The Europe Committee is pleased to present this special edition of our Europe Committee Newsletter devoted to the refugee crisis in Europe. The refugee crisis has spawned many opinions over the past couple of years ranging from Europe was right to open its doors to the downtrodden and help those who are fleeing from war and persecution to those who believe Europe made a “catastrophic mistake” (in the words of President Trump) in allowing so many undocumented refugees to enter Europe, which may eventually lead to the splitting up of the European Union. Regardless, it cannot be disputed that the millions of refugees that have come to Europe over the last few years have caused Europe to face significant challenges, not only logistically, but also culturally, politically, and financially. The purpose of this Newsletter is present the refugee crisis from the perspective of European Committee members from various countries – Austria, France, Germany, Greece, Hungary, and Turkey. We were also fortunate enough to receive a contribution from the European Council on Refugees and Exiles (ECRE), an alliance of over 90 NGO’s that works to protect refugees and asylum seekers throughout Europe. We hope that you find the articles to be of interest.

We welcome all Europe Committee members who are interested in acting as guest editors to volunteer to organize a future special edition newsletter on a hot topic important to Europe and the Europe Committee.

From April 25, 2017, through April 29, 2017, the Section of International Law will hold its Spring Meeting in Washington, D.C. We look forward to a great turnout of Europe Committee members. Only a few weeks thereafter (from June 11, 2017, through June 13, 2017), the 2017 Europe Forum will take place in the great city of Barcelona, Spain. We look forward to seeing you there.

The Europe Committee’s Year-in-Review publication (YIR 2017 volume 51) will be available on the Section’s website soon. This YIR edition again discusses developments in European law during the past year. Congratulations to Tom Stanton and the other contributors and editors for completing another excellent YIR.

Do not forget to join us on our monthly calls taking place the first Tuesday of each month!

Nancy Matos, Mattia Colonnelli and Jörg Rehder, Europe Committee Co-Chairs

A Note from the Editor

This hot topic issue of EUROPE UPDATE offers opinions on the refugee crisis from Committee members around Europe. The opening article of the edition has been contributed by a member of the European Council on Refugees and Exiles (ECRE). His article, along with the other contributors, demonstrate the breadth of this crisis alongside the community and country barriers impeding a unified and successful resolution for Europe.

Michael L. Balistreri (michael balistreri@rhi.com), Editor in Chief
About the Europe Committee

The Europe Committee seeks to engage lawyers conducting practices that touch Europe, including the various European countries, the European Union, and the institutions of the Council of Europe. It nurtures a community of lawyers sophisticated in cross-border matters, comparative law, and the continuously emerging transnational law of Europe, public and private. The Europe Committee’s activities include the sponsorship of programs at the Section of International Law’s seasonal meetings, hot topics teleconferences and newsletter presentations by experts on emerging developments of European law, exploration of legal policy and law reform topics, contribution to the Year in Review issue of The International Lawyer, and co-sponsorship of Section of International Law standalone and other programming.

The Europe Committee’s membership is its most important asset. We encourage all Committee members to be involved in Committee activities and to communicate freely suggestions and ideas.

Upcoming Events

The following are highlights of some of the upcoming Section events:

2016 U.S. Export Controls Year in Review (1 of 2)
02/07/2017-02/07/2017
Baker & McKenzie LLP, Washington D.C.
Also co-sponsored by the D.C. Bar International Section and the Virginia State Bar International Practice Section. One in a two-part series: The sixth annual U.S. export controls year-in-review event will discuss significant developments in 2016 with respect to U.S. export controls targeting Cuba and Russia as well as ongoing Export Control Reforms. After a busy 2016, this event will be helpful to, among others, compliance personnel updating and reviewing policies and procedures to make sure they reflect current U.S. export controls. We will also discuss enforcement trends under US export controls.

2016 U.S. Export Controls Year in Review (2 of 2)
02/14/2017-02/14/2017
Baker & McKenzie LLP, Washington D.C.
Again, co-sponsored by the D.C. Bar International Section and the Virginia State Bar International Practice Section. This is the second in a two-part, in-person series following on from the 2/07/2017 meeting above.

Product Liability Law: The Uncertain Landscape of 3-D Printing
02/21/2017-02/21/2017
Web Conference
The event sponsor(s) are Center for Professional Development, Solo, Small Firm and General Practice Division, Section of International Law, Tort Trial and Insurance Practice Section, Division for Public Services, Section of Science & Technology Law.

2017 Section of International Law Spring Meeting
04/25/2017-04/29/2017
Capital Hilton, Washington D.C.
Registration is now open. Register before March 17th to lock in our Early Bird discount!

2017 Europe Forum
06/11/2017-06/13/2017
Fairmont Rey Juan Carlos, Barcelona Spain
Registration is opening soon. Register before May 1st to lock in our Early Bird discount!

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Borders of Legality: The Reform of the Common European Asylum System

by Minos Mouzourakis

The aftermath of the European Union (EU)’s proclaimed “refugee crisis” has undoubtedly exposed the depth of divergence between its Member States’ interests in building a well-functioning, sustainable Common European Asylum System (CEAS). After the closure of the Balkan route and the EU-Turkey deal of 18 March 2016, the European Commission triggered a third phase of asylum harmonisation by reforming all legislative instruments of the CEAS, with a view to restricting protection space and reducing the attractiveness of Europe to refugees. The seven legislative proposals submitted this year entail a substantial shift in Europe’s vision on refugee policy to one that coerces compliance from refugees within the continent, and shifts responsibility to countries beyond the EU’s physical borders. The different proposals raise high protection risks and bring about new forms of barriers to civil society and legal practitioners’ capacity to safeguard refugees against abuse.

The Internal Dimension: Coercing compliance and trust

Rather unsurprisingly, the reform of the CEAS seems driven by concerns on resolving interstate divisions, rather than the plight of refugees. Even before the advent of a common asylum policy, the central point of contention between Member States has been the balance of responsibility for receiving those seeking protection and conducting refugee status determination procedures. The Dublin system, currently in its third iteration, has always been a highly dysfunctional mechanism of responsibility-allocation in the EU, as it deprives refugees of choice as to their country of residence and encourages Member States to disregard rules so as to avoid responsibility.

Yet Dublin was acknowledged as ineffectual only when last year’s influx of refugees and migrants led European countries to an overt policy of facilitating transit along the Balkan route. An in-depth revision of the Dublin Regulation against the backdrop of such a “crisis” was announced by the European Commission, raising hopes for an ambitious reform agenda. The legislative proposal tabled in May 2016, however, reflected an unparalleled reluctance to rethink the foundational flaws of the Dublin system. Instead, the main tenets of the new proposal seem an uncomfortable attempt to navigate deep divisions between the different national positions and to offer viable political compromise. Member States situated at the external border face further exacerbation of unfair distribution of duties, as they will be responsible for deflecting all protection claims relating to countries considered as safe or claims presenting security risks, while the allocation criteria remain unchanged, and their responsibility will no longer be time-limited, even if sending countries fail to observe the ambitious deadlines for transferring asylum seekers to the first entry state. Strikingly, the proposal professes to promote fair responsibility-sharing only in circumstances of excessive pressure on a specific Member State, through a “corrective allocation mechanism” which automatically allocates asylum seekers to other Member States, with a view to reducing the number of claims the affected country has to process.

The very notion of a “corrective” mechanism endorses the view that unfairness between different Member States is a feature built into the CEAS, and that Dublin would only remedy cases of extreme disproportionate pressure on an individual country. For most countries adversely affected by the status quo, this vision of Dublin fails to address the fundamental lack of solidarity in the EU. For others, however, even this modest scheme of responsibility-sharing is deemed too intrusive, and should be replaced by watered-down commitments to assist struggling Member States in whatever form they deem appropriate, as has been the case thus far. By the end of a difficult legislative negotiation, the envisaged Dublin Regulation seems unlikely to provide real incentives for developing...
sustainable asylum systems, each offering equivalent standards of protection.

Whereas the responsibility deficit of EU Member States seems largely unaddressed by the reform, asylum seekers face a range of coercive measures to prevent them from moving beyond the country designated as “responsible” for them by the Dublin system. To this end, the Dublin proposal is accompanied by an overhaul of all legislative instruments of the CEAS, which contribute to the prevention and sanction of secondary movements. Asylum seekers face physical coercion to be identified upon arrival and deprivation of liberty to refrain from absconding, deprivation of reception conditions, such as housing or education if they move to another country, and accelerated status determination procedures upon return to the responsible Member State. Crucially, the onerous waiting period of five years after a grant of international protection to have free movement rights across the EU restarts if a person irregularly moves to another country.

The presumption of equivalent protection standards across the EU has been a fallacy since the first iteration of the Dublin system. However, the reform strives to foster compliance with, and trust in, the CEAS, not through investing in the implementation of adequate standards across the continent, but through coercion of those fleeing these very protection inequalities. Safeguarding refugees and asylum seekers against unlawful deportation to countries where their human rights are at risk has mainly fallen on civil society and legal practitioners. Across the continent, the European Legal Network on Asylum (ELENA) provides much needed coordination and exchange of information and good practices to support lawyers representing claimants in asylum proceedings. Dublin litigation has been a central part of such efforts, and has successfully halted transfers of asylum seekers to a number of Member States. Beyond powerful pronouncements by the European Court of Human Rights and the Court of Justice of the European Union on the unlawfulness of transfers to Greece, courts across the continent have suspended transfers to Hungary, Bulgaria, Italy, Malta, Croatia, and Spain, as well as Austria and France, at times. Beyond the dubious safety of several EU countries for asylum seekers, many of the aforementioned proposed sanctions are in contradiction with fundamental rights as enshrined in the EU Charter of Fundamental Rights and interpreted by the Luxembourg Court.

The External Dimension: Deflecting protection duties

Europe’s attempts to bridge internal divisions are crystallised through a shared vision for redefining relations with third countries. The externalisation of protection obligations is no new phenomenon in refugee policy, nor one confined to the European continent. Quite to the contrary, migration management models such as Australia’s Pacific Solution have provided ample inspiration to EU politicians in the aftermath of a proclaimed crisis.

Rather unsurprisingly, the reform of the CEAS seems driven by concerns on resolving interstate divisions, rather than the plight of refugees.

The centrepiece of the proposed Common European Asylum System is, in fact, a policy reaching far beyond the physical borders of Member States. The proposal for an Asylum Procedures Regulation imposes, “safe country” concepts as mandatory presumptions on national asylum administrations; meaning that Member States will be obliged not to examine an application on the merits if a person is deemed to already benefit from protection in a “first country of asylum” or able to seek it in a “safe third country”. As mentioned above, the proposed Dublin reform sets the application of these concepts as a precondition to the allocation of protection responsibility within the EU. The broader policy goal is a reorientation of protection obligations further away from European soil and closer to regions of origin. “Protection in the region and resettlement from there to the EU should become the model for the future, and best serves the interests and safety of refugees.”

Accountability and legal scrutiny of asylum policies face even greater barriers when these policies are externalised.
To be able to access protection in the EU, asylum seekers will be required to rebut presumptions of safety in third countries by bringing forth evidence on protection conditions prevailing therein, or dispelling the existence of an individual connection thereto. Therefore, the need for effective, quality legal assistance as a means of securing access to Europe and preventing abuses cannot be overstated.

The implementation of the recent EU-Turkey deal has been a stark illustration of the crucial role of civil society and practitioners in halting unlawful deportations, yet already reflects the difficulty of obtaining detailed, up-to-date information on the functioning of asylum systems beyond the EU. Enhancing protection opportunities for refugees within the EU will require, now more than ever, stronger data collection, monitoring and legal support capacity for assisting organizations and practitioners outside the continent.

The European Council for Refugees and Exiles (ECRE) is a pan-European alliance of over 90 non-governmental organisations working to protect refugees and asylum seekers in Europe. ECRE also coordinates the European Legal Network on Asylum (ELENA), a network of over 500 asylum law practitioners across 35 countries, as well as two databases supporting legal practitioners, policymakers and researchers: the Asylum Information Database (AIDA) and the European Database of Asylum Law (EDAL).

Endnotes

1 European Council, EU-Turkey statement, 18 March 2016.


6 This is illustrated in the two policy options tested by the Commission prior to
The Refugee Crisis: Perspectives from France
by Salli Anne Swartz and Shalini Thouvenin

On September 14, 2015 the European Affairs Ministers approved the relocation of 40,000 migrants from Italy and Greece to other European countries. Eight days later, the European Parliament approved the relocation of an additional 120,000 migrants from Italy, Greece, and Hungary. The 160,000 migrants were deemed to be in clear need of international protection and were to be relocated within a period of two years beginning September 2015 on the basis of Article 78 of the Treaty on the Functioning of the European Union, which states, in part:

“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties…In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned”.

However, the planned relocations were not as successful as originally hoped.

On November 18, 2015, a few days after the Paris attacks, French President François Hollande stated (in translation):

“Our duty towards humanity regarding the refugees must go hand in hand with the duty to protect the French people.”

He did, however, confirm France's commitment to receive 30,000 migrants within the following two years, in accordance with the European relocation plan. But, in light of the then recent Paris terror attacks, this was seen as a political gesture, since the prior French position expressed by the statement of Prime Minister Emmanuel Valls on September 24, 2015, was (in translation), “France will not take more than 30,000 asylum seekers”, and was somewhat less enthusiastic. The French far-right leader Marine Le Pen expressed a much more negative view when she stated (in translation) on November 16, 2015 that France should, “Immediately stop receiving migrants.”

France has since agreed to abide by its European commitments. However, in doing so, it has clearly expressed its right to balance this commitment with the need to assure security at a time marked by threats and acts of terrorism.

This position was again reasserted during the recent dismantling of the "Calais Jungle" and the operations in the Paris Stalingrad neighborhood migrant camp during which security verifications were carried out at the same time as the humanitarian operations.

The manner in which the refugee crisis has been dealt with in France has been criticized by NGOs and migrants themselves. In this regard, the example of the process for dismantling the Calais Jungle, and the litigation which preceded its actual evacuation and destruction, is particularly revealing.

In 2014 and early 2015, during the first wave of migration to France, hundreds of migrants were transferred from the Calais Jungle to administrative retention centers in various locations around France.

The normal purpose of moving migrants to detention
centers is to organize their deportation proceedings.

However, the litigation that then ensued from this 2014/2015 evacuation resulted in a decision in February of 2015 rendered by a French Administrative Court with jurisdiction over the matter. This decision held that the Prefecture of Calais’ Order to detain and deport 205 migrants was an abuse of power and it annulled the Order, because no one had ascertained where the migrants had come from or to which countries they could be deported. The plaintiff was an Afghani without any identity papers and no one had contacted any Afghani authority to get authorisation for the deportation. The Court found that the real motivation of the order was not to deport the migrants, but to expel them from an area of Calais owned by the city. As a result of the annulment of the Prefecture's order, the State had to pay €1,000 to the plaintiff(s) to cover their legal costs and they were freed from detention.

Another example occurred in Southwest France. The migrants who were transferred from the Calais Jungle to the Nimes administrative retention center were all released based on an Order rendered by the Judge of Liberty and Detention of the Nimes Court of Grande Instance on November 5, 2015. The Order justified the release of the migrants by finding that it is illegal to move migrants to other parts of the country for reasons other than deportation. In this case, the sole reason to relocate the migrants from Calais to Nimes was to diminish the number of migrants in the Calais Jungle.

Later, in October of 2016, the final decision to permanently dismantle and destroy the entire Calais Jungle and send the migrants to administrative retention centers throughout France raised many concerns regarding the potential violation of fundamental human rights of such migrants, largely due to the number of persons concerned and the unsanitary and unsafe conditions in the Calais Jungle. By some estimates, there were between 6,000 to 10,000 persons residing in the Calais Jungle at the time it was evacuated.

Various NGOs thus filed an urgent lawsuit in summary proceedings on October 12, 2016 with the Lille Administrative Tribunal in an attempt to delay the dismantling of the Calais Jungle, by arguing that the procedures put in place by the State for the evacuation and resettlement of the migrants were largely insufficient, because the numbers were underestimated and the resettlement camps were not prepared to receive such a large number of migrants. Additionally, the pleadings claimed that the specific measures for minors required under Article 3-1 of the International Convention of the Rights of the Child were not taken into account.

The legal grounds evoked in the pleadings were Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which prohibits degrading and inhumane treatment and the International Convention of the Rights of the Child.

However, in the decision rendered by the Lille Administrative Tribunal on October 14, 2016, the judges found that the Governmental procedures had accurately assessed the number of migrants and that the displacement operations would ensure the respect of the principle of dignity, by providing the migrants with healthier and more secure living conditions.

With regard to the treatment of minors, the Lille Administrative Tribunal acceded to the request of the NGOs that all unaccompanied minors must be housed in a safe location before the dismantling of the Calais Jungle, and that they should be able to join their parents or relatives in the closest EU country, which in this case was, and is, the United Kingdom. Negotiations between France and the United Kingdom took place and are continuing regarding the isolated minors who have family in the United Kingdom. Such negotiations are taking place under aegis of the Dublin III Regulation, which sets forth the rules concerning the right of asylum within the European Union, and which provides that the application for asylum of unaccompanied minors should be made in priority in the country where a member of their family legally resides.

The follow-up to the relocation of the migrants in administrative centers in France is ongoing and the plight
of the migrants will depend upon what legal status the migrants obtain of the three potential types of legal status available in France:

- the status of “refugee”,
- the status of “subsidiary protection” or
- the status of “stateless person”.

“Refugee” status derives from the right of asylum which is recognized by the Universal Declaration of Human Rights, the Charter of Fundamental Rights of the European Union, the Geneva Convention, the Preamble of the French Constitution, and can also be granted by the United Nations High Commissioner for Refugees.

“Subsidiary protection” is granted when the applicant is not eligible for the status of refugee, but is subject to the following serious risks if deported: death penalty, torture or degrading or inhuman treatment, or threats due to widespread violence.

The status of “stateless person” derives from the Final Act of the United Nations Conference on the Status of Stateless Persons and the Convention relating to the Status of Stateless Persons of September 28, 1954 (which France ratified in 1955) and states that any individual, “who is not considered as a national by any State under the operation of its law” will be considered to be a “stateless person”.

The French Office for the Protection of Refugees and Stateless Persons is responsible for processing the applications for all three types of legal status.

The decision to refuse the status of “refugee” or “subsidiary protection” can be appealed to the National Court of Asylum. If the application is rejected, the migrant’s right to remain on French territory will cease, and a deportation order will be issued. In the time between a deportation order and the actual deportation, an emergency center will provide lodging and meals.

Upon the granting of one of the three types of legal status, the migrant (now considered a “refugee” or “stateless person”) will have access to social security rights, financial support, employment, and temporary lodgings through a procedure coordinated by the French Office for Immigration and Integration.

Conclusion

France is reluctantly abiding by its commitment to welcome 30,000 migrants, but it is struggling to find the personnel and lodging needed to accommodate the large number of migrants currently within its territory. The French Office for the Protection of Refugees and Stateless Persons is overwhelmed and understaffed, and as a result, the applications for “refugee”, “subsidiary protection”, or “stateless person” status is long.

Although France gives every sign that it is willing to do what is necessary to integrate (or deport) the migrants, it is doing what it can under strained administrative facilities which inevitably are currently insufficient to house, feed, and process the applications of all of the migrants in a timely and humane manner.

Endnotes

1 TGI Nîmes November 5, 2015
2 Article 4
3 Office Français de Protection des Réfugiés et des Apatrides (OFPRA)
4 Article L.744-4 and L.744-3 of CESEDA
Turkey: Key Player in the EU Refugee Solution
by Z. Can Gurvit

The term “irregular migration” is defined as, “movement that takes place outside the regulatory norms of the sending, transit, and receiving countries” by the International Organization For Migration. Following the start of the Syrian Civil War in 2011, millions of Syrians have been forced to flee their homes to countries such as Lebanon, Jordan, Iraq, Turkey, and various EU states. By 2014, the number of Syrian refugees had exceeded 3 million as stated by the UN. Frontex European Border and Coast Guard Agency reported that over 1.5 million refugees have crossed to Europe over Turkey within 2015. This overflow of refugees to Europe led to the EU states and Turkey seeking immediate solutions to stop, or at least reduce, irregular migration to manageable numbers. As it has been a huge topic of debate within Europe and Turkey, on 18 March 2016, EU Heads of State or Government and Turkey agreed to end irregular migration from Turkey to the EU and replace it instead with legal channels for resettlement of refugees to the European Union. The EU and Turkey agreed on many highly important issues within the EU-Turkey Statement of 18 March towards reaching that goal. Although all of the points of the agreement can be, and have been, debated on extensively, the main points are as follows:

- All new irregular migrants or asylum seekers whose applications have been declared inadmissible crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey;
- For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU from Turkey directly;
- The fulfillment of the visa liberalization roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens by the end of June 2016, at the latest, provided that all benchmarks have been met;
- The EU, in close cooperation with Turkey, will further speed up the disbursement of 3 billion euros initially allocated under the Facility for Refugees in Turkey, and ensure funding of further projects for persons under temporary protection identified with swift input from Turkey before the end of 2018.

Without a doubt, it is extremely important to define the criteria for who will be returned to Turkey, and on what ground, in light of the 1951 Refugee Convention, the European Convention on Human Rights, the EU Charter of Fundamental Rights, and EU law. It has been emphasized numerous times within the EU-Turkey Statement and its follow up reports that people who apply for asylum in Greece would have their applications treated on a case-by-case basis, in line with EU and international law requirements and the principle of non-refoulement. There would be individual interviews, individual assessments, and rights of appeal. There would be no blanket or automatic returns of asylum seekers. As has been stated by the European Commission Fact Sheet regarding Implementing the EU-Turkey Statement, the EU asylum rules allow Member States in certain clearly defined circumstances to declare an application “inadmissible”, which means, to reject the application without examining the substance after a fast track procedure, thereby accelerating the process of handling applications. There are two legal possibilities that can be used for declaring asylum applications inadmissible, in relation to Turkey;

1. first country of asylum (Article 35 of the Asylum Procedures Directive): where the person has already been recognized as a refugee in that country, or otherwise enjoys sufficient protection there; or
2. safe third country (Article 38 of the Asylum Procedures Directive): where the person has not already received protection in the third country, but the third country can guarantee effective access to protection to the readmitted person. 

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Following the implementation of the EU-Turkey Statement, the total number of migrants returned to Turkey as of 28 September 2016 has been reported as 578 (including 53 Syrians). The difficulties in recognizing Turkey as the first country of asylum, or safe third country for each asylum seeker, together with right of appeal of each individual, may be deemed as the reasons for such a number. With that said, the number of irregular crossings suggest that implementation of the EU-Turkey Statement has been a success in what it is trying to achieve. The Second Report on the progress made in the implementation of the EU-Turkey Statement dated 15 June 2016 stated that around 1,740 migrants were crossing the Aegean Sea to the Greek islands every day in the weeks before implementation of the Statement, whereas the average daily number of irregular crossings since 1 May had been down to 47.\(^8\) Correlatively, the Third Report dated 28 September 2016 stated that since the Second Report, the total number of arrivals from Turkey to the Greek islands was 9,250 – representing an average daily arrival of around 81.\(^9\) Even though this would suggest an increase in number of daily crossings from Turkey to Greece, either number is a tiny fraction of the daily number of crossings between September 2015 and February 2016, where daily averages during those months were 4,921, 6,929, 5,146, 3,368, 1,987 and 1,943 persons, respectively.

The Third Report stated that the EU has allocated over €2.2 billion of the €3 billion Facility for Refugees in Turkey as of 28 September 2016. This funding is supposed to be used to support Syrians in Turkey by providing access to food, shelter, education, and healthcare. It has been reported that Turkey has agreed to allow the EU to regularly monitor the situation of both Syrians and non-Syrians returned to Turkey, including access to refugee camps and centers, and has concluded an agreement with UNHCR to provide access to removal centers to specifically monitor Turkey's practices in relation to international protection procedures.

However, many difficulties and dangers remain for continued implementation of the Statement. Turkey has yet to fulfill any of the seven benchmarks of the Visa Liberalization Roadmap.\(^10\) Maintaining a good political relationship between the EU and Turkish government has always been fragile, and it seems to be worsening day by day. It is yet to be seen what the future holds for the Statement in light of numerous declarations of Recep Tayyip Erdogan, President of Turkey that the EU is not keeping its promises of aid money, coupled with the continued failure of the Turkish government to implement the seven benchmarks for visa liberalization.

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\(^1\) [http://www.iom.int/key-migration-terms](http://www.iom.int/key-migration-terms)
\(^2\) [http://www.reuters.com/article/us-syria-crisis-refugees-idUSKBN0GT0AX20140829](http://www.reuters.com/article/us-syria-crisis-refugees-idUSKBN0GT0AX20140829)
\(^5\) [http://www.echr.coe.int/Documents/Convention_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)
Germany’s Chancellor, Angela Merkel, decided to keep Germany’s borders open in 2015, resulting in a significant influx of refugees into Germany, at times upwards of 10,000 per day. What happened in 2015? Lines of Germans welcomed refugees with food and warm drinks at train stations such as in Munich, Frankfurt, and Cologne; Chancellor Merkel (borrowing from President Obama’s 2008 “Yes We Can” phrase) coined the phrase of “Wir schaffen das” (“We Can Do This”) in response to the increased burden on authorities, communities, and the German population; German charities raised money to support refugees financially; “refugee” was selected as the 2015 word-of-the-year in Germany (interestingly, “durchwinken” (“to wave through”), referring to a number of EU countries waving the refugees through their respective country so they could make it to Germany, was Number 6 on the list and the above-mentioned “Wir schaffen das!” was ranked Number 10); and lots of refugees who had escaped war, poverty, fear, and sheer hopelessness were happy to have adequate housing, food, and some semblance of a normal life, in Germany. In 2016, reality set in. Communities were ill-prepared and overburdened with the onslaught of nearly 1,000,000 refugees arriving during 2015; refugees had not been sufficiently documented, or documented at all, so it was often impossible to figure out whether the refugees had come from war-torn countries such as Syria or Afghanistan, or were “merely” economic refugees from countries such as Albania, Serbia, and Kosovo; Chancellor Merkel’s right-of-center CDU party not only lost the most recent state election, the State of Berlin election, garnering only 17.6% of the votes (23.3% of the votes in the previous, 2011 Berlin State election) because, according to many, the voters did not approve of the mass influx of refugees as evidenced by the anti-refugee party, the AfD (Alternative for Germany; recently founded in Germany in 2013), getting 14.2% of the votes; the election results in the other 2016 state elections in Germany, in the States of Baden-Wuerttemberg, Saxony-Anhalt, and Rhineland-Palatine, all similar in that the newly-formed AfD came in either second or third (out of five major political parties) in these elections; additionally, as widely reported by the international media, hundreds of women were sexually assaulted, primarily by northern African “refugees”, at a New Year’s gathering in Cologne.

Factors such as these caused Chancellor Merkel to admit that she had made a mistake when she provided for an open-border policy in Germany for refugees, or anybody else that wanted to come to Germany for that matter. (It has been reported, for example, that over 10,000 Egyptians, claiming to be refugees, left their country to go to Germany. They left Egypt for the most part because the economic and social conditions in their home country left little choice but to leave.)

Already in 2015, as it was becoming clear that the number of refugees arriving in the European Union would not decrease anytime soon, Germany and other EU countries realized that an EU-wide response was necessary. For geographic reasons, three EU countries faced the most immediate problems from the onslaught of refugees; Greece, Italy, and Hungary. It is estimated that over 850,000 refugees arrived in Greece alone during 2015. The European Council adopted two proposals in an effort to assuage the burdens on Greece, Italy, and Hungary. First, in July, 2015 the European Council adopted a plan to relocate 40,000 refugees from these three countries elsewhere within the European Union, and in September, 2015, another plan was adopted to relocate an additional 120,000 refugees from these same countries. In total, nearly 40,000 refugees are to be relocated from Italy, 54,000 are to be relocated from Hungary, and over 66,000 are to be relocated from Greece. These relocations are to take place within two years.

For a number of reasons, the relocation results have been abysmal to date. Based on figures released on November 17, 2016, slightly more than 5,700 have been relocated from Greece and fewer than 2,000 have been relocated from Italy. Germany was to accept over 27,000 of the relocated refugees, but as by November 17, 2016, had accepted only

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slightly more than 400. Germany, like most of the other EU member states, has not even provided the requisite quarterly reports as to how many refugees may be relocated to Germany each quarter.

Why have the relocation efforts been so pitiful? Some of the problems are practical – at the time that Germany approved the relocation efforts it did not realize that nearly 1,000,000 refugees would arrive in Germany in 2015; meaning, Germany did not have adequate housing and infrastructure or an adequate administration in place to house even more refugees, not to mention that many local communities and politicians were wary of accepting more refugees in their cities, towns, and villages. Documenting the refugees in Germany (including often conducting background checks) has also been a long and arduous process because so many refugees had entered Germany without adequate identification; under German law, individuals staying in Germany must be properly registered. Until this is done with the refugees already in Germany, many Germans are wary of accepting even more refugees.

The “fear of the unknown” also plays a factor for refugees. Many refugees are worried about gathering their things and family in Europe and being moved yet again to another new country, language, and culture. Undeniably, politics has also played a significant role in the low number of relocations. As evidenced by the results of the four above-mentioned German state elections in 2016, anti-refugee sentiment has gained momentum in Germany, as it has in many other EU countries, making it more difficult for politicians to agree to accept even more refugees. Finally, no EU country will face any consequences -- legal or political -- if, for whatever reason, it does not accept its allotted number of refugees. In essence, the acceptance of relocated refugees by each country is voluntary.

In an effort to decrease the number of refugees coming to the European Union, the European Union has entered into an agreement with Turkey whereby the European Union pays Turkey €3 billion, the European Union agrees to look into no longer requiring Turkish citizens to obtain a visa to travel to the European Union, and the European Union will put an increased effort on offering EU membership to Turkey.

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One sentiment has become clear within the European Union. If the European Union is not able to make progress, even on a temporary measure, such as relocating 160,000 refugees, then it is safe to say that the European Union will have an almost insurmountable path to reach a permanent solution. This does not bode well for the European Union as a whole as it will face many other challenges during the next few years, not only with respect to refugees.
The Refugee Crisis in Europe – An Austrian Perspective
by Holger Bielez

The massive inflow of migrants from Syria, Afghanistan, Iraq, and other countries turned out to be one of the greatest challenges for many European countries. On the one hand, countries located at the external borders of the European Union, like Italy and Greece, were particularly affected as they served as the first entry point for migrants in high numbers. On the other hand, the migrants’ crisis yielded significant effects in countries which were among the desired destination regions of migrants’ flows. Austria was, like Germany, Sweden, and Hungary, among this second group of countries. European political leaders were simply overwhelmed by the crisis. This is reflected by the ambivalent public reactions as to how to deal with the problem ranging from conveying a “welcome culture” (“Willkommenenkultur”) to statements like, “The boat is full” and raising demands to seal off the national borders with barbed wire.

Also, the historic developments in Austria since 2015 illustrate this antagonism. In late summer 2015, Austria’s public opinion was shocked by the humanitarian situation in the Budapest railway station, where masses of migrants were stranded, triggering a wave of solidarity. Demonstrations for refugees were organized and a concert called, “Voices for Refugees” in October 2015 attracted more than 100,000 visitors. In contrast, the year of 2016 was characterized by constantly increasing concerns on a political level, in particular after the Decision at the Extraordinary Justice and Home Affairs Council in fall 2015 to relocate 120,000 refugees (“EU Decision”) was not followed by tangible actions, a uniform European solution of the migrants’ problem appearing unrealistic. At the same time, Austria was on the top five list of desired destination countries by migrants. In 2015 Austria received approximately 90,000 asylum requests and the beginning of the year 2016 did not promise that the numbers were likely to decrease; quite the contrary.

In early 2016 one of the main paths, where migrants were entering Europe were Greek islands, e.g. Lesbos and Samos. However, Greece, itself heavily affected by a financial crisis with capital control measures in place, was overwhelmed by the sheer number of migrants crossing its Eastern and

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South-Eastern sea borders, and it is fair to say that tragedies of migrants drowning in the sea were, in particular at that time, nearly a daily occurrence. Greece was not in a position to meet its task under the Dublin agreement and the EU Decision to identify the refugees, "in clear need of international protection", i.e. to distinguish among refugees – who qualified for relocation among the European Union – and economic migrants, who were to be returned. Neither did the Greek authorities stop the migrants from moving further northbound across the Greek national borders. Streams of migrants continued their journey via Macedonia, Serbia, and Hungary to Central and Western Europe.

Against this backdrop in February 2016, Austria hosted an international conference, to which it invited, inter alia, Albania, Bosnia-Herzegovina, Croatia, Macedonia, Serbia, and Slovenia. Greece was not invited, neither was Germany. Austrian foreign minister Sebastian Kurz asked the invited States for common action, since Greece – as Kurz argued – kept waving through (“durchwinken”) thousands of migrants. Kurz further exercised pressure on Germany, which he asked to state how many refugees it was willing to accept going forward. The countries attending the conference agreed to block the Greek-Macedonian border in order to bring the influx of migrants from Greece to a halt. The agreement made was consequently implemented vigorously and led to a massive increase of stranded refugees at the Greek-Macedonian border, coupled with deplorable life conditions for the people affected. The incident triggered conflicts on a diplomatic level between Austria and Greece, and Austria was criticized by Germany and the European Commission for hosting this conference, which was perceived as improper unilateral action.

Austria further caused international attention when the council of ministers of the government agreed on a

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maximum threshold of 37,500 refugees per year to be granted asylum in Austria. If the threshold is reached, an emergency regulation shall be put in place blocking the acceptance of additional asylum requests. This move triggered particular criticism, as it was said that the Geneva Convention does not provide any legal basis for the introduction of such a threshold.

In order to strengthen its position, the Austrian government had retained an international public law expert who seemed to support the government’s stance. The expert took the view that there were two ways for a country to address the challenge of excessive numbers of asylum seekers. On the one hand, refugees may be pushed back into safe harbor third countries. On the other, the expert argued that Austria may use, “inherent exceptions” to the right of refugees to asylum in order to protect public order and safety. No state and no region may be required by the Geneva Convention to perform the practically impossible.

Both the Geneva Convention and the Dublin Regulation would have significant deficiencies. The regimes would wrongly assume that any Member State is able to accept any refugee, which would show that the involved contracting parties never took into consideration that a country may be overwhelmed by a certain number of refugees. Perhaps, according to the expert, the parties believed in the international solidarity of neighboring states, which would work towards a balanced distribution of refugees. Further, the expert took the view that the existing framework does not take into account that some “refugees” may not deserve refugee status, because they themselves constitute a threat to security of the society in the host state. In addition, the Dublin regime would not distinguish among Member states with EU external borders and those without, and therefore, does not foresee how the overall burden shall be distributed equitably. Since the international legal framework does not provide solutions, the States themselves should be entitled to rely on existing legal principles, one of which is that no State may be asked to perform the impossible. The expert concluded that Europe is currently at risk of being overrun by numbers of refugees that the Member States of the Geneva Convention cannot absorb. In order to remedy this situation, the Member States shall be permitted to re-introduce border controls and to introduce a maximum number of refugees accepted.

However, notwithstanding the above, the existing international legal framework simply does not provide for a maximum threshold of asylum seekers or for a right to introduce such a mechanism. In particular, one scholar strongly opposed this assumption and said that the Austrian domestic approach cannot be justified in light of public international law. In contrast, the only legally and practically feasible solution is that Europe, as a whole, must assume responsibility and take action for Europe.

The Austrian government is aware of the concerns that the maximum refugees’ threshold raises in light of international obligations. Recently in November 2016, the Austrian government revisited the issue and while the ministry for internal affairs intended to set in stone the maximum threshold by way of statutory law, the social-democrat coalition partner opposed this plan for the various public law concerns mentioned above.

Therefore, as things stand today, it seems that the current status in Austria will remain in place as the maximum threshold was not reached in 2016. As of 31 December 2016, 36,000 asylum requests were brought before formal proceedings (a large number of additional applications had been rejected for lack of competence). The issue, nevertheless, remains a topic of heavy political debate. In early 2017 the right-leaning Christian Democrats expressed their desire to have the threshold reduced to 17,000. The left-leaning Social Democrats took a reserved stance towards this position from their coalition partner. Regardless, in light of the increased strength of national movements in Austria, each political party is under intense pressure to reach a resolution. In fact, it is quite possible that the issue as to the maximum number of refugees that may be granted asylum in Austria per year will soon be an issue before the Austrian judiciary.
Access Denied: The Hungarian Government’s Failure to Protect Refugees

by Mártá Pardavi and Fanni Korzeg

There is no end in sight to the regional conflicts that force people to flee and seek safety elsewhere. The war in Syria is not abating, and Hungary is one of the many European countries through which people fleeing conflict have tried to make it to safer ground. Hungary, as with all European Union (EU) members, is party to several international agreements and subject to EU law, such as the Recast Asylum Procedures Directive (Directive 2013/32/EU) that impose certain obligations to protect refugees and asylum seekers. Basic principles of international law also protect those who are persecuted in their home countries and forced to leave. Yet, Hungary has been getting away with proactively dismantling protection systems and procedures for refugees.

The 2015 Refugee Crisis and Hungary

The refugee crisis is international, but in 2015, one of the only viable escape routes from Syria into the EU was through Hungary; what became known as the Western Balkans route. It leads from the Middle East through Turkey, Greece, and the Balkans (Macedonia and Serbia) to Hungary. Hungary thus became one of the main EU entry points for migrants and refugees. The police registered 400,000 irregular migrants; more than 177,000 of them applied for asylum. At most, 4,000 people with international protection status were living in Hungary at the time. With one of the lowest rates of immigrant populations in Europe (1.4%), most Hungarians were faced with an unknown phenomenon, one that had hardly been featured in Hungarian media or on political agenda before.

As a response (or perhaps as distraction from internal politics), the Hungarian government elevated migration to the number one topic on its political agenda, and began a massive anti-migrant public campaign that continues to this day.

Anti-Migrant Measures

In 2015, the existing refugee protection framework in Hungary was practically dismantled. The combined and intended effect of the following steps was to deter and limit people who needed international protection from accessing it in Hungary by:

- rejecting all asylum applications as inadmissible from people who had entered Hungary from Serbia, which was declared a “safe third country”, without real inquiry into the reason(s) why individuals from Syria, Iraq, Afghanistan, and other countries had to flee in the first place;
- introducing new and unfair procedural rules that resulted in genuine refugees being denied access to a proper asylum procedure and to the possibility of finding protection;
- sealing the borders with Serbia and Croatia with razor-wire fences, financed by the Hungarian taxpayers;
- criminalising the crossing of the border fence and trying migrants in expedited criminal trials, without due process guarantees;
- reducing the Hungarian reception system’s capacity to offer shelter to asylum-seekers by closing the largest existing refugee camp and opening smaller, temporary tent camps instead; and
- opening small ‘transit zones’ on the southern border where people who wish to seek asylum in
Hungary must apply and be registered without necessarily getting access to enter Hungary.

European Union Response

The measures described above are arguably in violation of international human rights law and incompatible with EU law. Indeed, in December 2015, the European Commission opened infringement procedures against Hungary concerning the changes to its asylum legislation, as it found that the law to be, in some instances, incompatible with EU law (specifically, the recast Asylum Procedures Directive (Directive 2013/32/EU) and the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU)). The infringement procedure is still pending today, as no changes were made to ensure compliance with EU law. Meanwhile, the Hungarian government has continued to tighten borders and disregard its legal obligations to protect refugees.

Limited Choices for Asylum Seekers

In late winter 2015, as border controls were reinforced and borders were closing on the Western Balkan route, which by that time avoided Hungary, many people began arriving again at the border area of Hungary and Serbia. The fence that Hungary had erected on its Serbian and Croatian borders in autumn 2015 meant that people trying to continue their route northwards into and across Hungary faced two options.

The first option, one that many migrants took, was to climb through the border fence, an act often aided by smugglers. This has been a criminal offense since September 2015, and is part of the wider agenda aimed at criminalising migration and seeking asylum. Between 15 September 2015 and 31 October 2016, out of 2,895 persons prosecuted, the overwhelming majority, 2,843 were convicted for prohibited crossings of the border fence. The verdict typically resulted in expulsion and an entry ban of 1-2 years, irrespective of whether the defendant had applied for asylum, or what the outcome of that asylum procedure was.

The second option was to wait at the border area to be granted access to one of two transit zones. These transit zones are small enclosures built into the border fence where Hungarian authorities are supposed to process asylum claims. Starting in March, hundreds of refugees and migrants began weeks-long waits in order to gain entry into a transit zone. Many of the refugees were families with small children. By the summer of 2016, up to a thousand people were forced to camp out amid squalid conditions, without adequate access to water, sanitary facilities, or help from Hungarian authorities. This was despite being within arms’ reach from Hungarian authorities, and actually staying on the territory of Hungary.

Over time, fewer and fewer people have been allowed to apply for asylum in the transit zones; now it is barely 10-20 persons per day. Families and other vulnerable persons are treated with priority, but single males have to choose between waiting several hundred days for access or climbing through the border fence.

Human Rights Violations Continue

From January to December 2016, 29,432 persons claimed asylum in Hungary, most of them fleeing war and conflict zones. A good proportion of those claimants must have arrived in the country by crossing the border fence.

In July 2016, to further reduce the flow of migrants and asylum applicants, the government began pushbacks across the border. Under a new law, the police must forcibly escort all migrants who had been apprehended within eight kilometres of the border fence, back to the other side of that border. In breach of Hungary’s obligations under both international and EU law, this pushback denies migrants and refugees the right to seek international protection.

From 5 July to 31 December 2016, 19,057 migrants were
pushed back this way across the Hungarian-Serbian border. Many of them reported that they were beaten and pepper sprayed by personnel in uniform after being caught at the fence. Human Rights Watch, Amnesty International and the UNHCR have also documented this practice.

**No Real Protection, Even for Recognised Refugees**

Meanwhile, as the conflicts that drive refugees to flee their homes rage on with no end in sight, by the end of December 2016, only 490 asylum applicants still remained in open reception centres or asylum detention centres in Hungary.

In 2016, 425 persons have received international protection status.

On 1 June 2016, however, government support for refugee integration was nearly eliminated, as all financial benefits were cut and access to government health care was curbed. This leaves recognised refugees and persons with subsidiary protection at the risk of homelessness and destitution 30 days after they are given permission to stay. Only NGOs now offer integration services specifically for refugees funded by the EU’s Asylum, Migration and Integration Fund. Essentially, the EU and UNHCR funds are what keeps the limited integration services for refugees above water in Hungary.

**Where Do We Go From Here?**

As the political situation surrounding the admission and acceptance of refugees in the EU becomes increasingly fraught with issues across the board, there is little hope that the EU will take strong legal or political action against Hungary for its many failures. However, it is imperative that the rule of law is observed within (and outside) the EU. At the very least, European countries, including Hungary, must respect the most basic rules of international human rights law in place since the 1950s; to protect the most vulnerable among us. □
certain European countries closed their borders or severely restricted access to their territory, even to people in clear need of international protection.

At the EU level, in May 2015, the European Commission introduced a temporary relocation scheme, meaning a fair distribution among Member States of third country nationals with an average recognition rate (refugee status and subsidiary protection) equal or higher than 75%. The European Council adopted the above proposal, allocating 40,000 places for relocation (in July 2015) and another 120,000 places (in September 2015). Specifically, in two years’ time, 63,302 people will be relocated from Greece. However, only 82 people were relocated in 2015, due to the limited number of open pledges from receiving countries and the slow registration pace of asylum and relocation claims from the Greek authorities.

As the EU relocation scheme is on a voluntary basis, Member States seem reluctant to follow EC decisions, while other types of assistance, such as financial aid, is being considered.

In 2016 (until 9 November 2016), 170,373 Syrians, Afghans, Pakistanis, Iranians, and other nationalities arrived in Greece by sea. Greek police data (until end of August 2016) report 166,335 people being arrested for illegal entry and stay in Greece.

In 2015, Greece witnessed an unprecedented mass influx of mixed flows (migrants and refugees) mainly from Syria, Afghanistan, Pakistan, Iraq, and some African countries... a total of 856,723 refugees and migrants arrived at Greek shores. Greek police data indicate 872,519 arrests of irregular migrants at the sea borders arriving from Turkey.

Due to the closing of the Western Balkan route, thousands of refugees and migrants were stranded in different locations in Greece (islands, mainland, along the Greece-FYROM borders and the Port of Piraeus). The increase of its reception capacity (accommodation places) became a top priority for the Greek state. Greece eventually became a host country for refugees rather than a transit country. Today, refugees in Greece have three options: (1) seek asylum in Greece; (2) relocation to another EU country (if they fulfill the criteria); and (3) family reunification with a close relative (as specified in the Dublin III Regulation). However, the capacity of the Asylum Service in registering and processing all applications was limited due to the financial constraints imposed on Greece by EU and IMF since 2009 as a result of the Greek debt crisis. This led to the frustration of refugees since their basic right of access to asylum (art. 14 Universal Declaration of Human Rights, art. 18EU Charter of Fundamental Rights) has been de facto denied. Therefore, from May to July 2016, a pre-registration of their claims, inside their place of temporary residence (camps) was implemented by mobile units of the Asylum Service in cooperation with UNHCR’s and EASO’s personnel. A total of 27,592 people were pre-registered. Relocation procedures started to speed up and by 8 November 2016, 5,376 persons in total have effectively been relocated from Greece.

At the external relations level, an EU-Turkey Statement was signed on 18 March 2016 in order to mitigate mixed migratory flows trespassing EU borders from Turkey. According to the agreement, all irregular migrants or rejected asylum seekers having entered into Greek territory from Turkey from 20 March 2016 onwards will be returned to Turkey. As of 28 September 2016, 578 returns had only been completed. The EU-Turkey joint operation plan comprises also a resettlement scheme on a one-for-one basis, for Syrians from Turkey directly to EU countries with an aim to combat human smuggling networks. According to the same source, 1,614 Syrian refugees had been resettled from Turkey to Europe.

Irrespective of the implementation progress of the EU-Turkey Statement, Greek immigration policy is now focused on the integration of the asylum seekers by enabling them to exercise their rights to accommodation, employment, and education. Priority is given to unaccompanied minors and other vulnerable asylum seekers. In conclusion, based on two years’ accumulated experience, Greek authorities as well as its population rose to the challenge and met all expectations, in spite of the unprecedented character of the refugee crisis and the deep-rooted financial crisis that Greece continues to experience.

Endnotes

1 For the period June 2013 to May 2014, there has been a 20.1% recognition of refugee status and subsidiary protection at first instance and an additional 13.9% recognition at second instance, http://asylo.gov.gr/en/wp-content/uploads/2014/06/1406_oneyearstats_en.pdf
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