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Instrumentalisation at the Belarussian borders and its impact on the new Pact

The discussions in this panel about the common European Asylum System took place in the context of the tensed situation at the Belarussian borders with Poland, Latvia and Lithuania. Belarussian border guards pushed migrants into the EU territory, and in response EU Member States pushed those migrants back without any individual assessment of their needs for protection or humanitarian aid. This political battle between authorities resulted in people stranded in forests, in the frozen cold and deprived of food, shelter and medical care. Although the conflict has been brought to an end through mediation and pressure at the international level, it has fueled the political debate in the Council on the need for strengthened border control, through more means (funds, fences, technical equipment, data-exchange) but also more legal possibilities to keep migrants out of the EU territory. The Commission served these needs with a proposal for an emergency measure[1], allowing Poland, Latvia and Lithuania to prevent the entrance of migrants at the 'green borders' by referring them to formal border crossing points, and to derogate from core provisions of the EU asylum acquis on procedures, reception and return. As other Member States also urged for this leeway, the Commission proposed similar derogations[2] for all Member States in cases of 'instrumentalisation' by third countries. These legislative pro-

1 Emergency measures: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0752&from=EN

2 Instrumentalisation proposal: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0890

posals risk to legitimize or even legalize pushbacks. Because as migrants are being sent back from the borders, back into the country they want or have to depart, there are exposed to risks in that third country, but also to not being able to reach the formal border crossing points with an EU country. Belarussian border guards keep them away, and we know that Spain pays Morocco to prevent migrants from Sub Sahara to reach the border crossing points. Furthermore, these points are not always open and do not always guarantee access to an asylum procedure.

As these proposals and discussions on the right to control the borders touch upon the core of international and European asylum law, namely the right to have access to an effective asylum procedure and the prohibition of refoulement, they endanger to unbalance the negotiations on the new pact on asylum and migration. This pact should lead to a harmonized asylum system, in which all Member States respect the procedural safeguards and reception needs of asylum seekers in law and practice, and acknowledge their common responsibility. However, if instead the focus shifts to the legitimation of keeping our borders closed, the asylum acquis alone cannot guarantee the right to protection. The Schengen rules, should therefore anchor these obligations. It is therefore vital that for this part, the negotiations on the Schengen reform, the proposal for revision of the Schengen Borders Code and the Schengen Evaluation and Monitoring Mechanism, do not undermine the current asylum acquis, nor the negotiations on the pact on asylum and migration.

No political will to combat fundamental rights violations

Having the right rules in place is important, but compliance with the rules and enforcement in case of violations is essential to live up to the standards and to achieve harmonization. It is discouraging that all Member States expressed solidarity and support to Latvia, Lithuania and Poland in coping with the situation at the borders, without any comment or

criticism on the systematic pushbacks. Although the three Member States even amended their legislation to legalise these illegal practices, the European Commission, our Guardian of the Treaty tasked with enforcement, stayed silent. Already since last summer, the Commission replies to questions from the Parliament that they have this national legislation 'under study'. During a hearing in the LIBE committee of the Parliament, the Commission seemed divided on the way forward. Commissioner Johansson acknowledged that pushbacks were taken place, whereas Commissioner Schinas said that there is no evidence for that. However, regarding Lithuania, where Frontex assists at the border, the Agency received over 600 serious incidents reports about violations of fundamental rights.

Also before the situation at the Belarussian/EU border, the Commission was reluctant to enforce compliance with the obligation to grant access to an asylum procedure and to guarantee *non-refoulement*. It still refuses to follow up the consistent reporting by authoritative bodies like bodies of the UN and Council of Europe, the EU Fundamental Rights Agency, national ombudsmen, NGO's on (violent) pushbacks, especially at the borders with Greece, Croatia and Bulgaria. And although the Commission says it prioritises 'systematic and persistent infringements' to act upon, the Commission defends its policy of turning a blind eye to pushbacks with the argument that it is not an investigative body. However, the Commission could and should make use of those credible reports to shift the burden of proof to the Member States under allegation. In the case Commission v Hungary[3] (CJEU 17 December 2020, C-808/18), the Commission attached three UNHCR reports to its application, which were referred to by the Court in its findings. Apart from acknowledging the value of these reports, the Court also referred to reports by the Special Representative of the Secretary General of the Council of

3 CURIA – Documents (europa.eu): https://curia.europa.eu/juris/document/document.jsf?text=&docid=235703&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=690839

Europe on Migration and Refugees and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. In the N.S. and M.E. (CJEU 21 December 2011, C-411/10 and C-493/10, paragraph 90)[4] the Court specifically referred to the ECtHR's judgement in the M.S.S. v Belgium and Greece case (ECtHR 21 January 2011, case no. 30696/09)[5], and the "regular and unanimous reports of international non-governmental organisations" referred therein. So the Commission is rather encouraged instead of discouraged to make use of evidence gathered by third parties, in its role of Guardian of the treaty. However what we see is that the Commission lacks courage if it comes to enforcement, but it is eager to show it is a political ally for the Member States.

Better implementation is more harmonisation

The Commission should be vigilant to avoid that the EU sacrifices the asylum acquis and fundamental rights in responding to a geopolitical conflict. That would open the door to many more situations in which derogations could be justified and allowed. Furthermore the proposed emergency rules will create more divergence of the asylum rules of the Member States, which runs counter to the aim to avoid a different treatment and recognition rates and, as a result, secondary movements. They add derogations which are already foreseen in the different instruments for situations of crisis of emergency. At the same time, the proposals do not fill the gap of solidarity with measures of enhanced relocation in those situations. That would really relief the border countries.

4 JUDGMENT OF THE COURT (Grand Chamber) (asylumlawdatabase.eu): https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/C-411_10%20NS%20and%20ME.pdf

5 CASE OF M.S.S. v. BELGIUM AND GREECE_0.pdf (asylumlawdatabase.eu): https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20M.S.S.%20v.%20BELGIUM%20AND%20GREECE_0.pdf

We don't need to await the adoption of a new Pact on asylum and migration, as we have many detailed rules at the EU level which would, if rightly implemented, lead to sufficient safeguards and harmonization. So instead of being distracted by new legislative proposals, let's take current rules seriously. This can be done with more attention to the implementation by conducting periodical evaluations, which is an obligation in every directive or regulation but long overdue. By starting infringement procedures, making funding for border management conditional upon respect for fundamental rights and imposing national monitoring mechanisms. The proposal for a Screening Regulation only provides for monitoring of the screening procedure, as pushbacks prevent migrants to enter into a screening procedure, this monitoring mechanism should be extended to border surveillance. The Commission should develop more guidelines on how to handle at the border, as suggested by the Fundamental Rights Agency in its report about fundamental rights violations at the land borders of December 2020, and by investing in access to justice at the borders. All other leverage and instruments should be used as well. It is a wrong signal that the Council recently concluded that Croatia meets all requirements to access Schengen, completely disregarding the systematic and flagrant violations at the border reported by many organisations. In essence it is a matter of political will to take respect for fundamental rights much more seriously.

No harmonization without solidarity. New Pact: fit for purpose?

Human rights violations at the external border cannot be seen apart from the lack of solidarity with in the EU. The 'first entry criterion' of the Dublin Regulation creates a disproportionate pressure at the Member States at the external borders. These border countries are judged (f.i. in the context of Schengen) on preventing irregular migration, but not on ensuring access to an asylum procedure. The lack of a system based on equal responsibility may contribute to the silence from the side of the

other Member States, because any criticism will fire back on them with demands to take a fair share.

As said, the EU has already developed a comprehensive legal framework on asylum, after a few rounds of revisions of the Procedures Directive, Reception Conditions Directive, Qualification Directive. If correctly implemented, where necessary with enforcement action, we would have reached a pretty high level of harmonization.

The main reason for a new pact would have been more equal responsibility sharing. Because this gap is an important cause for the huge differences. That was my biggest disappointment with this pact proposal: the Dublin first entry criterion remains. The pact proposal foresees in mandatory solidarity, but the a la carte system, in which Member States can choose whether to show solidarity through funding, deploying personnel, supporting return, cooperation with third countries or relocation of asylum seekers, doesn't guarantee a sufficient relief for the Member States at the borders. The mandatory screening and border procedure even increases the responsibility for border countries.

The negotiations of the last five years have distracted us from ensuring a proper implementation. So it would also create a huge opportunity: use the energy for stronger cooperation and support in practice.

The new EU AA Regulation foresees in a monitoring mechanism but this system will only enter into force after the whole pact has been adopted. We should immediately apply this, and create a public scoreboard of the performances by the Member States. In addition, more methods to enhance harmonization should be developed, such as the promotion of objective and transparent country of origin information and mutual learning through joint processing in the Member States.

The most important reason for adopting a new Pact is a fundamental change of the responsibility sharing, with the removal of the first entry criterion. In that sense, the pact proposals are a missed opportunity to resolve the most divisive and undermining element of the current asylum system. In the meantime, Member States should cooperate on a voluntary basis to relocate asylum seekers from the external borders, which

requires substantial financial incentives. Member States who refuse to cooperate should be faced with reduced funding. However, such financial incentives also requires legislation.

External dimension: outsourcing instead of sharing responsibility

Finally, the pact also deals with the external dimension, where member states seem to be much more in agreement, as it concerns outsourcing responsibility. One might remember the JHA Council declaration on Afghanistan,[6] of September 2021 which emphasized that all refugees have to stay in the region, regardless of the possibility to seek refuge there. This is in sharp contrast to the current unity and solidarity with the people fleeing Ukraine. However, refugees have the same fears and needs, wherever they are in the world. A common responsibility, as confirmed in the Global Compact on Refugees[7] in 2018, is the only way to ensure that their rights are respected.

The current emphasis in the cooperation with third countries on strengthening border controls and readmission without sufficient attention to access to asylum, enhances the risk of refugees stuck in transit countries without protection and longer, more expensive and more dangerous routes to protection. So we need a fundamental change in the external dimension: take more responsibility for refugees worldwide, invest substantially more money in the protection of refugees in developing countries (for instance with a Refugee Fund), make resettlement mandatory, ensure human rights impact assessments and monitoring of migration deals, ensure judicial and democratic control through formalized agreements and stop the conditionality on readmission and return.

6 Statement on the situation in Afghanistan – Consilium (europa.eu): https://www.consilium.europa.eu/en/press/press-releases/2021/08/31/statement-on-the-situation-in-afghanistan/

7 UNHCR – Global Compact on Refugees – Booklet: https://www.unhcr.org/5c658aed4

This is the only way to make EU asylum policies credible and fair.

Informationen zur Autorin

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Schlagwörter

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