



BOFAXE

A PUSHBACK AGAINST INTERNATIONAL LAW? (Part 1)

Legal Analysis of Allegations Against the Frontex Mission in the Mediterranean

Introduction

In late October, an international group of investigative journalists released a [detailed report](#) about the involvement of Frontex, the European border security agency, in so-called pushbacks in the Mediterranean. Though not a legal term, ‘pushbacks’ refer to the highly controversial practice of intercepting vessels filled with migrants as they enter the territorial waters of a state and pushing them back, sometimes with [very dangerous maneuvers](#), into another jurisdiction. Since March 2020, [allegations](#) of such activities have been made against the Greek Coast Guard (see [here](#), [here](#), and [here](#)). The October report, for the first time, provided evidence that Frontex was directly involved in pushbacks of migrant vessels from Greece to Turkey.

How was Frontex Involved?

In at least four cases Frontex units were located close to pushbacks conducted by the Greek Coast Guard (see [here](#), [here](#) and [here](#)). Although the Frontex officers did not actively support the Hellenic Coast Guard, it is fair to assume that they observed these dangerous activities [without reporting them](#). Two more incidents stand out. On April 28, 22 migrants were put on a life raft on the Greek island of Samos and towed towards the Greek-Turkish sea border in the middle of the night where the Greek Coast Guard left them afloat. This incident was live-streamed to the Frontex headquarters by a surveillance plane. On June 8, a Romanian Frontex vessel was [caught on camera](#) blocking a dinghy close to Lesbos. Later, the same ship started [generating waves](#) to push the migrants’ boat towards the Turkish coast.

Non-Refoulement = No Pushbacks?

Article 33(1) of the [1951 Refugee Convention](#) contains the cardinal principle of *non-refoulement*, which literally translates to ‘no pushbacks.’ Accordingly, 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.” This principle has evolved into a norm of customary international law (see [here](#) pp. 149-163) which does not allow reservations or derogation during situations of a mass-influx of migrants (see [here](#), [here](#), and [here](#)). It needs to be emphasized that the obligation of *non-refoulement* also exists in [international human rights law](#) (article 3 CAT, article 7 ICCPR, article 3 ECHR, article 19(2) CFR) and under [EU-law](#), partly, with even [higher requirements](#) and stricter enforcement mechanisms.

The personal scope of article 33(1) covers all refugees as defined in article 1(A) and also extends to asylum seekers until they receive a final determination of their refugee status. Concerning the territorial scope, all cases under scrutiny in this post took place within Greece’s territorial sea which makes the Refugee Convention directly applicable. However, pushbacks often occur outside states’ territories, for instance, on the high seas. In this vein, article 33 [has been interpreted](#) as applying wherever states have effective control over persons seeking asylum or when its actions directly affect them. Arguably, this is the case when coast guards actively push back boats filled with asylum seekers.

For the above reasons, it seems clear that Greece and the Frontex units were under an obligation not to expel or return the asylum seekers to a place where they would have a well-founded fear of persecution. To establish, however, whether such a risk was present, an individual assessment of each asylum seeker’s claim to refugee status needs to be conducted (see [here](#) pp. 330-344). This [procedural safeguard](#) is implicit in the *non-refoulement* principle, since the obligation not to return persons to a place where their lives or freedom would be threatened can only be discharged if that [risk is assessed](#) in the first place. The Frontex officers and Greek coast guard clearly did not comply with this obligation when blocking and pushing back boats without conducting a proper status determination procedure for the individuals aboard, *i.e.* assessing whether they were refugees or not.

Proponents of pushbacks regularly argue that Turkey is a safe third country where asylum seekers do not have to fear any persecution. Thus, *refoulement* to Turkey is unproblematic. Apart from questioning the classification of Turkey as a ‘safe third country,’ we argue that the pushbacks were still illegal since Turkey has a record of returning asylum seekers to other countries without adhering to the *non-refoulement* principle itself (e.g. [here](#) and [here](#)). These so-called indirect or [chain-refoulements](#) are also prohibited by international law. Although article 33 is [not directly applicable](#), states which return asylum seekers to a third country knowing that this state regularly violates the *non-refoulement* principle, will be complicit in the third state’s internationally wrongful conduct.