Does the Commission Cross the Rubicon? Legalising 'Pushbacks' on the Basis of Article 72 TFEU

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December 2024 may go down in history as a turning point of EU asylum law and policy. The newly appointed second von der Leyen Commission recognised, in a non-binding communication, that pushbacks may possibly be legal if Member States invoke a provision some experts may barely have noticed: Article 72 TFEU protects the responsibilities of the Member States to maintain law and order and to safeguard internal security.

This short provision can, in the view of the Commission, justify a derogation from the right to asylum at the EU's Eastern borders in response to the instrumentalisation of migration by Russia and Belarus. Doing so would effectively legalise controversial legislation and administrative practices refusing entry to the territory for people expressing the desire to apply for asylum, despite the obligations enshrined in the Asylum Procedures Directive and Articles 18 and 19 of the Charter. This blogpost serves as a guide to the legal questions surrounding the communication.

Politics: latest twist in a long debate

Just before the first wave of the Covid-19 pandemic, the Turkish President Erdoğan encouraged migrants to leave the country. Greek policemen closed the border, and the Commission President praised them as the 'ασπίδα' (shield) of Europe. 18 months later, the European Council honoured the efforts of Poland and Lithuania to rebut a 'hybrid attack' by the Belarusian dictator (here, No. 19). In both cases, martial language provided political backing for restrictive state practices, but the EU institutions shied away from crossing the Rubicon of legal endorsement.

To be sure, Member States had asked for legal approval. Poland, in particular, was unhappy with what it perceived to be hesitation when the Commission proposed, in draft emergency measures, to delay the formal 'registration' of asylum applications, instead of suspending the right to 'make' them in the first place (here, Article 2(1); here, pp. 373-374). The future Crisis and Force Majeure Regulation (EU) 2024/1359, which will apply from June 2026 onwards, will not sanction such drastic move either.

Before Christmas, EU institutions changed course. The use of the term 'weaponisation', rather than the more subtle 'instrumentalisation', stands for the shift in direction of the new Commission. It also responds to the political strategy of the Polish government headed by Donald Tusk. The former President of the European Council explicitly asked for EU backing and managed to organise political support during the European Council meeting of October 2024 (here, No. 38). Tusk embraced the EU institutions rather than following the 'model' of Victor Orbán who employs pushbacks as a means of anti-European propaganda, thus triggering the firm rejection by the Commission and the Court of Justice.

The Commission's communication is a decisive step in the direction of Donald Tusk even if it shies away—for the moment, at least—from proposing an amendment of EU legislation. Reliance on Article 72 TFEU puts the legal onus to defend the new approach on national governments. The Commission did not propose emergency measures under Article 78(3) TFEU or a 'regular' amendment of either the Asylum Procedures Regulation or the Crisis and Force Majeure Regulation. In this respect, the communication may be a 'test balloon' to learn about how the Court of Justice of the European Union (CJEU)

and the European Court of Human Rights (ECtHR) will react, including in several cases pending in Strasbourg to which we shall come back. The communication is a thinly veiled attempt to influence their outcome.

Article 72 TFEU: from obscurity to notoriety

In a series of more than ten judgments, the Court of Justice recognised that Member States may exceptionally invoke Article 72 TFEU to justify non-compliance with EU legislation, thus effectively aligning the provision with the well-known public policy caveat in single market law (e.g. here, paras 143-145; here, paras 67-69; here, paras 83-87). Judges have not recognised the arguments brought forward by Member States in a single case, but the option remains on the table, thus providing governments with legal ammunition to counter criticism of apparent wrongdoing.

When it comes to the conditions Member States have to fulfil, the Commission's communication lists all the judgments and requirements which equally feature on the relevant pages of my book on *European Migration Law* (here, p. 8; here, pp. 273-275). Member States must demonstrate underlying reasons and are subject to judicial oversight; Article 72 TFEU is no matter of sovereign autonomy (here, paras 84-85). Derogations will usually have to be limited in time to comply with the principle of proportionality which obliges Member States to show that non-compliance with secondary legislation is absolutely necessary (here, para 152).

Rather than setting aside whole pieces of legislation, Member States will usually divert from individual provisions. They will also have to demonstrate that legitimate security concerns cannot be remedied by exceptions in EU legislation, including under the Crisis and Force Majeure Regulation (here, paras 222-224). Finally, they will have to coordinate closely with other Member States and the EU institutions to comply with the principle of loyal cooperation under Article 4(3) TEU (here, para 119). The Commission leaves no doubt that it supports the view that the right to asylum can be suspended at the Eastern border, even if the communication does not put down this conclusion in writing.

Experts of asylum law may know that the Court rejected a Latvian attempt at invoking Article 72 TFEU in a scenario of instrumentalisation in a judgment of June 2022. However, the ruling can hardly serve as a generic rejection of the idea. It involved secondary movements between Poland and Lithuania, as opposed to entry directly from Belarus. Moreover, Lithuania had failed to substantiate its claim before the Court, thus effectively abandoning the idea during the judicial proceedings. Judges did not, as a result, examine the conditions and limits, including under human rights law, any invocation of Article 72 TFEU will inevitably gives rise to.

Nevertheless, the judgment serves as a powerful reminder that any invocation of Article 72 TFEU remains an uphill legal struggle for national governments: judges reminded Latvia that legislative safeguards in the Asylum Procedures Regulation, in particular the option to process asylum applications in the border procedure, allow Member States to respond to the 'hybrid threat' at the Eastern border without suspending the right to asylum (here, para 74). Political support by the Commission does not absolve governments from rebutting the counterarguments which will be put forward on the basis of the existing case law on Article 72 TFEU.

Prohibition of refoulement as a stop sign

Public debates about 'pushbacks' rarely distinguish between the prohibition of refoulement and the right to asylum. Both guarantees are closely intertwined, but they have to be distinguished nonetheless. In the words of the ECtHR: 'neither the Convention nor its Protocols protect, as such, the right to asylum. The protection they afford is confined to … the prohibition of refoulement' (here, § 188). For anyone trying to grasp the Commission's argument, it is essential to comprehend the subtle difference.

While the principle of *non-refoulement* obliges states not to return anyone to unsafe territories, the meaning of the right of asylum is rarely illustrated. Core components are generally understood to embrace access to status determination, a provisional right to stay, and a set of socio-economic rights after a positive decision. Status after recognition features prominently in Articles 12–24 of the Refugee Convention, not, however, in ECtHR judgments with their focus on *non-refoulement*.

For our purposes, access to status determination and the provisional right to remain are decisive. They give anyone expressing the wish to apply for asylum with any state authority, including border guards, the right to be admitted on the territory, within border procedures or elsewhere—irrespective of the prospects of success (here, paras 86-94; here, paras 95-

106). This right to remain exists even if there is no danger of illegal refoulement. Think of a Canadian citizen who claims to be persecuted by his perfectly democratic government. The right to asylum in the Asylum Procedures Directive requires his admission for purposes of the asylum procedure. These legislative guarantees exist even if there is no 'real risk' of refoulement.

In essence, the recent Commission communication maintains that these legislative guarantees can be abrogated in light of Article 72 TFEU under the condition that the prohibition of refoulement remains intact. The latter cannot, as an absolute guarantee (here, § 124-127), be subject to interferences like Article 18 of the Charter, which we will discuss later. Footnote 29 of the Commission communication recognises this 'non-derogable nature' of the principle of *non-refoulement* in passing. Some might intuitively assume that this is the end of the legal analysis: if the prohibition of refoulement is non-derogable, 'pushbacks' are always illegal.

Such assertion eschews the question as to whether state action amounts to illegal refoulement in the first place. This need not always be the case. The precarious security situation at the EU's Eastern border means that we can ignore scenarios of evident safety in countries of origin or safe third countries (here, §§ 134-141). Even if blanket refusal of entry is compatible with the prohibition of refoulement in situations of evident safety, the prohibition of collective expulsion requires states to allow each person to bring forward arguments against return, with less procedural safeguards than under Article 3 ECHR and without an automatic suspensive effect of legal remedies (here, pp. 309-311, 184). At the EU's Eastern border these exceptions for scenarios of evident safety are irrelevant.

One step further, the ECtHR famously relied on the 'own conduct' criterion when introducing another exception in the *N.D. & N.T.* judgment. The Grand Chamber found Spanish pushbacks not to amount to collective expulsion. Unfortunately, the doctrinal parameters defining the exception remain ambiguous: they fluctuate between the use of force, high numbers, and the availability of legal pathways (here, §§ 207-209; here, §§ 59-65; here, §§ 114-122; here, §§ 117-119). Two judgments applied the caveat to the prohibition of refoulement (here, §§ 19-20; here, para 117). The Grand Chamber will have to decide in several follow-up rulings which are currently pending (here; here; here) whether it covers scenarios of instrumentalisation. If judges extended the exception, Article 3 ECHR would remain a non-derogable guarantee, which, nevertheless, does not prohibit blanket refusal of entry at the Eastern border.

Such an application of the *N.D. & N.T.* exception to scenarios of instrumentalisation would effectively reintroduce a variant of the security exception in Article 33(2) of the Refugee Convention into the prohibition of refoulement under European human rights law. Space precludes an assessment of the requirements of the exception under international law. For practical purposes, the CJEU retains the authority to interpret the provision authoritatively within the EU legal order. In doing so, it would have to decide whether to follow proposals requiring an individualised assessment of the security risk posed by each applicant (here, No. 8; here, pp. 145-147). The Commission's communication vigilantly highlights Articles 33(2) of the Refugee Convention and is decidedly short when recapitulating ECtHR case law (here, pp. 5,7)—a brevity we may interpret as a deliberate choice in an attempt to influence the ongoing deliberations within the Grand Chamber.

For many experts of asylum law, the debate about a security-based exception from the principle of *non-refoulement* was inconceivable until very recently. To be sure, my generation (I am currently 51 years old) is accustomed to the ECHR as a 'living instrument'; we witnessed numerous judgments interpreting human rights dynamically. However, the past three decades primarily saw judicial innovation advancing the rights of migrants, not dynamism lowering protection standards. The recent Commission communication sponsors such reversal of the interpretative dynamics.

Interference with the right to asylum in the Charter

Contextual factors supporting judicial dynamism to the benefit of migrants include the steady expansion of EU asylum legislation over the past two decades, which many ECtHR judgments record among the legal arguments as an expression of pan-European 'consensus'. As a matter of principle, the ECtHR's conclusions can be projected upon the double prohibition of refoulement and collective expulsion under Articles 4 and 19 of the Charter, read in light of Article 52(3). Recent years have shown that the Court of Justice tends to follow its sister court in Strasbourg.

This brings us to a final question: what happens if the ECtHR—hypothetically—extends the 'own conduct' exception to instances of instrumentalisation? At this point, the distinction between the prohibition of refoulement and the right to asylum becomes relevant. Pushback practices would be compatible with the prohibition of refoulement and collective expulsion

under Articles 4 and 19 of the Charter. However, such conclusion would not extend to the provisional right to remain as an integral part of the right to asylum under Articles 6 and 9 of the Asylum Procedures Directive 2013/32/EU. In a recent judgment, the CJEU found that a pushback practice 'is' contrary to the Directive, whereas it 'may also' be incompatible with the prohibition of refoulement (here, paras 50-53). Judges distinguish, in a subtle manner, between the right to asylum and *non-refoulement*. Pushbacks are incompatible with the Asylum Procedures Directive, whereas it depends on the circumstances whether they amount to illegal refoulement.

In this context, Article 72 TFEU can—potentially—be relied upon to set aside the legislative guarantees in the Asylum Procedures Directive. However, this conclusion does not provide a final answer either, since the right to asylum equally features in Article 18 of the Charter which, according to the CJEU, is 'given concrete form by' the Asylum Procedures Directive (here, para 192; here, para 44). It is not enough, in other words, to justify disrespect for secondary legislation on the basis of Article 72 TFEU. Member States will also have to demonstrate in a final step that pushback practices are compatible with the Article 18 of the Charter.

At this point, governments could pursue different trajectories of legal argumentation, since the interpretation of Article 18 of the Charter defies easy definition on account of cautious drafting. It is not even self-evident that the provisions contains an individual right, as opposed to a principle which is not directly applicable. If Article 18 lay down an individual right, its bearing would have to be verified: the wording refers to the Refugee Convention, which, according to the habitual reading, contains the principle of *non-refoulement* but not the right to asylum (here, §§ 161-182). It might be possible, on this basis, to project exceptions in ECtHR case law and the Refugee Convention on Article 18 of the Charter.

If, by contrast, judges conclude that Article 18 of the Charter, read in conjunction with EU legislation, goes further than the prohibition of refoulement by guaranteeing access to the asylum procedure and a provisional right to remain, the Commission argues that the instrumentalisation of migration may justify 'serious interferences with fundamental rights' (here, p. 6). It conceives the right to asylum to be a derogable guarantee in the sense of Article 52(1) of the Charter, unlike the principle of *non-refoulement*. This position is supported by a CJEU judgment qualifying Hungarian pre-registration requirements on public health grounds to constitute 'a manifestly disproportionate interference' with the right to asylum, thus implying the option of justification (here, para 59).

Conclusion: proportionality as the final hurdle

This blogpost set out to provide readers with a mental map to navigate the uncharted waters of security-based exceptions to the prohibition of refoulement and the right to asylum. Article 72 TFEU may potentially serve, as we have seen, as a doctrinal instrument to set aside the legislative guarantees in the Asylum Procedures Directive. Whether such a conclusion complies with the prohibition of refoulement and collective expulsion will, for the most part, depend on the forthcoming ECtHR judgments assessing pushbacks in scenarios of instrumentalisation at the EU's Eastern border.

Even if the ECtHR's Grand Chamber found pushbacks to be legal, Member States would not be free. Governments would have to convince the Court of Justice that the strict requirements of Article 72 TFEU are being complied with and that the interference with the right to asylum fulfils the requirements set out in Article 52(1) of the Charter. Exceptions must be 'provided for by law', rather than being simple administrative practices, to comply with Article 52(1) of the Charter. The CJEU might also conclude, like in the judgment on Lithuania, that border procedures are enough to respond to security concerns or that the derogations in the future Crisis and Force Majeure Regulation are sufficient.

The final analysis might boil down to a proportionality test and the necessity of drastic state measures, both under Article 72 TFEU and Article 52(1) of the Charter. Judges may instruct Member States to exempt specific categories of persons, such as minors or vulnerable groups, mirroring existing exceptions in Finnish, Lithuanian, and Polish legislation. They might also require a basic triaging identifying people with evident protection needs who are not being pushed back. They would also have to ascertain the bearing of the nebulous category of the 'essence' of fundamental rights (see also here, point 137 without giving any reasons). The concept of 'essence' was borrowed from German constitutional law where, tellingly, it does not have much practical bearing besides the proportionality test.

It is beyond the scope of this blogpost to suggest definite legal answers to these numerous questions. Nevertheless, one thing is certain: the time of dynamic interpretation to the benefit of migrants may have come to an end. The Commission

communication marks a symbolic victory for governments calling for a fundamentally new approach to asylum. The Rubicon has been crossed, but decisive legal battles and skirmishes lie ahead.