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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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The common rules on the border management that the EU has adopted along with the establishment of Frontex 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 interests, 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 system. In the same context, the EU Charter of Fundamental Rights became legally binding having equal status as primary EU law.

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 documents.

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

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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).


the rules governing the movement of persons across borders\textsuperscript{9}. 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")\textsuperscript{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 Eurodac\textsuperscript{11}) combined with a set of measures for the criminalization of unlawful entry and trafficking\textsuperscript{12}.

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)\textsuperscript{13}. This Regulation was subsequently amended by Regulation (EC) No 863/2007, which created the Rapid Border Intervention Teams\textsuperscript{14}. 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\textsuperscript{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 EU\textsuperscript{16}, the fight against national and international crime - especially trafficking and terrorism -\textsuperscript{17}, and

\textsuperscript{15} C-77/05 (GJ), United Kingdom of Great Britain and Northern Ireland v. Council of European Union, para. 70-86.
management of migration flows. 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 measures. 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 Treaties 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".

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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 freedoms\(^{21}\). 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 Frontex\(^ {22}\). 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\(^ {24}\).

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 asylum.\(^{26}\)

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 procedure.\(^{27}\)

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

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\(^{27}\) See as regards the principle of non-refoulement at: ECtHR (GC) M.S.S. v. Belgium and Greece, 21 January 2011, para. 286, ECtHR Müslim v. Turkey, 26 April 2005, para. 72-76.
EU borders at serious risk. 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 impact.

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 conditions. 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 explored.

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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.
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 action\footnote{See \textit{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.}

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 system\footnote{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).} 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.


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-treatment\footnote{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).}. For refugees and migrants, which constitute vulnerable groups of people, such as a

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  \item 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.

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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 refugees. 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 policy.

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 probable. 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

and planned according to a proper risk analysis\textsuperscript{39}. 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 \textit{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

\textsuperscript{39} Kenk V.S., Križaj J., Štruc V., Dobrišek S., "Smart Surveillance Technologies in Border Control", \textit{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.