

POSITION PAPER

PUSHBACKS AND RIGHTS VIOLATIONS AT EUROPEAN BORDERS

In response to inward migration and the continued arrival of prospective asylum seekers, a disconcerting Europe-wide trend has emerged over recent years: the systematic use of ‘pushbacks’ at internal and external borders. These pushback operations frequently involve serious human rights violations against prospective asylum seekers and multiple breaches of international and European law. They can be understood as arising largely from the lack of implementation of the European Union’s values and rules or inconsistency in their implementation.

This paper outlines key considerations regarding pushbacks at European borders. It culminates in a set of recommendations for ensuring a rights-compliant, lawful and humane approach to asylum and migration.

PUSHBACKS ARE A EUROPE-WIDE TREND

There is widespread evidence that pushbacks are occurring daily at Europe’s internal and external borders, both at land and sea frontiers. They are not a new phenomenon and have been observed and documented across Europe by human rights organisations for several years.

Historically, pushbacks have occurred at the Greece-Turkey border, in the Aegean Sea and on land across the Evros river, along the Central and Western Mediterranean routes leading to Spain and Italy as well as at French borders, mainly with Italy and the UK.¹ Successive EU enlargements in 2004, 2007 and 2013 have modified the delineation of EU borders and pushbacks have been witnessed increasingly along the Eastern Mediterranean route to Malta and Cyprus, as well as along the Balkan route, at the Bulgarian, Hungarian and Croatian borders in particular.²

For more than 10 years, the European Parliament³, the European Fundamental Rights Agency (FRA)⁴, the Council of Europe (CoE)⁵, the UN Refugee Agency (UNHCR)⁶ and the European Court of Human Rights (ECtHR)⁷ have repeatedly condemned pushbacks through strong and consistent resolutions, statements and guidance, as well as case-law. Such condemnations have intensified since 2015 due to the increase in spontaneous arrivals at EU external borders and the consequent rise in reported pushbacks and human rights violations. Despite these loud and abundant criticisms, the situation remains critical for individuals stranded at the EU’s land and sea borders.

Several European states are actively carrying out pushbacks and the European Border and Coast Guard Agency (Frontex), which was established to ensure European integrated border management at the external borders, is regularly accused of supporting or enforcing these pushbacks.⁸ Most Member States turn a blind eye to these violations while the European Commission merely reminds them of their international and European obligations. Dangerously, pushbacks are being normalised amid a migratory situation depicted as a ‘war’ in which displaced people are primarily viewed as a ‘security threat’, rather than as rights holders.⁹

¹ Migreurop Annual Report 2009, “Europe’s Murderous Borders” <https://bit.ly/3g8bcXJ>

² Asylum Information Database (aida) annual country reports and aida Annual Report 2014/2015 “Common asylum system at a turning point: refugees caught in Europe’s solidarity crisis”, p.25-30 <https://bit.ly/3cRmoGa>

³ European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration <https://bit.ly/2M6uleK>

⁴ FRA, Scope of the principle of non-refoulement in contemporary border management: evolving areas of law, Report, December 2016 <https://bit.ly/2M8O8tZ>; FRA, Migrant pushbacks a growing concern in some Member States, News Item, March 2018 <https://bit.ly/36RcQJb> and FRA 2020 opinion 5.1 p.13 <https://bit.ly/2YlidMG>

⁵ CoE Resolution 2299 (2019), Pushback policies and practice in Council of Europe Member States, June 2019 <https://bit.ly/36Dj4Mz>

⁶ UNHCR, Statement on the situation at the Turkey-EU border, March 2020 <http://bit.ly/38nUfnb>

⁷ ECtHR, Hirsi Jamaa and Others v. Italy [GC], Application No. 27765/09, 23 February 2012

⁸ CoE Resolution 2299 (2019), Pushback policies and practice in Council of Europe Member States, June 2019 <https://bit.ly/36Dj4Mz>

⁹ Remarks by European Commission President Ursula von der Leyen, 3 March 2020 <https://bit.ly/3ePvUdr>

Pushbacks lead to severe human rights violations, including obstruction of access to asylum and inhuman and degrading treatment, as well as direct or indirect violations of the principle of *non-refoulement*.

Although border management is the responsibility of Member States under international law, they must comply with their obligations under international and European human rights and refugee law. The Schengen Borders code,¹⁰ which sets out rules on the control of EU borders, explicitly states that border checks should be carried out with full respect for human dignity. Both Member States and the European Border and Coast Guard Agency “shall contribute to the continuous and uniform application of Union law, including the Union *acquis* on fundamental rights, at all external borders.”¹¹ To this end, a complaints mechanism has been devised, and a Fundamental Rights Officer is technically in place, but is yet to denounce rights violations at borders in a meaningful manner. Fundamental Rights Monitors are to be put in place with support from FRA.

Across the European Union, the right to asylum is explicitly provided by the 1948 Universal Declaration of Human Rights (Article 14-1) and the EU Charter of Fundamental Rights (Article 18). It must be guaranteed with due respect for the rules of the 1951 Geneva Convention and the 1967 Protocol relating to the Status of Refugees, and in accordance with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). A prerequisite to exercising this right is having access to asylum procedures. However, Europe’s emphasis has instead been on containment and obstruction of access to asylum, for instance by means of closing off internal EU borders along the ‘Balkan route’ and between France and its southern neighbours, Italy and Spain. Importantly, containment and legal and administrative obstruction of access to asylum has also been enacted through the implementation of the EU Hotspot approach.¹² Originally designed to introduce open reception and identification centres,¹³ this EU migration management approach amounts to containing prospective asylum seekers at Europe’s outer edges under inhumane conditions and for prolonged periods. This often leads to severe delays in access to, and completion of, asylum procedures. The approach is increasingly detention-based¹⁴ and oriented toward returns to non-EU countries. Moreover, the procedures carried out in these sites involve evermore complex hurdles with questionable legal groundings.¹⁵

The principle of *non-refoulement*¹⁶ is grounded in international human rights¹⁷, refugee¹⁸, European¹⁹ and EU^{20,21,22} law. It prohibits states from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations. This principle is part of customary law and applies to all individuals at all times, irrespective of migration or other status.

There has been evidence of torture and inhuman or degrading treatment of displaced people by border guards in the context of pushbacks at many European borders,²³ in particular at Greece’s and Croatia’s borders. This occurs through intimidation, confiscation or destruction of displaced people’s belongings, use of violence, as well as inhuman and degrading treatment such as stripping people of their clothes and by depriving them of food and basic services. These acts are in clear breach of international and European human rights law that stipulates that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.²⁴

Rights violations at European borders also mean a breach of the right to life and security.²⁵ At the Greece-Turkey border, displaced individuals trying to cross the land border across the Evros river in March 2020 were killed after Greek border forces allegedly fired live ammunition.²⁶ Active pushbacks by the EU and Member States in the Aegean and Mediterranean Sea²⁷ have also led to people drowning and being returned to unsafe places like Libya.²⁸ In addition to international and

¹⁰ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders <https://bit.ly/3eRhcTo>

¹¹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard <https://bit.ly/2XK2InZ>

¹² Danish Refugee Council, Fundamental Rights and the EU hotspot approach, October 2017 <https://bit.ly/3g9b4Y4>

¹³ Communication COM(2015) 240 final of 13 May 2015 from the Commission on A European Agenda on Migration, p. 6.

¹⁴ Refugee Rights Europe, The Invisible Islands - Covid19 Restrictions and the future of detention on Kos and Leros, May 2020 <https://bit.ly/3fnmc2n>

¹⁵ DRC/ECRE desk research on application of a safe third country and a first country of entry concepts to Turkey, May 2016 <https://bit.ly/3dS41to>

¹⁶ OHCHR note on the principle of non-refoulement under international human rights law <http://bit.ly/38kCRON> and UNHCR Note on the Principle of non-refoulement <http://bit.ly/39rjndm>

¹⁷ 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 3.

¹⁸ 1951 Geneva Convention, Article 33(1) : This provision constitutes one of the basic Articles of the Convention, to which no reservations are permitted.

¹⁹ 1950 European Convention on Human Rights, Article 4 of Protocol 4 which states that collective expulsion of aliens is prohibited.

²⁰ Charter of the Fundamental Rights of the European Union, Article 19. Read more here: <http://bit.ly/2SkfzoO>

²¹ 2012 Treaty on the functioning of the EU, Article 78(1).

²² 2011 Recast Qualification Directive, Article 21.

²³ Detailed evidence can be found in the Border Violence Monitoring Network monthly reports <https://bit.ly/3bOGjnI>

²⁴ 1948 Universal Declaration of Human Rights, Article 5; 1950 European Convention on Human Rights, Article 3.

²⁵ 1948 Universal Declaration of Human Rights, Article 3; 1950 European Convention on Human Rights, Article 2.

²⁶ Amnesty International, April 2020 <https://bit.ly/3cR7zU2>

²⁷ The Guardian, Revealed: the Great European Refugee Scandal, March 2020 <https://bit.ly/3g6DCRL>

²⁸ Libya cannot be considered a place of safety, as confirmed by the Italian Court of Cassation’s sentence in the case of Carola Rackete and Sea Watch 3, which reaffirmed that rescues must end in a place of safety

European refugee law, maritime law stipulates that procedures shall “*guarantee that persons rescued at sea will be provided a place of safety regardless of their nationality, status or the circumstances in which they are found*”.²⁹

Pushbacks also leave displaced people in squalid living conditions as they often create bottleneck situations, and in some cases are coupled with arbitrary detention and deprivation of liberty. For example, on the Greek islands people are trapped in overcrowded camps where a lack of access to fundamental rights, health care and other reception conditions as well as legal aid are a daily reality. A similar lack of protection and services characterises living conditions of displaced individuals along the Balkan route, especially in Bosnia and Herzegovina and Serbia. In border towns such as Ventimiglia at the French-Italian border, a small and overcrowded Red Cross camp is the only infrastructure available to displaced individuals, leaving hundreds to sleep rough under bridges, on beaches and in parks. At the Northern France-UK border, i.e. in Calais and Dunkirk, the absence of regular and legal pathways to the UK has led to a bottle-neck scenario which has persisted for 30 years,³⁰ characterized by chronic precarity, police violence, detention, as well as the obstruction and criminalisation of aid.

The Covid-19 crisis has shown that when mobility to and within the European Union is further restricted, displaced people are disproportionately affected.

PUSHBACKS ARISE FROM A LACK OF CONSISTENCY IN THE IMPLEMENTATION OF EU VALUES AND RULES

How has Europe collectively reached this situation? A key factor has been the lack of solidarity and fair sharing of responsibility between Member States in the implementation of asylum and migration policies, as required by Article 80 of the TFEU.

Southern Member States have consistently requested greater solidarity within the EU to host asylum seekers, including recently in the context of the forthcoming New Pact on Asylum and Migration. A central pitfall of the Common European Asylum System (CEAS) is the Dublin III Regulation. Existing provisions that set out the criteria for establishing responsibility for processing the applicant's claim are not systematically applied. They run, in hierarchical order, from family considerations, to recent possession of visas or residence permits in a Member State, to whether the applicant has entered the EU irregularly³¹ or regularly. However, many displaced people arriving irregularly in the EU with the intention of applying for asylum in the country where they may have close family members, are pushed back, arbitrarily detained or have their claim processed primarily on the basis of irregular entry or stay.

The Dublin system has also proven dysfunctional in the face of a rapid increase in the number of asylum seekers in a few frontline countries, as witnessed in Greece from 2015. A direct consequence of this European solidarity crisis has been the EU-Turkey Statement and the implementation of the EU hotspot approach, with horrendous human rights and humanitarian consequences as described above. The parallel introduction of the Emergency Relocation Scheme³² to transfer asylum seekers from Italy and Greece across the EU could have been a positive step forward. In practice, however, it led to fewer than 30,000 people being relocated over two years,³³ as opposed to the initial 98,000 pledges made. There are currently more than 38,600 people living in hotspots on the Greek islands alone, which have a capacity for just over 6,000 individuals.³⁴

This lack of harmonised implementation of the CEAS by Member States and only partial compliance with the agreed EU rules has led to a scenario wherein illegal pushbacks and containment have become central aspects of the EU's asylum system. Despite this, the European Commission has launched only very few infringement procedures. The inconsistent implementation of the CEAS creates distrust between Member States and leads to increasingly unilateral decision-making based on supposed national interest only, often in violation of international and EU law.

The strategy that currently appears to be characterised by the most consensus at the EU and Member State levels, is the increased physical and legal fortification of Europe. This is reflected by the continuous legal, financial, human, and material strengthening of Frontex, which became the European Border and Coast Guard Agency in 2016.^{35,36} This focus on securitisation is reinforced by increased funding for border management envisaged in the Multiannual Financial Framework

²⁹ 2004 Amendments to the 1979 International Convention on Maritime Search and Rescue.

³⁰ Refugee Rights Europe, A Brief Timeline of the Human Rights Situation in Northern France, April 2020 <https://bit.ly/2Xa53vy>

³¹ Dublin III Regulation, Chapter III, Article 7 on the Hierarchy of Criteria (and following).

³² Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece <https://bit.ly/2Y20Gsy>

³³ European Commission, Relocation – Sharing Responsibility, Fact Sheet, September 2017 <https://bit.ly/2ZNqhz1>

³⁴ RRE, Urgent Call to Action: EU Member States Should Commit to the Emergency Relocation of Unaccompanied Children from the Greek Islands, March 2020 <https://bit.ly/3gvvLh3>

³⁵ ECRE, Comments on the Commission Proposal for a Regulation on the European Border and Coast Guards Agency, November 2018 <https://bit.ly/2TpiQaa>

³⁶ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard <https://bit.ly/2XK2InZ>

(MFF).³⁷ This goes hand in hand with increased ‘externalisation’ or outsourcing of border management and protection responsibilities to states outside Europe.³⁸

Similar to the 2014 to 2016 period, the Covid-19 crisis has exacerbated this trend: international and Schengen borders have been closed and ports declared ‘unsafe’ for specific groups, leaving displaced individuals in limbo at sea. Increased violence and pushbacks have been reported daily since early March 2020.

RRE'S KEY RECOMMENDATIONS

The European response to asylum and migration must be directed towards sustainable solutions upholding without exception individuals’ access to asylum as per Article 80 of the TFEU and in full compliance with international and European human rights and refugee law. Such a response implies that displaced people can access Europe in a safe and dignified way. Expanding legal channels to the EU is therefore necessary, both for people in need of international protection and for people desperately striving for a better future.

People always have and always will travel to Europe by their own means and without necessarily being in possession of the required paperwork: these people are rights holders under international and European human rights and refugee law. European border management must guarantee those rights under all circumstances: when enforced by Member States or the European Border and Coast Guard Agency, to ensure that individuals are treated in a humane and rights-compliant manner.

Ultimately, asylum and migration policies should be managed in a humane, responsible and consistent manner as other policy areas within the European Union acquis, and in a less politicised and haphazard way. This includes the elaboration and implementation of a sustainable and systematic responsibility sharing mechanism involving all Member States.

With the aim of ending illegal pushbacks and rights violations at Europe’s borders, RRE formulates the following recommendations.

BORDER MANAGEMENT AND RIGHTS AT BORDERS

1. The European Commission must monitor the design and implementation of Member States’ national strategies for integrated border management. These must include measures related to the referral of persons who are in need of, or wish to apply for, international protection as well as search and rescue operations for persons in distress at sea (*in line with Article 3-3 of the Regulation on the European Border and Coast Guard*).
2. Member States must openly provide access to independent investigations of their border practices in case of allegations of pushbacks to uphold their obligations under international and European human rights and refugee law.
3. The European Commission must publicly denounce pushbacks and rights violations at Europe’s internal and external European land and maritime borders and initiate infringement procedures against Member States.
4. The European Parliament and/or the Council must urgently invite the Executive Director of the European Border and Coast Guard Agency to report on the elaboration of the fundamental rights strategy, the implementation of the Fundamental Rights Officer mandate, the recruitment of the 40 Fundamental Rights Monitors and the functioning of the complaints mechanism. When the strategy is launched and when the fundamental rights monitors are operational, the European Parliament and/or the Council must invite the executive director every six months to report on the implementation and monitoring of both aspects (*in line with Article 68 of the Regulation on the European Border and Coast Guard*).
5. The European Parliament and the Council to whom the European Border and Coast Guard Agency is accountable, must ensure that the Agency has taken the necessary steps to ensure that all border guards and other relevant staff of the Member States who participate in the European Border and Coast Guard teams, as well as the staff of the agency, have received training in relevant EU and international law,

³⁷ European Parliament, Fact sheet on the Multiannual Financial Framework, December 2019 <https://bit.ly/3cq37ui>

³⁸ Human Rights Watch, EU policies put Refugees at Risk – An Agenda to Restore Protection, November 2016 <https://bit.ly/3g9HzoP>

including on fundamental rights, access to international protection and where appropriate search and rescue, prior to their participation in operational activities organised by the Agency (*in line with Article 36 of the Regulation on the European Border and Coast Guard*).

6. The European Commission must publicise the results of the independent external evaluation that it should have commissioned by 7 October 2019 which shall include a specific analysis on the way the Charter and other relevant Union law has been complied with in the application of the Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (*in line with Article 81*).
7. In line with its mandate and powers, the European Ombudsman must initiate a strategic inquiry on pushbacks and rights violations at borders and a strategic initiative on the lack of infringement procedures thereof. She should also encourage relevant national commissioners or ombudspersons to set up national monitoring and complaints mechanisms on pushbacks and right violations at borders.

ACCESS TO ASYLUM

8. The Directorate General for Migration and Home Affairs of the European Commission must guarantee Member States' compliance with their obligation to ensure access to asylum registration and procedures, including at borders (*in line with the 2013 Procedures Directive*³⁹), through increased monitoring and evaluation of legislation and through infringement procedures where necessary.
9. Considering the vast body of evidence documenting pushbacks and rights violations at Europe's borders, the Directorate General for Migration and Home Affairs of the European Commission must publicly clarify its reasons for not launching infringement procedures against those Member States violating EU law.
10. The European Parliament, at the initiative of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), should call the European Commission to systematically launch infringement procedures against those Member States operating pushbacks and violating rights at Europe's borders.
11. The European Council, that is currently leading the negotiations around the adoption of the Multiannual Financial Framework (MFF) 2021-2027 that foresees an increase in funding allocated to border management, must allocate the necessary funding to asylum and border management policies ensuring access to asylum, reception conditions and integration are guaranteed, in line with international and European human rights and refugee law.

SYSTEMATIC AND RELIABLE SOLIDARITY MECHANISM

12. In the short term, Member States must make full use of all criteria defined by the Dublin III Regulation in their order of priority. Consequently, family criteria must be applied first and foremost and lead to actual relocation from Greece and Italy in particular.
13. The Directorate General for Migration and Home Affairs of the European Commission, in cooperation with Member States' governments, should work with national Dublin units to put an end to unnecessarily lengthy processing times, missed transfer deadlines and other practices obstructing access to family reunification.
14. In the medium term, the Dublin III Regulation must be revised in order to establish a reliable and systematic solidarity mechanism that guarantees asylum seekers' rights and provides Member States with a framework for fair sharing of responsibilities within an enhanced and consistent EU protection system. Such a system must ensure that effective solidarity between Member States applies during and beyond crisis situations. For that reason, the country of first entry criteria must be omitted.

³⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection