

N o t e V e r b a l e

The Permanent Mission of Austria to the Office of the United Nations in Geneva presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to transmit the enclosed Response of Austria to the "Joint urgent appeal by Special Rapporteurs" concerning the Austrian measures regarding the refugee and migration situation.

The Permanent Mission of Austria to the Office of the United Nations in Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 5 July 2016



Office of the High Commissioner for Human Rights

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RESPONSE of Austria to the JOINT URGENT APPEAL BY SPECIAL RAPPORTEURS

Austria thanks the UN Special Rapporteurs on the human rights of migrants; contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and torture and other cruel, inhuman or degrading treatment or punishment for their Joint Appeal regarding international and European legal obligations relevant to the current refugee and migration situation and the conduct of Austria in this context.

Question 1:

Austrian measures regarding the refugee and migration situation since 2015

Generally, it is important to mention that starting in September 2015, Austria has been facing a massive influx of refugees and migrants, with 791.826 persons passing through Austria in the period from 5 September 2015 to 31 March 2016 alone. Around 57,000 applications for asylum were filed in Austria in the same period, because the majority of refugees and migrants chose to travel on to Germany to seek international protection there. Between 1 January and 31 December 2015 Austria, a country of 8,5 million inhabitants, received more than 88.000 asylum applications.

Austria has agreed with Germany, as of September 2015, to allow the passage of persons wishing to seek international protection in Germany, for humanitarian reasons, in accordance with Article 5(4)(c) of the Schengen Borders Code. After around 50.000 refugees and migrants had entered Austria without any verification of their identity within just 8 days between 5 and 13 September 2015, and Germany had introduced border controls as of 13 September 2015, Austria decided to also introduce border controls in accordance with the Schengen Borders Code from 16 September 2015. This measure was necessary, as a precautionary measure, to prevent the disruption of public order and security as a result of the large number of undocumented persons on Austrian territory and to prevent a backlog potentially resulting from the measures adopted by Germany. The necessity and proportionality of the introduction of these border controls was confirmed by the European Commission (see Commission Opinion of 23.10.2015, COM [2015]7100final). The border controls have been constantly prolonged. As a result, only persons fulfilling one of the following conditions, in accordance with the Schengen Borders Code, have been allowed to legally enter Austria: persons (i) in possession of a valid travel document, visa, residence permit etc.; (ii) filing an asylum application in Austria; (iii) wishing to pass through Austria in order to seek international protection in Germany. Due to continued structural deficiencies of the external border control management of Greece, on 12 May 2016 the Council of the European Union recommended Austria to maintain border controls at the Austrian-Hungarian and the Austrian-Slovenian land border (at least).

Austria has a strong humanitarian tradition and has for the past years figured among the top 3 of EU countries in asylum applications per capita. However, it is evident that despite the goodwill Austria has shown especially in 2015 in welcoming and accommodating refugees, continuing to accept around 90.000 asylum applications per year would clearly overstretch the capacities and resources Austria can offer:

police, medical and other staff working at the border, but also capacities of the Austrian social security and education system, not to speak of the labour market, providing for and absorbing a high number of new residents while maintaining social peace and cohesion. Therefore, in January 2016, the Austrian government decided to introduce a target number of 37.500 asylum applications it would accept and process in 2016. Let us emphasise that to this day, all applications for international protection in Austria have been accepted and duly processed.

Resettlement

Another challenge in this context is the smuggling of refugees and migrants, which Austria is determined to address in cooperation with its EU partners. Austria strongly supports the resettlement of refugees. We are committed to participate in the resettlement of Syrian refugees from Turkey on a larger scale once the migratory pressure on Austria subsides. Moreover, we have advocated the establishment of reception centres directly in the concerned regions where asylum applications could be processed. Finally, the Austrian government has decided to double the funds for its bilateral development cooperation by the year 2021.

Amendment to Austrian Asylum Act

In May 2016, the Austrian parliament passed an amendment to the Austrian Asylum Act (see Federal Law Gazette I No. 24/2016 of 20 May 2016), as a precautionary measure, in the event that Austria faces an influx of refugees and migrants similar to that of 2015 in the future. A new Chapter 5 of the Asylum Act enables the Austrian government, upon approval of the Standing Committee ("Hauptausschuss") of the Austrian parliament, to decree that further asylum applications may only be accepted if the acceptance is necessary to protect certain fundamental human rights of the applicant concerned. These rights include (i) the right not to be expelled to a country where the applicant faces a risk of torture or cruel, inhuman or degrading treatment or punishment, or a risk to his/her life (non-refoulement); (ii) the right not to be expelled to a country which may violate the principle of non-refoulement; and (iii) the right to respect for private and family life with special regard to the best interest of the child. Such a decree may only be issued while Austria exercises border controls, and on the condition that there are well founded grounds of a threat to public order and security.

The amendment ensures that each asylum application is processed individually in accordance with the above-mentioned criteria, and that an effective remedy is available to each applicant. The amendment is based on Article 72 of the Treaty on the Functioning of the European Union, which places the responsibility for public order and security with the Member States and enables measures notwithstanding provisions of EU secondary law if public order and security are threatened.

Austria wishes to emphasise that the use of the above-described decree by the Austrian government for the purpose of maintaining public order and security is a measure of last resort. The Austrian government has and will always fully satisfy its obligations under EU and international law, in particular the European Convention of Human Rights and Fundamental Freedoms and the Geneva Refugee Convention.

Joint Statement of Heads of Police Services

Austria would also like to comment on the “Joint Statement of Heads of Police Services” of Austria, Slovenia, Croatia, Serbia and Macedonia (“the host countries”) signed on 18 February 2016. The main purpose of this statement was to coordinate the transportation of refugees and migrants, prevent backlogs between the host countries and ensure that each of the host countries has sovereignty over and knowledge of who enters their territories, in line with their obligations under EU and international law. To this end, the Heads of Police Services agreed that:

- information on all measures adopted and executed by the host countries regarding refugees and migrants would be exchanged in advance;
- a common registration system for refugees and migrants would be introduced;
- Macedonia would receive support for border controls and patrols as well as the registration of refugees and migrants;
- refugees and migrants would be allowed to enter the host countries only if one of the following conditions was met:
 - (i) in possession of a valid travel document, visa, residence permit etc.;
 - (ii) filing an asylum application in the country which he/she wishes to enter;
 - (iii) a national of a war-torn country may be admitted if he/she can prove his/her nationality (e.g. identity documents, language skills) and has actually and recently fled hostilities.

Thus, the statement grants the right to enter or pass through the host countries only to persons who are actually seeking international protection. It excludes those who state reasons for such entry that clearly do not reflect the wish to seek international protection (eg. education, work, avoiding military service) or who have been residing in safe areas/countries for longer periods of time.

As of March 2016, Austria has seconded police officers to support the Macedonian authorities in accordance with the above-described Joint Statement. There are currently 20 Austrian police officers working in Macedonia.

Questions 2, 3, 6, 7, 8:

Non-refoulement

We wish to emphasise that Austria has so far accepted and processed all applications for asylum, not a single person has been refused the right to seek international protection in Austria.

Once it is determined in the asylum proceedings that asylum cannot be granted in Austria or that under the Dublin III regulation another EU country is responsible for processing the asylum application, the issue of whether expulsion would violate the principle of non-refoulement is dealt with by the competent authorities, with possibilities for appeal. In accordance with our international legal obligations, Austria has not and will not expel any person to a country where he or she is facing torture or other cruel or inhuman treatment or punishment, or a threat to his or her life, or which may violate the principle of non-refoulement. The same applies to the refusal of entry.

Pursuant to a judgment by the Austrian Supreme Administrative Court (8 September 2015), currently an expulsion to Hungary may only take place if it is determined, in

the individual case, that the human rights of the person concerned will not be violated. Expulsions to Greece are generally suspended, in accordance with the European Court of Human Rights judgment *M.S.S. v Belgium and Greece* (21 January 2011).

Children and unaccompanied minors

Once a person expresses a wish to seek international protection in Austria and is identified (or identifies him-/herself) as a minor, a first assessment of special needs will take place (medical care, food, clothes, shelter) which will be catered to right at the border. Thereafter, unaccompanied minors will be transferred to the care of the Austrian federal asylum authority that organise special care and treatment in accordance with Austrian and EU law and international obligations. Thus, unaccompanied minor refugees shall be housed in special facilities for minors, where, depending on their age and psycho-social needs, trained personnel (social workers, psychologists etc.) is available. The law also foresees that unaccompanied minor refugees are offered a daily routine (education, sports and leisure activities) and have the right to attend school or vocational training¹.

Austria ratified the Optional Protocol to the Convention against Torture and Other Inhuman, Cruel or Degrading Treatment or Punishment (OP-CAT) in December 2012. The Austrian Ombudsman Board (AOB) acts as the independent National Prevention Mechanism. The six regional commissions of the AOB may, of their own initiative, inspect places where persons are deprived of their liberty, as well as situations where police exercise their power of command and use force. In this capacity, they regularly visit refugee centres for unaccompanied minors (including unannounced visits). The Austrian Ombudsman Board works closely with the competent authorities to discuss findings and recommendations and address possible shortcomings in this context.

In the past year, when faced with a massive influx of migrants and refugees, Austria has experienced challenges in satisfying the special needs of refugee and migrant children. Particularly when unaccompanied minors and families had to stay in emergency shelters/centres for several weeks (before being transferred to permanent housing), child-friendly spaces/recreational activities, as well as access to education, psycho-social services, and protective services were sometimes unavailable. After a UNICEF rapid humanitarian and child rights assessment mission to Austria in November 2015, we have carefully studied the recommendations made by UNICEF in this context. As a result, we are now working with UNICEF to organise training for care personnel and profit from technical support particularly in the following areas:

- the establishment of child-friendly spaces and learn-and-play activities;
- prevention of violence and abuse;
- strengthening of protective services in the case of abuse.

As mentioned above, the new Chapter 5 of the Asylum Act also foresees the best interest of the child to be particularly considered by the competent authorities when making a decision about expulsion (see Article 40(2)). This also corresponds with the Federal Constitutional Act on the Rights of the Child, which was adopted in 2011 and

¹ Austrian law foresees an obligation of all children to attend school for nine years starting at the age of 6 or 7. This obligation also applies to non-nationals, including refugee and migrant children.

ensures that all children in Austria receive protection and care, following the “best interest of the child”.

Let us also emphasise that Austrian law prohibits the detention of children younger than 14 years. This includes detention-pending-expulsion of refugee and migrant children. Minors between 14 and 18 years may be detained in special facilities as a measure of last resort (if more lenient measures to ensure expulsion fail), and for the shortest possible period.

Question 4:

Austria has not carried out mass expulsions, every person’s application is examined on an individual basis and in accordance with the rule of law. As stated above, if a person wishes to apply for asylum in Austria, he/she will be granted entry into Austria.

Even if the Austrian government decreed that the acceptance of applications for international protection in Austria was restricted pursuant to Chapter 5 of the newly amended Asylum Act, the authorities would be obliged to examine each application on an individual basis and in accordance with the rule of law.

Question 5:

Border management system

Shortly after the introduction of border controls at the Austro-Hungarian border (Nickelsdorf) in September 2015, Austria has introduced a “border management system”, starting with the border post Spielfeld, bordering Slovenia, where most refugees and migrants were arriving at the time. This system is aimed on one hand, to verify if conditions for legally entering Austria are met, and on the other hand, also to ensure that all refugees and migrants receive the care and treatment afforded to them under international law. Thus, the border post Spielfeld offers medical care, food, clothes, sanitary facilities for all those arriving, with special attention paid to the needs of infants and children. People can rest in dormitories and/or are transported to shelters if they apply for asylum in Austria. All third country nationals arriving at Spielfeld and wishing to enter Austria have been, on an individual basis (i) asked about the reasons for entering Austria (interpreters are available); (ii) their personal data and fingerprints have been checked with national databases and the Schengen Information System; (iii) their luggage has been checked; (iv) all asylum applications filed in Austria have been accepted and the persons concerned have been transferred to the responsible national authorities for further action; (v) all persons wishing to seek international protection in Germany have been granted passage through Austria in accordance with Article 5(4)(c) of the Schengen Borders Code and have been transported to one of the 5 transfer locations agreed with Germany. Those persons who neither expressed a wish to seek international protection in Austria nor Germany have not been allowed to enter Austria.

In February 2016, the Austrian Ombudsman Board visited the border management system at Spielfeld.

A similar “border management system” is currently being established at the Brenner border post, bordering Italy. So far, border controls have not been introduced.

Question 9:

Human rights education as such forms an important part of the curriculum in police training (56 hours) and is compulsory also in continued training. Moreover, human rights have been mainstreamed across all aspects of police training and continued training.