

**EU Border Management Policy:
From *Promised Land* into *Fortress Europe***

*Do borders and border control contribute to the protection of citizens,
or are borders part of the problem?**

I. Introduction

Every year thousands of people coming from countries outside the European Union (EU) attempt to cross its borders, either trying to avoid different kinds of persecution (political, religious, racial, etc.) or in search for a better future for themselves as well as for their families. This phenomenon is certainly not recent and has led to personal and family tragedies of many of these people during their efforts to cross the EU borders.

The regular tragic events in the Mediterranean Sea show that the deliberately inadequate focus on the human rights aspect in the EU border control management has resulted in numerous and grave violations of migrants' and refugees' fundamental rights by Member States and EU agencies, as well as in dozens lethal shipwrecks¹. Moreover, the number of these tragedies has been increased since the EU migration policy and measures have become stricter, thus making the access to the EU territory extremely difficult and hazardous for third country nationals. Legal regulations, agencies, traditional and cultural backgrounds, stereotypes and domestic organized interests have created a complex border management system which has been widely criticized for failing to protect the human rights of those who attempt to cross the EU borders².

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¹ See *inter alia*: UNHCR alarmed at death toll from boat sinkings in the Mediterranean (available at: <http://www.unhcr.org/54184ae76.html>; date accessed 16.9.2014). *High seas tragedies leave more than 300 dead on the Mediterranean past week* (available at: <http://www.unhcr.org/53fc58969.html>; date accessed: 12.9.2014). LeVoy M. and Soova K., "How relevant, effective and humane is the EU border control regime?", *Government Gazette, European Union Border Security*, 2013, p. 53-54.

² Kostakopoulou D., "Irregular Migration and Migration theory: Making State Authorization Less Relevant", in *Irregular Migration and Human Rights: Theoretical, European and International*

The common rules on the border management that the EU has adopted³ along with the establishment of Frontex⁴ and the operational support of the latter to the EU Member States tend to be narrow, inefficient and have transformed the European Union from *Promised Land* into *Fortress Europe*.

II. The EU border management policy and measures as a central instrument of border control

The primary orientation of the EU border management policy in general is to safeguard European principles, values and interests⁵, including the respect of human rights, rule of law, freedom of movement and general principles of international law. Additionally, the Lisbon Treaty strengthened the EU mandate on fundamental rights, made significant advances in this field, increased and re-emphasized the power of the EU to act towards the protection of fundamental rights in its legal system⁶. In the same context, the EU Charter of Fundamental Rights became legally binding having equal status as primary EU law⁷.

The current common border management policy includes a wide range of legislative measures. These measures developed the Schengen border *acquis* on the external borders and proceeded to the establishment of Frontex and of a common legal framework regarding EU passports and other travel documents⁸.

The essence of the EU activity in the area of border management is to ensure the respect for and application of a common EU policy on this matter. A crucial piece of legislation is the adoption of the Schengen Borders Code (SBC), which includes

Perspectives, eds. Bogusz B., Cholewinski R., Cygan A. and Szyszczak E., Martinus Nijhoff Publishers, 2004, p. 41-44.

³ See: Regulation No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders, the Convention implementing the Schengen Agreement, Council Regulations No 1683/1995 and No 539/2001 and Regulations No 767/2008 and No 810/2009 of the European Parliament and of the Council.

⁴ Regulation (EC) No 2004/2007 establishing a Community agency for the coordination of operational cooperation at the external borders of the Member States (Frontex).

⁵ Kenk V.S., Križaj J., Štruc V., Dobrišek S., "Smart Surveillance Technologies in Border Control", European Journal of Law and Technology, Vol. 4, No. 2, 2013 (available at: <http://ejlt.org/article/view/230/378>; date accessed: 26.10.2014).

⁶ Carrera S., De Somer M. and Petkova B., "The Court of Justice of the European Union as a Fundamental Rights Tribunal", Centre for Economic Policy Studies, No. 49, 2012, p. 1-8.

⁷ Douglas-Scott S., "The European Union and Human Rights after the Treaty of Lisbon", Human Rights Law Review, Vol. 11, No. 4, p. 645-682.

⁸ Rijpma J., "EU border management after the Lisbon Treaty", Croatian Yearbook of European Law and Policy, Vol. 5, 2009, p. 122-140.

the rules governing the movement of persons across borders⁹. Furthermore, the border management policy contains a financial burden-sharing system through the creation of the External Borders Fund (as part of the General Programme "Solidarity and Management of Migration Flows")¹⁰. Moreover, a centralized database system is established as a pivotal instrument of the border management policy (Schengen Information System SIS-, Visa Information System -VIS- and Eurodac¹¹) combined with a set of measures for the criminalization of unlawful entry and trafficking¹².

Of course, one of the most important measures of the EU border policy related to the operational cooperation has been the adoption of Council Regulation (EC) No 2007/2004 establishing a Community agency for the coordination of operational cooperation at the external borders of the Member States (Frontex)¹³. This Regulation was subsequently amended by Regulation (EC) No 863/2007, which created the Rapid Border Intervention Teams¹⁴. The Court of Justice of the European Union defined in Case C-77/05 that the Frontex Regulation constitutes a part of the Schengen *acquis*¹⁵.

The primary goals of the EU border management policy are the facilitation of cross-border access of those having a legitimate interest to enter the EU¹⁶, the fight against national and international crime - especially trafficking and terrorism -¹⁷, and

⁹ Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006, L105/1.

¹⁰ Decision 574/2007/EC establishing the External Borders Fund for the period 2007 to 2013 as part of the General Programme "*Solidarity and Management of Migration Flows*", OJ 2007, L144/22.

¹¹ Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006, L381/4 and OJ 2007, L205/63.; Regulation (EC) No 767/2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, OJ 2008, L218/60; Council Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention, OJ 2000, L316/1.

¹² Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, OJ 2002, L 328/17 and Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ 2002, L328/1.

¹³ Article 64(2) EC, Article 8a, Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004, L349/1.

¹⁴ Regulation (EC) No 863/2007, establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ 2007, L199/30.

¹⁵ C-77/05 (GJ), *United Kingdom of Great Britain and Northern Ireland v. Council of European Union*, para. 70-86.

¹⁶ See: Schengen Borders Code (Regulation No 1051/2013 of the European Parliament and of the Council of 22 October 2013, Regulation No 610/2013 of the European Parliament and of the Council of 26 June 2013, Council Decision 2010/252/EU of 26 April 2010 and Regulation No 562/2006 of the European Parliament and of the Council of 15 March 2006).

¹⁷ Miller R. and Baumeister S. "*Managing Migration: Is border control fundamental to anti-trafficking and anti-smuggling interventions*", *Anti-Trafficking Review*, No. 2, 2013, p.15-19.

management of migration flows¹⁸. The measures usually exercised by the border control and security agencies are border controls, surveillance and risk analysis. Besides the latter, in the past few years advanced technologies have been integrated in the EU borders control and security policy and play vital role in the EU border management policy.

Indeed, advanced technologies such as undersea sensors, sonar surveillance, unmanned aircraft, collection and high analysis of biometric data and biometric recognition systems are used for the operational support of the border management policy. It is a widespread belief that the use of advanced technologies for the purposes of the border control and security can considerably increase the reliability and efficiency of the border control measures¹⁹. Due to the fact that these advanced technologies have the ability to collect massive amount of data and identify rapidly and effectively the potential threats, they can function preventively and respond automatically to security intimidations; however, these technology instruments have to be used responsibly and proportionately.

In addition to the above, the EU border management as a central instrument of border control policy should be construed and implemented in the light of the Founding EU Treaties²⁰ and of international human rights principles and standards.

The EU border management policy should principally be consistent with the Article 2 of the Treaty of the European Union which reads as follows: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*".

¹⁸ Hartmann A.-R., "Management of external borders", European Parliament - Fact sheets on the European Union, 2014, p 1-5.

¹⁹ See *inter alia*: Koslowski R., "New Technologies of Border Control in an Enlarging Europe", Woodrow Wilson International Center for Scholars, Meeting Report 299, 2004, p. 1-3, Mattiussi J., "The challenges regarding external security threats", Discussion forum organized by the EU Commission in the context of the Preparatory Action on the Enhancement of the European Industrial Potential in the field of Security Research, 2004, p. 39-45 and Kenk V.S., Križaj J., Štruc V., Dobrišek S., "Smart Surveillance Technologies in Border Control", *ibid*.

²⁰ See *inter alia*: Preamble of the Treaty on European Union (TEU) which reads as follows: "(EU) Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law".

III. Non-compliance between the EU border management policy and human rights respect and protection

Border management has to be compatible with the respect for and protection of fundamental rights and freedoms²¹. Violations of EU fundamental rights in the implementation of the EU border controls fall under the jurisdiction of the Court of Justice of the European Union. United Nations Treaties and European Convention on Human Rights are applicable respectively.

Article 6 of the SBC defines an obligation of Member States to maintain human dignity and proportionality in carrying out border-crossing controls. Almost all of the border codes of conduct state that border officers must respect the fundamental rights of people. Additionally, the protection of such rights should be one of the primary aims of all borders control service including Frontex²². This principle is further reflected in the *Schengen Handbook*, which states that "*rights enshrined in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union must be guaranteed to any person seeking to cross borders*"²³.

However, the EU border control's measures and their wide and comprehensive use violate human rights of those who attempt to cross the EU borders. **The main violations are related to the right to life, the right to leave a country, the right to liberty, the right to physical integrity and the right to asylum.** Additionally, **several human rights violations have occurred with regard to the illegitimate practice of push-backs, the unlawful dissemination and use of personal data, the criminalization and stigmatization, the torture and inhuman treatment, the ethnic profiling, the confiscation of travel documents as well as the suffered discrimination**²⁴.

²¹ Lisson V. and Wienzierl R., "*A study of EU Law and the Law of the Sea*", Deutsches Institut für Menschenrechte, 2007, p. 42-70.

²² See: Study published by Frontex: "*Ethics of Border Security*", Centre for the Study of Global Ethics, University of Birmingham, Frontex/64/2010.

²³ See Commission's Recommendation establishing a common Practical Handbook for Border Guards (Schengen Handbook) to be used by Member States' competent authorities when carrying out the border control of persons, 9 November 2006, Part II, Section 1.1.2, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015010%202006%20INIT>, date accessed 24.10.2014.

²⁴ See *inter alia*: Sunderland J., "*Frontex Should Respect Rights, Even on the High Seas*", European Voice, 2013 (available at: <http://www.hrw.org/news/2013/06/06/frontex-should-respect-rights-even-high-seas>; date accessed: 18.10.2014). Frontexit Press Release: "*No respect for Human Rights with Frontex – The mandate of Frontex is incompatible with human rights*" 2014 (available at: <http://www.migreurop.org/IMG/pdf/bilan-2014-frontexit-large-1.0-en.pdf>; date accessed: 25.10.2014).

As regards the right to leave a country, it constitutes an integral part of the international human rights *acquis*. Article 13.2 of the Universal Declaration of Human Rights (UDHR) reads as follows: "*everyone has the right to leave any country, including his own, and to return to his country*". Article 12.2 of the International Covenant on Civil and Political Rights (ICCPR) states that "*everyone shall be free to leave any country, including his own*" and Article 2.2 of Protocol No. 4 of the European Convention on Human Rights (ECHR) guarantees that "*everyone shall be free to leave any country, including his own*". Additionally, General Comment No. 27 of the United Nations' Human Rights Committee commences with the clarification that "*the right to leave a country may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country*"²⁵.

The right to leave a country is intended to ensure that people can move freely, without unjustified impediments and human rights violations. In addition to this, the right to leave a country is a prerequisite for the enjoyment of other rights, such as the right to seek and enjoy asylum²⁶.

As for the principle of *non-refoulement*, it is included in the 1951 Geneva Convention relating to the Status of Refugees (Geneva Convention). Article 33 para. 1 of Geneva Convention reads as follows: "*No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*". The principle of *non-refoulement* includes the obligation to advise an alien of his or her rights to obtain international protection and the obligation to provide for an individual, fair and effective refugee-status determination and assessment procedure²⁷.

However, the measure of "push-back" is an unlawful practice, which violates the principle of *non-refoulement* and puts the lives of those who attempt to cross the

²⁵ See: General Comment No. 27: Article 12 (Freedom of Movement) adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999, Article 12 para.8.

²⁶ See: Research paper on the right to live a country published by the Council of Europe Commissioner for Human Rights, 2013, especially p. 13-23 (available at: http://www.coe.int/t/commissioner/source/prems/prems150813_GBR_1700_TheRightToLeaveACountry_web.pdf; date accessed: 27.10.2014).

²⁷ See as regards the principle of *non-refoulement* at: ECtHR (GC) *M.S.S. v. Belgium and Greece*, 21 January 2011, para. 286, ECtHR *Muslim v. Turkey*, 26 April 2005, para. 72-76.

EU borders at serious risk²⁸. Indeed, the measure of “push back” in border management enforced by the use of advanced technologies results essentially in grave violations of the right to life, the right to leave a country, the right to liberty, the right to physical integrity and right to asylum.

Likewise, the EU border control’s measures of detention and custody of migrants and refugees have caused serious incidents of torture and other forms of ill-treatment. EU Member States have criminalized the efforts of migrants and refugees to enter the EU territory despite the fact that there is no linkage between detention as a border control’s measure and discouragement of these people to attempt to cross the borders. The pre-removal detention as a EU border management measure raises the question of efficiency. There is widespread doubt about how efficient is the policy of the pre-removal detention centers, based *inter alia* on the cost in terms of short and long term impact²⁹.

However, the EU has systematically turned the detention of migrants from last resort measure to priority measure without taking into account alternative to detention measures, the grave violations of human rights caused by this kind of detention and ultimately, the fact that this measure is proved significantly insufficient to reduce the migration flows.

It should be noticed that a lot of people who succeed in crossing the EU borders end up being detained for a very long period and under degrading conditions³⁰. On the other hand, international human rights standards and case law set clear criteria for the conditions under which it is acceptable to restrain someone of his liberty for deportation, expulsion etc. Detention should not be unlawful, unnecessary or disproportionate and alternative measures to detention should be always firstly explored³¹.

²⁸ See *inter alia*: ECtHR [GC] *Hirsi Jamaa and others v. Italy*, 23 February 2012, para. 70-84, 110-138, 145-158. In this case the Court said that Italy violated the Convention, *inter alia*, because of the adoption and implementation of the “push-back” policy.

²⁹ As for Greece, see Danai Angeli, Anna Triandafyllidou, “*Is the indiscriminate detention of irregular migrants a cost-effective policy tool? A case-study of the Amygdaleza Pre-Removal Center*”, May 2014 (available at: http://www.eliamep.gr/wp-content/uploads/2014/05/Policy-brief_the-case-study-of-Amygdaleza-1.pdf, date accessed 25.10.2014).

³⁰ ECtHR *Adem Ahmed v. Malta*, 9 December 2012, para. 85-100 ECtHR *I.A.H. v. Greece*, 1 August 2013, para. 39-53, ECtHR *Husein v. Greece*, 24 October 2013, para. 71-89, ECtHR *Dougoz v. Greece*, 6 March 2011, para. 44-49.

³¹ The United Nations High Commissioner for Refugees (UNHCR) published Guidelines on the detention of asylum-seekers in 1995. Guideline 3 provides that “*such detention may exceptionally be resorted to for the reasons set out below ... as long as this is ... in conformity with general norms and principles of international human rights law (including Article 9 ICCPR) ... Where there are*

Moreover, prohibition of torture or cruel, inhuman and degrading treatment and equal treatment of persons should be guaranteed in any system of border control. The importance of exercising restraint in the use of force has to be taken into serious consideration. Force by border controllers should be used only when necessary or only in exceptional circumstances and only to the extent that it is proportionate with the goals of the action³².

The EU border management policy and measures evidences that the EU has adopted a clear strategic orientation towards connection of border management with policy against criminality. This strategy leads to the legitimization of individual and collective expulsions and detentions, affects access to the asylum system³³ and prevents third country nationals who attempt to cross the EU borders from enjoying their rights to health care, education, access to the labour market and to justice.

Indeed, border control measures have essentially led to disproportionate criminalization of migrants and refugees because of an administrative breach of law. In favour of the latter, the Working Group on Arbitrary Detention of the United Nations Human Rights Council has held that "*criminalizing illegal entry into a country exceeds the legitimate interest of states to control and regulate irregular immigration and leads to unnecessary detention*"³⁴.

Moreover, the measure of collection of biometric data, the implications of such a procedure and the criminalization stigma related to fingerprints or "police photographs" violate the principle of non-discrimination and lead to ill-treatment³⁵. For refugees and migrants, which constitute vulnerable groups of people, such as a

monitoring mechanisms which can be employed as viable alternatives to detention (such as reporting obligations or guarantor requirements) ... these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose". See also: ECtHR *Torreggianni and others v. Italy*, 8 January 2013, para. 94-95.

³² See *inter alia*: "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials", adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, Rules 1-8.

³³ See: Council of Europe Commissioner for Human Rights, "Addressing the human rights challenges underlying the criminalization of irregular migrants and national minorities in Europe", The Centre for European Policy Studies Seminar, Brussels, 2013, p. 1-5 (available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2256631&SecMode=1&DocId=1991964&Usage=2>; dated accessed: 14.10.2014).

³⁴ See: Working Group on Arbitrary Detention. "Report of the Working Group on Arbitrary Detention", UN Doc. A/HRC/7/4. Report presented at the Human Rights Council, 7th Session, Geneva, 2008.

³⁵ Thomas R., "Biometrics, Migrants and Human Rights", Migration Information Source - Migration Policy Institute, 2005 (available at: <http://www.migrationpolicy.org/article/biometrics-migrants-and-human-rights>, date accessed: 23.10.2014).

procedure may not only be unpleasant in principle, but could amount to a lifetime traumatic experience.

Furthermore, the EU border management policy violates the protection of personal data and privacy rights. The gradual widening of the use of advanced technologies mainly by collecting personal data in border management beyond the purpose for which it was originally intended, creates serious problems to privacy rights for migrants and refugees³⁶. The fact that several times the data collected are inaccurate and the existence of inconsistent collection data systems across the Member States produce crucial operational problems and malfunctions.

For migrants and refugees, the use of biometric data within profiling activities can lead to unlawful arrest and detention and violation of the freedom of movement. Additionally, biometric personal information has been used for religious, ethnic, racial profiling or targeting migrants and refugees for the identification of issues unconnected to migration policy³⁷.

The multiple transfers of personal data between states and EU agencies create doubts about the ability of adequate protection of this sensitive data. A possible leak and/or abuse during the transfer and sharing of this data is highly probable³⁸. It is common sense that the more this data is transferred and shared across different states and agencies, the greater the risk of abuse and violation of privacy rights and freedom of movement. Additionally, the exchange of this data across different states raises jurisdictional questions on the issue which state's data protection laws should apply. The data and information collected at the borders should be handled with confidentiality and respect for privacy.

As regards the operational viewpoint, the surveillance of people who attempt to cross the EU borders should be proportionate to the legitimate border control aims

³⁶ Oberoi P. and Taylor-Nicholson E., "*The Enemy at the Gates: International Borders, Migration and Human Rights*", *Laws*, vol. 2, 2013, p. 173-175.

³⁷ Jones C., "*Analysis: EU Secretive Frontex Working Group seeks to increase surveillance of travellers*", *Statewatch Journal*, Vol. 22 No. 2/3, 2012, p. 1-5 (available at: <http://www.statewatch.org/analyses/no-217-frontex-traveller-surveillance.pdf>; date accessed: 15.10.2014). See also, Leonard S., "*Frontex and the Securization of Migrants through practices*", Paper presented at the Migration Working Group Seminar, European University Institute, Florence, 9. February 2011, p. 15-29 (available at: <http://www.eui.eu/Documents/RSCAS/Research/MWG/201011/SLeonardpaper.pdf>; date accessed: 20.10.2014).

³⁸ Ramage S (ed.), "*Privacy - Law of Civil Liberties*", iUniverse, London, 2007, p. 21-24.

and planned according to a proper risk analysis³⁹. The proportionality of border surveillance should also be analysed from the perspective of its impact on all privacy rights such as physical integrity and human dignity.

IV. Conclusion

The EU's mandate to respect and protect human rights and fundamental freedoms and the compatibility of its border control actions with the EU Treaties and international human rights law should inspire the border control's policy and measures towards a EU border management policy which fully complies with human rights standards. The elaboration of a human rights-orientated policy will enable border policy makers to identify and properly assist vulnerable individuals and groups at borders controls. Moreover, such a policy will promote the empowerment of third country nationals, ensure the protection of their personal data, enable their social integration and guarantee that actions taken by all states and EU agencies, when implementing the border management policy, are non-discriminatory in purpose and effect.

The question of borders, migration control and human rights can raise controversial issues; nevertheless, the respect for human rights has to govern all types of border management. Although the EU is increasingly using advanced technologies to strengthen border controls and several factors are critical of the ways in which borders control affect human rights, a key issue lies in the adoption of an anthropocentric - and not economic centric - migration and border policy.

A human rights-based approach in the EU border management policy is urgently needed and the advanced technologies should be used for the public best interest in order to address and reduce the negative effects of the growing human rights crisis at the European borders, sea and land. The implementation of the principle of proportionality and the *ad hoc* assessment of each individual case should be the priority in the EU border management policy.

Conclusively, the need for the protection of human rights of refugees and migrants combined with the safeguarding of the core values of the EU is evident and gradually increasing. The EU border management policy and Member States should

³⁹ Kenk V.S., Križaj J., Štruc V., Dobrišek S., "*Smart Surveillance Technologies in Border Control*", *ibid.*

decriminalize the phenomenon of migration and succeed in combining border controls with the protection of and respect for human rights. It should be recognized that behind the law and headlines, migrants and refugees are vulnerable persons who have already been exploited and the EU should prevent their sequential exploitation.

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