



DOSSIER

MIGRATION

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1. INTRODUCTION

The European Union's asylum and refugee policies are based on a combination of deterrence, defense, and fortressing of borders. Border authorities use all and any means to prevent refugees and migrants from crossing the EU's external borders. Ignoring fundamental human rights and refugee law, the EU and its member states too often deny protection to people fleeing from war, persecution, and despair, and stand by as many die at the borders.

Refugees and migrants drown in the Mediterranean with alarming frequency. At the EU's land borders, there are regular reports of serious violence by border guards – whether in Bulgaria, Hungary or Spain. In the Spanish enclave of Ceuta, for example, more than 15 people died in February 2014 when Guardia Civil officers attacked refugees with batons, rubber bullets and tear gas. The refugees were trying to swim around the border between Morocco and Spain.

The Spanish practice of unlawful and often brutal push-backs has now become a model for border protection along the EU's outer limits. This emphasis on return goes hand in hand with a strategy of exclusion, carried out via agreements entered into by EU countries seeking to outsource their legal obligations to neighboring and transit states.

Politicians in many states claim that these measures against refugees and migrants are legal as well as politically important. Meanwhile, those affected are left with almost no way to enforce their rights before a national or European court. This applies

especially to people in transit states like Morocco or Macedonia, where refugees face considerable barriers to accessing justice are essentially deprived of rights.

The law – which is supposed to act as a limit on politics – often seems like an afterthought when it comes to formulating current EU asylum and refugee policies.

ECCHR has been challenging the EU's approach to managing migration through legal interventions since early 2014 with the aim of setting firm human rights limits on state action. Legal instruments that can be used to achieve this goal include the initiation or support of criminal investigations against border guards in EU member states as well as complaints to the European Court of Human Rights and submissions to UN bodies.

Along with its partner organizations and partner lawyers, ECCHR is working with those affected to safeguard refugees' fundamental right to have rights.

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“The work of the ECCHR is a clear message to the perpetrators of yesterday, today and tomorrow: impunity for grave violations of human rights will not last.”

Lotte Leicht

Advocacy Director Human Rights Watch & Chairperson of ECCHR’s Council

2. LEGAL INTERVENTIONS BY ECCHR’S MIGRATION TEAM

Since 2014, ECCHR has been monitoring and documenting the [human rights situation at the EU’s external borders](#). Led by lawyer Carsten Gericke, ECCHR’s Migration team worked with activists from Europe and Africa, as well as non-governmental organizations from Germany, Spain, Greece and Morocco, and lawyers from several jurisdictions. Together, these groups collaborated to assess the scope for strategic litigation against the sweeping human rights

abuses being committed during the regulation of migration to Europe.

The practice of push-backs – i.e., summary deportations – is blatantly unlawful. Known as *devoluciones en caliente* or “hot returns,” this practice has taken place at the Spanish-Moroccan border since 2005. Furthermore, in April 2015, the Spanish government enacted a law mandating that non-EU citizens who are apprehended while trying to cross the high-tech border fence construction will be forced back, i.e., summarily deported.

ECCHR brought its first case in February 2015. Since then, the Migration team has been helping victims of push-backs at the

Spanish-Moroccan border to take legal action.

ECCHR's casework successfully contributes to helping those affected by illegal push-backs to seek accountability for breaches of their human rights in front of European courts.

In October 2017, the European Court for Human Rights (ECtHR) condemned summary deportations conducted by the Spanish government – the push-backs violate the European Convention on Human Rights (ECHR). Now a legal precedent, this case will help to reinforce the fundamental “right to have rights” of refugees and migrants.

The decision of the ECtHR clarifies, that refugees and migrants are entitled to have access to effective legal protection within the EU – their human rights need to be respected and protected regardless of their resident status.

Thanks to the support and cooperation from [Brot für die Welt](#) (since late 2014) and [PRO ASYL](#) (since spring 2016), ECCHR has been pursuing several legal interventions at national and supranational legal forums.

i) THE CEUTA CASE: SPANISH COURT ORDERS REOPENING OF INVESTIGATIONS INTO FATAL BORDER CONTROL ACTION

In the Spanish enclaves of [Ceuta](#) and Melilla on the northern coast of Africa, border guards regularly engage in violent attacks against refugees and migrants. Anyone apprehended while trying to cross

the border into these Spanish cities and thus into European territory is immediately returned to Morocco without any review of their asylum claim. These so-called “border protection” operations repeatedly result in many deaths and injuries.

Nathan and Liliane (*full names are known to ECCHR*) experienced firsthand the reality of what is euphemistically referred to as the “protection” of the EU's external borders. On 6 February 2014, both were part of a group of around 400 people who tried to swim around the border between Morocco and the Spanish territory of Ceuta. As they swam, Spain's paramilitary police force, the Guardia Civil, attacked them with tear gas and rubber bullets. Those who swam too close to shore were beaten with batons. At least 15 people were killed, and many were seriously injured. Consequently, those who survived the swim and managed to reach the Spanish side of the beach were immediately pushed back through a gate on the fence.

For a long time, there was no prospect of prosecutions or even any political consequences following the fatal attacks. In March 2015 – more than a year after the push-back – Spanish authorities heard evidence from 16 Guardia Civil officers. Ceuta's investigating judge, however, refused to acknowledge any criminal liability on the part of the Guardia Civil for the refugees' deaths. The judge found that the brutal attacks on refugees in the water were not only lawful and proportionate, but there was also no obligation to rescue them. The investigations were then subsequently closed in October 2015.

Due to flaws in the investigations, the Regional Court in Ceuta (*Audiencia Provincial de Cádiz, Sección Sexta, en Ceuta*) ordered that the proceedings be reopened, first in January 2017 and later in August 2018. In both decisions the court accepted a complaint submitted by ECCHR partner lawyer Gonzalo Boye in Madrid. The court's decision stated that the autopsies carried out were significantly deficient. Moreover the court found that the testimonies from the Spanish officers were insufficient as they did not take testimonies from other witnesses and survivors of the push-backs.

After that, survivors of the push-back who are now living in Germany were heard as witnesses. In March 2019, one of the survivors testified for the first time via video conference from Berlin.

ECCHR is assisting Nathan and Liliane as well as other survivors and eyewitnesses in cooperation with lawyer Gonzalo Boye in Madrid and the NGO [Observatori DESC](#) from Barcelona, which is a joint party to the proceedings.

ECCHR staff spoke to refugees in Spain, Germany, and Morocco who witnessed the Guardia Civil operation as well as those who, like Nathan and Liliane, have firsthand experience of the attack. Boye then presented the evidence gathered to the domestic authorities.

The aim of the legal proceedings concerning the events of 6 February 2014 is to establish criminal liability for the deaths and bring about a change to Spain's border policies. A further goal is to highlight the fact that the practice of push-backs and the

resultant legal action are not merely a domestic concern for Spain, but also an important issue for Europe as a whole.

II) THE MELILLA CASE: ECtHR CONDEMNS SPAIN'S PUSH-BACK PRACTICE AS UNLAWFUL

At the border with Morocco Spanish authorities push-back migrants and refugees continuously, systematically, and often brutally. In October 2017, this long-time practice was found unlawful by the European Court for Human Rights as it violates the European Convention on Human Rights (ECHR).

The decision came in response to two [complaints against Spain](#) at the ECtHR. The two individuals from Mali and the Ivory Coast lodged the complaints in February 2015 with the initiative and support of the ECCHR.

As the ECtHR concluded, the push-backs by the Spanish authorities on the border with Morocco violate Article 4 of Protocol 4 to the Convention (prohibition of the collective expulsion of foreigners) and Article 13 (effective remedy). Following a request from Spain, the Grand Chamber of the ECtHR heard the case again in September 2018.

The claimants, N.D. and N.T. (*full names omitted to protect claimants*), had climbed the border fences at Melilla to reach Spanish territory. Because the fences are on Spanish soil, N.D. and N.T. had effectively entered the EU. Subsequently, the two men along with roughly 70 other sub-Saharan individuals were seized and were

immediately pushed back to Morocco by Spanish border guards. It is unknown how many of them would have been entitled to asylum or subsidiary protection in Spain. They were denied any due process and could not seek international protection, or appeal their imminent deportations.

The operation in Melilla illustrates not only Spain's unlawful practice of push-backs but also more generally the human rights violations that occur in the context of the EU collaboration with Morocco. The EU works closely with Moroccan authorities as part of broader efforts to externalize border control and to take action in transit states to prevent refugees and migrants from getting to Europe.

The decision of the ECtHR from October 2017 attracted much attention from Spanish and international media, as well as from lawyers and politicians. It sets an important precedent to further enforce the "right to have rights" of people on the move across borders.

Legal opinions from the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees, and the Council of Europe's Commissioner for Human Rights, as well as from Amnesty International, and the Spanish refugee organization CEAR, all confirmed already back in 2015 that the push-backs were unlawful.

III) THE IDOMENI CASE: REFUGEES DEMAND THEIR RIGHT TO HAVE RIGHTS AT THE ECtHR

Beginning in the fall of 2015, European leaders and political authorities made the coordinated decision to close the borders along the West Balkan corridor to refugees and migrants. Countries like Hungary, Slovenia, Serbia, Croatia, and the Former Yugoslav Republic of Macedonia (FYROM) built fences and denied transit to everyone without Syrian, Iraqi or Afghan papers. Eventually, however, refugees of all nationalities were denied entry.

On 6 March 2016, the Greek-Macedonian border was officially declared closed. More than ten thousand asylum seekers – including Syrians, Iraqis, and Afghans – were trapped in a self-organized refugee camp in the town of Idomeni at the Greek-Macedonian border, without a real possibility to claim asylum. As a result, another humanitarian catastrophe on European territory emerged.

On 14 March 2016, around 1,500 people left the camp in Idomeni and walked to the Macedonian border to continue on their path toward safety and asylum in northern Europe. When they reached the Macedonian village of Moin, armored vehicles manned by the Macedonian army blocked the street. Then, officials surrounded the refugees, divided them into groups, forced them to board trucks and drove them back to Greece, forcing them to crawl through provisional holes on the newly built fence.

The refugees were given no means of asserting their rights: they had no

opportunity to explain their personal circumstances, to ask for international protection, or to contest their expulsion from FYROM. Eight persons from Syria, Iraq, and Afghanistan decided to act against the violations of their rights.

In September 2016, two women and six men (*names withheld for protection*) submitted a [complaint to the European Court of Human Rights](#) (ECtHR) against their unlawful push-back from FYROM.

The claimants assert that FYROM's practice of collective expulsion without an examination of individual circumstances and without access to an effective remedy is in breach of Article 4 Protocol 4 (prohibition on collective expulsion of non-citizens) and Article 13 (right to an effective remedy) of the European Convention on Human Rights.

In the beginning of 2017, the ECtHR decided to communicate the case following a preliminary examination of admissibility. The Court requested the Macedonian government to respond to several questions on the expulsions.

ECCHR and PRO ASYL are jointly supporting the individual litigation. The applicants are represented by ECCHR's partner lawyer Carsten Gericke. These proceedings are another important step to contest the push-back practices in Europe, including its external borders, and to demand the fundamental "right to have rights" for refugees.

IV) THE RIGHTS OF MINORS: UN COMMITTEE CONDEMNS SPAIN'S PUSH-BACK POLICY

Even minors are not safe from Spain's unlawful push-backs. Simply handed over to Moroccan border guards along with the adults in the group, there is no consideration of their special need for protection as minors. This was made evident through the [case of unaccompanied minor D.D.](#) (*name anonymised for protection*) from Mali, who was pushed back after he climbed the border fences at Melilla to enter the Spanish enclave in December 2014.

The ruthless push-backs of minors were strongly [condemned](#) by the UN Committee on the Rights of the Child (CRC) in February 2019 in a [decision](#) that clearly upholds the fundamental rights of unaccompanied minors at Europe's borders.

The Committee found Spain's practice to be in violation of several provisions of the UN Convention on the Rights of the Child, namely the best interest of the child (Article 3), the special protection of unaccompanied minors (Article 20) and the prohibition of torture and inhuman or degrading treatment (Article 37). Furthermore, the Committee ordered Spain to compensate for the harm suffered by the complainant. This is the first decision on push-backs by the CRC. The decision obliges Spain to amend the special legal regime authorizing automatic expulsions in Ceuta and Melilla.

Like N.D. and N.T. in the case before the ECtHR, D.D. was returned from Melilla to Morocco without any possibility to explain his personal circumstances. In response to this incident, D.D. submitted an individual

communication to the UN Committee on the Rights of the Child in December 2015 with the support of ECCHR and the Spanish organization [Fundación Raíces](#). The complaint was accepted in June 2016.

As with the ECtHR case, this legal action intervened against the unlawful and brutal Spanish practice of push-backs and foregrounds the human rights standards that Spain must respect in its political decisions. The action aimed to ensure that Spain grants unaccompanied minors access to a procedure to claim their rights.

With this case, ECCHR is again breaking new legal ground. The mechanism to bring an individual complaint to the UN Committee on the Rights of Child has existed only since April 2014. The decision in D.D.'s favor therefore sets an important precedent for reinforcing the rights of unaccompanied minors at Europe's borders and beyond.

V) THE FRONTEX CASE: SEEKING ACCOUNTABILITY FOR EU BORDER AGENCY

Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) is playing an increasingly important role in efforts to seal off the EU's external borders.

The border agency is responsible for dispatching so-called Rapid Border Intervention Teams to assist border control operations by EU member states, for the coordination between member states and

the collection and distribution of information on migration routes.

Frontex is also taking on more and more executive functions: it is a key player in the establishment of Hotspots – sites for expedited processing of migrants on the Greek Islands – and in the EU-Turkey Deal to keep refugees away. And it won't stop there. Following initiatives from the EU Commission, Member States are debating granting Frontex further powers and setting up a European coastguard and border patrol.

Meanwhile, victims of Frontex operations have no way to challenge illegal acts by the agency in court effectively. This makes Frontex virtually immune from legal claims for human rights violations or breach of duty.

ECCHR is turning to the law to challenge this *de facto* immunity. After consulting with experts on issues of liability and accountability, ECCHR developed strategies to combat this blatant infringement of the rule of law.

In May 2016, ECCHR submitted a freedom of information request to Frontex seeking the operational plans for the agency's missions. The focus is on Operation HERA between the Canary Islands and West Africa. Frontex considers HERA to have been a particularly successful mission as it significantly reduced the numbers of people fleeing to Europe via this route. ECCHR is currently assessing the information that Frontex has provided to date and weighing potential further legal action.

VI) GREEK ISLANDS: EUROPEAN ASYLUM SUPPORT OFFICE DISREGARDS FUNDAMENTAL RIGHTS

The European Asylum Support Office (EASO) will not be held accountable for blatant failures in its work in the Greek Hotspots. This is the final response of the [European Ombudsperson](#) to a complaint against EASO filed by ECCHR in April 2017. In her response, the Ombudsperson confirmed her previous [decision](#) from July 2018, in which she acknowledged serious concerns but nevertheless decided to close the inquiry into EASO.

ECCHR had urged the Ombudsperson to make an explicit finding on past wrongdoing of EASO and to issue recommendations for the future. The EU agency should not operate in a vacuum of accountability, especially when it concerns the lives of vulnerable individuals.

According to ECCHR's investigation into the admissibility interviews on the Aegean Islands, EASO exercises significant influence on the decisions on (in)admissibility at the Hotspots by conducting the interviews and making concluding recommendations to the competent Greek authorities (Greek Asylum Service, GAS).

In its [complaint](#) with the EU Ombudsperson, ECCHR criticized EASO's role and approach regarding the decision-making procedures on the Greek Islands as maladministration. EASO not only violates

its own interview guidelines but exceeds its legal competence under EU law.

An analysis of several interviews conducted by EASO shows that EASO officials disregard core standards of fairness. For example, EASO officials use rigid questionnaires and pose closed or suggestive questions. Overall, the interviews fail to take into consideration the individual experiences and vulnerabilities of the applicants. Due to this misconduct, the applicants are denied an appropriate evaluation of their case and need for protection. Furthermore, the interviews lack a critical assessment as to whether Turkey can be regarded as a safe third country for the person concerned.

In Greece, irregular migrants are heavily vetted upon their arrival to the Greek Islands. In the case of migrants coming via Turkey, if Turkey is considered a "safe third country" the claim of an applicant in question is often deemed inadmissible and promptly rejected. Furthermore, while waiting for a decision on their case, the new arrivals are forbidden to leave the Greek Islands.

According to the EU-Turkey Statement of March 2016, "[a]ll new irregular migrants crossing from Turkey into Greek islands ... will be returned to Turkey." The adjusted administrative measures stipulate admissibility procedures which threaten the fundamental rights of asylum seekers, as they are denied access to protection and the possibility to enter the EU asylum system.

3. OUTLOOK

Alongside the ongoing casework on push-backs in Ceuta in Melilla, the rights of unaccompanied refugee minors and accountability for the border agency Frontex, ECCHR continues to monitor political and legal developments in asylum and refugee policies.

As noted, illegal and often brutal push-backs have become a model for keeping refugees at the EU's outer borders and Europe's internal frontiers. This is made all too clear by reports of violence along the borders Hungary-Serbia, Bulgaria-Turkey, Slovakia-Ukraine and Switzerland-Italy. Collective expulsions are expressly prohibited under Article 4 Protocol 4 of the European Convention on Human Rights, as the ECtHR confirmed in its decision from October 2017.

Such collective actions effectively deny people the chance to explain their individual circumstances and argue against

deportation. As in Ceuta and Melilla, these practices by the European Union and its neighbors show disregard for fundamental human rights and refugee rights.

To date, very few refugees and migrants have challenged this infringement of their rights. For this reason, legal actions taken by those affected, like the ones initiated and supported by ECCHR are crucial. They also play an important role in upholding and strengthening the law that applies at the EU's outer borders, highlight how the EU's refugee policies are leading to human rights violations, and effectively put these issues on the political agenda.

FURTHER READING

ECCHR's work on migration, available at: www.ecchr.eu/en/migration/

Wolfgang Kaleck / Vera Wriedt
“Gewalt im Grenzbereich”, in: *DIE ZEIT*,
22 February 2018
<http://www.zeit.de/2018/09/abschiebungen-spanien-fluechtlinge-europaeischer-gerichtshof-menschenrechte-verurteilung>

Nora Markard / Helene Heuser
“‘Hotspots‘ an den EU-Außengrenzen: Menschen- und europa-rechtswidrige Internierungslager”, in: *ZAR* 6/2016

Nora Markard
“The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries”, in: *European Journal of International Law*, 2016

Stefan Klein
“Nathan will reden”, *Süddeutsche Zeitung*
vom 23 February 2015
https://www.ecchr.eu/fileadmin/Kommentare_Konferenzberichte>Weiteres/Nathan_will_rede_n_Sueddeutsche_Zeitung_2015_02_23.pdf

Dominik Koos / Kevin Thiel
“Kaugummigrenze? Push-Backs in Melilla und Ceuta”, *KJ Vierteljahresschrift für Recht und Politik* 4/2015, pp. 376-389

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