

Pushbacks at the EU's external borders

SUMMARY

In recent years, the migration policy of the European Union (EU) has focused on strict border controls and the externalisation of migration management through cooperation with third countries. Although states have the right to decide whether to grant non-EU nationals access to their territory, they must do this in accordance with the law and uphold individuals' fundamental rights.

Not only do the practices and policies of stopping asylum-seekers and migrants in need of protection at or before they reach the European Union's external borders ('pushbacks') erode EU values as enshrined in the EU Treaties, they may also violate international and European humanitarian and human rights laws.

National human rights institutions, international bodies and civil society organisations regularly report cases of pushbacks at the European Union's land and sea borders. According to those reports, pushbacks often involve excessive use of force by EU Member States' authorities and EU agencies operating at external borders, and degrading and inhuman treatment of migrants and their arbitrary detention.

The European Parliament has repeatedly called for Member States and EU agencies to comply with fundamental rights in their activities to protect the EU's external borders. Several international organisations and other stakeholders have condemned or filed legal actions against the practice of pushbacks carried out at the EU's external borders. In September 2020, the European Commission presented a pact on migration and asylum, including a proposal on pre-entry screening of third-country nationals at EU external borders, in a bid to address these potential breaches of fundamental rights.



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Introduction

The EU's objectives in the field of external border protection are to safeguard freedom of movement within the Schengen area, an area without internal borders, and to ensure efficient monitoring of people who cross both external Schengen borders and the European Union's external borders with countries that are not part of the Schengen area. Border surveillance operations carried out at the EU's external border must respect international and European human rights and humanitarian law, as well as the international law of the sea. The unprecedented [migration flows](#) of 2015 put management of the EU's external borders to the test, however, with uncontrolled arrivals of migrants and asylum-seekers in the EU eventually leading to the [temporary reintroduction of internal borders](#) between several Member States.

The European Council has gradually been [shifting focus](#) to prioritise strengthening the EU's external borders and preventing irregular migrants from reaching EU territory. To this end, the aim has been to stem illegal migration on all existing and emerging routes and extend the EU's partnerships with third countries, notably [Turkey](#) and [Libya](#). The [European Border and Coast Guard Agency](#) (Frontex) has been reinforced and provided with stronger means and powers to contribute to this goal. Some of these [EU policies](#) seem to have had an impact on the number of [detected illegal border crossings](#) along the EU's external borders, with a significant fall in numbers over the 2017-2020 period.

At the same time, the EU has been much [criticised](#) for prioritising border controls over migrants' human rights and for externalising border controls in cooperation with third countries, leading to grave human rights violations, including 'pushbacks'.

Pushbacks in international and EU law

There is no internationally agreed definition of the term 'pushbacks' in the area of migration. The special rapporteur on the human rights of migrants at the United Nations Office of the High Commissioner for Human Rights [defines](#) pushbacks as 'various measures taken by States which result in migrants, including asylum-seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-*refoulement*'.

In various judgments, the European Court of Human Rights (ECtHR) has condemned pushback practices as collective expulsions based on [Article 4 of Protocol No 4](#) to the European Convention on Human Rights (ECHR). The former European Commission of Human Rights defined collective expulsions as 'any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group' ([Becker v Denmark](#)). The definition is still applied by the Court today. The Court found a violation of Article 4 of Protocol No 4, among others, when the procedure for expulsion did not afford sufficient guarantees demonstrating that the personal circumstances of each individual had been genuinely and individually taken into account ([Conka v Belgium](#)); when applicants have been effectively prevented from applying for asylum or from having access to any other national procedure that meets the requirements of an effective remedy ([Sharifi and others v Italy and Greece](#)); and when applicants were refused entry into a state territory without giving proper regard to their individual situation as part of a wider policy of refusing to receive asylum applications ([M.K. and others v Poland](#)). For example, in 2012, the ECtHR condemned Italy for a 'pushback' practice ([Hirsi Jamaa and others v Italy](#)) when its coastguard physically intercepted a migrant boat and returned its approximately 200 passengers to Libya. Confronted with the question of the extraterritorial application of the ECHR, the Court asserted that the applicants had been 'under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'. In this case, the ECtHR found a breach of the prohibition on collective expulsions under Article 4 of Protocol No 4 to the Convention.

Prohibition of *refoulement*

As a general rule, states have a sovereign right to control the entry and continued presence of non-nationals on their territory. However, those policies must be applied without prejudice to the obligations deriving from [international humanitarian law](#) and [international human rights law](#), including in particular the [prohibition of refoulement](#) as enshrined in the 1951 Refugee Convention.¹ The territorial scope of the principle of non-*refoulement* is still under debate, however, both in scholarly debates and in practice. For example, some [academics](#) support its application wherever competent state authorities perform measures pertaining to border control, while for [others](#) the principle of non-*refoulement* applies to the actions of states, wherever undertaken, whether at the land border, or in maritime zones, including the high seas. The practical consequences of its application at sea are detailed in a [leaflet](#) edited by the United Nations High Commissioner for Refugees (UNHCR) and the International Maritime Organization (IMO).

According to other [expert](#) views, states have human rights obligations towards only those individuals who find themselves within their jurisdiction since legal systems do not recognise state duties towards migrants before they enter the relevant state's jurisdiction. As a rule, anyone within the territory (including the territorial sea) of a state is within that state's jurisdiction. As adjudicated by the ECtHR, states are considered to exercise jurisdiction when their officials are physically present at a particular incident and thereby exercise effective control over the individuals seeking protection (*Hirsi Jamaa and others v Italy*).

The 1951 Refugee Convention applies only to refugees, but Article 3 of the [Convention against Torture](#) expanded the scope of its protection to include expulsion, stating that states parties may not 'expel, return (*'refouler'*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. [Article 3 ECHR](#) also prohibits torture and, in contrast to Article 3 of the Convention against Torture, also applies to expulsion cases where the risk of ill treatment comes from non-state agents and if state authorities are unwilling or unable to provide protection (*H.L.R. v France*).

In 1993, in [Sale v Haitian Centers Council](#), the US Supreme Court concluded that both the international and US statutory prohibition against *refoulement* applied only with regard to actions taken on US territory. Accordingly, it ruled that the US policy to intercept refugees on the high seas and return them to Haiti without any screening or other processing did not violate international law.

Although the ECtHR in [N.D. and N.T. v Spain](#) found no violation of Article 4 of Protocol No 4, the Court stated that the prohibition of *refoulement* includes the protection of asylum-seekers in cases of both non-admission and rejection at the border. According to the Court, the notion of refugee covers not only refugees lawfully on the territory of the expelling state but also any person who, being unlawfully on that territory, has applied for refugee status, while his or her application is under consideration. The Court further notes that the wish to apply for asylum does not have to be expressed in a particular form. It may be expressed by means of a formal application, but also by means of any conduct that signals clearly the wish of the person concerned to submit an application for protection. Furthermore, the sole fact that a state refuses to admit to its territory an alien who is within its jurisdiction does not release that state from its obligations towards the person concerned arising out of the prohibition of *refoulement* of refugees.

EU law

EU law enshrines in primary law the right to asylum and the right to international protection ([Article 78](#) of the Treaty on the Functioning of the European Union and [Article 18](#) of the EU Charter of Fundamental Rights). The EU law also provides for the prohibition of collective expulsion and the principle of non-*refoulement* ([Article 19](#) of the Charter). As regards third-country nationals who are staying illegally on the territory of a Member State, [Directive 2008/115](#) on the return of illegally staying third-country nationals sets out the standards and procedures governing their return, 'in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations'. The Court of Justice of the

European Union in its [judgment](#) of 17 December 2020 found that Hungary had failed to fulfil its obligations under the Return Directive. Hungarian police forcibly escorted illegally staying third-country nationals to a strip of land between the border fence and the Serbian-Hungarian border without prior compliance with the substantive and procedural safeguards provided for in that directive. This judgment prompted Frontex to suspend all its operations in Hungary.

The [Schengen Borders Code](#) stipulates that third-country nationals who do not fulfil all the entry conditions are to be refused entry to the territories of the Member States. In such cases, the authorities must issue a decision stating the precise reasons for the refusal, without prejudice to the special provisions concerning the right to asylum and international protection. Moreover, Member States may decide not to apply the Return Directive to third-country nationals who are subject to such a refusal of entry, or who are apprehended or intercepted in connection with the irregular crossing of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State. In such cases, Member States may apply simplified national return procedures, but must comply with the conditions laid down in Article 4(4) of the Return Directive, including the principle of *non-refoulement*.

[Regulation No 656/2014](#) (Sea Borders Regulation) governs surveillance of external sea borders by EU Member States within the context of operational cooperation with Frontex. Article 4 ensures the protection of fundamental rights and the principle of *non-refoulement*. According to Article 4(3), before any rescued person is disembarked, forced to enter, conducted to or otherwise handed over to the authorities of a third country, the Frontex operation must conduct a case-by-case assessment of their personal circumstances and provide information on the destination. The rescued persons must also be given the opportunity 'to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*'.

Frontex's role in search and rescue (SAR) operations is enshrined in [Regulation \(EU\) 2019/1896](#). The regulation includes operations launched and carried out in accordance with Regulation (EU) No 656/2014 and international law, taking place in situations that may arise during border surveillance operations at sea. In these circumstances, Frontex is obliged to provide Member States and non-EU countries with technical and operational assistance in support of SAR operations.

SAR is a specific objective of the operational plan of every Frontex joint maritime operation. For this reason, vessels deployed by Frontex to an operational area should be ready to provide national authorities with support in SAR operations. It is important to underline that SAR operations are always coordinated by the national rescue and coordination centres (RCC). The RCC orders vessels that are the closest to the incident or the most capable to assist in the rescue. These may include national commercial or military vessels, vessels deployed by Frontex, private boats and other.

The EU and its agencies have no mandate to conduct SAR operations, as this remains a competence of Member States. The regulation constrains Frontex's actions by establishing that 'in accordance with Union law and those instruments the Agency should assist Member States in conducting search and rescue operations in order to protect and save lives whenever and wherever so required'.² The Agency also has an obligation to set up an independent and effective complaints mechanism to monitor and ensure respect for fundamental rights in all activities of the Agency. It must also suspend or terminate any (funding of) activities when serious or persisting violations occur.

Pushbacks in practice

Instead of providing for effective solidarity with frontline Member States and for fair responsibility-sharing, in recent years EU countries have continued to secure their external borders and focused on cooperating with third countries (in particular [Libya](#) and [Turkey](#)) to curb migration flows, prompting heavy criticism from [academics](#) and [civil society organisations](#). An increasing number of Member States have also set up [fences and border walls](#) on their external Schengen borders to prevent migrants and asylum-seekers from accessing their territory. These barriers have given cause for concern, owing not least to the [poor human rights situation](#) of migrants thereby refused entry.

National and European human rights institutions, international organisations and civil society organisations regularly report cases of persons who are apprehended after an irregular border crossing and later removed, without an individual identification procedure. In 2020 at the request of the European Parliament, the [European Union Agency for Fundamental Rights](#) (FRA) published a report on fundamental rights compliance at the EU's external land borders. The report focuses on pushbacks and fundamental rights violations in connection with these practices and offers recommendations on how to apply and implement in full the fundamental rights safeguards contained in EU law instruments relevant to border control.

In 2019, the Parliamentary Assembly of the Council of Europe adopted a [resolution](#) citing several cases of pushback action from EU Member States towards non-EU countries. The Assembly expressed concerns over the persistent and increasing practice and policies of pushbacks, in clear violation of the rights of asylum-seekers and refugees, including the right to asylum and the right to protection against *refoulement*. [UNHCR](#) and the [IMO](#) have meanwhile called on the EU and its Member States to take urgent action to end pushbacks, collective expulsions, and the use of violence against migrants and refugees. The 2020 [report](#) by Refugee Rights Europe and the End Pushbacks Partnership outlines in detail the practice of pushbacks and associated border violence at the EU's internal and external land and sea borders and its detrimental impact on people's lives. The report also outlines the harmful impact of pushbacks at EU level and on European social cohesion in terms of the polarisation of societies and normalisation of violence against newcomers.

Frontex

In October 2020, Frontex was [accused](#) of being involved in pushbacks of migrants in the Aegean Sea, which prompted the Agency to launch an internal [inquiry](#). In November 2020, upon an urgent [request](#) from the European Commission, the Frontex Management Board held an extraordinary meeting to discuss the issue of pushbacks. The Board acknowledged that 'urgent action is needed to investigate all aspects related to the matter'.

On 21 January 2021, the Frontex Management Board [asked](#) Fabrice Leggeri to take urgent measures to clarify several incidents at sea identified as possible pushbacks, to ensure that every incident in the operational area is reported, including regular submission of serious incidence reports to the fundamental rights officer, and to hire 40 fundamental rights monitors immediately. The final [report](#) on fundamental rights and legal aspects of operations in the Aegean Sea, prepared by a Frontex Management Board working group on 1 March, cannot confirm beyond any reasonable doubt the Agency's wrongdoing during its operations, as it found no indication of injuries, missing persons or deceased in the context of the incidents investigated. The report, however, identifies deficiencies in the incident reporting and monitoring systems and makes recommendations in this regard.

On 1 December 2020, members of Parliament's Committee on [Civil Liberties, Justice and Home Affairs](#) (LIBE) demanded answers from the Frontex Executive Director Fabrice Leggeri regarding the alleged involvement of Frontex staff in pushbacks of asylum-seekers by Greek border guards.

January 2021 also saw the approval of the establishment of a [Frontex Scrutiny Working Group](#) within the LIBE committee. The working group [formally began](#) work on 23 February and appointed its chair and a rapporteur. Its task will be to carry out a fact-finding investigation and gather all relevant information and evidence in order to issue recommendations on improving the Agency's work in terms of fundamental rights protection, internal management, accountability and transparency. The group will report on its findings to the LIBE committee within four months. On 4 March, the group had its [first meeting](#) with the Agency's Executive Director Fabrice Leggeri and Commissioner Ylva Johansson. MEPs questioned Mr Leggeri over delays in the hiring of the fundamental rights monitors and over the allegations of pushbacks, in particular in the Aegean Sea but also elsewhere. Following the meeting, MEPs Roberta Metsola and Tineke Strik confirmed the need to improve the culture and structure of the Agency as regards the respect of fundamental rights and the need to ensure that border control goes hand in hand with fundamental rights safeguards.

The European Ombudsman has initiated an [inquiry](#) to assess the Frontex complaint mechanism for those who believe their rights have been violated in the context of Frontex border operations, and the role and independence of the fundamental rights officer in this process. The European Anti-Fraud Office (OLAF) has also meanwhile opened an investigation into Frontex, but no further details have been provided. According to [media reports](#), the investigation involves allegations of harassment and misconduct within the Agency, in addition to the alleged migrant pushbacks.

Expert views on the accountability of Frontex with regard to pushbacks are divided. For example, according to [some](#), Frontex's set up and working methods allow all actors involved to shift the blame to others, while individuals face many practical as well as legal obstacles to bringing Frontex to court. [Others](#), however, insist that illegal pushbacks by Frontex units in the Mediterranean mean the EU incurs 'derivative responsibility' for a violation of the principle of non-*refoulement* and of the duty to assist persons in distress at sea. Furthermore, some [experts](#) argue there may be circumstances where Frontex may be held jointly responsible alongside a host Member State for alleged human rights violations occurring during joint operations (shared responsibility) or where it may incur responsibility for complicity if it assists a state in violation of human rights obligations.

Action relating to pushbacks

Already in an April 2016 [resolution](#) the European Parliament pointed out that any attempt by Member States to 'push back' migrants who have not been given the opportunity to present asylum claims runs contrary to Union and international law, and that the Commission should take appropriate action against any Member State that attempts such 'push backs'. In September 2018, Parliament also [invited](#) the Council of the EU to determine whether there was a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU, including violation of fundamental rights of migrants, asylum-seekers and refugees owing to the reported pushbacks at Hungary's border with Serbia, and to address appropriate recommendations to Hungary in this regard.

On 8 May 2018, the Global Legal Action Network submitted a case (*S.S. and others v Italy*) to the European Court of Human Rights in relation to Libya's abuses against migrants during operations at sea and upon return to the country in November 2017. Applicants are seeking justice before the court, claiming that Italy breached its obligations under the [European Convention on Human Rights](#) (ECHR) by cooperating with Libya to enable its coast guard to intercept people at sea and take them back to Libya. As explained by [experts](#), one key goal of the applicants and their defenders is to have the Court assert its jurisdiction by holding that a state party can retain effective control over persons also when its officers 'only' equip, train, and possibly instruct vessels of a third state. This would build on and expand previous case law, in particular with regard to the Court's assertion of extraterritorial application of the ECHR in the *Hirsi* case.

In June 2019, a [complaint](#) was brought before the International Criminal Court (ICC) claiming that EU Member States' migration policies in the Mediterranean constitute crimes against humanity. The plaintiffs argued that EU policies were responsible for thousands of migrant deaths in the Mediterranean, including the policy of returning some 40 000 migrants to militia-controlled camps in Libya 'where atrocious crimes are committed'.

The controversies surrounding the accountability of individual actors dealing with boat migrants at sea have been observed not only in the Mediterranean but also in [other parts of the world](#). The reason is varied application and interpretation of different bodies of international law. According to some [experts](#), the SAR regime, refugee law, international human rights law, the law of the sea, and the human smuggling and trafficking frameworks are all relevant in this regard. States often deal with these regimes in a fragmented manner, cherry picking provisions that allow them to justify a securitised approach to protecting state interests. [Harmonising](#) those laws could lead to the establishment of a 'politically realistic legal regime for maritime interceptions'.

2020 migration and asylum pact

In July 2020, the European Commission [recognised](#) the need for an institutional response to ensure that EU states uphold fundamental rights while guarding borders. In September 2020, it published a [new pact on migration and asylum](#), claiming that 'all necessary guarantees will be put in place to ensure that every person would have an individual assessment and essential guarantees remain in full, with full respect for the principle of non-*refoulement* and fundamental rights'. The pact includes a proposal intended to address the potential breach of fundamental rights at the EU's external borders.

Screening of third-country nationals at external borders

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.

According to the proposal, Member States are required to establish an independent monitoring mechanism to ensure the protection of the fundamental rights of the persons concerned, in compliance with EU and international law. They must ensure that allegations of non-respect for fundamental rights in relation to screening, including as regards access to the asylum procedure and non-compliance with the principle of non-*refoulement*, are dealt with effectively and promptly. The European Union Agency for Fundamental Rights should establish general guidance and, at the request of the Member States, support the development of the monitoring mechanism for the protection of fundamental rights. Furthermore, Member States may invite relevant national, international and non-governmental organisations and bodies to take part in monitoring.

On 10 February 2021, the European Parliament adopted a [resolution](#) on implementation of Article 43 of the Directive on Asylum Procedures (2013/32/EU), which the pact on migration and asylum suggests should be replaced by a [new regulation](#). Parliament stresses that, while Member States have an obligation to prevent irregular crossings at the European Union's external borders, they must also respect the fundamental rights of migrants, including the principle of non-*refoulement* and the prohibition of collective expulsions. It calls on the European Commission to ensure Member States' compliance with these obligations and to suspend EU payments in the event of serious deficiencies.

The provisions establishing a monitoring mechanism for fundamental rights have been commented on widely. Marco Stefan and Roberto Cortinovis of the Centre for European Policy Studies [warn](#) that the mechanism would leave out a whole range of border surveillance operations and activities performed by Member States and Frontex. They also point out that Member States authorities have too much discretion in their monitoring activities and that independent human rights monitors should investigate alleged pushbacks and thus oversee the work of national authorities responsible for checking, carrying out surveillance and patrolling the EU's external borders.

A [joint statement](#) signed by more than 80 civil society organisations argues that to ensure accountability for rights violations at borders, including the persistent use of removals and pushbacks across a large number of Member States, the monitoring mechanism must be expanded beyond the screening procedure, be independent of national authorities, and involve independent organisations, such as non-governmental organisations. However, as pointed out by other [commentators](#), rules are not enough to ensure compliance. The Commission, as guardian of the Treaties, should enforce Member States' compliance with EU obligations, especially regarding fundamental rights. This should be done by focusing not only on incorrect transposition of EU law but also on violations occurring during the implementation of the legislation on the ground.

Meanwhile, a [lack of solidarity](#) in the distribution of asylum-seekers and refugees means that responsibility falls mainly to the countries at the EU's external borders. This may remain so despite

the Commission's [proposal on asylum and migration management](#), which was presented as part of the pact and whose solidarity mechanism may [not be enough to support](#) fair sharing of responsibility for asylum-seekers between Member States. The longer the pressure remains on border countries, the greater the risk of human rights violations at the borders. It is therefore of paramount importance to strike the right balance between the effective protection of fundamental rights with procedural guarantees, solidarity in EU asylum policy and efficient border control.

MAIN REFERENCES

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ENDNOTES

- ¹ Article 33(1) of the [1951 Refugee Convention](#) includes the principle of non-refoulement, according to which states are prohibited from 'expel[ling] or return[ing] a refugee in any manner whatsoever to the frontiers of territories, where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion'.
- ² At the October 2019 [LIBE hearing](#) on EU obligations in SAR operations in the Mediterranean, Frontex Director Fabrice Leggeri claimed it was not Frontex's responsibility to decide if Libya was a safe destination for disembarkation. According to Mr Leggeri, Frontex has no legal mandate to coordinate operations that consist exclusively of search and rescue and is able to intervene when border surveillance is involved, acting under the coordination of national authorities.

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