Pushbacks? Never mind, we're doing it

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„Pushback" has been elected Germany's non-word of the year 2021. The word is rather innocent, the act is the problem: An inhumane process, says the jury, that deprives refugees of the opportunity to exercise their human and fundamental right to asylum. Whether or not the word euphemises the act, as the jury opines, it is a misdeed to deport people without acknowledging their concerns for protection, examining them substantially, and ensuring effective legal protection. Legal protection is not effective, if the case can only be brought to court *post factum*. A right to stay is required pending a (interim) court decision on the admissibility of the transfer. Where these standards are not met, the principle of non-refoulement – an absolute and non-derogable principle that must be safeguarded effectively – is guaranteed only on paper. The EU Commission has now submitted a proposal for an amendment of the Schengen Borders Code that allows for irregular arrivals to be returned without effective legal protection.

Since the 2015/16 crisis, there has been a growing political interest in the EU and its Member States to no longer be bound by the guarantees mentioned. This applies in particular to Europe's external borders, especially where neighbouring countries (most recently Belarus) put pressure on Europe by directing protection seekers to the European borders. However, the internal borders are also affected: Some Member States, including Germany, are carrying out border controls in violation of Schengen law since many years. One purpose of the German controls is to promptly return asylum seekers arriving from certain countries of first entry, bypassing Dublin law. A precedent on these "Seehofer pushbacks" is pending at the ECtHR.

The Case Law of the ECtHR and the CJEU

In numerous decisions on return, border protection practices, Dublin transfers, extraditions, or transfers within the framework of the third-country concepts of the Asylum Procedures Directive the ECtHR and the CJEU have made it clear that forced transfers to another state without procedures that ensure compliance with the non-refoulement principle and effective legal protection are inadmissible. Whether the affected person is already deep inland or still in transit is irrelevant; a notification of a refusal of entry makes no difference either. Instead, the factual deportation from one state to another is decisive (*N.D. and N.T. v. Spain*, paras. 184-188). This act cannot be defined away or withdrawn from jurisdiction by telling someone, who is de facto affected and present on the territory under international law, that she has not yet entered the country.

Anyone who does not acknowledge the people's concerns for protection, who does not examine them substantively, or who leaves it to the authorities to decide who may stay to await a court decision and who is deported immediately (*M.K. and others v. Poland*, para. 143), is in the wrong. The concern for protection does

not necessarily have to be an application for asylum or even have anything to do with the conditions in the country of destination. Any sufficiently serious need for protection against deportation is enough. Nothing else follows from the decision *N.D. and N.T.* of the ECtHR on the Spanish pushbacks in Melilla, which is often invoked as a counter-argument: The ECtHR read a conditional exception into the ban of collective expulsions. The obligation to ensure the principle of non-refoulement remained explicitly untouched. Spain simply was lucky that of all the people, who were returned without assessment of their protection needs and without legal protection, the two complainants could not substantiate in court that they had a protection need. The decision does not give a carte blanche to play Russian roulette with people, in the expectation that the cases with a bullet in the drum will not make it to court.

When the rule of law used to be a more stable principle, one could expect that the unambiguous and court-confirmed illegality of politically desired behaviour would prompt those responsible to stop and look for other ways of pursuing their goals. In 2011, the ECtHR and CJEU made it clear that within Europe, too, people should not simply be pushed from state to state: Member States must check whether the conditions in the destined Member State really comply with Art. 3 ECHR resp. Art. 4 GRC instead of feigning in “mutual trust”. Subsequently, the practice of Dublin transfers without effective legal protection was abandoned, although this made the system far more complicated.

Meanwhile, with a shrinking ability to reform and compromise within Europe and a dwindling commitment to the rule of law and to European court rulings, the pushback ban seems to have become so annoying to many Member States that the legal guarantees mentioned are simply and broadly ignored. Calls for legalising the „resolute measures“ across Europe are getting louder. It is unapparent how the legalisation should be feasible in view of an absolute and non-derogable human rights guarantee such as the principle of non-refoulement though.

The “Legalisation” of Pushbacks

The EU Commission is under pressure to present reform proposals: On the one hand, they should have a chance of being realised and, on the other hand, they must comply with primary law. In its quest to square the circle, the Commission presented two new legislative proposals in December 2021, following an immediate action proposal on the Belarus situation. With regard to external borders, a regulation addressing situations of instrumentalisation is proposed that allows substandard procedures in the border area to be expanded even further in relation to the migration and asylum package. In addition, the reception standards may be lowered further. In the event of an instrumentalisation, returns are to be subject to national law, which is likely to further weaken the protection of those affected.

For internal borders, the Commission proposes an amendment of the Schengen Borders Code. Explicitly for the purpose of curbing „unauthorised movements“ serves a new, very simple transfer option for persons, who are apprehended near the border following an irregular border crossing and are assessed by the

authorities as not being entitled to stay: immediate return, at the latest within 24 hours. Procedural safeguards to effectively protect persons who have left the other Member State out of necessity? None. Legal protection against the administrative assessment of the situation can be sought, but a suspensive effect is excluded (Art. 23a II). There is no suspensive effect under current Schengen law either, but this wisely concerns remedies against refusals of entry, not against return measures. Those affected receive a completed standard decision form together with a written indication of contact points that provide information on legal representatives. There they may ask *post factum* what that was about: a “legalised” pushback?

Is the proposal meant to be understood that it excludes at least irregular arrivals who want to apply for asylum from the transfers? The fact that border guards are supposed to assess the right to stay also based on registration entries of other Member States in Eurodac (p. 8) suggests that asylum seekers, who moved on from a Member State being responsible for them, are indeed supposed to be subjected to immediate transfers. Otherwise, it would be very much in doubt what the proposal is able to achieve at all in the matter of „unauthorised movements“. The widely deplored phenomenon are the onward movements within the European asylum system. Rhetorically, the – by no means merely theoretical – possibility that someone who is moving on is still fleeing, because fleeing has not yet come to a bearable end in the other Member State, has long been lost sight of: all are labelled “irregular migrants”. Will there now be installed a switch, operated by internal border guards to branch off onward moving asylum seekers into the roughshod Schengen transfer procedure, before granting access to the more demanding CEAS procedures?

Alternative Law

In any case, the Commission is proposing a procedure that lacks the minimum legal guarantees for compulsory transfers from one state to another. The explanations provided by the Commission do not contain any arguments as to the compatibility of the proposal with the case law referred to above. Understandable: If you fly a kite to legalise pushbacks, it is better to remain silent in this respect. Inspired by the term “alternative facts” in the dispute over the audience figures at Trump’s inauguration, I have described such approaches as „alternative law„, using the example of the „Seehofer pushbacks“. The attitude behind alternative law is: *Unlawful? Never mind, we’re doing it.* Especially in times when the rule of law is in jeopardy, the EU Commission is ill-advised to seek consensus in such a way.
