
LAW AT THE BORDER

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Admission criteria, distribution plans, or asylum procedures at the EU's external borders: the adopted EU asylum reform aims to clarify many aspects. Ulrich Becker and Constantin Hruschka call for effective and legally secure border procedures.

Shortly before Christmas, the European Council, the European Parliament, and the European Commission agreed on asylum procedures at the EU's external borders. At the time of going to press, the details of how these will be implemented had not been finalized. Since the summer of 2023, border procedures have been increasingly discussed as a possible means of combating human smuggling and relieving the burden on national authorities. This is also driven by the desire of EU member states to better control immigration and speed up decisions on access for asylum seekers.

Border procedures – i.e., recognition procedures for persons seeking international protection carried out at a border – are not entirely new. They have been part of asylum policies in many countries for more than 30 years. In Germany, such procedures have been in place at international airports since 1993. If it is established that a person who does not fulfill the conditions for entry is clearly not in need of international protection, they are refused entry, and the airline that transported the person is obliged to return them to the point of departure; in practice, however, this is of little significance due to the prohibition of airlines transporting passengers without a visa or other legal entry permit to the country of destination.

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VIEW POINT

ULRICH BECKER AND CONSTANTIN HRUSCHKA



ILLUSTRATION: SOPHIE KETTERER FOR MPG

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QUOTAS REDUCE THE NUMBER OF ASYLUM CASES

Now that border procedures have been extended, expectations are high, but they point in very different directions. Some see these procedures as an essential building block to curb irregular migration. Others consider them to be an abdication of responsibility and fear an erosion of asylum rights, as the assessment of protection claims at the border would inevitably lead to human rights violations. In the face of these conflicting positions, a sober examination of the legal requirements can help to assess the potential and requirements of border procedures.

What can border procedures be used for? First, it is important to understand why procedures are necessary, and second, where these procedures should take place. The need for procedures stems from the fact that, after the First World War, countries agreed not only to admit people from other countries because they were needed in their labor markets, but also to offer them protection. This admission of people is a humanitarian act that has gradually been codified into legally binding rules, notably through the 1951 Geneva Refugee Convention (GRC), which became universally applicable by virtue of the 1967 New York Protocol. However, it also involves a distinction between people fleeing their homeland: namely between those who meet the criteria for refugee status as defined in the GRC and those who do not. The purpose of this distinction is debatable, even considering the fact that the criteria for protection have now been broadened to include human rights – but there are good reasons to maintain it. The consequence is that procedures are needed to determine eligibility for protection.

However, the number of asylum procedures can be reduced by granting certain groups of people a (temporary) right of residence without individual assessment. For example, such temporary protection procedures have been implemented for refugees from Ukraine for the first time on the basis of EU law. This approach is not new and has been used in Germany since 1956. It could, in principle, be applied to other groups, such as those threatened by specific armed conflicts, and would contribute to the relief of other procedures.

The need for procedures leads to the second point and the question of where these procedures should take place. Germany is part of the EU's single market, which allows not only the free movement of goods but also, within the Schengen area, the free movement of persons without controls at internal borders. To support this, the Common European Asylum System was created on the basis of various EU laws and, since the Treaties of Amsterdam and Lisbon, on a contractual basis.

It can be argued that this system does not work well, partly because of overlapping competences between the EU and member states. But it does provide a legal framework for refugee policy. While internal border controls can be reintroduced in exceptional cases, they do not allow for the direct return of asylum seekers to the EU's neighboring states. Moreover, in a common space, there must be common decisions on the admission of people from other countries. Border procedures must therefore be carried out at the EU's external borders if they are to control access effectively.

What kind of control can border procedures develop? First, asylum border procedures should make it possible to refuse entry to people who do not meet the criteria for international protection. Such refusal of entry can only take place upon assessment of established protection criteria, as the asylum procedure is legally carried out before entry. However, even if the asylum procedure were to take place on the receiving country's own territory, procedures close to the border would offer the prospect of better controllability, faster procedures, and successful deportation/repatriation. Second, border procedures should ensure that people are not allowed to enter if they do not need protection on the other side of the border, because a third country is willing to take responsibility for assessing the need for protection and for granting protection in case of a positive assessment. The required assessment program has a different focus: it still maintains the prohibition of "pushbacks", i.e., refusals without an individual assessment of protection needs, yet it does not assess the circumstances of flight in the country of origin, but rather the circumstances of protection in the third country.

PUSHBACKS WITHOUT ASYLUM PROCEDURE- S ARE AND WILL REMAIN PROHIBITED

The question remains as to how border procedures should be organized. With regard to protection in third countries, it is necessary that third countries are willing and able to offer protection to threatened persons in two respects: protection against return to the country of origin and protection against human rights violations in third countries. Under these conditions, the GRC does not generally prohibit the involvement of third countries. This is the background against which the UK entered into an agreement with Rwanda, but also the reason the UK Supreme Court declared this agreement unlawful in the fall of 2023. Third countries must provide a guarantee that refugees will be protected from human rights abuses. Indeed, other attempts to completely outsource asylum procedures to third countries have largely failed – think of Australia's efforts with boat transfers to Papua New Guinea and Nauru, or the US's attempts to reach

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similar agreements with Guatemala and Honduras. It remains to be seen what will be achieved by the recent agreement between Italy and Albania, according to which people rescued in distress at sea will be processed by the Italian authorities in Albania – similar to the US's Remain in Mexico program. The legal uncertainties involved and the foreseeable difficulties in achieving even the planned maximum of 3000 admissions per month in Albania raise serious doubts as to whether this will be anything more than a symbolic act.

It will therefore remain necessary to carry out a full program of assessment of protection needs at the EU's external borders. This means two things: providing a procedure that meets the legal requirements, and the possibility of legal stay arrangements to carry out this procedure. The procedure must be fair in accordance with general human rights standards, with effective legal protection, and decisions should be taken within a reasonable period of time and with a reasonable expenditure of resources. The protection needs claimed by refugees must be genuinely assessed. In order to reduce the length of the procedure and increase the likelihood of repatriation in the event of a negative protection assessment, short procedural deadlines should be established and respected.

However, this should not be at the expense of ensuring effective legal protection. Legal protection against decisions must at least include access to full information and an independent review body. An appeal against the decision should have a suspensive effect on the execution of deportation. That means the ordered deportation will only take place after a judicial decision on the obligation to leave.

Expeditious and, at the same time, lawful procedures therefore place high demands on the resources invested in them. As the example of Switzerland shows, it is advisable to provide refugees with counseling and legal representation in order to complete most procedures within 100 days; accommodation must be humane, and families, people with disabilities, children and young people, victims of violence, and the sick must be given special support. Refugees may be housed in proximity to the border, but this must not involve deprivation of liberty. The EU Court of Justice and the European Court of Human Rights have dealt with this in several cases, although the specific requirements have not yet been clarified. However, it can be assumed that the detention of persons at the border is only allowed for a limited period of time and must serve the actual conduct of the procedure; furthermore, the circumstances of the conduct of the procedure must not hinder it in practice.

THE RULE OF LAW IN PRACTICE IS THE KEY

It is in the light of these broad legal requirements that the EU's current reform plans can be assessed. They are currently being negotiated between the participating institutions ("trilogue") and are expected to be adopted by spring 2024. The proposed border procedures could be applied to inadmissible cases (e.g., applicants from safe third countries) and for accelerated processing of applications, with a maximum duration of 12 weeks. These proposed procedures would be deemed mandatory, inter alia, for applications from persons coming from a country where the average EU-wide asylum recognition rate is at 20 percent or less and, generally speaking, would apply to an upper limit of up to 30,000 applications. In times of crisis, however, it should be possible to extend and increase the maximum duration of border procedures to 20 weeks. The last point in particular is viewed critically.

In principle, the proposals allow for a lawful organization of border procedures. Ultimately, it will come down to adhering to these requirements in practice. This practical reservation also applies to the solidarity measures aimed at achieving a fairer distribution of the persons admitted on the basis of their need of protection. On the one hand, EU member states would have the possibility to buy themselves out from such admissions obligations; on the other hand, financial commitments are a first approach as long as there is no prospect of enforcing EU-wide admission quotas. This is particularly relevant given that the introduction of legal border procedures is resource-intensive and the EU as a whole must take responsibility for it.

In conclusion, border procedures can be regulated in a lawful manner and can contribute to a more effective distinction between those in need of protection and other potential arrivals, as required by refugee law. However, they are not a panacea; they do not reduce the number of refugees, nor do they contribute to a meaningful overall responsibility-sharing approach. Multilateral agreements with third countries will remain indispensable and, above all, addressing the root causes of forced displacement and migration is crucial. None of this is new. But it is important, and the time has come once again to bring it to mind.

