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Access to the EU territory for the purpose of seeking asylum: a shrinking space for human rights

Under the international law **states can exercise their sovereign power to manage the entry, residence and expulsion of non-citizens** (*Paposhvili v. France*, § 172; *Boujlifa v. France*, § 42). States can also **shape their own immigration policies**, in the context of bilateral cooperation or in accordance with their obligations stemming from the membership of the European Union (*Asady v. Slovakia*, § 59).

However, international law provides also for **the right to seek and enjoy asylum from persecution** which is closely connected to the principle of *non-refoulement*. The principle, constituting the cornerstone of international refugee protection, is recognized by some scholars as a **universally binding peremptory norm** (Costello & Foster, 2016). According to others, the duty of *non-refoulement,* as enshrined in the 1951 Refugee Convention, amounts to a “de facto duty to admit a refugee” to the territory of a destination state until their asylum claim is examined (Hathaway, 2015).

Access to asylum procedure is contingent on access to the territory of the protecting state.

Nonetheless, neither international nor EU law offers a comprehensive guidance on the treatment of asylum-seekers before they formally reach the destination state's territory. It is one of the paradoxes of international human rights law which assures the right to leave one's country on one hand (Article 12(2) ICCPR) but does not impose an obligation on states to grant access to their territory on the other hand (Carlier, 2017). Scholars are therefore divided:

whether the right to seek asylum entails the obligation of the state to grant access to their territory for asylum seekers? And, if yes, when does this obligation start?

EUROPEAN UNION LAW

Charter of Fundamental Rights of the European Union

Article 18: Right to asylum
Article 19: Protection in the event of removal, expulsion or extradition

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders ("the Schengen Borders Code")

Article 3: Scope
Article 4: Fundamental Rights
Article 14: Refusal of entry
Article 16: Implementation of control

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted ("the Qualification Directive")

Article 2: Definitions
Article 15: Serious harm
Article 21: Protection from *refoulement*

Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 ("the Dublin Regulation") establishing the criteria and mechanisms for determining the member State responsible for examining an application for international protection lodged in one of the member States by a third-country national or a stateless person.

Chapter III: rules of establishing the member State responsible for examining asylum applications

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection("the Asylum Procedures Directive") provide:

Article 6: Access to the procedure
Article 8: Information and counselling in detention facilities and at border crossing points

Article 6(5)(c) of the Schengen Borders Code maintains discretion for states to authorise applicants for international protection arriving at an external border to enter their territory:

"By way of derogation from paragraph 1, third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations."

Article 4:

"When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter), relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ('the Geneva Convention'), obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis."

Article 6(2) of the recast Asylum Procedures Directive

“Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible.”

Article 9(1) provides in such a case a right to remain in the territory of the Member State as borders and transit zones are explicitly included in the scope of the Directive:

“Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit”.

European Convention on Human Rights

ECHR **does not provide for the right to asylum** as such. However, turning away an individual and thereby putting him/her at risk of torture or other forms of inhuman or degrading treatment or punishment is prohibited by the principle of *non-refoulement*.

- **Article 3 ECHR**

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

- **Article 4 Protocol 4 ECHR**

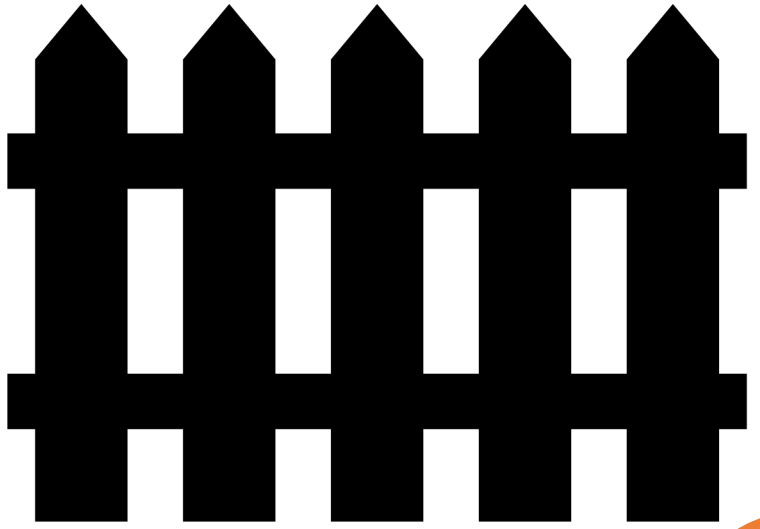
"Collective expulsion of aliens is prohibited."

Various **non-entrée policies** (Hathaway, 1992) make safe and legal access to asylum in the EU impossible for most refugees. These range from visa policies to illegal push-backs, as has been widely noted especially after the so-called “refugee crisis” (2015/2016). The persisting challenges to access the territory reveal that **European countries continue to see effective border control and human rights protection as contradictory** (ECRE, 2018).

The term “push-back” refers to a practice of removing asylum-seekers to a neighbouring country without offering them a prior opportunity to seek protection. Several EU countries have used domestic law to construct a legal or factual basis for justifying push-back policies denying asylum seekers the opportunity to register a claim after entering their territory, even where these are in clear breach of international refugee and human rights law.

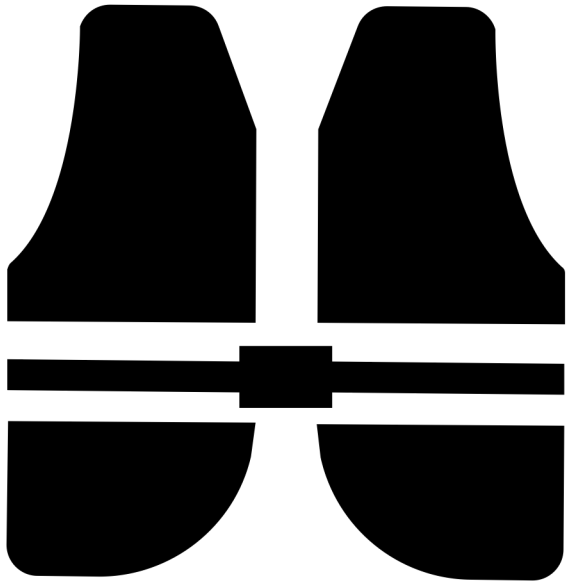
Non-entrée policies in EU take a form of:

- introducing strict visa policies for “refugee-producing” countries
- not allowing for disembarkation of boats and ships with migrants entering the territorial waters of the EU Member States,
- intercepting vessels with asylum seekers on the high seas,
- concluding agreements with third countries in order to effectively turn back people seeking protection outside of the EU territory (pull-backs),
- building fences and walls at the borders and conditioning the right of access to the asylum procedure on meeting certain requirements,
- refusing entry to persons declaring a wish to apply for international protection at the border,
- introducing “no jurisdiction zones” at the borders.



Lack of clear legal guarantees regarding the access to territory for the purpose of seeking asylum, combined with the **increasing popularity of the *non-entrée politics*** (Hathaway, 2015) put asylum-seekers arriving at the borders of destination states in a very vulnerable and legally vague position.

Can the case-law of the most prominent European courts (ECtHR and CJEU) be of help?



ECtHR has acknowledged on numerous occasions **the challenges that European States are facing in terms of immigration control** as a result of the economic crisis and recent political and social changes in certain regions of Africa and the Middle East (*M.S.S. v. Belgium and Greece*, § 223; *Hirsi Jamaa and Others v. Italy,* §§ 122 and 176; *Khlaifia and Others v. Italy*, § 241).

However, ECtHR has also stressed that the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers **cannot justify practices which are not compatible with the Convention or the Protocols** (*Hirsi Jamaa and Others v. Italy*, § 179; *N.D. and N.T. v. Spain,* § 170).

In the recent years, several judgements of both Courts concerning access to territory have been considered **highly controversial from the human rights perspective**.

Some scholars and legal experts raised concerns that **the legal integrity of both Courts has been compromised by the political opportunism** (Brouwer, 2017; Moreno-Lax, 2017; Kaminski, 2017). The increased numbers of people seeking international protection within the EU and the politicisation of migration (Grande et al., 2019) put to the test the rules and legal standards existing not only under the EU law, but also under the ECHR.

It can be argued that **the standards regarding access to protection have been, as a result, weakened and the interpretation of the law in this respect has been distorted**.

- ***Khlaifia and Others v. Italy*** – the Grand Chamber expressed different position than the Second Section of the Court which examined the case previously (2015). The Grand Chamber (2016) has not found the violation of Article 4 Protocol 4, stating that "the applicants underwent identification on two occasions, their nationality was established, and they were afforded a genuine and effective possibility of submitting arguments against their expulsion".
- ***N.D. and N.T. v. Spain*** - the Third Section of the Court found that there had been a violation of Article 4 of Protocol 4. The Court noted that "in the present case the removal measures were carried out in the absence of any prior administrative or judicial decision. At no point were the applicants made subject to any procedure. The issue whether there were sufficient guarantees demonstrating that the personal circumstances of those concerned had been genuinely and individually taken into account does not even arise in the present case, in the absence of any examination of the individual situation of the applicants, who were not subjected to any identification procedure by the Spanish authorities." In 2020, the Grand Chamber found no violation of Article 4 Protocol 4 due to the "own culpable conduct" of applicants.

Recent ECtHR cases on the access to territory:

M.A. and Others v. Lithuania (2018) – violation of Article 3

Asady v. Slovakia (2020) – no violation of collective expulsion (shift in the concept of the "individual interview": from the requirement of proactive attitude of border authorities as indicated in *M.A. and Others v. Lithuania* to the more passive one as indicated in *Asady*. The required standards of interpretation provided at the border have also decreased.)

M.N. and Others v. Belgium (2020) – case inadmissible, no jurisdiction of ECtHR in the humanitarian visa case (risk of non-refoulement)

M.K. and Others v. Poland (2020) – violation of collective expulsion

Push back cases are currently pending against: the Netherlands, Italy, France, Northern Macedonia, Croatia, Hungary, Latvia and Poland.

“Article 4 of Protocol No. 4 **does not guarantee the right to an individual interview in all circumstances**, as the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State”

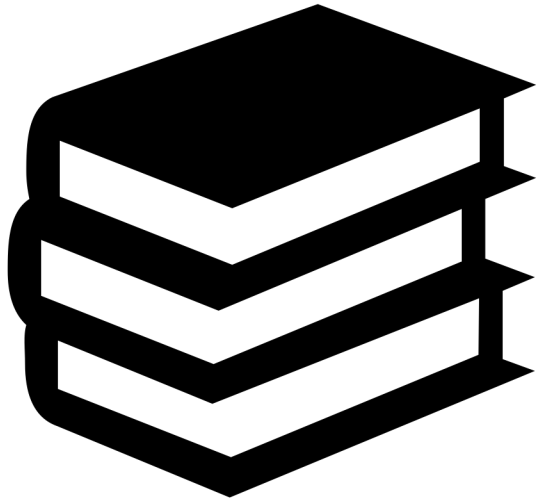
“Article 4 of Protocol No. 4 is aimed at maintaining the possibility, for each of the aliens concerned, **to assert a risk of treatment which is incompatible with the Convention – and in particular with Article 3** – in the event of his or her return and, for the authorities, to avoid exposing anyone who may have an arguable claim to that effect to such a risk.”

”(…) what matters is whether the applicants had a **genuine and effective opportunity to submit arguments against their expulsion**.”

(*Asady v. Slovakia*, §§ 57-65).

CJEU, in turn, is using an **“avoidance technique”** in order not to deal with the politically sensitive topic of refugees (Bruycker, 2018), which has been demonstrated in the cases *X and X v. Belgium* and *NF v. European Council*. CJEU considered both: the issuance of humanitarian visas and the agreement concluded with Turkey on the management of migration flows, as topics laying outside of the scope of its jurisdiction. As some scholars commented, the **CJEU has decided not only to keep refugees outside the territory of the European Union but also to keep them outside the scope of the EU law** (Spijkerboer, 2017).

The CJEU judgement in the case C-808/18 is awaited.



In my PhD research, **I focus on the issue of access to the EU territory for the purpose of seeking asylum in the ECtHR and CJEU case-law**. I monitor currently emerging case-law and conduct its ongoing analysis. I put an emphasis on the shift in the jurisprudence after 2015 and analyse the new directions of the ECtHR and CJEU case-law regarding access to asylum. The analysis of the jurisprudence is being conducted against the complex approach to the issue of the access to the territory: from the perspective of the right to seek and enjoy asylum, principle of *non-refoulment* and the prohibition of collective expulsion.

My main research questions are:

- What is the scope of protection arising from the right to seek and enjoy asylum in the light of the *non-refoulement* principle regarding access to territory for the purpose of initiating asylum procedure?
- Does the adoption of factual and legal measures obstructing access to territory for asylum-seekers constitute a violation of international and/or EU law?
- What are the push-back policies observed in the EU Member States after 2015?
- Have the standards of legal protection regarding access to the territory for the purpose of seeking asylum lowered in the recent case-law of ECtHR and CJEU?
- What is the direction of changes in the ECtHR and CJEU case-law regarding access to territory for the purpose of seeking asylum?