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Pushback Policies and Practices toward Migrants and Protection of Human Rights (The Council of Europe's Approach)

Keywords: migration flows, guarding frontiers, refusals of entry, expulsions, “pushbacks”, Council of Europe

Słowa kluczowe: fale migracyjne, punkty graniczne, odmowa wjazdu, wydalenie, „wypchnięcia”, Rada Europy

Abstract

To control and manage migration flows, the Council of Europe member states concentrate much of their efforts on guarding frontiers. In this context, refusals of entry and expulsions without any individual assessment of protection needs have become a documented phenomenon at European borders, as well as on the territories of member states further inland. As these practices are widespread, and in some countries systematic, those “pushbacks” can be considered as a part of national policies rather than incidental actions. The highest risk attached to pushbacks is the risk of *refoulement*, meaning that a person is sent back to a place where she might face persecution in the sense of the 1951 United Nations Convention relating to the Status of Refugees. The author analyzes PACE Resolution 2299 (2019) *Pushback policies and practice in the Council of Europe member States* and recommendation 2161 (2019) on this subject offered by this international organization. The author suggests that even if this document belongs to the so-called “soft law”, it has an important political meaning and PACE’s recommendations may positively affect the CoE’s member states policy toward the pushbacks.

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Streszczenie**Polityka „wypychania” i praktyki w stosunku do imigrantów
oraz ochrona ich praw człowieka (Podejście Rady Europy)**

W zakresie kontroli i zarządzania falami migracyjnymi Rada Europy koncentruje swe wysiłki na punktach granicznych. W tym kontekście uważa, że odmowa wjazdu i wydalenie osób bez jakiejkolwiek indywidualnej analizy staje się istotnym problemem na granicach Europy, a także na terytoriach państw członkowskich. Ponieważ te praktyki są powszechne, a w niektórych państwach systematyczne, te „wypchnięcia” muszą być traktowane jako część polityki krajowej, a nie jako incydentalne działania. Największe ryzyko wiąże się z możliwością wydalenia człowieka do państwa, gdzie grozi mu prześladowanie w rozumieniu konwencji Narodów Zjednoczonych dotyczącej statusu uchodźców. Autor poddał analizie uchwałę ZPRE 2299(2019) *Polityka i praktyka odepchnięcia w państwach członkowskich Rady Europy* oraz zalecenie 2169(2019) na ten temat zaoferowane przez tę organizację międzynarodową. Autor sugeruje, że choć dokument ten ma jedynie charakter tzw. „miękkiego prawa”, to jednak zalecenie ZPRE ma istotne polityczne znaczenie i może pozytywnie oddziaływać na politykę państw członkowskich RE w tej kwestii.

I. Introduction

In recent years, the problem of migrations is an important subject of scientific research². The migration starts to be one of the most important phenomena of the contemporary international relations³. It is of the most difficult challenges for the world's development⁴. It must be analyzed us-

² M.S.M. Collyer, *Migration*, London 2017, p. 34; S.R. Hedge, *Mediating Migration*, Cambridge-Malden 2016, p. 23; Comp. *Identity and Migration in Europe: Multidisciplinary Perspectives*, ed. M.C. La Barbera, Cham 2015; *Migration und demokratie*, ed. S. Roter, Wiesbaden 2016; *Global and Asian Perspectives on International Migration*, ed. G. Batistella, Cham 2014; *Migration internationale africaine*, ed. R. Chaabita, Paris 2016; *Qualitative Research in European Migration Studies*, eds. R. Zapata-Borrero, E. Yalaz, Cham 2018.

³ G.E. Clark, *The Business of Mass Migration: Fear, Exploitation, and the Political Economy of Immigration Restriction*, “New Labor Forum” 2019, No. 2, p. 28.

⁴ M. Sammers, M. Collyer, *Migration*, London 2017, p. 29.

ing the multidisciplinary approach⁵. Migration from developing to developed countries has been accompanied by growing resentment of immigrants and refugees. While xenophobic sentiment continues to be strongly entrenched in developed countries, it is increasingly prevalent in developing countries as well⁶.

One of the important problems is the policy and practice of pushbacks toward migrants. The Parliamentary Assembly of the Council of Europe has analyzed that problem on June 26, 2019 and offered the resolution 2299 (2019) *Pushback policies and practice in the Council of Europe member States*⁷, as well as a recommendation 2161 (2019) on that subject⁸. To control and manage migration flows, the Council of Europe member states concentrate much of their efforts on guarding frontiers. In this context, refusals of entry and expulsions without any individual assessment of protection needs have become a documented phenomenon at European borders, as well as on the territories of member states further inland. As these practices are widespread, and in some countries systematic, those “pushbacks” can be considered as part of national policies rather than incidental actions. The highest risk attached to pushbacks is the risk of *refoulement*, meaning that a person is sent back to a place where she might face persecution in the sense of the 1951 United Nations Convention relating to the Status of Refugees, or inhuman or degrading treatment in the sense of the European Convention on Human Rights⁹.

The aim of this paper is to analyze whether PACE’s resolution 2299 (2019) and recommendation 2161 (2019), belonging to the so-called “soft law”, may effectively influence a politics of the CoE’s member states toward migration policy, and especially toward “pushbacks”.

⁵ Comp. *Migration theory: talking across disciplines*, eds. C. Brettel, J.F. Hollifield, New York 2015.

⁶ J. Crush, S. Ramachandran, *Xenophobia, International Migration and Development*, “Journal of Human Development and Capabilities” 2010, No. 2, p. 211.

⁷ *Assembly debate* on June 28, 2019 (27th Sitting) (see Doc. 14909, report of the Committee on Migration, Refugees and Displaced Persons, rapporteur: Ms Tineke Strik). *Text adopted by the Assembly* on June 28, 2019 (27th Sitting).

⁸ Ibidem.

⁹ ETS, No. 5.

II. General characteristics of migrations waves

Place of birth and nationality are two criteria commonly used by OECD countries to define their immigrant population. According to the first criterion, migrants are persons residing in a country but born in another. According to the second criterion, migrants are residents who have a foreign nationality and may include persons born in the host country¹⁰.

It was estimated that more than 200 million people, or around 3% of the world's population, live outside their country of birth. This figure includes migration in all possible directions. Within this overall figure, total migrants from developing countries are around 171 million. Available data suggest that nearly a half of them resides within other developing countries (mainly immediately neighboring countries). A similar number (around 75 million) reside in OECD countries¹¹.

Europe recorded in 2015 an unprecedented number of asylum seekers and refugees with up to 1.2 million asylum applications; an estimated 250 000 to 350 000 people could be granted refugee or similar status, more than in any previous European refugee crisis since World War II. As during previous refugee crises in the 1990s the impact is concentrated in a few countries. In the OECD, Turkey is the most affected, currently hosting as many as 1.9 million Syrians as well as a large number of people from Iraq. Within the European Union, Italy, Greece and Hungary are on the front line but the main destination countries are Germany, in absolute terms, Sweden and Austria, relative to their population¹².

An unprecedented number of people is currently on the move seeking refuge in Europe. Large parts of European societies respond with anxiety and mistrust to the influx of people. Nationalist, anti-migrant parties from Slovakia over Germany to the UK have gained increasing support among the electorate and challenge the political mainstream. Europe is struggling how to respond¹³.

¹⁰ OECD, *Migration*, [in:] *Society at Glance*, Paris 2009, p. 66.

¹¹ OECD, *Migration*, Paris 2001, p. 12.

¹² OECD, *Migration*, Paris 2016, p. 8.

¹³ Comp. *Fortress Europe? Challenges and Failures of Migration and Asylum Policies*, eds. N. Scherer, N. Fromm, Wiesbaden 2017.

III. General characteristic of pushbacks

A pushback describes the informal expulsion (without due process) of an individual or group to another country. This lies in contrast to the term “deportation”, which is conducted in a legal framework. Pushbacks have become an important, yet unofficial, part of the migration regimes of EU countries and other countries alike¹⁴.

Kilometers of barbed wire exclusion fences, thousands of high-tech patrols at sea, in the air and on land, pushback agreements with neighboring countries: the European Union goes to great lengths to exclude people fleeing from war, persecution and hardship in their home countries. To justify their actions leaders in Brussels and the EU member states claim the pushbacks are politically necessary and permitted by law. Illegal pushbacks or forced returns at the EU borders represent a flagrant violation of fundamental human rights and refugee laws. Since 2014, ECCHR has been examining the scope for legal intervention against the practice of pushbacks in the EU and has been helping affected persons with individual legal proceedings¹⁵.

Hundreds of migrants including children and families have been illegally returned from Greece to Turkey despite Greek authorities being repeatedly warned about the practice, three non-governmental organizations said on Dec. 12, 2018. Migrants being forced back over the border, in violation of international law, has become the “new normality” at the border crossing with Turkey in Greece’s northeast Evros region, the three Greek organizations said¹⁶.

Migrants at border crossings face being turned back in a number of the member states without the chance to exercise their right to asylum, finds the Agency’s latest report on migration-related fundamental rights issues. Pushbacks and cases of people being returned to where they risk persecution are just some of the challenges facing migrants when trying to enter or travel through the EU. Looking at the situation across 14 EU member states, the report reveals how in Croatia, France and Spain migrants continue to be

¹⁴ *Illegal Push-Backs and Border Violation Reports, Balkan Region, April 2019*, Sarajevo 2019, p. 2.

¹⁵ *Push-backs*, <https://www.ecchr.eu/en/topic/push-backs> (7.07.2019).

¹⁶ *Greece accused of migrant ‘pushbacks’ at Turkey border*, <http://www.hurriyetdailynews.com/greece-accused-of-migrant-pushbacks-at-turkey-border-139688> (7.07.2019).

sent back without the chance to lodge claims for international protection. In Greece, there are rising numbers of families, pregnant women and torture victims at the border between Greece and Turkey who risk being persecuted as they are forcibly ejected from the EU. In Spain for example, the reception conditions for the growing number of newly-arrived migrants remained critical and the situation appears to be getting worse¹⁷.

The European Union must ensure full compliance with fundamental rights as part of its migration and border management policies. Practices which endanger the lives of undocumented migrants, such as “pushbacks” and the violation of the principle of non-refoulement, shall be clearly prohibited; alleged violations of fundamental rights at the EU external borders must be investigated, and the protection needs of all migrants should be assessed and addressed¹⁸.

The decision of the UN Committee on the Rights of the Child in the case of *D.D. v. Spain* 4/2016 sets a precedent that strongly condemns the policy and practice of pushbacks, called “rechazos” by the Spanish authorities. As the first case on summary expulsions in front of the Committee, *D.D. v. Spain* plays a crucial role for future jurisprudence on individual communications. The Committee’s decision clearly affirms the rights of unaccompanied minors at Europe’s borders and beyond¹⁹.

The European Court of Human Rights, in its judgment *Hirsi Jamaa v. Italy*²⁰, but also in *N.D and N.T v. Spain*²¹ requires an individual assessment of protection needs and of the safety of a return in order to prevent violation of the Article 3 of the European Convention on Human Rights and of the prohibition of collective expulsions as enshrined in the Article 4 of Protocol No. 4 to the Convention²². Pushbacks take place in particular at European Union borders, which is at least in part a consequence of the shortcomings of the

¹⁷ *Migrant pushbacks a growing concern in some member States*, <https://fra.europa.eu/en/news/2018/migrant-pushbacks-growing-concern-some-member-states> (7.07.2019).

¹⁸ S. Rizakos, [in:] *EU Immigration Policy: A Push Back for Migrants’ Rights in Greece*, Brussels 2014, p. 5.

¹⁹ V. Wriedt, *Push-backs Rejected: D.D. v. Spain and the Rights of Minors*, <http://eumigrationlawblog.eu/push-backs-rejected-d-d-v-spain-and-the-rights-of-minors-at-eu-borders> (7.07.2019).

²⁰ Application No. 27765/09.

²¹ Applications Nos. 8675/15 and 8697/15.

²² ETS, No. 46.

current Dublin Regulation and of the failure of attempts to introduce fair responsibility-sharing in Europe²³.

The European Commission has contacted Greek authorities concerning reports of alleged illegal pushbacks of migrants to Turkey in the Evros region on Greece's northeastern border. The Commission is always concerned about reports of mistreatment of migrants and refugees and we take these allegations very seriously. Any form of violence or abuse of migrants is unacceptable²⁴.

New report by Amnesty International, published in March 2019, accuses the EU and European governments of being actively complicit in – and helping to fund – ‘violent and illegal’ pushbacks of migrants and refugees from Croatia²⁵. A report by a coalition of Croatian NGOs denounced the country's authorities continuing practice of illegal pushbacks, abuse and violence against migrants at the border between Croatia and Bosnia²⁶.

IV. The Parliamentary Assembly of the Council of Europe approach to the pushbacks treatment in the member states

The Parliamentary Assembly of the Council of Europe is concerned about the persistent and increasing practice and policies of pushbacks, which clearly violate the rights of asylum seekers and refugees, including the right to asylum and the right to protection against *refoulement*, which are at the core of international refugee and human rights law. In the face of the gravity of human rights violations involved, the Assembly has urged member states to provide adequate protection to asylum seekers, refugees and migrants arriving at their borders, and thus refrain from any pushbacks, to allow for independent monitoring and to fully investigate all allegations of pushbacks. Pushbacks often

²³ PACE Res. 2299(2019), § 2.

²⁴ T. Kokkinidis, *Greece In the Spotlight Over Alleged Pushbacks of Migrants to Turkey*, <https://greece.greekreporter.com/2019/06/11/greece-in-the-spotlight-over-alleged-pushbacks-of-migrants-to-turkey> (7.07.2019).

²⁵ A. Vladisavlevic, *Amnesty: EU ‘Complicit’ in Illegal Pushbacks from Croatia*, *Balkan Insight*, March 13, 2019, p. 1.

²⁶ *Report by Croatian NGOs denounces illegal push-backs and abuses*, <https://www.infomigrants.net/en/post/16141/report-by-croatian-ngos-denounces-illegal-push-backs-and-abuses> (7.07.2019).

take place where migrants attempt to enter the territory of a member state in large numbers because the passage is, or appears to be, more “open” than elsewhere, or is geographically close to the countries of origin of asylum seekers. However, recent evidence of pushbacks shows that they also take place where the numbers of arrivals are low, but where national policies are hostile toward migration in general. There are also cases of “multiple pushbacks” where migrants are expelled by various countries successively. The Assembly is extremely worried about persistent reports and evidence of inhuman and degrading treatment by member states and their agencies in the framework of those pushbacks, through intimidation, taking or destroying migrants’ belongings, and even through the use of violence and depriving migrants of food and basic services. In their denial of carrying out pushbacks, these types of (sometimes systematic) inhuman and degrading treatment are denied as well, and therefore not adequately examined or not examined at all. The Assembly, therefore, has called on the Council of Europe member states to comply with their international obligations in this regard, in particular those set out in the European Convention on Human Rights concerning the prohibition of collective expulsion and inhuman and degrading treatment, as well as the right of access to asylum procedures and the prohibition of *refoulement* as established in the United Nations Refugee Convention²⁷.

Reported pushbacks concern actions toward migrants who have clearly crossed the border and find themselves inland, but also toward migrants who are present near or at the border, attempting to cross it. A significant number of them had attempted or envisaged submitting an asylum claim. The most important negative consequence of pushbacks is the vulnerable position of the victims. The denial of access to a proper asylum procedure implies that they run the risk of being returned to, or stranded in, another country where they do not have access to proper asylum procedures either, which puts them at risk of being refouled to yet another country (so-called “chain *refoulement*”). Pushbacks can, however, also lead to direct persecution or inhuman or degrading treatment in the country they are returned to, or from which they cannot escape. The core obligations of asylum and international law are meant to prevent this from happening. The consequence of member states’ refusal to address re-

²⁷ PACE Res. 2299(2019), § 3–6.

ported cases of pushbacks is that those practices continue, depriving victims of the right to an effective remedy and to hold authorities accountable for human rights violations. In order to avoid responsibility, member states increasingly make attempts to prevent migrants from crossing their border and to keep them out of their jurisdiction. To this end, frontline states in particular conclude agreements with their neighboring country, which is requested and paid to prevent migrants from leaving their territory. These actions of neighboring countries, often referred to as “pull-backs”, may hamper access to protection for asylum seekers stranded in that country if a sufficient protection system is lacking. In cases of a clear connection between such bilateral co-operation, lack of access to asylum and other human rights violations, the member state requesting pull-backs is also responsible for those violations. To abandon all types of pushbacks, member states should respond actively and adequately to every signal or evidence of their occurrence. Instead, however, in an increasing number of countries there is a tendency to refuse independent examination of serious allegations, to simply deny them or even to accuse, stigmatize and even criminalize non-governmental organizations (NGOs), human rights defenders and civil society actors who work to assist migrants in gaining access to asylum procedures and protection. In reporting and attempting to investigate pushbacks and related human rights violations, NGOs are frequently blamed and negatively framed for “interference”, despite their role as key actors in facilitating migrants’ access to rights and to justice. In this regard, the Assembly has called on the Council of Europe member states to respect the role of NGOs and human rights defenders in conformity with their commitments, for instance as set out in Committee of Ministers Recommendation CM/Rec(2007)14 on the legal status of non-governmental organizations in Europe²⁸.

V. The Parliamentary Assembly of the Council of Europe recommendations dealing with pushbacks treatment in the member states

The Parliamentary Assembly has offered several recommendations dealing with pushbacks, which may improve the situation in this area in the member states.

²⁸ PACE Res. 2299(2019), § 7–10.

The PACE has urged member states, with respect with border controls, to: refrain from any measure or policy leading to pushbacks or collective expulsions, as they lead to a violation of the core rights of international asylum law, notably the right to asylum, the right to be protected against *refoulement* and the right to access an asylum procedure; refrain from any type of violence against migrants and measures depriving them of their basic needs such as food, water, housing and emergency health care; ensure independent and sustainable monitoring of border control activities, which is essential in putting an end to (violent) pushback action, by granting independent bodies and NGOs access to all border areas, by granting independent bodies access to all border surveillance material, and by effectively addressing reports and complaints by migrants and NGOs, ensuring sufficient independence; combine the investigation of incidents with protective measures for alleged victims pending enquiries. Prevention measures must be introduced against informal forced return procedures, including standardized procedures at borders and clear rules of conduct; encourage and support legal research as well as research journalism and reliable information from recognized reputable international and non-governmental organizations as a means of correctly informing the public, rather than relying on unsubstantiated reports, hearsay and misinformation. Satellite and digital data enable registration of cases which require investigation by official and impartial bodies; comply with judgments of national courts and of the European Court on Human Rights, including their interim measures, in relation to pushbacks and refusing access to asylum and even to an asylum procedure, and to follow up recommendations of national independent bodies such as Ombudsmen; introduce and/or improve police training programmes, emphasizing that border protection and surveillance must be carried out in full compliance with international obligations to respect individual rights to protection, to information, to legal assistance and not to be detained arbitrarily²⁹.

With respect to services at borders, PACE has urged member states to: increase the means given to border services in order for them to be in a position to provide adequate services to refugees, asylum seekers and migrants arriving at national borders, whatever their status and pending the implementa-

²⁹ PACE Res. 2299(2019) § 12.1.

tion of appropriate procedures; ensure the provision at borders of information for migrants on their legal position, including on their right to apply for international protection (as enshrined in the Article 8 of the Asylum Procedures Directive) in languages they can understand, including oral interpretation (if necessary using the possibilities of distant interpretation using services available on the internet), taking into account the special difficulties of vulnerable persons such as children and traumatized, and illiterate people; ensure the provision of interpretation at borders and throughout reception and medical examinations, registration and asylum processing, and to immediately cease any practices consisting in obliging migrants to sign documents they do not comprehend, which could lead them to believe they are signing asylum applications while the documents concern deportation³⁰.

Concerning legal assistance, the PACE has urged member states to: ensure migrants' access to the possibility of making a claim for protection at borders, to obtain legal aid as well as accessible and comprehensible information regarding their legal rights, considering the special circumstances of vulnerable persons; allow NGOs to provide assistance at places where human rights violations are reported (in particular in transit zones and along borders)³¹.

The Assembly has suggested to the European Commission to: ensure that member states immediately halt practices and policies of pushbacks and collective expulsions by responding actively and effectively to violations of the Article 3 of the European Convention on Human Rights, the Article 4 of Protocol No. 4 to the Convention and the Article 33 of the United Nations Refugee Convention, as well as the European Union asylum *acquis*, and by investigating allegations of unlawful actions by member states; establish a systematic, independent and transparent monitoring mechanism of compliance of border management policies and practice with the relevant provisions in the European Union asylum *acquis*, the Articles 18 and 19 of the Charter of Fundamental Rights of the European Union, the Schengen Borders Code and the European Union Returns Directive, and launch infringement procedures where necessary; define guidelines on how to reconcile border control with safeguarding access to protection, and assist member states in implementing these guide-

³⁰ PACE Res. 2299(2019), § 12.2.

³¹ PACE Res. 2299(2019), § 12.3.

lines; link human rights-related requirements to the use of European Union funding related to asylum, migration and border management and monitor the compliant use of this funding by member states³².

In the recommendation 2161(2019) the Parliamentary Assembly has recommended to the Committee of Ministers to: exhort the governments of all member states to reject and prevent any form of pushback policy and action; promote the reconsideration of any bilateral agreements between member states on border control between neighboring countries which jeopardise the human rights of migrants, refugees and asylum seekers arriving at their borders or trying to arrive there; ensure the swift execution of the relevant judgments of the European Court of Human Rights, including the implementation of interim measures; promote the work of national and international non-governmental organizations as partners, refraining from action that undermines their legitimate activities aimed at saving human lives, to refrain from using stigmatizing rhetoric against NGOs assisting migrants, and to invite the Council of Europe's INGO Forum to work on recommendations in this area for national NGOs; consider drafting guidelines for border policing practices along the lines of the Manual on Intercultural Community Policing of the Council of Europe's Intercultural Cities Programme, and examine how this programme could be used as a model; consider inviting the Council of Europe's relevant committee to work on guidelines on ensuring access to rights of migrants arriving at borders or attempting to arrive there, including aspects such as access to complete and comprehensible information, to translation and interpretation services, to legal assistance at all stages of reception and asylum processes, to continued and child- and gender-sensitive medical, social and psychological services and to decent conditions of accommodation, prohibiting inhuman and degrading treatment in violation of the Council of Europe and other international conventions³³.

³² PACE Res. 2299(2019), § 18.

³³ PACE Rec. 2169(2019), § 4.

VI. Final observations

The analyzed documents have proved that the Parliamentary Assembly of the Council of Europe is concerned about the persistent and increasing practice and policies of pushbacks, which clearly violate the rights of asylum seekers and refugees, including the right to asylum and the right to protection against *refoulement*, which are at the core of international refugee and human rights law. In the face of the gravity of human rights violations involved, the Assembly has urged the member states to provide adequate protection to asylum seekers, refugees and migrants arriving at their borders, and thus refrain from any pushbacks, to allow for independent monitoring and to fully investigate all allegations of pushbacks. This PACE's attitudes are characteristic to the Council of Europe's axiology system, oriented toward protection of democracy, rule of law and human rights. PACE is described as a 'soul of Europe'. It reacts and offers solutions dealing with the most serious challenges to the European development. Without any doubt the migration waves in Europe creates such a challenge which should be addressed by the States and the international organizations. Even if PACE's resolutions and recommendations represents only a so called "soft law", not legally binding, they play an important role as an inspiration for the CoE's member states and international organizations. It offers at least know how which may be implemented in member states policies and practice. In consequences they have opened the way to the progress in that important area of human rights protection.

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