



# BOFAXE

## A PUSHBACK AGAINST INTERNATIONAL LAW? (Part 2)

### Legal Analysis of Allegations Against the Frontex Mission in the Mediterranean

#### Duty to Assist Persons in Distress at Sea

The pushbacks in our cases were also inconsistent with the law of the sea. In particular, pushbacks contravene the customary obligation of states to assist persons in distress at sea which is codified in Art. 98(1) of the United Nations Convention on the Law of the Sea (UNCLOS):

1. Every State shall require the master of a ship flying its flag [...]:
  - (a) to render assistance to any person found at sea in danger of being lost;
  - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

While the scope of the ‘duty to assist persons in distress’ extends to all ships which have reasonable means to provide salvage without endangering themselves, it needs to be clarified which situations ultimately qualify as ‘distress.’ Relevant jurisprudence and the 1979 Convention on Maritime Search and Rescue define a “distress phase” as “a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance.”

The EU signed UNCLOS in 1984 (see [here](#) p. 51) and deposited an instrument of formal confirmation under part XI, which is comparable to a ratification, in 1998 (see [here](#) p. 227). Thus, the EU carries all rights and obligations under UNCLOS which are within the competences transferred to it by its members. Moreover, EU organs are also bound by the obligation to provide assistance to persons in distress under customary international law and by force of EU law (see paragraph 20 of EU Regulation 2019/1896).

In all instances, Frontex forces found unseaworthy boats which were severely overcrowded and without adequate propulsion. The mere state of these vessels clearly indicated an imminent danger to the migrants’ lives and the vessels’ overall safety. Despite its obligation to provide assistance, Frontex patrol boats did not intervene, or even worse, put the vessels at risk by unnecessarily creating waves. Therefore, the pushbacks in which Frontex was involved constitute a clear violation of the duty to assist persons in distress at sea.

#### Who is responsible?

The illegal pushbacks were a joint effort of the Greek Coast Guard and Frontex coast guards from Portugal and Romania on a Romanian and two Portuguese border patrol boats. In this complex scenario, it is worthwhile looking at how the involved states and international organizations can be held responsible for violating their international obligations.

Under the law of international responsibility, Greece is directly responsible for all illegal acts by its Coast Guard, which is a *de jure* state organ, in accordance with article 4(1) of the articles on state responsibility (ASR). It gets more difficult, however, regarding the Frontex vessels at the scene. The main problem is that the officers were under no exclusive control by a single state or international organization. During Frontex missions, the command is shared between the host state (Greece), the home state (Portugal and Romania), and the Frontex headquarters in Warsaw. Still, we argue that Romania and Portugal incur direct responsibility for the internationally wrongful conduct of their officers under article 4(1) of the ASR, despite their status as Frontex units. The boats are sailing under national flags, the officers wear their national uniforms, and receive substantive instructions from their home states. Therefore, the mere label as a Frontex unit cannot shield Portugal and Romania from international responsibility.

Greece, Portugal, and Romania carrying direct responsibility does not get Frontex off the hook. Although it is not an international organization by itself, in the sense of article 2(a) of the ARIO, Frontex rather counts as an organ of the EU. Frontex and its officers may not be directly responsible for the illegal pushbacks, but we nevertheless argue that the EU is at least complicit in those internationally wrongful acts under article 14 of the ARIO by providing aid and assistance to the main perpetrators. Thus, the EU incurs derivative responsibility for the complicity in illegal pushbacks by Frontex units in the Mediterranean.

#### Conclusion

Only thanks to courageous journalists we learned that several EU members under the coordination of Frontex orchestrated pushbacks in the Mediterranean. This practice is a blatant violation of the principle of *non-refoulement* and the duty to assist persons in distress at sea. The secrecy and indifference with which pushbacks are executed is shocking and other scholars have argued that they may classify as torture and, at some point, even amount to crimes against humanity. As a consequence, we should continue emphasizing that the pushbacks happening right now are clear and unacceptable violations of international law. We should further demand from our politicians that our coast guards and the EU cease their complicity and pressure Greece to stop its illegal activities immediately.