



## **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 borders. Border authorities use any and all 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 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, e.g. in Bulgaria, Hungary or Spain. In the Spanish enclave Ceuta, for example, more than 15 people died in February 2014 when Guardia Civil officers attacked migrants and refugees with batons, rubber bullets and tear gas. They 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 the EU's external borders. The 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 and 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 EU asylum and refugee policies.

ECCHR has challenged the EU's approach to managing migration through legal interventions since 2014 with the aim of enforcing firm human rights limits on state action. Such legal instruments include initiating or supporting criminal investigations against EU member state border guards, as well as complaints to the European Court of Human Rights and submissions to UN bodies.

ECCHR works with those affected, along with its partner organizations and lawyers, to safeguard refugees' and migrants' fundamental right to have rights.

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## 2. LEGAL INTERVENTIONS BY ECCHR'S MIGRATION PROGRAM

ECCHR has monitored and documented the [human rights situation at the EU's external borders](#) since 2014. Led by lawyer Carsten Gericke, ECCHR's Migration program works with activists from Europe and Africa, NGOs from Germany, Spain, Greece and Morocco, and lawyers from several jurisdictions. They collaboratively assess strategic litigation opportunities to challenge sweeping human rights abuses that occur in the regulation of migration to Europe.

The practice of [push-backs](#) (summary expulsions) is blatantly unlawful. Known as "hot returns" (*devoluciones en caliente*),

this practice has taken place at the Spanish-Moroccan border since 2005.

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

Furthermore, ECCHR works to challenge the [criminalization of sea rescues](#) that provide humanitarian aid to refugees and migrants in the Mediterranean.

Thanks to the support of and cooperation with [Brot für die Welt](#) and [PRO ASYL](#), ECCHR is pursuing various legal interventions at national and supranational legal forums.

## I) THE CEUTA CASE: FATAL BORDER OPERATIONS

In the Spanish enclaves [Ceuta](#) and Melilla on the northern coast of Africa, border guards violently attack refugees and migrants regularly. 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 (whose full names are known by ECCHR) experienced the reality of what is euphemistically referred to as the EU's external border "protection" firsthand. On 6 February 2014, they were part of a group of around 400 people that tried to swim around the border between Morocco and 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. Those who survived the swim and managed to reach the beach's Spanish side were immediately pushed back through a gate on the border fence.

For a long time following the fatal attacks, there was no prospect of prosecutions or even political consequences. 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 the Guardia Civil's criminal liability for the refugees' and migrants'

deaths. The judge found that the brutal attacks on people in the water were lawful and proportionate, and that there was no obligation to rescue them. Investigations were 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 by ECCHR partner lawyer Gonzalo Boye. The court's decision stated that the autopsies were significantly deficient. Moreover, the court found that the Spanish officers' testimony was insufficient, as witnesses and survivors of the push-backs were not interviewed.

In March 2019, a survivor testified for the first time in the case via video conference from Berlin. Later that year, another survivor was prevented from giving evidence due to technical difficulties at the Spanish court. In September 2019, the investigative judge ordered to prepare a hearing on gross negligence manslaughter and failure to provide assistance. However, a month later, following the public prosecutor's appeal against the opening of this hearing, the proceedings were closed for a third time. Boye appealed the decision in November 2019.

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

ECCHR staff spoke with refugees and migrants in Spain, Germany and Morocco

who witnessed the Guardia Civil operation, as well as those, like Nathan and Liliane, who were attacked. Boye presented this evidence to the Spanish authorities.

The aims of this legal proceeding are to establish criminal liability for the deaths, change Spain's border policies, and highlight that push-backs are a critical issue for all of Europe.

## **II) THE MELILLA CASE: ECTHR CONDEMNS SPAIN'S PUSH-BACK PRACTICE**

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

The decision came in response to two [complaints against Spain](#) at the ECTHR. An individual from Mali and another from the Ivory Coast lodged the complaints in February 2015 with ECCHR's initiative and support.

The European Court for Human Rights concluded that the Spanish authorities' push-backs violate the convention's Article 4 of Protocol 4 (prohibition of the collective expulsion of foreigners) and Article 13 (effective remedy). On Spain's request, the court's Grand Chamber heard the case again in September 2018.

The claimants, ND and NT (names withheld for protection), climbed the Melilla border fences to reach Spanish territory. Because

the fences are on Spanish soil, ND and NT effectively entered the EU. Subsequently, the two men along with roughly 70 other sub-Saharan individuals were seized and immediately pushed back to Morocco by Spanish border guards. It is unknown how many would have been entitled to asylum or subsidiary protection in Spain. They were denied due process, could not seek international protection, or appeal their imminent deportations.

The Melilla operation illustrates Spain's unlawful practice of push-backs, as well as the human rights violations that occur in the EU's collaboration with Morocco more generally. The EU works closely with Moroccan authorities as part of broader efforts to externalize border control, and take action in transit states to prevent refugees and migrants from reaching Europe.

The ECTHR's October 2017 decision attracted lots of attention from Spanish and international media, as well as lawyers and politicians. It sets a significant precedent to further enforce people on the move across borders' "right to have rights."

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, Amnesty International, and the Spanish refugee organization CEAR confirmed in 2015 that the push-backs were unlawful.

### **III) THE IDOMENI CASE: REFUGEES DEMAND THEIR RIGHT TO HAVE RIGHTS**

In fall 2015, European leaders and political authorities made a coordinated decision to close the EU's western border and 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 except those with 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 10,000 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 of claiming asylum. As a result, another humanitarian catastrophe emerged on European territory.

On 14 March 2016, around 1500 people left the camp in Idomeni and walked to the Macedonian border to continue their path toward safety and asylum in northern Europe. When they reached the Macedonian village Moin, armored Macedonian army vehicles blocked the street. Then, officials surrounded the refugees, divided them into groups, forced them to board trucks, and drove them back to Greece, making them crawl through provisional holes in the newly built fence.

The refugees were given no means of asserting their rights: They did not have an opportunity to explain their personal

circumstances, ask for international protection, or contest to their expulsion from FYROM. Eight people from Syria, Iraq and Afghanistan decided to challenge this 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](#) regarding their unlawful push-back from FYROM.

The claimants assert that FYROM's practice of collective expulsion without examining individual circumstances, and without access to effective remedy breaches Article 4 of Protocol 4 (prohibition of the collective expulsion of foreigners) and Article 13 (right to an effective remedy) of the European Convention on Human Rights.

In the beginning of 2017, the ECtHR issued a statement following a preliminary examination of admissibility. The court asked the Macedonian government to respond to several questions about the expulsions.

ECCHR and PRO ASYL jointly support the litigation. The applicants are represented by ECCHR's partner lawyer Carsten Gericke. These proceedings are another consequential step in contesting European push-back practices, including on external EU borders, and demanding refugees' and migrants' "right to have rights."

### **IV) THE RIGHTS OF MINORS: UN COMMITTEE CONDEMNS SPAIN**

Even minors are not safe from Spain's unlawful push-backs. They are handed over

to Moroccan border guards along with adults – their special needs for protection as minors are not considered. This was evident in the [case of unaccompanied minor DD](#) from Mali (name withheld for protection), who was pushed back after he climbed the Melilla border fences in December 2014.

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

The committee found Spain’s practice 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 the complainant for harm suffered. This is the the CRC’s first decision on push-backs. It obliges Spain to amend its policy authorizing automatic expulsions in Ceuta and Melilla.

Like *ND and NT v. Spain* before the European Court of Human Rights, DD was returned to Morocco from Melilla without a possibility to explain his personal circumstances. In response, DD submitted an individual communication to the CRC in December 2015 with the support of ECCHR and the Spanish organization [Fundación Raíces](#). The complaint was accepted in June 2016.

As in the ECtHR case, this legal action contests the unlawful and brutal Spanish

practice of push-backs, and underscores the human rights standards that Spain must respect in its political decisions. It also aims to ensure that Spain grants unaccompanied minors access to a procedure to claim their rights.

ECCHR again broke new legal ground in this case. The mechanism to bring an individual complaint to the CRC was created in April 2014. The decision in DD’s favor sets a precedent to reinforce unaccompanied minors’ rights at Europe’s borders and beyond.

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

Frontex (the European Border and Coast Guard Agency) plays an increasingly influential role in efforts to seal off the EU’s external borders.

The agency is responsible for dispatching so-called Rapid Border Intervention Teams to assist EU member state border control operations, coordinating member states, and collecting and distributing information about migration routes.

Frontex is also taking on more and more executive functions: It is a key player in establishing “hotspots” – sites to swiftly process migrants on the Greek Islands – and in the EU-Turkey Deal to keep refugees out of Europe.

Meanwhile, victims of Frontex operations have no way of effectively challenging the agency’s illegal in court. This makes Frontex virtually immune to legal claims

regarding human rights violations or breaches of duty.

ECCHR is using the law to challenge this de facto immunity. After consulting liability and accountability experts, 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 for its missions' operational plans. It focuses 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 number of people fleeing to Europe via this route.

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

The European Asylum Support Office (EASO) will not be held accountable for its blatant failures in the Greek hotspots. This is the [European Ombudsman's](#) final response to ECCHR's April 2017 complaint against EASO. The ombudsman confirmed her July 2018 [decision](#) in which she acknowledged serious concerns, but nevertheless decided to close the inquiry.

ECCHR urged the ombudsman to make an explicit finding on past EASO wrongdoing and to issue recommendations for the future. The EU asylum 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 significantly influences decisions on (in)admissibility at the hotspots by conducting the interviews and making recommendations to the competent Greek authorities (Greek Asylum Service, GAS).

In its [complaint](#) to the EU Ombudsman, ECCHR criticized EASO's role in and approach to decision-making procedures on the Greek Islands as maladministration. EASO not only violates its own interview guidelines, it exceeds its legal competence under EU law.

An analysis of several EASO interviews has shown that EASO officials disregard core standards of fairness. For example, they use rigid questionnaires and pose close-ended and suggestive questions. The interviews fail to take applicants' individual experiences and vulnerabilities into consideration. 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 of whether Turkey can be regarded as a safe third country for the person concerned.

Irregular migrants are heavily vetted upon their arrival to the Greek Islands. For migrants coming via Turkey, if Turkey is considered a "safe third country," the applicant's claim is often deemed inadmissible and promptly rejected. Furthermore, new arrivals are forbidden from leaving the Greek Islands while waiting for a decision about their case.

According to the March 2016 EU-Turkey Statement, "[a]ll new irregular migrants crossing from Turkey into Greek islands ...

will be returned to Turkey.” The adjusted administrative measures stipulate admissibility procedures that threaten asylum seekers’ fundamental rights, as they are denied access to protection and the possibility of entering the EU asylum system.

### **VII) RESCUE AT SEA: SEA-WATCH 3 AND IUVENTA**

Italy intimidates, threatens and prosecutes sea rescuers that provide vital humanitarian assistance to refugees and migrants in the Mediterranean.

Search and rescue (SAR) NGOs, like Sea-Watch from Germany, are trying to fill a gap left by state-run operations. The Italian government implemented stricter migration policies in 2017, criminalizing search and

rescue. Italy has unlawfully arrested activists, imposed high fines, and run smear campaigns against them.

To counter the ongoing criminalization of sea rescues, ECCHR submitted two complaints to the UN Special Rapporteur on the Situation of Human Rights Defenders in November 2019 and January 2020. The submissions describe the cases of NGO ships Sea-Watch 3 and Iuventa, in particular Sea-Watch 3 Captain Carola Rackete.

ECCHR argued that the Italian authorities’ targeted oppression of SAR workers violates international law, and asked the special rapporteur to issue a public statement. By proving that such cases are not isolated incidents but part of a systematic policy, ECCHR aims to counter this worrying trend of criminalizing those who rescue lives at sea.

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### 3. OUTLOOK

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

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

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

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

Very few refugees and migrants have challenged these infringements of their rights. Every legal action by those affected, such as those initiated and supported by ECCHR, are crucial. They also play a critical role in upholding and strengthening the law that applies at the EU's outer borders, highlighting how EU refugee policy leads leading to human rights violations, and puts these issues on the political agenda.

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## ADDITIONAL READING

ECCHR's work on migration, available at: [www.ecchr.eu/en/migration](http://www.ecchr.eu/en/migration)

**Wolfgang Kaleck/Vera Wriedt**  
“Gewalt im Grenzbereich,” in: *DIE ZEIT*,  
22 February 2018.

**Carsten Gericke/Vera Wriedt**  
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**Hanaa Hakiki/Vera Wriedt**  
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Condemns Spain’s Push-Backs and  
Demands Legal Amendments,” in:  
European Council on Refugees and Exiles  
(ed.), 1 March 2019.

**Nora Markard/Helene Heuser**  
“‘Hotspots‘ an den EU-Außengrenzen:  
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**Nora Markard**  
“The Right to Leave by Sea: Legal Limits  
on EU Migration Control by Third  
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**Stefan Klein**  
“Nathan will reden,” in: *Süddeutsche  
Zeitung*, 23 February 2015.

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“Kaugummigrenze? Push-Backs in Melilla  
und Ceuta,” in: *KJ Vierteljahresschrift für  
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