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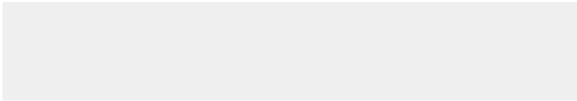
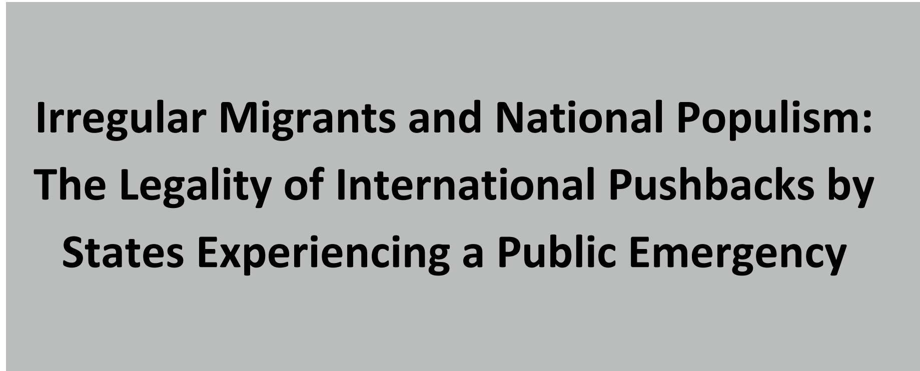
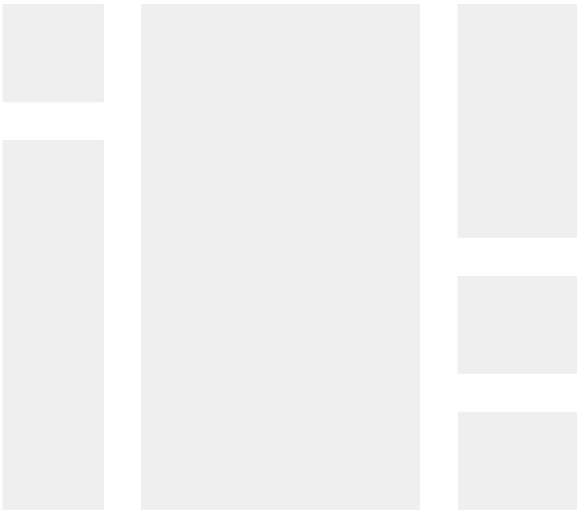
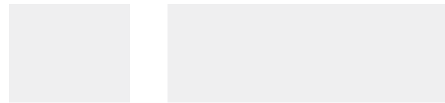



Irregular Migrants and National Populism: The Legality of International Pushbacks by States Experiencing a Public Emergency



Anna Labadie Weeks



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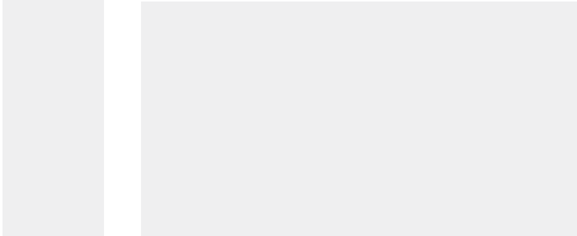

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Irregular Migrants and National Populism: The Legality of International Pushbacks by States Experiencing a Public Emergency

*Anna Labadie Weeks**

Abstract:

International law offers various frameworks, including international human rights and refugee law, that provide baseline protections for irregular migrants. However, there has been an increase in global discourse surrounding the prevention and removal of such persons from a state territory, through what is often known as "pushback" policies. These policies codify xenophobic and exclusionary practices to summarily deny baseline protections of migrants' rights that culminate in violations of international law. Alongside a global prevalence of public emergencies, as seen with COVID-19 and widespread armed conflict, these policies have simultaneously found domestic support by states with national populist leaders who utilize an "us *vs* them" ideology to paint irregular migrants as a threat to national security. Furthermore, the protection of sovereignty, as found in the heart of international law, provides states with justification to continue such practices despite clear violations of other aspects of international law.

This paper critically examines the legality of pushback policies during public emergencies and how national populism is utilized to garner widespread support by citizens through an analysis of regional and legal frameworks and public policy. This paper will further delve into how sovereignty is utilized as justification, and often deferred to, by international actors when discussing how to address pushbacks as this leaves a legal gap for states to circumvent human rights obligations. This paper will conclude by offering a brief analysis of several proposals for the international community that could be utilized to address the complexities of pushbacks, practically in light of national populism and public emergencies.

Keywords: Irregular migration, public emergency, national populism, sovereignty

A. INTRODUCTION

Since 2015, following the "migration crisis"[2] the international community has seen an increased prevalence of discourse surrounding national immigration policies, alongside calls for transboundary cooperation due to the global nature of the situation. The few attempts to address this in a comprehensive manner have largely fallen short as they favour state interests over human rights principles. Additionally, the discussion around irregular migration is often entrenched in xenophobia and racism, leading to the discrimination of outsiders to be institutionalized through state policy.[3] State leaders have capitalized on this, making immigration central for high profile political campaigns, specifically using prejudiced ideology against irregular migrants to cultivate fear.[4] This goes beyond immigration concerns, with, as how Amnesty International has labelled it, a "politics of demonization"[5] are being utilized to justify human rights violations and incite violence. With

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[2] Srđan Mladenov Jovanović, 'Rebuilding Fortress Europe, Building Fortress USA: From Discursive to Physical Boundaries against Refugees on a Global Level' (2019) 5 *Eastern European Journal of Regional Studies* 19-39 [hereinafter Jovanović].

[3] Ibid, 20-21.

[4] Ibid, 31.

[5] Amnesty International, *The State of the World's Human Rights* (International Report, POL 10/4800/2017, 2017) <www.amnesty.org/en/documents/pol10/4800/2017/en/> accessed 12 November 2024.

the rise of public emergencies, as characterized by the COVID-19 pandemic, states have further perpetuated this "us *vs* them" ideology in supposedly legal human right derogations. This work aims to discuss this prevalent challenge and what it reveals about international law. However, to fully ascertain the scope of this work, I will first establish three definitions that I will use throughout its entirety.

1. Pushbacks

At this time, there is a notable absence within the international community of an agreed-upon definition of "pushback". Due to this deficiency, I will rely on the working definition as given by the Special Rapporteur on the human rights of migrants within their report for the 47th Human Rights Council.[6] This establishes pushbacks as an overarching term that encompasses:

> "Various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border."[7]

As this asserts, there are two distinct types of pushback policies. The first occurs prior to crossing an international border, which consists of deterrence and prevention of migrants from ever reaching the state's territory. The second type, removal of migrants, occurs once an international border is crossed and the migrants are physically present in the state's territory.[8] These two types of pushbacks may be used singularly or together in order to encompass the state's practice. Furthermore, state practices may constitute other established concepts in international law, including arbitrary or collective expulsion; however, this is not a requirement for a policy to be classified as a pushback. As this working definition establishes, due to the innate nature of pushbacks attempting to deny, prevent or remove migrant's access to a state's territory, pushbacks can occur extraterritoriality as well as within any defined international border.[9]

In conjunction with a lack of a globally agreed definition, there is a notable absence of international instruments that directly address pushbacks. Various international legal regimes do address the potential impacts of such procedures, with a range of relevant principles found in International Human Rights Law (IHRL). However, this patchwork of law is not enough to fully cover the hole that currently exists in international law surrounding pushbacks. This, as well as additional relevant international law, will be discussed in further detail within Section B of this work.

2. Public Emergencies

In contrast to pushbacks, international law has clearly addressed public emergencies; typically, in the context of how states may legally derogate from international obligations during such times. Prominent jurisprudence is found in the International Covenant on Civil and Political Rights (ICCPR)[10] which asserts that a public emergency must "threaten the life of the nation and the existence of which is officially proclaimed".[11]

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[6] UNHRC, 'Special Rapporteur on the Human Rights of Migrants, Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea' (2021) UN Doc A/HRC/47/30.
[7] Ibid, 4, para 34.
[8] Ibid, 8, para 53.
[9] Ibid, 4-5, para 36-38.
[10] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[11] Ibid, art 4.

While these conditions further assert that “not every disturbance or catastrophe qualifies as a public emergency,”[12] they remain vague and fail to establish what this threshold entails. As such, various documents with non-binding guidance have since emerged. Significantly, the 1984 Siracusa Principles,[13] formed by a conference of international law experts, have offered additional conditions for what constitutes a threat to the life of a nation. Subsequent ICCPR General Comment 29 on article 4 draws heavily on the Siracusa Principles and both establish, that firstly, the event must be “actual” and display “imminent danger”[14] to the nation. Additionally, the emergency must:

> “(a) Affects the whole of the population and either the whole or part of the territory of the State, and (b) Threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.”[15]

Regional treaties have further expanded on this, adding explicit events as examples of what may constitute a public emergency such as “in time of war.”[16] However, it must be noted that while explicitly mentioned, armed conflict is not a requirement for a state of emergency, as other events, such as environmental catastrophes may also meet this prescribed threshold.

For this work, the following definition, drawn from the aforementioned jurisprudence and persuasive authorities will be used to define public emergencies: An actual, imminent danger that threatens the life of a nation, including but not limited to its political independence or territorial integrity, and has been publicly announced as such by relevant State authorities. Other terms that may be used throughout this work include state of emergency, time of crisis, state of urgency, state of danger and emergency situation. Further discussion of public emergencies and how states may use them to legally derogate from international obligations will be found in Section B of this work, with examples of application in Section C.

3. National Populism

For this work to provide a clear working definition of national populism, populism itself must first be briefly discussed. Populism, while currently often used as a vague label for political actors, ultimately has no internationally agreed-upon definition. The concept itself remains highly contested,[17] with debates around the nature of populism involving various approaches to the concept as either a social, economic, or political movement.[18] Additionally, adding to the dispute and confusion around populism is its malleable nature. As populism almost always exists in conjunction with other concepts, the meaning of populism shifts based on context; thus, creating heterogeneous uses and understanding.[19] However, ultimately all contemporary approaches to populism retain the core defining concepts of it being a “thin-centered ideology”, which believes governmental regulations should be an expression of the general will of the “pure people”, who

[12] UNHRC, ‘CCPR General Comment No. 29: Article 4: Derogations During a State of Emergency’ (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11.
[13] UNCHR, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (28 September 1984) UN Doc E/CN .4/1985/4 (Siracusa Principles).
[14] Ibid, 7, para 39.
[15] Ibid.
[16] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 03 September 1953) (ECHR).
[17] Cas Muddle, ‘The Populist Zeitgeist’ (2014) 39 *Government and Opposition* 541-563 [hereinafter Muddle].
[18] Cas Muddle & Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) [hereinafter Muddle & Rovira Kaltwasser].
[19] Ibid, 6-7.

stand opposed to the "corrupt" elite.[20] In short, all approaches to populism utilizes some form of an "us *vs* them" rhetoric[21] in expressing a population's collective ideology.

Moreover, throughout all approaches to populism, the concept of what constitutes the general will remains relatively the same, drawing back to Jean-Jacques Rousseau's theories.[22] In this, Rousseau establishes the *volonté générale* (general will) as the people acting in unison to enforce their commonly shared interests. This is in contrast to the *volonté de tous* (will of all), which takes into consideration private interests during a specific moment in time.[23] In this model, the general will stands as the source of sovereignty. Populists rely on this model to justify the authority of the majority in elections[24] as well as critiquing any outside influence as preventing the full expression of the general will.

Additional divergence in the understanding of populism occurs with the vague "people" and "elite" being prescribed different definitions based on the context, region, and use of the word. As this work will discuss national populism, I will as such draw on the national populism understanding of the people and elite. Here, the "pure people" are framed as the state's native ethnocultural groups. In contrast, the elite consists of "agents of an alien power"[25] or an alien power themselves. In other words, the elite are those who influence policy and who favour the interests of immigrants over the "ethnic native" people. Within national populism, immigrants themselves can be subclassed within the "corrupt elite", as while they do not hold power, they are an alien power themselves and therefore in this model, an other. This ideology often overlaps and draws upon antisemitic, racist, and xenophobic rhetoric to unify a community towards the exclusion of others.

For the purpose of this work, the following working definition, drawn upon previous scholar's efforts, will be used for national populism: An ideology where the general will of the state's native ethnocultural groups stands in opposition to elites who are perceived to hold an outside power interest in higher regard to their own. Classified within the elites is the outside or alien power itself, including irregular migrants.

4. Essay Scope and Methodology

The purpose of this work is to examine global human rights principles within the prevalence of pushback policies, specifically in times of emergency to ascertain what is revealed about international law. This topic came about due to my interest in US domestic policy, specifically Title 42, and how I perceived it to not be in line with international law. I have been further struck by the United States appeared disinterest in ratifying human rights treaties and the sovereignty-based rationale for this. As such, I wanted to delve deeper into these topics by examining if the US was following relevant international law, and if not, why and would any adverse action be taken by international actors? I took these interests and further narrowed my scope to include public emergencies due the increased relevance following COVID-19 and the Ukraine-Russia armed conflict. Overall, I hoped this research topic would clarify my understanding and perception of such concepts, which in the end I do believe I have achieved. Additionally, alongside what I establish in this work, I discovered that essentially it is much more convoluted than I initially thought, with my preconceived notions being too simplistic. I have been especially surprised by the gap around pushbacks and the lack of an obvious solution to this evident issue.

[20] Ibid, 6-7.

[21] Stephan De Spiegeleire, Clarissa Skinner & Tim Sweijs, *The Rise of Populist Sovereignism* (The Hauge Centre for Strategic Studies 2017) 27-28 [hereinafter Hauge Centre Report].

[22] Raphaël Girard, 'Populism, 'The People' and Popular Sovereignty' in Maria Cahill and others (eds), *Constitutional Change and Popular Sovereignty: Populism, Politics, and the Law in Ireland* (Routledge 2021) 77-92 [hereinafter Girard].

[23] Ibid, 88-89.

[24] Ibid.

[25] Muddle & Rovira Kaltwasser (n.18) 14.

This work and its format reflect my personal research and understanding process to reach the conclusions found in Section E. I will first establish a baseline by discussing the relevant international frameworks regarding state obligations in implementation of domestic immigration policy. After establishing this standard for regular circumstances, I will then discuss the legal provisions for human rights derogation in times of emergency. I have chosen to additionally examine two regional systems, Europe, and the inter-American states. These regions were chosen due to their prevalent location on irregular migration routes, notable recent national populist leaders who have implemented pushbacks and their response to recent public emergencies. Section C will then examine international actors' attitude towards pushbacks by looking at non-binding obligations and prominent UN statements. I will narrow my focus further onto two states within the aforementioned regions, Hungary and the United States (US), and their domestic policy in times of crisis to consider how this reflects on the regional stance of pushbacks during emergencies. Finally, this work will culminate in Section D where I will consider the research question and the apparent disconnect between international law and state policy. While I am not directly commenting on the effectiveness of international law, this is a biproduct of my examination. I will then consider recommendations or suggestions on how to bring international law and policy into alignment. Throughout this, I will be utilizing critical case analysis and desk-based research.

B. DOES INTERNATIONAL LAW ALLOW FOR PUSHBACK POLICIES DURING PUBLIC EMERGECNIES?

1. International Law on Pushbacks

As exemplified by the lack of a globally agreed-upon definition for "pushback," there is likewise no international instrument that explicitly addresses such practices at this time. However, at the core of these policies lies the fundamental importance of a state's authority over its defined physical territory and legitimacy over domestic law. As such, this section will first discuss the legal basis for states to regulate affairs within their territory, a power derived from sovereignty.

While enshrined in the UN Charter[26] and thoroughly enmeshed in the current international legal order, sovereignty is a difficult concept to fully define. Originally understood as a "supreme power within the state,"[27] this understanding has shifted alongside its continually evolving definition. Presently, in broad terms, sovereignty is generally accepted as a recognized state's legal authority to conduct its own internal and external affairs[28] within its defined territory per international law.

As this definition alludes to, sovereignty encompasses two separate concepts: external and internal. Briefly defined, the external element provides a state with the legal authority to conduct relationships with other states or parties devoid of outside interference and restraint.[29] The internal element grants a state competence over its geographical region and persons,[30] which encompasses the legal power for states to enact domestic legislation. Internal sovereignty, and as such the state's relationship with its population, is further protected by the principle of non-interference. Found alongside the principle of sovereignty in the

[26] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2(1).
[27] James Crawford, 'Sovereignty as a Legal Value' in James Crawford, Martti Koskenniemi & Surabi Ranganathan (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2015) 117-133 [hereinafter Crawford].
[28] Ibid, 118.
[29] Richard Perruchoud, 'State Sovereignty and Freedom of Movement' in Brian Opeskin, Richard Perruchoud & Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012) 123-152 [hereinafter Perruchoud].
[30] Ibid, 123-124.

UN Charter, non-interference establishes the protection from outside interference "in matters which are essentially within the domestic jurisdiction of any state."[31] These concepts of sovereignty and non-interference work in conjunction to establish the legality for a state to regulate affairs within its territory, free from outside influence. This has come to be understood as including the power to control movement across international borders.[32]

States have significant self-interest in such topics, specifically that of ensuring demarcated borders and regulating international migration flows. Such principles assist states in maintaining security and safety for their inhabitants thus contributing to state sovereignty and enhancing their ability to regulate affairs within the territory.[33] Additional importance of these principles is derived from the 1933 Montevideo Convention[34] which establishes that for statehood the nation must have a permanent population and a defined territory.[35] Statehood and recognition as a sovereign are pinnacle aspirations for nations as it remains essential for full participation in international society due to entry into a distinctive legal category. This legal value of sovereignty gives the state rights and duties, separating them from other organizations within international law.[36] States go beyond having international legal personality to notably having the authority to enter into international agreements or treaties.[37] This is a right not given to any other international organizations and is granted due to their nature as sovereign.

Furthermore, by nature of legal authority over border movement, states can exercise their right to regulate by the admission or refusal of non-nationals. In general, states have wide discretion over such protocols, including management of the number of migrants admitted and the rights to which they are entitled.[38] This discretion has frequently led to the practice of exclusionary regulations upon entry. Often, public health or national security is used as justification for such policies,[39] even when a state has not declared an official public emergency. However, as the Vienna Convention on the Law of Treaties[40] establishes, a state's failure to be aligned with international law cannot be justified by any domestic legislation.[41]

(a) International Human Rights Law

Since all migrants' circumstances are as unique as the individual's, there can be an assortment of pertinent international laws that states must respect. However, International Human Rights Law with its firm entrenchment within the international framework, provides fundamental safeguards that are universally applicable. The international community's commitment to safeguarding human rights is exemplified by the UN Charter's vow of "faith in fundamental human rights, in the dignity and worth of the human person, in

[31] UN Charter (n.26) art 2(7).
[32] Perruchoud (n.29) 124.
[33] Ibid.
[34] Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (entered into force 26 December 1934) 165 LNTS 3802 (Montevideo Convention).
[35] Ibid, art 1.
[36] Crawford (n.27) 117-118.
[37] Ibid, 122.
[38] Perruchoud (n.29) 131.
[39] Ibid, 131-133.
[40] Vienna Convention on the Law of Treaties (adopted 26 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[41] Ibid, art 27.

the equal rights of men and women."[42] This has since been reinforced by the creation of the nine core human rights treaties,[43] alongside their monitoring bodies and other supplemental international conventions.

At the root of IHRL lies the International Bill of Human Rights, which is comprised of the United Nations Universal Deceleration of Human Rights (UDHR),[44] International Covenant on Economic, Social, and Cultural Rights (ICESCR)[45] and the aforementioned ICCPR. While the UDHR itself is non-binding on states, the principles introduced, including equality, prohibition of discrimination, and the right to life are arguably now customary international law.[46] At the very least it offers itself as a "policy guide"[47] on accepted contemporary international practice. Other immigration-relevant guidelines established in the UDHR include the right to nationality, the right given to residents of a state for freedom of movement, and the right to seek asylum.

In contrast, the ICESCR and ICCPR are legally binding conventions on the states that are party. While having two separate conventions are a byproduct of the global circumstances at the time of their creation, it has since spread a belief in a hierarchy of human rights based on different "generations." While this belief is flawed, owing to the interrelationship and interdependence between all rights and freedoms,[48] it has been continually perpetuated. This has led to the view of ICCPR rights as first-generation human rights, thus fundamental to a fair society and typically universally accepted.[49] Again, while this view is flawed, the common global acceptance of ICCPR rights has assisted in establishing the basic IHRL standards that states must consider when implementing policy. Such relevant rights include the right to a national's freedom of movement within the state, freedom to leave the country as they choose[50] and due process when being expelled from a territory.[51]

Core principles, as found in the International Bill of Human Rights, only briefly touch the basic protections found in IHRL. However, states must "promote and protect *all* human rights and fundamental freedoms,"[52] regardless of their generational standing. This can be achieved in part, by states ensuring international compliance within their domestic policy. In accordance, states must ensure the consideration of all additional factors, with a key consideration often being where the migrants are located in relation to the state's territory. This is where the distinction between the two types of pushback policies becomes essential, since different protections are afforded once migrants have crossed an international border and are within the state's territory. Specifically, principles from International Refugee Law (IRL) become applicable.

(b) International Refugee Law

The prominent jurisprudence for IRL is established in the 1951 Convention Relating to the Status of Refugees and the accompanying 1967 Protocol Relating to the Status of Refugees (in conjunction referred to as the

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[42] UN Charter (n26) Preamble.

[43] OCHR, 'The Core International Human Rights Instruments and Their Monitoring Bodies' (OHCHR, 2023) <www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies> accessed 12 November 2024.

[44] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

[45] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 03 January 1976) 993 UNTS 3 (ICESCR).

[46] Rhona Smith, *International Human Rights Law* (Oxford University Press 2022) [hereinafter Smith].

[47] Ibid, 61.

[48] UNGA 48/121, 'Vienna Declaration and Programme of Action' (25 June 1993) A/CONF.157/23 (Vienna Declaration).

[49] Smith (n.46) 67.

[50] ICCPR (n.10) art 12.

[51] Ibid, art 13.

[52] Vienna Declaration (n.48) 1, para 5 [emphasis added].

Refugee Convention).[53] This treaty codifies international practices to provide in one document the rudimentary global standard of treatment of refugees,[54] which includes the fundamental principles of non-discrimination[55] and the right to seek asylum.

Notably included as well, is the recognized legal definition of a refugee to be a person who:

> "…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[56]

This established threshold of a "well-founded fear" is arguably ambiguous,[57] and can impede migrants seeking legal refugee status and applicable protections from pushbacks. The burden of proof is placed on migrants and amassing this when coming from highly dangerous situations can be difficult to impossible. In the absence of undoubtable proof of well-founded fear, it can often translate to a matter of whether or not the judging body believes the migrant's claims,[58] making this often a subjective threshold.

The Refugee Convention also significantly codifies *non-refoulement*,[59] the obligation on states to not return persons outside of their country of nationality when they may be subject to persecution or threats of life. Like IHRL, *non-refoulment* is applicable extraterritoriality, meaning anywhere the nation has "jurisdiction or effective control"[60] it must be respected. This principle is now embedded in various international laws, extending its umbrella of protection outside of IRL.[61] As the Refugee Convention only has 149 states party, this is a notable obligation on states, regardless of their ratification status. However, due to the duties placed on states by the principle of *non-refoulment,* nations may attempt to skirt such obligations[62] by preventing asylum seekers from physically entering their territory both through regular and irregular migration patterns, thus leading to pushback legislation.[63]

Similar to the International Bill of Human Rights, the Refugee Convention also extends protections of due process rights for asylum seekers and refugees.[64] This is vital as often pushbacks fail to respect due process rights by summarily removing migrants.[65] Finally, the Refugee Convention briefly addresses irregular migration patterns in Article 31 establishing that if a person shows that they entered a territory fleeing

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[53] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).
[54] Andreas Zimmermann, *"Preface" The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) v-vi.
[55] Refugee Convention (n.53) art 3, 5.
[56] Ibid, art 1(2).
[57] UNHCR, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (24 August 1977) EC/SCP/54.
[58] Ibid.
[59] Refugee Convention (n.53) art 33(1).
[60] A/HRC/47/30 (n.6) 5, para 38.
[61] Notably found in IHRL, such as, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) (CAT) 1465 UNTS 85.
[62] A/HRC/47/30 (n.6) 4, para 33.
[63] Violeta Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 *Human Rights Review* 574-598 (hereinafter Moreno-Lax).
[64] Refugee Convention (n.53) art 32(2).
[65] A/HRC/47/30 (n.6) 4, para 36.

persecution, the state cannot "impose penalties, on account of their illegal entry or presence."[66] Yet, this again forces the burden of proof onto the migrant, opening the door to subjective courts in the absence of substantial evidence.

Ultimately, it is not disputed that states have the right to regulate their borders and thus have the authority of discretionary powers upon domestic immigration legislation. However, as states must also remain in alignment with international law, the discussed principles of IHRL and IRL work together to establish the state's basic obligations to migrants. Despite these established principles, "migrants' rights emerge as matters of secondary importance when they clash with states' sovereign self-interest."[67] This perpetuates these ideas as conflicting concepts when in reality they can be used together to further the interests of the state and the migrant. As this section has now established, pushback policies are inherently against principles of international law. I will now address international law in times of emergency to discuss if pushbacks are legal while a state is in crisis.

2. International Law in Times of Emergency

As aforementioned, international law consistently addresses states of emergency in conjunction with how they may be used as justification for derogations from International Human Rights Law. It must be noted that before any derogation the situation must constitute a genuine emergency that meets the previously expressed conditions. This within itself has proven problematic. While legally nations are required to proclaim a public emergency,[68] this declaration by the state is typically believed without outside assessment or accountability. The overall deferral to states has perpetuated a "low threshold"[69] for emergencies. This, in turn, creates opportunities for regimes to abuse this right by claiming a crisis, thus making way for human rights derogation, even when the circumstances would not typically permit. Institutions that are essential to monitoring human rights compliance, such as Human Right Courts, often fail to intervene on this subject and instead focus on other principles in their examinations.[70]

However, presuming there is a real and actual emergency, international law has a set criterion that must be met prior to legal derogations. Prominent jurisprudence is found in ICCPR article 4 which maintains that states:

> "May take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation."[71]

This establishes the fundamental requirement that any limitations must first be required by the emergency itself. ICCPR article 4 General Comment 29 has elaborated further noting that this requirement directly "reflects the principle of proportionality."[72] In accordance, the burden of justification lies on the nation to show, if necessary, that such human rights derogations are not more restrictive than required[73] by the needs arising from the emergency. The aforementioned Siracusa Principles reiterate proportionality while adding the requirement that for a limitation to be considered necessary it must be in pursuit of a legitimate aim in

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[66] Refugee Convention (n.53) art 31(1).

[67] Alan Desmond, 'From migration crisis to migrants' rights crisis: The centrality of sovereignty in the EU approach to the protection of migrants' rights' (2023) 36 *Leiden Journal of International Law* 313-334 [hereinafter Desmond].

[68] General Comment No. 29: Article 4 (n.12) para 2.

[69] Scott Sheeran, 'Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal, Doctrine, and Politics' (2013) 34 *Michigan Journal of International Law* 491-557 [hereinafter Sheeran].

[70] Ibid, 493-494.

[71] ICCPR (n.10) art 4.

[72] General Comment No. 29: Article 4 (n.12) 2, para 4.

[73] Siracusa Principles (n.13) art 11-12.

correlation to the emergency.[74] By placing the burden on the state to show a link between implemented restrictive measures and the nation's needs, international law defers to the state's sovereignty.

Furthermore, General Comment 29 and the Siracusa Principles[75] highlight that legal derogations must have a temporal element.[76] As public emergencies eventually end, with either the event itself and its impacts concluding or by the circumstances becoming incorporated into daily life, so must the human rights limitations. Yet, while states must ensure they respect the temporal element, there is no prescribed time limit or threshold, thus allowing states to implement policies for as long as they deem fit. This has expanded the potential for abuse, as notably seen by Israel's establishment of a forty-five-year emergency and subsequent derogations.[77]

Moreover, when an armed conflict constitutes a public emergency, derogations cannot be inconsistent with relevant aspects of International Humanitarian Law (IHL) as found in the Geneva Conventions[78] and customary international law.[79] Due to length and scope, I will not examine this further; however, it is highly pertinent to mention due to the seen increase in the displacement of communities and irregular migrants fleeing the impacts of armed conflict.

Finally, ICCPR article 4 establishes limits on what human rights may be derogated from stating:

> "That such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."[80]

Following this, the article states specific rights that may not be derogated from in any circumstance. These explicitly include the rights to life, recognition as a person before the law, and the freedom of thought as well as the prohibition of torture, slavery, and arbitrary imprisonment.[81] General Comment 29 has further elaborated, establishing that this list is not exhaustive and to maintain alignment with international law, states must additionally respect peremptory norms.[82] Significantly, this encompasses aforementioned tenants of IHRL and IRL including that of non-discrimination and *non-refoulment.*

From this examination of international law in times of emergency, I conclude that the legal circumstances and elements of derogation are, in theory, narrow and do not allow for pushbacks. The prescribed elements for derogation, particularly the critical inclusion of respect for key peremptory norms, are such that the aspects of IHRL and IRL protecting against pushbacks cannot be derogated from, even in public emergencies. To fully establish these claims, I will now dedicate the remainder of this section to examining the European and inter-American state regional human rights systems, alongside applicable cases brought forth to the respective courts and commissions. It is important to note that like domestic policy, regional systems cannot conflict with international law and must respect all principles. However, since considerable progress in

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[74] Ibid, art 10.
[75] Ibid, art 51.
[76] General Comment No. 29: Article 4 (n.12) para 4-5.
[77] John Quigley, 'Israel's Forty-Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations? (1994) 15 *Michigan Journal of International Law* 491-518.
[78] 'The Geneva Conventions and Their Commentaries' (International Committee of the Red Cross, 20 May 2021) <www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> accessed 12 November 2024.
[79] 'Customary Law' (International Committee of the Red Cross, 29 June 2023) <www.icrc.org/en/war-and-law/treaties-customary-law/customary-law> accessed 12 November 2024.
[80] ICCPR (n.10) art 4(1).
[81] Ibid, art 4(2).
[82] General Comment No. 29: Article 4 (n.7) para 11.

relevant subjects of international law has come from regional systems, assisted by their enhanced accessibility for claims of violations to be brought forth,[83] they are highly pertinent to establishing the illegality of pushbacks.

3. Regional Systems

(a) Europe

Similar to international law, Europe's regional human rights system has reiterated established safeguards for the protection of migrants. The European Convention on Human Rights[84] (ECHR) includes articles regarding due process rights,[85] prohibition of discrimination[86] and derogations in times of emergency.[87] Drawing heavily from the ECHR, the Charter of Fundamental Rights of the European Union[88] (CFR) also notes the right to asylum[89] will be granted per the Refugee Convention. All applicable articles retain core parallels to their international law counterparts, reaffirming protections for irregular and regular migrants within the European region.

Furthermore, the ECHR and then CFR places additional obligations on member states. Perhaps most notably, ECHR Additional Protocol 4 establishes the prohibition of the collective expulsion of aliens.[90] This is understood to encompass:

> "Any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group." [91]

When first drafted in 1963, this was the first precise inclusion of such wording in international law.[92] However, the concept itself was not new as the Genocide Convention[93] addresses the forcible transfer of children.[94] As this concept has evolved to include demographics outside of children, it has likewise continued to advance from the regional sphere to the international with the UN Human Rights Committee expressing that collective expulsion is inherently contrary to ICCPR article 13.[95] This has culminated in the ILC Draft Articles on the Expulsion of Aliens,[96] providing an authoritative document containing protections for irregular migrants who are within a state's territory.

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[83] Smith (n.46) 80.
[84] ECHR (n.16).
[85] Ibid, 6, 13.
[86] Ibid, 14.
[87] Ibid, 15.
[88] European Union: Council of the European Union (Charter of Fundamental Rights of the European) (entered into force 01 December 2009) (CFR).
[89] Ibid, art 18.
[90] ECHR (n.16) additional protocol 4, art 4.
[91] ECHR, 'Article 4 of Protocol No.4 – Prohibition of Collective Expulsion of Aliens' (ECHR, 31 August 2022) <https://ks.echr.coe.int/web/echr-ks/article-4-protocol-4> accessed 12 November 2024 [hereinafter ECHR Guide].
[92] Ibid, 5.
[93] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 09 December 1948, entered into force 12 January 1951) 78 UNT 277 (Genocide Convention).
[94] Ibid, art 2.
[95] UNHRC, 'CCPR General Comment No.15: The Position of Aliens Under the Covenant (11 April 1986) UN Doc HRI/GEN/1/Rev.9 (Vol. I).
[96] ILC, 'Draft Articles on the Expulsion of Aliens' (2014) UN Doc (A/69/10).

Yet, despite this significant advancement, consequently creating additional protection for migrants alongside multiple regional articles that expand upon established international principles,[97] none explicitly mention pushbacks themselves. Nonetheless, the European Court of Human Rights (ECtHR) has made several key judgments, consequently establishing case law around the existence of such policies under regular circumstances. A key role in such case law comes from the prohibition on collective expulsion with numerous relevant cases citing violations.[98] I will now look at two highly notable judgments from the ECtHR that have affirmed Europe's legal stance on pushbacks.

Often regarded as the first significant ECtHR case that examines pushbacks, *Hirsi Jamaa and Others v. Italy*[99] reviewed Italy's state practice of intercepting boats and summarily returning them to Libyan territory[100] without a full assessment of their rights. Notably, this 2012 judgment explicitly uses the term "push-back" when discussing the relevant policy,[101] calling attention to its core purpose. The Grand Chamber unanimously found that this practice violated the principles of collective expulsion and *non-refoulment*[102] and thus the state was in violation of the relevant law. Additionally established in this judgment was the concept that extraterritorial jurisdiction includes "control and authority over an individual abroad."[103] Subsequently, in this case, by authorities taking full control over the migrants' boats, it was therefore Italian territory, and persons were entitled to applicable rights. This judgment ascertained the regional standard regarding interception of migrants at sea and states' extraterritorial jurisdiction, with the ECtHR citing *Hirsi Jamaa* in many subsequent cases, thus upholding its principles regarding pushbacks. Notable examples include *Sharifi and Others v Italy and Greece*,[104] *Khlaifia and Others v. Italy*[105] and *N.D. and N.T. v. Spain.*[106]

N.D. and N.T. v. Spain are markedly noteworthy as it discusses similar subject matters as *Hirsi Jamaa,* yet ultimately results in a contrasting judgment. This case examines land pushbacks, and Spain's policy of arbitrarily returning migrants who attempt in crossing an international border, as marked by three separate fences with Morrocco.[107] A key component of this case was considering the jurisdiction of the fenced land and whether it constituted Spanish territory or a land border. Originally, in 2017, it was noted that the principles of extra-territoriality and jurisdiction as established in *Hirsi Jamaa* are also applicable to land borders.[108] Due to Spain's effective control of the area, the ECtHR Grand Chamber found a violation of the prohibition of collective expulsion.[109] However, following the Spanish appeal, this judgment was unanimously reversed. This focused on the meaning of the term "expulsion," with the ECtHR considering whether or not non-admission at a border constituted such.[110] In the appeal, the ECtHR asserted that non-admission was not an expulsion. The ECtHR then went against the understanding of extraterritorial jurisdiction as established in *Hirsi Jamaa* and found that the land in question was a border, thus Spain was not in violation of collective expulsion. The ECtHR additionally held that as Spain had accessible controlled entry points, the Plaintiff should have attempted through these instead of irregular migration routes.

[97] Smith (n.46) 85.
[98] ECHR Guide (n.91) 5-9.
[99] *Hirsi Jamaa and Others v. Italy.* App No. 27765/09 (Grand Chamber, ECtHR) [2012].
[100] Ibid, para 9-14.
[101] Ibid, para 4.
[102] Ibid, para 196.
[103] Moreno-Lax (n.63) 574.
[104] *Sharifi and Others v Italy and Greece* App No. 16643/09 (Grand Chamber, ECtHR) [2014].
[105] *Khlaifia and Others v. Italy* App No. 16483/12 (Grand Chamber, ECtHR) [2016].
[106] *N.D. and N.T. v. Spain* App Nos. 8675/15 and 8697/15 (Grand Chamber, ECtHR) [2020].
[107] Ibid, para 15-20, 24-27.
[108] Ibid, para 91-94.
[109] Ibid, para 124.
[110] Ibid, para 240-244.

This decision conspicuously undermines the progress and regional standard *Hirsi Jamaa* had previously established, creating the opportunity for states to implement pushback policies when extraterritorial jurisdiction is relevant. Furthermore, this decision places a high emphasis on state sovereignty, stating: "The Court also reiterates the right of States to establish their own immigration policies" and the right to control the entry and removal of aliens.[111] These statements in the context of pushbacks dangerously contributes to the narrative of migrant rights being in competition with state sovereignty. Moreover, within this decision the ECtHR places an inappropriate focus on the migrants' means of entry into a state, instead of on whether the state is in violation of human rights. This attribution of the Plaintiff's lack of individual assessment to the Plaintiff themselves thus inserts the underlying question of if they are worthy of human rights,[112] despite the universal applicability. This view fails to consider reasons irregular migration patterns are used, any aspects of persecution, and the practical challenges of accessing entry points.[113] Unfortunately, this ideology has been reaffirmed in the 2020 case, *M.K. and Others v. Poland,*[114] where the ECtHR references *N.D. and N.T.* by stating, "In addition, the Court has taken the applicants' own conduct into consideration when assessing the protection to be afforded."

While this is in no way a comprehensive examination of European case law regarding pushbacks, these two cases provide direct insight into the current developments of international law within the European region. As seen, there has been comparatively recent changes in such developments, displaying a shift in the regional acceptance of pushbacks and understanding of law. Furthermore, these cases exemplify the difficult balance states must strike between sovereignty and immigration policies, alongside the continual challenge this poses to international actors. While I have heavily highlighted the negative impacts, it is also important to note that these cases demonstrate that the established regional framework does contain legal provisions against aspects of pushbacks, to provide, in theory, a general standard of opposition of such policies during regular circumstances. As there is a currently a notable absence of cases regarding pushbacks by states in a public emergency, I cannot fully assert what the European regional legal understanding is. However, based on the international and regional law surrounding pushbacks and public emergencies, I argue that collective expulsions are likely illegal under existing state obligations within Europe.

(b) The Inter-American States

Similar to Europe, the inter-American states have established regional standards that reaffirm the commitment to international law, including the right to equality,[115] due process[116] and the right to seek asylum.[117] Likewise, the American Convention on Human Rights[118] (Pact of San Jose) asserts that human rights may be derogated in times of emergency with provisions detailing additional explicit protections such as the right to participate in government, the rights of the family, and nationality.[119] The Pact of San Jose additionally includes a clause regarding the prohibition of collective expulsion,[120] highly reminiscent of the ECHR.

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[111] Ibid, para 167.
[112] Sergio 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) (2020).
[113] Ibid, 9.
[114] *M.K. and Others v. Poland* App No. 0503/17, 42902/17 and 43643/17 (Grand Chamber, ECtHR) [2020] para 203.
[115] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).
[116] Ibid, art 26.
[117] Ibid, art 27.
[118] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San Jose).
[119] Ibid, art 27(2).
[120] Ibid, art 22(9).

However, unlike in Europe, within the Americas there are minimal cases regarding pushback policies and even fewer of derogations in times of emergency. The cases that do discuss similar principles often refer to European judgments, such as the *Nadège Dorzema et al v. Dominican Republic,*[121] which references *Hirsi Jamaa.* I believe this lack of case law is likely to change in the coming years due to the global pandemic and related human rights derogations. Additionally, the Inter-American Commission on Human Rights (the Commission) has condemned such policies, subsequently making way for future decisions or case law. I will discuss this in greater detail below in section C.

Nonetheless, the lack of cases brought forth regarding pushbacks up to this point does not establish the lack of policy in this region. Indeed, the Commission heard *The Haitian Centre for Human Rights et al v. United States*,[122] what is often considered the first contemporary pushback case following the United States 1981 "illegal aliens" interdiction policy.[123] Comparable to *Hirsi Jamaa*, this case considered the legality of arbitrability and forcibly returning migrant boats without proper assessment. Interestingly, the petition did not bring forth violations of collective expulsions, but of *non-refoulment,* right to life, and due processing.[124] In the findings, the Commission noted that they lacked the jurisdiction to assess the argued violations of the Refugee Convention but noted that the United States does have *non-refoulment* obligations within national law. They did find that the US, by their arbitrary return of persons to Haiti, were in violation of the American Declaration's right to life as there was substantive evidence of human rights abuses in the country of origin.[125]

Notably, the Commission observed a dual criterion for the right to asylum; that while states must respect this right, refugees must also respect "domestic laws of the country in which refuge is sought."[126] Similar to the decision in *N.D. and N.T.,* this onerous stipulation places state sovereignty against human rights and fails to consider additional factors that irregular migrants face in seeking international or regional protections. Furthermore, it neglects to recognize that upon following domestic procedures the applicant is unlikely to receive the protection needed, as since the 1990s the US has seen a steady decline in refugee admissions.[127] These standards conclusively establish a harmful precedent for pushbacks, paving the way for their continued practice within the inter-American region, as well as cementing human rights and sovereignty as conflicting values.

However, in 2014 judicial advancement towards establishing a regional harmony of human rights and sovereignty was found in the *Expelled Dominicans and Haitians v. Dominican Republic*.[128] Here, the Inter-American Court of Human Rights (IACHR) significantly asserts that regardless of the "legal terms of State laws and regulations" that parties must follow a "basic standard of reasonableness" towards their regional rights and obligations.[129] While this statement does not fully provide a much-needed balance between migrants' rights and sovereignty, it does reaffirm that member states may exercise their sovereignty but must also be in alignment with international and regional human rights obligations. This principle directly translates to pushbacks, confirming the existence of state's human rights duties toward migrants in all circumstances.

[121] *Nadège Dorzema et al v. Dominican Republic,* Case 12.688 Inter-American Commission on Human Rights [2012].
[122] *The Haitian Centre for Human Rights et al v. United States,* Case 10.6575 Inter-American Commission on Human Rights [1997] Report No. 51/96.
[123] Executive Order 12324: Interdiction of Illegal Aliens (29 September 1981).
[124] *The Haitian Centre for Human Rights* (n.122) para 1-10.
[125] American Declaration (n.115) art 1.
[126] *The Haitian Centre for Human Rights* (n.120) para 158.
[127] 'U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present' (migrationpolicy.org, 9 June 2023) <www.migrationpolicy.org/programs/data-hub/charts/us-refugee-resettlement> accessed 12 November 2024.
[128] *Expelled Dominicans and Haitians v. Dominican Republic,* Case C.282 Inter-American Commission on Human Rights [2014].
[129] Ibid, para 294.

Furthermore, this case additionally assists in advancing the regional standard by indirectly addressing collective expulsions. The IACHR unanimously found the prohibition of arbitrary and abusive interference in private and family life[130] also encompasses the prohibition of unwarranted expulsion or detention.[131] From this, it can be established that within inter-American states, pushbacks that include the arbitrary removal of persons from their territory without respect to due process can consist of unwarranted expulsion.[132]

Similar to the European regional system, this section has not encompassed a comprehensive examination of the inter-American region but instead has provided a brief overview of key inter-American treaty and case law statements on relevant aspects of pushbacks. Further highlighted is the overall deferral of responsibility on migrants to follow state legislation, with a significant regional disregard for whether this conflicts with the accessibility of the right to seek to asylum. However, like Europe, the inconsistency on these positions is seen, as well as the lack of regional comments around public emergencies. With no one set standard within the inter-American states on pushbacks, I argue that based on cumulative international and regional law on human rights and emergencies, pushbacks are illegal within the inter-American states in regular circumstances and in crisis. I would additionally like to note, that in comparison, within this region there does appear to be a lesser emphasis on how discriminatory and harmful these policies can be. With this argument, I have now established the illegality of pushbacks in public emergencies on the international and regional level as they are inherently against vital human rights principles. I will now move on to examine state practice and statements to determine if pushbacks are accepted, regardless of the illegality.

C. ARE PUSHBACK POLICIES ACCEPTED BY INTERNATIONAL ACTORS AND STATES IN REGLUAR CIRCUMSTANCES? IN PUBLIC EMERGENCIES?

Due to the binding nature and accompanying oversight of international conventions, states have proven to be reluctant or slow in their acceptance.[133] This is heightened when the convention's expressed purpose is protecting migrant rights, demonstrated by the overwhelming low ratification status of such in comparison to other human rights treaties.[134] Instead, states opt towards politics and soft law which, as defined by Alan Desmond, is "made up of statements, agreements and documents that, though important and influential, are not binding."[135] The non-binding nature appeals to states as a way to facilitate multilateral cooperation without being subject to restrictions on sovereignty. Thus, states have frequently turned to soft law to address irregular migration, with a notable increase in use following the 2015 European "migration crisis."[136] Due to its prevalence and use alongside politics, this section will examine such to ascertain the overall attitude of the United Nations and states regarding pushbacks. While non-governmental organizations (NGOs) contribute and are a notable part of the pushback conversation, I will not be discussing this in greater detail due to their lack of sovereignty. While the UN likewise does not hold sovereignty, I have chosen to discuss its expressed views due to its authoritative nature and ability to facilitate soft law. Specifically, I will consider the Global Compact for Safe, Orderly and Regular Migration (GCM) and recent thematic reports presented by the Special Rapporteur on the human rights of migrants.[137]

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[130] Pact of San Jose (n.118) art 11(2).
[131] *Expelled Dominicans and Haitians* (n.126) para 438.
[132] Ibid*,* para 313-314.
[133] Desmond (n.67) 318.
[134] Ibid.
[135] Ibid, 321.
[136] Ibid, 315-315.
[137] UNGA Res 73/195, 'Global Compact for Safe, Orderly and Regular Migration' (adopted 19 December 2018) A/RES/73/195 (GCM).

1. International Actor Statements: The United Nations

The increased use of soft law following the dramatic rise of irregular migrants seen in 2015 is exemplified by the New York Declaration for Refugees and Migrants[138] (NY Declaration) and subsequent GCM.[139] Following calls for action, in September 2016, the UN organized the Global Summit on Refugees and Migrants as a way to aid state cooperation on addressing mass irregular migration.[140] This conference of 193 UN member states unanimously adopted the NY Declaration, launching the development and adoption of the GCM in December 2018.[141] The GCM stands out as the first "inter-governmentally negotiated agreement"[142] prepared under the sponsorship of the UN. It attempts to fill the gaps left by binding-law[143] to offer a comprehensive soft law commitment towards global cooperation in the protection of migrants and related services or rights. These cooperative elements are highlighted throughout its text as it recognizes the trans-boundary challenges, declaring "that no State can address migration alone."[144]

While non-binding, the GCM Preamble states it "rests" on international law and notes migrants are entitled to universal human rights and freedoms.[145] This notion is infused throughout its entirety, with many of the objectives echoing principles of international law in a migration context. Furthermore, the GCM offers guidance on the implementation for each objective, with suggested actions for states to draw upon. By doing so, the GCM has the potential to encourage a minimum global standard on migrant rights while simultaneously promoting changes on a national level[146] in a manner that respects sovereignty. The GCM also assists in bringing concepts that can be somewhat abstract within international law to a practical application. This is demonstrated in GCM Objective 17, which is dedicated to the elimination of discrimination against migrants.[147] The objective explicitly observes various forms of discrimination, specifically noting racism and xenophobia, both key aspects of pushbacks, and overtly condemns such.

However, while these inclusions are noteworthy, they are overshadowed by the GCM's heavy deference to sovereignty.[148] The GCM maintains it upholds sovereignty[149] and asserts the right of states to "determine their national migration policy."[150] National sovereignty is further enshrined as one of the GCM's guiding principles.[151] While this inclusion is not inherently detrimental and indeed has the potential to assist in showcasing sovereignty and human rights as aligned principles, the GCM ultimately fails to achieve this. Instead, the nature of the language used undermines the GCM's attempts to promote international cooperation and provides an exclusionary clause, thus allowing states to strengthen their own position on irregular migrations against the solidarity of international law.[152] As the final draft was negotiated and

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[138] UNGA Res 71/1, 'New York Declaration on Refuges and Migrants' (adopted 19 September 2016) A/RES/71/1 (NY Declaration).
[139] GCM (n.137).
[140] Micheline van Riemsdijk & Marion Panizzon, "A collective commitment to improving cooperation on migration' (2022) 43 *Third World Quarterly* 2169-2187 [hereinafter van Riemsdijk & Panizzon].
[141] UNGA, 'General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants' (United Nations, 19 December 2018) <https://press.un.org/en/2018/ga12113.doc.htm> accessed 12 November 2024.
[142] IOM, 'Global Compat for Migration' <www.iom.int/global-compact-migration> accessed 12 November 2024.
[143] van Riemsdijk & Panizzon (n.138) 2181.
[144] GCM (n.137) 2, para 7.
[145] Ibid, 1-2, para 1,4 2.
[146] Desmond (n.67) 320.
[147] GCM (n.137) 24, para 33.
[148] Ibid, 4, para 15.
[149] Ibid.
[150] Ibid, 4 para 15.
[151] Ibid.
[152] Desmond (n.67) 324.

approved by UN member states, this could be attributed to a self-serving desire or as an appeal for wider acceptance. Such was not an unfounded fear as the GCM failed to be unanimously adopted as the NY Declaration was, with nations expressing concerns over infringement of sovereignty.[153] Yet, by placating the state concerns and interests to the potential detriment of human rights,[154] the GCM further encourages a "false dichotomy."[155] Additionally, states that prominently expressed concerns, including the populist governments of Hungary[156] and the United States, ultimately did not accept the GCM.

While the GCM does not explicitly mention pushbacks, it nonetheless discusses highly relevant concepts which I assert provides insight into the UN's stance on the subject. Due to the nature of its very existence, as well as the GCM's clear acknowledgement that previous failures and gaps in hard law for protection of migrant rights culminated in such devastating circumstances, it showcases the international community's desire to implement change. It further demonstrates the UN desire to address such in a way that encourages state cooperation to prevent future failures and loss of life. However, the lack of balance and inordinate prioritization of sovereignty displays, at the very least, the unwillingness by the UN to make a clear statement when doing such would prevent state acceptance. At the most, it offers an implicit acceptance of violations, including pushbacks, under the banner of sovereignty. I argue that it lies somewhere in the middle. The GCM clearly establishes principles that culminate against pushbacks, confirming notionally that the UN does not endorse such policies. However, the concessions made for sovereignty show that in practice the UN's desire for any progress achieved through widespread state acceptance[157] is a satisfactory exchange for not taking a stronger stance against harmful practices, thus deferring to state prerogatives. This idea is further supported as conversely, when state acceptance is not a factor, the ambiguous language as found in the GCM is replaced by powerful verbiage expressing a definite denial of pushbacks. This is most clearly apparent in the Special Rapporteur's work.

Under the mandate to compile regular reports and provide recommendations to prevent human rights violations towards migrants, the Special Rapporteur devoted a 2021 thematic report to the human rights impact of pushbacks.[158] This report, and the subsequent 2022 follow-up,[159] include distinctly clear language explicitly concluding that pushbacks "demonstrate a denial of States' international obligations."[160] The Special Rapporteur further asserts that while states have a responsibility over their international borders, and elsewhere when they "effective control"[161] this does not preclude human rights obligations or accountability. While not directly commenting on the tension between sovereignty and migrant rights, these statements place these concepts together as tenets of international law, instead of in opposition, thus reminding states of the dual obligation. Furthermore, following the reminder that states must respect the principle of non-discrimination[162] as found in international law, the discriminatory nature of pushbacks is declared. The report expresses that pushback are often based in discriminatory legislation or policy and "manifest an entrenched prejudice against migrants."[163] Similarly, the increasingly common evaluation of the migrant's actions to determine applicable protections is indirectly addressed, stating that unauthorized border crossings do not constitute a crime or a valid reason to deprive migrants of their human rights

[153] van Riemsdijk & Panizzon (n.138) 2184.
[154] Desmond (n.67) 329.
[155] van Riemsdijk & Panizzon (n.138) 2183.
[156] Desmond (n.67) 329.
[157] Desmond (n.67) 324.
[158] A/HRC/47/30 (n.6).
[159] UNHRC, 'Special Rapporteur on the Human Rights of Migrants, Report on Human Rights violations at international borders: trends, prevention and accountability' (2022) A/HRC/50/31.
[160] A/HRC/47/30 (n.6) 4, para 33.
[161] Ibid, 5, para 38-39.
[162] Ibid, 5 para 39.
[163] Ibid, 18, para 100.

entitlements.[164] In the 2023 thematic report,[165] this was again emphasized stating that "the fact that [persons] migrate irregularly does not relive States from the obligation to protect their rights."[166] These inclusions with such equivocal language contribute to the understanding of pushbacks and clarifies the UN viewpoint on their legality under international law.

Highly significantly, the Special Rapporteur also addresses pushbacks in the context of public emergencies, noting an increase of human right derogations that disproportionately impact migrants significantly occurred following COVID-19.[167] While acknowledging the legality, and necessity of extraordinary measures, it insists the "principles of *non-refoulement* and the prohibition of collective expulsions" must simultaneously be respected.[168] This inclusion of collective expulsions is prominent, showcasing its relevance beyond the regional systems and further establishing an argument towards its inclusion in customary international law, thus extending its umbrella of protection. This assertion is further upheld with the report's consideration of the principle as international law procedure.[169] Moreover, while this discussion is mainly in the context of COVID-19, this inclusion is fully applicable to the broader terms of public emergencies to provide a clear stance by the Special Rapporteur of pushbacks in times of crisis being incompatible with international law and its principles.

Examining the GCM and Special Rapporteur reports in conjunction supports my previous assessment that while the UN does not appear to endorse pushbacks, state acceptance of soft law is of a higher importance than condemning these policies. This is illustrated by comparing the differences in the expressed purpose and contrasting language of the two documents. As discussed, a key element of the GCM vision and purpose is stated to be international cooperation,[170] which logically would require state acceptance to achieve. While state acceptance would greatly support the Special Rapporteur's functions, it is not expressed in their mandate. Consequently, the Special Rapporteur offers an authoritative denial of pushbacks as inherently against international law with clear reference to relevant principles[171] and remarks on state obligations. The GCM similarly does such, albeit in less direct language and takes into greater consideration state interests. Furthermore, the Special Rapporteur comments do not uphold any justification for pushbacks under sovereignty, and further details specific state violations[172] to take a distinctly stronger stance in comparison to the GCM. Overall, I argue that these two documents provide a clear characterization of the UN's ongoing failure to assist the international community in finding a balance for the respect of all aspects of international law. This is despite the organization's foundational document, the UN Charter, providing protections of both sovereignty[173] and fundamental human rights.[174]

With the UN's stance on pushbacks now established, I will now examine if this is reflected in regional systems with the culmination of soft law and practices. I will be specifically discussing Hungary and the United States due to their populist governments and internationally prominent pushback policies.

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[164] Ibid.
[165] UNHRC, 'Special Rapporteur on the Human Rights of Migrants, Report on How to expand and diversify regularization mechanisms and programmes to enhance the protection of the human rights of migrants' (2023) UN Doc A/HRC/53/26.
[166] Ibid, clarification added.
[167] A/HRC/47/30 (n.6) 19 para 106.
[168] UNGA, 'Human Rights of Migrants' (2021) A/76/257.
[169] Ibid, 20-21, para 89.
[170] GCM (n.137) 2 para 7.
[171] A/HRC/47/30 (n.6) 5-8.
[172] Ibid, 8-17.
[173] UN Charter (n.26) art 2(1).
[174] UN Charter (n.26) preamble.

2. Regional Systems and Statements

(a) Europe: Hungary

As a response to the 2015 migration crisis, numerous European bodies and EU member states chose to introduce rigorous immigration policies accompanied by strict enforcement. This has resulted in what is often called "Fortress Europe",[175] with this term alluding to a broad regional desire to prevent asylum seekers or refugees from gaining physical entry and its effectiveness in this regard. Accordingly, such policies attempt to address irregular migration in terms of promoting member state cooperation. To further enhance the impact of such, implemented soft law also endeavours to reach beyond EU borders, with instruments that encourage outside third-country participation or negotiation. A prominent example of this, is the EU-Turkey joint action plan,[176] which encompasses Turkey's commitment to take "any necessary measures"[177] to prevent irregular migrants traveling from their territory into the EU. Utilizing soft law in this manner is particularly appealing as the European Parliament is not required to formally be involved in such agreements, thus ensuring garnering agreement by all parties is easier.[178] Furthermore, as likewise demonstrated with the EU-Turkey action plan, another appealing factor for all parties is the noticeable lack of jurisdiction[179] seen by regional courts. Absence of judicial accountability measures can encourage participation by actors wanting to avoid third-party scrutiny but simultaneously can support a non-human rights-based approach that fails to remain compliant with international or regional law.[180]

Additionally, in response to the 2015 migration crisis, the European Council and Parliament placed a heavy focus on a widespread regional "solidarity and fair sharing of responsibility."[181] However, due to geographical location and legislation such as the Dublin Regulation[182] that requires migrants to file for asylum in the first EU country they reach, there is a disproportionate burden on external border states. In attempts to address this, the European Commission provides financial support based on state needs in conjunction with border monitoring initiatives and agencies. Yet, states can misuse these resources, utilizing them instead to aid in pushback implementation.[183] Such misuse is publicly seen in 2022 reports that provide evidence of the European Border and Coast Guard Agency (Frontex) working alongside Greek agencies in the Aegean to conduct or cover up sea pushbacks. While there remains widespread criticism and calls to halt such practices, pushbacks or "forced returns", as Frontex claims, are continuing to be performed with joint operations in the Mediterranean.[184] Unfortunately, this use of pushbacks despite external objections is not unique to Greece

[175] Jovanović (n.2) 21.

[176] European Commission, 'Press Corner' (European Commission, 15 October 2015) <https://ec.europa.eu/commission/presscorner/detail/en/memo_15_5860> accessed 12 November 2024.

[177] European Council (EU-Turkey Statement, Consilium, 18 March 2016) <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement> accessed 12 November 2024.

[178] Peter Slominski & Florian Trauner, 'Reforming me softly: how soft law has changed EU return policy since the migration crisis' (2021) 44 *West European Politics* 93-113 [hereinafter Slominski & Trauner].

[179] Ibid, 105.

[180] Ibid.

[181] Roberta Metsola & Kashetu Kyenge, 'Report on the Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration: A8-0066/2016: European Parliament' (Report on the situation in the Mediterranean and the need for a holistic EU approach to migration, 23 March 2016) <www.europarl.europa.eu/doceo/document/A-8-2016-0066_EN.html> accessed 12 November 2024.

[182] EU Parliament Reg. No 604/2013, 'Dublin Regulation' (26 June 2013).

[183] Michael Garcia Bochenek, 'The Persistent, Pernicious Use of Pushbacks against Children and Adults in Search of Safety' (2023) 12(3) *Laws* 1-30.

[184] 'Frontex (Frontex Executive Director and Greek officials agree on cooperation on returns, 14 March 2023) <https://frontex.europa.eu/media-centre/news/news-release/frontex-executive-director-and-greek-officials-agree-on-cooperation-on-returns-iNUJcF> accessed 12 November 2024.

or even to sea bordering states. Notably, Hungary under the populist Prime Minister (PM) Viktor Orbán has utilized the guise of various public emergencies to continually implement pushbacks from 2015 onwards.[185]

From July 2015 to March 2016, under claims that the "country must be protected" against irregular migrants,[186] Hungary progressively introduced pushback legislation aimed at preventing asylum seekers from entering the state's physical territory. This escalated in September 2015 when the government declared a "crisis situation caused by mass immigration."[187] In March 2016 this led to an official proclamation of a "state of crisis" that is to be evaluated, and then if deemed necessary, extended every six months. Almost nine years later various state of crisis remain in effect, consequently supporting state and police led pushbacks.[188] Coinciding with the implementation of the declared emergency, Hungary began to heavily politicize irregular migration as to push the narrative that migrants pose a threat to the people of the state. This tactic of othering, labelling irregular migrants as a negative or harmful outside influence, has only intensified since 2015, with PM Orbán directly connecting terrorism to migrants with claims they are attacking the cultural integrity of Hungary.[189]

Corresponding with these events, Hungary constructed razor-wire fences, effectively closing the Hungary-Serbia and Hungary-Croatia borders in an attempt to prevent physical entry of irregular migrants. Two set transit zones were established, to, in theory, allow for persons to apply for asylum. Yet in practice the number of persons allowed to do so was highly restricted by authorities and the small number who could apply were often summarily rejected under accelerated procedures.[190] Furthermore, Hungary legalized additional pushbacks that included the forcible removal of third-country nationals found within 8km of the border, with numerous reports of authorities using violent tactics to do so. Testimonies of such actions include evidence of police use of tear gas, dogs, removal of clothes and blankets in extreme weather conditions, physical brutality, and removal of identification documents.[191]

In 2017 due to these policies and the presumed violations of regional law, the European Commission launched an infringement proceeding, resulting in the referral of Hungary to the CJEU.[192] In December 2020, and again in November 2021, the CJEU found Hungary's policies in breach of various regional protections, including the right to asylum and effective remedy.[193] Likewise, in a separate case the CJEU found Hungary's restrictive transit zones as a form of unlawful detention and therefore a violation of regional obligations. In response, Hungary closed all transit zones, consequently stopping all border asylum applications. Instead, Hungary now requires migrants to initiate the process at Hungarian embassies in Belgrade or Kyiv.[194] This is irrespective of whether the migrant is already physically present in Hungary, with the COVID-19 pandemic and social distancing as justification for the policy. While the step of closing the transit zones was in the right direction, Hungary's response continues to violate international and regional human rights with the suppression of access to asylum. This is displayed by the shockingly low reported 44 asylum applications in

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[185] UNCHR, 'Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016' (May 2016).

[186] Ibid, 6.

[187] Ibid, 6-7.

[188] Asylum Information Database, 'Country Report of the main changes since the previous report update' (19 April 2023) <https://asylumineurope.org/reports/country/hungary/overview-main-changes-previous-report-update/> accessed 12 November 2024.

[189] Balázs Majtényi, Ákos Kopper & Pál Susánszky, 'Constitutional othering, ambiguity and subjective risks of mobilization in Hungary: examples from the migration crisis' (2019) 26(2) *Democratization* 173-189 [hereinafter Majtényi, Kopper & Susánszky].

[190] UNCHR Hungary Report (n.185) 6-7.

[191] Belgrade Human Rights Center, *'A Dangerous Game'* (Joint Agency Briefing Paper) 5-8.

[192] HHC Special rapp. Submission 2021 pg. 5.

[193] *European Commission v Hungary,* No. C-808/18 (Grand Chamber, ECtHR) [2020].

[194] *European Commission v Hungary*, No. C-823/21 (Fourth Chamber, ECJ) [2023].

2022.[195] In June 2023 the Court of Justice of the European Union addressed this, finding Hungary to be in failure of the regional obligation to ensure effective opportunities, as soon as possible, for applicants to file for international protections.[196] Additionally in response to aforementioned policies resulting in collective expulsions, individual cases such as *Shahzad v. Hungary*[197] and *H.K. v. Hungary*[198] have been brought to the ECtHR. In both cases, Hungary was found in violation due to the effective control of authorities over migrants and no proven genuine access to legal entry or accessibility to claim asylum.[199]

Yet, despite the authoritative stance of these EU bodies, Hungary has not implemented the numerous recommendations or made any progress towards reaching a basic standard of human rights for irregular migrants. Instead, Hungary under PM Orbán, continues to employ pushback policies and restrict access to international protections. To justify such, public emergency procedures have been exploited by the government to gain excessive power.[200] This notably occurred in March 2020, following Hungary's declaration of a "state of danger" due to the global pandemic and Parliament's subsequent authorization to extend governmental powers while the state of danger was ongoing. The result was a "*carte blanche*"[201] mandate providing full government authority to override Acts of Parliament and derogate from fundamental rights as required by the emergency, in this case as needed for the pandemic.[202]

However, this state of danger has since outlasted the pandemic. In 2022, the execution of a Fundamental Law (Constitution) amendment extended the original provisions of a state of danger to include "armed conflict, war or humanitarian disaster in a neighboring country."[203] Subsequently, with the exception of a few months, Hungary's declared state of emergency has been continually extended, with it still in effect at this time due to the Russia-Ukraine conflict.[204] This, alongside the aforementioned continued declared state of crisis due to migration, has resulted in excessive "emergency" governmental decrees. Such decrees, whose subjects often have no relation to the claimed emergency, authorize human rights violations, including those culminating in collective expulsion, authorization of extreme police force in border protection and a complete restriction of asylum procedures.[205] Furthermore, there is a documented lack of local activism against such policies, however, this could be attributed to PM Orbán's tactic of portraying migrants as a direct threat to the state, alongside the fear of retaliation from the unconstrained government.[206]

In light of Hungary's incessant human rights violations during public emergencies, the Special Rapporteur has distinctly reminded states that the existence of "exceptional or disproportionate operation challenges" such as large migration movements or a state of crisis do not validate pushbacks.[207] Moreover, regional European bodies have maintained a clear stance against Hungarian land pushbacks while voicing explicit concerns over

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[195] Asylum Information Database, Hungary (n.188).
[196] *European Commission v Hungary*, No. C-823/21 (n.194).
[197] *Shahzad v. Hungary,* App No. 12625/17 (Grand Chamber, ECtHR) [2021].
[198] *H.K. v. Hungary,* App No. 18531/17 (Grand Chamber, ECtHR) [2022].
[199] *Shahzad v. Hungary* (n.191) para 58-68.
[200] Hungarian Helsinki Committee, 'Government gains excessive power from forever renewable state of danger' (24 February 2023) [hereinafter HHC Executive Power].
[201] Hungarian Helsinki Committee, 'Overview of Hungary's emergency regimes introduced due the Covid-19 pandemic' (1 January 2022).
[202] Ibid.
[203] HHC Executive Power (n.200) 2.
[204] Hungarian Helsinki Committee, 'Hungary: Perpetuated States of Exception Undermine Legal Certainty and Human Rights' (2 April 2024).
[205] HHC Executive Power (n.197) 5.
[206] Majtényi, Kopper & Susánszky (n.189) 181.
[207] A/HRC/47/30 (n.6) 7, para 46.

the continued state of danger and excessive powers given to PM Orbán.[208] Due to Hungary's prominent lack of change in policy to be in compliance with the CJEU 2020 judgment, Frontex has since stopped Hungarian operations,[209] an incongruous stance considering their contribution to pushbacks in other EU states. However, this clear position against Hungarian pushback policies has proved markedly ineffective. PM Orbán steadfastly refuses to implement any required protections while simultaneously continuing to further the political attacks to garner widespread domestic support in his policies. He overtly defies international and regional rule of law stating Hungary "will maintain the existing regime, even if the European court ordered us to change it"[210] showcasing the ineffectiveness of the legal and political efforts to stop Hungarian pushbacks. As aforementioned, citizens appear to support such policies, whether by acceptance or out of fear, as seen with the re-election of the Fidesz party and PM Orbán in 2022.[211]

This inability of Europe to effectively stop Hungarian pushbacks highlights prevalent protections of sovereignty even in the regional sphere as well as displaying the clear impact of national populist leaders in their ability to successfully perpetuate othering tactics for political advantages.

(b) Inter-American States: United States of America

While in comparison to Europe the inter-American states have an extended history of pushbacks, there was originally an overwhelming lack of action by regional bodies to these violations. In response, a colloquium of representatives from Latin American governments and legal scholars gathered in 1984 to create the Cartagena Declaration on Refugees[212] (Cartegena Declaration). While non-binding soft law, this document expanded the regional refugee definition to include the listed persecutions in the Refugee Convention and additionally:

> "Persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[213]

This specific inclusion reflects the unique regional circumstances and needs, and has been highly influential, with the Commission urging states to adopt this extended definition into domestic policy.[214] While states have been reluctant to do so, with only 16 of the 35 OAS member states[215] adopting a similar provision, the Cartegena Declaration opened the regional conversation on migrant rights. This resulted in regional bodies slowly producing statements affirming legal protections of asylum seekers and openly condemning actions that culminated in violations of international or regional law.

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[208] European Parliament, 'Hungary: MEPs denounce deliberate and systematic efforts to undermine EU values' (01 June 2023) <www.europarl.europa.eu/news/en/press-room/20230524IPR91910/hungary-meps-denounce-deliberate-and-systematic-efforts-to-undermine-eu-values> accessed 12 November 2024.

[209] European Parliament, 'Suspension of Frontex operations in Hungary' (24 February 2021) <www.europarl.europa.eu/doceo/document/E-9-2021-001120_EN.html> accessed 12 November 2024.

[210] Thibault Spirlet, 'Hungary won't abide by EU court ruling on migration, Orbán says' (21 December 2021) <www.politico.eu/article/hungary-challenge-eu-court-ruling-migration-viktor-orban/> accessed 12 November 2024.

[211] Robert Tait & Flora Garmvolgi, 'Viktor Orbán wins fourth consecutive term as Hungary's prime minister' (3 April 2022) <www.theguardian.com/world/2022/apr/03/viktor-orban-expected-to-win-big-majority-in-hungarian-general-election> accessed 12 November 2024.

[212] OAS, *'Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama'* (22 November 1984).

[213] Ibid, 3.

[214] IACHR, 'Human Mobility Inter-American Standards' (2015) OEA/Ser.L/V/II. Doc. 46/15.

[215] Ibid, 50-51.

In 2006, this was seen by the OAS General Assembly adoption of the Protection of Asylum Seekers, Refugees and Returnees in the Americas.[216] This document showcases the OAS support for the Refugee Convention and associated rights, regardless of individual state ratification status, while urging for regional cooperation in implementation of vital principles. It notably references *non-refoulement* and family unity obligations.[217] In 2019, the Commission reaffirmed the regional commitment to international law principles and noted "the universality, indivisibility, interdependence, interrelationship, progressivity and non-regression of all human rights and fundamental freedoms"[218] regardless of the person's migration status. Recently, following the pandemic, the Commission has intensified statements condemning state policies that impede access to asylum procedures, specifically calling out states who are in violation.[219] While there remains a notable absence of the use of the term "pushbacks" by inter-American regional bodies, the overall accumulation of statements condemning *refoulment*, collective expulsions and additional violations of international or regional law in protection of migrants displays a definite stance against pushbacks.

Despite this, since 1981 the United States has continued to implement dangerous pushback policies with minimum consequences, establishing a permissive environment for their continued operation. In discussing this, I have chosen not to detail policies prior to 2017. This is primarily due to the 2016 election of populist leader President Trump, and his administration's highly prominent pushbacks that began one week into his presidency.[220] Like Hungary, many such policies are enacted alongside othering rhetoric framing irregular migrants as dangerous persons that threaten the "welfare and safety of communities"[221] in order to promote support. This rhetoric is ongoing, with a 2022 survey finding that "over half of American adults" believed to some degree that the US is "experiencing an invasion at the southern border" and that migrants smuggling drugs are responsible for "increases of overdose in the US."[222] While these claims are not founded in fact or validity, they prominently display the impact of rhetoric on voters to provide some explanation for the domestic support of pushbacks.

Following President Trump's inauguration in 2017, the first prominent pushback policy constituted of an Executive Order (EO) that denied persons, including asylum seekers, who were coming from specified states, physical access to the US. This ban was aimed to protect the state "from foreign terrorists"[223] but failed to show a concrete correlation between the listed countries and terrorism. Various court injunctions temporarily blocked this EO due to claims of religious discrimination, however in June 2018 the US Supreme Court upheld the legality of a version of the travel ban that restricted travel from five Muslim countries, North Korea, and Venezuela, with no sunset clause. While not overtly labelling the ban as a pushback, the Inter-American Commission on Human Rights expressed concerns that the EO was in violation of the right to seek asylum, *non-refoulment* and collective expulsion.[224] However, once legally brought forth to the Commission in 2022 it was found to be inadmissible due to the complaint's general assertions of harm, instead of naming specific victims. Nonetheless, it was noted that "States are not allowed to implement discriminatory policies,

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[216] OAS, 'Protection of Asylum Seekers, Refugees and Returnees in the Americas' (adopted 06 June 2006) AG/RES. 2232.
[217] Ibid
[218] IACHR, 'Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking' (adopted 07 December 2019) Res. 04/19.
[219] IACHR, 'End of Title 42: IACHR calls on United States to protect rights of migrants and refugees' (26 May 2023) <www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2023/099.asp> accessed 12 November 2024.
[220] Executive Order 13769: Protecting the Nation from Foreign Terrorist Entry into the United States (27 January 2017).
[221] Proclamation 4865: High Seas Interdiction of Illegal Aliens (29 September 1981).
[222] IPSOS, 'On immigration, most buying into idea of "invasion" at southern border' (18 August 2022) <www.ipsos.com/en-us/news-polls/npr-immigration-perceptions-august-2022> accessed 12 November 2024 [hereinafter IPSOS poll].
[223] Executive Order 13769 (n.214).
[224] IACHR, 'IACHR Expresses Concern over Executive Orders on Immigration and Refugees in the United States' (01 February 2017) <www.oas.org/en/iachr/media_center/PReleases/2017/008.asp> accessed 12 November 2024.

even in the name of national security."[225] In January 2021, President Biden removed the travel ban, citing it as a "moral blight."[226]

Under President Trump, the pushbacks continued with the 2019 Migrant Protection Protocols, commonly known as "Remain in Mexico."[227] This policy, implemented in cooperation with Mexico and enforced by the Department of Homeland Security (DHS), removed asylum seekers from US southern borders and expelled them to Mexico to await their immigration court date, regardless of the applicant's nationality. This is despite Mexico experiencing their own "public security crisis."[228] The very nature of the Remain in Mexico policy is implicitly a human rights violation due to the complete lack of due process prior to removal and the high potential for *refoulment*.[229] Subsequently, the Commission noted "deep concern"[230] over the program's failure to respect international obligations. The Special Rapporteur expressed similar concerns, further expressing during the pandemic that "the human rights of migrants are protected under international law, by which the United States of America are bound" and does not change in a state of emergency.[231] While these statements are authoritative, they did not influence President Trump to terminate the policy. It was not until June 2021 that President Biden attempted to end Remain in Mexico; with the program not officially ending until August 2022 due to domestic courts' injunctions.[232]

While the Remain in Mexico policy was still in effect, President Trump implemented another simultaneous pushback policy in response to the COVID-19 pandemic. Known commonly as Title 42, this World War II era public health policy[233] provided that if a communicable disease is present in a foreign country and there is reasonable danger of introduction into the US, the government "shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries."[234] While the government firmly maintained Title 42 was not an immigration policy, it was utilized as justification to summarily expel asylum seekers and suspend any further applications. Further justification for such actions lay in the claim that migrant holding areas were not suitable for quarantine or social distancing.

The use of Title 42 as an immigration policy was widely rejected by national, regional, and international bodies due to the violations of collective expulsion and *non-refoulment*.[235] The Commission was particularly vocal of the potential human rights implications and remarked on the increased risk of violence faced by migrants.[236] The Special Rapporteur further noted that "non-white asylum seekers"[237] are disproportionately impacted by such policies, suggesting a potential racial discrimination element. Public health experts likewise condemned the use of this policy as an immigration tool due to the lack of evidence concluding the removal

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[225] IACHR, 'Report No. 291/22 Petition 3034-18' (01 November 2022) OEA/Ser.L/V/II. Doc. 296.
[226] Proclamation on Ending Discriminatory Bans on Entry to The United States (20 January 2021).
[227] US DHS, 'Remain in Mexico' (08 August 2022) <www.dhs.gov/archive/migrant-protection-protocols> accessed 12 November 2024.
[228] HRW, 'We Can't Help You Here' (02 July 2019) <www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico> accessed 12 November 2024.
[229] Ibid.
[230] IACHR, 'IACHR Expresses Deep Concern about the Situation of Migrants and Refugees in the United States, Mexico, and Central America' (23 July 2019) <www.oas.org/en/iachr/media_center/PReleases/2019/180.asp> accessed 12 November 2024.
[231] OHCHR, 'Mandate of the Special Rapporteur on the human rights of migrants' (7 March 2019) OL USA 4/2019.
[232] Remain in Mexico (n.227).
[233] 42, U.S. Code Section 265 (Title 42).
[234] Ibid.
[235] IACHR, End of Title 42 (n.230).
[236] Ibid.
[237] A/HRC/50/31 (n.159) 9-10.

of migrants prevents the spread of COVID-19.[238] Nonetheless, prior to Title 42's sunset in May 2023 by President Biden, 2.8 million migrants were arbitrarily expelled from the United States.[239]

Yet, the United States has failed to consider these statements as the end of Title 42 has not shown to be the end of US pushbacks. What is often considered the replacement policy, known as Title 8, continues to restrict access to asylum and places a heavy burden of proof on the migrant in the face of criminal prosecution.[240] On this, the Commission asserts the sovereign right to set migration legislation but then asserts "these policies must ensure the protection of the human rights of persons in human mobility" further calling the US to adopt a human rights based approach to irregular migrants.[241]

This continual practice of pushbacks by the United States clearly demonstrates the denial of obligations, despite regional soft law and conventions assertion. Yet, national public support for pushback policies within the United States is prevailing, with many calling for the return of Title 42 despite the discontinued state of emergency.[242] This popularity stems from persuasive us *vs* them ideology, perpetrated under President Trump, that has placed irregular migrants as perceived threats to national security. This placement of immigration as a security issue assists in supporting the contention between sovereignty and human rights protections as an either-or choice, suggesting that both cannot coexist. This is highly similar to Hungary, displaying the similarity in tactics by national populist leaders in order to push self and state interests.

D. WHAT IS REVEALED ABOUT INTERNATIONAL LAW WITH THE CONTUINED USE OF PUSHBACK POLICIES THROUGHOUT A STATE OF EMERGENCY?

In addressing irregular migration, the previous sections have displayed the severe disconnect between international law and domestic policy in practice. While international law principles provide clear protections for migrants, regardless of their refugee status, the continued use of pushbacks blatantly displays states' denial of these duties.[243] International and regional bodies have attempted to address this issue by way of soft law and assertions reminding states of their commitments, however, have seen little success. I argue this failure can be attributed to international law's fundamental inability to address pushbacks that is amplified under national populist leaders.

1. International Law is Not Equipped to Address Pushbacks: Sovereignty and Populism

At the root of international law's inability to address pushbacks lies sovereignty, specifically in the perpetuated dichotomy between human rights and state interests. Throughout this work I have framed this contention as false, due to the mutual enshrinement in the UN Charter and the proposed theoretical application for states respect of both. However, I now assert the ongoing practical application by states has brought this conflict into reality. At international borders, internal sovereignty, which functionally demands states protect the safety and security of its citizens,[244] is manifested through border management. In prioritization of this, exclusionary measures are implemented to protect the country from perceived outside

[238] A/HRC/47/30 (n.6) 19, para 106.
[239] Muzaffar Chishti & Kathleen Bush-Joseph, 'U.S. Border Asylum Policy Enters New Territory Post-Title 42' (25 May 2023) <www.migrationpolicy.org/article/border-after-title-42> accessed 12 November 2024 [hereinafter Chishti & Bush-Joseph].
[240] Ibid.
[241] IACHR, End of Title 42 (n.230).
[242] IPSOS poll (n.222).
[243] A/HRC/47/30 (n.5) 18, para 100.
[244] Perruchoud (n.29) 124.

threats, as seen in pushback policies. Yet, herein lies the paradox, how can human rights that prohibit certain exclusionary measures and provide protections, be reconciled with a state's essential need to protect its citizens?[245] I assert that under the current understanding in international law of sovereignty and universal human rights, mutual respect is not possible. Therefore, international law is not equipped at this time to address pushbacks in a comprehensive manner.

Furthermore, national culture and identity are highly intertwined with a defined physical territory and the citizens who reside within.[246] Thus, any limitations on a state's discretion over domestic migration policy, such as protections found in IHRL and IRL, are often perceived as an attack on the nation itself alongside their sovereign rights. The prevalence of contemporary international challenges, such as terrorism or irregular migration has intensified this view.[247] Such placement of human rights obligations as an infringement of sovereignty furthers the paradox and prevents the full realization of both rights. Another layer to this paradox lies in the essential need for inter-state relationships and shared responsibility[248] in addressing irregular migration due to globalization. While not as a blatant contention, external sovereignty and thus the right of states to conduct relations without outside influence[249] can protect a state from being compelled to cooperate internationally in addressing pushbacks in a comprehensive manner.

While international and regional bodies attempt to reconcile this contention by upholding both the legality of sovereignty and principles against pushbacks[250] the continual prioritization of state interests to promote widespread acceptance[251] demonstrates a clear inability to obtain a balance within law. This, alongside the lack of actionable accountability for states who are not in compliance with international law,[252] signals that the international community will protect sovereignty over human rights if state acceptance is a factor. Yet, this should be no surprise as the international framework is inherently designed to consider states' interests and their acceptance, as seen by the unique legal value of sovereignty[253] only granted to those with statehood. Indeed, while *erga omnes* rights and customary international law provides a minimum standard, nations exercise their sovereignty in ratification or rejection of treaties[254] facilitating a system based on a fundamental prioritization of states interests. A possible solution to this would be to balance a state's sovereignty with the inclusion of outside, independent organizations such as NGO's. These organizations would bring with them their own diverse interests and would offer an authoritative push to the international community to consider such that would otherwise be overshadowed by state wants. Specifically human rights NGOs would be able to offer support in offsetting the heavy emphasis on state acceptance, thus assisting in removing the contention between sovereignty and migrant rights While at this time, I do not foresee this occurring due to states' desire to continue benefiting from the status quo, with the increase of emergence in non-state actors this has significant potential.

Furthermore, international law's inability to address this paradox is heightened by the recent rise of national populist leaders. The contention of human rights with sovereignty at international borders takes on life through political messaging grounded in a model of sovereignty reliant on the general will of the homogenous people.[255] This othering tactic is used to unite a specific population into action and assists national populist

[245] Ibid.
[246] Perruchoud (n.29) 124-125.
[247] Ibid, 125.
[248] Desmond (n.67) 324.
[249] Perruchoud (n.28)123.
[250] A/HRC/47/30 (n.5) 4, para 32-33.
[251] Desmond (n.67) 324.
[252] Ibid.
[253] Crawford (n.27) 118.
[254] Ibid, 124.
[255] Muddle & Rovira Kaltwasser (n.16) 543.

leaders in securing popular approval and votes. When "outsiders" are introduced, such as irregular migrants seeking international protections, they are portrayed as in opposition to state interests and therefore a security threat.[256] As discussed, these messages are typically rooted in xenophobia and racism, rather than in a truth of any true threat to the nation. PM Orbán has continually publicly asserted that migration leads to the "disintegration of nations and states"[257] and the "defense of the borders"[258] ensures public security. President Trump uses similar rhetoric, framing irregular migration "like an invasion"[259] and places border policy as a national security issue.[260] While this portrayal is a political strategy, it heavily assists in reinforcing the reality of the immigration dichotomy of human rights and sovereignty. When these statements are implemented into public policy, thus culminating in violations of international law through pushbacks, there is a noticeable lack of actionable accountability, as seen in section C. This culmination of factors reveals international law's inadequacies and inability to address this contention in protection of migrant rights.

2. International Law's Inadequacies in Public Emergencies: Fragmentation and Margin of Appreciation

A potential solution for assisting international law in addressing pushbacks and aiding in accountability would be implementing new hard laws, such as through an international convention. However, in addition to the unlikelihood of states supporting this, it would contribute to fragmentation. Fragmentation, a "paradox of globalization"[261] is the emergence of specialized branches or regimes in international law, such as IHRL and IRL, that has resulted in overlapping jurisdictions with inconsistent case law.[262] This occurs simultaneously alongside the development of regional and international law.[263] The "reality and importance of fragmentation"[264] is not questioned, instead a difference in criticism on its impact and management has emerged. While the scope of this work is not to evaluate this, fragmentation's influence on the international community's ability to address pushbacks is undeniable. A clear demonstration of this is seen in the previously discussed patchwork of laws with various applicable principles relevant to pushbacks found alongside soft law and state practices. As aforementioned this has been proven to be useful in providing a standard of treatment for irregular migrants, there remains gaps between the different specialized branches that is heightened by the varied state acceptance of different treaties. As such, while a convention on pushbacks, if accepted by states, may assist in the short term, yet it would have long term implications on international law that may prevent addressing future issues.

With these inadequacies established, I will now consider if international law is equipped to address pushbacks in times of emergency. As human rights derogations in times of emergency have already established jurisprudence, contributing to fragmentation is a lesser concern. Yet, despite this, significant

[256] Hauge Centre Report (n.21) 5-6.
[257] 'Viktor Orbán's full speech for the beginning of his fourth mandate' (12 May 2018) <https://visegradpost.com/en/2018/05/12/viktor-orbans-full-speech-for-the-beginning-of-his-fourth-mandate/> accessed 12 November 2024.
[258] 'Full speech of V. Orbán: Will Europe belong to Europeans?' (24 July 2017) <https://visegradpost.com/en/2017/07/24/full-speech-of-v-orban-will-europe-belong-to-europeans/> accessed 12 November 2024.
[259] White House, 'Remarks by President Trump on the Illegal Immigration Crisis and Border Security' (01 November 2018) <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/> accessed 12 November 2024.
[260] Ibid.
[261] ILC, Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi (13 April 2006) A/CN.4/L.682.
[262] Martti Koskenniemi & Päivi Leinopg, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553-579 [hereinafter Koskenniemi & Leinopg].
[263] A/CN.4/L.682 (n.255), 10 para 7-9.
[264] Ibid, 10, para 9.

challenges prevent human rights derogations in public emergencies, including pushback policies, from being appropriately addressed. While the very nature of an emergency means the required measures to address it are unpredictable, there is inconsistent case law regarding the application of current principles[265] allowing international law to be complicit in the continuation of human rights violations in states of crisis.

This is loosely attributable to sovereignty as well, due to the margin of appreciation,[266] a concept that states have certain discretion over their laws and enforcement. While not inherently detrimental, as it promotes democracy,[267] its use by courts when examining state compliance with derogation in times of emergency results in overall deferral to the national judgments. This includes on the crisis validity itself and legality of human rights derogations implemented in response.[268] These two considerations are highly intertwined, as per the proportionality test derogations must be justified under the emergency. This practice has become more normal than irregular in courts discussing public emergencies, yet this prevalent practice fails to consider any state weaknesses or wrongdoing. Critics have asserted this overuse of the margin of appreciation by courts in these situations is an "easy way out" to avoid difficult decisions.[269] Yet whether its avoiding responsibility or the court is simply going along with the precedence, it has harmful implications for maintaining state accountability. If courts incorrectly differ to state's judgments on the public crisis's validity, this directly impacts if the derogations are considered appropriate, paving way for abuse. The effectiveness of the judicial system as an accountability measure is removed, resulting in failing to safeguard minorities against the "tyranny of the majority."[270] Thus, realistically states who facilitate pushbacks in actual or manufactured emergencies are unlikely to be held fully responsible by the international community, further contributing to the inability to address unlawful derogations in a comprehensive manner.

One proposed solution to assist in addressing public emergencies in a consistent manner is that of a new universal court.[271] However, I believe this an overly idealistic approach and highly unlikely to occur due to the potential intense time and money constraints. Furthermore, as discussed, states are reluctant to engage in acts that may result in loss of sovereignty or restrictive oversight, such as submitting to judicial competence. This is already an ongoing challenge with the current international courts, as demonstrated in states' refusal to submit to the International Criminal Court (ICC) jurisdiction. The United States under President Trump went as far to declare the ICC as a threat to sovereignty as well as an impediment to "the critical national security and foreign policy work."[272] Another international court would be met with the same criticism and ultimately be an expensive and lengthy process that would not comprehensively address the inadequacies found in international law.

A similar proposed idea has been to allow the International Court of Justice (ICJ) to review inconsistent cases to create advisory opinions. This has been proposed specifically as a method to avoid further and heal current fragmentation[273] and is a logical solution when considering physical restraints such as money and time. Furthermore, this could potentially provide the desperately needed insight into a global standard on pushbacks, both in regular times and times of crisis, through the authoritative voice of the ICJ. With the prevalence of soft law in relation to migration, an ICJ advisory opinion could offer a strongly persuasive assessment, without the constraints on states of binding law. Conversely, as ICJ advisory opinions are not

[265] Sheeran (n.68) 493.
[266] Ibid, 538.
[267] Ibid, 538-540.
[268] Ibid, 539-40.
[269] Ibid.
[270] Ibid.
[271] Koskenniemi & Leinopg (n.262) 544.
[272] Executive Order 1392: Blocking Property of Certain Persons Associated with the International Criminal Court (11 June 2020).
[273] Koskenniemi & Leinopg (n.262) 544.

binding, and states, specifically those with national populist leaders, are unlikely to adhere to the recommendations.[274] Further issues may arise as national populist governments who emphasize sovereignty at the cost of human rights would potentially view this expansion of scope as a threat to sovereignty. A widespread belief of this would directly contribute to the dichotomy of sovereignty and human rights, instead of assisting in bringing such into alignment. While there is always risk in change, I believe this potential to be quite significant due to national populist leaders discussed attitudes towards any perceived infringement on sovereignty. Moreover, such reactions could create a negative rippled impact on future advisory opinions, such as through an increased state disregard for advisory opinions, regardless of the subject. Unfortunately, while more likely to be successful than a new court, due to these challenges I ultimately do not believe utilizing the ICJ in this manner would prove to be a successful long-term solution in addressing pushbacks in public emergencies in a comprehensive manner.

E. CONCLUSIONS: INTERNATIONAL LAW'S POTENTIAL

To conclude this work, I will briefly provide two possible methods that, upon further examination, may provide opportunities for international law to rectify the sovereignty-human rights contention and address pushbacks in a comprehensive manner. I will note that these methods are contingent on recognizing pushbacks inherent discriminatory and xenophobic uses and thus involves considering them as within the scope of genocide or crimes against humanity.

While this is a strong statement to assert pushbacks as a part of two internationally recognized crimes, it is not an absurd reach due to the Rome Statute's[275] provision against methods of collective expulsion. Genocide is found to include forcible transferring of children from one to group to another[276] with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[277] While this is not the expressed aim of pushbacks as discussed in this work, it can be a biproduct as seen with Title 42's international population transfers. Furthermore, the hateful othering used to further such policies by national populist leaders are clearly rooted in discrimination and at a minimum a desire by states to not have such populations in the defined territory, and at most a deep desire to destroy the entirety of the group. A hurdle in proving genocide would be demonstrating the policies special intent to destroy or damage the group,[278] but this can be possibly assisted by the plethora of state sponsored discriminatory comments towards ethnic groups. Again, however even when these public comments and policy are clear in their desire to remove or prevent specific groups from their territory through pushbacks, to fall under the Rome Statute they must display a clear culmination of collective expulsion of children with a direct intent to destroy such group. Furthermore, due to severe connotations associated with the term genocide and other potential procedural difficulties I assert it would be difficult to draw this described connection between pushbacks and special intent in a way that would not be controversial and accepted globally. Yet, as pushbacks inevitably increase under national populist leaders, and as communities become emboldened in hate and fear, this may change. However, at this time I do not believe using the term genocide would assist in stopping pushbacks in a meaningful manner and instead polarize the international community.

The second category, one I believe would be more successful in addressing pushbacks, is within the scope of crimes against humanity. As defined in the Rome Statute, crimes against humanity can consist of

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[274] Ibid, 568.
[275] UNGA, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 01 July 2002, last amended 2010) 2187 UNTS 3 [hereinafter Rome Statute].
[276] Ibid, art 6(e).
[277] Ibid.
[278] Ibid, art 6.

"deportation or forcible transfer of population"[279] in a "widespread or systematic attack directed against any civilian population, with knowledge of the attack."[280] The broader application, as well as the specific inclusion of deportation relates directly to pushbacks. This is seen in the threshold of unlawful deportation consisting of "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."[281] As under the Refugee Convention irregular migrants are considered lawfully present if crossing borders to seek asylum[282] and when these persons are expelled, the threshold is met. The connection between collective expulsions, pushbacks and thus crimes against humanity is also clear with the use of similar language and meanings. I am not the first, or undoubtably the last to assert this, due to this direct relationship within the language used[283] alongside leader's discriminatory statements explicitly asserting their policies as an attack on specific civilian groups.

Here, the xenophobic comments and actions of states' leaders would prove highly useful in displaying a systemic attack against a specific group for the purpose of constituting a crime against humanity. For both Hungary and the United States, the plethora of statements and policy regarding forcible transfers of the Muslim population would be highly applicable due to explicit comments against this defined group. Specifically in the United States this is seen in the aforementioned Muslim travel ban. Furthermore, as the understanding of collective expulsions is still expanding, this could be used to the advantage of the international community, developing the concept to be become parallel with unlawful deportation. Using an already implemented ideology as found in regional and international treaties to be the foundational concept for collective expulsions, concern around state acceptance is diminished as they have already acknowledged such language. This assists in propelling collective expulsions, and therefore pushbacks, into an established area of law and supports mending the gap found in the patchwork of international law, while simultaneously avoiding fragmentation. Doing so would also allow for considerations in times of emergency to establish clear protections against collective expulsions when states implement derogations.

The discussion of pushbacks as within the purview of these international crimes could constitute another work within itself, however under this very brief overview I have attempted to establish the idea that pushbacks may amount to genocide. As well, I have attempted to establish that crimes against humanity often already do constitute a crime against humanity, and by classifying them as such provide an avenue for meaningful state accountably as well as bringing about an alignment in language around pushbacks. With this, I will now propose how the international community can use this to address this subject in a comprehensive manner to hold those who perpetuate these policies accountable and prevent the arbitrary loss of human life. The first potential method would be through utilization of the Responsibility to Protect[284] (R2P) doctrine. R2P sets forth three principles: the responsibility of states to protect "its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,"[285] the assertion that the international community should assist in implementing this and if a state "manifestly"[286] fails to protect against these actions it is the duty of the international community to take collective action. While controversial, R2P could provide the framework for global cooperation towards the intervention of pushbacks. It must be noted here that a key element in this is that states must want to support cooperation towards the intervention of pushbacks for the protection of persons, regardless of other competing state interests. Expanding R2P's

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[279] Ibid, art 7(1)(d).
[280] Ibid, art 7.
[281] Ibid, 7(2)(d).
[282] Refugee Convention (n.53) art 31.
[283] Legal Centre Lesvos, 'Crimes Against Humanity in the Aegean' (02 February 2021) 36.
[284] UNGA Res. 60/1, '2005 World Summit Outcome' (24 October 2005) A/RES/60/1.
[285] A/RES/60/1 (n.278) 30, para 138.
[286] Ibid, 30, para 138.

scope has already been suggested following the seen impact of COVID-19, specifically its disproportionate impact on minorities,[287] and could assist in addressing the multifaceted issue of pushbacks in states of crisis. However, as action for R2P must be authorized by the UN Security Council (UNSC)[288] this method is unlikely to ever be utilized as state interests would ultimately prevail, specifically the interests of those that sit on the UNSC.

Instead, I propose a second consideration on how international law may be used to address pushbacks in times of emergency, despite its addressed inadequacies. I assert, due to the prevalence of sovereignty and state interests, instead of holding states accountable, to hold the national populist leaders who perpetuate this ideology accountable within the ICC. By changing the subject of accountability, state sovereignty remains respected while ensuring protections of human rights, thus assisting in reconciling these subjects within international law. This would in no way mend this contention, but it could provide a step forward, sending a clear message to the international community that such ideology will not be tolerated. Furthermore, this method would take away a driving factor of pushbacks, the populist leader themselves. By removing this key factor behind othering tactics, the rise in pushbacks, both in regular times and during crisis should greatly decrease in prevalence. While this may be drastically overestimating the potential impact, as the ICC remains a contentious subject for some states, including the US, I believe this would be the route that would see the most success. By placing the focus on the leader instead of the state, the challenges that arise from sovereignty would be diluted and human rights could be upheld. Again, while this does not provide a long-term solution to the dichotomy of sovereignty and human rights, it would be a massive step towards reconciling such.

Overall, with the inability of international law at this time to address pushbacks, it is difficult to propose a solution that simultaneously assists in public emergencies that would not be destined for disaster. Adding this extra layer of emergencies also adds further concepts for states to disagree on, regardless of whether the leader is a national populist. While I believe holding the leader themselves accountable for such discriminatory policies provides a path to assist in addressing such, I will not pretend this is the sole answer to this question. Yet, I also do not think all hope is lost. While I am unsure if the dichotomy between sovereignty and human rights will ever fade, I assert there must be a way to utilize the current international framework to progress reasonable changes while a comprehensive solution is considered. The ever-increasing violations of IHRL and IRL cannot feasibly go unaddressed long-term, and I have hopes states will begin to see that it is in their best interests to prevent such violations. Perhaps this is an overly idealistic mindset to pushbacks and public emergencies, but, as the alternative is the ever-increasing arbitrary loss of migrant's lives and egregious violation of human rights, I refuse to lose hope.

[287] Nadia Jeiroudi, 'The Wrath of a Pandemic: A Call to Expand R2P in Response to Covid-19' (February 2021) <www.mjilonline.org/the-wrath-of-a-pandemic-a-call-to-expand-r2p-in-response-to-covid-19/> accessed 12 November 2024.

[288] A/RES/60/1 (n.278) 30 para 139.