



MIGRATION RELATED RESTRICTIONS BY THE EU MEMBER STATES IN THE AFTERMATH OF THE 2015 REFUGEE “CRISIS” IN EUROPE: WHAT DID WE LEARN?¹

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Abstract. The article explores the actual and potential negative effects of selected restrictive measures undertaken by the European Union Member States on the protection of asylum seekers and refugees in Europe and its near vicinity, and the lessons learned from the post-2015 migration and refugee ‘crisis’ in the EU. The article aims to provide a legal assessment of these measures and their consequences from the perspective of international and EU law. The selected restrictive measures employed by the Member States in relation to or post-2015 refugee ‘crisis’ that are analysed in the article, relate to restrictions in the area of border controls: reintroduction of Schengen control at EU internal borders; physical barriers built along the borders of EU Member States and closure of external borders; other restrictions through legislative changes related to fast-track procedures and the increased use of detention. The research demonstrates that the restrictive measures analysed have already caused and will raise concerns resulting in legal actions at national, as well as European courts, the latter being far less favourable to accepting the arguments of “unexpected migration flow”, protection of national security or public order as justification for such measures. The article suggests that the lessons learned from the post-2015 refugee ‘crisis’ have been limited, and restrictive tendencies continue, including new trends in the upcoming revision of EU asylum legislation.

Keywords: migration, refugee crisis, migration restrictions, asylum in Europe

Introduction

The refugees in Europe are not a trend of the 21st century, as Europe has a long history and tradition of assisting and providing protection to refugees (Christensen, 1995, p. 103). There have always been and will be refugees who are forced to seek a new home abroad in order to escape from persecution, violence, and wars, but nowadays the world is facing greater problems than ever as compared to previous decades. With the dramatically increased number of asylum seekers in recent years, it has become evident that paradoxically, the granting of refugee status within the meaning of the 1951 United Nations Convention Relating to the Status of Refugees (hereafter – the 1951 Refugee Convention) has significantly decreased (Christensen, 1995, p. 105). The changing global and national circumstances relating to migration and refugees have caused strains on national, regional and international institutions, as well as increased tensions in the context of international refugee protection. This changing context of migration and asylum

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has been particularly evident in the European Union (hereafter – EU) as a result of the so-called migration and refugee ‘crisis’ in 2015.

First of all, in the year 2015, over 1 million asylum seekers reached the EU borders and a majority of them (802,000 persons) entered from Greece (Clayton, 2015). In 2016, around 1,204,280 persons reached EU Member States (majority went to Germany) (Eurostat, 2017), while 164,500 were recorded in the 1st quarter of 2017 (Asylum Quarterly Report, 2017). Throughout 2016, 362,752 arrivals by sea were recorded, while in the first part of 2017, 140,686 (UNHCR). Considering the number of deaths in the Mediterranean Sea connected to the immigration routes, it can be called “the world’s deadliest migration route”, and since 2000, nearly 22,400 persons have died (IOM, 2014, p. 20). In 2016, 5096 deaths were recorded and over 2000 in the first half of 2017 (UNHCR). The high rate of deaths has created a new agenda for the EU and calls for creating high level standards of humanitarian imperatives to stop this from happening (Motion for A European Parliament Resolution, 2015/2342(INI)).

Secondly, the existing asylum systems were not prepared to handle such unprecedented numbers of asylum-seekers in 2015 and the EU bodies resorted to a so-called ‘quota’ system for accepting asylum seekers and refugees. This mandatory system introduced by the European Council in September 2015 resulted in several protests in Poland, Czech Republic and Slovakia, some of which resulted in legal actions by Slovakia and Hungary to the Court of Justice of the EU (hereafter – the CJEU) in Luxembourg (Action brought on 3 December 2015, *Hungary v Council of the European Union* and Action brought on 2 December 2015, *Slovak Republic v Council of the European Union*).³ On the other hand, the EU promise to relocate 160,000 refugees from Italy and Greece was not fulfilled and according to the European Commission, only 29,144 persons have been given protection in other EU Member States so far (20,066 from Greece and 9,078 from Italy) (European Commission, 2017).

Thirdly, the environment of this protection has been changing in Europe due to the signature of the EU-Turkey deal in March 2016, in an attempt to stop the flow of migrants throughout Europe, which resulted in the transfer of migrants, including asylum seekers from Greece to Turkey, which has not been considered to be a safe third country as per the EU’s own legislation. The effect of the deal was that it reduced the numbers in Greece, but increased them in Italy, and raised serious questions of the EU’s commitment to its own laws and international obligations.

Last, but not least, on an individual basis, countries such as Serbia, Croatia, Slovenia, Macedonia (FYROM) and Austria, which were along the Balkan transit route, decided to close their borders to refugees (International Rescue Committee, 2016, p. 4). Paradoxically, refugees fleeing from war and violence hoping to get protection outside of their country suffered further ill-treatment, arbitrary detentions and violence, including sexual, human trafficking, etc., in the states of their first arrival (Doctors Without Borders, 2016, p. 8-9).

Thus, the migration and refugee ‘crisis’ of 2015 put unprecedented pressure on the EU and its Member States despite the fact that all of them had legislation and procedures to handle the influx. The pressure led several Member States to adopt various national restrictive measures, some of which have raised concern with regard to international obligations on human rights and refugee protection. These restrictions could be grouped into several categories by their type: 1) border control: reintroduction of Schengen control at EU internal borders, 2) fences built along the borders of EU Member States, 3) changes in legislation.

This Article explores some of the effects of the selected restrictive measures on the protection of asylum seekers and refugees in Europe and its near vicinity, and the lessons learned from the post-2015 period migration ‘crisis’ in the EU. It aims to provide a legal assessment of these measures and their consequences from the perspective of international and EU law.

³ On 6 September 2017, the CJEU issued its decision in cases C-643/15 and C-647/15, rejecting the claims of both countries to annul the Relocation Decisions adopted by the Council as a provisional measure under Article 78(3) of the Treaty on the Functioning of the European Union.

1. Restrictions in the area of border controls

1.1. Reintroduction of Schengen border control at EU internal borders

At the outset, it must be stressed that the reintroduction of Schengen border controls at EU internal borders is not, as such, a violation of EU law or international protection obligations, as it is allowed by the Schengen Border Code (hereafter - SBC). However, there are certain procedures and time limits for that, as well as certain risks involved, as countries should provide notification of the temporary reintroduction of border control at internal borders, and several EU Member States took advantage of this opportunity. Several countries, like Slovenia, Hungary, Malta and Belgium did it for one or two months. Other countries, like Germany, Austria, Sweden, Norway and Denmark prolonged the term for a year (Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 et seq. of the Schengen Borders Code). After September 2015, several Schengen countries - Germany, Austria, Slovenia, Hungary, Sweden, Norway, Denmark and Belgium - reintroduced internal border controls due to an alleged "big influx of persons seeking international protection" or "unexpected migratory flow" (Study for the LIBE committee, 2016, p. 15). Belgium was the last country to reintroduce internal borders (23 February 2016), fearing the arrival of refugees from the Calais refugee camp. After April 2016, Belgium did not prolong its internal border controls (Study for the LIBE committee, 2016, p. 16).

The criteria against which any justification by a Schengen state to reintroduce border controls with another Schengen state must be assessed are now set out in Regulation 2016/399. The Regulation, in Articles 21 and 25–30, sets out the conditions under which the reintroduction of intra-Schengen state border controls can lawfully be applied. Thus, where a Schengen state seeks to rely on the movement of persons across a Schengen border as a ground for the reintroduction of controls, a justification well beyond the mere movement of persons must be involved. As the European Border and Coast Guard Agency Frontex reported, almost 223 million of persons entered the EU in 2015 (Frontex, 2016). They have the possibility of crossing Schengen internal borders once inside the EU. Thus, the movement of persons as a ground for the reintroduction of intra-Schengen border controls clearly must have a much more substantial content than just numbers. Their numbers over time and the purpose for which these people come to the EU can have a differential impact on some Member States, in comparison with others, of course. Yet, the scale of the numbers of persons in need of protection is dwarfed by those of travellers in general. There is a difference between the justifications offered by Sweden, which hosts quite a lot of beneficiaries of international protection, and Denmark and Norway, who host far fewer. The main question that the Member State must assess in the prolongation of border controls is the extent to which the measure is likely to adequately address the threat to public policy or internal security, and the proportionality of the measure in relation to the threat. The criteria that must be taken into account are: (a) The likely impact of any threats to public policy or internal security, including the terrorist incidents or threats following them, and those posed by organized crime; (b) The likely impact of such a measure on the free movement of persons within the area without internal border controls. This means that the Schengen states must provide exact details concerning the nature of the threat and its impact, which must be so substantial and immediate that it justifies the use of exceptional border control measures (Study for the LIBE committee, 2016, p. 41-42).

In practice, the re-introduction of the Schengen border controls was combined with the closure of the borders to incoming asylum-seekers, spreading the impression in the media that these countries reject refugees. As mentioned above, the re-introduction of the border controls does not in itself mean that asylum-seekers are not allowed to enter, and as such, not a violation of EU or international law. Article 14(1) of the Schengen Border Code provides that conditions of arrival of third country nationals do not apply to asylum-seekers. The practices of some Member States have, however, raised serious concerns, as the closure of internal borders has had an impact on the situation in the vicinity of the EU. For example, after the decision to close the border between Slovenia and Hungary, refugees who wanted to reach Western Europe from Croatia were redirected (Sisgoreo, 2016, p. 1). The Prime Minister Miro Cerar has said that his country will stick to the rules of Europe's Schengen zone of border-free travel. It will receive asylum requests, but will not create a "corridor" for refugees to simply pass through Slovenia into Austria (Radio Free Europe, 2015).

Therefore, the reintroduction of internal border controls in the EU can only be implemented in such a way as to control the entry of asylum-seekers, but not to reject their entry as such at the borders, in particular, if asylum seekers are pushed towards countries that are already overburdened with high numbers of arrivals and cannot ensure appropriate standards of treatment to refugees (e.g., Greece, Italy). Despite the security and other pressures, the opposite practice would be incompatible with the principle of non-refoulement to which the Member States are still bound by Article 3 of the SBC, Article 9 of the Asylum Procedures Directive 2013/32/EU, Article 21 of the Qualification Directive 2011/95/EU, Article 4-5 of the Return Directive 2008/115/EC, Article 19(2) of the EU Fundamental Rights' Charter and others.

1.2. Fences built along the borders of EU Member States and closure of borders

Although building fences at the borders of EU Member States (hereafter – MSs) in order to prevent migration flows is not a new measure (e.g., Spanish Government's actions along the Spanish-Moroccan border), the refugee 'crisis' in 2015 prompted that this remedy has been increasingly employed by some MSs. Most notably, negative attitudes towards newcomers have been significantly demonstrated at the Hungarian border, but Hungary was not the only EU state that introduced fences at the border, as the same was done by Greece, Bulgaria and other countries.

As stated by Frontex, in 2016 there was a drop in arrivals due to, among other measures, the closure of the Western Balkan route by means of technical obstacles put in place along the borders (Frontex, 2017, p. 6). As pointed out in the report for the LIBE Committee (Study for the LIBE committee, 2016, p. 57), the migration crisis of 2015 resulted in, among other measures, the setting up of physical barriers at both the internal and external borders of the Schengen area. The introduction of physical barriers at the borders gave the impression that asylum seekers are not let through the borders and are rejected. This would not be in line with the international protection of refugees. Thus in 2016, the Slovenian, Croatian, Serbian and FYROM governments established a rule, that only 580 migrants and refugees can pass through their country per day (Radio Free Europe, 2017), and as a result, the measure served to provide control rather than rejection at the border of persons who sought protection. However, in July 2016, the Serbian Government adopted a decision to form mixed patrols of the army and police to strengthen the border with FYROM and Bulgaria. The Ministry of Defence reported in December 2016 that more than 18,000 migrants had been prevented from illegally crossing the border from Bulgaria. Furthermore, Croatia together with FYROM, Serbia, Austria and Slovenia made a decision to impose new restrictions on the border to stop asylum seekers from irregular entrance. Croatia was strongly criticized by the Human Rights Watch to send asylum seekers back to Serbia by using violence. The people who were interviewed by this organisation included minors, who described the violence that was used against them, and they were obviously deprived of the right to apply for asylum as well (Human Rights Watch, 2017). According to the monthly data collection by the EU Agency for Fundamental Rights, more than 24,000 people were rejected at the border from entrance into Poland from October till December 2016, while only 120 persons managed to register their asylum applications. Only two or three families who tried to submit their family applications had an opportunity for official registration (FRA, 2017, p. 103). This practice was followed by Lithuania, where the case of refoulement at the border was recorded in October 2017. Hungary sent back any asylum seekers who had entered from Serbia, which has no sufficient functioning asylum system and does not provide any shelter or protection for refugees (FRA, 2017, p. 79), without taking into account the needs of these people, and this obviously goes against EU legislation, UNHCR recommendations and the practice of the Hungary Supreme Court.

Hungary was also the first EU Member State to build fences at internal borders, as Hungarian authorities reportedly started building a fence with Slovenia to re-direct the flow of refugees. Hungary started to install a barbed-wire fence on the internal Schengen border with Slovenia at the end of September 2015, and even planned to extend the fence to Romania (Study for the LIBE committee, 2016, p. 57-58). Subsequently, the fence with Slovenia was demolished and Hungary continued to build fences on its external borders with Croatia (a Schengen accession country) and Serbia (Frontex). In February 2016, Prime Minister Viktor Orban announced his intention to develop a 280-mile-long razor-wire barrier at the southern borders of Hungary. According to IOM, Hungary was the third among two other states (i.e. Croatia and Greece) for having a great number of irregular migrants at the border. In 2015, the number of crossings had reached 411,515 (IOM). The explicit aim to block refugee flows was demonstrated on one hand by the

construction of a fence along the Serbian-Hungarian border (Frontex) and on another hand, by the change in legislation that occurred, which resulted in a legal barrier for those who wanted to claim asylum, who were automatically refused in extremely fast procedures (discussed further under Chapter 3) (Dearden, 2017).

Slovenia began erecting a similar fence with Croatia starting in November 2015. Throughout November 2015 – January 2016, Austria had border barriers with Slovenia (Spielfeld-Sentry) and in 2016, along its border with Italy (Brenner, South Tyrol). Austria announced in October 2015 that it planned to build a fence, not to block refugees from entering the country, but instead to better channel migrants and improve safety (Deutsche Welle, 2015). Austria announced a cap of 37,500 asylum applications for 2016 (Oltermann, 2016). Bulgaria built a barrier, in fact a razor-wire fence (Lesovo, Rezovo), which is 146 km in length, due to the fact that the length of the border of Bulgaria with Turkey is 240 km (Chrysopoulos, 2016). However, there were still 20,391 applications in Bulgaria for international protection in 2015 (Bulgarian State Agency for Refugees within the Council of Ministers).

While the building of fences is not illegal under the EU law and each EU Member State has a right to control who may enter its territory, it is quite obvious that technical barriers, which might be appropriate to address irregular migration as such, are neither effective nor legally appropriate to prevent the flows of asylum-seekers. If, by building fences, a state prevents people from entering its territory and forces them to go back to the country of danger, this practice cannot be considered legal from the perspective of the EU and international law. In particular, pushing those asylum-seekers towards some of the states along the so-called Balkan route, might mean they end up in countries that cannot be considered as safe-third countries as per the requirements of Article 38 of the Asylum Procedures' Directive.⁴

Although there is no right of entry to an asylum country as such, the effect of the principle of non-refoulement prevents rejecting asylum-seekers at the borders without examination of their claims. Therefore, this expensive measure for states and their taxpayers is unlikely to be effective in preventing asylum claims at the borders. The collective expulsion of protection seekers has been previously condemned by the European Court of Human Rights (hereafter – the ECtHR) (see decision *Hirsi Jamaa v. Italy* of 23 February 2012). This conclusion can be further enforced with the issuance of a recent ECtHR judgment on the practice at the Spanish border in Ceuta and Melilla with Morocco. In a judgment delivered on 3 October 2017, the Court ruled unanimously against Spain in *N.D. and N.T. v. Spain*, stating that the country had violated the prohibition of collective expulsion (Article 4 of Protocol No. 4 to the ECHR, which requires that the personal circumstances of each individual concerned to be individually taken into account) and the right to an effective remedy by *de facto* immediate expulsion (Article 13 of the ECHR, which requires a remedy to be effective in “practice and law”). This is the first time an international court had the opportunity to rule on the legality of the EU Member State policy and practice at the external border, preventing persons, including potential asylum-seekers, from entering the EU. According to the Court, the general policy applied by the national government to prevent a migrant's attempts to unlawfully cross the border does not take into consideration each individual's circumstances (neither identification nor information about possibility of asylum).

⁴ APD, Article 38

The concept of a safe third country

1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership in a particular social group or political opinion;
- (b) There is no risk of serious harm as defined in Directive 2011/95/EU.
- (c) The principle of *non-refoulement* in accordance with the Geneva Convention is respected.
- (d) The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- (e) The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. Other restrictions through legislative changes

Several EU Member States responded to the various migration ‘crisis’ by changing their legislation concerning procedures for asylum claims (e.g., introduction of fast-track procedures at the border) and the reception or detention of asylum seekers. For instance, Hungary was one of the EU Member States that had changed the procedure and reception regime for asylum seekers in a restrictive manner. As for the former, it is currently deemed to be a legal barrier for the asylum claims who were automatically refused in an extremely fastened procedures (Dearden, 2017). As for the latter, it allows keeping asylum seekers in detention camps while waiting for the result of their application for international protection (Hungarian Helsinki Committee, Grounds for Detention). The legal amendments of 5 July 2016 allowed the Hungarian police to automatically push back asylum seekers who were apprehended within 8 km of the Serbian-Hungarian or Croatian – Hungarian border to the external side of the border fence, in a summary procedure, without registering their data or allowing them to submit an asylum claim (Hungarian Helsinki Committee, Update). Following the EU-Turkey deal, Greece enacted law 4375/2016, subsequently amended by law 4399/2016. The new legislation established a fast-track border procedure, which *de facto* excluded the possibility to apply for relocation and imposed a geographical restriction, meaning the obligation to stay on the islands (Update Greece, 2017). In April, Italy approved DL13/2017, which abolished the possibility to appeal the Civil Tribunal decisions on international protection before the Court of Appeal. According to this law, the Civil Tribunal decisions can only be appealed before the Court of Cassation within 30 days (Short overview of the asylum procedure in Italy). These and similar fast-track procedures might lead to legal actions in the context of obligations to ensure access to the asylum procedures and an effective remedy under the European Courts. In addition, the recent ECtHR judgment in *N.D. and N.T. v. Spain* that will clearly have impact on Spanish legislation and might become a precedent, setting one for other fast-track procedures at European borders.

Several countries have resorted to the increased use of detention in asylum procedures through legislative changes. Hungary is one of those rare EU states which detains a lot of first-time asylum seekers. The reception centres are overcrowded and suffer from a lack of sufficient services, hygienic conditions, etc. (Pardavi & Gyulai, 2015). Hungary continued its hostile attitude toward refugees in 2017 as well, and Human Rights groups strongly condemned the Hungarian Parliament vote, which aims to force all asylum seekers into detention camps. Among other civil rights groups, one of the first was Amnesty International, which protested against the new regulations for being in breach of EU law and the 1951 Refugee Convention. The new policy of Hungary was defined as a “flagrant violation of international law” (Wintou, 2017). In 2016, France allowed prefectures to systematically use house arrest orders against asylum seekers placed under the Dublin procedure, during the procedure for determination of the Member State responsible for their asylum claim (France: Overview of the main changes), while in May 2017, Germany introduced an additional ground for the detention of rejected asylum seekers who are suspected of constituting a public danger, including persons awaiting Dublin transfers (ECRE, 2017). It must be emphasized that routine and systematic detention may amount to arbitrary detention under international and even national law. At the same time it harms the person and creates long-term consequences for the state, including constrains in integration, high costs involved and the inefficiency of the measure to deter further flows. Furthermore, state obligations to ensure humane detention conditions apply even in situations of emergency due to the absolute nature of Article 3 ECHR (see, e.g., ECtHR judgment in *Khlaifia and Others v. Italy* of 1 September 2015).

In addition, proposed changes to new EU legislation confirm the restrictive tendencies not only at national, but also the EU level, for example, the elimination of the automatic suspensive effect of appeal if the application is rejected as manifestly unfounded based on the safe third country notion in the proposed amendments to the Asylum Procedures Directive, or the proposal to ensure standards of sufficient protection without referring to the 1951 Refugee Convention, as well as the expansion of detention/grounds in proposed amendments to the Reception Conditions Directive, seem to attempt institutionalising restrictions in response to the post-2015 refugee ‘crisis’ and will likely raise new legal concerns towards ensuring proper international protection of asylum seekers and refugees.

Conclusions

- If we look back at various restrictions introduced in response to the post-2015 refugee ‘crisis’ in Europe, we can see that we did not learn much indeed, because restrictive border management measures in some MSs prompted the proliferation of these practices in others. Temporary measures due to “crisis” not only find their extension to permanent legislation at the national, but also EU level. Proposed changes to new EU legislation confirm the restrictive tendencies and seem to fail to learn the lesson that certain restrictive practices will not stand the legal actions towards ensuring proper international protection of asylum seekers and refugees. For the time being, the European courts at least seem to be far less favourable to accepting the arguments concerned with “unexpected migration flow” and the protection of national security or public order as justification for such measures.
- With regard to the border management measures that have been used by the EU Member States (re-introduction of Schengen border controls combined with the closure of borders), it seems that the learning gained from the refugee ‘crisis’ of 2015 did not bring about better results for management of asylum-related flows in the EU. Despite the security and other pressures, the practice of states in rejecting access to the borders and thus asylum procedures is incompatible with the principle of non-refoulement to which the Member States are still bound under EU and international law, and in particular if asylum seekers are pushed towards countries already overburdened with high numbers of arrivals that cannot ensure appropriate standards of treatment to refugees as already explained by the European Court of Human Rights. However, recent amendments to national legislations in several EU countries have confirmed the restrictive tendencies, which will continue raise challenges in view of international law.
- While the building of fences is not illegal under the EU law and each EU Member State has a right to control who may enter its territory, physical barriers, which might be appropriate to address irregular migration as such, are neither effective nor legally appropriate to prevent the flows of asylum-seekers. If, by building fences, a state prevents people from entering its territory and forces them to go back to the country of danger, this practice cannot be considered legal from the perspective of EU and international law. Although there is no right of entry to an asylum country as such, the effect of the principle of non-refoulement prevents rejecting asylum-seekers at the borders without examination of their claims. Collective expulsions of protection seekers have been previously condemned by the European Court of Human Rights on several occasions.
- Restrictive measures of access to the asylum procedures (including fast-track procedures), effective remedies or routine and systematic detention might lead to more litigation within the countries and/or international instances, because routine and systematic detention may amount to arbitrary detention under international and national law. At the same time, it harms the people and creates long-term consequences for the state, including constrains in integration, high costs involved and the inefficiency of the measure to deter further flows. The fast-track procedures might lead to legal actions in the context of obligations to ensure access to the asylum procedures and an effective remedy under the European Courts. The recent ECtHR judgment in *N.D. and N.T. v. Spain* that will clearly have impact on Spanish legislation, and might become a precedent setting one for other fast-track procedures at European borders.

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