On the Involvement of Frontex at the Greek Border

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First Order, then Humanity

While most news platforms are providing up-to-date information on Covid-19, one can easily forget the people trying to enter Greece to seek asylum, waiting at the Turkish side of the border or that are being detained and punished on Greek territory on the grounds of illegal entry. Europe's response to the situation at the Greek external border does not follow its own rules. It abandons European values and foundational principles. The decision to launch a Frontex activity seems to follow a current trend to perceive human rights as subordinate to the unfettered sovereign rights of States.

On March 2, the Greek Government enacted an Emergency Legislative Act, based on Art. 44 (1) Greek Constitution. It suspended, for the period of one month, the right to apply for asylum of anyone who had entered the country irregularly. At this time, border controls and police had already returned numerous unregistered asylum seekers to their country of origin or transit (i.e. Turkey) and NGOs have reported push-backs and the use of excessive violence. Nevertheless, the European Commission has announced to provide financial and enhanced operational support by the European Border an Coast Guard Agency (Frontex). On March 12, Frontex deployed 100 border guards at the Greek land border as part of a rapid border intervention, in addition to the 500 officers already deployed in Greece.

Now that Frontex is involved, the responsibility to return to legality does not only lie with Greece – but with the entire EU. As Greece's suspension is due to expire, and as it remains unclear whether the government will prolong the Emergency Act, the EU and its member States, in whatever kind of support they provide, need to reconcile order and humanity.

Setting the Scene: Why the Legality of Greece's Actions Matters for Frontex

In all its operations, Frontex is obliged to respect fundamental rights and international refugee law including the EU asylum and border acquis. This follows from Art. 51 Charter of Fundamental Rights of the European Union (ChFR), and is explicitly laid down in, inter alia, Art. 1, 36 (2), 80 (1) Frontex Regulation, which particularly mention the Geneva Convention of 1951 and the principle of non-refoulement. This includes a positive

obligation to not assist in and to prevent violations conducted by others. Art. 46 (4) stipulates that the executive director shall suspend or terminate any activity if there are '*violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or likely to persist'*. Even more, Art. 46 (5) Frontex Regulation stipulates not to launch an activity, if *'there would already be serious reasons at the beginning of the activity to suspend or terminate it because it could lead to violations of fundamental rights or international protection obligations of a serious nature.'*

In the present case, the executive director should have made sure from the beginning that the activity of Frontex would give no serious reason to expect violations of fundamental rights or international protection obligations related to. The activity concerned was the deployment of a rapid border intervention team according to Art. 36 Frontex Regulation. They are generally meant to assist Greece in implementing its obligations with regard to external border control under the instructions of Greece (Art. 43 (1) Frontex Regulation). Meanwhile the Greek authorities – supported by the Government – violently pushed-back or returned people trying to cross the border to seek asylum without an individual examination. Additionally, the Greek Government had already suspended the right to apply for asylum for a month. Both actions seriously violate fundamental rights and the latter has additionally been criticised by the EU and recently by the UN Special Rapporteur on the human rights of migrants. The decision to launch an intervention therefore lacks a legal basis.

Effective Protection Requires Fair and Accessible Procedures

The push-backs and returns of people without an individual examination violate international and European law – whether at the land border or in Greek waters.

The principle of non-refoulement prohibits States from returning refugees to a place where their lives will be in danger (Artt. 33 Geneva Convention, 3 European Convention on Human Rights (ECHR), 4 ChFR and other EU secondary and international law sources). The ECHR, and thereby through Art. 52 (3) also the ChFR, explicitly states that this principle is non-derogatory. Since it applies at the border, the question is what kind of 'border' will create liability for non-refoulement violations. Insofar it is unclear whether such a principle would only apply to an open border, i.e. a border with accessible and sufficient official border crossings, or also to a closed border, lacking such pathways. Does the duty to provide an individual examination therefore only arise at official border crossings? States cannot circumvent their international obligations by fortifying and abandoning their borders for the sole purpose of preventing access to procedures. For the application of the non-refoulement principle, it is irrelevant whether legal pathways are provided at the border as even 'illegal' entry is protected and often the only option. Nevertheless, States need to provide such legal entries.

Accordingly, the ECtHR Grand Chamber in *N.D. and N.T. v Spain* (para. 209) stated that *'the effectiveness of Convention rights requires that […] States make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. […] [T]he Court also refers to the approach reflected in*

the Schengen Borders Code. The implementation of Article 4(1) of the Code, which provides that external borders may be crossed only at border crossing points and during the fixed opening hours, presupposes the existence of a sufficient number of such crossing points. In the absence of appropriate arrangements, the resulting possibility for States to refuse entry to their territory is liable to render ineffective all the Convention provisions designed to protect individuals who face a genuine risk of persecution'.It may be debatable whether this also holds true if the bordering State is a party to the ECHR, but at least in light of the ECtHR's *M.S.S.* judgement, this does not seem to relieve a State from providing protection in line with the ECHR.

Additionally, the performed push-backs violate the prohibition of collective expulsion laid down in Art. 4 Protocol No. 4 of the ECHR and Art. 19 ChFR, which prohibits the expulsion of and thereby also refusing entry to large groups of asylum seekers at border checkpoints without individual examination of their circumstances. Although Greece did not ratify the respective protocol, the respective Art. 19 (1) ChFR is interpreted in the same manner (Art. 53 (3) ChFR). This is even true in the light of the recent and controversial ECtHR judgment in *N.D. and N.T. v Spain*. Here the Court stated that even in the case of a 'culpable' attempt to cross a border unauthorized and taking advantage of large numbers, the responsibility of the State depends on whether it provided genuine and effective access to means of legal entry, in particular border procedures (para. 201).

The aforementioned principle of non-refoulement and the prohibition of collective expulsion oblige the States to conduct individual examinations. The possibility that someone seeking asylum may not be entirely materially protected ('mixed migration flow'), does not preclude this duty as only individual examinations can ensure the effective assessment of who is in need of protection. The ECtHR further substantiated the right to apply for protection as arising from Art. 3 ECHR. In its *N.D. and N.T.* judgement it stated, that genuine and effective access to means of legal entry '*[…]should allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the Convention, under conditions which ensure that the application is processed in a manner consistent with the international norms, including the Convention.'*. On the EU level, Art. 18 ChFR requires a fair procedure for determining a protection status, as further specified in the Asylum Procedures Directive (APD). According to Art. 6 (1) APD, all applications to a competent authority or officials who are likely to receive such applications shall be registered and dealt with as set out in the APD.

No Legal Justification for a 'Suspension of the Submission of Asylum Applications'

Contrary to what has been invoked by Greece, there are no legal grounds for suspending the submission of asylum applications. International law does not provide for a suspension of the non-derogatory principle of non-refoulement, which foresees procedurally the right to apply for protection. Especially for the Geneva Convention, the UNHCR explicitly stated that there are no legal bases for suspending the requirement of individual examinations.

Regarding EU law, the APD does allow for special border procedures in the case of a mass-influx (Art. 43 (3) APD) but not for a suspension of the procedures. Greece had invoked Art. 78 TFEU but neither its procedural nor its substantial requirements are met. Art. 78 (3) TFEU allows for provisional measures to be adopted in case of a sudden inflow of third country nationals '*by the Council, on a proposal from the Commission*' after consulting the European Parliament. Obviously, a member State's unilateral approach is not foreseen. Moreover, even if the Council would adopt a decision under the procedure foreseen, which the Commission declined, such measures must not violate the ChFR, including the non-refoulement principle and the right to apply for asylum.

Art. 72 TFEU had been discussed in previous situations restricting the right to apply for asylum. It provides that Title 5 TFEU, which includes immigration and asylum, *'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security*'. This provision remains rather mysterious as to its legal nature. But it has been argued (p. 62) that the provision would cover temporary restrictions aimed at restoring the administrative management of large numbers of refugees or that it would cover temporary derogations of EU secondary law (p. 763). Nevertheless, applied to the present situation, it is doubtful whether Greece could invoke Art. 72 TFEU. The border opening by Turkey may, with respect to the number of people, not qualify to threaten the overall administrative management as Greece would still be obliged to ensure such an effective management. Moreover, Art. 72 TFEU does not allow to deviate from EU primary law, including the ChFR. In particular, it does not allow for violations of absolute fundamental rights such as push-backs and returns without the possibility to undergo an asylum procedure. The present suspension does not only deviate from certain secondary EU law provisions – it effectively contravenes the ChFR and ECHR.

The Way Ahead: The Need to Reconcile Order and Humanity in Frontex Operations

The systematic disregard for the rights of those waiting at the border for the duration of one month was already a serious violation of fundamental rights and at the time of the decision of the EU likely to persist. Instead of continuing to unlawfully support Greece's measures, the EU should now pressure Greece to refrain from a prolongation and reverse the Emergency Act and help to ensure that all people can apply for asylum and are cared for by means of relocation and collective burden sharing. This holds especially true in times where a pandemic further deteriorates the situation of those who are most vulnerable.

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