



Analysis

The EU at war with refugees: the origin of the “hotspots” concept

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Introduction

Social media and civil society reported and foretold what we were to witness in 2015. *Medecins sans Frontieres* reported in December 2014 from Greece:

“Thousands of refugees arriving on the shores of Greece’s Aegean islands are being welcomed with a dysfunctional reception system and inhumane living conditions, according to Médecins Sans Frontières (MSF). Greece and the European Union (EU) must urgently improve living conditions for refugees, migrants and asylum seekers, and offer them adequate medical assistance and protection.” [1]

The EU institutions were well aware that with continuing conflicts in Syria, Iraq and Libya would lead to growing numbers of refugees in Turkey, Lebanon and Jordan that 2015 would bring an even greater exodus.[2] On 13 January 2015 a Commission Factsheet was published: “Questions and Answers: Smuggling of Migrants in Europe and the EU response” which said:[3]

“In 2014, more than 276 000 migrants irregularly entered the EU, which represents an increase of 155% compared to 2013. Syrians together with Eritreans were the largest group of person apprehended at EU external borders trying to enter the EU in an irregular manner.”

Five legislative measures form the so-called “Common European Asylum System”: the Dublin Regulation, Asylum Procedures Directive, the Qualification Directive, Reception Conditions Directive, and EURODAC Regulation.

¹ <http://www.msf.org/article/eu-and-greece-turn-their-backs-refugees-arriving-greek-islands>

² In Turkey only 250,000 Syrian refugees live in camps out of an estimated 2.2 million in the country.

³ FACTSHEET with detailed information:

<http://www.statewatch.org/news/2015/sep/eu-com-refugee-factsheet-15-1-15.pdf>

And on 2nd version a useful map: <http://www.statewatch.org/news/2015/sep/eu-com-refugee-factsheet-15-1-15-2.pdf>

Yet it was not until 23 September 2015 that the Commission announced **that only five Member states had been correctly applying EU asylum rules. Eighteen Member States had not implemented the Asylum Procedures Directive** which concerns procedures relating to international protection and **19 had not implemented the Receptions Directive** which sets out minimum standards for applicants for international protection including housing, food and health care which were due to be applied in July 2015.

The Commission served infringement notices for “non-implementation” against Member States. This concept is problematic as “not implemented” simply means that Member States have not transposed the measures into national law. Even when this is done it can take months before funds and staff are allocated let alone them becoming operational. Two crucial EU measures concerning international protection and providing minimum standards for reception are in many instances still not operative. The Commission admits that:

“The reality is that this year’s crisis has been made worse by the failure to implement existing laws in areas like reception conditions, fingerprinting and return.” [4]

“Hotspots”, “nationality screening” and lack of legal aid

The remit and legality of the processes carried out in Hotspots where refugees, on the basis of “nationality screening”, are to be “channelled” into relocation within the EU for those considered to be in need of international protection or those deemed to be “economic migrants” to be swiftly returned is of crucial importance.

Here six key, official, documents are analysed: They expose the paucity of the EU institutions belated plans to try and stem the arrival of refugees and a frightening view of the “other” to ensure the *“correct functioning of the system.”*

1. European Commission “Explanatory note on the “Hotspot” approach”

Produced in July 2015 this document sets out the official view on the intended role of “hotspots”: [5]

“Those claiming asylum will be **immediately channelled into an asylum procedure** where EASO support teams will help to process asylum cases as quickly as possible. For those not in need of protection, Frontex will help Member States by coordinating **the return of irregular migrants.**”

The “channelling”, or separation, of those “claiming asylum” and those “not in need of protection” is problematic. All refugees have the right to claim asylum under international law but those who do not apply for asylum are deemed “not in need of protection”.

The Note describes in some detail how “nationality screening” should make it possible to “distinguish” between “categories”:

“Registration and **screening** of irregular migrants by Frontex **to determine their identity and nationality**, and provision of information, where appropriate, concerning the asylum

⁴ Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration: <http://www.statewatch.org/news/2015/sep/eu-com-managing-refugee-crisis-com-490.pdf>

⁵ Explanatory note on the “Hotspot” approach: <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>

process. Fingerprinting and registration in EURODAC will be carried out by Member State authorities, and if requested with the support of the relevant EU Agencies and specialized expert teams from the Member States. At this stage, each **individual undergoes a first screening interview**. Following the screening it **should be possible to distinguish** between the following categories of persons:

a. Persons who wish to apply for asylum (Actors: national competent authorities with the support of EASO)

b. **Persons who can be returned immediately: procedures for immediate return** (Actors: national competent authority with the support of Frontex)

c. Persons with regard to whom the situation may remain doubtful: normal procedure applies (Actor: national competent authorities).”(p4)

Those “who can be returned immediately” are those who do not come from Syria, Iraq and Eritrea or who have not applied for asylum.

It says that European Union Regional Task Force (EURTF, based in Athens)

“will enable concerted actions by the Agencies from the moment of disembarkation of irregular migrants at the borders to the channelling of these persons through the appropriate asylum or return procedures.”

The language is chilling: **“from the moment of disembarkation” the migrants will be “channelled” through the “appropriate asylum or return procedures”.**

2. Letter to EU Home Affairs Ministers: Commissioner for Home Affairs (1.6.15)

The dehumanised portrayal of refugees is echoed in a second document, a Letter to EU Home Affairs Ministers on 1 June 2015 from Dimitris Avramopoulos, Commissioner for Home Affairs. [6]

He says that the “relatively low rate of returns of irregular migrants undermines the credibility of our efforts” so:

“we must make sure that the countries of origin of these irregular migrants cooperate and take them back” [emphasis added]

The Commissioner says that another reason for the low return rate is the:

“lack of cooperation from the individuals concerned (they conceal their identity or abscond)” [emphasis added]

To deal with this problem, the Commissioner argues that the Returns Directive provides Member States with the possibility “to use coercive measures, including detention” and “detention should be applied, as a legitimate measure of last resort.” The Commissioner reminds Member States that the Directive allows for detention for up to six months and “18 months in case on non-cooperation.”

⁶ Dimitris Avramopoulos, Commissioner for Home Affairs in fact has responsibility for internal security, security research, immigration and migration, police cooperation and criminal law:
<http://www.statewatch.org/news/2015/jun/eu-AVRAMOPOULOS-migration-letter-to-eu-ministers.pdf>

The Commissioner then spells out a strategy when Member States are “confronted with large numbers of irregular migrants” – as they were already in June 2015 - and do not have “sufficient places in closed detention facilities”:

*“they can apply the **emergency clause** of the Return Directive (Article 18).. [which] provides Member States more flexibility regarding the conditions of closed detention of irregular migrants, by enabling them to derogate from the detention-related requirements of the Directive temporarily.”* [emphasis in original]

A Footnote spells out that all basic standards can be by-passed:

“This clause offers a possibility for Member States not to apply three detention related provisions of the Directive, namely: the obligation to provide for a speedy initial judicial review of detention; the obligation to detain only in specialised facilities and the obligation to provide separate accommodation guaranteeing adequate privacy to families.” [emphasis added]

3. Inter-parliamentary Committee Meeting EU Parliament and national parliaments

A third illuminating document on Hotspots is in the record of an inter-parliamentary meeting between the European and national parliaments.

Marta Cygan, The Director of DG Home: Strategy in the European Commission described the role of Frontex as:

“- Identification

- Registration

Finger-printing

- support in regard of the briefing of migrants

- Fight against smuggling”

She also crucially confirmed that:

“The individuals after their identification will be channelled towards return or relocation asylum procedure.” [7] [emphasis added]

In the words of Klaus Rösler: Director of Operations Department, Frontex “identification” is in practice not just establishing who the person is but constitutes:

“nationality screening” [8]

The Commission had already agreed that only people from Syria, Iraq and Eritrea (see below) were to be “channelled” into the relocation asylum procedure” a policy questioned at the same meeting by Mario Morcone, Head of the Italian Department of Civil Liberties and Immigration, who said Italy was:

“puzzled with the idea that there are categories of nationalities that deserve protection and others are economic migrants. Italy has difficulties to believe that some nations don’t have the same right to international protection.” [9]

⁷ LIBE Committee: 23 September 2015: Hotspots:

<http://www.statewatch.org/news/2015/dec/eu-hotspots-ep-nat-parls-23%209%2015.pdf>

⁸ op.cit, p3

The UN General Secretary Ban Ki-moon confirmed the unlawfulness of “nationality screening” whether by only accepting people from war zones or, by implication, the collective return of all refugees who were not from Syria, Iraq and Eritrea:

"UN General Secretary Ban Ki-moon has spoken out against filtering asylum-seekers by nationality, claiming that the procedure "infringes" on their rights. Several Balkan states are only accepting migrants from war-zones.

Ban called on authorities "to respond with compassion, solidarity and shared responsibility," and to ensure that their policies on screening refugees adhere to international regulations, his spokesman Stephane Dujarric said.

*The head of the global organization also stressed that **collective expulsion and return of asylum seekers were strictly prohibited under international law.**" [10] [emphasis added]*

A representative of the Fundamental Rights Agency also drew attention to the European Court of Human Rights judgment in *Khlaifia and others vs Italy*:

*"The Court further considered that the applicants had suffered a **collective expulsion, as their refoulement decisions did not refer to their personal situation** – the Court held in particular that an **identification procedure was insufficient to disprove collective expulsion**. Furthermore, the Court noted that at the time a **large number of Tunisians had been expelled under such simplified procedures**. Lastly, the Court considered that the **applicants had not benefited from any effective remedy in order to lodge a complaint**, because under Article 13, if a remedy was to be deemed effective in the case of a collective expulsion it had to have automatic suspensive effect – which in this case meant that **it should have suspended the refoulement to Tunisia – and that had not been the case.**" [11] [emphasis added]*

4. Council Decision: provisional measures for the benefit of Italy and Greece

The EU formally decided that only refugees from Syria, Iraq and Eritrea were in need of international protection and hence relocation. Everyone else including those from Afghanistan, Pakistan and the rest of Africa are considered to be “economic migrants” and hence not in need to international protection.

The Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece set out the formula used to identify Syria, Iraq and Eritrea:

"Relocation pursuant to this Decision shall be applied only in respect of an applicant belonging to a nationality for which the proportion of decisions granting international protection among decisions taken at first instance on applications for international protection

⁹ op.cit. p2

¹⁰ [UN's Ban Ki-Moon decries Balkan refugee restrictions](#) (DW, link)

¹¹ ECHR:Press release: Unlawful detention of Tunisian migrants in degrading conditions on the island of Lampedusa in Italy pending collective expulsion:
<http://www.statewatch.org/news/2015/dec/echr-Khlaifia-and-Others-v-Italy-Detention-and-expulsion--tunisian-migrants.pdf>
Judgment: <http://www.statewatch.org/news/2015/dec/echr-Khlaifia-and-Others-v-Italy-Detention-and-expulsion--tunisian-migrants-judgment.pdf>

as referred to in Chapter III of Directive 2013/32/EU is, according to the latest available updated quarterly Union-wide average Eurostat data, 75 % or higher.” [12]

The Commission explained the rationale as follows:

*“The relocation mechanism will only apply to those nationals who have an average EU-wide asylum recognition rate equal to or higher than 75%, on the basis of EUROSTAT data for the previous quarter. For 2014, two nationalities had a recognition rate above 75%: Syrians and Eritreans. According to the latest quarterly data in 2015, the 75% threshold is now passed by **Syrians, Eritreans and Iraqis**.*

The 75% recognition rate threshold has two objectives: to ensure that all applicants who are in clear and urgent need of protection can enjoy their right of protection as soon as possible; and to prevent applicants who are unlikely to qualify for asylum from being relocated and unduly prolonging their stay in the EU.” [13]

This decision was based on **blatant pragmatism** as people from these countries had, on recent Eurostat quarterly figures, a 75% chance of their claim for asylum being accepted in EU states – or put simply an arbitrary line was drawn.

In hotspots the first stage is "nationality screening" by Frontex "screeners" and national officials - Frontex also supplies interpreters. **There is no legal representation or a right of appeal provided as part of this “nationality screening” process:**

“The screening officers play a key role in helping authorities to determine the nationality of the incoming migrants in order to identify and register them. Debriefers gather information about the activities of smuggling networks.” [emphasis added] [14]

Those "screened" for return at the "nationality screening" (Stage 1) are to be held in "closed" camps awaiting "return" flights (eg those from Afghanistan, Pakistan or Africa). Whereas those from the three favoured countries are to be in "open" camps awaiting relocation.[15]

Stage 2 “Debriefers” are supplied by Europol to question all refugees as to the route they followed and to get information on smugglers.

Stage 3 for all refugees is registration and fingerprinting.

The asylum Stage 4 is assessment for "relocation" around the EU (an asylum process by EASO with national officials) – from which those determined for “return” are effectively excluded.

¹² <http://www.statewatch.org/news/2015/sep/eu-council-provisional-measures-IT-GR-12144-15.pdf>

¹³ Commission memo: 9-9-15:
<http://www.statewatch.org/news/2015/dec/eu-com-relocation-9-sept-15-memo.pdf>

¹⁴ LIBE Committee: 23 September 2015: Hotspots:
<http://www.statewatch.org/news/2015/dec/eu-hotspots-ep-nat-parls-23%209%2015.pdf>

¹⁵ Point 5.b.iii:
<http://www.statewatch.org/news/2015/dec/eu-council-managing-migration-flows-14733-15.pdf>

The legal position over hotspots is that EU officials from EASO and Frontex help national officials. The corollary is that asylum claims/claims for international protection are supposed to be subject to the national law of the territory where they are made.

But the recast Asylum Procedures Directive requires Member **States' to provide an effective remedy against all decisions on international protection.** [16]

Article 20(1) of the Procedure Directive says:

*“Free legal assistance and representation in appeals procedures: Member States shall ensure that **free legal assistance and representation is granted on request in the appeals procedures** provided for in Chapter V. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.”*

5. Leaders' Meeting on refugee flows along the Western Balkans Route

The fourth document is the Commission report on the follow-up to the Leaders' Meeting on refugee flows along the Western Balkans Route in December 2015 added to the confusion over “nationality screening”:

*“the principle of “no registration, no rights”: the registration of migrants (irrespective of their status) is the precondition to appropriately managing the flows and setting the rights and duties of migrants. However, **in practice this led to a de facto nationality – based approach of refusing entry to all those who are not of certain nationalities (Syrian or Iraqi). So far, it is unclear whether all those who have been refused entry effectively did not express a wish to apply for asylum**” [17]*

The Commission giving voice to **what had become the practice on the ground** - people who were not Syrian or Iraqi were being refused entry and but they may not have had the chance to apply for asylum. Three countries – Croatia, Serbia and Macedonia - have set a different “nationality” test to the EU based on countries where there is ongoing conflict: Syria, Iraq and Afghanistan.[18]

And further:

*“**Too many unilateral measures continue to be taken, including the de-facto nationality – based entry conditions for migrants entering Croatia, Serbia and the former Yugoslav Republic of Macedonia and Fence construction at the border between the former Yugoslav Republic of Macedonia and Greece (as previously Hungary had erected at its border with Serbia).**”*

The Commission seems to be oblivious to the fact that its own chosen criteria is also based on identifying three favoured nationalities.

¹⁶ Procedures Directive: international protection:

<http://www.statewatch.org/news/2015/dec/eu-procedures-dir-int-prot-26-6-13.pdf>

¹⁷ West Balkans Route report:

<http://www.statewatch.org/news/2015/dec/eu-com-western-balkan-676-15.pdf>

¹⁸ West Balkan countries: “*began filtering the flow, granting passage only to those fleeing conflict in Syria, Iraq and Afghanistan*”

<http://www.euractiv.com/sections/justice-home-affairs/conditions-worsen-migrants-stranded-balkan-borders-319731>

Confusion at the end of 2015 abounded – not for the first time between EU institutions - with the European Council President, Donald Tusk, calling the detention of migrants for up to 18 months in order to “screen” them [19]

Key EU figureheads were conceding to popular racist rhetoric. The Times reported that:

“The European Union must close its “open door” to prevent millions of migrants entering Europe unchecked or there will be a backlash leading to a surge in support for extremist and far-right parties, a senior Brussels official has warned.”[20]

And the European Vice President Frans Timmermans said in an interview with Radio 4 the BBC that:

“Central European countries have ‘no experience with diversity... making them susceptible to fears about Muslim refugees.’

“If no sustainable solution is found ‘you will see a surge of the extreme right across the European continent,’ Timmermans said” [21]

It can be said that in 2015 the EU institutions had lost control of dealing with the crisis at the borders and inside the EU. Border controls have been introduced by a number of Schengen states, border “walls of barbed wire” set up – including at the Austrian border, Member States pledges for aid funds are pitiful, the relocation system is a shambles with a derisory number of offers, the number of “returns” in the hundreds and with the hotspot system is not in place and the “nationality screening” process of dubious legality.

6. European Commission: Non paper: "No registration no rights"

The fifth document came out on 2 December 2015 the Commission sought, yet again, to re-assert the need for uniform practices under the Common European Asylum System in a “Non-paper” entitled “No registration no rights” at the beginning of December.[22] By this time 744,662 refugees had entered the EU through Greece and had or were making their way northwards.

The Commission sought to re-establish control after the event as most refugees were not apprehended, they simply crossed borders “in an unauthorised manner”, did not apply for asylum in the “Member state of first entry (which was Greece) and there was a lot of “secondary movement”:

*“In addition to the registration obligations, this paper outlines the main obligations and tools Member States have under the EU acquis to manage effectively migrants and asylum seekers, and **in particular their non-cooperative behaviours**....*

¹⁹ MEPs voice concerns over detention and reception conditions for asylum seekers:

<http://www.statewatch.org/news/2015/dec/ep-refugees-rights-prel.pdf>

²⁰ <http://www.thetimes.co.uk/tto/news/world/europe/article4566487.ece>

²¹ <http://www.politico.eu/article/migration-news-diversity-timmermans/>

²² It has a Council document no: 3322-15, LIMITE, but is not on the public register:

<http://www.statewatch.org/news/2015/dec/eu-com-No-registration-no-rights.pdf>

take the fingerprints of every third-country national or stateless person who is apprehended by the competent control authorities in connection with irregular crossing by land, sea or air of the border (and not turned back)...

*inform individuals that, under EU law, they do not have the right to choose the Member State in which they would like to apply for asylum and **that if they intend to apply for asylum they should do so in the Member State of first entry...***

prevent third-country nationals from leaving their territory in an unauthorised manner by crossing the border outside the border crossing points.

determine rapidly the Member State responsible to examine the application under the Dublin Regulation

*prevent **secondary movements** of applicants to other Member States in particular by: informing applicants that they do not have the right to travel to other Member States pending the examination of their application."*

The Endgame

After the events and horrors of the past year it might be hoped that EU institutions and power elite will reflect on the cost with nearly 4,000 dead or missing refugees in the Med and reassert Europe's humanitarian and welcoming history. Unfortunately all the indications are that a controlling and repressive "Fortress Europe Version III" will be put in place.

Lawyer Frances Webber questioned the legal process and sets out its consequences in

"Hotspots' for asylum applications: some things we urgently need to know" [23]:

"Through the mechanisms it is setting up for the relocation of refugees from Italy and Greece, the EU is trying to regain control of refugee movement in the EU. The tough screening process it is setting up at points of entry into the EU seems designed as a crude instrument to separate out a minority of 'good' refugees from what EU ministers want to convince us are a majority of 'bad' economic migrants, and to dispatch the latter rapidly and efficiently. But life is not that simple, and the hotspots' screening procedures could result in large numbers of people being returned to unsafe or unviable situations without proper consideration of their claims.... The opportunity to claim international protection should be available at any time, up to the point of removal; but how will this right be guaranteed?

Without clear and robust safeguards in place, the EU's relocation package could turn out to be a figleaf for a quiet but massive removal operation against, rather than a protection operation for, those arriving on Europe's shores."

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²³ EU Law Analysis: <http://eulawanalysis.blogspot.be/2015/09/hotspots-for-asylum-applications-some.html>