

Generalised push-back practices in Europe. The right to seek asylum is a fundamental right

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Abstract

In recent years, more and more asylum seekers trying to reach the European Union (EU) have found themselves subjected to practices that contradict the EU Charter of Fundamental Rights and the democratic principles within the Dublin III Regulation. The inalienable right of those individuals to seek asylum is violated every time that the Member States' national authorities subject them to irregular procedures and deny them their right to international protection without an individual assessment of their asylum claims. These practices are defined as push-backs.

This brief outlines the ways in which asylum seekers are exposed to both 'external' and 'internal' push-backs by and between the Member States, while also underscoring the importance of safeguarding the physical safety and integrity of people seeking asylum. It offers case studies of EU countries where push-backs have become the new normal, and highlights the role of courts in remedying the widespread push-backs practices. Within this context of generalized push-backs and executive backlash against European and domestic judgments finding violations of human rights, the withdrawal of the European Border and Coast Guard Agency from Hungary is an alarming signal for human rights protection. In the face of the rule of law and human rights challenges, was the Agency's withdrawal the most appropriate measure?

Finally, it asks whether the recent EU border procedure proposed in 2020 will have a positive or a negative impact on the right to seek asylum on the ground.

Keywords: Asylum; Right to seek asylum; European Union; Dublin Regulation; Push-backs.

Resumen. *Prácticas de devoluciones forzosas en Europa. El derecho a solicitar asilo es un derecho fundamental.*

En los últimos años, cada vez más solicitantes de asilo que intentan llegar a la Unión Europea (UE) se han visto sometidos a prácticas que contradicen la Carta de los Derechos Fundamentales de la UE y los principios democráticos del Reglamento Dublín III. El derecho inalienable de esas personas a solicitar asilo se viola cada vez que las autoridades nacionales de los Estados miembros las someten a procedimientos irregulares y les niegan su derecho a protección internacional, sin una evaluación individual de sus solicitudes de asilo. Estas prácticas se definen como devoluciones forzosas.

Este resumen describe las formas como los solicitantes de asilo están expuestos a devoluciones tanto "externas" como "internas" por parte de los Estados miembros y entre ellos, al mismo tiempo que subraya la importancia de salvaguardar la seguridad física y la integridad de las personas que solicitan asilo. Ofrece estudios de casos de países de la UE donde las devoluciones se han convertido en la nueva normalidad y destaca el papel de los tribunales para remediar las prácticas generalizadas de devoluciones. Dentro de este contexto de rechazos generalizados y reacciones violentas del ejecutivo contra las sentencias europeas y nacionales que declaran violaciones de los derechos humanos, la retirada de la Agencia Europea de la Guardia Costera y de Fronteras de Hungría es una señal alarmante para la protección de los derechos humanos. Ante los desafíos del Estado de derecho y los derechos humanos, ¿era la retirada de la Agencia la medida más adecuada?

Por último, se pregunta si el reciente procedimiento fronterizo de la UE, propuesto en 2020, tendrá un impacto positivo o negativo sobre el derecho a solicitar asilo sobre el terreno.

Palabras clave: Asilo; Derecho a solicitar asilo; Unión Europea; Reglamento de Dublín; Devoluciones forzosas.

Resum. *Pràctiques de devolucions forçoses a Europa. El dret a sol·licitar asil és un dret fonamental.*

En els darrers anys, cada cop més sol·licitants d'asil que intenten arribar a la Unió Europea (UE) s'han vist sotmesos a pràctiques que contradiuen la Carta dels Drets Fonamentals de la UE i els principis democràtics del Reglament Dublín III. El dret inalienable d'aquestes persones a sol·licitar asil es viola cada vegada que les autoritats nacionals dels Estats membres les sotmeten a procediments irregulars i se'ls nega el dret a la protecció internacional, sense una avaluació individual de les sol·licituds d'asil. Aquestes pràctiques es defineixen com a Devolucions forçoses.

Aquest resum descriu les formes en què els sol·licitants d'asil estan exposats a devolucions tant "externes" com "internes" per part dels Estats membres i entre ells,

ahora que subratlla la importància de salvaguardar la seguretat física i la integritat de les persones que sol·liciten asil. Ofereix estudis de casos de països de la UE on les devolucions s'han convertit en la nova normalitat i destaca el paper dels tribunals per posar remei a les pràctiques generalitzades de devolucions. Dins d'aquest context de devolucions forçoses i de reaccions violentes de l'executiu contra les sentències europees i nacionals que declaren violacions dels drets humans, la retirada de l'Agència Europea de la Guàrdia Costanera i de Fronteres d'Hongria és un senyal alarmant per a la protecció dels drets humans. Davant els desafiaments a l'Estat de dret i als drets humans, la retirada de l'Agència era la mesura més adequada?

Finalment, es pregunta si el recent procediment fronterer de la UE, proposat el 2020, tindrà un impacte positiu o negatiu sobre el dret a sol·licitar asil sobre el terreny.

Paraules clau: Asil; Dret a sol·licitar asil; Unió Europea; Reglament de Dublín; Devolucions forçoses.

Summary

1. Seeking asylum in Europe. Push-back practices under the Common European Asylum System
2. Border guards and court judgements. The decision of Frontex in Hungary
3. Current challenges to remedy push-back practices
4. The possible impact of the new EU border procedure

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1. SEEKING ASYLUM IN EUROPE. PUSH-BACK PRACTICES UNDER THE COMMON EUROPEAN ASYLUM SYSTEM

In Europe, the right to asylum is a key, fundamental right enshrined in the EU Charter of Fundamental Rights¹ (Art. 18). It is legally binding for all EU institutions and Member states responsible for asylum and migration procedures. However, some Member states engage in widespread practices that subject people seeking international protection to violence, intimidation and arbitrary denial of access to asylum procedures. These practices, also known as pushbacks², are occurring both at EU borders, as well as within the EU, between Member states' shared borders. European Courts (the Court of Justice of the EU and the European Court of Human Rights), the EU's Fundamental Rights Agency and the UNHCR have found Belgium³, Greece⁴, Lithuania⁵, Poland⁶, Hungary⁷, Italy⁸, Spain⁹, Bulgaria¹⁰ and Croatia¹¹ in violation of the principle of non-refoulement, prohibition of collection expulsion, and the right to an effective legal remedy, precisely because of their extensive push-back practices.

¹ OJ C 326, 26.10.2012, p. 391–407.

² For a definition of push-backs, see Fundamental Rights Agency (FRA), 2020 Report 'Migration: Fundamental Rights Issues at Land Border'.

³ ECtHR, Čonka v. Belgium, Appl. no. 51564/99, Judgment of 5 February 2002.

⁴ UNHCR Briefing Note: [UNHCR– UNHCR calls on Greece to investigate pushbacks at sea and land borders with Turkey](#)

⁵ ECtHR, M.A. and Others v. Lithuania, Appl. no. 59793/17, Judgment 11 November 2018.

⁶ ECtHR, M.K and other v Poland, Appl. nos. 40503/17, 42902/17 and 43643/17, Judgment 23 July 2020, the link is here: <https://hudoc.echr.coe.int/eng>

⁷ ECJ Judgment of 17 December 2020, Case C-808/18 Commission v Hungary, ECLI:EU:C:2020:1029.

⁸ ECtHR, Khlaifia v. Italy, Appl. No. 16483/12, Grand Chamber, Judgment of 15 December 2016 and Hirsi Jamaa and others v Italy, Appl. no. 27765/09, Judgment of 23 February 2012.

⁹ 2020 Report 'Migration: FRA 2020 Report 'Migration: Fundamental Rights Issues at Land Border', p.18.

¹⁰ ECtHR, D v. Bulgaria Appl. no. 29447/17, Judgment 27 July 2021.

¹¹ ECtHR, M.H. and others v Croatia, Appl. nos. 15670/18 and 43115/18, Judgment of 1 November 2021.

Additional push-backs practices are conducted in other EU countries with external borders, such as Romania, however cases have not yet herein reached the courts¹².

Moreover, beyond the EU border push-back practices, the 'internal' push-backs between the Member states (in Eastern Europe, see Jafari;¹³ for Western Europe, see Arib¹⁴) reflect a persistent lack of solidarity among the Member states. The lack of solidarity is endemic, as no one will take responsibility for asylum seekers who are then 'ping-ponged' from country to country (see the judgment of the Serbian Constitutional Court¹⁵ declaring push-backs from Serbia to Bulgaria unlawful). While the Dublin III Regulation¹⁶ and bilateral return readmission agreements (under Art. 6(3)) of the Return Directive¹⁷ are supposed to enhance effectiveness of asylum adjudication and migrant returns, these instruments have in practice been used to achieve the opposite aim: avoiding compliance with the legally binding EU right to seek asylum.

The Dublin III Regulation

The main goal of the Dublin III Regulation is to ensure quick access to asylum procedures and the examination of an application on its merits by a single, clearly determined EU country. The Regulation establishes the Member State responsible for the examination of the asylum application (European Commission, n.d.). Some of the theoretical purposes of the Regulation are to: - Offer quick access to protection and efficiency of asylum procedures. - Prevent multiple applications by asylum seekers in several EU Member States. - Reduce the number of asylum seekers transferred between EU Member States.

¹² Madalina Moraru and Felicia Nica, 'A practical evaluation of border activities in Romania: control, surveillance and expulsions', Chapter 9 in Marco Stefan and Sergio Carrera (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union - Complaint Mechanisms and Access to Justice* (Routledge 2020).

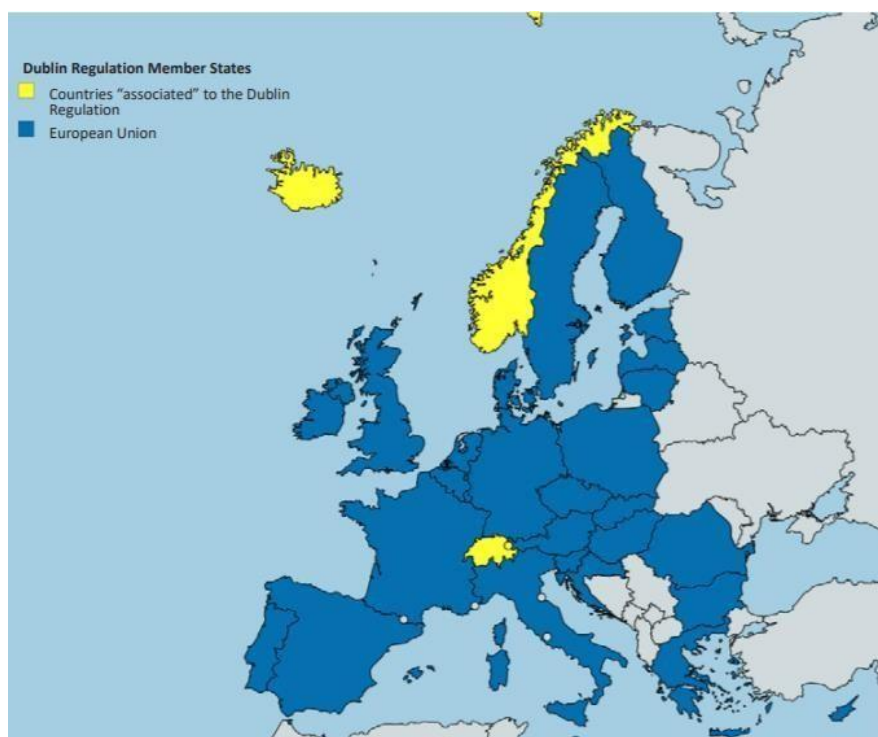
¹³ ECJ, C-646/16, Jafari, ECLI:EU:C:2017:586

¹⁴ C-444/17, Arib and Others, ECLI:EU:C:2019:220

¹⁵ Constitutional Court of Serbia, decision Už-1823/2017.

¹⁶ Regulation(EU) No 604/2013

¹⁷ Directive 2008/115/EC



Source: EASO, 2019: 15¹⁸

2. BORDER GUARDS AND COURT JUDGEMENTS. THE DECISION OF FRONTEX IN HUNGARY

The year 2021 began with the unprecedented decision¹⁹ of the European Border and Coast Guard Agency (Frontex) to suspend its activity in Hungary. This was allegedly due to this country's persistent non-compliance with the right to asylum and its guarantees, in defiance of both the European Commission's infringement procedures and a CJEU judgment²⁰ that found Hungary's restrictive asylum practices in breach of the right to asylum and principle of non-refoulement. However, is this Frontex decision aimed at complying with human rights, or is Frontex instead simply avoiding being held jointly legally accountable?

The Frontex decision to withdraw from Hungary has left a profound gap in on-the-ground monitoring, as NGOs and the UNHCR are not allowed access to the transit zone camps. Unfortunately, the minimal EU legal compliance that was still ensured by Hungarian border guards will probably vanish. Judging by the Hungarian Ministries of Justice and Home Affairs' press releases²¹, the judgments issued by a far away court

¹⁸ EASO Practical Guide: Qualification for international protection: <https://euaa.europa.eu/sites/default/files/easo-practical-guide-qualification-for-international-protection-2018.pdf>

¹⁹ Pushbacks at the EU's external borders', European Parliamentary Research Service Briefing, PE 689.368 – March 2021, p.4.

²⁰ December 2020, Case C-808/18 Commission v Hungary, ECLI:EU:C:2020:1029.

²¹ Euronews, 28.1.2021.

(i.e. CJEU) will not ensure that border guards in Hungary comply with human rights. The on-the-ground Frontex border guards served as some of the last effective human rights gatekeepers. The danger of Frontex withdrawing from the Serbian-Hungarian border for security in the Union and human rights is thus high. In the face of the rule of law and human rights challenges, was the Agency's withdrawal the most appropriate measure?

Measures taken by Hungarian law enforcement authorities against irregular migrants							
2017	Jan.	Feb.	March	April	May	June	Total
Blocked entries at the border fence	1,679	2,183	647	27	395	1,024	5,955
Escorts to the external side of the border fence	1,423	1,050	350	118	330	711	3,982
Irregular migrants apprehended	138	166	37	46	112	50	549
Total	3,240	3,399	1,034	191	837	1,785	10,486

Source: Hungarian Helsinki Committee, 2017



3. CURRENT CHALLENGES TO REMEDY PUSH-BACK PRACTICES

The greatest challenge in remedying push-back practices is the difficulty in identifying and litigating them (on litigation difficulties see the difficulties in litigating the Slovenian push-backs²²), which means that such practices might be even more widespread than current human rights monitoring bodies have the capacity to identify, or that courts have the ability to sanction.

3.1. A recent case of chain push-back practices taking place from Slovenia to Croatia, and then onwards to Bosnia

In this instance, around 30 third-country nationals have been forcibly escorted to Croatia by the Slovenian police without their oral asylum claims being registered, or without receiving any written decision rejecting their asylum claim or communicating a return decision. Croatian police proceeded in the same manner, forcibly escorting individuals to Bosnia without informing them of their rights to choose destinations. The case of one of these third-country nationals, who was subject to the Slovenian push-backs, is currently being presented by pro bono lawyers before the Administrative Court in Slovenia. Such a procedure allows individuals to challenge material acts that interfere with their fundamental rights. The Administrative Court's almost 200-page long judgment is an in-depth analysis and application of relevant EU legislation, CJEU and ECtHR jurisprudence to a highly political case, significant as well for the broader EU.

3.2. What the Administrative Court of Slovenia found

The Court found violations of multiple fundamental rights, including of the right to asylum, the principle of non-refoulement and the prohibition of collective expulsion. The judgement essentially required that police forces respect the right to claim asylum²³, and that they fulfil their duty of cooperation as stated in Article 4 of the Qualification Directive²⁴. It thus required the police forces to put an end to the arbitrary and forceable transfers of third country nationals to another Member state. The Slovenian Ministry of Interior has appealed the Administrative Court's judgement twice, and the case is now pending before the Supreme Court. The final judgment of the Administrative Court, following the Supreme Court decision, will be referential for

²² See TRIIAL webinar, presentation of Mohor Fajdiga, <https://youtu.be/5mhaHBji0nM>

²³ Slovenia, Administrative Court of Republic of Slovenia, I U 1490/2019-92, 22 June 2020.

²⁴ Directive 2011/95/EU

domestic courts across the EU and lawyers litigating asylum seekers' rights, particularly in push-back cases.²⁵

4. THE POSSIBLE IMPACT OF THE NEW EU BORDER PROCEDURE

On 23 September 2020, the European Commission put forward a proposal for a new regulation on the screening of third-country nationals at external borders, aiming to clarify and streamline the rules on dealing with third-country nationals who arrive at the EU borders in an irregular manner, including following disembarkation after search and rescue.²⁶ It remains to be seen whether the new EU border procedure proposed in the 2020 European Pact on Asylum and Migration will have a positive or negative impact on the right to seek asylum on the ground.

It might have a positive impact as all Member States will have to follow the same, mandatory border procedure for identification and registration of asylum claims, instead of the current diverse rules and arbitrary practices. Nevertheless, it could also have a negative impact on the right to seek asylum, as the speedy procedure eliminates key procedural safeguards for asylum seekers and hampers identification of certain refugees and beneficiaries of subsidiary protection (in particular cases that require specialised and multiple hearings, such as victims of smuggling, trafficking, and torture).²⁷

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²⁵ A commentary on the first judgment of the Administrative Court by Mohor Fajdiga can be found here: <https://cjc.eui.eu/data/data/data?idPermanent=104&trial=1>

²⁶ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM/2020/612 final.

²⁷ Evros Report, 'Defending human rights in times of border militarization', published by Human Rights360, October 2020.

²⁸ Available in: <https://www.itflows.eu/wp-content/uploads/2021/02/Madalina-Moraru-BUL-PB.pdf>

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