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Controlling irregular migration: international human rights standards and the Hungarian legal framework

Abstract: In the summer of 2015 Hungary constructed a 175 km long barbed-wire fence at its southern border with Serbia. New criminal offences and asylum procedures were introduced that limited access to refugee status determination and ignored agreed EU asylum policy, deterring and de facto preventing asylum seekers from entering Hungarian territory. This paper provides an analysis of these new measures, which criminalized asylum seekers, and the subsequent Hungarian policy in relation to the case law of the European Court of Human Rights – arguing that the Hungarian authorities excessively abused their discretion in implementing these new policies of immigration and border control.

Keywords: Asylum, crimmigration, human rights, Hungary, irregular/illegal migration, non-refoulement

Introduction

It is a feature of our globalized world that migration is on the rise. There are safe and well-regulated routes for the rich or anyone lucky enough to come from western, or perceived-to-be western-friendly, nations. Conversely, there are routes that fall foul of the normal regulatory systems and these tend to be used by the poor and those from perceived-to-be western-unfriendly nations. Those migrants who are poor and from perceived-to-be western-unfriendly nations have limited access to well-regulated movement across borders and are invariably forced into transactions with criminals and into a precarious relationship with those nations that they wish to enter (Bowling and Sheptycki, 2015). For this latter group, mobility, if not migration, seems to be possible only through undocumented or irregular routes. Because their

lives are without proper documentation, they are open to exploitation and both over-regulation and criminalization by the countries they wish to move to (Oelgemöller, 2011). They live in a precarious relationship with the state they come from and, more importantly, the one they wish to move to (Aas, 2011). Moreover, they demonstrably come to be understood, in the political sphere, as a challenge to the agreed norms and processes of the state (Bosworth, 2008). Criminologists have been at the forefront of detailing this process and what we might refer to as a hierarchy of migration; and how that, in turn, highlights practical human rights issues and the need for mechanisms that take seriously the irregularity of this form of migration process (Aas and Gundhus, 2015). This article sets out in detail the dangers of marginalizing human rights and promoting inflexible systems of migration control to deal with irregular migration, taking the Hungarian example.

Europe is currently facing the largest number of irregular migrants since the Second World War (Naccache and Al Ariss, 2017). Most of them are asylum seekers who have been forced to leave their home mainly owing to the armed conflicts in Syria, Iraq and Afghanistan. When they reached the Serbian border in summer 2015, the Hungarian government introduced strict control measures in both its immigration and its criminal policy (Bilgic and Pace, 2017). It justified the changes by claiming national interest and security concerns, and its right and obligation to protect the economic, social, cultural and physical integrity of the nation. The key consideration is this: when security is in question, every state has the right to define criteria for inclusion, sometimes at the expense of human rights in balancing public interest against individual rights. However, there should be a minimum level of justice: a symbolic bottom line that sets limit to the discretionary power of the authorities. Van der Woude (2017: 13) emphasizes that misused discretion inflicts immediate harm to the victims of the abuse and long-lasting harm to the legitimacy of the criminal justice system. Our objective is, on the one hand, to identify the limits of exclusion set by international human rights law and, on the other,

to point out the critical issues when Hungary, while exercising its legitimate sovereign power over border control, stepped across that line.

In the first part of the study we will outline how states lately are re-nationalizing politics and criminalizing migration-related conduct to regain their supposedly lost authority over border control, arguing that, although international human rights provide protection for individuals against the abuse of power, the entitlements of irregular migrants are highly contentious. In the law of the European Court of Human Rights (ECtHR), we will identify a list of core, quasi non-derogable rights that cannot be contested, irrespective of any claims made by states. In the second part, we will then analyse the most criticized preventive, deterrent measures and subsequent practices implemented in Hungary in 2015. We will focus on the criminalization of entry, Hungary's safe third country policy, and the process for determining refugee status in transit zones, with its implications for the detention of asylum seekers.

The conflicting expectations of member states and EU institutions and the bureaucratic complexity of EU procedures pose significant challenges for Schengen border countries: the EU's structurally unbalanced, ineffective asylum and gate-keeping policy is responsible for making southern member states, and implicitly Hungary, both victims and perpetrators of the controversial externalization strategies (Trauner, 2016; Triandafyllidou, 2014); this implies a broader, contextual framework analysis. We argue that the initial failures and the indecisiveness at the supranational level do not justify and vindicate exceptionally hostile domestic policies. Hungary is one of those member states that has created additional obstacles, and persists in refusing to comply with the EU's burden-sharing initiatives, thereby jeopardizing the execution of the European Agenda on Migration.

The criminalization of migration

Sassen (1996) shows that, in tandem with human rights, economic globalization has contributed to the erosion of state sovereignty by denationalizing territory and shifting some of its components to supranational organizations. Although sovereignty weakened, the state's role in determining certain criteria for entry to its territory and its role in determining citizenship remained intact. The legitimacy of the state has shifted from a focus upon sovereignty to adherence to, and compliance with, a set of nation-transcending human rights (Levy and Sznajder, 2006). Immigration control as an aspect of national sovereignty is now linked to best international practice. Borders proved to be porous and, owing to the increased movement of labour (especially of unauthorized, irregular migrants), states found themselves unable to fulfil this function through immigration law alone. Furthermore, owing to pre-existing human rights treaties, even these irregular migrants enjoyed some form of legal recognition, and were able to formulate claims for some basic civil, social and economic rights. States failed in their obligation to maintain the social and economic integrity of the nation-state by losing control over the distribution of national resources and social goods. The perceived crisis of the welfare state and welfare chauvinism, along with identifying migrants as being one of the main factors weakening national tradition and societal homogeneity, eventually led to the renationalization of political discourse (Huysmans, 2000). The desire to reduce and monitor those who enter has increasingly been presented as a security issue, and foreigners became the target of state intervention. Non-citizens were seen as a presumptively dangerous population (Simon, 2007). They found themselves the focus of the new 'penal-welfare state' (Garland, 2001). Migration had been transformed into the last bastion of sovereignty (Dauvergne, 2008: 47). Triggered by the language of threat, security and exclusion, 'illegal' gained an identity of its own, obscuring

the original function of the legal term and now marking an entire population of people seeking to migrate outside the authorization of the law (Dauvergne, 2008).

The construction of threat identity in relation to irregular migration was a critical step in institutionalizing policies and practices targeting the control of migration through criminal justice responses by calling upon the state's responsibility and obligation in responding to that threat (Hastie and Crépeau, 2014). Although at first immigration related infringements were not sanctioned by criminal law, irregular migrants have increasingly been perceived as criminals (Bosworth, 2008). The otherness of the stranger and of the deviant 'are collapsed in the social portrayal of the criminal immigrant' (Melossi, 2005). Governments associate illegality with criminality, creating a functional link, and they use it as a justification for addressing the phenomenon through a new crime control model using the state's coercive power not only in the criminal law realm but also in administrative immigration law, blurring the lines between these two initially distinct branches of law (Chacón, 2007). This is known as 'crimmigration' law (Stumpf, 2006). The methods related to criminal law enforcement, with their extremely punitive, penal-like sanctions, have been incorporated into immigration procedure, while the traditional procedural safeguards and protections of criminal adjudication have been rejected (Legomsky, 2007). Addressing unauthorized entry within the realm of criminal rather than administrative law has become a general trend; 'managing migration through crime' has become a widespread practice (Chacón, 2009). Moreover, 'ad hoc instrumentalism' (that is, using legal rules and procedures as interchangeable tools) raises important issues regarding accountability (Sklansky, 2012). The US-dominated war on terror and calls for homeland security mean that human rights have come under attack (Amatrudo, 2009: 36). The rights-based, cosmopolitan voices around migration have been effectively silenced; prevention and intervention-oriented policies have become universal since 9/11 (Cohen, 2007). The new practices, with their ill-suited measures, and an increasingly

xenophobic tone against irregular migrants in criminal justice (referred to as ‘enemy criminal law’) do not follow the norms of conventional criminal law; instead they ignore proportionality and privilege the pursuit of security against irregular migrants (Aliverti, 2012; Guia, 2012; Zedner, 2010). All this departs from standard procedural safeguards and allows the exceptional treatment of migrants (Agamben, 2005).

The tense socio-legal environment, where the immigrant-other is subject to permanent suspicion and control, has led to the proliferation of policies that have generated serious anomalies and exploitation concerning both the reception and integration of irregular migrants (Campesi, 2011; Cheliotis, 2017; Pickering and Weber, 2013; Van der Leun, 2003; Vecchio, 2014). These practices, although sometimes justified by legitimate state objectives, are based on the concept of threat and criminality. Melossi (2015) outlines in detail that the criminal involvement of migrants and the criminalization process are ultimately an aggregate function of these restrictive policies and societal attitudes towards migration. He notes how the ‘obsession with discovering migrant crime may increase the likelihood of its occurrence’ (Melossi, 2015: 43).

Nevertheless, not only has the crimmigration regime been expanded in terms of power but its target population has gone through considerable changes. Terms, definitions, policies and criminalization strategies vary among EU member states. The responses to migration are dependent on the states’ legal and political cultural settings (Düvell, 2011; Parkin, 2013; Vollmer, 2011). The construction of illegality primarily relates to three domains: entry, residence and employment (Van der Leun, 2003: 19). Moreover, simply being in transit has become an automatic pathway to illegality: transit migration, hence asylum seekers, are now perceived and understood as illegal even before entering the territory (Oelgemöller, 2011). In the general political discourse, illegal migration is an umbrella term for a group commonly described as unlawful, undocumented, economic migrants, bogus refugees, invaders. There is

a culture of disbelief and an exaggerated focus on the notion of genuineness in this narrative of people on the move (Cohen, 2002).

The determination of refugee status can be a complex and unpredictable legal process. Recognition rates vary greatly from country to country. Undocumented migrants may well be granted status whereas others with a valid passport are rejected. Carling (2015) notes that ‘mixed migration is not a checkboard of black and white but a jumble of different histories, resources and entitlements’. Moreover, he argues, the terminological differentiation between migrants and refugees would undermine the right to seek asylum. In indicating inferiority, it contributes to the deserving/undeserving dichotomy. It would be counterproductive, in effect complicit in criminalization.

Reconstructing territoriality

In the language of exclusion, ‘illegal’ equally means to be deportable. The prerogative of the state is absolute and unconditional. Whereas everyone has the right to leave a country and seek asylum, nobody can freely choose the destination. The right to immigrate is not a human right. Although human rights are universal in nature, for the states’ obligation to respect and facilitate the enjoyment of rights it is necessary to be present in the territory and be subject to the state’s jurisdiction (Blitz, 2014). In order to neutralize human rights claims, the state needs only to find a reason to deport/reject individuals. In doing this it prevents access to the right without which no other right can be materialized, the right termed ‘the right to have rights’ (Arendt, 1973: 296). Paradoxically, in the age of the international human rights regime that is meant to decentralize and erode the Westphalian concept of sovereignty, the access to the right to have rights remains with states. The right to have rights is the right to be present. This is why it is crucial to the logic of exclusion to outlaw the unwanted population and make them illegal,

identifying asylum seekers as bogus refugees or economic migrants. In fact, the label ‘illegal’, combined with the status of foreign-ness, pre-empts that restricted, territory-based protection, and the citizen/non-citizen dichotomy has been reaffirmed regarding protection against arbitrary measures and the enjoyment of rights within a territory. This is clear in immigration detention circumstances, where the right to have rights is now dependent on membership of the political community, and access to basic legal safeguards and judicial review has become conditioned on citizenship (Bosworth, 2011).

Robert Fine (2010) has maintained that ‘international law offers a major resource to combat illegitimate power, but it is relative to other norms and always contains the possibility of conflict between what it is and what it ought to be’ (Fine, 2010: 198). Being an illegal foreigner, subject to deportation/rejection, can be interpreted as resulting both from the shortcomings of human rights and from the means by which their protection has been disabled. The dominance of the legitimate power of the state is reaffirmed regarding the practice of balancing human rights claims against the competing public interest: the proportionality principle seems to be satisfied concerning the interference caused by confinement as a tool to prevent unauthorized entry and courts attach more weight to the logic of control than to individual justice and claims to liberty. Aliverti (2014) and Cornelisse (2011) show that neither the Court of Justice of the European Union nor the ECtHR are exceptions in this regard.

Retained rights of irregular migrants: The principle of non-refoulement

It is the principle of non-refoulement that sets certain limits on territorial sovereignty. Non-refoulement is first and foremost the core element of the 1951 Geneva Convention, the key legal document ensuring the protection of refugees. Furthermore, human rights have ‘radically informed and transformed the distinctive tenets of the Geneva Convention’ (Chetail, 2014: 22).

Under human rights law, the implicit prohibition of refoulement where there is a risk of torture, inhuman or degrading treatment or punishment is not subject to discretion. Aside from Convention refugees, it applies to everyone, including asylum seekers, in a broader sense to those who would otherwise be denied protection on the grounds of national security or public order (Lambert, 2005). Deprivation of socioeconomic rights, such as lack of medical treatment or education in the country of origin, may also trigger this obligation (Foster, 2009). Automatic rejection of asylum seekers categorized as economic migrants can be considered a breach of the principle.

The principle inherent in Article 3 of the European Convention on Human Rights (ECHR) has been repeatedly reaffirmed at the ECtHR: first in the landmark *Soering* case, and later in *Chahal v. UK* (the case of a Sikh separatist, whose presence in the UK was not conducive to the public good for reasons of national security, including the fight against terrorism), when the Court made clear that there is no exception in this regard, even in the event of a ‘public emergency’ (Lambert, 2007). The territorial dimension of non-refoulement, it is argued, is the responsibility of a state in all circumstances where acts are attributable to the state wherever they may occur (Lauterpacht and Bethlehem, 2003). It is irrelevant whether they happen within the territory of the state. Individuals come within the jurisdiction of a state in any circumstances in which they come under the effective control of the state, wherever it occurs. This view has been expressed in the *Loizidou v. Turkey* case. Regarding ‘chain refoulement’, in *T.I. v. United Kingdom* the Court made clear that the principle also precludes removal to a country from which asylum seekers may be subsequently removed to a third country where they would face a real risk of treatment contrary to Article 3. Although non-refoulement is a negative obligation, states also have the positive obligation to guarantee the effective enjoyment of basic rights to avoid breaching the principle: ‘Serious violation of any human right would prompt the correlative prohibition of non-refoulement, as soon as the gravity of the prospective violation amounts to

degrading treatment’ (Chetail, 2014: 35). It is argued that any measure that has the effect of putting the individual at risk of treatment contrary to Article 3 of ECHR might come within the purview of the principle (Lauterpacht and Bethlehem, 2003). The ECtHR case law provides examples when states do not comply, or respect, the procedural requirements and guarantees afforded by a procedure to determine refugee status – notably, the right to ‘effective remedy’ and protection against arbitrary detention.

Sovereignty claims are burgeoning, as regards asylum seekers the bottom line of the ECHR. The minimum standard of treatment at the basic level of rights relates to the content of the principle of non-refoulement. It is clear in the Court’s case law that any act (or non-act) that results in, or contributes to, the risk of treatment contrary to Article 3 of the Convention is expressly prohibited. Although Articles 5, 6 and 13 are limited rights, in some circumstances, in conjunction with Article 3 or even individually, they might be considered as quasi-absolute, non-derogable rights. Immigration law itself, arguably, becomes illegitimate, illegal and potentially criminal insofar as it allows exceptional treatment of irregular migrants beyond the limits set by international law (Fabini, 2014; Pickering, 2005a, 2005b, 2008).

Hungary: A country of refuge?

In 2015 an unprecedented number of asylum seekers arrived in Hungary. Between January and September over 175,000 people seeking protection registered with the authorities. When the situation got out of hand and the average number of irregular border-crossers reached 2000 people per day at the Serbian border, the government introduced amendments to the legal framework on asylum and migration (Nagy, 2015). The Hungarian case is framed by a particular political history that includes both support for racist politics in the 20th century, notably during the interwar period and the Second World War, and a strong folk memory of

conquest and partial occupation by the Ottoman Empire in the 16th century and numerous subsequent occupations right up to the fall of its communist government and the proclamation of the Republic of Hungary, as late as October 1989. Blomqvist (2016) has argued how this complex history shows itself in widely held national historical narratives that support strongly nationalistic domestic politics that prioritize Hungarian exceptionalism and a concern for self-determination above all else. Since 2010, nationalism has become the organizing principle of the government's symbolic kin-state and migration policy. Government policy aims to restructure public policy around a nation-centric conceptualization of belonging allied to memories of the heroic revolutions of the past that fought against colonizing foreign powers (Pogonyi, 2015).

Hungary has developed a hierarchy of immigration policies. On the one hand, the government privileges and endorses links with foreign-national ethnic Hungarians to maintain the cultural legacies and spiritual unity of the historical Hungary. On the other hand, it problematizes immigrants who do not fit into the idealized ethno-national group. A regime of 'foreignness-averse' politics has been followed (Korkut, 2014; Melegh, 2016). This radical version of demographic nationalism has been the basis of recent government policy. The government has sought to demolish the asylum system, while presenting itself as the defender of the nation and of European Christianity (Fekete, 2016; Thorleifsson, 2017). The government defined itself in contradistinction to the so-called lenient politics of Brussels in tackling the migration crisis (Melossi, 2015: 74; Nagy, 2016). In doing this the government advanced a Christian-nationalist rhetoric as a marker of national identity, which it understood as 'a matter of belonging rather than believing' (Brubaker, 2017; Ádám and Bozóki, 2016). Christianity has been advanced in popular political discourse to unify and elevate the nation and its leaders, thereby legitimizing illiberal and anti-democratic practices designed to control and oppress outsiders. This appeal to the authority of history and the historic faith has enabled the government to mainstream its

position on issues of both Europeanization and migration (Bajomi-Lázár and Horváth, 2013; Korkut, 2015; Szilágyi and Bozóki, 2015). However, we note that a securitization of migration policy in terms of far-right populism is not unheard of in the member states of the EU (Akkerman, 2012; Zaslove, 2004).

In February 2015, the government launched a billboard campaign with messages such as ‘If you come to Hungary, you have to respect our culture’ and ‘If you come to Hungary, don’t take the jobs of the Hungarians’. It was followed by the National Consultation on Immigration and Terrorism, a questionnaire sent to every household. The questionnaire portrayed asylum seekers as economic migrants illegally crossing the border and threatening the Hungarian welfare system. It suggested a link between migration and terrorism. The government asked for the public’s support in order for it to handle the problem as a purely domestic matter. In the meantime, a 175 km long barbed-wire fence was constructed along the Serbian border, accompanied by new asylum and criminal procedures limiting access to the regular process for determining refugee status. This deterred bona fide asylum seekers from entering the territory. The situation in the country of origin of those who reached the border established, beyond doubt, a well-founded fear and a real risk that upon return they would be subject to treatment contrary to Article 3 of ECHR.

Non-penalization: expulsion from trial

Hungary amended its Criminal Code in September 2015 to establish the following criminal offences punishable by 3 to 10 years’ imprisonment: unauthorized crossing of the border closure (fence), damaging the border closure, and obstruction of the construction works related to the border closure. Article 60(2a) of the Code provides that individually, or in combination with other sentences, expulsion of those convicted would be mandatory. The Act on Criminal

Proceedings was accordingly amended and a new chapter was inserted sanctioning the procedure to be followed in the case of these offences. The chapter provides for a fast-track procedure. The defendant can be brought to trial within 15 days after interrogation, or within 8 days if caught in flagrante (Art. 542/N). The government introduced and declared a ‘state of crisis due to mass migration’, a concept analogous to Agamben’s (2005) state of exception, during which these criminal proceedings are to be conducted prior to all other cases (Art. 542/E). There is no requirement to provide any written translation of the indictment or of the judgment (Art. 542/K). Although the amendments provide for the mandatory participation of a defence lawyer, in practice most lawyers appointed by the court had met their clients only right before the hearings, where in general the indictment was presented only orally, without having been served in writing beforehand (UNHCR, 2016).

According to the ECtHR’s standpoint, decisions regarding deportation or expulsion are outside the ambit of Article 6 of ECHR: ‘Such orders ... constitute a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge against the applicant for the purposes of Article 6’ (Maaouia v. France, para 39). Poor legal representation and the lack of interpretation for those who were sentenced to expulsion cannot be taken into account in this regard, except in a case such as the infamous Röske trial,² where the defendants had been held in custody for nine and a half months before being sentenced to 1 to 3 years’ imprisonment without probation. These sentences were not substituted by expulsion. In fact, one of the accused was sentenced to 10 years imprisonment for terrorism on 30 November 2016. Between 15 September 2015 and 31 March 2016, 2353 people were convicted of unauthorized border crossing. These people generally remained in immigration detention pending removal to Serbia. Applications for a stay of proceedings referring to the non-penalization principle of the 1951 Convention were systematically dismissed on the grounds that ‘eligibility for international protection was not a relevant issue to criminal

liability'. The court argued that the defendant had not presented an application for asylum immediately upon entry, only at the court trial, three days after being apprehended (UNHCR, 2016).

In *Jabari v. Turkey* (paras 40–50), the ECtHR held that refusal of an asylum request on the grounds of its late submission (five days after arrival) is a violation of the right to effective remedy, and 'such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3' of ECHR.

The denial of generally recognized international immunity from penalty for asylum seekers by instituting criminal proceedings without regard to their claim to refugee status may be considered a violation of Articles 6 and 13 of ECHR (Goodwin-Gill, 2003). Nils Muižnieks, Council of Europe Commissioner for Human Rights, urged the authorities to remove all of these newly created criminal offences, stressing that asylum seekers are not criminals and should not be treated as such. In a third-party intervention in *S.O. v. Austria* and *A.A. v. Austria* (para. 14), the Commissioner further argued that Hungary's fast-track criminal procedure presents shortcomings in terms of fair trial standards.

Article 542/H of the Act on Criminal Proceedings instituted the notion of house arrest for irregular border-crossers during criminal proceedings – a measure carried out either in immigration detention centres or in police jails. In doing this, as the Hungarian Helsinki Committee (HHC, 2015a) argued, the Act technically provides for the pre-trial detention of asylum seekers. In *Amuur v. France* (para. 43), the ECtHR made it clear that detention of asylum seekers is not arbitrary per se if it is prescribed by and in accordance with the law in compliance with international obligations, particularly under the 1951 Geneva Convention and the ECHR. In elucidating the non-penalization obligation, the Court implicitly prohibits practices where asylum seekers and criminals fall into the same category. The Court also states (para. 50) that the expression 'in accordance with the law' also refers to the quality of the law,

implying that, where a national law authorizes deprivation of liberty, it must be sufficiently accessible and precise. As regards accessibility and foreseeability, the Asylum Act does not allow detention on those grounds (pre-trial). Even if Article 542/H of the Act on Criminal Proceedings was a formally valid prescription as regards clarity and preciseness, the notion of house arrest in the context of detention is rather blurred and nonsensical. The detention of asylum seekers under such indirect and equivocal authorization is clearly not carried out in good faith, and is therefore arbitrary and violates Article 5 of ECHR since the *Saadi v. United Kingdom* case (para. 74), never mind the appropriateness of a police jail as the place of detention (*Amuur v. France*, para 43). The exceptional speed of the legislative process and the fact that these provisions massively derogate from the normal rules of criminal procedure is clear.

These legislative decisions, being the basis of lower-level decision-making, are ‘culprits’ in the merger of crime and migration control (Van der Woude and Van der Leun, 2017). In offsetting certain criminal procedural safeguards, the new amendments opened up vast negative discretionary spaces by applying articles specifically tailored to the situation at hand. This surely represents an example of ad hoc instrumentalism and enemy criminal law. Criminal proceedings and a razor-wired fence constructed to keep asylum seekers out of the territory could all be interpreted in no other way than the ‘badfaith abuse of governmental power’ (Mahoney, cited in Lambert, 2007: 42). The obvious purpose of both the fence and the amendments is rejection of the existing social and legal norms. They violate the basic rights of those who need protection under Article 3 of ECHR.

The territorial dimension of non-refoulement

The EU's safe third country concept is a procedural mechanism that minimizes obligations and shifts and devolves responsibility (Foster, 2008). In setting grounds of inadmissibility it provides excuses for member states to avoid and dilute their agreed non-refoulement obligation. It is a sophisticated method for rejecting the unwanted seemingly without criminalization or illegalization, while the Asylum Procedures Directive (APD) has failed to develop sufficient safeguards that should be considered as necessary to comply with international human rights standards (Costello, 2005). This is why *M.S.S. v. Belgium and Greece* is a landmark case: the ECtHR made clear (para. 342), that states must still comply with their obligations under human rights law in applying the Dublin Regulation. This approach was extended to transfers to non-member states in *Sufi and Elmi v. UK*, and to all cases of indirect refoulement in *Hirsi Jamaa and others v. Italy* (Lambert, 2012). In *Čonka v. Belgium* (para. 63), the Court held that procedures concerning the expulsion of individuals must afford 'sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account'. Following these judgments, establishing lists of safe third countries might be acceptable only if states avoid direct application, and assess whether a particular country on the list is in fact safe for the particular person in question. Notwithstanding the imperfections of the EU framework, where member states chose to adopt such lists 46–48 of the APD provides that they should take into account, inter alia, the relevant guidelines of the UNHCR (the UN Refugee Agency).

The safe third country concept was introduced to the Asylum Act in November 2010. The definition under Article 2(i) was initially in accordance with both the principles enshrined in the 1951 Convention and the obligations inherent in Article 3 of ECHR. It was later amended and shortened by the new Constitution. The prohibition on expulsion in Article XIV(2) of the

Constitution does not include the risk of being subjected to treatment that is degrading, nor does it provide protection against expulsion where there is a risk of an unjustified deprivation of liberty and of unfair trial (McBride, 2012). Furthermore, according to Article XIV(3), non-citizens shall be granted asylum only if another country does not provide protection for them. The main country in respect to which the authorities applied the safe third country concept was Serbia (UNHCR, 2016), even though the HHC made it clear that Serbia cannot be regarded as safe third country, among other reasons owing to its almost zero recognition rates. In August 2012, the UNHCR reaffirmed that view by calling on states to stop sending asylum seekers to Serbia, given the shortfalls in its asylum system. Hungary nevertheless continued to apply this practice. This led the UNHCR in October 2012 to call on states to avoid chain refoulement and to refrain from transferring its asylum seekers back to Hungary. Two months later, when Hungary stopped applying the safe third country concept altogether, the UNHCR reversed that position. Notwithstanding the warnings, on 30 June 2015 the parliament amended the Asylum Act in order to authorize the government to issue a decree establishing a list of safe third countries, including all the countries along the Western Balkans route. It should have come as no surprise, therefore, when, in *Ilias and Ahmed v. Hungary* (paras 102–125), the ECtHR held that the applicants' expulsion from the transit zone to Serbia constituted a breach of Article 3 of ECHR.

Access to the refugee status determination process and the right to effective remedy:

Expulsion from transit zones

Article 15/A of the amended Border Act provides for the establishment of 'transit zones' at the borders, and refers to asylum seekers being 'temporarily accommodated' in these zones for the purpose of the process of determining immigration and asylum status. A further amendment to

the Asylum Act (Art. 71/A) introduced the ‘border procedure’, a fast-track refugee status determination procedure, which is to be followed in the case where the application has been submitted in the transit zone. The Office of Immigration and Nationality (OIN) has to deliver the admissibility decision with priority but, in any event, no later than eight days after submission (UNHCR, 2016). Article 51(4)(b) provides that the asylum application is inadmissible if the applicant ‘travelled through the territory of a safe third country and would have had the opportunity to apply for effective protection’. In the case of refusal, the applicant may appeal and submit a judicial review request within seven days. According to Article 51(11), the applicant also may – no later than within three days – make a declaration concerning why in their case that country in question cannot be considered to be safe. The feasibility of these deadlines is disputable; evidence such as documents concerning personal situation and circumstances might be obtainable only in the applicant’s country of origin, from which they have fled (*Bahaddar v. The Netherlands*, para. 45). Short notice deadlines place undue burden on the applicant, especially if the safe third country concept in question is as flawed as in Hungary and disregards the validation process prescribed by (48) APD, and deems a third country safe, which is clearly not in accordance with the UNHCR guidelines available for asylum seekers.

Between 15 and 19 September 2015, thousands of asylum seekers arrived at Röszke, but only 352 people were allowed to enter the transit zones. Many people, among them families with children, left towards Croatia after waiting days without food, water or shelter. The processing capacity of the zones was said to be 100 people in each zone per day. However, the admission rate was gradually reduced, and by June 2016 only 15–17 people were let in per day. The scale of the problem is perhaps best represented by the fact that the entire Western Balkans route was successfully diverted to Croatia. From September to October 2015, the total number of asylum applicants dropped from 30,795 to 615 (Eurostat, n.d.). In the last quarter of 2015, of

1172 applicants, only 38 were granted refugee status and 119 subsidiary protection status (KSH, n.d.). In the cases witnessed by HHC (2015b) in the Röszke transit zone, the OIN delivered inadmissibility decisions in less than an hour and automatically entered a one to two year ban on entry in the Schengen Information System. Nagy argues that banning entry to the entire EU in such circumstances is a nominal immigration law sanction: given the deterrent nature and the disproportionality of the measure, it constitutes punishment and, as such, is a textbook example of crimmigration law (Nagy, 2016: 1065). Regarding the applicants' opportunity to challenge that decision based on the safe third country concept, after providing brief information OIN offered applicants the opportunity to sign a simple statement format, according to which they disagree with the decision. In doing so, OIN did not provide an opportunity to consult a legal adviser or to collect supporting arguments. Nor did it consider the applicants' actual personal statement. The asylum seekers interviewed by HHC did not understand the reasons for the inadmissibility and their right to judicial review. To submit an appeal later, applicants have to wait for readmission on the other side of the fence in a so-called 'pre-transit zone', a 3 metre wide strip between the Serbian border and the Hungarian fence. Although they have a legal opportunity, actual access is limited to effective remedy because admission is random and does not follow any rules. In 2015, only nine rejected asylum seekers submitted a request for judicial review, and seven of these later withdrew the request. The hearings of the remaining two were conducted over Skype, and the judge after the second appeal still upheld the OIN's decision, irrespective of medical evidence proving that the applicants were suffering from post-traumatic stress disorder (UNHCR, 2016). In the Jahari case (para. 50), the Court held that effective remedy 'requires independent and rigorous scrutiny', yet in Hungarian practice not only effectiveness but the notion of remedy itself is hardly applicable.

There is no permanent access to legal advice in transit zones. OIN staff in Rösztke initially refused entry to these sites for the HHC to provide free legal assistance to asylum seekers, and they were able to obtain entry only following intervention by UNHCR. In *Chahal* (para. 154), the Court held that legal representation for the applicant is necessary given ‘sufficient procedural safeguards for the purpose of Article 13’, and following *Čonka* (paras 80–84) there is no exception even in the case of a fast-track procedure or where there is a risk of overloading. By not providing or by preventing access to legal representation and forcing asylum seekers to wait outside the fence to submit their appeal, given the short deadline and limited admissions the authorities are arguably in breach of Article 13 of ECHR.

According to the government’s position, asylum seekers in transit zones are in ‘no man’s land’, therefore these pushbacks do not qualify as acts of forced return because they have never really entered the territory (HHC, 2015b). Following the judgment in *Loizidou v. Turkey* (paras 61–64), these acts are ‘capable of falling within the jurisdiction’ of a state within the meaning of Article 1 of ECHR. In *Amuur v. France* (para. 52) the Court held that, ‘despite its name, the international zone does not have extraterritorial status’. It is important to note that the government did not dispute the forced removals, only its responsibility, which was set out in the two above judgments: the authorities are in breach of Article 3 of ECHR.

Procedural guarantees governing detention in (pre-)transit zones

The HHC (2015b) described the transit zones at the Serbian border as ‘massive prison camps’, and warned the government that holding people in transit zones qualifies as detention. The authorities claimed that applicants are not detained, since they are free to leave the zones whenever they wish in the direction they came from. In *Amuur* (paras 43–48) the Court found that holding asylum seekers in transit zones can amount to deprivation of liberty within the

meaning of Article 5 even if they are free to leave for another country. The lawfulness of the detention and whether it is in accordance with the procedure prescribed by the law or done to avoid arbitrariness entails that the application of substantive and procedural guarantees must be ensured. Substantively, the measure has no legal basis in domestic law, because Article 15/A of the Border Act provides for holding asylum seekers in transit zones as ‘temporary accommodation’. Therefore, the rules regarding procedural safeguards that sufficiently guarantee the applicants’ right to liberty are not laid down in Hungarian law. Similarly to the Amuur family at Paris-Orly Airport (Amuur, para. 53), asylum seekers in the Hungarian transit zones are also placed under strict and constant police surveillance without access to appropriate legal, humanitarian or social assistance. However, there is no law allowing the courts to review the conditions under which they are held or, if necessary, to impose a limit on OIN as regards the length of time for which they are held. In *Ilias and Ahmed v. Hungary* (paras 48–77) the Court accordingly found a breach of Articles 5(1) and (4) of ECHR. Holding asylum seekers in transit zones is recognized as a form of detention by EU law, which technically qualifies as domestic law: Articles 8–11 of the recast Reception Conditions Directive guarantee precise and sufficiently accessible safeguards against deprivation of liberty for asylum seekers. The authorities, as HHC (2015b) pointed out, have also failed to comply with these rules. The detention of asylum seekers in transit zones is, again, arbitrary.

The ECtHR held in the *Sanchez-Reisse v. Switzerland* case (para. 47–52) that the assistance of a lawyer is an important guarantee, because ‘the detainee is, by definition, a foreigner in the country in question and therefore often unfamiliar with its legal system’. The Court found a violation of Article 5. In terms of duration, although the onehour asylum procedure clearly does not qualify as prolonged detention, those who appeal immediately after refusal must wait, and asylum seekers may be held in the zones for a period of four weeks. The ECtHR’s view, expressed in the *Loizidou* case, is that asylum seekers in both pre-transit and transit zones fall

within the jurisdiction of the state. Since people who wait outside have limited access to transit zones, and returning to Serbia would most likely result in their refoulement, following *Amuur* Hungary is indeed responsible for the deprivation of their liberty. Because applicants waiting for the opportunity to appeal are in the middle of the refugee status determination process, besides general subjectivity they are in an ongoing legal relationship between themselves and the state. Thus, despite the authorities' standpoint, the 3 metre wide strip does in fact function as a transit zone and all the safeguards and guarantees apply there that would otherwise apply in regular detention circumstances. In placing asylum seekers 'beyond the human rights framework' it is also 'detrimental' to their health and well-being (Malloch and Stanley, 2005). The conditions in the pre-transit zone are shocking. Hundreds of asylum seekers wait idly for entry in makeshift tents made of blankets, while others simply 'sit amidst rubbish and dirt'. Approximately one-third of the people waiting are children, many of them infants, some still breastfeeding (HHC, 2016).

In the *S.D. v. Greece* case, the ECtHR found a violation of Article 3 owing to the conditions in the holding centres for foreigners, where the applicant had to sleep on a dirty mattress and had no free access to a toilet (Chetail, 2014: 58). Similar decisions were made concerning Belgian transit zones (*Riad and Idiab v. Belgium*, para 106-110), where the Court considered it 'unacceptable that anyone might be detained in conditions in which there is a complete failure to take care of his or her essential needs'. However, as Amnesty International points out (2015), irrespective of whether or not pre-transit zones are defined or considered to be a place of confinement, in *Hirsi Jamaa* (para. 74) the Court held that, whenever a state exercises control and authority over an individual, the state is under an obligation to secure the rights that are relevant to the situation. A similar decision was made in *M.S.S. v Belgium and Greece* (paras 263–264), where the Court found that humiliating conditions combined with 'prolonged uncertainty in which he has remained and the total lack of any prospects of his situation

improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention'. In *Ilias and Ahmed v. Hungary* (paras 91–101), although there was no violation of Article 3 in respect of the conditions in the Röszke transit zone, the Court observed that the government had not indicated any remedy by which the applicants could have complained about it: there had been a violation of Article 13 in conjunction with Article 3.

Mass expulsion and legal persecution

Collective expulsion has been explicitly acknowledged in Article 4 of Protocol 4 of the ECHR as an absolute prohibition with no exception whatsoever (Chetail, 2014: 60). In *Andric v. Sweden* (para. 1), the ECtHR held that, to avoid collective expulsion, the measure must be taken 'on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'. Given the above analysed shortcomings of the refugee status determination process, the practices of the Hungarian authorities arguably do not fit this requirement.

Moreover, a new provision was inserted in the Border Act in July 2016, authorizing the police to escort illegally present individuals apprehended within 8 km of the border to the external side of the border fence without initiating a formal expulsion procedure (Nagy, 2016). As of March 2017, during the 'state of crisis due to mass migration', the '8 km rule' was extended to the entire territory of the country; tens of thousands of potential asylum seekers have been automatically pushed back and denied access without registration or being given the opportunity to file an asylum application (AIDA, 2018: 19–20).

In October 2017, in *N.D. and N.T. v. Spain*, the ECtHR found that the applicants' removal to Morocco amounted to a violation of Article 4 of Protocol 4 of the ECHR. The case concerned a Malian and an Ivorian national who illegally crossed the border fence between Melilla and

Morocco. When apprehended, they were sent back to Morocco by the Spanish Guardia Civil in a manner identical to that used by the Hungarian authorities.

Widespread antagonism against asylum seekers is tangible in the Hungarian political discourse, though this is not to say there is not also support for migrants in Hungary. The authorities seem to have slipped into an advanced state of denial that there is any popular dissent to the view that sees migrants as a problem. However, as Nagy (2016) has shown, asylum seekers and their supporters (non-governmental organizations) are portrayed and dealt with as ‘enemies’. This demonization of dissenting voices, combined with unjust criminal proceedings, mass processing, pushbacks and bars to lawful reentry, is instrumental in generating a perception that the government understands migrants as deserving social censure, if not punishment (Stumpf, 2013). It is no longer protection that is prioritized to meet the needs of asylum seekers, although this is not explicitly articulated in the legislation. Exclusion is inherent in the provisions of the new policy measures: the amendments presuppose rejection. It is all directly tailored to asylum seekers. The Hungarian asylum system, which shows a close resemblance to the Australian framework, has become a grotesque caricature of the 1951 Convention (Pickering, 2005a, 2005b, 2008). Legal protections are undermined because persecution has become the organizing principle. People are chased not because of their political opinions but because of their religion and their membership of a particular social group, to the extent that we might describe Hungary’s treatment of asylum seekers as persecution by the country of refuge.

Conclusion

The deprivation of fundamental rights has become the everyday reality at the borders. Dublin transfers to Hungary have been suspended by several EU member states on the basis that

asylum seekers would have to face a real risk of treatment contrary to Article 3 of ECHR. The prohibition of inhuman and degrading treatment is ignored by the authorities, to the extent that Hungary has arguably become an outlaw state in the Rawlsian sense (Rawls, 2002: 80). In violating human rights, any state undermines its own legitimacy and loses the respect of the international community. Yet the EU has been criticized for bolstering exclusionary and securitized migration policies, for jumping onto the ‘bandwagon’ of Hungarian crisis management instead of effectively challenging it (Bilgic and Pace, 2017; Karamanidou, 2015; Peers, 2016). EU law does not criminalize irregular entry per se. It is the overall scope of the framework that increasingly exposes asylum seekers to significant adverse consequences. The EU is supposed to have had a protective function by imposing limits on unfettered sovereignty. It is meant to avoid widespread criminalization by member states as a tool of immigration control (Mitsilegas, 2012). The Hungarian example not only shows that this role suffers from its own constraints but also illustrates that the discussion on the European Agenda on Migration still lacks the longed-for common European language. It merely remains, for some governments at least, the usual dispute of nation-states arguing behind the gates of ‘Fortress Europe’ (Melossi, 2005, 2015: 70–5). The aim of European integration has been undermined by successfully marginalizing international human rights standards at the regional level. The national and the EU frameworks are more punitive than protective. The question is yet to be answered of how the Hungarian framework will affect the integration of migrants admitted into the country/EU, and, more importantly in the long run, those who are not. The criminological importance of all of this is in understanding how the mechanisms of the international legal framework intended to safeguard people have been successfully turned against those same vulnerable individuals – excluding them, ridiculing them and pushing them into a relationship with crime. When a state departs from agreed norms of behaviour in the area of migration and refugee policy, as Hungary has, it is not something simply to be lamented. It is both

destabilizing for the region and a spur to the exploitation, and criminalization, of some of the most vulnerable people on earth.

Notes

1. In September 2017, the European Court of Justice dismissed the actions brought by Hungary and Slovakia against the mandatory relocation of asylum seekers. Earlier, the European Commission had launched infringement proceedings against Hungary, Poland and Czech Republic for non-compliance with their legal obligations on relocation.

2. The authorities sealed Röszke border crossing on 16 September 2015, leaving hundreds stranded in the border zone. During clashes with the riot police, 11 migrants ('the Röszke 11') were arrested and accused of illegal border crossing and participating in a mass riot, following a spontaneous protest against the blockade. Although the event relates to freedom of expression and assembly, civil liberties in Hungary are in decline irrespective of immigration status (Freedom House, 2017).

3. In December 2015, the European Commission opened infringement proceedings against Hungary concerning its asylum law, inter alia owing to the incompatibility of its criminal proceedings with the Directive on the right to interpretation and translation in criminal proceedings.

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