

Editorial

The Re-emergence of ‘Fortress Europe’

Over the past decade, the EU’s migration, asylum and border control policies have been undergoing a constant tightening. These developments have been manifested both in the EU’s legislative changes, culminating with the recently adopted New Pact on Migration and Asylum (further in text: Migration Pact),¹ and in Member States’ practices. What seemed socially, morally, politically and legally unacceptable at the end of the twentieth century, has over the past years become permissible and, in the eyes of many, even necessary. The reinforcement of the EU’s migration, asylum and border control policies is consistent with the notion of ‘Fortress Europe’. Its official aim is to counter irregular arrivals, while its additional and unspoken aim is to reduce the number asylum applications in the EU.

The reinforcement of the EU’s external border controls and its migration and asylum policies is being implemented through a number of different means. First, it is enacted through the internal dimension of EU migration and asylum policies, which includes the adoption of new rules, such as novel border procedures, envisaged by the Migration Pact. Second, the strengthening of EU’s external border controls is indirectly being enacted through the external dimension of EU migration policy, which includes different types of arrangements with third countries, such as return, readmission and visa facilitation agreements, informal arrangements and financial support for migration-related activities in third countries.² Such arrangements take the role of figurative walls aimed at preventing migrants’ departure from third countries. Finally, the reinforcement of the EU’s external border controls and its migration and asylum policies is being implemented through the construction of

¹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A New Pact On Migration And Asylum*, COM(2020) 609 final (23 Sep. 2020). For the Migration and Asylum Package see here, https://ec.europa.eu/info/publications/migration-and-asylum-package_en (accessed 15 Sep. 2024). For border procedures, see *Regulation Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU*, COM/2016/0467 final-2016/0224 (COD).

² On the financing of migration and asylum-related activities in the EU, see I. Goldner Lang, *Financial Implications of the EU’s New Pact on Migration and Asylum: Will the Next Multiannual Financial Framework Cover the Costs?*, in *The Future of Legal Europe: Will We Trust in It?* 329–348 (G. Barrett, J.-P. Rageade, D. Wallis & H. Weil eds, Springer 2021).

border walls and fences (border fortification) and enhanced use of modern technologies (digitalization or smartification of borders) and patrolling at the EU's external border.³

EU border walls can be viewed as a measure of last resort in case other dimensions of the EU's external border policy have not prevented the arrival of unwanted migrants to the EU.⁴ In 2022, the European Union and the Schengen area were encircled or intersected by nineteen border or separation fences, totalling over 2,000 kilometres of fences built at the borders of twelve EU/Schengen states.⁵ As a consequence, in 2022, 13% of the EU's external land borders was fenced off.⁶ This growth, from 315 km of border fences in 2014 to over 2,000 km in 2022, primarily serves two objectives: curbing irregular migration and combating terrorism.⁷

Spain pioneered this trend in the early 1990s with fences in Ceuta and Melilla, its enclaves in Morocco, to address irregular migration. Following the 2004 enlargement wave, the EU gained two previously constructed fences: one between Lithuania and Belarus and the other one separating Cyprus (this is one of border fences within the EU). The 2015/2016 migration crisis and recent security tensions with Belarus and Russia accelerated this trend, with several EU countries fortifying borders with Belarus and Russia. Border fences at the EU's/Schengen external borders now include: a fence between France and the UK, at the entry area of the Channel Tunnel and the port of Calais, whose construction started in 2016; a fence between Lithuania and Belarus, which was initially built in 1999/2000 and reinforced and expended in 2021/2022; a fence between Lithuania and Kaliningrad, built in 2017/2018; a fence between Greece and Turkey, initially built in 2012 and subsequently expanded in 2021, with further expansions⁸; a fence

³ On the discussion of the challenges emerging due to the use of modern technologies at the EU's external borders, see I. Goldner Lang, *Security-Centric Approach in the Use of Digital Technologies at the EU's External Borders*, *Transnational Legal Theory* 1–9, Special Issue (I. Isailovic ed. 2024); J. J. Rijpma, *Brave New Borders: The EU's Use of New Technologies for the Management of Migration and Asylum*, in *New Technologies and EU Law* 197–241 (M. Cremona ed., Oxford University Press 2017); B. Simmons & R. Hulvey, *Cyber Borders: Exercising State Sovereignty Online*, 95(4) *Temple L. Rev.* 617–640 (2023).

⁴ For a more detailed discussion of EU border walls, their monitoring and their legality, see I. Goldner Lang, *Walls and Fences at the EU's External Borders and their Monitoring*, in *The Law of Schengen: Limits, Contents and Perspectives after 40 Years* (P. De Bruycker, F. Lutz, J. Rijpma, D. Thym eds, Edward Elgar, forthcoming in 2025).

⁵ C. Dumbrava, *European Parliament Briefing 'Walls and fences at EU Borders'* (Oct. 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733692/EPRS_BRI\(2022\)733692_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733692/EPRS_BRI(2022)733692_EN.pdf) (accessed 15 Sep. 2024).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ On further expansion of the Greek–Turkey border fence, see ECRE, *Greece: Further 'Fortification' of Borders and More Vessels for Hellenic Coast Guard as Situation for Refugees in Türkiye Worsens Following Earthquakes*, *Series of Reports on Systematic Detention and Abuse* (2023), <https://ecre.org/greece-further-fortification-of-borders-and-more-vessels-for-hellenic-coast-guard-as-situation-for-refugees-in-turkiye-worsens-following-earthquakes-series-of-reports-on-systematic/> (accessed 15 Sep. 2024). See also M. Polynaki, *Greece Expands Fence along the Border With Turkey: What Does the Extension Project Include?*,

between Greece and North Macedonia, built in 2015; a fence between Bulgaria and Turkey, built in 2014 and subsequently expanded in 2017; a fence between Hungary and Serbia; a fence between Estonia and Russia, initially built in 2015 and expanded in 2021; a fence between Latvia and Russia, whose construction started in 2015 and was completed in 2019; a fence between Latvia and Belarus, initiated in 2021; a fence between Norway and Russia, built in 2016; and a fence between Poland and Belarus, built in 2021.⁹

The upsurge of border walls is continuing and there is no indication of its slowdown in the near or mid-term future. In 2023 Finland started constructing a border fence with Russia, which should ultimately cover 200 km of the border.¹⁰ Latvia and Estonia are extending their fence with Russia and the construction should be completed by the end of 2024 and 2025 respectively.¹¹

The proliferation of walls, in the EU and worldwide, points to growing social anxiety and the revival of right-wing politics, marked with xenophobia and ideologies of separation between 'us' and 'them'. On the other hand, the actual effectiveness of walls is difficult to assess. It depends, primarily, on their proclaimed and hidden goals and on whom one asks. While some view them as necessary for security and migration control, others argue they merely reroute migration flows, inadvertently boosting smuggling and organized crime.¹² In any case, EU borders should be viewed against the background of their three functions: their physical function of preventing entry, their symbolic function of creating a simultaneous sense of security and fear from the dangers outside, and their filtering function of enabling the smooth flow of 'bona fide' travellers (tourists, people with powerful passports and visas, and those who are needed, such as labour migrants), while stopping the unwanted and dangerous ones.¹³

Finabel (European Army Interoperability Centre) (6 Apr. 2023), <https://finabel.org/greece-expands-fence-along-the-border-with-turkey-what-does-the-extension-project-include/> (accessed 15 Sep. 2024).

⁹ For an overview of border fences built at the EU's/Schengen external borders, see Dumbava, *supra* n. 5.

¹⁰ G. Wright, *Finland Starts Construction of Russia Border Fence*, BBC (28 Feb. 2023), <https://www.bbc.com/news/world-europe-64802457> (accessed 15 Sep. 2024). See also S. Januzi, *Finland Has Started Construction of a Pilot Fence at the Imatra Border With Russia*, Schengenvisa News (28 Feb. 2023), <https://www.schengenvisa.info.com/news/finland-has-started-construction-of-a-pilot-fence-at-the-imatra-border-with-russia/> (accessed 15 Sep. 2024).

¹¹ Eng.LSM.lv (Latvian Public Broadcasting), Jānis Kincis (Latvian Radio), *New procurements for some parts of Latvia-Russia Border Fence* (30 Dec. 2023), <https://eng.lsm.lv/article/society/defense/30.12.2023-new-procurements-for-some-parts-of-latvia-russia-border-fence.a537172/> (accessed 15 Sep. 2024); S. Lau, *Estonia Builds New Fence on Russian Border*, Politico (13 Dec. 2023), <https://www.politico.eu/article/estonia-russia-ukraine-war-builds-new-fence-on-russian-border/> (accessed 15 Sep. 2024).

¹² E. Vallet, *The World Is Witnessing a Rapid Proliferation of Border Walls*, Migration Policy Institute (2022), <https://www.migrationpolicy.org/article/rapid-proliferation-number-border-walls> (accessed 15 Sep. 2024).

¹³ K. Korte, *So, If You Ask Whether Fences Work: They Work' – the Role of Border Fortifications for Migration Control and Access to Asylum. Comparing Hungary and the USA*, 11(29) *Comp. Migration Stud.* 1–18 (2023), doi: 10.1186/s40878-023-00352-1.

The legality of EU external border walls remains an open issue. Neither the Schengen Borders Code nor its amendment (or any other piece of EU legislation, for that matter) explicitly mention border walls or fences. Consequently, the construction of border walls is neither allowed nor banned by EU law. However, the Schengen Borders Code emphasizes that penalties for unauthorized border crossing of the external borders need to be proportionate (Article 5(3)) and take full account of third-country nationals' right to seek asylum (Article 5(4) of the amended Schengen Borders Code), and that border surveillance needs to comply with fundamental rights (Article 13(2)). These obligations set by EU law should apply equally to the erection of EU border walls. Border walls inherently restrict migrants' access to the state's territory, consequently obstructing their ability to lodge an asylum claim. This may lead to the breach of Article 4 of the Schengen Borders Code, which obliges Member States to comply with the Charter, the Geneva Convention and the rules related to access to international protection, in particular the principle of non-refoulement and fundamental rights.

Additionally, border walls reduce the state's liability in case of inaction.¹⁴ According to the judgment of the ECtHR in the 2001 case *Streletz, Kessler and Krenz v. Germany* on the Berlin Wall, border walls by themselves (without the presence or actions of border guards) do not trigger the liability of a state in case of violations of migrants' rights, as long as such walls do not violate the principle of proportionality (for example, they do not use automatic-fire systems or minefields) and the right to life. In this case, the ECtHR did not contest the legality of the Berlin Wall, but established that the activities of border guards violated the principles of proportionality and the need to preserve human life by 'protect[ing] the border between the two German states "at all costs" in order to preserve the GDR's existence, which was threatened by the massive exodus of its own population'.¹⁵ The ECtHR concluded that 'by installing anti-personnel mines and automatic-fire systems along the border, and by ordering border guards to "annihilate border violators and protect the border at all costs", the GDR had set up a border-policing regime that clearly disregarded the need to preserve human life ... and the right to life'.¹⁶

The Court of Justice has not yet ruled on the legality of border walls, but one could infer from its earlier judgment in the infringement proceedings C-808/18 against Hungary that it does not consider border walls, by themselves, to be contrary to EU law. In this case, the Grand Chamber found that Hungary's

¹⁴ For a detailed explanation on how border wall reduce state's responsibility, see M. Paz, *The Law of Walls*, 28(2) Eur. J. Int'l L. 601–624 (2017), doi: 10.1093/ejil/chx026.

¹⁵ Paragraph 71 in *Streletz, Kessler and Krenz v. Germany*, Applications Nos. 34044/96, 35532/97 and 44801/98.

¹⁶ Paragraph 192 in *Streletz, Kessler and Krenz v. Germany*.

legislation on the rules and practice in its transit zones situated at the Serbian-Hungarian border violated EU law. In particular, the Court established that Hungary failed to comply with EU asylum law by restricting access to asylum procedure only to transit zones, by unlawfully detaining applicants in transit zones and by moving illegally staying third-country nationals to a strip of land between the Hungarian border fence and its border with Serbia and effectively divesting them of the possibility to apply for asylum.¹⁷ However, the Court did not question the legality of the border fence erected on the Hungarian territory towards Serbia, thus, tacitly approving its legality. Without expressly stating this, in *Commission v. Hungary* the Court appears to have delineated a distinction between the illegality of human deterrence or pushbacks of third-country nationals beyond the Hungarian border fence, and the legality of border fences themselves, as mere physical constructs.

Despite the contestable efficiency of border wall, their symbolic function, of creating a simultaneous sense of security and fear from the dangers outside, remains relevant. Both the symbolism of border walls and their physical function, of preventing entry, are reflected in further proliferation of border fences, with no clear effort by the European Commission or the Court of Justice to limit Member States' construction activities. The only point of contention is the issue whether border walls can be financed from the EU budget. In October 2021, twelve EU Member States addressed a letter to the Commission, requesting the adoption of EU rules that would allow the funding of a 'physical barrier as a measure for protection of the EU external borders'.¹⁸ This request was reiterated in May 2023 in the Joint Statement of eight Member States with external land borders with third countries. They maintained that 'physical infrastructure as an effective means of protection' and 'encourage[ed] [the] EU to look for a solution to finance physical infrastructure (including physical barriers) from EU Funds'.¹⁹

The Commission's response to such demands has ranged from the earlier categorical rejection to a much vaguer recent reaction. In its Memo from 2018, as a response to the question will the Commission finance the construction of fences, it responded: 'No. The Commission's work is aimed at ensuring proper

¹⁷ Case C-808/18 *Commission v. Hungary*, ECLI:EU:C:2020:1029, para. 317. Due to the fact that Hungary had not complied with the judgment, on 22 Feb. 2022 the Commission brought an action to the Court of Justice, (Case C-123/22) asking the Court to impose financial sanctions in the form of a lump sum and a daily penalty payment. At the time of writing this text, the case is still pending.

¹⁸ The letter is, <https://s3.eu-central-1.amazonaws.com/euobs-media/59f9f4116a089cec71bf81b76413503a.pdf> (accessed 15 Sep. 2024). As an example of different Member States' insistence on EU funding of EU border fences, see also A. Zimmermann, *Greek Prime Minister Renews Call for EU Cash for Border Fence*, Politico (1 Apr. 2023) <https://www.politico.eu/article/kyriakos-mitsotakis-greek-prime-minister-border-fence-anti-migrant-turkey/> (accessed 15 Sep. 2024).

¹⁹ Council of the European Union, *Ministerial Forum for Member States of the Schengen Area With External Land Borders – Joint Statement*, 9939/23 (30 May 2023).

control of borders, not closing them. The Commission has never financed fences and will not do so under the new EU budget either'.²⁰ Similarly, in 2021, in her answer to the Parliamentary question, the Vice President of the European Commission, Ms. Johansson stated that 'while the use of fences is not explicitly excluded by the Schengen Borders Code, the Commission considers that fences are not the most efficient tool to improve border management and, therefore, does not support the use of EU funds for this purpose'.²¹

However, the narrative has been slowly changing over the past couple of years. In February 2023, the president of the European Commission, Ms Ursula von der Leyen, asserted that the Commission 'will act to strengthen our external borders and prevent irregular migration' and that it will, for this purpose 'provide an integrated package of mobile and stationary infrastructure – from cars to cameras, from watchtowers to electronic surveillance'. With this change of tone and the shift of political and social climate in the EU, the likelihood of EU funding of border walls increases. The current Multiannual Financial Framework (MFF) does not prevent this.²² The Integrated Border Management Fund supports 'infrastructure, buildings, systems and services required at border crossing points and for border surveillance between border crossing points'.²³ In case one interprets the term 'border surveillance' as necessitating the construction of border fences, one could easily infer that financial resources available under this Fund could be used for the construction of border fences. Such practice might not yet start in the lifetime of this MFF (2021–2027). However, with the passage of time, the likelihood of allocating EU funds for the construction of border walls becomes increasingly probable and could become a reality with the new MFF.

Iris Goldner Lang

Jean Monnet Professor of EU Law, Vice Dean and Head of Department of European Public Law, Faculty of Law – University of Zagreb.

Email: igoldner@pravo.hr.

²⁰ European Commission – Fact Sheet, *Questions and Answers: Future EU funding for Borders and Migration*, MEMO/18/4127 (12 Jun. 2018), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_4127 (accessed 15 Sep. 2024).

²¹ European Parliament, *Parliamentary Question – E-003322/2021(ASW), Answer Given by Ms Johansson on Behalf of the European Commission* (25 Aug. 2021), https://www.europarl.europa.eu/doceo/document/E-9-2021-003322-ASW_EN.html (accessed 15 Sep. 2024).

²² Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 Laying Down the Multiannual Financial Framework for the Years 2021 to 2027, OJ L 433I, 11–22 (22 Dec. 2020).

²³ Annex III, Art. 1(a) of Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 Establishing, as Part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy, PE/57/2021/INIT, OJ L 251, 48–93 (15 Jul. 2021).