

Special Issue

Constitutional Dimensions of the Refugee Crisis

Recent Developments in Austrian Asylum Law: A Race to the Bottom?

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Abstract

The Austrian asylum policy is shifting from a showcase of support to asylum seekers to one of the most restrictive in Europe. Recent amendments to the asylum law are due to the massive influx of asylum seekers in 2015/2016 as a result of which Austria has accepted the second largest number of asylum seekers per capita in Europe. The Austrian government first responded by setting an upper limit of asylum applications from 2016 and then by creating the possibility of suspending its obligations under international and European asylum law. Both measures are legally doubtful and based on the assumption that if the upper limit is met this may threaten the maintenance of public order and the protection of internal security, which is not possible to prove. The contribution provides a legal analysis of the recent legal developments in Austrian asylum law, which are reviewed from the perspective of international and European asylum law as well as human rights. It concludes that the Austrian measures are part of a race to the bottom of European countries with the purpose of keeping refugees away. They cannot be justified from a legal perspective and create a threat to the respect for the rule of law.

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A. Introduction

According to the Assistant UN High Commissioner for Protection, Volker Türk, the current international refugee situation represents a world in turmoil. At the same time, the European refugee policy is in crisis.¹ The disproportionate number of asylum seekers that European states receive, coupled with diverging attitudes, has led to unilateral responses, raising concerns over obligations under international law and European Union (EU) law.

Austria is particular in that it has moved from a long-term showcase of support for asylum seekers² to one of the most restrictive asylum laws, placing the long asylum tradition in Austria into question. This move resulted from a massive influx of asylum seekers, particularly in 2015 and in early 2016. The shift risks upsetting the Austrian asylum tradition and the Common European Asylum and Migration Policy.

Austria's initial welcome policy in 2015, aligned with that of German Chancellor Angela Merkel, was soon repealed and replaced by a policy of stopping refugee movements through the Balkan route. This new policy prevailed although less than 10 % of people reaching Austria made a request for asylum there and more than 90 % only transited to other European countries.³ The Austrian government argued that the loss of control during the massive transit, when people entered without registration, could no longer be tolerated and border controls were established on a temporary basis. This external policy change also tightened asylum and immigration laws internally. These amendments generated fierce debates on the suspension of international and European legal obligations in order to address national challenges. For some, the challenges threatened public order and internal security. While it was argued that the rule of law was threatened by a loss of control by the state, the measures proposed are often themselves undermining the rule of law. For example, asylum law restrictions, restrictions of social rights, or discriminatory

¹ See Volker Türk, *A World in Turmoil*, in *EUROPEAN YEARBOOK ON HUMAN RIGHTS* 27-30 (Wolfgang Benedek, Florence Benoît-Rohmer, Matthias C. Kettemann, Reinhard Klaushofer & Manfred Nowak eds., 2016); Manfred Nowak & Antonia Elisabeth Walter, *The Crises of the European Refugee Policy*, in *EUROPEAN YEARBOOK ON HUMAN RIGHTS* 31-55 (Wolfgang Benedek, Florence Benoît-Rohmer, Matthias C. Kettemann, Reinhard Klaushofer & Manfred Nowak eds., 2016).

² BUNDESMINISTERIUM FÜR INNERES, 50 JAHRE GENFER FLÜCHTLINGSKONVENTION IN ÖSTERREICH (2005).

³ According to the Federal Ministry of Interior, between September 5, 2015, and June 6, 2016, 803,600 aliens entered Austria of which 56,600 applied for international protection. See the proposed Regulation of the Federal Government on the Finding of the Endangerment of the Maintenance of Public Order and the Protection of Internal Security [Verordnung der Bundesregierung zur Feststellung der Gefährdung der Aufrechterhaltung der öffentlichen Ordnung und des Schutzes der inneren Sicherheit], [hereinafter Regulation on the Finding of Endangerment], Justification according to Para. 36 (2) of the Austrian Asylum Law.

additional obligations, let alone suggestions to follow the Australian model—known for its cruel internment policy of refugees on islands outside Australia—essentially undermine the rule of law.⁴ This dramatic change was largely due to the fact that the Austrian government under the pressure of the right-wing Freedom Party and of the conservative print media was not able to counter that trend and the People's Party in particular started to compete for the supporters of the Freedom Party.

After a short overview of facts and figures, this Article will review the main legal developments and analyze the “upper limit” for accommodating refugees, agreed upon by the Austrian government. Subsequently, this Article will discuss the planned measures to restrict access to the asylum procedure, as well as other related legal developments, before ending with several conclusions.

B. Background Facts and the Upper Limit

According to the Austrian “Report on Integration” of August 2016, there were 88,340 applications for asylum in 2015.⁵ It is estimated, however, that about ten times more asylum seekers crossed Austria in order to look for asylum in Germany, Sweden, or other European countries before the so-called Balkan route was officially closed by restrictive border measures—first by Hungary in September 2015 and then by Macedonia in March 2016, in the wake of the EU-Turkey deal. As a result, the extensive “border management” prepared by Austria at its Southern border never began operating and the numerous police and armed forces deployed there were largely withdrawn.

On January 20, 2016, the Austrian government, under the impression of the large influx of migrants in 2015 and early 2016 and the critique from right-wing populist parties, decided to establish a ceiling as an upper limit (*Obergrenze*) of 37,500 asylum applications for 2016, while the ceiling for subsequent years would be lower. For the period of four years until 2019, a maximum of 127,500 asylum seekers may be accepted, which roughly corresponds to 1.5% of the population. The Social Democrats, who provide the Chancellor, presented the ceiling as a target, while the People's Party, which provides the Vice-Chancellor in the

⁴ See Sebastian Kurz, *Australien Weiter Vorbild*, DIE PRESSE (Aug. 18, 2016), <https://www.pressreader.com/austria/die-presse/20160818/281676844315791>. See also Wolfgang Benedek, *Die Flüchtlinge und der Rechtsstaat*, 119 POLITICUM 50–53 (Apr. 6, 2016), http://politicum.at/wp-content/uploads/2016/05/politicum_119_inn.pdf.

⁵ Zwischenbilanz Des Expertenrates Zum 50 Punkte-Plan, in INTEGRATIONSBERICHT 2016 (2016), https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Integrationsbericht_2016/Integrationsbericht_2016_WEB.pdf [hereinafter Austrian Integration Report].

Austrian coalition government, understood it as an absolute limit. This politically-agreed limit was inspired by what the government considered its integration capacity based on the number of applications received before the peak of 2015, ranging between 11,012 in 2010 and 28,064 in 2014, and as a response to pressures from part of the public and the media to cap the influx of refugees.⁶

In June 2016, some controversy arose over how the asylum applications should be counted for that target. It was agreed that this number would include 8,676 applications of asylum seekers who arrived already in 2015, but exclude those applications for which another EU state was responsible based on the Dublin rules, according to which the country of first asylum has to provide the asylum procedure. Accordingly, by November 1, 2016, the government had accepted 30,356 applications, which meant that the limit had been exhausted up to 80.95 %.⁷

There was also the expectation that other European countries should accept more asylum seekers, but the Eastern European countries in particular showed little interest in sharing responsibility as the EU proposed.⁸ Hungary, in particular, does not take back any asylum seekers, which had entered Austria through Hungary and thus violates its Dublin obligations according to which the first EU country, in which asylum seekers arrive is responsible for the asylum procedure.⁹ The Hungarian government did hold a referendum on October 2, 2016, to confirm the Hungarian people's support for its current position, but failed to reach the 50%-requirement for the turn out of voters to make the referendum valid. However, it still kept its position. It also argues that most asylum seekers first entered the EU in Greece or Bulgaria and that therefore these countries are responsible for the asylum procedure.

In absolute numbers, Austria was the third-largest recipient of asylum seekers in 2015, behind Germany and Sweden and it was second-largest behind Sweden with respect to the number of asylum seekers per inhabitant—which for Austria was 10.3 per 1,000 as

⁶ *Id.*; see also BUNDESMINISTERIUM FÜR INNERES, http://www.bmi.gv.at/cms/bmi_asylwesen/statistik/start.aspx.

⁷ See *Noch 7,144 Asylanträge bis zur Obergrenze*, DIE PRESSE (November 11, 2016, at 11), [http://www.pressreader.com/austria/die-presse/20161111/..](http://www.pressreader.com/austria/die-presse/20161111/)

⁸ See, e.g., Fifth Report on Relocation and Resettlement, EUROPEAN COMMISSION (July 13, 2016), <http://www.statewatch.org/news/2016/jul/eu-com-relocation-resettlement-5th-report-com-340-annex-3-resettlement.pdf>.

⁹ In Austria alone, 7,200 asylum seekers should be sent back to Hungary, while for several EU-countries the number of Dublin III-cases for which Hungary should be responsible in August 2016 was given as 19,542. See DIE PRESSE (August 23, 2016, at 5), http://diepresse.com/home/politik/aussenpolitik/5072787/Osterreich_Ungarn-nahm-nur-vier-von-7200-abgeschobenen-Fluchtlingen.

compared to Germany with 5.9, Italy with 1.4, Greece with 1.2, France with 1.1, Spain with 0.3, and Poland with 0.3. The European Union average was 2.6 per 1,000.¹⁰

C. Legal Analysis of the Upper Limit

The decision to apply an upper limit or ceiling immediately drew criticism in the legal commentary, including by this author, who argued that an international obligation, like the right to lodge an application for asylum, could not be subject to a quantitative limitation. While it is clear that the absorption capacity of a small country of eight million inhabitants like Austria is limited, the acceptance of asylum applications and the respect for human rights—like the right to non-discrimination or the right to a family—have to be beyond doubt.¹¹ Not everyone who applies for asylum in Austria necessarily needs to remain there because of the Dublin rules and the EU proposals for certain burden-sharing procedures, which can also include relocations of refugees. In order to legitimize its introduction of a ceiling to asylum applications, the Austrian government requested a legal opinion from two Austrian European and public law experts, which was officially presented on March 29, 2016.¹²

The expert opinion clearly found that an upper limit as an absolute number—beyond which no asylum applications would be accepted—was prohibited under both international law and the law of the European Union.¹³ The opinion also pointed out that the EU Charter on Fundamental Rights, in the right to asylum provision, contains a reference to the Geneva Refugee Convention and other relevant obligations and that according to the jurisprudence of the Austrian Constitutional Court, rights guaranteed by the Charter can be asserted before the Constitutional Court if the right corresponds to a similar right guaranteed under the Austrian constitution.¹⁴ While this is not the case for the right to asylum as such, the jurisprudence of the Constitutional Court shows the

¹⁰ Austrian Integration Report, *supra* note 5, at 26 and 29.

¹¹ Wolfgang Benedek, *Gegen eine polarisierende Obergrenze*, KLEINE ZEITUNG 42 (Jan. 27, 2016), https://static.uni-graz.at/fileadmin/projekte/refugee-law-clinic/KZ_Gegen_eine_polarisierende_Obergrenze__27.1.2016_.pdf.

¹² Walter Obwexer & Bernd-Christian Funk, *Gutachten, Völker-, Unions- und Verfassungsrechtliche Rahmenbedingungen für den beim Asylgipfel am 20.01.2016 in Aussicht genommenen Richtwert für Flüchtlinge* (Mar. 29, 2016), <http://www.bundeskanzleramt.at/DocView.axd?CobId=62571> [hereinafter Opinion].

¹³ *Id.* at 84.

¹⁴ *Id.* at 85; Verfassungsgerichtshof [VfGH] [Constitutional Court of Austria] Mar. 14, 2012, Case No. U 466/11 (2012).

recognition of an illimitable right to an individual procedure based on a fair trial.¹⁵ Accordingly, the experts concluded that an administrative decision needs to be provided on the existence of a possible violation of fundamental rights with a judicial review. While an upper limit resulting in a denial of judicial review of a decision would not be in conformity with Austrian constitutional law, Austrian constitutional law would not generally prohibit a limitation of asylum applications. The opinion also made clear that the Geneva Refugee Convention neither includes a right to have one's asylum application examined nor prohibits sending an asylum seeker to a country where her or his life or freedom is not threatened. However, according to Article 6 of the EU Asylum Procedure Directive the responsible EU member state has to provide access to an asylum procedure.¹⁶

The expert opinion further noted that Article 72 of the Treaty on the Functioning of the EU (TFEU) opens a possibility for derogating from obligations under EU law *in extremis* for guaranteeing public order and the protection of internal security; but, such derogation has to respect the principle of proportionality.¹⁷ In principle, the derogation would, as the experts argue, only cover EU secondary law, particularly the right to have one's asylum application examined.¹⁸ It does not cover EU primary law. Derogating from EU secondary law would permit sending back asylum seekers to neighboring EU countries without assessing their asylum application, provided that basic human rights are guaranteed. Some of these rights include the prohibition of torture and inhuman treatment,¹⁹ the right to privacy and family life,²⁰ and the right to an effective judicial remedy,²¹ which is also required to ensure the collective expulsion prohibition.²² It can also be argued that Article 47 covers the right to have an asylum application effectively assessed under EU primary law.²³

¹⁵ Opinion, *supra* note 12, at 56-58.

¹⁶ See Directive on Common Procedures for Granting and Withdrawing International Protection 2013/32/EU, 2013 O.J. (L 180/60) [hereinafter Asylum Procedure Directive].

¹⁷ Opinion, *supra* note 12, at 18-20.

¹⁸ Asylum Procedure Directive, *supra* note 16, at art. 33 (2) (a)-(b), 35.

¹⁹ European Convention of Human Rights art. 3 [hereinafter ECHR]

²⁰ *Id.* at art. 8.

²¹ EU Charter on Fundamental Rights art. 47 [hereinafter EU CFR].

²² *Id.* art. 19.

²³ *Id.* at art. 18.

So far Article 72 TFEU has never been relied upon by a government to derogate from its obligations under EU law. It is very unlikely that the Austrian government will be able to prove the requisite actual and significant threat to basic interests of the society. Irrespective of the clear assessment of the legal experts that the introduction of an upper limit requires compliance with EU primary law and that derogation from EU secondary law has to respect proportionality, the Austrian government decided to amend the asylum and immigration laws to include an upper limit. The Austrian government argues that the continuing increase of asylum applications in Austria threatens public institutions and systems, which include existing obligations towards already present asylum seekers.²⁴

D. Suspending the Right to Asylum?

Among several amendments to the Asylum Law of 2005 proposed in early 2016, new special provisions addressed the maintenance of public order and the protection of internal security based on Article 72 of the TFEU.²⁵ They provide that the Federal Government can make a determination in accordance with the main committee of the National Council—the main chamber of the Austrian Parliament—in which the Government has the majority by a “specific regulation” which is generally addressed as the emergency regulation (*Notstandsverordnung*). The emergency regulation only need to state that the maintenance of public order and the protection of internal security are in danger. In this case, the government should reestablish border controls. To do so, the government has prepared a border management plan including fences, which can be set up quickly, especially at the Brenner border between Austria and Italy to reintroduce control over border crossings. The government should also establish specific “registration offices” for potential asylum seekers.²⁶ These offices are planned to be located at the border and can hold people up to two weeks. Asylum applicants, whether people who request asylum when crossing the border or people who entered Austria illegally, will have to submit their applications exclusively at the new registration offices. Before an asylum

²⁴ Gesamtändernder Abänderungsantrag mit dem das Asylgesetz 2005, das Fremdenpolizeigesetz 2005 und das BFA-Verfahrensgesetz geändert werden, [hereinafter Motion on the Amended Law on Asylum] https://www.parlament.gv.at/PAKT/VHG/XXV/AUA/AUA_00004/imfname_525278.pdf.

²⁵ 24. Bundesgesetz: Änderung des Asylgesetzes 2005, des Fremdenpolizeigesetzes 2005 und des BFA-Verfahrensgesetzes [Amendment of the Austrian Federal Asylum Law of 2005, the Federal Law on the Exercise of Alien's Police etc., adopted on Apr. 27, 2016, and published on May 20, 2016], Nr. 24/2016, BGBl I, [hereinafter Amendment to Law on Asylum], No.17 on new para. 36.

²⁶ Id. No.17 on paras. 37 and 38.

procedure is opened, the border authorities have to examine whether the person can be prevented from entering the country through hindrances, refusal, or outright removal.²⁷

There are only two exceptions from this rule: If the person can demonstrate that he or she would risk the right to life, torture, or inhuman treatment if returned,²⁸ or if his or her presence in Austria is mandated for private and family life reasons.²⁹ Accordingly, applications for asylum will not be dealt with except for cases of possible violations of Articles 2, 3, and 8 of the ECHR or if it is impossible to return the person—for example, if the neighboring state refuses to cooperate. Examining possible human rights claims before hindering access or removal is expected to take less than one hour per person. Each person does have the right to a complaint against the decision with the administrative courts of the “*Länder*,” the federal units of Austria. Should the Court find no violation, the government will not consider the application for international protection as submitted. The same result prevails if the applicant has made no complaint.³⁰ The consequence in both cases is that no asylum procedure will be opened. It will hardly be possible for the applicant to prove in the short procedure that he or she risks a threat to his or her life or of torture and inhuman treatment if refused entry from or returned to a neighboring country of Austria, which is a member of the EU. The only realistic chance for admittance is if the asylum seeker already has family in Austria. All others should either be denied entry or returned, effectively suspending the right to asylum in practice.

1. Reactions to the Amendments

The reactions to the draft law were very critical throughout the legal and asylum expert community as well as among the liberal opposition parties. The Austrian government, which originally intended to avoid a public review of the amendments, finally granted a very short peer review period and then adopted the law, with only cosmetic changes, in spite of largely critical comments on the amendments.³¹ The government also argued that the criticized provisions, which would practically abolish the right to asylum in Austria, would not become operational without the required specific regulation. Such regulation would be unnecessary if the upper limit was unlikely to be reached.

²⁷ *Id.* No. 17 on para. 38.

²⁸ ECHR, *supra* note 19, at arts. 2, 3.

²⁹ *Id.* at art. 8; Amendment to Law on Asylum, *supra* note 25, No.17 on paras. 40 (2), 41 (1).

³⁰ Explanations to para. 41 of the Motion on the Amended Law on Asylum, *supra* note 24, at 31-32.

³¹ Law on Asylum 2005, BGBl. I, No. 100/2005 as amended.

Although there was a significant drop in the number of asylum applications and several reception centers in Austria could be closed in summer 2016, the conservative People's Party increased its pressure on the coalition partner to also adopt the specific regulation. They argued that there was a certain likelihood that the upper limit could be reached in autumn of 2016 and that the government should be prepared to act without delay. The party also argued that the adoption might have a preventive effect and push back against countries like Hungary, who refused to accept asylum seekers under the Dublin rules, to become more cooperative. The Social Democrats, in turn, argued that Hungary should comply with its Dublin obligations first, because if it did not accept the return of any asylum seekers, the Austrian regulation would be unable to work with Hungary.

The Austrian presidential elections—which took place on April 24, 2016, and on May 22, 2016 (second round)—demonstrate a particular coincidence to the above dilemma. For the first time, a candidate of the right wing Freedom Party succeeded in reaching the second round. As he and his party argued for stronger measures against the influx of asylum seekers, the government was trying to show that it was already addressing the issue. The amendments to the asylum law were passed on April 27, 2016, in the context of the presidential elections that brought a very thin majority for the liberal candidate. But the Freedom Party claimed irregularities in the counting of some postal votes, later confirmed by the Austrian Constitutional Court, although not a single case of election fraud could be identified. The Court was satisfied that, theoretically, the irregularities could have allowed for manipulations changing the overall result.³² Therefore, the second round of the elections must be repeated, which will finally take place on December 4, 2016. Again, the government seems to believe that a tough attitude towards asylum seekers would provide the Freedom Party candidate with fewer criticisms against its asylum policy.

The legislature ignored the criticisms of the amendment to the asylum law in the review process. They consisted of practical arguments, including that the administrative courts are not prepared and lack the capacity to deal with a larger number of complaints to be expected or that in the absence of agreements with the neighboring countries, it is unclear whether they will accept the return of asylum seekers. Once the special regulation came into force, the amendments would result in a situation in which Austria, a country with a long tradition of accepting asylum seekers—allowing more than 90,000 Bosnian refugees to remain in the 1990s—would de facto abolish the right to asylum by accepting

³² See Verfassungsgerichtshof [VfGH] [Constitutional Court of Austria] Press Release, *Bundespräsidenten-Stichwahl Muss in ganz Österreich und komplett wiederholt werden*, (July 1, 2016), https://www.vfgh.gv.at/downloads/verkuendung_w_presseinformation.pdf; see for the decision Verfassungsgerichtshof [VfGH] [Constitutional Court of Austria], July 1, 2016, No. W I 6/2016-125.

applications only in a few exceptional cases. The amendments undermine the obligations under the Geneva Refugee Convention of 1951 and the Office of the UN High Commissioner for Refugees has strongly criticized them in its draft law review.³³

The Institute of International Law and International Relations of the University of Graz also presented its concerns with the law to no avail.³⁴ Assuming that derogation from EU primary and secondary law, in particular from the right to have the admission of one's asylum application assessed, is permitted and considered proportionate (which it is not), the procedure for refusing to admit asylum applications nevertheless violates the right to an effective remedy.³⁵ In particular, the idea that the refusal to admit an asylum application would not be based on a formal decision, but could effectively be denied by pushing the refugee back from the Austrian border, would make a complaint nearly impossible. Because filing a complaint against these measures requires physical presence, the right to an effective remedy would be violated, in line with the past case law of the Austrian Constitutional Court.³⁶ Accordingly, the right to remain in the member state pending the examination of the application, enshrined in Article 9 of the Asylum Procedure Directive, needs to be respected as shown in the case *Mohammed v. Austria* before the European Court of Human Rights, which found that the effectiveness of a remedy depends also on the protection against deportation.³⁷

On September 7, 2016, the Austrian government, after long internal disputes, submitted the draft special or emergency regulation for public review. Because the measures to be taken have already been adopted as amendments to the asylum law, all the regulation has to do is to state that "the maintenance of the public order and the safeguarding of internal security are endangered".³⁸ There are ongoing differences between the government and the public over the justification for the regulation and when it should become effective.

³³ UNHCR Press Release, Alarmierende Änderungen im Österreichischen Flüchtlingsschutz Geplant (Apr. 21, 2016), <http://www.unhcr.at/presse/pressemitteilungen/artikel/d3ec3a9914ed0dd212109d971067ae06/alarmierende-aenderungen-im-oesterreichischen-fluechtlingsschutz.html>.

³⁴ *Stellungnahme zum Bundesgesetz betreffend die Änderung des AsylG 205, FPG 2005 u dBFA-Verfahrensänderungsgesetz 2005*, UNI. OF GRAZ, <https://refugee-law-clinic.uni-graz.at/de/neuigkeiten/> [hereinafter UNI. OF GRAZ].

³⁵ EU CFR, *supra* note 21, at art. 47.

³⁶ UNI. OF GRAZ, *supra* note 34, at 8 - 9.

³⁷ *Mohammed v. Austria*, App. No. 2283/12, para 81 (June 6, 2013), [http://hudoc.echr.coe.int/eng-press#{"fulltext":\["2283/12"\]}](http://hudoc.echr.coe.int/eng-press#{).

³⁸ Regulation on the Finding of Endangerment, *supra* note 3, para.1.

II. Justification for the Emergency Regulation

The justification given as required by Paragraph 36 (1) of the amended Austrian Asylum Law attempts to justify the existence of a threat to the maintenance of public order, as well as internal security, to qualify as an exception under Article 72 TFEU required to justify derogations from the EU directives on asylum. Similar to the explanations for the amendments to the asylum law, the government argues that the stress on the labor market and social security systems by the refugees recognized in 2015 and in 2016 could lead to an increased unemployment rate, result in social tensions and unrest, and further threaten the security, public order, and social peace in Austria to the detriment of public institutions and functions. It also claims that an additional influx of asylum seekers could lead to higher criminality and to inter-religious and inter-ethnic tension and conflicts. Interestingly, the explanations speak of a repeated influx “of a comparable dimension with the year 2015”,³⁹ while the government now argues that already the agreed upper limit of 37,500, and not the 89,000 arrivals in 2015, would trigger a need to introduce the regulation.

The justification for the regulation provides some statistics, which should prove the strain on public institutions like the asylum system in which the backlog of open asylum procedures has doubled since the beginning of 2015 and the average time needed for one case has increased from 6.3 months in 2015 to 7.6 months.⁴⁰ It highlights several bottlenecks in the field of education, health, integration, and employment, evidenced by the fact that the unemployment rate is expected to rise from 5.7 % in 2015 to 6.1 % in 2017. The statistics further observe a rise of 3.58 % of foreign suspects between 2014 and 2015 and calculate the additional costs on the public budgets for 2016 to be two billion Euros.⁴¹

In an international comparison, Austria still has a relatively low unemployment rate,⁴² and there are no specific social tensions. Although the subjective feeling of security in the population has indeed deteriorated, this is not correlated with the actual development of

³⁹ Justification to the Regulation on the Finding of Endangerment, *supra* note 3, at 5 - 8.

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 8.

⁴² See, AMS (Arbeitsmarktservice), Übersicht über den Arbeitsmarkt (Sept. 2016), http://www.ams.at/_docs/001_uebersicht_aktuell.pdf.

criminality, which has hardly changed in spite of an influx of more than 100,000 people in 2015 and 2016. There are also no inter-ethnic or inter-religious tensions of any disturbing dimensions. The costs of social security are increasing partly due to unemployed refugees, but the total amounts are far from putting the system at risk. The additional costs on the public budget are significant and the stress on public institutions is considerable, but do not rise to an emergency situation. Accordingly, there is no sufficient reason to justify Article 72 measures because there simply is no threat to public order and internal security and this would not change even if Austria reached its upper limit of 37,500. This is also reflected in the regulation's designation, which was first called an "emergency regulation" (*Notstandsverordnung*) in order to signal its extraordinary nature, while the government now prefers to call it a "special regulation" (*Sonderverordnung*), because an emergency is difficult to prove. And indeed, the justification for the special regulation repeatedly refer to a new mass migratory influx "as in the year of 2015" or even a higher influx than in 2015.⁴³ This influx, however, is nowhere to be seen.

III. Implementation and Proportionality

The second major issue is determining when the special regulation should enter into force. Contrary to the triggers indicated in the explanations, the People's Party argues that the regulation should come into force when the upper limit of 37,500 accepted asylum applications has been reached, if not before, to prevent this from happening. The Social Democrats want more flexibility. They rightfully argue that if the limit would eventually be reached towards the end of the year, a new contingent of 35,000 would have been agreed for 2017 anyway. Therefore, there would be no need for the regulation, which is intended to last for six months subject to extensions. This is indeed the case and has also been the government's position when the amendments to the asylum law were adopted. Finally, to procedurally make the special regulation effective, the government has to take a common position and give its reasoning to the main committee of the National Council of the Parliament, which then has to give its approval. It is unclear whether this is going to happen in the near future as the governmental coalition is not in agreement whether the necessary conditions exist.

It indeed appears very doubtful that the Austrian government could convince the European Union—which was skeptical about the Austrian move from the beginning—that it needs to suspend major obligations under the TFEU without a truly emergency situation. Maybe the whole exercise is to buy time and after the Presidential elections of December 4, 2016, things might look differently for politicians. From the legal perspective, if the regulation is adopted, even it is not put into force, part of the damage is done and raises the issue of whether the Austrian government is acting in a responsible way vis-à-vis the

⁴³ Justification to the Regulation on the Finding of Endangerment, *supra* note 3, at 3 and 4.

European Union and in conformance with international law at large—let alone acting responsibly towards the asylum seekers potentially affected by the measures to be applied—to implement the special regulation.

There is also the issue of the proportionality of the border controls. There have already been strong protests against the border controls temporarily reestablished in spring 2016—and prolonged since several times—because of the high costs due to the delays created for business and tourism. They were of a largely symbolic nature as asylum seekers now come mainly over the green border, which is difficult to control. For example, the government invested millions in a new border management in Spielfeld, at the Southern border with Slovenia, which then has not been needed since the Balkan route was closed. Since March 7, 2016, hardly any refugee has arrived there, but the police presence remains.⁴⁴ The reestablishment of full border controls at the border station would have little effect on the number of asylum applications, but would cause high costs for the economy and interfere with free movement in border-crossing under the Schengen border regime. In order to be effective, the green border would also need to be controlled, for which purpose the military alone calculates at least 2,000 people are needed. Accordingly, the total costs would be disproportionate to the potential reduction of asylum seekers.

E. Other Legal Restrictions of Asylum

The amendments described were not the only changes to the Austrian Asylum Law. In addition, one amendment provides that asylum will only be granted in the future for a period of three years, subject to review thereafter.⁴⁵ This measure seems impractical because tens of thousands of decisions would need to be reviewed, while an asylum decision can easily take a year or more already. It seems that Germany employed such limitation, but dropped it for reasons of practicality. The new limitation may also work against the objective to provide effective integration of refugees, because companies are unlikely to invest in the education of an employee with an uncertain future in the country. Furthermore, family reunification has been made more difficult by limiting the period in which recognized refugees can apply for family members to join them for three months, whereas those who only get subsidiary protection now have a waiting time of three years before they can apply.⁴⁶ In addition, new measures were introduced to facilitate the

⁴⁴ See *Ruhe an der Grenze hat ihren Preis*, KLEINE ZEITUNG 19 (Aug. 27, 2016), <https://www.pressreader.com/austria/kleine-zeitung-steiermark/20160827/textview>.

⁴⁵ See Austrian Asylum Law, as amended, *supra* note 31, at para. 3 (4).

⁴⁶ See Austrian Asylum Law, as amended, *supra* note 31, paras. 36 (1), 35 (2).

deportation of unrecognized asylum seekers or those who have lost the temporary subsidiary protection.

The declared intention of all these measures is to make Austria less attractive for asylum seekers and thereby reduce the number of applications and the costs for the Austrian state. It will be up to the Austrian and European Courts to review whether these measures comply with constitutional law, human rights, and European law.

This tightening of the Austrian Laws on asylum seekers and foreigners in general is only one step in a long series of similar moves, which regularly responded to increases of the number of asylum seekers or the pressures coming from the right wing of the political spectrum, in particular the Freedom Party. It goes hand in hand with additional obligations regarding the integration of refugees and reduced social rights for refugees. It should be noted that the trend to more restrictive measures has persisted since the late 1990s only to be mitigated by the obligation to accept rules of the emerging European Asylum and Migration System, which needed to be incorporated into the Austrian Asylum Law.⁴⁷

One particular case relates to restrictions on the right to education for young asylum seekers. The new Austrian Law on youth education in July 30, 2016, enlarges the obligation for young people to be educated by extending the duty of training from sixteen to eighteen years. An exception was included for young asylum seekers, who have not yet obtained refugee status.⁴⁸ Different from their Austrian colleagues they were excepted from such duty meaning that the state has no obligation to include them in the education system. The Green Party provided the necessary constitutional majority for the law, which is generally seen as a step towards the right to education. It argued for the inclusion of young asylum seekers, because the procedure of recognition can take years during which no proper education is offered to young asylum seekers, particularly those between sixteen and eighteen years. Additionally, most of them obtain refugee status anyway. The party was only able to get the commitment from the governing coalition to increase the number of German courses for this group, which is an inadequate solution. The reason given for the restrictive approach by the conservative People's Party, which prevented an equal treatment, once again was that Austria should not become too attractive for young asylum seekers.

⁴⁷ See Iris Bonavida, *Asylrecht: Eine Reform in der Dauerschleife*, DIE PRESSE (Aug. 23, 2016), http://diepresse.com/home/politik/innenpolitik/5073079/Asylrecht_Eine-Reform-in-der-Dauerschleife.

⁴⁸ The Austrian Council of Ministers adopted the requirement to get education until the age of 18 on July 6, 2016, published on July 7, 2016 as the *Jugendausbildungsgesetz*, July 30, 2016, BGBl. I 62/2016, https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_I_62/BGBLA_2016_I_62.pdf.

This measure must be considered in violation of the right to education of children as enshrined in Article 28 of the UN Convention on the rights of the child of 1989 and Article 30 of the UN Covenant on Economic, Social, and Cultural Rights. According to the Convention, the period of childhood goes until eighteen years of age. The restriction might also have negative social consequences for the affected young asylum seekers who are left without adequate educational opportunities. Education might reduce their chances in the labor market and produce additional costs for the state in the future. Not having a meaningful occupation might also make them more vulnerable to radical or extremist thoughts and to criminal activities.

More restrictions are being planned, which raises additional concerns regarding the violation of international human rights law and EU law in particular. According to the plans by the conservative People's Party, the need-based minimum benefits ("*Mindestsicherung*") should be significantly reduced for refugees, at least during the first years of entitlement. This raises issues of discrimination in the enjoyment of social rights, as has been pointed out by an opinion of the Constitutional Service of the Federal Chancellery, but which seems to be ignored.⁴⁹ Other ideas relate to requiring unemployed refugees to do social work at a minimum rate of one Euro per hour. These proposals are very controversial within the federal and regional governments and therefore no agreement has been reached so far, but there is constant pressure on the principle of equal rights for all persons lawfully residing in Austria.

In August 2016, the Minister of Interior announced new restrictions further tightening the asylum law. Asylum seekers and refugees should be forced to stay where they receive support. In a case of criminal conviction, they should automatically lose their asylum status and be deported immediately. While the Minister did not expect that the upper limit would be reached, he considered the adoption of the special regulation as an absolute necessity to be prepared for the case of new mass influx. Once more, this influx is nowhere to be seen. To cross the border into Austria illegally should also become a criminal offense for asylum seekers who arrive with economic motives.⁵⁰ This latter proposal would clearly

⁴⁹ N.N. "*Deckel verfassungswidrig*". *Mindestsicherung. Die SPÖ lehnt eine Obergrenze von 1500 Euro weiterhin ab. Sozialminister Alois Stöger verweist auf zwei Gutachten*, DIE PRESSE 5 (July 27, 2016), <http://www.pressreader.com/austria/die-presse/20160727/281590944927068>.

⁵⁰ See Phillip Aichinger, Iris Bonavida & Thomas Prior, *ÖVP: Illegale Einreise als Straftat*, DIE PRESSE (Aug. 17, 2016, 6:23 PM), http://diepresse.com/home/politik/innenpolitik/5070452/OVP_Illegale-Einreise-als-Straftat; see also Iris Bonavida, *Sobotka: Ohne Wohnsitzpflicht keine Grundversorgung*, DIE PRESSE (Aug. 24, 2016, 6:21 PM) http://diepresse.com/home/politik/innenpolitik/5073779/Sobotka_Ohne-Wohnsitzpflicht-keine-Grundversorgung.

violate international and European law because it is the purpose of the asylum procedure to decide the status of asylum seekers. According to Article 31 of the Geneva Refugee Convention, contracting parties shall not impose penalties for illegal entry.

F. Conclusion

The legal measures taken by the Austrian government and the ongoing debate over further restrictions on the rights of refugees and asylum seekers are largely inspired by fears that Austrian voters might move to the right wing Freedom Party, which indeed had considerable success in recent regional and the first rounds of the presidential elections by utilizing an anti-migrant and anti-refugee rhetoric. One argument is that the state must not lose control of its borders and must preserve its sovereignty, although Austria does benefit significantly from the Schengen Regime of open borders as a tourist destination and for its greater economy. Accordingly, there is a trend of “resovereignization” visible also in the Austrian public discourse, which has already led to the building of some symbolic fences, the preparing of a border management, and the reintroduction of border controls if considered necessary even with military support. This raises fundamental issues of freedom of movement in Europe because Austria is centrally located and is an important transit country in Europe. The European Commission therefore has asked Austria repeatedly to be as careful as possible in—temporarily—reintroducing border controls. The last such appeal was by the President of the Commission, Jean-Claude Juncker, at the opening of the European Forum Alpbach on August 21, 2016.⁵¹

The recent Austrian practice supported by conservative print media shows a piecemeal approach to restrict asylum laws more and more. Gradually, exceptions become the rule, which could culminate in the suspension of the right to asylum as such for asylum seekers arriving from EU neighboring countries. First an upper limit is set, which is clearly found to be a violation of international and European Union law. Then, the same limit would be used as a trigger for measures which would result in the same violations. These plans to practically annul the right to asylum and to reduce—in a discriminatory way—the social rights of refugees raise basic questions on the respect for the rule of law. If followed by other states, such disregard would destroy both the international and the European asylum system. Austria would follow the path of Hungary and some other Eastern European states into isolation as clear violators of international and European rules. The difference remains that Austria has shouldered a greater burden through a high number of refugees. But there is a question of principle whether the problem of overburdening, if it exists at all, should be resolved by unilateral measures in violation of international and European law or by strengthening efforts with the European Union within the framework

⁵¹ See Erich Kocina, *Juncker maßregelt Platter und “Landesobermuftis,”* DIE PRESSE 3 (Aug. 28, 2016), <https://diepresse.com/home/alpbach/5072398/Juncker-massregelt-Platter-und-Landesobermuftis>.

of its Common Asylum and Migration Policy.⁵² It has become quite fashionable to criticize the EU for failing to address the refugee problem, but as a matter of fact, the EU member states have caused these failures thus far. Some, like Austria, have done little to seek solutions within the EU although the proposals by the Commission on a revised Dublin regulation also contain a burden-sharing mechanism.⁵³ The fundamental question therefore is whether Austria will resolve its refugee problem with or against the EU. But in the long run, there remains no alternative to European solutions. This insight might have prevented the adoption of the emergency regulation so far, but this could happen any time with the result of allowing the provisions of the asylum law, which have been found incompatible with international and European law to enter into force.

It remains to be seen to what extent international law, EU law, and the respective procedures and courts will function as a barrier to unilateral legal inroads into international human rights law and European asylum obligations. The comparative law perspective does play a role in this context, but so far mainly in informing the race to the bottom, in which European Ministers of Interior and their governments seem to be engaged.

⁵² See *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, EUROPEAN COMMISSION (Apr. 6, 2016), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160406/towards_a_reform_of_the_common_european_asylum_system_and_enhancing_legal_avenues_to_europe_-_20160406_en.pdf.

⁵³ European Commission Press Release IP/16/2433, *Completing the Reform of the Common European Asylum System: Towards an Efficient, Fair, and Humane Asylum Policy* (July 13, 2016).

