views.com/2019/07/eu-border-guards-use-a-little-bit-of-force-to-push-migrants-back-to-bosnia-croatias-president-admits/ (accessed 19 April 2021).

[90] Hina, 'Hrvatska policija odbacuje nove optužbe o nasulju nad migrantima', N1, 21 October 2020, https://hr.n1info.com/vijesti/a566666-hrvatska-policija-odbacuje-nove-optuzbe-o-nasilju-nad-migrantima/, (accessed 1 May 2021); 'Reaction of the Croatian Ministry of Interior to the article of the British news portal The Guardian', Ministry of Interor, 13 May 2020, https://mup.gov.hr/news/response-of-the-ministry-of-the-interior-to-the-article-published-on-the-online-edition-of-the-british-daily-newspaper-the-guardian/286199, (accessed 1 May 2021).

[91] It has to be noted that the author does not aim to label the migrants illegal or irregular, because it is their entrance into the Croatian territory that may be illegal or irregular if not done at an official border crossing satisfying the entry requirements, e.g., having travel documents, visas etc. Nevertheless, they

with documents through official border crossings. However, even if the migrants were in Croatia illegally, they still cannot be removed from Croatian territory into BiH without an individual assessment and due process. This is in order to determine if they should benefit from humanitarian protection or if they can be lawfully returned to BiH, in accordance with relevant rules and procedures. Article 4 of Protocol 4 of the ECHR prohibits the collective expulsion of migrants. This means that migrants cannot be returned to Bosnia without an individual assessment. This also ties into the non-refoulement principle, which requires an individual assessment of every migrant in order to prevent them from being returned to a country where they could face unlawful persecution, inhuman or degrading treatment or torture. In addition, the principle of non-refoulement also applies if the country where the migrants are being returned threatens to deport them to a country where they may face unlawful persecution, inhuman or degrading treatment or torture. Croatia also has a bilateral agreement with Bosnia which allows Croatian authorities to return migrants, however, this is also following a procedure where the intention to return needs to be communicated to the Bosnian authorities who need to accept the decision to return.[92]

It was mentioned before that institutionally, all issues related to migration are handled by the Ministry of Interior.[93] This also relates to the asylum procedure. It is important to mention this to be able to see how the migrants who seek asylum need to be treated, in order to be able to compare it with the alleged treatment they got. To begin with, the Law on International and Temporary Protection regulates the procedure for granting international protection.[94] The basic steps indicate that asylum can be claimed

---

enjoy the protection of the ECHR. However, as the term illegal or irregular migrant is used in the statements made by the Croatian officials, the term as such may appear in the thesis.

[92] Zakon o potvrđivanju sporazuma između Vlade Republike Hrvatske i Vijeća Ministara Bosne i Hercegovine o predaji i prihvatu osoba kojih je ulazak ili boravak nezakonit, Official Gazette NN 11.2011-96.

[93] Law on International and Temporary Protection, Official Gazette NN 70/2015, 127/2017, Article 32 (1).

[94] Ibid.

at the border with the intention expressed to the border officials, or within the territory to the police. The applicants are then given access to a reception in Croatia. They shall be fingerprinted and photographed, have their identity established, as well as the route they reached Croatia and personal circumstances important for assessing the need for international protection.[95] The authority that took the registration needs to issue a certificate of registration of the applicant in the records of the Ministry, and, set a time limit in which the applicant must report to the Reception Centre for Applicants for International Protection to lodge an application The maximum is 15 days.[96] After that, the Department for international protection procedures of the Ministry of Interior shall arrange the personal interview with the applicant as soon as possible.[97] A decision should be within 6 months of a duly completed application or a duly completed and admissible subsequent application.[98]

Therefore, the main evidence of the treatment migrants receive from the Croatian authorities will be discussed in the following chapters.[99] The reports of pushbacks from Croatia to Bosnia and Herzegovina began in 2018, while the reports starting from November 2015 until 2018 were mainly concerned with the pushbacks from Croatia to Serbia.[100] The main reporters are non-governmental organisations (NGOs), which were

---

[95] Ibid, Article 33 (8).

[96] Ibid, Article 25.

[97] Ibid, Article 26.

[98] Ibid, Article 27.

[99] Ibid.

[100]E. Zalan, 'EU launches migration cases against Croatia, Greece, Hungary, and Italy', EU Observer, 10 December 2015, https://euobserver.com/migration/131479, (accessed 1 March 2021); 'Refugee Crisis: Balkans border blocks leave thousands stranded', Amnesty International, 20 November 2015, https://www.amnesty.org/en/latest/news/2015/11/refugee-crisis-balkans-border-blocks-leave-thousands-segregated-and-stranded-in-greece/, (accessed 2 July 2021); AIDA, *December 2015 Report*; Refugee Crisis: Balkans border blocks leave thousands stranded', Amnesty International, 20 November 2015, https://www.amnesty.org/en/latest/news/2015/11/refugee-crisis-balkans-border-blocks-leave-thousands-segregated-and-stranded-in-greece/, (accessed 2 July 2021); Interview with Magda Sindičić for Hrvatska

actively engaged with helping migrants settled in camps in Bosnia and Serbia. These are namely Human Rights Watch, Welcome! Initiative, Are You Syrious?, No Name Kitchen and Border Violence Monitoring Network. Their observations regarding the situation of migrants in the Camps in Bosnia and how they came there, including the treatment they received from Croatia, have been yearly recorded, which will be the focus of this master thesis.[101] Based on these reports, and on video and photo evidence which corroborated the stories of migrants regarding the alleged push-back practices,[102] two

---

uživo, 20 December 2016, https://www.facebook.com/hrvatskauzivo/videos/1874913726078656, (accessed 10 April 2021); AIDA, *2016 Update*; Dobrodošli! and Are You Syrious, *Izvještaj o nezakonitim i nasilnim protjerivanjima izbjeglica iz Republike Hrvatske, 2017,* (website), http://welcome.cms.hr/wp-content/uploads/2017/01/Izvje%C5%A1taj-o-nezakonitim-i-nasilnim-protjerivanjima-izbjeglica-iz-RH-AYS-i-Inicijativa-Dobrodo%C5%A1li.pdf, (accessed 10 April 2021); 'Croatia: Asylum Seekers Forced Back to Serbia', Human Rights Watch, 20 January 2017, https://www.hrw.org/news/2017/01/20/croatia-asylum-seekers-forced-back-serbia, (accessed 10 April 2021); A. Vladisavljevic, 'Videos 'Prove' Croatia Forcibly Expelling Migrants, Watchdog Says', Balkan Insight, 16 December 2018, https://balkaninsight.com/2018/12/16/bvm-proves-human-rights-violations-at-external-eu-border-12-14-2018/, (accessed 5 July 2021); l. Tondo, 'Croatia violating EU law by sending asylum seekers back to Bosnia', The Guardian, 17 December 2018, https://www.theguardian.com/world/2018/dec/17/croatia-violating-eu-law-by-sending-back-asylum-seekers-to-bosnia, (accessed 5 July 2021); L. Tondo, ''They didn't give a damn': first footage of Croatian police 'brutality'', The Guardian, 14 November 2018, https://www.theguardian.com/global-development/2018/nov/14/didnt-give-a-damn-refugees-film-croatian-police-brutality-bosnia?CMP=share_btn_fb, (accessed 5 July 2021); Medecins Sans Frontieres, *Push-backs, violence and inadequate conditions at the Balkan route's new frontier,* (website), https://www.msf.org/push-backs-violence-and-inadequate-conditions-balkan-route%E2%80%99s-new-frontier, (accessed 14 June 2021);

Human Rights Watch, *Croatia:Migrants Pushed Back to Bosnia and Herzegovina,* (website), https://www.hrw.org/news/2018/12/11/croatia-migrants-pushed-back-bosnia-and-herzegovina, (accessed 15 June 2021); Oxfam, Macedonian Young Lawyers Association, Belgrade Centre for Human Rights, *A Dangerous 'Game': The pushback of migrants, including refugees, at Europe's borders*, (website), https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-dangerous-game-pushback-migrants-refugees-060417-en_0.pdf, (accessed 20 May 2021); AIDA, *2019 Update*; AIDA, *2020 Update.*.

[101] AIDA, 2018 Update; AIDA, 2019 Update; AIDA, 2020 Update.

[102] Border Violence Monitoring Network, *Pushbacks and Police Violence.*

case scenarios are created containing factors that appear in most of the stories told by migrants as to how the alleged pushbacks happened. It has to be noted that the details included in the scenarios mostly focus on the pushback practices. While the author notes the grave allegations of persistent violence of the Croatian police, this will not be discussed at present.

C.2. Case Scenarios

C.2.1. Case A

Group one consisting of 8 people from Iran left the camp in Velika Kladusa and crossed into Croatia through the green border. They walked around 25km into Croatia and got detected by 5 Croatian policemen. When they tried to speak up and ask for asylum because they escaped the violent and oppressive government in Iran, they were not given a chance and were told to 'Shut up!' by the police. The group was searched, their money and mobile phones taken and destroyed. After this was done, the group was stripped naked, men and women, and their bodies examined by the police officers. Those who resisted were met with violence. When the police officers finished, they placed the members of the group in a windowless van without proper seating and driven for circa 30 minutes into the mountains where a part of the group was told to walk into the woods in the direction of Bosnian town Bihac and the other part was directed into the woods towards Velika Kladusa, which they needed hours to reach. This also resulted in family members being separated from each other by walking in different directions.

C.2.2. Case B

Group two consisting of two Eritreans, one Afghan and two Iranians were walking through Croatia for seven days, when they were detained about 200km away from the

border. They were taken by four men in green uniforms into a windowless white van and to a police station. At the station they were given over to a police officer in a civil uniform and one in the dark blue uniform with the sign 'Policija'. The police officers at the station asked about their personal data, such as name, country of origin, age and travel route. They were also given a paper to sign in English, but they were not given a copy of it, so it is impossible to determine what the paperwork contained exactly in hindsight. During the interview, two members of the group expressed the wish to seek asylum in Croatia if they could be given one. To this, the police officer simply laughed without a reply. After they finished, the members of the group were given a white paper with their names handwritten on them alongside a number. The group members were made to hold this paper while their mug shot was taken. Without any further procedure, the group was detained overnight in one cell, without access to food, but only tap water available in the bathroom. In the morning they were taken to a point on the green border with Bosnia and were forced to walk across.

C.2.3. The reasoning behind the case scenarios

These two scenarios were chosen because they illustrate two different ways migrants are treated when caught by the police in Croatian territory. The migrants referred to did not cross through official border-crossing points but in other ways, such as the green border. The first scenario shows how the police can be violent and deny any procedure to the migrants, including those who express to seek asylum. They simply put them in the van and return them through the green border. On the other hand, the second scenario shows that migrants are sometimes taken to the police stations and there is some individual assessment that is done. However, the question to answer is whether such procedure is enough for this act to not be classified as individual assessment as required by the prohibition of collective expulsion under Article 4 of Protocol 4 ECHR. The individual procedure is also the key requirement to assess when discussing the principle of non-refoulement, because it is necessary to see if the individual persons would be at risk of unlawful persecution, inhuman treatment, or torture in the country that they are being

returned to. It is also necessary to examine whether they are being put at risk of being deported to a country where they would face any of these risks from the country they are returned to.

D. Article 3 ECHR: The Principle of Non-refoulement

D.1. Introduction

The principle of non-refoulement in general terms prevents a state from expelling a person to another state where they will be exposed to torture, inhuman or degrading treatment or punishment.[103] It was originally a principle of refugee law, enshrined in Article 33 of the 1951 Refugee Convention. This Article prohibited an expulsion of a refugee to a country where they would face ill-treatment based on their 'race, religion, nationality, membership of a particular group or political opinion.'[104] However, this thesis will consider the principle of non-refoulement as a principle of human rights law, particularly focusing on Article 3 of the ECHR. The principle of non-refoulement is not expressly mentioned, however, through the caselaw of the ECtHR, it has become a well-established principle enshrined in Article 3 of the Convention.[105] This chapter will therefore introduce the definition and scope of the principle of non-refoulement, as developed by the ECtHR jurisprudence. After this is established, it will be analysed whether the facts of the case scenarios warrant the applicability of Article 3 ECHR. This is the first step that leads into the discussion of the cases based on merits to see whether there is a violation of Article 3 principle of non-refoulement. This will be done by examining the relevant details of the case scenarios against the existing ECtHR caselaw. The biggest focus will be placed on the recent judgment given in *M.K. and Others v. Poland*, as it

---

[103] De Weck, p. 8.

[104] Ibid.

[105] Ristik, 2017, p. 109; European Court of Human Rights, *Soering v. The United Kingdom,* no. 14038/88, 7 July 1989; European Court of Human Rights, *Cruz Varas and Others v. Sweden,* no. 15576/89., 20 March 1991; European Court of Human Rights, *Vilvarajah and Others v. The United Kingdom,* nos. 13163/87, 13163/87, 13165/87, 13447/87, 13448/87, 30 October 1991.

represents the most recent judgment on the issues of non-refoulement and collective expulsion in the context of alleged pushbacks by CoE member states into a third country, which is not the country of the migrants' origin, as is the case with Croatia and BiH.[106] After it has been established whether the alleged pushbacks amount to violations of the principle of non-refoulement and the prohibition of collective expulsion under the ECHR, the chapter will discuss the pending case at the ECtHR against Croatia regarding the alleged pushback practices to BiH. This illustrates the relevance of the topic discussed in this master thesis and shows how the analysis provided could be used in reality.

D.2. Theoretical framework

To begin with, the definitions and nature of Article 3 of the ECHR have to be established. Article 3 states that 'no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment'.[107] It is an absolute prohibition. This means that a breach cannot be justified under any circumstance, and it cannot be derogated from under Article 15 ECHR.[108] As such, it holds the status of being one of the fundamental principles of the ECHR.[109] However, the ECHR does not provide definitions of torture,

---

[106] *N.D. and N.T. v. Spain; M.K. and Others v. Poland.*

[107] ECHR, Article 3.

[108] Hemme, 2009, p. 584; European Court of Human Rights, *Ireland v. The United Kingdom*, no. 5310/71, 18 January 1978, para. 167; European Court of Human Rights, *Selmouni v. France*, no. 25803/94, 28 July 1999, para. 95; European Court of Human Rights*, Gäfgen v. Germany*, no. 22978/05, 1 June 2010, paras. 87 and 107.

[109] European Court of Human Rights, *Babar Ahmad and Others v. The United Kingdom,* nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012, para. 200.

cruel, inhuman or degrading treatment, so other legal sources have to be used as a point of reference. Namely, Article 1 of the Convention Against Torture states that:

"torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[110]

Additionally, ECtHR, the judicial body in charge of developing and applying the principles set in the ECHR and its protocols, provided its own definitions of the three types of ill-treatment. At the time, the European Commission of Human Rights laid out in the *Greek case* that inhuman treatment covers at least such treatment as deliberately causing severe suffering, mental or physical, which, in a particular situation, is unjustifiable. "Torture" is often inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and is generally an aggravated form of inhuman treatment. Degrading treatment grossly humiliates a person before others or drives him to act against his will or conscience.[111] These definitions continued to be applied by the ECtHR in principle and it was maintained that these three forms of ill-treatment have different levels of severity, thus also different conditions that need to be satisfied to establish them.[112]

The principle of non-refoulement appeared for the first time in ECtHR's case-law when it examined a complaint of the breach of the non-refoulement principle in the

---

[110] CAT, Article 1.

[111] *Greek Case*, Judgement of 18 November 1969, Yearbook of the European Convention on Human Rights, No. 12.

[112] De Weck, p. 139.

case of *Soering v UK*.[113] This was the first case where extradition was considered a breach of Article 3 because of the risk of treatment in the receiving country. The ECtHR held that although potential violations of the ECHR which have not happened yet are not normally considered, in refoulement cases the potential breach of Article 3 by the conditions in the receiving country has to be considered due to the serious and irreparable nature of the alleged suffering risked. Otherwise, the safeguard provided by Article 3 would be undermined.[114] The ECtHR was looking to answer the question 'whether the extradition of a fugitive to another state where he would likely be subjected to torture or inhuman or degrading treatment or punishment would itself engage the responsibility of a contracting state under Article 3 ECHR.'[115] It was held that:

> *extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intention of the Article … this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State with a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.*[116]

The ECtHR also said in *Soering* that 'assessment of conditions in the requesting country against the standard of Article 3 of the Convention' is necessary in order to see whether extradition would be a violation of the non-refoulement principle.[117] However, the principle of non-refoulement does not deal with establishing responsibility of the receiving country. It is the act of the removal or decision to remove despite the real risk of ill-treatment that is prohibited under the principle of non-refoulement.[118] Thus, insofar as any liability under the ECHR may be incurred, it is a liability incurred by the

---

[113] *Soering v. The United Kingdom.*

[114] *Soering v. The United Kingdom,* para. 90.

[115] De Weck, p. 18.

[116] *Soering v. The United Kingdom*, para. 88.

[117] Ibid, para. 91.

[118] De Weck, pp. 137-138.

extraditing country 'by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.'[119]

The *Soering* judgment was confirmed in later cases and expanded so that the principle of non-refoulement not only applies to the cases of extradition, but in all kinds of transfers of a person from one territory to another.[120] The ECtHR jurisprudence developed and clarified that the principle of non-refoulement holds a primarily negative obligation to respect under Article 3 for the state to not cause harm to persons by removing them from their territory when there is a real risk that the person being removed will face ill-treatment in the receiving country.[121] In addition, the countries have a positive obligation to protect individuals from ill-treatment, including that administered by private individuals and foreign state actors.[122] In order for the state responsibility to be engaged, the authorities have to 'fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known.'[123] Finally, there is the procedural obligation for the states to investigate arguable claims raised by individuals that the treatment they received was in violation of Article 3 ECHR.[124]

Considering that the principle of state sovereignty normally allows countries full control over border management, including decisions to allow someone to enter their territory or refuse them, the obligations that arise under Article 3 ECHR non-refoulement principle may seem too far-reaching.[125] However, the ECtHR explained that

---

[119] *Soering v. The United Kingdom,* para. 91.

[120] *Cruz Varas and Others v. Sweden; Vilvarajah and Others v. The United Kingdom*.

[121] De Weck, p. 149.

[122] European Court of Human Rights, *Pretty v. The United Kingdom*, no. 2346/02, 29 April 2002, paras 50 and 51; European Court of Human Rights, *El-Masri v. Former Yugoslav Republic of Macedonia*, no. 39630/09, 13 December 2012.

[123] *Pretty v. The United Kingdom*, paras 50 and 51; *El-Masri v. Former Yugoslav Republic of Macedonia*.

[124] *El-Masri v. Former Yugoslav Republic of Macedonia*, para 193.

[125] Gatta, 2019 (b), p. 115.

the ECHR does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention.[126]

Nevertheless, the *Soering* judgment means that the ECHR does create an obligation under Article 3 to not surrender a fugitive to another state if there are substantial grounds for believing that they would be in danger of being subjected to torture or inhuman treatment. This obligation is considered to override the state's obligations under the extradition treaties it signed.[127]

In the more recent context of allegations of illegal pushbacks, the ECtHR has stated in the case of *N.D. and N.T. v Spain* that states have the sovereign right to manage and protect their borders, but this is not supposed to be done in a way to render the Convention rights ineffective, particularly Article 3 and Article 4 of Protocol 4 ECHR.[128] From this it could be deduced that the ECHR cannot be considered as preventing Croatia from legally and lawfully returning irregular migrants to BiH, respecting Croatia's international national and international obligations in protecting its borders and the territory of the EU. In addition, Croatia has a bilateral agreement [129] with BiH regarding the return of the irregular migrants from the Croatian territory back to Bosnian territory. However, all of these international and bilateral agreements are overridden if the treatment and the conditions the returned migrants face in Bosnia reach the threshold of a breach of Article 3 ECHR.

In sum, the non-refoulement principle under Article 3 ECHR prohibits a removal of a person from a territory of a signatory country if the conditions they will foreseeably

---

[126] European Court of Human Rights, *Calovskis v. Latvia*, no. 22205/13, 24 July 2014, para 129.

[127] European Court of Human Rights, *Al-Saadoon and Mufdhl v. The United Kingdom*, no. 61498/08, 2 March 2010, para 128.

[128] *N.D. and N.T. v. Spain*, nos. 8675/15, 8697/15, paras. 168 and 171.

[129] Zakon, Official Gazette NN 11.2011-96.

face in the receiving country fall under the scope of Article. This is called direct refoulement. However, the non-refoulement principle in Article 3 ECHR also prohibits indirect refoulement. Thus, an ECHR signatory country is prohibited from sending a person to the territory of a third state which may foreseeably further send the person to a country where they may face torture or inhuman and degrading treatment.[130] If the person being removed is an asylum seeker, the state removing the person has to first ensure that they will have access to the effective asylum procedures in the country they are being removed too.[131] This principle can be applied in any transfer of a person from one country to another.[132] Nevertheless, an important factor is that the country removing a person from its territory is a signatory of the ECHR because this is the country carrying the liability in the refoulement cases.[133] This is relevant because Croatia has ratified the ECHR in 1997. Hence, its provisions, as well as the jurisprudence of the ECtHR are binding to Croatia. Furthermore, following Article 1 ECHR, the Convention protects all individuals on the territory of the signatory countries, thus the principle of non-refoulement protects any person on the territory of a signatory country, regardless of their legal status.[134] This can also be deduced from the ECtHR concluding that 'the question whether there is a real risk of treatment contrary to Article 3 in another State cannot depend on the legal basis for removal to that State.'[135] This means that the principle of non-refoulement can be applicable in the Croatian pushbacks of migrants to BiH, regardless of the fact that they are considered irregular migrants by the Croatian

---

[130] European Court of Human Rights*, T.I. v. United Kingdom*, No. 43844/98, Admissibility Decision of 7 March 2000, p 15; UNHCR, *Manual on Refugee Protection and the ECHR: Part 2.1 – Fact Sheet on Article 3*, (website), https://www.unhcr.org/3ead2d262.pdf, (accessed 1 May 2021), para. 2.3.

[131] European Court of Human Rights, *Ilias and Ahmed v. Hungary,* no. 4728/15, 21 November 2019, paras. 144-149.

[132] UNHCR, *Fact Sheet on Article 3,* para. 1.3.

[133]*Soering v. The United Kingdom*, para 91.

[134] ECHR, Article 1; UNHCR, *Fact Sheet on Article 3,* para 1.3.

[135] *Babar Ahmad and Others v. The United Kingdom*, para.168.

authorities and regardless of the fact that the Croatian authorities may consider their actions as legal returns of irregular migrants. This was also confirmed in the recent ECtHR ruling of *N.D. and N.T. v Spain*.[136] However, Article 3 was declared inadmissible in this case, which was found problematic and contradictory by academics and human rights organisations.[137] More about this will be discussed in the assessment of the cases below.

When talking about the different forms of ill-treatment in the context of the prohibition of refoulement, it is necessary to mention that although they differ in severity, all forms of ill-treatment are equally prohibited. This means that there will be a violation of the absolute prohibition under Article 3 regardless of whether the treatment feared by the migrant facing removal constitutes torture, inhuman or degrading treatment.[138] In fact, 'the Court considers that … in the extra-territorial context … it is not always possible to determine whether the ill-treatment which may ensure in the receiving State will be sufficiently severe to qualify as torture.'[139] Therefore, in the refoulement cases the ECtHR normally contents itself with finding the risk of ill-treatment, without trying to classify it.[140] It is noteworthy that this is mainly possible because there is, principally, no just satisfaction according to Article 41 awarded by the ECtHR to the applicant in refoulement cases.[141] This means that the ECtHR will not award any non-pecuniary damage to the applicant, so the classification of the ill-treatment, which would normally influence the amount awarded, does not play a crucial role

---

[136] *N.D. and N.T. v. Spain*, para 187.

[137] Lübbe, 2020; Carrera, 2021.

[138] European Court of Human Rights*, Harkins and Edwards v. The United Kingdom,* nos. 9146/07, 32650/07, 17 January 2012*, para 128.*

[139] Ibid, para 122; *Babar Ahmad and Others v. The United Kingdom,* para. 170.

[140] De Weck, p. 139.

[141] De Weck, p. 140.

in the judgment. In order for the treatment to fall under the scope of Article 3 ECHR, the harm or ill-treatment must attain a minimum level of severity, which depends on the facts of each individual case.[142] The factors that have to be taken into account include the nature of the treatment, duration, physical and mental effects on the applicant, as well as their personal characteristics, e.g. sex, age and state of health.[143]

On the other hand, it has been argued that refoulement cases where degrading treatment is dealt with rarely succeed because it is hard to establish a real risk of such harms.[144] This is mentioned in the case of *Harkins and Edwards v the UK* where the ECtHR held that in the context of refoulement, 'the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State.'[145] Furthermore, in *F v. UK*, it was held that on 'a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.'[146]

Therefore, it seems that all kinds of ill-treatment are equally prohibited in principle but, in practice, degrading treatment is very hard to establish in refoulement cases.[147]

D.3. Assessment of the case scenarios

D.3.1. Case A

---

[142] *Ireland v. The United Kingdom,* para. 162.

[143] Ibid, para. 162; *Soering v. The United Kingdom,* para 91; *N.A. v UK*, para 110.

[144] De Weck, p 155.

[145] *Harkins and Edwards v. The United Kingdom,* para 129.

[146] European Court of Human Rights, *F v. The United Kingdom*, no.17341/03, 22 June 2004, para. 12.

[147] De Weck, p 156.

To begin with, the relevant facts of the first case scenario as to the determination of the applicability of Article 3 are that the group crossed into the Croatian territory irregularly through the green border with BiH and they were apprehended by Croatian police 25km into Croatian territory. However, in terms of the applicability of Article 3 principle of non-refoulement, the fact that the migrants entered Croatia irregularly is irrelevant because it has been established that the migrants' legal status in the country does not change the fact that the ECHR protects everyone present on the territory of the member states, such as Croatia.[148] This could potentially be contested based on the judgment of *N.D. and N.T. v. Spain*, where the principle of non-refoulement was not assessed since it was concluded that the applicants crossed into Spain irregularly and were not in need of protection.[149] However, this approach has been widely criticised saying that it undermined the intended scope of protection provided by the prohibition of non-refoulement.[150] This is because the principle of non-refoulement exists to provide everyone with the opportunity to claim protection and appeal return decisions in order to avoid being exposed to ill-treatment in the receiving country.[151] Therefore, although *N.D. and N.T.* may have not been in need of international protection, their situations were not assessed in time so the Spanish officials could not have known that this is the case when they returned the applicants, which should be considered to fall under the breach of the procedural obligations raised by the principle of non-refoulement. Arguably, the case of *N.D. and N.T.* cannot be seen as applicable in this case, since the group of migrants claim that they tried to claim asylum in front of Croatian police, but were told to 'Shut up'. Therefore, the cases of *M.K. and Others v. Poland* and *Ilias and*

---

[148] ECHR, Article 1; UNHCR, *Fact Sheet on Article 3,* para 1.3.

[149] *N.D. and N.T. v. Spain*, para. 128 and 206.

[150] Alonso Sanz, p. 342; Carrera, 2021, p.4.

[151] Carrera, 2021, p.5; Lübbe, 2020; *Ilias and Ahmed v. Hungary*, para 137: post-factum decision that an asylum claim is unfounded, does not absolve the state of the procedural duty of individual assessment in retrospect.

Ahmed v. Hungary may be more applicable. They both considered returns of asylum seekers to third countries without examining the merit of the asylum applications. The circumstances were more straightforward since the applicants in these cases lodged their applications at the border crossings, and migrants in the case scenario have crossed the border irregularly. Additionally, it can be argued that the migrants in question are not asylum seekers at all, since there is no record of a claim made.[152] However, the facts of the case illustrate that there were attempts of claiming asylum which means that their situations should have been examined more closely.[153] Additionally, since Croatian law[154] allows claiming asylum from within the Croatian territory, and not just at border crossings, the situation of the migrants in question is more relatable to the *M.K.* and *Ilias* cases, than *N.D.* and *N.T. v. Spain*. The importance of this is the fact that in the former two cases, Article 3 was deemed applicable in the context of the principle of non-refoulement.[155] Additionally, since the migrants were apprehended on the Croatian territory, there is no issue of territorial jurisdiction.[156] However, the facts of the case state that the migrants were driven to the woods and forced to walk to BiH, which took hours until they reached Bihać and Velika Kladuša. Since it is impossible to establish from these facts where the migrants were left exactly, potentially it could be argued that the migrants crossed the border by themselves, which can give rise to an argument that the removal from the territory was not conducted by the Croatian police, since it seems that the migrants have been left far from the border by the might have refused to cross. Nevertheless, this is hard to imagine, since it seems that the Croatian police were exercising control[157] considering the strip-search, removal of property and van transportation into

---

[152] *M.K. and Others v. Poland*, para. 174.

[153] Ibid, para. 170.

[154] LITP, Article 33 (2).

[155] *M.K. and Others v. Poland*, paras. 150-151; *Ilias and Ahmed v. Hungary*, para. 91.

[156] Ibid; *N.D. and N.T. v. Spain*, para 110.

[157] European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, 23 February 2012, paras. 76-82.

the woods. Therefore, although they might have not physically transferred the migrants over the border themselves, the control they have established over the migrants makes this case most likely amount to removal that triggers the application of the principle of non-refoulement.[158] Considering that the scope of the prohibition of refoulement under Article 3 ECHR covers cases of any cross-territorial removal of migrants, it seems that these actions by the Croatian police trigger the responsibilities of the Republic of Croatia under Article 3 and further examination is necessary.[159] It seems clear that the migrants qualify to enjoy the protection against refoulement provided under Article 3 ECHR. Another relevant fact is that the Croatian police as Croatian officials exercised control in the situation, which puts the responsibility on the Republic of Croatia.[160]

Having established the applicability of Article 3, it needs to be seen whether such a return breached the migrants' non-refoulement right. As was mentioned before, the prohibition of non-refoulement is absolute and cannot be derogated from in any situation.[161] Therefore, Croatian officials had the obligation in this case to ensure that the migrants are not going to face any form of ill-treatment and that they have effective access to asylum if needed. For this, it was necessary to apprehend the migrants and give them the due procedure. What this means is that the Croatian police had the obligation to assess the reasons as to why the migrants were in the Croatian territory, how they came there and whether they are in need of international protection. This is also provided for in Croatian law.[162] In case that asylum was requested, the police officers were obliged to make a record and give the applicants confirmation of registration which allows them to stay in Croatia and lodge an application for asylum to the relevant

---

[158] Gatta, 2019 (b), p. 117.

[159] *M.K. and Others v. Poland*, para 168.

[160] *N.D. and N.T. v. Spain*, paras. 104-111; *Hirsi Jamaa and Others v. Italy*.

[161] Gatta, 2019 (b), p. 116.

[162] LITP, Article 33 (8).

authority within 15 days.[163] According to *M.K. v Poland*, if the country refuses to examine an asylum claim on the basis of merits, when removing an asylum seeker to a third state, the removing state has the obligation to ensure that they will have access to an effective asylum procedure in addition to ensuring that they are not in danger of ill-treatment or chain refoulement.[164] This can be done through formal procedures, such as communicating and coordinating the return with BiH under the bilateral agreement thus ensuring that the migrants' human rights will be respected.[165] However, the facts of the case scenario seem to illustrate that there was no opportunity given to the migrants to speak rather, they were silenced at the attempts to claim asylum. There was no admission or return procedure, but a pushback, i.e. an informal expulsion without any procedure and through an informal border crossing, was conducted. If proven, this would likely amount to a breach of Article 3 ECHR. This conclusion is reinforced with the consideration of the conditions reported in BiH. They include an ineffective asylum system and inhuman and degrading living conditions in the camps, which amount to treatment prohibited by Article 3 ECHR.[166] The Croatian officials ought to have been aware of this situation and not have proceeded with the pushback of migrants. However, the treatment in question seems consistent with the numerous reports that were produced over the years. Due to the excessive number of reports produced over the years regarding the pushback practices conducted in secrecy and without any formal procedure, it seems viable that this practice is recognised as part of the systemic and deliberate practices exercised in Croatia. A similar conclusion was reached in the case of *M.K. v Poland*, where the Court found a violation of Article 3 and stressed that this is not a single

[163] Ibid, Article 34 (2).

[164] *M.K. and Others v. Poland*, para. 172.

[165] Zakon, Official Gazette NN 11.2011-96; *Ilias and Ahmed v. Hungary.*

[166] *European Court of Human Rights, M.S.S. v. Belgium and Greece, no. 30696/09, 21 January 2011*, para. 249.

case but a systemic practice by the Polish state, based on the evidence reported by human rights institutions and NGOs.[167]

D.3.2. Case B

The second case scenario included a group of 5 migrants who were found 200km into Croatian territory from the BiH border. Similarly to above, their presence on the Croatian territory means that the territorial jurisdiction is undisputable.[168] They were apprehended by men in green uniforms. It is unknown who these men may be and whether they are officials of the Croatian state. However, after these men hand the migrants over to the police officers in the police station, the effective control of Croatian officials becomes evident.[169] Therefore, it is clear that the migrants in question qualify for ECHR protection, since they are within the jurisdiction of a member state.[170] Furthermore, the 5 migrants, in this case, have also been driven to the green border with BiH and forced to cross. Again, it is hard to establish where exactly this was and similar concerns as above may arise when considering the responsibility of the Croatian police. However, the police have apparently examined the migrants, held them in a cell overnight and drove for 200km to the border. Like above, this can illustrate that the Croatian police was ineffective control over the migrants and although it is vague as to what 'forced' means in terms of describing police conduct, the control can be considered enough to qualify this return as triggering the Croatian state's obligations under Article 3 ECHR. Therefore, since it is established above that removal of migrants from one territory to

[167] Gatta, 2020.

[168] *M.K. and Others v. Poland*, para. 205.

[169] *Hirsi Jamaa and Others v. Italy*.

[170] ECHR, Article 1.

another by a state triggers Article 3, it follows that the principle of non-refoulement is applicable to this case scenario too.

Secondly, the merits of the case have to be examined. The principle of non-refoulement requires each individual to be given an assessment by the state officials in order to have the opportunity to seek international protection and not be transferred to a state where they may face ill-treatment or chain refoulement. In this case scenario, it is evident that the 5 migrants were given a level of individual assessment. However, it is questionable whether this is enough to satisfy the procedural requirement under the principle of non-refoulement. In the case of *M.K. and Others v Poland*, the ECtHR clarified that it is the quality of the interviews that matters.[171] In that case, the Polish authorities conducted interviews of the applicants' asylum claims, however, the ECtHR held that they were not conducted in the right manner. The interviews did not focus on genuinely trying to establish the reason for the migrants' presence on the Polish territory, but they were steered towards establishing that the applicants were economic migrants, rather than genuine asylum seekers. In addition, the applicants were issued standardised refusal of entry decisions, rather than those tailored to their own specific cases and reasons. Lastly, the ECtHR took into account that there is a clear drop in the numbers of registered asylum applications, as well as the fact that the Polish Minister of Interior in 2016 announced that the borders will be kept closed to repel migrants.[172] All of these factors combined, made the ECtHR decide that the interviews were not the adequate individual assessment as required under the principle of non-refoulement and they did not protect Poland from being found in violation of the Convention when they returned applicants in Belarus.[173] Applying this to the facts of the second case scenario, it should be taken into account that the assessment was undertaken only to establish the migrants' identities and the travel route they took to reach Croatia. When two of the applicants expressed the wish to claim asylum, they were ignored and pushed back into BiH without

---

[171] Gatta, 2020.

[172] Ibid.

[173] *M.K. and Others v. Poland*, paras 208. and 210.

further procedure trying to ensure that they will have the chance to claim asylum in BiH and not be exposed to inhuman or degrading treatment and chain refoulement. In addition, it is hard to determine what the paper the migrants signed contained. One of the potential options can be that it was a decision to return that the migrants were made to sign in confirmation that they received it and understood. However, the paper was not given to them, so even if it was a return decision, it is hard to be adequate since it was not given to the migrants in question in a way that they understand. In addition, there were the public statements made by the Croatian officials that Croatia will not become a hotspot for migrants,[174] the rejection rates of international protection as high as 83% in 2019,[175] as well as 29,000 entries classified as illegal in 2020.[176] Therefore, if the reasoning from *M.K. and Others v. Poland* is applied, it can be said that the assessment conducted is not likely to satisfy the requirements set under the principle of non-refoulement. In this case a difference can be made between the two migrants who claimed asylum and were ignored and the three others. The obligation that Croatia had towards the migrants that claimed asylum when their claim was not registered and assessed on the merits, is to ensure through a proper procedure that they will have access to an effective asylum system in BiH and that they will not be in danger of chain refoulement to their home country where they left from seeking international protection.[177] In addition, Croatia had the obligation towards all of the migrants to ensure that they will not foreseeably face ill-treatment in BiH and that they can effectively appeal the return decision that was supposed to be issued after their assessment since they were not given permission to stay in Croatia.[178] However, as in the first case scenario, the known facts of the second case show neither of these procedural requirements was satisfied by the conduct of the Croatian police. Instead of an orderly procedure after the assessment, the Croatian

---

[174] Weaver, 2015.

[175] AIDA, *2019 Update*, p. 7.

[176] AIDA, *2020 Update,* p. 22.

[177] *M.K. and Others v. Poland*, para. 172.

[178] Ibid, para. 172.

authorities opted out for another unregulated and secretive pushback practice, breaching the migrants' right to not be returned without due process and into conditions prohibited by the Article 3 ECHR.

It is noteworthy to mention, in support of the arguments in both case scenarios that the Croatian pushback practices breach the principle of non-refoulement that there is a case in Swiss and Austrian courts where it was decided that it is not safe to return migrants to Croatia because of the pushback practices to BiH that are taking place, exposing the migrants to ill-treatment, ineffective asylum procedures and chain refoulement.[179]

In summary, both of the case scenarios describe practices that amount to breaches of the principle of non-refoulement enshrined in Article 3 ECHR. Although both cases have facts that could arguably take the case outside of the scope of protection of Article 3, the cases of *M.K. and Others v. Poland* and *Ilias and Ahmed v. Hungary* provide a sound legal basis for arguing in favour of the applicability of the principle of non-refoulement in both of these cases, as well as finding a violation to both of them due to the fact that the pushbacks exercised by the Croatian police in both cases were done without the necessary procedures of legal cross-territorial removals, thereby putting the migrants in danger of facing ineffective asylum system in BiH, as well as dire living conditions which could amount to a breach of Article 3 ECHR prohibition of inhuman or degrading treatment or punishment, as established in the case of *M.S.S. v. Belgium and Greece.*

[179] European Database of Asylum Law, *Switzerland: Suspension of Dublin transfer to Croatia due to summary returns at border with Bosnia-Herzegovina,* (website); 'Finally Some Visibility for Illegal Austrian Pushbacks!', transform!europe, 13 July 2021, https://www.transform-network.net/blog/article/finally-some-visibility-for-illegal-austrian-pushbacks/, (accessed 21 July 2021).

D.4. *S.B. and Others v. Croatia*

This case consists of applications submitted by three Syrian nationals who were allegedly pushed back from Croatia to BiH as a part of a group, without individual assessment or the possibility to claim asylum. All three of the applicants claim that they had been apprehended by the Croatian officers after already spending some time at the Croatian territory. The first applicant claims that he was apprehended and immediately put into a van and driven towards the BiH border, where he was ordered to walk in BiH with his group. The second applicant claims that he was apprehended by officers, beaten, taken to a police station and kept in a cell until they transported him in the van to the BiH border, where he was ordered to walk across with his group. The third applicant claimed that he was summarily returned from Croatia to BiH, despite stating that he was Syrian and wished to seek asylum. The last time was in 2018, when he, like the first applicant, was apprehended within the Croatian territory and immediately put in a van and transported to the BiH border where he was forced to walk across with his group. Firstly, the complaints claim a violation of the principle of non-refoulement under Article 3 ECHR because the summary returns, without any assessment of the dire living conditions in BiH, exposed them to ill-treatment and dysfunctional asylum system, which the authorities ought to have been aware of. Secondly, they claim that the removals in the case were expulsions collective in nature, due to the fact that they were removed as a part of a group without any review of their situation at any stage. Thus the removals constituted a violation of Article 4 of Protocol 4. The latter claim will be dealt with at the end of the subsequent chapter, while the alleged breach of Article 3 will be discussed below in relation to the analysis already provided in the assessment of the case scenarios above. Therefore, first territorial jurisdiction has to be established, followed by the assessment of the applicability of Article 3 in this situation. If applicable, the case facts are to be assessed on the merits to determine if there was a violation.

To begin with, all three of the migrants were on the territory of the Croatian state. In the arguments in the two cases above, it has been concluded that in this case, territorial jurisdiction is satisfied.[180] Since the facts of the cases do not substantially differ from those already discussed above, it can be said that the applicability of Article 3 is established, since the applicants were not provided with the opportunity to seek protection or raise objections to their expulsion by the Croatian police, while they were under their control.

Additionally, since the reports about the grave living conditions and dysfunctional asylum system are widely available, the Croatian officials ought to have inquired and known about these circumstances and the danger that each of the applicants face with conditions amounting to ill-treatment. Since the Croatian authorities failed to conduct this step, there will likely be a breach of the principle of non-refoulement held, as in the cases above. In addition, for the applicants who claimed asylum, if the Croatian officials decided to not examine it on merits, they still ought to have registered it and in the removal make the assessment to ensure that they will have the access to an effective asylum procedure. Since this was also not done, the probability of the violation under Article 3 ECHR is very high. Nevertheless, in order to be able to make a full assessment, a response from the Croatian government has to be received in order to establish the real facts of the case and the circumstances.

[180] *M.K. and Others v. Poland*, paras. 150-151; *Ilias and Ahmed v. Hungary,* para. 91; *N.D. and N.T. v. Spain*, para 110.

E. Article 4 of Protocol No. 4 ECHR – Prohibition of Collective Expulsions of Aliens

E.1. Introduction

Article 4 of Protocol 4 ECHR contains the prohibition of Collective Expulsions of Aliens. As such, it provides important procedural protection to the migrants in the territory of ECHR member states, since it requires examination of individual circumstances of all migrants before their removal from a territory.[181] This prohibition, therefore, compliments the Article 3 prohibition of non-refoulement, but they are independent of each other.[182] This prohibition is relevant in the context of the pushbacks described in the case scenarios because both of them include removals of migrants in groups from Croatian territory to BiH. Therefore, as in the previous chapter, the theoretical framework of Article 4 Protocol 4 ECHR will be established. This is necessary to be able to proceed to the analysis of the facts of the two case scenarios and establishing the applicability of the prohibition, as well as the existence of a violation, in case there is one. In the last part, the chapter will examine the application of *SB and Others v Croatia*, pending at the ECtHR,[183] for reasons identical to the preceding chapter.

E.2. Theoretical framework

[181] *N.D. and N.T. v. Spain*, para. 195.

[182] *N.D. and N.T. v. Spain*.

[183] *S.B. v. Croatia and 2 other applications*.

Article 4 of Protocol 4 ECHR states that 'collective expulsion of aliens is prohibited.'[184] It was the first time that an international human rights treaty prohibited the collective expulsion of aliens from a territory of a state.[185] The purpose of the article was to prevent states from removing a certain number of aliens from their territory without examining their personal circumstances and providing them an opportunity to appeal the measures of removal put forward by the state authorities.[186] The article was written in 1963 in order to prevent the repetition of what happened in the recent history of Europe at that time,[187] referring to the expulsion that happened during World War II.[188] Its importance became prominent during the migration influx starting in 2015. This is when European states went into the so-called 'migration crisis' and when many states did not know how or did not want to manage the increased numbers of migrants reaching their territories, they turned to pushback practices as a part of a securitisation approach.[189] An example of such a state is allegedly Croatia, which is why the examination of this article is crucial in order to assess whether the allegations of pushback of migrants from Croatia to BiH constitute a violation of the prohibition of collective expulsion.

---

[184] ECHR, Article 4 of Protocol No. 4.

[185] European Court of Human Rights, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of collective expulsion of aliens,* (website), https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf, (accessed 25 July 2021), para 1.

[186] *Hirsi Jama*, para 177; European Court of Human Rights, *M.A. v. Cyprus*, no. 41872/10, 23 July 2013, para. 245; ECtHR, *Guide on Article 4 of Protocol No. 4,* para 2.

[187] ECtHR *Guide on Article 4 of Protocol No. 4*, para 1.

[188] J.M. Henckaerts, 'Mass expulsion in modern international law and practice', *Martinus Nijhoff Publishers,*1995, p.11.

[189] Šabić, 2017(a), p. 54.

For years the Article 4 of Protocol 4 has not been judged on the basis of merit by the ECtHR. In fact, the first decision where a violation of this provision was found was in *Čonka v. Belgium*.[190] According to Duran Alba, the two dissenting opinions illustrate how controversial this judgment was.[191] This case concerned Slovakian nationals of Roma origin, who came to Belgium and requested asylum because they were assaulted by skinheads in Slovakia. They received a notice from the Belgian police to present themselves at a police station to complete their asylum files but, they were served an order to leave the territory. They also received a decision for removal and detention. In this case, it was held by a four to three majority that 'at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account.[192] According to Rietiker, 2016, p. 655, a strong link between the prohibition of collective expulsion and the need for procedural safeguards and legitimate reasons justifying expulsion has been established.[193] Therefore, Article 4 of Protocol 4 focuses on the actions of the expelling state and the procedural features.[194]

When examining this article in its judgments, the ECtHR takes the methodological approach of establishing whether the article was triggered, i.e. whether it applies. This is called the procedural test.[195] This is done by seeing whether the treatment in the

---

[190] European Court of Human Rights, *Čonka v. Belgium,* no. 51564/99, 5 February 2002.

[191] J.F. Duran Alba, 'Prohibition of the collective expulsion of aliens (Article 4 of Protocol 4)', in *Europe of Rights: A Compendium on the European Convention of Human Rights,* 2012, pp. 629-633, (accessed 1 May 2021), p. 632.

[192] *Čonka v. Belgium*, para 63, p. 28.

[193] Rietiker, 2016, p. 655.

[194] M. Di Filippo, 'Walking the (barbed) wire of the prohibition of collective expulsion: An assessment of the Strasbourg case law', *Diritti umani e diritto internazionale,* vol. 15, no. 2, 2020, (accessed 15 May 2021), p. 7.

[195] Gatta, 2020.

case falls under the definition of collective expulsion. Therefore, this is what has to be defined first. In the judgment of *N.D. and N.T. v. Spain*, the ECtHR adopted a broad definition of the term expulsion, saying that it means to drive away from a place, i.e. any forcible removal from a state's territory, irrespective of the lawfulness of the person's stay, the length of the time they spent in the territory, the location in which they were apprehended, their status as a migrant or asylum seeker or their conduct when crossing the border.[196] However, the main authority used to identify what is necessary for the expulsion to be collective in recent cases was the *Hirsi Jamaa* case against Italy.[197] The ECtHR stated that collective expulsion is any measure 'compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group'.[198] Therefore, two essential aspects are of particular significance, first, the individual is expelled with other persons, as a group and secondly, their situation was not examined individually by the authorities.[199]

The group does not have to comprise a minimum number of individuals for the article to apply.[200] Regardless, if a group of aliens is subject to similar decisions 'does not in itself lead to the conclusion that there is collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis.'[201] Additionally, the ECtHR clearly stated in the *N.D. and N.T.* judgment that Article 4 of Protocol 4 applies to any situation coming within the jurisdiction of a contracting state even in situations where the authorities

---

[196] *N.D. and N.T. v. Spain*, para 185.

[197] *Hirsi Jamaa and Others v. Italy*.

[198] Ibid, para. 166.

[199] Gatta, 2019 (a), p. 138.

[200] *N.D. and N.T. v. Spain*, para 194.

[201] Ibid, para. 184.

have not yet examined the existence of grounds entitling the persons to claim protection.[202]

After the procedural test is completed and the application of Article 4 of Protocol 4, the 'own culpable conduct' test needs to be conducted. This is the test introduced in the Grand Chamber judgment of the *N.D. and N.T.* case.[203] This provides an exception to the rule of the prohibition of collective expulsions if the aliens in question

> *... cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force ... to create a clearly disruptive situation which is difficult to control and endangers public safety.*[204]

The ECtHR proceeds to say that the things that need to be taken into account when assessing if this is whether the respondent State 'provided genuine and effective access to means of legal entry, in particular border procedures.'[205] If such procedures were provided but not used by the aliens in question, 'the Court will consider whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible.'[206] In this case, the ECtHR is inclined to find that the lack of the individual examination of the applicants' circumstances cannot be attributed to the Government's fault.[207] The facts of *N.D. and N.T.* are that the two applicants entered Spanish territory irregularly by jumping over the border fence from Morocco, as a part of a large group of migrants. They were apprehended by Spanish border officials and returned to Morocco without any assessment of their circumstances. The ECtHR held that this amounted to collective expulsion, however, due to the applicants' own disruptive

---

[202] Ibid, para. 186.

[203] *N.D. and N.T. v. Spain*, para. 200.

[204] Ibid, para 201.

[205] Ibid.

[206] Ibid.

[207] Ibid.

behaviour, use of force and decision to cross into Spanish territory irregularly, without using the procedures to claim asylum in Spain from Morocco, there was no violation of Article 4 of Protocol 4.[208]

This decision has been criticised by academics,[209] as well as human rights actors.[210] Sergio Carrera argues that this test illustrates a departure from a person-centric to a state-centric approach, which is incompatible with the ECtHR mandate to protect individuals from human rights breaches by the state in an independent and impartial manner.[211] The ECtHR introduced this test by referring to the *Hirsi Jamaa* judgment, where it was mentioned that 'the Court has ruled that there is no violation of Article 4 of Protocol 4 if the lack of an expulsion decision made on an individual basis is the consequence of the [applicants'] own culpable conduct.'[212] As a justification for this test, two previous cases were used.[213] However, according to Carrera, the ECtHR failed to take into account that those cases dealt with different and limited rights, such as family life, therefore this test should not be applied in expulsion cases, since the rights triggered there are not limited.[214] The reason for the strong criticism of the judgment is the fact that in the challenges that the European countries are facing with managing migrations, this judgment could potentially be used as a justification for collective expulsions of any migrant group irregularly on the territory of a state by saying that it is their conduct of not crossing regularly through a border checkpoint into the state that absolves the state of the obligation to assess their individual situation. Additionally, the decision is

---

[208] Ibid, para 231.

[209] Carrera and Stefan, 2020; Carrera 2021.

[210] Gatta, 2020; Hakiki, 2020; Lübbe, 2020; Wissing, 2020.

[211] Carrera, 2021, p. 8.

[212] *Hirsi Jamaa and Others v. Italy*, para. 184.

[213] European Court of Human Rights, *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia,* no. 18670/03, partial admissibility decision 16 June 2005; European Court of Human Rights, *Dritsas v. Italy,* no. 2344/02, admissibility decision 1 February 2011.

[214] Carrera, 2021, p. 9.

criticised on the basis that the test itself was not applied correctly. Namely, it is argued that the test requires intention by the migrants to disrupt and endanger public safety but, the individual intentions of the applicants were never considered but they presumed collective intention. Furthermore, the expression "use of force" usually depicts violent acts. However, no argument or evidence was given about violent acts by the applicants crossing on that day, while there was evidence of disproportionate violence used by the authorities. It remains open to interpretation then 'whether "use of force" in this case means the use of muscular force to climb a fence, and if so where the line should be drawn. Would the use of muscular force to walk across a borderline be enough?'[215] This will be further discussed in the next part of the chapter in relation to the conduct of the Croatian police in the two case scenarios.

Regardless of the criticism, the ECtHR caselaw stands as it is and it is being applied in subsequent cases. The first case methodically applying the own culpable conduct test after the *N.D.* judgment is *M.K. and Others v. Poland*.[216] The test is applied in order to check whether the collective expulsion of Russian citizens of Chechen descent back into Belarus can be justified. The ECtHR focused on applicants' conduct. In this case, the applicants attempted to enter the territory in legally, i.e. orderly presenting themselves at the official border checkpoint, without using any violence or clandestine or aggressive behaviour, and subjecting themselves to the prescribed border checks and procedures. Therefore, in this case, the *N.D. and N.T.* exception did not apply and there was a violation of Article 4 of Protocol 4.[217] The Court's procedural analysis here is also important because it focuses on assessing individual assessment provided by the state and whether it is adequate to satisfy the requirement under Article 4 of Protocol 4 to qualify as an individual expulsion. This was also mentioned in the assessment of the case scenarios in the previous chapter but it is equally relevant in Article 4 of Protocol 4 context. Namely, the ECtHR clarified that it is important that the interviews are

---

[215] Gatta, 2020.

[216] Ibid; *M.K. and Others v. Poland*, paras. 203-210.

[217] *M.K. and Others v. Poland*, para. 211.

conducted with the object to really determine the reasons for the migrants' presence at the territory of the state and provide them with the possibility to claim asylum. In case they are not admitted, the return decisions have to be based on individual facts and circumstances and provide an opportunity to appeal. Therefore, the individual interview in itself does not make the assessment satisfactory, as was the case in *M.K.*[218] However, the facts of this case were straightforward in terms of the migrants' conduct and there is room for discussion whether the same arguments would apply in the case of Croatian pushbacks, where the migrants have entered irregularly.

Therefore, the next part of the chapter will proceed to assess the two case scenarios created by the author of this thesis, that illustrate examples of the allegations of the pushback practices conducted by Croatian officials. The aim is to see whether the treatment in question triggers the Croatian responsibility as a state arising under Article 4 of Protocol 4 ECHR, having regard to the definitions and scope introduced above.

E.3. Assessment of the case scenarios

To begin with, the territorial jurisdiction of Croatia was established in the assessment of the cases under Article 3 ECHR principle of non-refoulement. Therefore, there is no need to provide a detailed examination here. For the purposes of reinforcing the argument, it is noteworthy to mention that the ECtHR in *N.D. and N.T.* case upheld the fact that states cannot escape their human rights obligations under ECHR by 'creative legal thinking' and trying to frame certain parts of their territory as 'non-territory.'[219] Additionally, in the case of *M.K.*, the court clarified that states also cannot avoid jurisdiction by claiming that the migrants have to spend enough time on the territory.[220]

---

[218] Ibid, paras. 208-210; Gatta, 2020.

[219] *N.D. and N.T. v. Spain*, paras. 106 and 109-110; Carrera, 2021, p. 21.

[220] *M.K. and Others v. Poland*, para. 131.

Therefore, regardless of the migrants being 25km into the state territory or 200km, both of the case scenarios have established territorial jurisdiction.

E.3.1 Case A

Considering that the territorial jurisdiction is established, the facts of the first case scenario will be assessed through the procedural and own personal conducts tests. This is in order to assess whether the pushbacks amount to collective expulsion and if they do, whether there is a violation of Article 4 of Protocol 4. Firstly, Article 4 of Protocol 4 applies to any situation of expulsion that is within the jurisdiction of a state.[221] For this purpose, expulsion has a very broad meaning to encompass any forceable removal of an alien from a territory.[222] Therefore, since the first case scenario involves 8 migrants being forced to walk to BiH, it is evident that the definition of expulsion is satisfied. Having already established the territorial jurisdiction, it is evident that Article 4 of Protocol 4 is applicable and has to be examined further.

The procedural test requires there to be an establishment of the collective character of the expulsion. The key criterion for an expulsion to be collective is an absence of a reasonable and objective examination of the individual circumstances of each migrant in the group.[223] Considering that the facts of the first case scenario indicate that the migrants were only physically searched, without any examination of their personal circumstances before their expulsion, the procedural test seems to be satisfied. Therefore, the first case scenario represents an example of a collective expulsion, prohibited under Article 4 of Protocol 4. However, this does not mean that there is a violation. In order to establish a violation, it has to be established that the individual examination

---

[221] *N.D. and N.T. v. Spain*, para. 186.

[222] Ibid, para. 185.

[223] Ibid, para. 195.

was omitted due to the migrants' conduct and not at the fault of the Croatian police.[224] This will be the focus of the second part of the examination and it is called the 'own culpable conduct' test.

On first glance, it seems that the ECtHR set a standard in *N.D. and N.T.* that the migrants who have irregularly crossed a border of a state as a group and are apprehended on the territory of that state, do not enjoy the protection against collective expulsion.[225] In that case, the migrants crossed into Spain over a border fence as a part of a larger group of people. This was deemed disruptive to the public order, as the applicants were deemed to have used the opportunity of the large number of migrants crossing in order to avoid legal entry into the country. Their conduct was also problematic as it was deemed that there was a use of force, however, it was not clarified what this refers to. Since no arguments were advanced to claim that the applicants were violent, it seems that the use of force was attributed to the force that a large number of migrants had collectively when using the momentum to jump over the border fence. The applicants were apprehended immediately after they jumped the fence and they were collectively expelled. Applying this reasoning to the first case scenario, it is relevant to identify the relevant facts. Namely, the 8 migrants in question were apprehended when already 25km into the Croatian territory, somewhere in the woods, which can indicate that they crossed through the green border, instead of an official border crossing. However, the fact that they managed to walk 25km before being noticed, indicates that there was no forceful or disruptive border crossing. Rather their crossing was simply irregular. Furthermore, after they were apprehended, there is no indication of resistance or use of force towards the Croatian authorities by the migrants. On the contrary, it seems that they complied with the police and tried to claim asylum, which is allowed under Croatian asylum law.[226] Nevertheless, their attempts to speak were ignored and they were collectively expelled. Therefore, it seems that it would be hard to conclude that the

---

[224] Ibid, para. 200.

[225] Ibid, 201.

[226] LITP, Aticle 33 (2).

individual assessment lacked in this case due to the migrants' own conduct. However, the ECtHR also claims that it can be migrants' fault if they fail to use the opportunities to claim asylum regularly before entering the state if such opportunities are effectively provided.[227] In the case of *N.D. and N.T.*, this was the case because Spain offered the possibility to apply for asylum from Morocco. Regardless, of the third-party submissions supporting the applicants' claim that the access to asylum through these procedures was ineffective, the Court held that they were not enough to prove that the migrants could not have used this regular route instead of opting for their irregular crossing.[228] The key fact to prove was not that the regular route is ineffective, but that the ineffectiveness is attributable to the state.[229] This was another reason why the collective expulsion of *N.D. and N.T.* was not a violation of Article 4 of Protocol 4.[230] When considering this requirement in the context of Croatia and BiH, the only two ways to claim asylum in Croatia are at an official border crossing to border officials or within the Croatian territory to police officers.[231] However, just in 2020, the statistics of the Ministry of Interior show that there have been around 29,000 attempts of illegal entry into Croatia, and around 13,000 of those migrants were apprehended within the territory of Croatia. Most people were of Afghan origin, followed by Albania, Algeria and Bangladesh. At the same time, there are only 1,932 asylum applicants registered in the system.[232] Understandably, there are no statistics that compare how many 'illegal' migrants refused sought asylum, and it is hard to know the circumstances of all of those cases. However, those numbers can speak to show that the asylum system in Croatia is hard to access. This is because, 83% out of the 1,400 asylum applicants were refused in 2019. Additionally, numerous human rights reports claim that people are denied access to

---

[227] *N.D. and N.T. v. Spain*, para. 201.

[228] Ibid, paras. 227 and 228.

[229] Alonso Sanz, p. 346.

[230] Ibid, para. 231.

[231] LITP, Article 33 (2).

[232] AIDA, *2020 Update*, p. 7.

asylum by the Croatian police whether requested at the border crossing or not. For example, the Centre for Peace Studies recorded 110 testimonies of pushbacks affecting 1,656 persons in 2020. In 58.59% of these cases, persons expressed the intention to seek asylum in Croatia, and in 39% of cases persons were under the age of 18.[233] Therefore, a reasonable conclusion would be that the 8 migrants in question did not use the regular border crossing asylum procedure claim because it is ineffective due to the actions of Croatian officials, i.e. the Croatian state, who ignore or deny the asylum claims made. Therefore, their irregular entry can hardly amount to culpable conduct, as to make the *N.D. and N.T.* exception apply. This can be argued untrue because there were also numerous reports about the ineffectiveness of the Spanish asylum procedures and the ECtHR did not deem it as substantial evidence. However, taking into account that the migrants in question entered in a peaceful manner, without the use of force at any stage, as well as the fact that they are allowed to seek asylum from within the Croatian territory, this collective expulsion is most likely a breach of Article 4 of Protocol 4 ECHR.

E.3.2. Case B

It is time to move onto the assessment of the second case scenario. The territorial jurisdiction has been established above. The second step is to establish the applicability of Article 4 of Protocol 4 to the case. For this, there has to be an expulsion and territorial jurisdiction. There is expulsion since 5 migrants are being forced to walk to BiH by the Croatian police[234] and territorial jurisdiction is already established. This means that Article 4 of Protocol 4 applies and has to be examined.

To begin with, the expulsion in question has to be collective, as is required by the procedural test. As was mentioned before, for an expulsion to be collective there has

---

[233] AIDA, *2020 Update,* p. 36.

[234] For more information on the definition of expulsion, please refer to the assessment of the first case scenario.

to be a reasonable and objective examination of the individual circumstances of each migrant in the group.[235] The facts of the second scenario show that the migrants were taken to a police station, where there were interviewed individually. However, these interviews focused on establishing the migrants' identity and travel route, without real opportunity to claim asylum. This is illustrated by the fact that two of the migrants expressed their wish to claim asylum but were ignored. Thus, following the approach taken in *M.K. v Poland*, it has to be assessed whether this assessment was enough to say that the migrants had an individual assessment and their returns are based on individual decisions.[236] The facts of the *M.K.* case were considered in the previous chapter regarding the principle of non-refoulement, so they will not be repeated. Applying the *M.K.* approach to the interviews in the second case scenario, it can be said that they do not seem to make a genuine effort in effectively establishing all of the relevant circumstances of the migrants' cases, but they focus on identifying them and the way they travelled, directly ignoring the two asylum applications expressed. Even if the authorities had legitimate ground to expel the other three migrants, the fact that they made no difference between them and returned the whole group indicated that the quality of the assessment procedure does not seem adequate as to be able to say that the return decisions are individual. In the case of *M.K.*, the ECtHR also considered the broader context of the Polish asylum and border management policies, as well as the different reports submitted that claim that the expulsion of asylum seekers is a systemic and deliberate practice.[237] This helped the ECtHR to deem the assessment inadequate and the applicants' expulsion collective.[238] The same approach can be taken in regards to Croatia, considering the numerous reports already mentioned that allege the pushback practices are happening in a systemic and deliberate manner.[239] Additionally, the denial by the Croatian

---

[235] *N.D. and N.T. v. Spain*, para. 195.

[236] *M.K. and Others v. Poland*, paras. 208 and 209.

[237] Ibid, paras. 208 and 209.

[238] Ibid, para. 211.

[239] Ibid, para. 208.

officials and statements like the one saying that Croatia will not be a hotspot for migrants can be considered to contribute to the conclusion that the assessment of migrants in the second scenario was not effective and adequate. Therefore, this expulsion qualifies as collective.

As was the approach in the assessment of the first case scenario, to determine whether the Croatian police violated Article 4 of Protocol 4, the 'own culpable conduct' test has to be conducted. Since it has been established that regardless of the appearance of an assessment procedure, the expulsion, in this case, is considered collective, there are not many differences between the first and the second case when applying the 'own culpable conduct' test. The 5 migrants in question were irregularly on the territory, however, there did not seem to be anything disruptive or forceful in their irregular presence to warrant the applicability of this exception. In addition, the technical asylum procedure at the official border crossings and the failure of the migrants in question to use them also does not seem to be enough for the *N.D. and N.T.*, exception to apply, for the same reasons as in the first case scenario. However, there may be an argument, different to the first case scenario, as regards to the fact that the migrants, in this case, were 250km far from the Croatian and Bosnian border. This could mean that they had more opportunities to apply for asylum than the migrants in the first case scenario for example, at a police station. However, the case of *M.K.* states that the applicants for international protection have to be treated in accordance with their precarious position and be given the benefit of the doubt when receiving and assessing their claims, even if they are submitted at the first convenience.[240] Regardless, the case of *M.K.* presented straightforward facts where the migrants presented themselves regularly at the border and underwent the procedure. Thus, it is hard to determine whether the outcome of this test would be positive or negative for the migrants. However, in the spirit of the aim of Article 4 of Protocol 4, which is to ensure that the states give a reasonable opportunity to migrants to seek international protection and not be arbitrarily expelled, considering

[240] Ibid, para. 170.

that the migrants' conduct did not disturb the public order, the author leans into the conclusion that even in this case there should be a violation of Article 4 Protocol 4 held.

In summary, the case of *N.D. and N.T. v. Spain* brought some controversies into the assessment of Article 4 of Protocol 4 by introducing their own culpable conduct test, making the applicants in some cases responsible for the lack of individual assessment in their cases. Nevertheless, it has been argued that both of the case scenarios should be held in violation of Article 4 of Protocol 4 because they clearly illustrate instances of collective expulsion and do not fall under the *N.D. and N.T.* exception. Applying the own culpable conduct test is still unexplored territory, with only one case applying it methodologically since the ND judgment. Nevertheless, it is crucially important to discuss its application in the cases of pushbacks of irregular migrants, especially since there are more cases regarding such practices awaiting judgment in front of the ECtHR.[241] One of the cases is SB and Other v Croatia, which illustrates the relevance of the analysis provided in this thesis. For a full round-up, the as in the previous chapter, the last part of this chapter will briefly discuss the facts of the Croatian case awaiting judgment, to see if the same analysis can be applied to it as the one above.

E.4. *S.B. and Others v. Croatia*

The facts of the case have been introduced in the previous chapter, as well as the establishment of the territorial jurisdiction. However, what is relevant here is the fact that all three of the applicants were allegedly forced to cross the border with BiH by the Croatian officials, as a part of a group and without any individual assessment. Since it can be seen that there seems to be a complete lack of any kind of personal assessment in all three applications submitted and that they were all removed from the territory in groups, in line with the arguments presented in the assessment of the case scenarios

[241] Gatta, 2020: examples of pending cases against Hungary, Croatia, Latvia, North Macedonia and Poland.

above, it seems that there is a clear case of collective expulsion, in accordance to the procedural test requirements.[242] Since no assessment whatsoever seemed to have taken place, there is no need to apply the *M.K.* assessment of whether they are enough to make the expulsion individual.[243] Therefore, Article 4 of Protocol 4 is applicable.

Having established the applicability, it has to be seen whether the applicants' right was violated or not. This is to be done through the application of the own culpable conduct test.[244] Although, if the argument above is followed, this exception should not apply to the applicants because the facts available do not illustrate that there has been a disruptive and forceful crossing. In addition, it has been concluded that it can hardly be argued that the fact that the migrants were on the Croatian territory irregularly would take them outside of the scope of protection provided by the article, since the availability of effective asylum procedures on the official border crossing is highly questionable, as proven above by statistics and reports.

However, it has to be acknowledged that his will most likely take up the majority of discussion by the ECtHR when delivering their judgment, since the test introduced is very new and controversial. Some of the third-party interventions are already published[245] and they speak largely in support of finding a violation of this article. They provide details that the summary expulsions are well-documented and consistent, while the conditions in BiH are grave to the point that they could qualify as ill-treatment. This

---

[242] *N.D. and N.T. v. Spain*, para. 195.

[243] *M.K. and Others v. Poland*, paras. 208 and 209.

[244] *N.D. and N.T. v. Spain*, para. 201.

[245] Commissioner for Human Rights, *Third party intervention by the Council of Europe Commissioner for Human Rights*, (website), https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-in-/1680a0ee5e, (accessed 15 July 2021); Hungarian Helsinki Committee, *Joint third party intervention at the ECtHR in S.B. v Croatia, app. No 18810/19,* (website), https://helsinki.hu/en/tpi-app-no-1881019/, (accessed 15 July 2021).

could lead to the ECtHR adopting the approach taken in *M. K.*[246] and using the opportunity to classify the treatment in question as a systemic and deliberate violation. However, it was also mentioned above that in the stricter case of *N.D.*[247] that the reports submitted in third party interventions about the inefficiency of regular asylum routes in Morocco were not enough to convince the ECtHR that the applicants had a legitimate reason to not pursue the regular entry routes, but rather attempt the irregular entry. Thus, it is very unsure as to what the outcome of the case will be in reality, since the ECtHR will have to choose between the two approaches. Additionally, the decision is even harder to make because the submissions by Croatia are not available yet, in order to assess both allegations properly against each other.

Even though it is hard to make a decision on the outcome of the *S.B. v. Croatia* case, it is necessary to note that there is very possible that the ECtHR reverts back to the effective and dynamic approach it had when interpreting these two provisions until the N.D. case. As Gatta and Rietiker argued in their articles, the ECtHR used its mandate to expand the scope of the ECHR protection of migrants by providing the protection from refoulement enshrined in Article 3 ECHR and by starting to actively apply the prohibition of collective expulsion provision, once the cases started rising due to the influx in migration flows.[248] Therefore, the ECtHR can use once again the dynamic interpretation, which stresses that the moment relevant for the interpretation of a provision is the moment of the ECtHR's judgment, thus allowing the ECtHR to expand the scope of protection of the ECHR to correspond to the given needs and circumstances in time.[249] Arguably, this is even crucial in order to provide adequate protection of migrants in the context of the alleged systemic and deliberate pushback practices in Europe and not continue taking a step back in protection, as was argued to be the case in *N.D.* by

---

[246] *M.K. and Others v. Poland.*

[247] *N.D. and N.T. v. Spain*.

[248] Rietiker, p. 654; Gatta, 2019 (a), p.121; Gatta, 2019 (b), p. 104, 115.

[249] Rietiker, pp.673-674.

Alonso Sanz.[250] This analysis applies to both the provisions of non-refoulement and the prohibition of collective expulsion.

[250] Alonso Sanz, p. 349.

F. Conclusion

In summary, this thesis has aimed to answer the question *'Are the pushbacks of irregular migrants on the Croatian border breaching human rights law and how?'.* In the introduction, it was explained that this is going to be done by focusing on the ECHR and more specifically, Article 3 which enshrines the principle of non-refoulement and Article 4 of Protocol 4 prohibition of collective expulsion. The reason that the ECHR was chosen as the sole human rights instrument to be examined is the fact that the violation of its provisions can be argued in front of the ECtHR. In addition, as a judicial body, the ECtHR issues decisions binding to the states, rather than being advisory in nature, as is the case with the UN Treaty bodies. Therefore, it can be said that the ECHR is easier and more effective for the individuals to enforce, compared to the other mechanisms. Furthermore, the relevance of the research question is illustrated by the reports of current events regarding pushbacks of migrants Europe-wide and in Croatia. These reports show that the pushback practices keep increasing since 2015, they happen as a part of a deliberate approach in order to deter migrants from trying to reach their territory and the territory of the EU. Considering that Croatia is an EU border country and there is a pending application regarding alleged pushback of migrants in front of the ECtHR, there is a need to provide a legal analysis from a human rights perspective. Additionally, a gap in research was identified by the lack of academic literature focusing on how the existing ECtHR case-law could be applied to the circumstances of the alleged pushbacks in Croatia. Therefore, this thesis can be a contribution to attempt to start closing the gap.

The substantive chapters of the thesis are the ones examining the case scenarios created by the author based on some of the most important characteristics of the reported pushback practices. The analysis needs to be consistent with the establishment of the theoretical framework of the principle of non-refoulement, established in Article 3 ECHR and the prohibition of collective expulsion, set out in Article 4 of Protocol 4 ECHR. Both of these articles are intended to serve the purpose of preventing states to

arbitrarily expel migrants from their territory. The prohibitions require states to provide migrants with an assessment of individual circumstances and an effective opportunity to claim asylum and complain about a decision to return. The key ECtHR cases used in the analysis are the recent cases *of N.D. v Spain* and *M.K. v Poland*, as they seem to be examples of two opposite approaches – a strict one and a more liberal one towards the migrants. Sure enough, they deal with different cases based on the facts, but nevertheless, the M.K. case for the first time methodically applies the 'own culpable conduct' test introduced in the N.D. case.

In summary of the Chapter on non-refoulement, it has to be noted that both of the case scenarios describe practices that amount to breaches of the principle of non-refoulement enshrined in Article 3 ECHR. Although both cases have facts that could arguably take the case outside of the scope of protection of Article 3, the cases of *M.K. and Others v. Poland* and *Ilias and Ahmed v. Hungary* provide a sound legal basis for arguing in favour of the applicability of the principle of non-refoulement in both of these cases, as well as finding a violation to both of them due to the fact that the pushbacks exercised by the Croatian police in both cases were done without the necessary procedures of legal cross-territorial removals, thereby putting the migrants in danger of facing ineffective asylum system in BiH, as well as dire living conditions which could amount to a breach of Article 3 ECHR prohibition of inhuman or degrading treatment or punishment, as established in the case of *M.S.S. v. Belgium and Greece.*

As far the Article 4 of Protocol 4 is concerned, the case of *N.D. and N.T. v. Spain* brought some controversies into the assessment of Article 4 of Protocol 4 by introducing their own culpable conduct test, making the applicants in some cases responsible for the lack of individual assessment in their cases. Nevertheless, it has been argued that both case scenarios should be held in violation of Article 4 of Protocol 4 because they illustrate instances of collective expulsion and do not fall under the *N.D. and N.T.* exception. Applying the own culpable conduct test is still unexplored territory, with only one case applying it methodologically since the *ND* judgment. Nevertheless, it is crucially important to discuss its application in the cases of pushbacks of irregular migrants, especially since there are more cases regarding such practices awaiting

judgment in front of the ECtHR.[251] One of the cases is *SB and Other v Croatia*, which illustrates the relevance of the analysis provided in this thesis.

Finally, the known facts of the *S.B*. case do not substantially differ from the two case scenarios that have been analysed in this thesis, therefore only a brief analysis was done, with references to the more in-depth arguments that are applicable and are provided in the assessment of the set case scenarios. In sum, all three of the migrants were on the territory of the Croatian state. In the arguments in the two cases above, it has been concluded that in this case, territorial jurisdiction is satisfied.[252] Since the facts of the cases do not substantially differ from those already discussed above, it can be said that the applicability of Article 3 is established, since the applicants were not provided with the opportunity to seek protection or raise objections to their expulsion by the Croatian police, while they were under their control. In addition, Article 4 of Protocol 4 is also considered applicable since there is a complete lack of any kind of personal assessment in all three applications submitted and that they were all removed from the territory in groups. In line with the arguments presented in the assessment of the case scenarios, it seems that there is a clear case of collective expulsion, in accordance with the procedural test requirements. However, more indecisive parts of the arguments were regarding the fact of whether there were violations or not. Considering the known facts and following the analysis of the case scenarios, it was held that there could be a violation of both articles concerned. Nevertheless, it is very hard to give a decisive answer considering that this exact context of pushbacks has never been examined before by the ECtHR,[253] so it is hard to determine whether the judgment would be static as in *ND* or

---

[251] Gatta, 2020: examples of pending cases against Hungary, Croatia, Latvia, North Macedonia and Poland.

[252] *M.K. and Others v. Poland*, paras. 150-151; *Ilias and Ahmed v. Hungary,* para. 91; *N.D. and N.T. v. Spain*, para 110.

[253] What is meant by this is the fact that the pushbacks in question concern migrants apprehended inside Croatian territory, who entered irregularly, and returned through informal border without any obvious procedures. The other mentioned cases concern either migrants stopped right at the crossing when they

dynamic, as in *MK*. In addition, the submission by Croatia will also play a crucial role in the judgment, because their argument may introduce different facts to those provided by applicants. Lastly, in support of the argument that there can be a violation held, it has to be mentioned that the ECtHR can revert back to the dynamic interpretation, which stresses that the moment relevant for the interpretation of a provision is the moment of the ECtHR's judgment so that the judgment can respond to the needs and circumstances in time.[254] Arguably, this is even necessary in order to provide adequate protection of migrants in the context of the alleged systemic and deliberate pushback practices in Europe and avoid taking another step back in protection, as was argued to be the case in *N.D*. by Alonso Sanz.[255]

attempted irregular entry or migrants who presented themselves at official border crossings to seek asylum.

[254] Rietiker, pp.673-674.

[255] Alonso Sanz, p. 349.

Legal resources

International Treaties

UN:

Convention Relating to the Status of Refugees (adopted 14 December 1950, entered into force 22 April 1954) 189 UNTS 137.

Protocol Relating to the Status of Refugees (adopted 16 December 1966, entered into force 4 October 1967) 606 UNTS 267.

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

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

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.

CoE:

Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and No. 14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005.

EU:

Charter of Fundamental Rights of the European Union (2007) OJ C303/1.

Regulation of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (2016) OJ L 77.

CoE Case Law

European Court of Human Rights, *Al-Saadoon and Mufdhl v. The United Kingdom*, no. 61498/08, 2 March 2010.

European Court of Human Rights, *Babar Ahmad and Others v. The United Kingdom,* nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012.

European Court of Human Rights, *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia,* no. 18670/03, partial admissibility decision 16 June 2005.

European Court of Human Rights, *Calovskis v. Latvia*, no. 22205/13, 24 July 2014.

European Court of Human Rights, *Cruz Varas and Others v. Sweden,* no. 15576/89., 20 March 1991.

European Court of Human Rights, *Dritsas v. Italy,* no. 2344/02, admissibility decision 1 February 2011.

European Court of Human Rights, *El-Masri v. Former Yugoslav Republic of Macedonia*, no. 39630/09, 13 December 2012.

European Court of Human Rights, *F v. The United Kingdom*, no.17341/03, 22 June 2004.

European Court of Human Rights*, Gäfgen v. Germany*, no. 22978/05, 1 June 2010.

European Court of Human Rights, *Harkins and Edwards v. The United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012.

European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, 23 February 2012.

European Court of Human Rights, *Ilias and Ahmed v. Hungary,* no. 4728/15, 21 November 2019.

European Court of Human Rights, *Ireland v. The United Kingdom*, no. 5310/71, 18 January 1978.

European Court of Human Rights, *M.A. v. Cyprus*, no. 41872/10, 23 July 2013.

European Court of Human Rights, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17, 43643/17, 23 July 2020.

European Court of Human Rights, *M.S.S. v. Belgium and Greece*, no. 30696/09, 21 January 2011.

European Court of Human Rights, *N.D. and N.T. v. Spain*, nos. 8675/15, 8697/15, 13 February 2020.

European Court of Human Rights, *Pretty v. The United Kingdom*, no. 2346/02, 29 April 2002.

European Court of Human Rights, *S.B. v. Croatia and 2 other applications*, nos. 18810/19, 18865/19, 23495/19, Communicated on 26 March 2020.

European Court of Human Rights, *Selmouni v. France*, no. 25803/94, 28 July 1999.

European Court of Human Rights, *Soering v. The United Kingdom,* no. 14038/88, 7 July 1989.

European Court of Human Rights*, T.I. v. United Kingdom*, No. 43844/98, Admissibility Decision of 7 March 2000.

European Court of Human Rights, *Vilvarajah and Others v. The United Kingdom,* nos. 13163/87, 13163/87, 13165/87, 13447/87, 13448/87, 30 October 1991.

Greek Case, Judgement of 18 November 1969, Yearbook of the European Convention on Human Rights, No. 12.

EU Case Law

European Court of Justice, C-126/81 [1982] ECR I-01479, Wünsche Handelsgesellschaft v Federal Republic of Germany. Reference for a preliminary ruling: Bundesverwaltungsgericht – Germany, 6 May 1982 (Solange II).

Court of Justice of the European Union, C-402/05 and C415/05 [2008] ECR I-06351, Yasin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 3 September 2008.

European Court of Justice, C-11/70 [1970] ECR I-01125, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany, 17 December 1970 (Solange I).

European Court of Human Rights, Čonka v. Belgium, no. 51564/99, 5 February 2002.

National Law

Law on International and Temporary Protection, Official Gazette NN 70/2015, 127/2017.

Zakon o potvrđivanju sporazuma između Vlade Republike Hrvatske i Vijeća Ministara Bosne i Hercegovine o predaji i prihvatu osoba kojih je ulazak ili boravak nezakonit, Official Gazette NN 11.2011-96.

Bibliography

Books

Carrera, S. and Stefan, M., *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union,* Oxon, Routledge, 2020.

De Weck, F., *Non-refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT*, Leiden, Koninklijke Brill nv, 2014.

Gatta, F.L.,'The Problematic Management of Migratory Flows in Europe and its Impact on Human Rights: the Prohibition of Collective Expulsion of Aliens in the Case-law of the European Court of Human Rights', in G.C. Bruno, F.M. Palombino and A. Di Stefano (eds.), *Migration Issues before International Courts and Tribunals*, Rome, CNR, 2019, pp. 119-146.

Mungianu, R., 'The Principle of Non-Refoulement in the EU Legal Setting', in Mungianu, R. (eds.), *Frontex and Non-refoulement: The International Responsibility of the EU,* Cambridge, Cambridge University Press, 2016, pp. 89-135.

Župarić-Iljić, D. and M. Valenta, 'Opportunistic Humanitarianism and Securitization Discomfort Along the Balkan Corridor: The Croatian Experience', in M. Feiscmidt et al. (eds.), *Refugee Protection and Civil Society in Europe*, eds, Palgrave Macmillan US, 2018.

Journal Articles

Alonso Sanz, L., 'Deconstructing Hirsi: The Return of Hot Returns. ECtHR 13 February 2020, Nos. 8675/15 and 8697/15, ND and NT v Spain', *ECLR*, vol. 17, 2021, pp. 335-352, (accessed 1 June 2021).

Berc, G., 'Croatian Experience with the Refugee Crisis on the Balkan Route and Possible Implications for Social Work Practice and Education', *Journal of Human Rights and Social Work,* vol. 4, 2019, p. 68 (accessed 31 February 2021).

Çali, B., Costello, C., and S. Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies', *German Law Journal*, vol. 21, 2020, pp. 355-384 (accessed 1 March 2021).

Carrera, S., 'The Strasbourg Court Judgement *N.D. and N.T. v Spain* - A *Carte Blanche* to Push Backs at EU External Borders?', EUI Working Paper, RSCAS 2020/21, 2021, (accessed 20 February 2021).

de Burca, G., ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?‘, *MJ*, vol. 20, no.2, 2013, (accessed 25 June 2021).

de Burca, G., ‘The European Court of Justice and the International Legal Order After Kadi’, *ILJ*, vol. 51, no. 1, 2010, (accessed 25 June 2021).

Di Filippo, M., ‘Walking the (barbed) wire of the prohibition of collective expulsion: An assessment of the Strasbourg case law’, *Diritti umani e diritto internazionale*, vol. 15, no. 2, 2020, (accessed 15 May 2021).

Duran Alba, J.F., ‘Prohibition of the collective expulsion of aliens (Article 4 of Protocol 4)’, in Europe of Rights: A Compendium on the European Convention of Human Rights, 2012, pp. 629-633, (accessed 1 May 2021).

Gatta, F.L., ‘Migration and the Rule of (Human Rights) Law: Two ‘Crises’ Looking in the Same Mirror’, *CYELP,* vol. 15, 2019, pp. 99-133, (accessed 11 April 2021).

Hemme,B.,‘In search for a fair balance. The absolute character of the prohibition of refoulement under Article 3 ECHR‘, *Leiden Journal of International Law,* vol. 22, no. 3, 2009, (accessed 1 July 2021).

Knezović, S., Dr and Grošinić, M., *Migration Trends in Croatia*, Zagreb, Hanns-Seidel-Stviftung, 2017, (accessed 1 March 2021).

Kokott J. and Sobotta, C., ‘Constitutional Core Values and International Law – Finding the Balance?’, *EJIL*, vol.23, no. 4, 2012, (accessed 23 February 2021).

Milanovic, M., ‘Extraterritorial application of human rights treaties: Law, principles, and policy’, *Oxford Monographs in International Law,* 2011, (accessed 5 April 2021).

Mole, N. and Meredith, C., *Asylum and the European Convention on Human Rights,* Srasbourg, Council of Europe Publishing, 2010, (accessed 5 April 2021).

Rietiker, D.,‘Collective Expulsion of Aliens: The European Court of Human Rights (Strasbourg) as the Island of Hope in Stormy Times‘, *Suffolk Transnational Law Review,* vol. 39, no. 3, 2016 pp. 651 – 682, (accessed 5 April 2021).

Rijavec, D., Štambuk, A. and Pevcin, P.,‘ Evidence-Based Assessment of Readiness to Solve wicked Problems: The Case of Migration Crisis in Croatia and Slovenia’, *Social Sciences*, vol. 10, no. 6, 2021, (accessed 5 April 2021).

Ristik,J., ‘The Right to Asylum and the Principle of Non-Refoulement Under the European Convention on Human Rights’, *ESJ*, vol. 13, no. 28, 2017, pp. 108-120, (accessed 5 April 2021).

Šelo Šabić, S., ‘The Impact of the Refugee Crisis in the Balkans: A Drift Towards Security’, *Journal of Regional Security*, vol.12, no.1, 2017, pp. 51-74, (accessed 5 April 2021).

Smith, R.K.M., *International Human Rights Law,* Oxford, Oxford University Press, 2016, (accessed 5 April 2021).

Publications by international human rights bodies

'Council of Europe anti-torture Committee carries out rapid reaction visit to Croatia to examine treatment of migrants', CPT, 18 August 2020, https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-carries-out-rapid-reaction-visit-to-croatia-to-examine-treatment-of-migrants, (accessed 30 May 2021).

CoE, *Department for the Execution of Judgments of the European Court of Human Rights,* (website), https://www.coe.int/en/web/execution/presentation-of-the-department, (accessed 1 July 2021).

Committee on Migration, Refugees and Displaced Persons, *Pushback policies and practice in Council of Europe member States,*(website), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=27728&lang=en, (accessed 1 July 2021).

European Court of Human Rights, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of collective expulsion of aliens,* (website), https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf, (accessed 25 July 2021).

Spindler, W., '2015: The year of Europe's refugee crisis', UNHCR, 8 December 2015, https://www.unhcr.org/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html, (accessed 1 June 2021).

UNHCR, *Manual on Refugee Protection and the ECHR: Part 2.1 – Fact Sheet on Article 3*, (website), https://www.unhcr.org/3ead2d262.pdf, (accessed 1 May 2021).

UNOHCHR, *Fact Sheet No.17, The Committee against Torture,* (website), https://www.ohchr.org/Documents/Publications/FactSheet17en.pdf, (accessed 1 May 2021).

NGO publications

‘As migrants continue to reach Ceuta, Spanish pushback hardens’, AlJazeera, 19 May 2021, https://www.aljazeera.com/news/2021/5/19/spain-moves-to-head-off-ceuta-migrant-and-refugee-crisis, (accessed 10 July 2021).

‘Croatia: Asylum Seekers Forced Back to Serbia’, Human Rights Watch, 20 January 2017, https://www.hrw.org/news/2017/01/20/croatia-asylum-seekers-forced-back-serbia, (accessed 10 April 2021).

‘Finally Some Visibility for Illegal Austrian Pushbacks!’, transform!europe, 13 July 2021, https://www.transform-network.net/blog/article/finally-some-visibility-for-illegal-austrian-pushbacks/, (accessed 21 July 2021).

‘Refugee Crisis: Balkans border blocks leave thousands stranded’, Amnesty International, 20 November 2015, https://www.amnesty.org/en/latest/news/2015/11/refugee-crisis-balkans-border-blocks-leave-thousands-segregated-and-stranded-in-greece/, (accessed 2 July 2021).

AIDA, *Country Report: Croatia 2016 Update,* (website), https://asylumineurope.org/wp-content/uploads/2017/04/report-download_aida_hr_2016update.pdf, (accessed 1 July 2021).

AIDA, *Country Report: Croatia 2017 Update*, (website), https://asylumineurope.org/wp-content/uploads/2018/04/report-download_aida_hr_2017update.pdf, (accessed 1 July 2021).

AIDA, *Country Report: Croatia 2018 Update*, (website), https://asylumineurope.org/wp-content/uploads/2014/08/AIDA-HR_2018update.pdf, (accessed 1 July 2021).

AIDA, *Country Report: Croatia 2019 Update*, (website), https://asylumineurope.org/wp-content/uploads/2014/08/AIDA-HR_2019update.pdf, (accessed 1 July

AIDA, *Country Report: Croatia 2020 Update,* (website), https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-HR_2020update.pdf, (accessed 1 July 2021).

AIDA, *Country Report: Croatia December 2015,* (website), https://asylumineurope.org/wp-content/uploads/2015/12/report-download_aida_hr_update.ii_.pdf, (accessed 1 July 2021).

Border Violence Monitoring Network, *Pushbacks and Police Violence – Legal Framework*, (website), https://www.borderviolence.eu/legal-framework/, (accessed 10 June 2021).

Border Violence Monitoring Network, *Torture and Cruel, Inhumane, or Degrading Treatment of Refugees and Migrants in Croatia in 2019*, (website),

https://www.borderviolence.eu/wp-content/uploads/CORRECTEDTortureReport.pdf, (accessed 19 April 2021).

Dobrodošli! i Are You Syrious, *Izvještaj o nezakonitim i nasilnim protjerivanjima izbjeglica iz Republike Hrvatske, 2017,* (website), http://welcome.cms.hr/wp-content/uploads/2017/01/Izvje%C5%A1taj-o-nezakonitim-i-nasilnim-protjerivanjima-izbjeglica-iz-RH-AYS-i-Inicijativa-Dobrodo%C5%A1li.pdf, (accessed 10 April 2021).

European Center for Constitutional and Human Rights, *Push-backs in Croatia: Complaint before the UN Human Rights Committee,* (website), https://www.ecchr.eu/en/case/push-backs-croatia-complaint-un-human-rights-council/, (accessed 1 May 2021).

European Database of Asylum Law, *Switzerland: Suspension of Dublin transfer to Croatia due to summary returns at border with Bosnia-Herzegovina,* (website), https://www.asylumlawdatabase.eu/en/content/switzerland-suspension-dublin-transfer-croatia-due-summary-returns-border-bosnia-herzegovina, (accessed 15 March 2021).

Human Rights Watch, *Croatia:Migrants Pushed Back to Bosnia and Herzegovina,* (website), https://www.hrw.org/news/2018/12/11/croatia-migrants-pushed-back-bosnia-and-herzegovina, (accessed 15 June 2021).

Interview with Magda Sindičić for Hrvatska uživo, 20 December 2016, https://www.facebook.com/hrvatskauzivo/videos/1874913726078656, (accessed 10 April 2021).

Medecins Sans Frontieres, *Push-backs, violence and inadequate conditions at the Balkan route's new frontier,* (website), https://www.msf.org/push-backs-violence-and-inadequate-conditions-balkan-route%E2%80%99s-new-frontier, (accessed 14 June 2021).

Oxfam, Macedonian Young Lawyers Association, Belgrade Centre for Human Rights, *A Dangerous 'Game': The pushback of migrants, including refugees, at Europe's borders*, (website), https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-dangerous-game-pushback-migrants-refugees-060417-en_0.pdf, (accessed 20 May 2021).

Blogposts

Gatta, L., 'Systematic push back of 'well behaving' asylum seekers at the Polish border: M.K. and Others v. Poland', *Strasbourg Observers,* [web blog], 7 October 2020, https://strasbourgobservers.com/2020/10/07/systematic-push-back-of-well-behaving-asylum-seekers-at-the-polish-border-m-k-and-others-v-poland/, (accessed 15 July 2021).

Hakiki, H.,'N.D. and N.T. v. Spain: defining Strasbourg's position on push backs at land borders?', *Strasbourg Observers,* [web blog], 26 March 2020,

https://strasbourgobservers.com/2020/03/26/n-d-and-n-t-v-spain-defining-strasbourgs-position-on-push-backs-at-land-borders/, (accessed 15 July 2021).

Lübbe, A., 'The Elephant in the Room: Effective Guarantee of Non-Refoulement after ECtHR N.D. and N.T.?',*Verfassungsblog on Matters Constitutional,* [web blog], 19 February 2020, https://verfassungsblog.de/the-elephant-in-the-room/, accessed (15 July 2020)

Wissing, R.,'Push backs of "badly behaving" migrants at Spanish border are not collective expulsions (but might still be illegal refoulements)', *Strasbourg Observers,* [web blog], 25 February 2020, https://strasbourgobservers.com/2020/02/25/push-backs-of-badly-behaving-migrants-at-spanish-border-are-not-collective-expulsions-but-might-still-be-illegal-refoulements/, (accessed 15 July 2020).

News

'Reaction of the Croatian Ministry of Interior to the article of the British news portal The Guardian', Ministry of Interior, 13 May 2020, https://mup.gov.hr/news/response-of-the-ministry-of-the-interior-to-the-article-published-on-the-online-edition-of-the-british-daily-newspaper-the-guardian/286199, (accessed 1 May 2021).

'Rome Court decision against Italy's illegal migrant pushbacks is a significant step', Euro-Med Human Rights Monitor, 26 January 2021, https://euromedmonitor.org/en/article/4120/Rome-Court-decision-against-Italy%E2%80%99s-illegal-migrant-pushbacks-is-a-significant-step, (accessed 10 July 2021).

Dikov, I., 'EU Border Guards Use 'a Little Bit of Force' to Push Migrants Back to Bosnia, Croatia's President Admits', European [views], 15 July 2019, https://www.europeanviews.com/2019/07/eu-border-guards-use-a-little-bit-of-force-to-push-migrants-back-to-bosnia-croatias-president-admits/ (accessed 19 April 2021).

Gabrić, T., 'Izvještaj Odbora Vijeća Evrope za sprečavanje mučenja potrebno je hitno objaviti', H-Alter, 1 June 2021, https://h-alter.org/ljudska-prava/izvjestaj-odbora-vijeca-evrope-za-sprecavanje-mucenja-potrebno-je-hitno-objaviti/, (accessed 15 June 2021).

Hina, 'Hrvatska policija odbacuje nove optužbe o nasilju nad migrantima', N1, 21 October 2020, https://hr.n1info.com/vijesti/a566666-hrvatska-policija-odbacuje-nove-optuzbe-o-nasilju-nad-migrantima/, (accessed 1 May 2021).

Kingsley, P., 'Balkan countries shut borders as attention turns to new refugee routes', The Guardian, 9 March 2016, https://www.theguardian.com/world/2016/mar/09/balkans-refugee-route-closed-say-european-leaders, (accessed 5 June 2021).

Ministarstvo unutratnjih poslova, *COVID i kirminalitet u 2020. Komentar pokazatelja sigurnosti u Republici Hrvatskoj*, (website), https://mup.gov.hr/UserDocsImages/2021/04/Covid%20i%20kriminalitet%20u%202020%20-%20Komentar%20pokazatelja%20sigurnosti%20u%20Republici%20Hrvatskoj.pdf, (accessed 1 July 2021).

Republic of Croatia Ombudsman, *Annual Report of the Ombudswoman of Croatia for 2018*, (website), https://www.ombudsman.hr/en/download/annual-ombudsman-report-for-2018/?wpdmdl=6777&refresh=610821a18aca11627922849, (accessed 20 May 2021).

Sly, L., '8 reasons Europe's refugee crisis is happening now', The Washington Post, 18 September 2015, https://www.washingtonpost.com/news/worldviews/wp/2015/09/18/8-reasons-why-europes-refugee-crisis-is-happening-now/, (accessed 1 June 2021).

Tondo, L., ''They didn't give a damn': first footage of Croatian police 'brutality'', The Guardian, 14 November 2018, https://www.theguardian.com/global-development/2018/nov/14/didnt-give-a-damn-refugees-film-croatian-police-brutality-bosnia?CMP=share_btn_fb, (accessed 5 July 2021).

Tondo, L., 'Croatia violating EU law by sending asylum seekers back to Bosnia', The Guardian, 17 December 2018, https://www.theguardian.com/world/2018/dec/17/croatia-violating-eu-law-by-sending-back-asylum-seekers-to-bosnia, (accessed 5 July 2021).

Vladisavljevic, A., 'Videos 'Prove' Croatia Forcibly Expelling Migrants, Watchdog Says', Balkan Insight, 16 December 2018, https://balkaninsight.com/2018/12/16/bvm-proves-human-rights-violations-at-external-eu-border-12-14-2018/, (accessed 5 July 2021).

Wallis, E., 'Hungary: 4,903 pushbacks after EU Court declared them illegal', InfoMigrants, 2 January 2021, https://www.infomigrants.net/en/post/29944/hungary-4-903-pushbacks-after-eu-court-declared-them-illegal, (accessed 10 July 2021).

Weaver, M., 'Croatia 'will not become a migrant hotspot' says prime minister', The Guardian, 18 September 2015, https://www.theguardian.com/world/2015/sep/18/croatia-refugees-zoran-milanovic-migrant-hotspot, (accessed 1 June 2021).

Zalan, E., 'EU launches migration cases against Croatia, Greece, Hungary, and Italy', EU Observer, 10 December 2015, https://euobserver.com/migration/131479, (accessed 1 March 2021

Abstract

Croatia has the longest EU external land border which placed it at the forefront of managing the migration influx that started in 2015. However, there have been serious allegations by various actors that Croatian officials have systematically engaged in violent pushbacks of migrants from Croatia to Bosnia and Herzegovina during this time. If true, the pushbacks could amount to serious breaches of human rights law principles of non-refoulement and prohibition of collective expulsion. At the time of writing, the scholarship surrounding the allegations of pushbacks mainly focused on the reported violence by the Croatian police in respect of the prohibition of ill-treatment. However, the principle of non-refoulement and the prohibition of collective expulsion are some of the core principles protecting the human rights of migrants, regardless of their legal status in a country. They ensure that migrants get individual assessment and protection from being returned to a country where they may face ill-treatment. These principles are enshrined in various international human rights treaties but, for practical purposes, the main focus in this master thesis is placed on the ECHR. Namely, Article 3 where the principle of non-refoulement is enshrined, and Article 4 of Protocol 4, which prohibits collective expulsion of aliens. This contributes to the scholarship by illustrating through legal analysis that the principle of non-refoulement and prohibition of collective expulsion have been violated by the conduct of the Croatian authorities, thus providing a point of reference which could be applied to the same issues arising Europe-wide.

Das Abstrakt

Kroatien hat die längste Landesgrenze außerhalb der EU. Diese Tatsache stellt sie an die Spitze der Verwaltung des in 2015 angefangenen Migrationszustroms. Dennoch haben mehrere Akteure den kroatischen Beamten schwer vorgeworfen, sie hätten in jenem Zeitraum am gewaltsamen Rückdrang der Migranten von Kroatien nach Bosnien und Herzegowina systematisch teilgenommen. Trifft dies zu, so würde es auf eine ernsthafte Verletzung der Menschenrechte nach dem Gesetzesgrundsatz der Nichtzurückweisung sowie dem Verbot der Massenabschiebung hinauslaufen. Die Untersuchungen der damaligen Vorfälle konzentrierten sich aber lediglich auf die gemeldeten Gewalttaten der Misshandlung seitens der kroatischen Polizei. Allerdings, stellen der Grundsatz der Nichtzurückweisung sowie das Verbot der Massenabschiebung jene Kernprinzipien dar, welche die Menschenrechte der Migranten schützen, ungeachtet der Rechtslage eines Landes. Sie stellen sicher, dass Migranten eine individuelle Einschätzung beanspruchen, wie auch, dass sie vor der Ausweisung in ein Land, wo sie misshandelt werden könnten, geschützt werden. Diese Grundsätze sind wohl in sämtlichen, internationalen Menschenrechtsverträgen fest verankert. Die vorliegende Masterarbeit bezieht sich aus praktischen Gründen auf einige, bestimmte Bestandteile der EMKR, nämlich auf Paragraph 3 und Paragraph 4 des Protokolls 4, in denen der Grundsatz der Nichtzurückweisung und das Verbot der Massenverschiebung der Ausländer festgesetzt sind. Gegenüber diesem Verstoß der kroatischen Behörden, sind sowohl der Grundsatz der Nichtzurückweisung als auch das Verbot der Massenabschiebung, als wesentliche Teile der EMKR fix verankert. Somit ist die Grundidee dieser Masterarbeit, eine kritische Resonanz auf die umstrittene Vorgehensweise der kroatischen Behörden, darzustellen. Die Ergebnisse der Analyse würden einen Referenzpunkt bilden, der dann europaweit in ähnlichen Fällen verwendet sein könnte.