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Migrants and Refugees in Hungary

A Legal Perspective

Edited by
Ádám Rixer

Károli Gáspár University of the Reformed Church in Hungary
Budapest, 2016

Linguistic proofreading
László Oláh

ISBN

This book contains the scientific contributions of the members of the Lajos Lőrincz Research Centre for Public Law (Lőrincz Lajos Közjogi Kutatóműhely)

Published by
Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law
Csaba Törő, the Dean of the Faculty

Kiadja:
A Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara

Felelős kiadó: Dr. Törő Csaba, dékán

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Editor's Preface

Refugee and migration issues are undoubtedly among the most frequent questions of our era in Europe and in Hungary as well. Though the continuity and stability of peace were worked out after 1945 in Europe, the effects of the new migration wave of 2015 do question even the further development of the political and economic foundations of the unification process.

This edited collection - which is an achievement of the members of the Lajos Lőrincz Research Centre for Public Law, founded within Károli Gáspár University of the Reformed Church in Hungary – is the very first, substantive scientific response to certain unique phenomena related to the migration issue and (also) to the political and legal answers given by the Government and the Parliament in Hungary. As responsible actors of the academic sphere, we felt that we were urged to share our contributions concerning this intrinsic social issue with the broader public immediately. In Titus 3:14 Paul urges Christians through Titus: 'And let ours also learn to maintain good works for necessary uses, that they be not unfruitful.'[1] And indeed, there is a situation in which we feel called upon to do things beyond formal requirements: it is a moral obligation of a sort.

Our collection tries to seize the given topic comprehensively, aims to present the reasonable complexity of the perception of the problem in question; even though, that in the case of migration there are several newly evolved phenomena, concerning which even proper questions are hardly found - answers even less.

It is of course important that the base of any complex approach must involve jurisprudential methods, as the questions related to the operation of the state, to the actions of public administration and to the possibilities of the individuals may be most easily homogenised legally. Inasmuch as the scope of the problem is an aggregate of extremely complex phenomena and multiple social relations, the examination by

[1] The Epistle of Paul to Titus, King James Version.

jurisprudential methods requires the provision of internal multidisciplinarity of legal sciences as well. In a parallel way, limitations within the scope of possible results achieved by jurisprudential approaches are also visible; phenomena that concern the systems of social norms outside law (public morality, religion, professional ethics) require the usage of the results of political science, social psychology, economics or even theology – besides the results of legal sciences.

Moreover, as it will be seen in one of the essays, beside the approaches of the relevant fields of science, a more punctual imprint and powerful *portrayal* of the migration and refugee issues can be drawn by contemporary Hungarian arts. The results achieved by social sciences shall be completed by perceptions of reality offered by art or even publicistic genres: science can obtain more precise questions and answers.

At the same time the authors of this compilation also made some efforts to set up possible scenarios for the future: in 5-10 years from now it might be an interesting attempt to examine which prognosis has come to fruition and which one has failed...

To sum up, this volume was issued for three reasons: firstly, we wanted to lose no time in reacting, secondly we emphasize the importance of approaches beyond law, and thirdly, we look into the future, featuring possible models of regulation within this work based mainly on the methods and achievements of jurisprudence.

Based on the authors' efforts I sincerely wish that the reading of this book will be fruitful,

Budapest, Fall 2015

The Editor

Photo by Hajni Valczer. Budapest, Hungary, 2015.

Ádám Rixer[1]

The Refugee Issue in Sciences and Arts in Contemporary Hungary

1. Introduction

Questions related to the migration and the situation of refugees have been more or less intensively examined by the representatives of different sciences in the period since 1945. Nevertheless, it is a radical change that compared to earlier times when the vast majority of problems that arose was rather theoretical and was mainly connected with territories outside Europe or fairly confined territories within Europe (the Western Balkans in the 1990s or East German refugees in the summer of 1989), and now, since the beginning of 2015, it has become a political, fiscal and moral burden for Hungary, for most of the European countries and on the level of the EU as well, causing practical, daily challenges. The political and scientific importance of this issue is increased by the fact that though the current 'exodus" is generated mainly by civil wars or other armed conflicts, the situation will be more serious because of parallel processes induced by the consequences of the climate change.[2]

The increasing importance of the given topic is not merely caused by the objective weight of the problem, but – from the perspective of sciences – it also comes from the fact that the migration-issue is an 'ideal' object to examine the cumulated effects of several crises of the last decade, moreover, it makes the representatives of different fields of

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2 Bende Zsófia – Muhoray Árpád. A környezeti migráció, mint komplex kihívás. [Environmental migration as a complex challenge] Hadtudomány, 2014/3-4. 106-115.

science face new expectations towards social sciences in general and the need for new scientific approaches to this problem.

It can be stated that social sciences are increasingly forced to start to examine the underlying meaning of things and the broader logical framework of the examined phenomenon more deeply besides or instead of descriptive questions that are inquisitive about operation. In an era of crises, when everyday experience confutes our previous expectations, legal and political theory is radicalised as well: it has to examine and rethink the validity of its presumptions that were considered stable. 'This way philosophising will gain civil rights again, as it is harder and harder to exclude such questions from political theory discussion that have needs of describing professional science and are averse to philosophical questioning and that are not related to the method of the operation, but to its sense (i.e. to the frames of interpretation).'[3]

The attention of legal science, besides others, also turns more and more to the question of morale principles penetrating into the world of law. One certain sign of this is that the forefronts of 'traditional' legal positivism create their own systems of criteria systems one after another, which may allow this incorporation to happen justifiably.[4]

The overview of the Hungarian scientific literature related to the topics of migration and refugees provides and promises some findings and lessons even if the majority of these writings was published before the 'new Exodus' in 2015. The picture, provided by the most frequent forms and results of scientific examination and analysis on the given topic, can not be complete, beacause it may take half a year or even a year until the first scientific answer (contribution) is published. The most intrinsic feature of mainly social sciences is that from the moment the problem arises and the first scientific approach is given (and published), this nature of science forces us to look for further methods of perceiving reality that enable us to reach a more complete picture by 'real time' reflections concerning the issues in question. That is why an examination of the

[3] Lányi, András: Az ökológia, mint politikai filozófia. [Ecology as political philosophy] Politikatudományi Szemle, 2012/1. 107.

[4] Matthew H. Kramer: Where Law and Morality Meet. Cambridge University Press, 2008. 17.

portrayal of the migration and refugee topics, drawn by contemporary Hungarian art, is also useful. The 'quick to respond' nature of Art and its ability to introduce the moral contexts beyond the facts enable us to detect a more complex perception of reality.

The perception of the problem in question by science, completed with the information provided by contemporary arts is able to draw such contours of reality that construe political-type standpoints that evolve within the public sphere. Moreover, these facts broaden the scope of valid reasons for any forthcoming debate.

Within the first part of this essay which sets up a catalogue of approaches of inland science, we will group the topics in question into three aspects. The first one detects the fields of science involved, the second one lists the most frequented topics that ensure a well-interpretable catalogue of problems, and the third one examines the main methods, inner features and the relative weight of the scientific fields involved, providing some quality aspects for the evaluation of the results achieved by them.

2. Main fields of science delaing with migration and refugee issues

The main sciences dealing with the migration and refugee issues are historical sciences, archaeology, medicine, theology, science of religion (independent of theology), philosophy, legal science, sociology, political science, statistics, demography, economics, military science, regional studies and climatology (climate science) as well. Beyond these fields of science and within the major disciplines several further interdisciplinary (sub)fields evolve, such as administrative sciences, administrative legal science (the meaning of this term is narrower than that of administrative sciences), management science, police science[5], financial sciences, international studies, science of labour, futurology, development economics, (social) psychology and archaeogenetics.

We can state without any exaggeration that the number of related works within the territory of legal sciences is quite high, the relative majority

[5] Studies and research in criminology, forensic science, jurisprudence, community policing, criminal justice, correctional administration and penology all come under this umbrella term ‚police science'.

of them uses partly or exclusively legal approaches. Besides the methods of some dominant legal disciplines (such as the science of criminal law, administrative legal science etc.) the emergence of approaches based on the inner multidisciplinarity of law or interdisciplinarity can be seen: on the one hand, a particular problem is presented and illuminated from many aspects, or on the other hand, the same volume consists of several works, the authors of which separately try to introduce the relevant – legal and non-legal – aspects.[6]

Historical research and research in the broad field of legal history can rely on the rich material of the past in regard to the fact that scuttles, returns and migration in general are not new or unique phenomena in Hungarian history.[7] The monography of Iván Halász, which undertakes to show the most important turning points of the political and administrative measures taken by different regimes concerning refugees from the beginnings until 1989 (concentrating mainly on the 20th century), is a valuable contribution to the scientific literature in question.[8] This literature also nicely determines the boundaries of the eras: e.g. Boldizsár

6 See e.g. *A világ menekültjeinek helyzete. A humanitárius segítségnyújtás öt évtizede*. [Situation of the refugees in the World. Five decades of humanitarian help] UNHCR, Budapest, 2001. It is a comprehensive collection of essays that gives a general overview of current wars, civil wars and other conflicts, providing detailed data about the main directions of the migrants and about international and country-specific programs on migrants.

7 See e.g. Ablonczy Balázs: Sérelem, jogfolytonosság, frusztráció: Alsó-Fehér vármegye menekült törvényhatósága Budapesten, 1919-1921. [Damage, legal continuity and frustration: Alsó-Fehér County's Emigré Authority in Budapest, 1919-1921] Kisebbségkutatás, 2008/2. 248-260.; and Keresztes Csaba: A felvidéki menekült magyar diákok magyarországi tanulmányai 1945-1949 között. [Studies of Hungarian migrant students from Felvidék between 1945-1949] Fórum: Társadalomtudományi Szemle, 2009/2. 3-23.

8 Halász Iván: A nemzetközi migráció és a közigazgatás. [International migration and public administration] Budapesti Corvinus Egyetem Közigazgatástudományi Kar Nemzetközi Migrációs és Integrációs Karközi Kutatóközpont, Budapest, 2011. 117-143.

Nagy elaborated the history of the period of time between the fall of the iron curtain and the EU accession.[9]

Nagy Boldizsár's book is – already in its title – an intentionally essayistic one; traditionally dominant legal approaches are supplemented by the narrowly interpreted approaches of political science and also by mere philosophic interpretations.

Publications related to economics often reflect the fact that the migration has become a 'transnational subsystem' which seems to be an independent and fairly important economic factor by its stable structures.[10]

The importance of police science, which is a common territory of criminal sciences and administrative sciences[11], will presumably grow in the near future – mainly because of the radicalisation of the issue in question.[12]

Moreover, *communication science* is also a field the importance of which certainly increases since within the political sphere and the territory of social needs the significance of conscious communication about crises connected with law enforcement grows.[13]

Statistics and demography do also seriously contribute: the data-based introduction of the territories from which the migrants come and the

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9 Nagy Boldizsár: A magyar menekültügy a rendszerváltozástól az Európai Unióba lépésig. Erkölcsi, politikai-filozófiai és jogi vizsgálódások. [Migration affairs in Hungary from the fall of the Iron Curtain to the EU accession. Moral, Politico-philosophical and Legal Aspects] Gondolat Kiadó, Budapest, 2012.

10 Dr. Nyusztay László (ed.): Tanulmányok a nemzetközi migráció köréből. [Studies on international migration] BGF – Perfekt Kiadó, Budapest, 2011.

11 Dr. Kondorosi Ferenc: Rend és szabadság: esély Európában. [Order and Freedom: a Chance in Europe] Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2010.

12 See e.g. Gaál Gyula – Hautzinger Zoltán (szerk.): A modernkori magyar határrendészet száztíz éve. [110 years of modern border policing in Hungary] Magyar Rendészettudományi Társaság Határrendészeti Tagozat, Budapest, 2013.

13 See e.g. Fodros István: Válságkommunikáció. [Crisis communication] Minerva Kiadó, Budapest, 2008., and Dr. Barlai Róbert – Kővágó György (szerk.): Válság-(katasztrófa)kommunikáció. Tanulmányok és zemelvények. [Crisis (catastrophe) communication. Essays and extracts] PETIT REAL Könyvkiadó, Budapest, 1996.

main directions they choose was completed by the Hungarian Demographic Research Institute (KSH Népességtudományi Kutató Intézete) in several edited collections.[14]

Searching for the peculiarities of (social) psychology, Terézia Nagy's approach is quite typical of the methods of the given field, inasmuch as she made narrative interviews with third-world refugees, examining the dinamics of the 'relational nets' (how they are built up or destroyed), actually, the models of relational successes and failures among refugees.[15] In other cases we are faced with the scientific elaboration of real physical and psychological torture and pain.[16]

Searching among 'mixed' fields of sciences, archaeogenetics comes into sight; it was born by linking genetics and archaeology and the most interesting results of it throw new light upon early human migrations, in some cases even confuting former assumptions related to those migration periods.[17]

3. Main sub-topics and aspects of the refugee and migration issues

The most general directions (i.e. directions not primarily related to particular fields of science) of researches concerning European migration and the refugee phenomena can be systematically catalogued according to

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14 Illés Sándor – Tóth Pál Péter (szerk.): Migráció. Tanulmánygyűjtemény. I. kötet [Migration. Collection of essays. Volume I.] KSH Népességtudományi Kutató Intézete, Budapest, 1998.; and Tóth Pál Péter – Illés Sándor (szerk.): Migráció. Tanulmánygyűjtemény. II. kötet [Migration. Collection of essays. Volume II.] KSH Népességtudományi Kutató Intézete, Budapest, 1999.

15 Nagy Terézia: A kapcsolatok szerepe egy menekült élettörténetében. [Importance of relationships within the life story of a migrant] Belvedere Meridionale, 2013/2. 64-71.

16 Kroó Adrienn - Hárdi Lilla: A kínzás élménye menekült nőknél. [Experience of torture in case of migrant women] Pszichoterápia, 2012/1. 43-57.

17 Horváth Tünde: Az őskori migráció kérdése az archeogenetikai és izotópos vizsgálatok alapján. [Issue of prehistoric migration based on the results of archaeogenetics and isotope examinations] Magyar Tudomány, 2014/2. 196-208.

a) geographical and territorial aspects (where migrants come from, which countries they pass through, where they want to go, etc.);[18]

b) the types of events or reasons causing or provoking the migrations (war, civil war, ethnic or religious conflicts, natural disasters, economic reasons); or

c) consequences that can be grouped by

ca) the levels on which those effects appear (individual level, community level, societal level, EU-level, etc.). From a substantial point of view we can also observe that besides the introduction of homogenizing integrational politics controlled and directed by central governments, descriptions of politics aiming at inserting layer-specific, strategic and decentralized programs by means of positive discrimination do also exist.[19] The analyses of the recent past on the possible forms of political (i.e. suffrage) and further societal integration[20] of migrants are exciting readings even if it is visible that the features, the intensity and the extent of the latest sequels strongly differ from that of the previous ones.[21] Moreover, the role and effect of entities belonging to the civil society or the religious sphere – that prevail mainly through certain situations or processes – are also constantly present.[22]

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18 See e.g. Komáromi Sándor: Oltmer, J.: Európai migráció kelet és nyugat között. [East-West migration in Europe] Kisebbségkutatás, 2014/2. 187-190.; and Kovács Judit Nóra: Extern migráció és az Európai Unió. [External migration and the European Union] De Iurisprudentia et Iure Publico, 2014/1. 1-12.

19 Robert Castel: A szociális kérdés alakváltozásai. A bérmunka krónikája. [Metamorphoses of the social question. The chronicle of wage labour] Kávé Kiadó – Max Weber Alapítvány, Budapest, 1998. 379-380.

20 Örkény Antal – Székelyi Mária (Eds.): Az idegen Magyarország. Bevándorlók társadalmi integrációja. [The strange Hungary. The social integration of migrants] ELTE Eötvös Kiadó, Budapest, 2010.

21 Halász Iván (ed.): A migránsok politikai integrációja a visegrádi államokban. [Political integration of migrants within the Visegrád countries] NKE Szolgáltató Kft., Budapest, 2014.

22 Czakó Ágnes: A romániai menekültek és a civil szféra változó szervezetei. [Migrants from Romania and transforming organisations of the civil sphere] In: Sík Endre (ed.): Útkeresők. [Wayseekers] MTA Politikai tudományok Intézete Nemzetközi Migrációs Kutatócsoport Évkönyve, Budapest, 1992. 93-111.

cb) the fields of consequences; we can distinguish legal, discriminational, economic, political, demographic, security[23], military[24] and other consequences. Furthermore, the fields of research concerning special or multiple disadvantages are also detectable.[25] Some aspects of migration do have feministic approaches as well; the intrinsic and European value of mobility is often propagated in such writings.[26] The focus of examinations is also more and more put on the reactions of particular members or groups of the society, especially on reactions related to prejudice and xenophobia.[27]

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23 Lőwiné Kemenyeczki Ildikó: A migráció várható alakulása és hatása a biztonság dimenzióira 2030-ig. [Security dimensions of the prospective tendencies and consequences of the migration up to 2030] Hadtudományi Szemle, 2015/1. 189-208.; and Szabó A. Ferenc: A nemzetközi migráció és korunk biztonságpolitikai kihívásai. [International migration and contemporary challenges of security politics] Zrínyi Kiadó, Budapest, 2006.

24 The questions of the common defence policy and common foreign and security policies have come to the front in Hungarian scientific literature as well. See e.g. Lorina Buda – Boglárka Koller – Attila Kovács – Attila Marján et al.: European Policy Overhaul: A Sectoral Assessment. Pro Publico Bono – Magyar Közigazgatás 2015/2. 73-82. See also: *Refugee crisis: present and future EU military operations in the Mediterranean*. European Parliament News. 23. 09. 2015. http://www.europarl.europa.eu/news/en/news-room/content/20150923STO94304/html/Refugee-crisis-present-and-future-EU-military-operations-in-the-Mediterranean (2 November 2015)

25 See e.g. Kiss Adrienn: A hajléktalan menekült esete a szociális szférával. [The affair of the homeless migrant with the sphere providing social services] Háló: a Szociális Szakmai Szövetség Hírlevele, 2011/11-12. 25-27.

26 Luisa Passerini et al. (Eds.): Női migráció keletről nyugatra. Társadalmi nem, mobilitás és azonosulás a jelenkori Európában. [East-West migration of women. Gender, mobility and identification in contemporary Europe] Feminizmus és Történelem sorozat. [Feminism and History series] Balassi Kiadó, Budapest, 2008.

27 Bőhm Antal: Előítélet és xenofóbia a helyi vezetők értékrendjében (egy nemzetközi összehasonlító vizsgálat tapasztalatai alapján). [Prejudice and xenophobia within the value system of local leaders in accordance with observations of an international comparative inquiry] In: Sík Endre (ed.): Útkeresők. [Wayseekers] Yearbook of the MTA Politikai tudományok Intézete Nemzetközi Migrációs Kutatócsoport, Budapest, 1992. 85-91.

Naturally, among such effects (consequences), mentioned above, we can separate those which refer to processes that have already taken place and those which have not occured yet.

The number of scientific writings raising questions of internal and international security risks (threats) had increased already before the enormous wave of migration of 2015.[28] These works typically try to gain further information for setting long term prognoses by detecting regional factors that exercise power and also cultural peculiarities.[29]

Reviewing works dealing with border policing we do experience that – beyond some traditional aspects of the given field – they deal with the requirements of the Schengen Area and with corruption issues to a large extent.[30]

There are also some books, the writers of which were mere clairvoyants; they had predicted the extent and the important substantive elements of the prospective phenomena – several years ago.[31]

In addition, forecasts and academic risk analyses concerning further and accelerating migration generated by climate change have also appeared.[32]

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28 See e.g. Gaál Gyula – Hautzinger Zoltán (Eds.): Tanulmányok a „Biztonsági kockázatok – rendészeti válaszok" című tudományos konferenciáról. [Essays form 'Security risks and answers of policing' conference] Pécsi Határőr Tudományos közlemények XV. Magyar Hadtudományi Társaság Határőr Szakosztály, Pécs, 2014.; and Póczik Szilveszter – Dunavölgyi Szilveszter (Eds.): Nemzetközi migráció – nemzetközi kockázatok. [International migration – international risks] HVG-ORAC, Budapest, 2008.

29 Háda Béla – Tálas Péter (Eds.): Regionális biztonsági tanulmányok. [Regional security studies] NKE, Budapest, 2014.

30 See e.g. Varga János – Verhóczky János (ed.): Határrendészet. Egyetemi jegyzet. [Border policing. University course-book] Nemzeti Közszolgálati Egyetem Rendészettudományi Kar, Budapest, 2013.

31 Corinna Milborn: Európa: az ostromlott erőd. A bevándorlás fekete könyve. [Gestürmte Festung Europa/The besieged fortress of Europe] Alexandra, Pécs, 2008.

32 See e.g. Dr. Bukovics István: Felkészülés a klímaváltozásra: Környezet – kockázat – társadalom. Katasztrófavédelem. [Preparations for climate change. Environment – Risk – Society] Országos Katasztrófavédelmi Főigazgatóság, Budapest, 2006.

d) country and region specific features beyond general trends, as particular states have to face also *specific* migration phenomena that – at least partly – differ from the problems of other states.[33] The importance of this approach is also shown by the fact that the Hungarian scientific literature does contain several essays examining migrants coming from certain countries, areas or continents. These works tend to introduce the political, territorial and cultural (multi-cultural) aspects simultaneously – introducing perspectives, methods and results of disciplines connected with the topics in question in an integrated, complex way.[34]

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[33] See e.g. Urbán Ferenc. Massey, D. S. – Durand, J. – Pren, K. A.: Az Egyesült Államokba irányuló illegális migráció jellemzése. [Features of the illegal immigration to the United States] Statisztikai Szemle, 2015/4. 397-401.; Dézsi Tímea – Tömöry Éva: Bevándorló vállalkozók: az ‚56-os magyarok szerepe a kanadai gazdaság kiépítésében. [Immigrant entrepreneurs: the role of Hungarians 'of 1956' in building up the Canadian economy] Kisebbségkutatás, 2010/2. 337-339.; Csatlós Fruzsina: A vegyes migráció és az UNHCR 10 pontos cselekvési tervének alkalmazhatósága a líbiai menekültek esetében. [Mixed migration and applicability of the UNHCR's Ten-Point Plan of Action for Refugee Protection in the case of Libian refugees] Nemzetbiztonsági Szemle, 2014/ 2. 5-27.; Komáromi Sándor: Nemić, N., Seger D., Kujaičić, K.: Migráció, politika és demokrácia Szerbiában és a tágabb posztjugoszláv térségben. [Migration, politics and democracy in Serbia and in the broader Post-Yugoslav region] Kisebbségkutatás, 2014/1. 122-124.; and also Németh Krisztina. Kvalitatív szemlélet a migráció kutatásában. Moreh Christian: Alcalái románok. Migráció és társadalmi differenciálódás. [Qualitative aspects applied in the examination of migration. Moreh Christian: Romanians in Alcalá. Migration and social differentiation] Tér és Társadalom, 2015/3. 155-160.; and Berta Péter: Közvetítő kereskedelem, migráció és az etnicitás politikája Az erdélyi gábor romák megélhetési stratégiái. [Transmissionary trade, migration and politics of ethnicity. Strategies for living of Gábor Romas in Transylvania] socio.hu, 2013/4.

[34] See e.g. Tarrósy István – Glied Viktor – Keserű Dávid (Eds.): Új népvándorlás. Migráció a 21. században Afrika és Európa között. [New Exodus: Migration from Africa to Europe in the 21st century] Publikon Kiadó, Budapest, 2012., and Tarrósy István – Glied Viktor – Vörös Zoltán (Eds.): Migrációs tendenciák napjainkban. A 21. század migrációs folyamatainak tanulmányozásához. [Migration tendencies nowadays. For studying the migration processes of the 21st century] Publikon Kiadó, Pécs, 2014.

The Hungarian Roma (Gypsy) migration,[35] the immigration of (ethnic) Hungarians living outside Hungary (mostly in the neighbouring countries) to Hungary and their migration to Western-European countries[36] and also the *en masse* migration of Hungarians to Western-Europe as an employee migration process[37] are definitely such questions – as it has been proved by several researches.

Immigration of (ethnic) Hungarians living outside the borders, the responses of the homeland society given to this issue and also the transformation of Hungarian minorities as a result of that migration have been the most frequent topics for several years in the majority

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35 Klímová Ilona: A roma migráció és a menedékkeresés politikai szempontjai a jelenlegi tudományos viták tükrében. [Roma migration and the political aspects of asylum-seeking according to recent scientific debates] Kisebbségkutatás, 2009/3. 528-534.

36 See e.g. Cseresnyés Ferenc: A romániai és jugoszláviai magyarok menedékkérelmei Németországban (1987-2002). [Asylum applications of Romanian and Yugoslavian ethnic Hungarians in Germany (1987-2002)] Regio: Kisebbség, Politika, Társadalom, 2004/1. 89-110.; Móré Sándor: Románia uniós csatlakozásának hatása az ország emberi jogvédelmi rendszerére, különös tekintettel a romániai magyarok helyzetére. [*The impact* of the *EU accession* of *Romania* on the *system* for the *protection* of *human rights and on the situation of the ethnic Hungarians in Romania]* Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Patrocinium, Budapest, 2013. 35.; and Móré Sándor: Some thoughts about the legal protection of national minorities in Romania. Jogelméleti Szemle 2013/1. 105-111.

37 See e.g. Girasek Edmond – Csernus Réka – Ragány Károly – Eke Edit: Migráció az egészségügyben. [Migration in Health Care] Magyar Tudomány, 2013/3. 292-307.; and Honvári János: Migrációs potenciál és a potenciális tanulási migráció. Hazai hallgatók külföldi tanulási szándékai. [Migrational potential and potential student migration. Hungarian students' intentions to study abroad] Tér és Társadalom, 2012/3. 93-104.

of social sciences.[38] Several questions, such as nationalization or the legal handling of the diaspora issue have been evolved.[39]

All four approaches mentioned above do have a historical aspect which can be sketched as a process-like context, besides the fact that these approaches address living, contemporary political, practical and scientific problems even nowadays.

4. Methodological issues: features of recent researches and possible directions of the future ones

In spite of the inner multidisciplinarity of law and the interdisciplinary approaches (both mentioned in the second chapter), the dominance of approaches based on law and fundamental legal conceptions and that of partly academic studies (surveys) on the content of different human rights[40] can be still observed.

These examinations, even if they use some court cases, uphold the principle of a closed, self-referential (auto-referential) system, that is they intentionally use exclusively legal-type reasons supporting their statements. The examination of the large service providing systems (pension

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38 See e.g. Gödri Irén: Migráció nemzeti/nyelvi határokon belül. Bevándorlók és új állampolgárok a szomszédos országokból – változó trendek. [Migration within national and linguistic borders. Immigrants and new citizens from the neighbouring countries – changing trends] Magyar Tudomány, 2013/3. 263-279.; Nagy Imre – Tátrai Patrik: A migráció hatása Temerin népességnövekedésére és etnikai szerkezetének átalakulására. [Effects of migration on the growth of Temerin's population and on the transformation of its ethnic structure] Tér és Társadalom, 2013/2. 134-146.

39 See e.g. Tóth Judit: A diaszpóra a jogszabályok tükrében. [The diaspora in accordance with law] In: Sík Endre – Tóth Judit (Eds.): Diskurzusok a vándorlásról. [Discourses on migration] MTA Politikai Tudományok Intézete, Budapest, 2000.

40 Naszladi Georgina: A menekült gyermekek alapjogi helyzete Magyarországon. [Basic rights of refugee children in Hungary] Studia Iuvenum Iurisperitorum, 2012/6. 149-165.

system, health care system etc.) by other fields of science is just residual compared to the legal approaches.

Extreme legal positivism related to the topic in question is especially 'dangerous', because – as we have seen in year 2015 – the Schengen-system and other related international systems collapsed or became seriously deformed (damaged) within a few days or weeks. Consequently, those studies that exclusively search for the content of certain legal sources (instruments)[41] remain fragmentary comncerning their value.

Theoretically, we can even predict that changes related to the migration indicate paradigm shifts far beyond the field of the migration phenomena.

The academic literature of police science did not treat the migration issues as if they were among the most serious problems[42]: Hungarian handbooks and monographies written in the near past still reflected the main 'trends' that resulted in a more aerial policing and propagation of certain forms of community policing within the framework of a decentralisation process.[43] Nowadays we can see that political and legal efforts are just the very opposite; they point to a powerful centralisation.

Similarly, amongst the substantial elements (and provisions) of various cross-border cooperations there was hardly anything concerning migration.[44] What is more, the requirement of 'aerialisation' of the state borders[45] has been forcefully presented earlier by various fields of science,

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41 See e.g. Windt Szandra: Külföldiek rendészete, bevándorlás és menekültügy. [Policing of foreigners, immigration and the refugee issue] In: Korinek László (ed.): Értekezések a rendészetről. [Essays on policing] NKE RTK, Budapest, 2014. 291-307.

42 See e.g. Böröcz Miklós: Az illegális migráció és a terrorizmus közti összefüggések vizsgálata. [Examination of the connection between migration and terrorism] (T)error & Elhárítás 2014/2. 20 p. http://tek.gov.hu/TT_pdf/2014/Borocz_Miklos_Az_illegalis_migracio.pdf (22 November 2015)

43 See e.g. Danielisz Béla – Jármy Tibor: Rendészet Európában. [Policing in Europe] Duna Palota Kulturális Kht., Budapest, 2008.

44 On the most frequent issues concerning cross-border cooperations see e.g. Soós Edit – Fejes Zsuzsanna: Határon átnyúló együttműködések Magyarországon. [Cross-border cooperations in Hungary] Pólay Elemér Alapítvány, Szeged, 2009.

45 Sallai János: Az államhatárok. [State borders] Press Publica, Budapest, 2004.

but now, on the contrary, physical borders are newly set up and there are some unique developments redefining even the borders within the EU (between the member countries of the Schengen-Area).

Affairs of the recent past newly put the dilemma of the civilian control of the military forces – the importance of which was decreasing on the surface - in the centre of scientific debates as well. The relevant academic literature on that topic has been quite scanty until the recent past[46]: we can predict that growth within this field of research will continue also apace.

Here, amongst the topics examined, we must mention that there is a growing need within Hungarian and international literature[47] for an international treaty which expansively contains the rights of migrants – because nowadays we can find only isolated provisions related to the given issue within distinct international legal instruments. The preparation of the most important elements of such a treaty is, at least partly, an intrinsic task of sciences.

Whilst some issues become of great importance, others lose their importance in the course of time. Such a, less and less important, issue is the integration of native German immigrants into Germany in the 1990s and at the very beginning of the new millenia[48]; up to now this topic has been eliminated, it has almost vanished.[49]

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46 See e.g. Dr. Szabó Mária: A civil kontroll német megoldása: az Innere Führung. [The German solution for civilian control: the Innere Führung] Védelmi Tanulmányok 21., Stratégiai és Védelmi Kutatóintézet, Budapest, 1997.

47 See e.g. Lőrincz Hajnalka: A nemzetközi migráció szervezeti és jogi keretei. Egyetemi jegyzet. [Organisational and legal frameworks of international migration. University coursebook] NKE, Budapest, 2013. 7.

48 See e.g. Cseresnyés Ferenc: Migráció az ezredfordulón. [Migration at the turn of the millenium] Dialóg Campus Kiadó, Budapest-Pécs, 2005. 191-209.

49 From the latest literature see: Schmidt-Schweizer, A. – Dömötörfi Tibor: „Kijelentette: nem érdekük, hogy az NDK-ból tömegesen meneküljenek az NSZK-ba." Két dokumentum a Magyarországra menekült keletnémet állampolgárok és a nyugatnémet-magyar kapcsolatok történetéhez 1989 augusztus elején. [He declared that it was not in their interest to back mass escape from East-Germany to West-Germany. Two documents on East-German refugees in Hungary and on German-Hungarian relations at the beginning of August 1989] Történelmi Szemle, 2009/2. 295-310.

Actually, the methodological renewal of particular sciences can even gather speed due to the special nature of the migration issue, which can not be handled with traditional means and solutions: e.g. the renewal of the methodology of administrative legal science has become unavoidable (because of many reasons): this topic in question also evidently requires classic case studies and participant obsrevations on the one hand, and the launch of new pilot-projects on the other hand.[50]

There is also a new phenomenon: traditional genres, usually used for debates concerning migration and refugee issues, have become more aerial as well; namely, borders wear off, the representatives of science are moving towards publicists. Nowadays this shift towards publicists is detectable even in journals strongly dedicated to social sciences.[51] The reason behind this new tendency can be the fact that we are forced to react immediately to those radical, elementary changes that have evolved lately.

These questions, as it has already been mentioned above, are not totally new ones, but their intensity and weight makes researchers and institutes who/that have been present for a long while more visible.

Amongst the most visible entities we must mention the HAS Centre for Social Sciences Institute for Minority Studies (MTA Társadalomtudományi Kutatóközpont Kisebbségkutató Intézete), which has published several books (and complete sets of books) repeatedly answering the most urgent and problematic issues, such as the immigration of the ethnic Hungarians living in Romania and in other neighbouring countries, and the migration of the Hungarian Roma to Canada and to other western countries in the last two decades.[52] We must also mention the Division of Border Protection

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50 The methods of modeling should be used preferably because within the complex and adaptive system of public administration the distinct examination of certain elements weekens the verity of possible explanations.

51 Lángh Júlia: Egyetlen árva menekült. [Just a single refugee] Mozgó Világ, 2015/9. 80-83.

52 E.g. Örkény Antal (ed.): Menni vagy maradni? Kedvezménytörvény és migrációs várakozások. [Should I stay or should I go? Preference Act and migration expectations] MTA Kisebbségkutató Intézet, Budapest, 2003.; and Kováts András (ed.): Roma migráció. [Migration of the Gypsies] MTA Kisebbségkutató Intézet – Nemzetközi Migrációs és Menekültügyi Kutatóközpont, Budapest, 2002.

of Hungarian Association of Military Science (Magyar Hadtudományi Társaság Határőr Szakosztálya), the publicational activity of which has been outstanding in the last few years. Unfortunately, it is also inevitable to ingrain that the visibility of some institutes, dealing with similar issues, is quite low [see e.g. the activity of the Research Institute for National Strategy (Nemzetstratégiai Kutatóintézet) in the given field of research].

We could find more and more tipologies related to migration within academic literature[53]; as the weight of this problem is growing and new phenomena do evolve, the grouping of such phenomena seting up a more rigorous catalogue of them becomes more urgent as well.

There is also an inevitable ambition for launching comprehensive and complex writings that trace historical, legal and practical contexts and facts at the same time.[54]

Books that give a general (comprehensive) picture, but do not aim at influencing the public at large, are mostly written for distinct groups of professionals, such as social workers, immigration officers, decision makers, politicians. These books both collect useful data and broaden the field of vision of such professionals.[55]

As an example, a profound brochure published by the Scientific Council of the Office of Immigration and Nationality (Bevándorlási és Állampolgársági Hivatal Tudományos Tanácsa) undertook the review

[53] See e.g. Rédei Márta: Mozgásban a világ. A nemzetközi migráció földrajza. [The World on the move. Geography of international migration] ELTE Eötvös Kiadó, Budapest, 2007. 384-386.

[54] See e.g. Wetzel Tamás: A bevándorlás kérdése Magyarországon. [The immigration issue in Hungary] Publikon Kiadó, Budapest, 2011.

[55] *Szakszerűen segíteni. Kézikönyv és példatár a migráns-specifikus segítés gyakorlatához.* [Professional help. Handbook and case-book on migrant-specific help] Menedék – Migránsokat Segítő Egyesület, Budapest, 2011.; and Állampolgárság és hontalanság. Kézikönyv parlamenti képviselőknek. [Citizenship and statelessness. Handbook for MPs] UNHCR, Budapest, 2007. See also: Lékó Zoltán (ed.): A migrációs jog kézikönyve. [Handbook on law and migration] COMPLEX, Budapest, 2009., and Kőszeg Ferenc (ed.): Menedékjog a magyar gyakorlatban. Kézikönyv a menekültügyi eljárás résztvevői számára. [The asylum practice in Hungary. Handbook for immigration officers and other participants of the process] Kossuth Egyetemi Kiadó, Debrecen, 2001.

of the valid norms and actual practices.[56] Moreover, besides handbooks there are several teaching materials and printed notes.[57]

And lastly, let us take one more aspect into account: the handling of migration phenomena by law-making and executive entities is part of an organisational learning process, an element of a valuable set of experiences within immigration administration and policing.

As Existentialism also presumes, the real character of any person often reveals itself only in extreme life situations; parallelly, the substantive commitment to the democratic values of persons belonging to certain administrative structures, can be measured only in non-plannable, cataclysmic situations that require immediate reactions.

To reach a complete and developed institutional memory we need intentional efforts; to work out such a memory within immigration administration and policing is undoubtedly the task of the near future.

5. The presentment of the migration and refugee issues by contemporary arts in Hungary

It can be a working hypothesis of an essay which introduces the representation of new migration phenomena in arts that the given issue has become not only the part of the tematised public speech but also of contemporary art. In Hungary, 25 years after the change of the regime, migration is an important issue and we can observe that it interests artists more than 10 years ago or just after the fall of the Iron Curtain. Detailed data also show that the number of exhibitions, books, documentary films and movies related to this topic has increased lately.

But this all – as we can recognise it with some surprise – is largely not connected with the current migration wave of 2015 or with the

[56] Ördög István (ed.): Migration Anthology. Bevándorlási és Állampolgársági Hivatal Tudományos Tanácsa, Budapest, 2013.

[57] See e.g. Jójárt Borbála Gyöngyike: Kiutasítás végrehajtásának eljárásjogi kérdései. Egyetemi jegyzet. [Procedural questions of the execution of expulsion. University course-book] PTE, Pécs, 2011.; and Dr. Tóth István (ed.): Idegenrendészeti jog. A Rendőrtiszti Főiskola jegyzete. [Policing of foreigners. A course-book of the Police Academy] Rejtjel Kiadó, Budapest, 1998.

period of time between 2010 and 2014, which also saw some migrants come to Hungary. Actually, the majority of artistic works or exhibitions presenting these works tries to introduce exoduses that happened decades earlier (such as the one after the Trianon Treaty, migration waves under and after WW II, the one after the 1956 Revolution and the migration from Romania via Hungary before and after 1989): mainly the sufferings of Jews[58], Gypsies or Polish people[59] and the resettlement of ethnic Hungarians living outside the new borders of Hungary.

There is a twofold reason behind that: on the one hand, not all the branches of art are able to react immediately by shocking or setting free the audience concerning the given topic, and on the other hand, there is a period of time that is needed for the society for the successful elaboration of the past or for a completed grieving process. One of the most popular fields of current psichology is the introduction of the stages of mourning and grief. The authors of such books all agree that setting up a catalogue of deficiencies behind the losses and the consummation or completion of the failed relationship even without the other party, can be helpful if we would like to face the past or better understand the present.

Supposedly, the newest migration wave of 2015, which strongly influenced Hungary, will be represented in more and more complete forms by artists, even though, parallelly, the interpretation and elaboration of the past has not been finished yet. We can also presume that these two

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58 The exhibition, named 'Gateway to Shanghai' was organised and performed by the Jewish Museum of Shanghai and the Budapest History Museum in 2014 – in memory of the victims of the Holocaust. During World War II the Japanese authorities set up a 'residential area for stateless fugitives', and many Jews who escaped from Hungary lived there that time.

59 The Hungarian Polish Museum in Kőbánya (Budapest) in 2015 launched an exhibition which introduced the Polish refugees of the World War II. Hungary opened its borders and provided a shelter (an asylum) for Polish soldiers and also for families even with children in September of 1939. The exhibition, which was displayed in several places throughout the country, shows the lives of those Polish people in huge photographs. The documentary film, named *Wegierskie serce* (Hungarian Heart, directed by Gzegorz Lubczyk, 2013) also deals with the Polish – Hungarian relations, holding Henryk Slawik's and József Antall's (senior) names in remembrance.

aspects converge somehow enhancing each other and even new forms of the artistic representation of migration can occur as a result of these processes.

The term 'collective memory' was introduced by Maurice Halbwachs, who stated that remembrance is a merely collective, social interpretation, that is a reconstructive process. In relation with the migration topic it is visible that this reconstruction comes off with delays and is not always and exclusively determined by the facts of the present.

5.1. *The Holocaust Issue*

Within the scope of the Holocaust Issue we can observe that during the last two decades not only the survivors have come up with new books[60] and memoirs, but other, previously written but earlier unpublished documents have also been published in Hungary[61]. Moreover, the facts and important connections of the era in question have become more important also for the second and third – mainly Jewish – generation.[62]

There are still some authors and books that have not found their place within Hungarian literature. A good example is the internationally well-known and highly appreciated János Nyíri and his book *Madárország*.[63]

The Roma Holocaust is a very specific topic because of the fact that before 1990 it was forbidden to write about this aspect of the Holocaust in Hungary. This topic is represented by Choli Daróczi József's poems, *Elvitték a cigányokat* [The Gypsies were taken] and *Csend, 1944*

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60 Sándor Iván: Követés. Egy nyomozás krónikája. [Shadowing. A Chronicle of an Ivestigation] Pesti Kalligram Kft., Budapest, 2006.

61 Gyarmati Fanni: *Napló* 1935-1946 I-II. [Diary 1935-1946 I-II.] Jaffa Kiadó, Budapest, 2015. Just after her husband, Miklós Radnóti, the great Hungarian poet, was taken to Labor Service for the third time, Fanni Gyarmati had to hide for months. As she confessed, she began to write because she wanted to perpetuate what had happened to them.

62 See e.g. Márton László: Árnya főutca. [Shady High Street] Jelenkor Kiadó, Pécs, 1999.

63 Nyíri János: *Madárország.* [Battlefields and Playgrounds] Makkábi Könyvkiadó –Téka Könyvkiadó, Budapest, 1990.

[Silence][64]; Nagy Gusztáv's poem, *Auschwitzcesko sikado* [Visiting the Auschwitz-exhibition][65] written in Lovari; Szolnoki Csanya Zsolt's poem, *Auschwitz, 1944*; Száva Vince's poem, *Holokauszt*; Lakatos Menyhért's poem, *Holocaust. Még mindig siratunk* [We are still mourning] [66]; and also in the novels of Farkas Kálmán (*Feldmann*[67]) and Orsós Jakab (Átok[68]).

Two main features of this Roma Holocaust literature are the lack of fiction as a genre and that none of the authors directly witnessed those years.

5.2. *Artistic representation of current phenomena*

Reviewing the fields of art it is better to begin with the genre of *documentary film*. Among these works there are constantly several ones introducing the fate of native Hungarians leaving those territories that were expropriated from Hungary earlier. These films show both migrants choosing Hungary and those going to Western countries.[69]

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64 Choli Daróczi József: Elvitték a cigányokat. In: Varga Ilona – Hegedűs Sándor (Eds.): Válogatás a kortárs cigány irodalom alkotóinak írásaiból a középiskolások számára. [Anthology of artwoks of contemporary Roma writers for secondary schools] Konsept Kiadó, Budapest, 1999., and Choli Daróczi József: Csend, 1944. In: Varga Ilona - Hegedűs Sándor (Eds.): Válogatás a kortárs cigány irodalom alkotóinak írásaiból a középiskolások számára. [Anthology of artworks of Roma writers for secondary schools] Konsept Kiadó, Budapest, 1999.

65 Nagy Gusztáv: Auschwitzcesko sikádó. *Auschwitzi kiállításon.* In: Choli Daróczi József – Nagy Gusztáv (Eds.): Maskar le shiba dukhades. *Nyelvek között fájón*. [Maskar shiba dukhades. Between langueges with pain] Roma módszertani kiadványok 1., Magyar Művelődési Intézet, Budapest, 1994.

66 Lakatos Mernyhért: Holocaust. Még mindig siratunk. In: Lakatos Menyhért: Tenyérből mondtál jövendőt. [You foretold the future through palm lines] Széphalom Könyvműhely, Budapest, 1999. 11-13.

67 *Farkas Kálmán*: *Feldmann*. In: Farkas Kálmán: Csisznyikói cserepek. [Sherds of Csisznyikovó] Országos Cigány Kisebbségi Önkormányzat, Sóstófürdő, 1998. 65-69.

68 Orsós Jakab: Átok. In: Orsós Jakab: Gyökerezés. *Prinde rădĕcină. Buchumisaripe*. [Be routed on…] Zala megyei Könyvtár, Zalaegerszeg, 1992. 39-43.

69 See e.g. *Kárpátaljai szappanopera*. [Soap-opera in Kárpátalja] Documentary film, directed by Dezső Zsigmond, 2007.

Parallelly, the artistic representation of the newest migration wave of 2015 is also an item on the agenda, e.g. the Palantir Film Foundation was supported by the European Integration Fund for making a short documentary film.[70] Otherwise, Palantir Film Foundation has a borrowable collection of 34 documentary films that can be used for educational goals.

Concerning these works, both the documentary ones and the *movies*, there is a further and unavoidable aspect; the possibility of the creation of such films is determined not only by the intents of the authors, nor by the financial background, but also by the prospective receptivity of the social milieu too. '[The film] is the visible aspect of a certain period of time, an interpretation of the movie-makers and at the same time something that is accepted by the audience because the „spectators" do think that the given thing and its introduction is a feasible solution to the representation of the problem.'[71] That interaction between the social environment and films is usually more direct, the relationship is closer than between any work of social sciences and its audience:

As opposed to the films produced by the bigger European countries[72], amongst the Hungarian movies of the last decade we can not find specific works on the migration issue; there is only one among the film proposals supported by the Hungarian National Film Fund [Magyar

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70 The 10-30-minute long documentary films tends to introduce the sentiments and integrational problems of migrant youngsters, presenting the differences based on linguistic, religious and cultural features, the hardships and successes related to the integration, and identity changes as well.

71 Francesco Casetti: Filmelméletek 1945–1990. [Theories of Cinema 1945-1990] Budapest, Osiris, 1998. 123.

72 Mentioning only the well-known examples: Samba (French, directed by Olivier Nakache and Eric Toledano, 2014), Dheepan (French, directed by Jacques Audiard, 2015), and Meditteranea (Italian, 2015). Each movie tries to introduce the hardships of Asian or African illegal migrants in Europe.

Nemzeti Filmalap]: the story of 'The Citizen' [Az állampolgár] tries to address the issue of migration.[73]

A movie adaptation, however, is a huge responsibility. The difference between documentary films and movies also comes from the fact that a movie can not avoid the delineation of the broader contexts and even the introduction of certain cultural differences; on the contrary, a documentary film can concentrate on the essentials, leaving several less important facts in shade: there is no need for direct comparison.

Contrary to the aforementioned tendencies, we have to state that the basic motive of the best Hungarian films of the last few years was to portray different forms of 'escape' or at least the intention of escape. These films show ways of physical escape and – where this form is not possible – methods of escape from reality as well. The *Bibliotheque Pascal* (directed by Hajdú Szabolcs, 2010), the *Aglaja* (directed by Deák Krisztina, 2012), *A nagy füzet* (directed by Szász János, 2013), the *Fehér isten* (directed by Mundruczó Kornél, 2014.), a *Saul fia* (directed by Nemes Jeles László, 2015) were probably the most remarkable films in the last few years.

These films have a common feature: the defencelessness of the main characters is a general phenomenon. Jews, women, children, or even dogs are coerced and degraded by physical outrage or by psychical extortion. As to putting into these movies into shape, the phrases used are almost always rude, unparliamentary, insensible. The dialogues are short, ruffled

[73] The movie, named *The Citizen* [Az állampolgár], takes place in Budapest. It is about the hardships of integration through a love-story that is a refugee-story at the same time. Roland Vranik's (director) movie, which will first be shown in January 2016, works with amateur actors, in a minimalist style and with a lot of humor. The main character of The Citizen, the Black-African Wilson who is in his late fifties, has lost his family in the war, got to Budapest because of political reasons, works as a security guard in a food store for many years, and his goal is to obtain Hungarian citizenship. Mary, a teacher of Hungarian language and history helps him to prepare for the exam on civics, while Shirin, the young Persian girl can stay in Hungary if she marries somebody, actually by a fake marriage.

and tough.[74] The conflicts are angry, often barbarous and insoluble ones: rigidity is general. The persons shown are not able to change and they directly march towards their fate. These films do not contain elements of successful films: there is no personality development, repentance, forgiveness or 'happy ending' at all.[75] As if they were Greek tragedies in which actors unsuccessfully fight against their fate…

The *theatre* – thanks to its 'real-time' form of self-expression – always carries the possibility of making things up-to-date: there is a chance to 'bring' the intrinsic problems of the given era into the play: either through the settings, or through monologues, conversations, through caricaturing some phenomena by changing moves within a dance play or even through rewriting some texts. Exactly this happened by a rewriting of Eugéne Ionesco's play, Makbett, using indirect and even concrete (direct) references related to the Government's migration policies (it was directed by Róbert Alföldi – the premiere was held on 24 September 2015 at Átrium Film-Színház, Budapest). Naturally, the 'experimental theatre' also 'grabs' the issue in question: a good example is the play, named Elveszettek – A hiányzó pillanat [The Lost – The Missing Moment], performed by KÁVA company (KÁVA/MU Színház, 2015).

It is worthy of note that the ways migration related issues appear are closely connected with the contemporary presentment of poverty, misery and situations 'outside society'.

Contemporary Hungarian (fine) *literature* tends to confront utopias that present a breakout from poverty, the erosion of peripheries and social upheaval as if they were real possibilities in current Hungarian society. Among well-known authors especially László Krasznahorkai, Szilárd Borbély[76] and Tibor Kiss[77] represents this firm point of view.

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74 Sellei Iván: Szeretetlenség a magyar filmekben - és körülöttük. [Misadventures within and around Hungarian movies] Szombat. Zsidó politikai és kulturális folyóirat. http://www.szombat.org/kultura-muveszetek/szeretetlenseg-a-magyar-filmekben-es-korulottuk (19 June 2014)

75 Ibid.

76 Borbély Szilárd: Nincstelenek – Már elment a Mesijás? [Penniless people – has the Messiah left already?] Pesti Kalligram Kft., Budapest, 2013.

77 Kiss Tibor Noé: Aludnod kellene. [You'd better sleep] Magvető Kiadó, Budapest, 2014.

Nowadays we can meet the presentment of the migration topic in Hungarian literature mainly in genres like poetry,[78] and also in transitional genres, like publicistics[79]. Novels also present this important issue but they are exclusively books by foreign authors, translated into Hungarian.[80]

Photo Art is also a branch of art which reacts rapidly to new social phenomena. This field, on the one hand, directly helps us to become more conscious concerning our social responsibilities,[81] and on the other hand, it also shows that the migration and the refugee question can not be separated from the context of modern consumer society: e.g. norbert Baksa's fashion photo series in 2015, named *Der Migrant*, introduces the newest fashion collection using models who – for the sake of some artistic impact – are holding onto the fence while some policemen (also played by well-paid models) are trying to catch them…

In addition, the importance of the issue of native Hungarians living outside Hungary has also been enlarged by the Exodus, the new wave of migration, mainly because the constant topics of fine arts of the given minority group are questions of identity and the border-issue. In 2015 the

Hungarian Cultural Institute in Vojvodina [Vajdasági Magyar Művelődési Intézet, VMMI] and the Association of Hungarian Artists in Slovakia [Magyar Alkotóművészek Szlovákiai Egyesülete, MaMszE] procreated a joint project, named *Beyond two borders* [Két határon túl], the aim of which was to introduce a contemporary artistic material of Hungarian artist living in Slovakia in Serbia, and also to introduce a contemporary artistic material of Hungarian artist living in Serbia in Slovakia. 28 representatives of arts and crafts, sculptors, painters, architects, graphic artists were involved; the exhibition in Slovakia was held in Révkomárom, and in Serbia in Zenta and Szabadka.

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78 Molnár Krisztina Rita: Hontalan Iván szomorú története. [The sad story of Ivan the Stateless] ÉS, 2 October 2015. (Poem) 22.

79 Ágoston Gábor: *Menekültkérdés* Törökhonban. [The refugee issue in Turkey] ÉS, 2 October 2015. 43.

80 *Olga Tokarczuk: Nappali ház, éjjeli ház*. [House of Day, House of Night] L'Harmattan Kiadó, Budapest, 2015.

81 See e.g. Balázs Mohai's photos on the World Press Photo exhibition in the Museum of Ethnography (Néprajzi Múzeum), in October of 2015.

6. Conclusion

Concerning such an important question of public politics as the migrant-issue, science has to break with the mockery of 'objective science', and has to admit that in the examination of governmental activities it is impossible to separate goals and means and also values and techniques from each other.[82]

Moreover, it is also untenable that the examination of those elements of the legal system which are closely related to the migration issue, is mainly simplified to an exclusive evaluation by constitutional law, based on the provisions of the current constitution. The examinations made by the representatives of constitutional studies are of great importance, but this aspect can not stay alone: a complex scientific approach to this problem requires the presentation of the political side of the given norms as well.[83] Consequently, a broader approach toward the regulation of the migration issue can be suggested: methods of several fields of science must be applied to reach any substantive results.[84]

This 'basic context' of sciences is completed by the elaboration and cataloguing of artistic performances. It must be mentioned even related to the arts that – based on already traditional approaches – sciences of history serve social interests, mental demands and power requirements; history for postmodernism is a non-interpretable category, it accepts only phenomena like narrative, interpretation or dialogue. *In accordance with such a starting situation what can be the real value of artistic narratives of the migration or refugee issues*?

The answer to this question is, definitely, that by these narratives we are forced to percept the broader contexts and to more soundly traverse and re-catalogue the values behind the facts.

The leisurely erudition of a third party is not enough: any more we

82 Gulyás Gyula: A közpolitika paradoxonai. [Paradoxes of public policies] PhD Dissertation. ELTE, Budapest, 2002. /manuscript/ 69.

83 Szigeti Péter: Társadalomkutatás – mi végre? Politikatudomány – Alkotmányjog –Világrendszerelmélet. [Social research – for what? Political science – Constitutional Law – World system theory] [Publicationes Jaurinenses op. 9. Széchenyi István Egyetem, Győr, 2011. 53.

84 Ibid.

are challenged by the need for active participation, moreover, by the need for compassion within arts, sciences and also in other fields.

One of the main goals of the modern Western-type education is to teach the skills of avoiding pain; the frontal and provoking appearance of issues related to the migrants and refugees is also a vivid critique on certain social consensuses and current social practices.

It is evident concerning several fields of art that the Western-European tradition has an edge over the Hungarian one: either concerning how it relates to the past, or on the immediacy of reactions of certain artistic fields.

Even so, through the migration crisis a huge chance has been presented to Europe: the European and – in our case – Hungarian identity can be strengthened. Moreover, the crisis brought about a demand for questions that were not formulated and asked earlier, and also for setting up a newly defined catalogue of values.

Within Hungarian arts it is extremely obvious that the general effects of migration crises are long-drawn-out stories. Moreover, the tardiness of artistic answers and presentments can be observed, and these works of art often present situations, conflicts that happened decades ago, instead of showing the contemporary phenomena.

We must also weight up the 'scuttle periods' of our history, because without facing the experiences of our past, current challenges can be hardly handled by the same society.

Tamás Molnár[1]

The Right to Asylum in International Law

Motto:
"*Governments* […] *are more often motivated by self-interest than by considerations of humnity, and this provides a further reason for those seeking to combat human rights violations to insist upon the right of asylum*."[2]

1. Historical development

The current form of asylum is the result of a *long historical development*, and it can even be stated that ensuring the right of asylum has existed since the beginning of human history. The word 'asylum' can be traced back to the Greek expression *"asylon"*, the Greek original consists of the privative prefix *"a"* and the word "*syle"*, which means 'the right of capture, detention'.[3] This means that the word *"asylon"* originally meant freedom from capture.[4] The shelters (sacred places, churches and cemeteries) est-

1 Adjunct professor, Corvinus University of Budapest, Institute of International Studies

2 Ian Martin, *Foreword* to Daniele Joly, Clive Nettleton & Hugh Poulton, *Refugees: Asylum in Europe?*, London, MRG, 1992; quoted by Roman Boed, 'The State of the Right of Asylum in International Law', 5 *Duke Journal of Comparative & International Law* (1994) 1.

3 Roman Boed, *op.cit.*, 2 (footnote 3).

4 Kay Hailbronner & Jana Gogolin, 'Asylum, Territorial' in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008- (http://opil.ouplaw.com – article last updated: March 2009), para. 1, Tóth, Judit, *Menedékjog kérdőjelekkel*, Budapest, Közgazdasági és Jogi Könyvkiadó, 1994, 25.

ablished in the different cultures on the basis of customary law, as well as some objects (sculptures of gods or emperors), or the courts of the rulers can be regarded as the *predecessors* of asylum in the modern sense of the word. In the latter case, the provision of shelter was the demonstration of the reconciliation of the conflict between certain social norms (below formal law) and formal law (the supreme power). In ancient Greece, it was initially the temples of the gods that served as sanctuaries against tyrants,[5] and this legal institution was not unknown in the Roman Empire either but it was treated with reservations in Roman law because the ancient Romans were afraid that villains might misuse it.

In medieval Europe, asylum originated from the Catholic Church, which relaxed the strict feudal criminal law.[6] For long centuries, the issues of seeking and providing asylum were not regulated by any international legal norms whatsoever, although *legal scholars* studied the institution of regional asylum as early as in the 16th century. Francisco de Vitoria (1480-1546) discussed the obligation to accept foreigners fleeing persecution as part of the right of communication (*ius communicationis*), i.e. in a broader sense rather than independently, on the basis of natural law. Similarly, Hugo Grotius (1583-1645) viewed asylum as the obligation of a territorial State, and he saw it as an obligation of the State towards the victims of injustice, making a distinction between the eligible innocent foreigners and the criminals excluded from this right. Later, the right to asylum was discussed by von Pufendorf (1632-1694) not as a command of natural law but as the prerogative of the sovereign State, then the fundamental principle of the State discretion of accepting foreigners was even more strongly emphasized by Christian Wolff (1679-1754), as well as Emerich de Vattel (1714-1767), who moved the non-coercible nature (*lex imperfecta*) of the right to asylum to the foreground.[7] It was from the 17th century onwards that the view on

5 Anicet Le Pors, *Le droit d'asile*, Paris, Presses Universitaires de France, 2005, 7-8.

6 Tóth, Judit, *op.cit.*, 25.

7 Vincent Chetail, 'Théorie et pratique de l'asile en droit international classique: étude sur les origines conceptuelles et normatives du droit international des réfugiés', 115 *Revue générale de droit international public* (2011), 627-631.

asylum according to which this means that a sovereign power provides shelter and thus a special status to a foreigner, i.e. to a person who is a "subject" of another sovereign power, consolidated. Despite its history going back to several thousands of years and its worldwide recognition in practice, it is still difficult to find a universal definition for territorial asylum, or the right to asylum.

2. Defining the "right to asylum"

According to the most widely accepted *definition,* asylum means the protection provided by a State to a national of another State against this other State.[8] The receiving State decides by itself who it grants asylum to, i.e. it is not granted on the basis of an individual, unconditional right. Granting asylum is a sovereign prerogative of each State, as controlling the cross border movements of persons and permitting the entry and stay of foreigners are the traditional attributes of territorial sovereignty. Under territorial asylum, a foreign national is allowed to stay in the territory of the State that grants the asylum even if the person otherwise does not fulfill requirements of domestic law regarding the stay of foreigners in that country. Thus, the right of asylum constitutes a unique buffer zone between the territorial sovereignty of a State and the right to physical protection that can be sought by an individual from another State. What we call *diplomatic asylum* should be distinguished from territorial asylum, which means the refusal to extradite a person who has fled to the diplomatic mission of a State. This international legal institution, however, being different from territorial asylum, which is part of general customary international law, only exists in regional frameworks, in some Latin American countries by now (see, for example, the 1928 Havana

[8] See similarly: Institut de Droit international, *L'asile en droit international public* (à *l'exclusion de l'asile neutre*), Session de Bath – 1950, 11 septembre 1950, Article premier.

Convention[9] or the 1954 Caracas Convention[10] as well as the judgment of the International Court of Justice in the *Haya de La Torre (Columbia/Peru)* case in 1951[11]).

Asylum includes at least the following *rights and obligations* stemming from the recognition of refugee status: 1) the right to enter and stay in the territory of the State; 2) the prohibition of return (the principle of *non-refoulement*); 3) the prohibition of extradition; 4) the prohibition of persecution and punishment by the State providing shelter; 5) and the protection and support to be provided to the refugees.[12]

3. International legal framework and its evolution

After the Second World War, from among the international legal instruments, it was in Article 14 of the *Universal Declaration of Human Rights* (UDHR)[13] that *the right to asylum* was first defined on a universal level. It says that "Everyone has the right to seek and to enjoy in other countries asylum from persecution. […] This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." In this context, the provisions set out in Article 13(2) of UDHR should also be

9 *Convention on Asylum, Signed in Havana, February 20, 1928, at the Sixth International Conference of American States* (OAS Official Records, OEA/Ser.X/I. Treaty Series 34), available at http://www.refworld.org/docid/3ae6b37923.html (last accessed on 1.12.2015).

10 *Convention on Diplomatic Asylum*, *29 December 1954* (OAS, Treaty Series, No. 18), available at http://www.refworld.org/docid/3ae6b3823c.html (last accessed on 1.12.2015).

11 *Haya de la Torre Case (Colombia v. Peru)*, International Court of Justice, judgement of 13 June 1951, I.C.J. Reports 1951, 4.

12 James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge, Cambridge University Press, 2005, chapters 4-5; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, Oxford, Oxford University Press, 2007, 3rd edition, chapter 7.

13 *Universal Declaration of Human Rights*, adopted by General Assembly Resolution 217 A(III) of 10 December 1948. The UDHR is available in 369 language variations on the website of the Office of the United Nations High Commissioner for Human Rights (http://www.ohchr.org/).

mentioned: "Everyone has the right to leave any country, including his own, and to return to his country." The situation is that this universal right regarding the country of origin is critical in applying for asylum in another country. The right to leave a country was then confirmed by *universal codifications* [such as Article 12(2) of the International Covenant on Civil and Political Rights[14]], as well as *regional human rights treaties* (e.g. Protocol 4 of the 1950 European Convention on Human Rights;[15] the 1969 American Convention on Human Rights,[16] or the 1981 African Charter on Human and Peoples' Rights[17]).

Although asylum can even be interpreted as a universal individual right if seen in the light of the definition in Article 14(1) of the UDHR, the content of which can be regarded as reflecting customary international law, both the subsequent instruments of universal character and the regional conventions prove that it was the "*right of seeking asylum*" that was acknowledged by the international community as a human right. As a result, the granting of asylum still remains the sovereign right of each territorial State. It is pointed out in Article 1(1) of *the Declaration on Territorial Asylum* solemnly adopted by the United Nations (UN) General Assembly in 1967 that "[a]sylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights […] shall be respected by all other States".[18] In other parts of the Declaration, it is the State granting the asylum that is specified as well.

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14 *1966 International Covenant on Civil and Political Rights* (UNTS No. 14668, vol. 999, 171).

15 *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto*, Strasbourg, 16/09/1963 (CETS No. 046).

16 *American Convention on Human Rights*, signed at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

17 *African (Banjul) Charter on Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

18 UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), available at: http://www.refworld.org/docid/3b00f05a2c.html (last accessed on 1.12.2015).

In harmony with the universal international instruments, in the regional conventions, the right of the States to grant asylum to those in need is underlined as well. This approach is obvious in Article 1 of *the 1954 Convention on Territorial Asylum adopted by the Organization of American States*[19], then in Section III.4 of the *1984 Cartagena Declaration*[20] elaborated by Central American States; furthermore, in Article II(1)-(2) of the *1969 Addis-Ababa Convention* governing the specific aspects of refugee problems in Africa,[21] and then in Article 12(3) of the *1981 African Charter of Human and Peoples' Rights,*[22] as well as in regional *soft law* documents alike (see, for instance, the fundamental principles on the treatment of refugees laid down by the Asian-African

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19 *Convention on Territorial Asylum*, *29 December 1954* (OAS, Treaty Series, No. 19), Article 1: "Every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State."

20 *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984, Section III.4: "…the peaceful, non-political and exclusively humanitarian nature of grant of asylum or recognition of the status of refugee and to underline the importance of the internationally accepted principle that nothing in either shall be interpreted as an unfriendly act towards the country of origin of refugees."

21 *OAU Convention governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session*, Addis-Ababa, 10 September 1969 (U.N.T.S. No. 14691), Article II(1)-(2): "1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality. 2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State."

22 Article 12(3): "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions."

Legal Consultative Committee in 1966 and revised in 2001;[23] or the 1977 Council of Europe Declaration on Territorial Asylum[24]). Article 18 of the *Charter of Fundamental Rights of the European Union*[25] also indirectly reflects this concept when, besides the founding treaties of the EU, it refers to the 1951 Geneva Convention and the 1967 New York Protocol thereof, in line with which asylum should be granted. It can be clearly concluded from the subject and purpose, as well as the regulatory logic of these two international treaties that 'asylum' in this sense does not mean more than the right of seeking asylum, while the granting of asylum ultimately depends on the discretion of Member States by taking the substance of international and EU asylum law into account.

If one looks at the universal endeavors of the past decades, the diplomatic conference convened under the aegis of the UN in 1977 in order to discuss the regulation of territorial asylum failed, which well illustrates that States were not ready to consider conceiving asylum as a universal right, i.e., as approached from the other side, to accept the granting of asylum as a State obligation under international law. The provisions set out in paragraph 23 of the *Declaration and Program of Action adopted by consensus at the 1993 Vienna World Conference on Human Rights*[26] merely repeat the content of Article 14(1) of UDHR again, so it can be

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23 *Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees, as adopted on 24 June 2001 at the AALCO's 40th Session*, New Delhi, available at http://www.refworld.org/publisher,AALCO,,,3de5f2d52,0.html (last accessed on 1.12.2015).

24 Council of Europe, Committee of Ministers, *Declaration on Territorial Asylum* (Adopted by the Committee of Ministers on 18 November 1977, at the 278th meeting of the Ministers' Deputies).

25 *Charter of Fundamental Rights of the European Union,* OJ C 326, 26.10.2012, 391.

26 *Declaration and Program of Action adopted by consensus at the 1993 Vienna World Conference on Human Rights* (A/CONF.157/23, excerpted from DPI/1394/Rev.1/HR-95-93241, April 1995, on the World Conference on Human Rights, 14-25 June 1993), available at http://www.unesco.org/education/nfsunesco/pdf/VIENNA.PDF (last accessed on 1.12.2015), para. 23: "The World Conference on Human Rights reaffirms that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution…".

concluded that at the current stage of development of international law, an individual is not entitled to receiving asylum on a universal basis, which right could be invoked and enforced against the country where the refugee wishes to stay.

4. Personal scope – refugees and other persons enjoying international protection

If one approaches the issue from the legal preconditions of access to asylum, one can define the *scope of persons* who may enjoy this special human right called 'asylum' (*ratione personae*). In general, it can be stated that the beneficiaries of the right of asylum are those forced migrants who were forced to leave their own country because of some form of persecution, against their will (they are refugees). From the legal point of view, a *refugee* is a person who meets the requirements of the concept of refugee defined by an international treaty or the national law of a specific State. The refugee definition being acknowledged in the widest scope is provided by the *1951 Geneva Convention relating to the Status of Refugees*,[27] and which was supplemented by the *1967 New York Protocol*,[28] in order to release the regional and time restrictions. These two international legal instruments are the cornerstones of the international legal regime ensuring the protection of refugees. Under the 1951 Geneva Convention, which by now claims universality, a refugee means any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." (Article 1, Section A(2)). The substantive requirements of this refugee definition are

[27] *Convention on the Status of Refugees of 28 July 1951* (UNTS No. 2545, vol. 189, 137). As of now, the Convention has 145 States Parties.

[28] *1967 Protocol Relating to the Status of Refugees* (U.N.T.S. No. 8791, vol. 606, 267).

called *inclusive elements* and the collective term for the persons who fulfill the requirements contained in this definition is "*convention refugees*". It should be pointed out that this definition only entitles those who seek refuge to submit their applications for asylum and for the competent authority to review them, there are no more rights at all (as this also derives from the currently dominant interpretation of Article 14 of UDHR in international legal scholarship). In the Geneva Convention, there are no provisions whatsoever on the procedures aimed at determining refugee status, so this is left to the discretion of *the national law of the States involved*. As a general rule, the application of the person who considers himself a refugee is assessed by the competent authorities of the country in which this person applies for asylum and if the country concerned has no functioning asylum system and infrastructure, then it is the *Office of the United Nations High Commissioner for Refugees* (UNHCR) which may grant refugee status, acting on the basis of the mandate in its Statute[29] on this subject (these are the so-called *mandate refugees*).

On the regional level, on the *American continent*, it is the Convention on Territorial Asylum adopted by the Organization of American States in 1954 and the 1984 Cartagena Declaration; then *in Africa*, it is the 1969 Addis-Ababa Convention governing the specific aspects of refugee problems in Africa, while *in Europe*, it is the EU's asylum *acquis* that have been growing continuously since the 1990s that constitute the legal framework of refugee protection (by having built up the Common European Asylum System), which also take regional characteristics into account. The definitions of refugee in the regional structures exceed the term "convention refugee" as defined by the 1951 Geneva Convention, and their definition of the category of people receiving asylum (international protection) is wider than this. The 1951 Geneva Convention allows that, by the extensive interpretation of what we call inclusive requirements, asylum can be provided to a wider scope of applicants. The *UNHCR Executive Committee* (ExCom), which consists of the government representatives of the internationally most affected countries

[29] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: http://www.refworld.org/docid/3ae6b3628.html (last accessed on 1.12.2015).

of origin and countries of destination, has interpreted the components of the definition of convention refugees like this, allowing for broader definitions on the regional level.[30] According to the wider definition in the *1969 African Convention*, a person is also entitled to obtain refugee status if "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, he is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." (Article 1(2)). In the Latin American region, the *1984 Cartagena Declaration* further extended the definition used by the 1951 Geneva Convention, since its concept "includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order" (Section II.3).

The definition applied in the *asylum acquis of the European Union,* which, in addition to the term refugee, also introduced the collective term "beneficiaries of international protection",[31] on the one hand, took over the traditional definition of refugee used in the 1951 Geneva Convention, and on the other hand, introduced a new type of protection status, through the so-called "*persons eligible for subsidiary protection*".[32] According to the recast Qualification Directive (2011/95/EU), the latter protection status covers those who do not qualify as refugees *stricto sensu,* but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as

30 E.g. UNHCR ExCom conclusions No. 37 (XXXVI) of 1985, lit. (d); No. 41 (XXXVII) General of 1986, lit (i); No. 44 (XXXVII) of 1986, preamble.

31 See e.g. *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)* (OJ L 337, 20.12.2011, 9-26), Article 2 lit. (b).

32 See Directive 2011/95/EU, Article 2 lit. (g) and Chapters V-VI.

defined, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.[33] In the revised Qualification Directive, "serious harm" consists of means imposing or executing a death sentence, torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[34] What is more, in EU law, the group of those who receive what we call *temporary protection* is yet another special category, and the purpose of this form of international protection by virtue of Directive 2011/55/EC is, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, to provide immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.[35]

Since the right to asylum provides international protection against persecution to those who deserve it, the cases of non-eligibility, i.e. the *reasons for exclusion* from the right to asylum are also defined by the 1951 Geneva Convention. Under this exclusion clause (Article 1, Section F), the provisions of this Convention shall *not apply* to any person with respect to whom there are serious reasons for considering that: a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

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33 Directive 2011/95/EU, Article 2 lit. (f).

34 Directive 2011/95/EU, Article 15.

35 *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof* (OJ L 212, 7.8.2001, 12-23), Article 2 lit. (a).

In some cases, refugee protection under the 1951 Geneva Convention is not necessary, as the person concerned does not need it. The cases of *the lack of need* are described in Article 1, Sections D and E which say that the Geneva Convention shall not apply to persons who a) are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for refugees protection or assistance (e.g. the organizations such as UNRWA[36] or UNKRA[37] assisting Palestinian and Korean refugees, respectively), furthermore, b) to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

5. Protection status – rights of refugees

As for the content of the international protection, the *rights* involved by the acknowledgement of refugee status *(the substance of protection)* are set out in Articles 3-34 of the 1951 Geneva Convention.[38] The main rights are as follows: 1) no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion (principle of *non-refoulement*); 2) the recognized refugees should be provided with travel documents; 3) the States should treat the refugees on an equal basis with their own nationals (e.g. with regard to the freedom of religion, the right of access to the courts, labor regulation and social security, as well as the right of intellectual property), or they should definitely not be treated less favorably than foreigners (e.g. with regard to housing, self-employment, independent professions, employment, the acquisition of property).

[36] United Nations Relief and Works Agency for Palestine Refugees (http://www.unrwa.org/).

[37] United Nations Korean Reconstruction Agency.

[38] For a detailed commentary of those rights, see: Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary*, Oxford, Oxford University Press, 2011; James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge, Cambridge University Press, 2005.

A refugee will lose this status on the ground of the following *cessation clauses*: if a) he has voluntarily re-availed himself of the protection of the country of his nationality (e.g. he has obtained a national passport); b) having lost his nationality, he has voluntarily re-acquired it; c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality (e.g. he was naturalized in the country of refuge); d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution (repatriation); or e) he can no longer be considered a refugee, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist (Article 1, Section C of the Geneva Convention).

The protection standard provided by the 1951 Geneva Convention and the 1967 New York Protocol is by far not complete. Furthermore, these documents provide almost nothing on procedural law issues, so some of the phases and principles of procedure as well as procedural safeguards regarding the recognition of refugees are contained in the norms set out in *soft law documents* elaborated and developed by the UNHCR and the Executive Committee of the Office of the High Commissioner during several decades. In 1992, the *Handbook on Procedures and Criteria for Determining Refugee Status*[39] was published by UNHCR (then reissued in 2011), which contains a collection of experiences of several decades in application of law regarding the requirements of determining the refugee status and the assessment thereof. Likewise, a high number of *conclusions* were adopted by the *UNHCR Executive Committee* on the clarification and explanation of certain aspects of the right to asylum, as well as the proper application of asylum law.[40] Additionally, some pertinent resolutions have been adopted by the *UN General Assembly, too,* e.g. on the procedure to be applied in the case of a mass inflow of

[39] *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Reissued, Geneva, December 2011, available at http://www.unhcr.org/3d58e13b4.html (last accessed on 1.12.2015).

[40] See *Conclusions adopted by the Executive Committee on the International Protection of Refugees, 1975 – 2009 (Conclusion No. 1 – 109),* Office of the United Nations High Commissioner for Refugees, Division of International Protection Services, December 2009.

refugees, on temporary protection to be provided in such cases, or on family reunification.[41]

As regards the application of the provisions set out in the Geneva Convention and the monitoring of their implementation, it is to be emphasized that no treaty body has been established by the Convention, which would have controlled and monitored the fulfillment of the obligations by the Contracting Parties, nor has it set up a human rights monitoring mechanism. However, it is the responsibility of the *UNHCR to control the implementation* of the Convention by the States (in the light of Article 35), which activity is primarily performed through consultation, providing advice, the issuance of position papers and turning to the public. As far as the international jurisprudence on refugee law is concerned, besides the judgments rendered by the International Court of Justice on the asylum case between Columbia and Peru in 1950 and 1951, it is in the case-law of *regional human rights courts and quasi-judicial bodies* where one can find cases related to refugees and contemplating their protection before international judicial forums [see: the European Court of Human Rights (e.g. case No. 2345/02 – *Said v Netherlands*; case No. 27765/09 – *Hirsi v Italy,* case No. 14743/11 – *Abdulkhakov v Russia*; case No. 58802/12 – *A.A. v Switzerland)*; the Inter-American Court of Human Rights (e.g. case No. 10.675 – *Haitian Refugee Cases* 1994; report No. 51/96 – *Haitian Center for Human Rights v United States*), and in the past few years, the *Court of Justice of the European Union* has also established an increasingly significant judicial practice concerning the qualification of persons eligible to international protection as well as the rights and entitlements of refugees and other beneficiaries of international

[41] For an inventory of those asylum related UNGA resolutions, see http://www.refworld.org/publisher,UNGA,RESOLUTION,,50ffbce5271,,0.html (last accessed on 1.12.2015).

protection (e.g. case No. C-465/07 – *Elgafaji*; case No. C-31/09 – *Bolbol*; case No. C-69/10 – *Samba Diouf*; case No. C-285/12 – *Diakite*)[42] etc.).

6. Closing remarks

It is evident from the above sketchy portray that international refugee law, both on universal and regional planes, protects people who seek asylum from persecution, and those who have been recognized as refugees. This branch of international law overlaps to some extent with international human rights law, which means that its fundamental principle called "right to asylum" is complemented by human rights considerations and obligations, and it is interpreted with the legal toolbox developed for the interpretation of internationally protected human rights. The domestic implementation by States of the individual right of asylum continues to raise controversies and grave concerns alike (e.g. the access to asylum procedures is getting harsher and harsher).[43] I conclude with the expressive words of Hailbronner and Gogolin, who noted: '[w]hile the rights of refugees once recognized are fairly well determined under the Geneva

[42] For more on that trend, consider e.g. Madeline Garlick, 'International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR' 34 *Refugee Survey Quarterly* (2015), 107-130; Geert De Baere, *The Court of Justice of the EU as a European and International Asylum Court*, Leuven Centre for Global Governance Studies, Working Paper No. 118, August 2013 (available at https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp111-120/wp118-de-baere.pdf – last accessed on 1.12.2015); Madeline V. Garlick, 'The Common European Asylum System and the European Court of Justice. New Jurisdiction and New Challenges', in Elspeth Guild, Sergio Carrera & Alejandro Eggenschwiler (eds.), *The Area of Freedom, Security and Justice Ten Years on. Successes and Future Challenges Under the Stockholm Programme*, Brussels, Centre for European Policy Studies (CEPS), 2010, 49-62 (available at http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=117520 – last accessed on 1.12.2015).

[43] Cf. Vincent Chetail, 'Droit international des migrations: fondements et limites du multilatéralisme' in Habib Gherari & Rostane Mehdi (éd.), *La société internationale face aux défis migratoires*, Paris, Editions A. Pedone, 2012, 51-52.

Refugee Convention, the duties of States towards an individual, whose claim is still examined, are giving rise to some controversy. […] To this point, there is very little customary law restricting the right of States to prevent potential asylum seekers from reaching their territory. There is wide consensus, however, that problems relating to territorial asylum cannot be solved by focusing upon the duties of States receiving asylum seekers, but by establishing a concept of international co-operation and development reducing the need to resort to asylum as a backdoor to illegal immigration.'[44]

[44] Kay Hailbronner & Jana Gogolin, *op.cit.*, para. 39.

Photo by Hajni Valczer. Röszke, Hungary, 2015.

Csaba Törő[1]

The Main Normative Elements of the Current European Asylum System Applicable to Hungary

1. Common European Asylum System

Since 1999, the EU has been working to create a Common European Asylum System (CEAS) and install its necessary legal elements. At its special meeting in Tampere in October 1999, the European Council agreed to move towards the formation of CEAS based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the Status of Refugees as supplemented by the New York Protocol of 31 January 1967.

The main goal was confirmed in November 2004 by the adoption of the Hague Programme setting out the objectives for the implementation of the area of freedom, security and justice within the EU during the period 2005-2010. Five years later, the heads of EU states and governments approved the Stockholm Programme (in December 2009) which undertook to establish a common area of protection and solidarity through the application of a common asylum procedure with high protection standards and effective practice by 2012.

The Lisbon Treaty provides a legal basis for an EU-wide asylum policy.[2] The respective provision prescribes for the EU to 'develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement'. For the purposes of common asylum and

1 ....

2 Article 78, Treaty on the European Union (TEU)

protection policies, the Treaty authorized the European Parliament and the Council – together as co-legislators in accordance with the ordinary legislative procedure – to adopt a broad range of legislative measures for a common European asylum system.

These acts of EU legislation were envisaged to lay out the rules in all Member States on a uniform status (with equal validity throughout the Union) of *asylum* and *subsidiary protection* (without qualifying for European asylum, but nevertheless in need of international protection) for nationals of third countries. Furthermore, a common system of *temporary protection* had to be introduced for displaced persons in the event of a massive inflow. Not only the status, but also the *procedure* leading to the decision on granting and withdrawing uniform asylum or subsidiary protection was stipulated in the Treaty as another area that requires common rules at EU level.

The allocation of *responsibility* among EU countries for the conduct of asylum procedure was also identified as another aspect of the common asylum system where a particular legislative act should determine the criteria for the attribution of competence to one of the Member States.

The introduction of a common asylum system was intended to bring about a high degree of similarity, set the aim of common high standards and stronger co-operation to ensure that asylum seekers are treated equally in every Member State. An asylum system with the same normative contours within the entire EU was designed to introduce and maintain the equivalent treatment of asylum-seekers across the Union in order to prevent their free circulation between Member States in search of the best place ("asylum shopping") to submit asylum application with the highest protection standards and the most generous conditions.

In the first phase of the evolving CEAS, only the lowest common denominator (minimum standards) could be adopted and put in practice in all Member States. As another illustration of normative expansion and approximation in the EU by the piecemeal approach, the adoption of a package of EU legislative acts moved the common standards higher and pulled the national standards closer in 2013 completing the second phase of the CEAS.

All adopted instruments of EU legislation – either directly applicable and effective in the form of regulation or directives requiring national implementation measures – for the uniformity or, at least, approximation of standards on the treatment of asylum applications and procedures across the Union were justified – in line with the requirement of subsidiarity[3] – by the invocation of objectives that cannot be sufficiently achieved by Member States separately and can therefore be better attained at a Union level.

The current harmonized European asylum framework rests on the following principal secondary sources of EU rules applicable everywhere within the Union.

2. International protection granted in EU Member States

First of all, EU rules clarify the reasons and circumstances for which EU countries can and should confer international protection on applicants within their jurisdiction. The Qualification Directive[4] of 2011 determines the grounds on which international protection is granted to asylum-seekers. The minimum standards for international protection set out in the previous version of the relevant EU norms were considered too vague, because it permitted a larger latitude for national regulation and maintained divergence in national asylum legislation and practices within the Union. The chances for the conferment of international protection could vary significantly from one Member State to another.

One of the main stated objectives of the Qualification Directive is aimed to ensure that Member States apply common criteria for the identification of persons in need of international protection and guarantee that the same minimum level of benefits is available for those persons in all Member States.[5]

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3 Article 5, TEU

4 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *Official Journal of the European Union*, L 337/9, 20.12.2011

5 ibid. Recital 12

The approximation of rules on the recognition and content of refugee and subsidiary protection status through the implementation of the Qualification Directive was expected to limit the "secondary movement" of applicants for international protection (their further flow from one EU country to another) within the Union, when such movement is purely motivated by differences in legal frameworks.[6]

Among the reasons for law approximation, the Directive stressed the necessity to introduce common criteria for recognising applicants for asylum as refugees (within the meaning of Article 1 of the Geneva Convention)[7], common concept of persecution[8] and common criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection[9].

Within the scope of its provisions, the Directive sets out the parameters of the assessment of applications with regard to the evaluation of facts and circumstances as well as the consideration of international protection needs. In order to ensure uniform interpretation, the Directive also prescribes the definitions (such as the acts of and reasons for persecution in case of refugee application) and meanings (for instance, real risk of serious harm to a person as justification for subsidiary protection) applicable to the qualification for refugee status or subsidiary protection. Other important provisions determine the conditions for granting of refugee or subsidiary protection status and the circumstances for the revocation of, ending of or refusal to renew refugee status or subsidiary protection.

With respect to the content of international protection, the Directive firmly ensures the uniform protection of applicants from refoulement by direct reference to the obligation of Member States to respect the principle of non-refoulement in accordance with their international obligations.[10]

The benefits of either status of international protection are determined in the form of duties for Member State to ensure various significant rights for refugees or recipients of subsidiary protection. The implied broad

6 ibid. Recital 13
7 ibid. Recital 24
8 ibid. Recital 30
9 ibid. Recital 34
10 ibid. Article 21

range of rights practically extend various entitlements of the nationals of Members States (or those of foreigners legally residing in their territories) to refugees and persons receiving subsidiary protection. For the exercise of these conferred rights all EU countries are required to adopt national measures to the following effects.

As soon as possible after international protection has been granted, Member States must provide the beneficiaries of refugee or subsidiary protection status with residence permit which must be valid for at least 3 years or 1 year respectively with the possibility of renewal for further periods.[11]

Member States are ordered to authorise beneficiaries of international protection to engage in employed or self-employed activities in accordance with the rules generally applicable to the profession and to the public service, immediately after protection has been granted.[12]

Member States need to ensure that the beneficiaries of international protection receive the necessary social assistance in the same manner as provided for their own nationals.[13]

Access to healthcare must be ensured for the beneficiaries of international protection under the same eligibility conditions as nationals of the Member State that has granted such protection.[14]

With a rather vague meaning, Member States need to provide refugees and recipients of subsidiary protection with "access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories".[15]

In order to facilitate the social integration of refugees and beneficiaries of subsidiary protection, Member States are obliged to maintain open access to appropriate integration programmes as well as specific provisions for children and vulnerable persons.

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11 ibid. Article 24
12 ibid. Article 26
13 ibid. Article 29
14 ibid. Article 30
15 ibid. Article 32(1)

3. Harmonized asylum procedure in the EU

The Asylum Procedure Directive[16] was adopted in 2013 to establish common procedural rules for granting and withdrawing international protection with the aim of providing uniformly applied and protected rights for asylum-seekers during the process of application for and deliberation of refugee status. The common procedural rules set a time limit of maximum six months for the regular asylum procedure in any EU country.

The Directive on the approximation of asylum procedures was conceived to replace the previous arrangement at EU level, which allowed large differences in national rules and practice among EU members. The currently applicable common norms were introduced to create a more uniform system which ensures that decisions on asylum seekers are made more efficiently and all Member States examine applications by the same high quality standards.

The Asylum Procedures Directive lays out the normative features of the whole process of claiming asylum. Its provisions cover practically all aspects and stages: how to apply, how the application should be examined, what help the asylum seeker must be given, how to appeal and whether the appeal would allow the person to stay on the territory, what can be done if the applicant escapes to another EU country or how to deal with repeated applications.

The Directive prescribes the basic principles and guarantees of the asylum procedure: access to the procedure[17], the applications made on behalf of dependants or minors[18], information and counselling in detention facilities and at border crossing points[19], right to remain in the Member State pending the examination of the application[20], requirements

16 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Official Journal of the European Union L 180/60, 29.6.2013

17 ibid. Article 6

18 ibid. Article 7

19 ibid. Article 8

20 ibid. Article 9

for the examination of applications[21], requirements for a decision by the determining authority[22], guarantees for applicants[23], obligations of the applicants[24], personal interview[25], medical examination[26], provision of legal and procedural information free of charge in procedures at first instance[27], free legal assistance and representation in appeal procedures[28], right to and the scope of legal assistance and representation at all stages of the procedure[29], applicants in need of special procedural guarantees[30], guarantees for unaccompanied minors (appointment of qualified representative by the national authorities)[31], detention[32] and the procedure in the event of (explicit or implicit) withdrawal of the application[33].

Further provisions define the content and aspects of commonly applicable appeals procedure in the exercise of the right to an effective remedy before a court or tribunal, against a decision taken on their application for international protection.[34]

Although the Directive determines the parameters of interpretation for the concept of safe country of origin[35], it leaves within the national competence of Member States to designate third countries (in accordance with the Annex attached to the Directive) as safe countries of origin for the purposes of examining applications for international protection.[36]

In any application of the concept of European safe third country, Member States may provide that no (or no full) examination of the ap-

21 ibid. Article 10
22 ibid. Article 11
23 ibid. Article 12
24 ibid. Article 13
25 ibid. Articles 14-17
26 ibid. Article 18
27 ibid. Article 19
28 ibid. Article 20
29 ibid. Articles 22-23
30 ibid. Article 24
31 ibid. Article 25
32 ibid. Article 26
33 ibid. Article 27-28
34 ibid. Article 46
35 ibid. Article 36
36 ibid. Article 37

plication for international protection should take place in cases where a competent authority has established, on the basis of the facts, that the applicant is seeking to enter or has entered illegally its territory from a safe third country.[37] The basic criteria for the qualification of safe third country is stated by the Directive as the ratification and observance of the Geneva Convention without any geographical limitations, asylum procedure prescribed by law and the ratification and observance of the European Convention for the Protection of Human Rights and Fundamental Freedoms including the standards relating to effective remedies.[38]

Cases that are unlikely to be well-founded can be dealt with in special procedures ('accelerated'[39] and 'border' procedures[40]). The Directive made it clear when these procedures can be applied in order to avoid the inclusion of well-founded cases into the scope of those facilitated procedures.

After the Directive entered in force in 2015, Member States have also become better equipped to deal with abusive claims, in particular with repetitive applications by the same person. Someone who does not need protection will no longer be able to prevent removal indefinitely by continuously making new asylum applications.

4. The Dublin framework for the allocation of responsibility within the EU

The so-called Dublin system is considered a cornerstone in the construction of the Common European Asylum System, which allocates responsibility among Member States in the examination of applications for international protection. The core principle of the original Dublin Regulation[41] is that the responsibility for examining claim lies primar-

37 ibid. Article 39

38 ibid. Article 39(2)

39 ibid. Article 31(8)

40 ibid. Article 43

41 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal of the European Union, *Official Journal*, L 50, 25.02.2003

ily with the Member State which played the greatest part in the entry or residence of the applicant in the EU. The criteria for establishing responsibility include, in order of priority, from family considerations, to recent possession of visa or residence permit in a Member State and the mode of entry (irregular or regular) into the European Union.

The previous (Dublin II) Regulation was seen as one of the structural problems of EU asylum policy. In the absence of an EU-wide asylum status, it regulated the responsibilities of Member States for the examination of asylum applications and granting protection if the asylum application is justified. The provisions of that Regulation established that, by default, the first Member State an asylum-seeker entered is responsible for examining their application for international protection. This means that an asylum-seeker who moves to another Member State is automatically transferred back to the Member State at the external borders of the EU. As a consequence of the Dublin rules, those Member States found themselves in the front line for asylum-seekers and as entry points for irregular migrants. The duty to process all these cases placed EU members on the outer perimeter of the Union under high pressure of all sorts of arrivals and claims.

The Dublin III Regulation[42] was intended to avoid situations when no Member State takes responsibility for asylum-seekers and to prevent multiple asylum application. The current Dublin arrangement was designed to introduce better procedures for the protection of asylum applicants and improve the efficiency of the system in several aspects.

Besides those improvements, the hierarchy of criteria for determining the competence of Member States is established by the Regulation to define the significance and relative weight of circumstances in the attribution of responsibility for the conduct of asylum procedure in any particular case. The list of criteria contained in the Dublin III. Regula-

[42] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, *Official Journal of the European Union*, L 180/31, 29.6.2013

tion introduced a compulsory order of priority in the consideration of national responsibility among EU Member States for processing an asylum application.

The first criterion to be considered is the location of relatives of minors.[43] Then, the residence of family members who are beneficiaries of international protection in an EU country must be taken into account as the decisive circumstance.[44] The next criterion that could assign responsibility for the procession of an asylum application is the presence of family members who are applicants for international protection in an EU Member State.[45] Next in line, the allocation of responsibility for asylum applications should be treated in combination with applications by other members of a family. In that instance, asylum applications would be contracted for a cluster of claims that belong together, therefore all of them need to be evaluated and decided upon as parts of interrelated cases.[46]

If an applicant is already endowed with a valid residence document, the Member State which issued the document shall be responsible for examining the application for international protection.[47]

If all the above criteria could not be applied, the geographical location of the entry into EU jurisdiction becomes a decisive aspect in the determination of national competence for the asylum procedure. Where it is established that an applicant irregularly crossed the border into an EU country from outside the Union, that particular Member State must bear responsibility for examining the application for international protection. That responsibility can be validly attributed only for 12 months after the date on which the irregular border crossing took place.[48]

If a third-country national enters the territory of EU country under the favourable conditions of visa waiver, that particular member of the European Union will be held responsible for examining the application for international protection.[49]

43 ibid. Article 8
44 ibid. Article 9
45 ibid. Article 10
46 ibid. Article 11
47 ibid. Article 12
48 ibid. Article 13
49 ibid. Article 14

Where the application for international protection is submitted in the international transit area of an airport of an EU member by a third-country national, no other EU country could assume responsibility than the territorial state for the examination of the application.[50]

Under the applicable Dublin rules, the Member State whose responsibility can be established on the ground of the above order of criteria is expressly obliged to comply with one of the prescribed procedures (take charge or take back) to handle the asylum application falling within its defined competence.[51]

In case of an obligation to take charge, the competent Member State must assume responsibility, under the conditions laid down in the Regulation[52], for the full conduct of an application procedure lodged in a different Member State. In other examples of attributed responsibility, the Member State has to take back, according to the defined conditions[53], an applicant whose application is either under examination, or the application under examination has been withdrawn or rejected, but made an application in another EU country or stays on the territory of another EU member without a residence document.

The Regulation lays out the parameters of the procedures for taking charge and taking back as well.[54] Further, separate provisions determine the necessary applicable safeguard measures and available remedies for applicants.[55]

With regard to the detention of applicants during the process of transfer from an EU Member State to another, a single ground for detention was determined to secure transfer procedures with a strict limitation to the duration of detention.[56]

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50 ibid. Article 15
51 ibid. Article 18
52 ibid. Articles 21, 22 and 29
53 ibid. Articles 23, 24, 25 and 29
54 ibid. Article 20-25
55 ibid. Article 26-27
56 ibid. Article 28

Móré Sándor[1] – Szilvásy György Péter[2]

The Official Forum System of the Asylum Administration

1. The legal and procedural framework of asylum in Hungary

In Hungary, the basic tasks of managing asylum are performed by a central administrative body, which fits into the conventional organizational structure of administration. Even though the management of this body is ministerial responsibility, in addition to the central administrative body it also has regional bodies. However, before we give a detailed presentation about this body, it is appropriate to say a few words about the issue of Hungarian legislation on refugees and administrative proceedings regarding the management of asylum.

1.1. *Framework of the Hungarian legislation*

In Hungary regulations associated with refugees and persons of comparable status in legal relationships are controlled in a multi-level way.

1.1.1. At the highest level, our constitution, the Fundamental Law of Hungary (25th April, 2011) contains certain provisions which should be taken into consideration regarding our topic. First of all, the chapter on fundamental rights (title: Freedom and responsibility) is relevant, as Article XIV paragraph (3) stipulates:

'Hungary shall, upon request, grant asylum to non-Hungarian citizens being persecuted or having a well-founded fear of persecution in their native country or in the country of their usual residence for reasons of race, nationality, membership of a particular social group, religious or

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political belief, if they do not receive protection from their country of origin or from any other country.'

Hungary therefore – in accordance with multiple international conventions – clearly stipulated in its Fundamental Law: we are committed to the cause of refugees, and giving aid is considered to be an *obligation of the State*. It is also clear from the Fundamental Law that refugees can only be non-Hungarian citizens. In this case, there is an exceptional situation when the Fundamental Law and the relevant Hungarian legislation concern people – staying within the territory of Hungary – who are non-Hungarian citizens.

Our Fundamental Law moreover grants another specific right to every adult person recognized as a refugee, so that they can practice *suffrage*, and they may participate as electors in the local governmental elections, where they may cast their votes. [Article XXIII paragraph (3)].

1.1.2. First of all, we should have a look at the highest level of *legislation*, which was created by the Parliament. *Act LXXX of 2007* on Asylum (Asylum Law) should be mentioned here.

The act regulates all details of the material and procedural aspects. The persons covered are the following: all foreigners, through the actions of the Dublin Regulations, who have submitted an application for recognition or have been granted with asylum. In addition, the act considers stateless persons as foreigners, who are not recognized by any state as its citizen under the operation of its own law.

Asylum, under this law, includes not only the title to stay in the country, but at the same time protection against refoulement, expulsion and extradition.

In our country, asylum-seekers may benefit from asylum not only as *refugees*, but also as people who are granted with *subsidiary protection or as beneficiaries*. (According to the law, asylum-seekers are entitled to *temporary protection* or additional *subsidiary protection*.)

The Government has adopted government decree 301/2007. (XI. 9.) for the enforcement of the Asylum Law. It contains detailed aspects

of asylum regulations – similar to the law – both on material and on procedural bases.[3]

1.2. *The basic framework of asylum procedure*

The procedures regulated in the Asylum Law – which the law summarizes as *asylum procedures* – are official administrative procedures, just like, for example, issues of granting construction or official certificates, or procedures related to granting the title of place of business. Accordingly, the general (background) control of asylum procedures is stipulated in Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (Ket.).[4]

The asylum process, however, carries a number of specialities which make the application of the regulations of Ket. significantly difficult. Therefore Ket. stipulates that regulations concerning *asylum procedures*, as defined by law, shall be only applied in such types of cases for which the law does not establish different rules. In this form, eventually the law provides *general authorization* to deviate from general procedural rules, so the regulations of Ket. have been "overshadowed" and became general, but subsidiary (additional) rules in asylum procedures.

1.2.1. The Asylum Law regulates two basic types of asylum procedures:

a) procedures for achieving status of refugee or subsidiary protection;

b) procedures for achieving status of beneficiary.

With regard to the fact that procedural regulations both in the Asylum Law (§ 33-80 / G.) and in the government decree (§ 62-108.) are ex-

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3 For a detailed analysis of asylum-related issues in legislation on the bases of material and procedural law, see Hautzinger Zoltán (editor), *The migration theory*, NKE, Budapest, 2014, 59-61.

4 Hautzinger Zoltán defines legislations relating to the non-resident persons (foreigners) as *aliens' law*. These rules relating to the scope of asylum procedures, can be considered as the *aliens' administrative law* – more broadly – is a *special section* of the Hungarian administrative law. See details Hautzinger Zoltán, '*Aliens' law contra law enforcement of aliens*' in Gaál Gyula – Hautzinger Zoltán (editors), *Thoughts of Police Sciences*, Police Science Society of Hungary, Budapest, 2014. 113., 116.

tremely broad, within the limits of this essay we undertake to present only some general common sets of rules.

The asylum procedure is aimed at determining whether:

a) the conditions to grant asylum to a foreign applicant for becoming refugee, subsidiary protected or beneficiary have been met;

b) the existence of non-refoulement in connection with the foreign applicant;

c) if non-refoulement does not exists, can the foreign applicant be expelled or deported;

d) whether a foreigner can be transferred abroad in the context of Dublin transfers.

Both the asylum procedure and the opening of the judicial phase of the asylum procedure are exempt from charges for the first time. The process always starts with an *application*, submitted for recognition. The requesting party *shall attend* the procedure and *must appear* before the asylum authorities *personally*.

At the time of submitting the application for recognition or during the asylum detention the asylum authority is obliged to take action and record the facial image and fingerprints of the applicant. If the person seeking recognition is in detention, the proceedings shall be conducted out of turn. According to the principles, asylum authorities are required to ensure the delivery of the decisions taken to the applicant within eight days.

1.2.2. The legislation records several important legal guarantees. Thus, states that people seeking recognition during asylum procedure *may use their mother tongue* or the language they understand both orally and in writing. Notice of the decision shall be provided in their mother tongue or another language which they understand, and at the same time, it shall be communicated in writing as well. (However, the written form is required only in Hungarian.)[5] The asylum authority is obliged to inform the foreign applicant of the procedural rights, obligations and legal consequences of breaching the obligations – in their mother tongue

[5] These rules are much more favorable than the general regulations of Ket., related to the use of mother tongue.

or in another language they understand – and shall inform the foreign applicant, at the same time, of submitting the request in writing. In addition, the requesting applicant should be able to recognize the fact that the even at their own expense and in need – as stipulated in the act on legal aid – free of charge is entitled to *legal assistance* or accepts legal assistance from a registered association dealing with the protection of rights. In addition to the above, the representative of the United Nations High Commissioner for Refugees may also take part in the proceedings.

Among these client obligations, the law specifically highlights that those who apply for recognition during the procedure are obliged to tolerate the investigation of their packages, clothing and their vehicle, as well as the recording of their facial image and fingerprints.

1.2.3. Finally, among the general procedural rules it is worth mentioning that the Asylum Law precludes the usage of multiple legal institutions stipulated in Ket. The most important is to point out that remedies are much narrower: in asylum procedures there is no possibility for *appeals or case reopening procedures*. Due to the exclusion of appeal, the asylum procedure is an *administrative procedure of first instance*. Of course, this does not exclude the possibility of judicial review.

1.2.4. Among the specific procedural rules we must examine the rule for the completion of the administrative procedure within a reasonable period of time.

a) If the applicant is seeking refugee status or recognition for subsidiary protection, the authority shall investigate the application. During the investigation, the asylum authority may observe that the conditions for the application of the Dublin regulations are met, or notes that the application is inadmissible or an accelerated procedure shall take place. In cases of inadmissible applications or applications adjudicated in accelerated procedure, the asylum authority must reach a decision *within 15 days* after noticing the reasons underlying the procedure. If based on the abovementioned facts there is no place for out of turn procedure, it should be completed *within 60 days* following the submission of the application.

For specialized authorities involved in the procedure the law provides an execution period of *8 days*.

b) If the asylum seeker asks for the status of beneficiary, the administration period is *45 days*, which cannot be extended. The official proceedings for specialized authorities in this case, however, are provided with a *30-day* deadline by the law.

1.2.5. As indicated above, the Asylum Law excludes the possibility of appeal in the asylum procedure, and decisions taken during the proceedings of first instance shall come into effect. Article 110 paragraph (2) of Ket. – similarly to Article 25 paragraph (2) point c)[6] of the Fundamental Law – at the same time provides an opportunity available against the final decisions to judicial review.

The judicial review of administrative decisions takes place within a specific civil lawsuit. The so-called administrational trials are regulated in Chapter XX of Act III of 1952 on Civil Procedure (Pp.). In this case the asylum seeker asking for the recognition shall be considered as plaintiff and the asylum authority reaching decisions shall be considered as defendant.

Regarding the asylum procedures some regulations should be mentioned. In connection with the competence of authorities it is worth mentioning that in all administrative proceedings – such as the review of decisions reached during asylum procedures – administrative and labour courts shall rule at first instance. The court jurisdiction – in principle – depends on the applicant's domestic residence; if it is not their place of residence, the last known place of adobe designates, in such way that the trials shall take place at administrative and labour courts operating in the territory of the relevant Court of Appeals. If the site is within the jurisdiction of the Metropolitan Court of Appeal, the trials shall be carried out by the Metropolitan Administrative and Labour Court.

The remedies of court decisions are regulated in a specific way. Pp. declares that judicial decisions reached in administrative lawsuits – as a general

[6] According to the Fundamental Law, the court shall decide on – among other things – the legality of administrative decisions. This important constitutional principle – in addition to the general rules on appeal – ensures the judicial control of the executive branch bounded by law.

rule – become final and binding at first instance, because the possibility of filing an appeal is excluded. Exceptionally, however, there are ways to file an appeal when the administrative procedure was at first instance on condition that the court should be entitled to change the administrative decision.[7] The asylum procedure is only a first instance administrative procedure; and since the Civil Procedure has not given competence to the courts to change the decision of the asylum authority – in general –, typically, court proceedings shall also stay on the level of first instance.

However, an exception could be made according to Pp.; a separate law can also allow the modification of administrative decisions. The Asylum Law states that it is possible to review certain decisions, in connection with the material conditions of acceptance and benefits and subsidies related to the course. In principle, this would be the place for an appeal against the judgment of the court. However, according to the Asylum Law, the opportunity of filing an appeal against the final decision of the court does not exist even in this case.

Overall, it can be concluded that the asylum procedures – both at the administrative and at the judicial procedural stages – operate only at first instance.

1.3. *Legislative changes related to the mass immigration*

Given that in 2015 whole Europe faced the challenge of a radically increased migratory pressure,[8] the Hungarian Parliament and the Government intended to settle the situation through legislation. The legislation was based on two pillars which include the following key elements:

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7 During the judicial review of administrative decisions the court is typically only allowed to repeal the decision. Pp. lists the unusual cases in which the administrative decision of the court can be changed [Art. 339 § (2)].

8 For the security context for migration, see e.g. Vajkai Edina, *The issue of migration gains ground in the security policy* in Pécs Border Guard Scientific Publications, 2014, 251-257, in particular 254 (Volume XV.).

legislative changes related to the management of mass immigration[9], and governmental decrees created in connection with the mass immigration crisis.[10] (In addition, ministerial regulations and other internal standards, e.g. governmental decisions had been made).

1.3.1. It is appropriate to emphasize the Parliament did not intend to amend the Fundamental Law in order to deal with the situation, and the leaders of the decision-making bodies of the central government have not justified any legal facts, regarding to which special legal order stipulated in Fundamental Law should enter into force. It is appropriate to point out that the case of special legal order enters into force upon usually armed acts or offensive threats; emergency may be based on the latter issue of a natural disaster or an industrial accident. The events that took place so far, therefore, did not cause any changes in the 'basic functioning' of the state.

1.3.2. According to the legal amendments – among other things, in general – the following aspects should be considered. Pp. was amended due to massive judicial review procedures; the rules of jurisdiction had been partially modified as well. The Penal Code and the introduction

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9 Act CXXVII of 2015 on the modification of laws on temporarily closed border security zone and of laws related to migration; Act CXL of 2015 on amending certain laws on the issue of management of mass immigration; Act CXLII of 2015 on amending certain laws for the more effective protection and management of the state borders of Hungary due to the mass immigration.

10 Government Decree no. 260 of 2015 (IX. 14.) amendments related to the management of illegal immigration and other governmental regulations aiming at EU harmonization; Government Decree no. 269 of 2015 (IX. 15.) on the announcement of a crisis situation caused by mass immigration and on regulations based on the ordering, the existence and the termination of the crisis situation; Government Decree no. 270 of 2015 (IX. 18.) on the promulgation of rules of crisis caused by mass immigration in Baranya, Somogy, Zala and Vas counties, and the imposition of emergency situation, its existence and termination; Government Decree no. 316 of 2015 (X. 30.) on acquisitions related to measures based on the crisis situations.

of stricter rules on criminal procedure law also took place (especially in connection with new offenses related to the border closure).

The Hungarian Police were authorized by the Parliament *to carry out exploratory activities abroad* with the purpose of border control, law enforcement and crime prevention, cooperating with national security agencies; so that the Hungarian Police can gather information on acts violating the order of the state border and terrorism-related acts as well, and implement the measures needed to handle the management of the mass-scale migration. In addition, the police have been authorised to apply epidemiological and so-called *security measures* at the state border, because of the current situation caused by mass immigration,

The Hungarian Defence Forces, the armed forces of Hungary also gained the right in times of crisis caused by illegal immigration to contribute in the guarding of the state border – with the right to use weapons –, to implement measures in times of conflicts directly threatening the order of the state border and to implement measures for the management of mass-scale migration, as well as to prevent violence against the state border. It is appropriate to refer to the Fundamental Law; the fundamental tasks of the Hungarian Defence Forces include *military* protection of the borders of Hungary, which assumes an armed attack or threat thereof. The Fundamental Law stipulates that the *general* protection of the order of the state border is the task of the Hungarian Police. This is the reason why soldiers just simply cooperate in the law-enforcement procedures at the state border. In this scope they only help the police carrying out their duties, but they cannot overtake responsibilities and powers from the Hungarian Police. At the same time, however, in an unusual way, soldiers are entitled to carry out police actions (e.g. ID checks, apprehension, venue security, traffic control). These extraordinary actions cannot be carried out during the usual performance of national defence tasks.

It should be noted, however, that in the wake of legislative changes, although the soldiers are entitled to use weapons, they may only do so with the following restrictions:

a) they do not have to use their weapons for requirements under the Defence Act;

b) if other coercive means are not available or usage is not possible; thus they may use weapons suitable to cause bodily injury against anyone, other than those specified in the National Defence Act, and also may use other means of coercion as well, but the certain usage cannot lead to death.

1.3.3. The Parliament also amended Act LXXXIX of 2007 on the state border. A new legal instrument was created, the so-called: *transit zone*.

The zone serves as a transit place for persons seeking refugee status or persons applying for a recognition of subsidiary protection and serves the purpose where the authorities can conduct asylum and immigration procedures, as well as where the accommodation related facilities may be established. On the territory of Hungary transit zones may be designated within 60 metres from the external border line and border signal. Persons staying in the transit zone and seeking recognition for asylum may be allowed to enter the country only in cases specified by law (e.g. if the asylum authority decided on providing international protection or if conditions under the general rules are met to conduct the asylum proceedings).

1.3.4. The amendments of the Asylum Law in this issue – valid from 15th September 2015 – are very significant. The amendment specifies those cases in which *emergency situation* may be imposed *due to illegal mass immigration*:

'80/A § (1) A crisis situation caused by mass immigration can be declared if

a) the number of those arriving in Hungary and seeking recognition exceeds

aa) five hundred people a day as a month's average, or

ab) seven hundred and fifty people per day as the average of two subsequent weeks, or

ac) eight hundred people per day as a week's average,

b) the number of people staying in the transit zone in Hungary – not considering those contributing to taking care of the foreigners – exceeds

ba) one thousand people per day as a month's average, or

bb) one thousand five hundred people per day as the average of two subsequent weeks, or

bc) one thousand six hundred people per day as a week's average,

c) in addition to the instances specified in paragraphs a) and b), the development of any circumstance related to the migration situation directly endangering the public security, public order or public health of any settlement, in particular the breakout of unrest or the occurrence of violent acts in the reception centre or another facility used for accommodating foreigners located within or in the outskirts of the settlement concerned.'

The *Government is entitled* to declare crisis situation upon the proposal of the minister responsible for asylum, if the Heads of the National Police and the asylum authority had initiated it in advance. The regulation may be ordered in a decree, and may cover the whole or specifically defined areas of the country. In principle, the Decree shall be valid for 6 months but the Government may extend its scope.

In connection with the crisis situation, the law contains regulations of usage of property, as well as a number of other official rules for the provision of the authorities (e.g. constructional, public contractual, epidemiological measures), which are otherwise usual in defence administration. In the event of crisis the tasks of the registration of applications for recognition may be fulfilled with the assistance of the Police and the Hungarian Defence Forces, and their activities at this time shall be directed by the refugee authority.

The amendment also established the so-called institution of *legal proceedings on the state border*. The essence of this scheme is the regulation applicable for those foreign nationals who apply for their recognition as refugee or submit their claim for subsidiary protection in the transit zone before entering the territory of Hungary. This amendment introduces a number of restrictive and process accelerating provisions (such as reaching decision out of turn on the issue of the admissibility of an application, the asylum authorities must reach a decision no later than within 8 days; the applicant shall immediately be notified of the decision; specialized authorities do not participate in this procedure; trustee cannot be appointed, etc.).

1.3.5. Based on the regulation of the Asylum Law, the government proclaimed crisis situation for the first time on 15th September 2015 on

the basis of the migration crisis in the areas of Bács-Kiskun and Csongrád counties [Government Decree no. 269 of 2015. (IX. 15.)]. At the time of the promulgation of the regulation, section 80/A. paragraph (1) point a) sub-point aa) of the Asylum Law was the point of reference (five hundred people a day as a month's average), then the decree was modified on 22th October and section 80/A. paragraph (1) point c) of the Asylum Law has become the point of reference (situations directly endangering public security, public order or public health).

The second crisis situation has been valid since 18th September 2015 and it applies to the territories of Baranya, Somogy, Zala and Vas counties [Government Decree no. 270 of 2015. (IX. 18.)]. The reference determined by the Asylum Law has also changed.

The imposition of crisis situation has provided a way for the application of the regulations of the Asylum Law in the areas of the aforementioned counties. Furthermore, the decrees stipulate the following:

a) the Minister responsible for asylum is accountable for providing information on the content of the relevant statutory provisions;

b) the Heads of the National Police and the asylum authority are together liable for jointly informing the Minister at least in every 15 days about the conditions giving reason to maintain the crisis situation after the imposition of emergency situation. (This is necessary because, according to the Asylum Law, if the conditions are no longer met, a repeal proposal should be made towards the government regarding the regulations related to the crisis situation.)

2. The organizational framework of the asylum system

The agencies responsible for performing the tasks of the state related to asylum are defined in a Decree published by the Minister of Justice and Law Enforcement (IRM), which is Decree no. 52 of 2007 (XII. 11.) on the organizational structure of refugee affairs. In accordance with this, asylum agencies are the following: Office for Immigration and Nationality (hereinafter: OIN), reception centres and guarded asylum reception centres.

2.1. *Office for Immigration and Nationality (OIN)*

The legal status of OIN is determined by government decree no. 162/1999 (XI. 19). The OIN is a *central office*[11] controlled by the minister responsible for law enforcement concerning aliens and for asylum – currently the Minister of Home Affairs.[12] The predecessor of the bureau (until 1 January 2000) was the Asylum and Migration Bureau.

The leader of OIN is the Director General, who is appointed by the supervising minister. The Director General shall hold a law degree and a legal or administrative professional examination certificate.

The OIN performs tasks related to citizenship, immigration and asylum and also performs the tasks of a Central Registry Office.

The OIN operates with central and territorial agencies. The regional offices are called *directorates*. Currently seven regional directorates operate:

a) Budapest and Pest County (registered office: Budapest),
b) Northern Great Plain (registered office: Debrecen),
c) Southern Great Plain (registered office: Szeged),
d) Northern Hungary (registered office: Miskolc),
e) Southern Transdanubian (registered office: Pécs),
f) Central Transdanubian (registered office: Székesfehérvár) and,
g) Western Transdanubian (registered office: Győr).

The jurisdictions of directorates cover counties, except obviously the Regional Directorate of Budapest and Pest County. The Directorate is lead by a Director appointed by the Director General.

The OIN is a medium level supervisory organisation of reception centres and guarded asylum reception centres.

The organizational and operating structure of the OIN was regulated in detail by the Minister of Home Affairs, and the Minister of Public Ad-

11 Act XLIII of 2010 on central state administrative organs and on the legal status of Government members and state secretaries stipulates that the central office is a central public administration agency, created by Government Decree and managed by the Minister.

12 See paragraph (9) of Government Decree No. 152 of 2014 (VI. 6.) concerning the task and competence of the members of the Government.

ministration and Justice with joint normative order no. 9/2010. (IX. 29.).

The Central Office of the OIN is a centrally directed, national competence organizational Central Office. The Director General shall be assisted by two *Deputy Directors*. The Central Office is responsible for carrying out the tasks of the Refugee Board, which operates the Refugee Law Department and the Department of Supply and Integration. The regional directorates also have refugee departments.

The IRM decree specifies a detailed list of the responsibilities of OIN in concerning asylum seekers. Among others the OIN:

a) performs the official and administrative activities in connection with refugees;

b) manages the central register of asylums;

c) it operates and monitors the reception centre and the guarded asylum reception centres;

d) carries out and coordinates issues in connection with the care and support of foreigners requesting the recognition, as well as of refugees, beneficiaries and foreigners under subsidiary protection; furthermore fulfils tasks in relation with the social integration of the management of refugees, beneficiaries and foreigners under subsidiary protection;

e) ensures personal and material conditions necessary for carrying out the asylum process;

f) as specified in the legislation for asylum seekers, provides care and support for refugees, beneficiaries and foreigners under subsidiary protection;

g) cooperates with other government agencies (including district offices, guardianship authorities, law enforcement agencies), churches and non-governmental organizations;

h) cooperates with national and international organizations of asylum and migration;

i) accesses the data stored in the Visa Information System established by Council Decision no. 2004/512/EC dated 8th June, 2004 on the establishment of the Visa Information System (VIS);

j) as National Contact Point it performs the duties to maintain relations with asylum support teams in liaison with the European Asylum Support Office.

2.2. *The reception centre*

According to the organizational and operating structure of the OIN the reception centre is controlled by the Director General, and is a department with independent financial management. The reception Centre is directed by a director appointed by the Director General. The centre carries out professional duties under the professional supervision of the Refugee Board.

The employees of the centre are public servants. The station operates 24 hours a day continuously. The station provides health and social care, food, information and concierge service, as well as guardianship.

The functions and responsibilities of a reception centre are the following:

a) provides asylum seekers, refugees, beneficiaries and foreigners under subsidiary protection with accommodation and supplies;
b) fulfils the requirements of providing information stipulated in the legislation, as well as those concerning the reporting obligations prescribed by the law and the OIN;
c) ensures the rights of asylum seekers placed in the reception centre and manages the registration of supplies and benefits stipulated in the regulations;
d) ensures the conditions needed to complete the official procedures of OIN;
e) cooperates with organizations involved in refugee care;
f) provides healthcare screening required by the healthcare authority, and organizes primary health care;
g) organizes the effective spending of free time;
h) provides shared rooms in particular for the purpose of worshipping;
i) implements measures to fulfil the responsibilities of the reception centre in helping the integration of refugees and foreigners under subsidiary protection;
j) facilitates the voluntary return and departure to a third country;
k) provides information and solution about the daily problems, conducts life-skills counselling, and to the necessary extent facilitates the involvement of minors in public education.

The headquarters of the reception centre is Bicske, and headquarters site points operate in: Debrecen, Vámosszabadi and Nagyfa.[13]

2.3. *Guarded asylum reception centre*

The guarded asylum *reception centre* is controlled by the Director General, and is a department with independent financial management. The guarded asylum reception centre is directed by the station director, who is appointed by the Director General. The guarded asylum reception centre carries out professional duties under the professional supervision of the Refugee Board.

In contrast to the reception centre, the centre performs its tasks primarily related to the implementation of *asylum detention*.

The employees of the guarded asylum reception centre are government officials and public servants. The centre operates 24 hours a day continuously.

The functions and responsibilities of a guarded asylum reception centre are the following:

a) ensures the implementation of asylum detention for the attainability of a foreigner during the asylum procedure of requesting for recognition;

b) provides asylum seekers under asylum detention with accommodation and supplies ensuring the implementation of regulations;

c) fulfils the requirements of providing information stipulated in the legislation, as well as and those concerning the reporting obligations prescribed by the law and the OIN;

d) ensures the rights of foreigners placed in the centre's premises, ensures the implementation of asylum detention, and manages the registration of supplies and benefits stipulated in the regulations;

e) provides healthcare screening required by the healthcare authority, and organizes general medical care;

f) with the 24 hours per day employment of social workers provides help and information to solve everyday problems, conducts life-skills

[13] According to the OIN website *temporary* reception centers operate in Nagyfa, Szentgotthárd and Körmend. see: http://bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=478&Itemid=1226&lang=-hu (access: 13th November 2015)

counselling and, to the necessary extent facilitates the involvement of minors in public education and performs the duties upon the area of child protection;
g) organizes the effective spending of free time;
h) provides shared rooms in particular for the purpose of worshipping;
i) ensures the possibility of contact keeping for the foreigners under asylum detention during the asylum procedure of requesting for recognition;
j) cooperates with national and international organizations involved in refugee care;
k) facilitates the voluntary return and departure to a third country.

The headquarters of the guarded asylum reception centre is Békéscsaba, and headquarters' branches operate also in Debrecen and Nyírbátor.

2.4. *The community shelter*

The Asylum Law stipulates that the asylum authorities may provide *community shelters* designated as a place of residence for asylum seeking refugees and foreigners under subsidiary protection during the asylum procedure of requesting for recognition. According to the organizational and operating structure of the OIN, the community shelter provides foreigners with the following services as defined in the applicable legislation:
a) access to basic and emergency health care;
b) providing three meals a day in line with religious rules; and
c) personal equipment.

In addition to the above, the community shelter:
a) complies with the requirements of providing information set out in the legislation, particularly with regard to the policy of the community shelter;
b) monitors and reports absences from 24 hours up to 120 hours to the competent regional directorates;
c) ensures the enforcement of the community shelter's house rules.
The community shelter operates in Balassagyarmat.

2.5. *Specialized authorities cooperating in asylum procedures*

The procedural model of Hungarian authorities is sometimes referred to as *specialized model*. This means that in administrative procedures, in addition to the proceeding authority – by virtue of legislation, compulsorily – specialized authorities participate too. Given the fact, that the participation of specialized authorities is required by law, failure to request the procedure of specialized authorities or ignoring the decision of specialized authorities are serious procedural breaches of the law, which could lead to the invalidity of the administrative decision made by the proceeding authority. In the Hungarian model it is essential that the decision-making authority exercises the decision-making powers together with the specialized authority.

Regarding the relevant rules of asylum procedures and specialized authority procedures, we would like to emphasize the following.

2.5.1. According to the Asylum Law, during the asylum procedure for the recognition of asylum seeking refugees and foreigners under subsidiary protection (not including a procedure carried out at the borders) *law enforcement agencies* shall participate as specialized authorities as defined in the implementation decree. During the procedure for the recognition of beneficiaries, the asylum authorities are also obliged to obtain the authority statement specified in the implementation decree from the *specialized law enforcement authority*.

According to the Asylum Law, specialized authorities involved in asylum procedures may be determined by the Government. Based on the implementation decree and the Asylum Law, in procedures for recognition, in the decision-making process on whether or not the stay of foreigners in the territory of Hungary infringes national security, the Government appointed the Constitution Protection Office and the Counter Terrorism Centre as specialised authorities.

2.5.2. The *Constitution Protection Office* is part of the national security services in Hungary, and as such, it is a central state administration body under the supervision of the Government. According to the related law,[14]

[14] Act CXXV of 1995 on the National Security Services

its responsibilities are the following:

a) detects and averts efforts and activities of foreign intelligence, which abuse or threaten the political or economic security or the independence of Hungary;

b) detects and averts efforts to attempt to modify or disrupt the legal order of Hungary with illegal means;

c) detects and averts efforts which threaten the economic, scientific-technical, financial security of Hungary, and issues of illegal drug and arms trafficking;

d) performs the tasks of certifying documents regarding the applicants' legal status in procedures related to requesting *recognition for refugee status* or applying for Hungarian citizenship, and – with the protection of the independence of the state and bonded to the rule of law;

e) controls tasks related to the persons having submitted an application for visa;

f) gathers information until the start of an investigation in serious crimes, as defined in the Penal Code;

g) participates in detecting and preventing illegal trafficking of internationally controlled products and technologies, as well as military equipment and services.

2.5.3. Since the organisational reforms of 2010 the *Counter Terrorism Centre* has been a major component of the structure of the Hungarian police, which was divided into three parts. The Counter Terrorist Centre – as defined by the law or governmental decrees[15] – has extremely diverse tasks, such as:

a) prevents, detects and interrupts certain serious crimes, arrests and takes perpetrators to the authorities;

b) in respect of highly protected leaders (including the Attorney General and the Prime Minister) performs security duties;

c) protects the lives and physical safety of Hungarian citizens in situations of armed conflicts, acts of war and in the case of terrorist at-

[15] Art. 7/E of Act XXXIV of 1994 on the Hungarian Police and Government decree no. 259/2010 (XII. 22.) on the appointment and discharge of the duties of an agency against terrorism.

tacks outside of Hungary; rescues Hungarian citizens from hostage situations, ensuring their return and safety, implements evacuation; obtains necessary information from foreign origin to perform this task, analyses, evaluates and transmits the gathered information;

d) analyses and evaluates the level of terrorist threat in Hungary;

e) performs the security duties and facilitates the protection of designated Hungarian embassies and their diplomatic staff, as well as Hungarian foreign bodies with important governmental competence, performs the protection of institutions and establishments;

f) performs demolition experts' tasks;

g) if necessary, carries out the attendance of detained persons.

It is important to emphasize that the Constitution Protection Office and the Counter Terrorism Centre have been granted the right to conduct *secret information-gathering activities*, which may help them carry out their specialized official duties.

2.5.4. The implementation decree only lists a number of specific tasks of specialized authorities. This includes that the *applicant is granted with an audition* by specialized authorities during the asylum procedure. The specialized authority *is approached by the asylum authority* and receives the data records of the asylum applicant contained in the request managed by the registry. If the specialized authority has sent its statement to the asylum authority, and the information transmitted came from the applicant justifying the withdrawal of the statement, the specialized authority shall send a new statement to the asylum authorities immediately.

2.5.5. Finally – in connection with law enforcement agencies – we would like to mention, that according to the regulations of the Asylum Law, the tasks of implementing *asylum detention* is supported by an entity (the 'traditional' police) with general police duties (even though according to the implementation decree, custody cannot be performed in police lockups or in penitentiaries, it is primarily carried out in the reception centre). In the crisis situation caused by mass immigration the *police may also be used* in order to take advantage of certain assets defined by the law.

Sándor Udvary

The Migrant Crisis and its Impact on Civil Procedure in Hungary

1. Introduction

Hungarian civil courts have dealt with migrants and their asylum petitions for more decades. Still, it was 2015, and the widely known migration crisis, when the number of illegal migrants multiplied,[1] when such procedural issues surfaced that were unknown under a much lighter burden of migrants. Hungarian Courts and their resources (including human and material resources) were stretched thin. However, the legislator, and primarily an internationally widely criticized act of the government have turned the tide and the ever-growing numbers of the migrants, that could have hindered the courts from adjudicating other types of cases – which is their primary obligation under the Fundamental Law –, were reduced to fragments of the previous. Still, the legislator made preparations and the courts – having learnt from the mid-2015 crisis – stand now better prepared for a new tide of migration. This preparation includes the renewal of relevant civil procedural rules, thus enabling the courts to deliver timely decision on the applications for asylum.

In this article, I attempt to present the legal background of the courts' work in migrant cases, including the former and the current procedural rules. The amendment of the rules were aimed at enabling the courts' timely work in these special types of cases, I shall try to present the legislator's reasoning and its expected effects.

[1] Strong increase in the numbers of in Hungary would have different effects, for example they would create a pressure not only on the social security system, but on the minorities' democratic representation system. More on this representation system, see: Sándor Móré: Minority Self-Governments in Hungary, In: András Patyi – Ádám Rixer (eds.), Hungarian Public Administration and Administrative Law, Passau, Schenk Verlag GmbH, 2014, 350-363.

2. Asylum procedure before the courts – as created

Hungary's first democratic act on asylum was Act 89 of 1997, which was thoroughly amended during our accession to the EU. Since EU plays a vital role in the common migration policy – though this united front seems somewhat ravaged now –, Hungary had to recodify its substantive law related to migrants, thus enacted Act 80 of 2007 on Asylum (hereinafter: Asylum Act) and Government Order 301/2007 (XI. 9.) on its executive details (Asylum Gov. Order). The rules of the Asylum Act were created in accordance with the Dublin Regulation [Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national] and its "Dublin procedure". There is a further European Directive [2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (hereinafter: Procedural Directive)], to which the Hungarian laws had to be harmonized. It was completed during the recent years and as this Procedural Directive was subject to amendment itself, it is still a reference to the Hungarian legislator, when the amendment of asylum laws is concerned.

The main administrative agency of immigration issues was and still is the Office of Immigration and Nationality of the Ministry of Interior (Belügyminisztérium Bevándorlási és Állampolgársági Hivatala, abbr. and hereinafter: BM BÁH).[2] According to the Dublin Regulation, applicants shall lodge their application for asylum with the BM BÁH, which shall proceed with a preliminary examination of the application first: according to the now-under-scrutiny "transportation principle" that Member State shall be responsible for the asylum procedure whose border the applicant first time crossed. Thus, Hungarian authorities had to proceed with this preliminary examination whether the applicant migrant has crossed any

[2] On the structure and competence of BM BÁH see more in: Ádám Rixer: Introduction. In: András Patyi, Ádám Rixer (Eds.): Hungarian Public Administration and Administrative Law, Passau, Schenk Verlag GmbH, 2014, 33-159.

other Members State's border before the Hungarian border, since in this case, the applicant must be transported to that country.

This part of the procedure is vital in our geographic position, since on the Balkan route, hundreds of thousands of migrants have crossed our borders on their way to mainly Germany. Still, the first Member State border they have crossed must have been Greece – at least according to the Hungarian Government –, thus, up until the "massification" of the migrant crisis, migrants coming on the Greece-Macedonia-Serbia route should have been ordered to be transported to the country of their first entry.

As of the decision of the BM BÁH, it is an order of the official authority, given in the administrative procedure about the possibility of transportation. According to the original rule, 72 hours of asylum detention was available for the authorities, more correctly the authority may have ordered the applicant not to leave the designated place. This decision was subject to judicial supervision by the Metropolitan Court of Budapest, which was to deliver its judicial decision in a non-contentious procedure, within 8 days of the application for supervision. The Court's decision was to be based on the legality of the preliminary decision: whether the conditions of applying the Dublin procedure shall stand. From the procedural point of view it must be mentioned that this is an *in camera* decision and the Court is not obliged to hear the applicant, thus no trial shall be held. Therefore, the evidence is also very restricted; it is limited only to the documentation of the application and the BM BÁH decision.

Should this Dublin procedure be not available (e.g. for the applicant who has not crossed a Member State border, or he/she came from the Ukraine), the BM BÁH was to decide on the admissibility of the application. The rejection of admissibility has to be based on strict rules and be reviewable by the Metropolitan Court exclusively. The time limit of the review of rejection is again 8 days, but an important difference is that a hearing may take place if the court orders so. The rejecting decision of the BM BÁH may be amended by the court itself – thus the Court has not only cassation powers – and no further remedy shall be available against the Court's decision: this is a final decision.

If neither the Dublin transportation, nor the rejection of the application is available, the application of a migrant shall be dealt with in substance. Again, BM BÁH is the authorized agency, which shall consider the application. The substantial evaluation criteria of the application would exceed the boundaries of this short essay, but it is sufficient to say that they were created in harmony with the relevant EU regulations and directives. The BM BÁH may admit the application and grant asylum to the applicant or shall refuse the application, if the conditions of admission shall not be met.

Only the refusing decision of BM BÁH may be subject to review, again then by the Metropolitan Court. As opposed to the non-contentious procedures mentioned above, this review is a contentious procedure, in accordance with the procedural rules of the review of administrative agencies.

Incidentally mentioned, Hungarian civil procedure – by the time of 2008, the entry into force of the Asylum Act – had no special court or procedure for the review of administrative acts. Since then, in compliance with the Fundamental Law, and the new Act on Judicial Organization, new Administrative and Labor Courts were set up in 2012, thus the review of the above-mentioned decisions shall belong to the jurisdiction of such Administrative and Labor Courts. As of the separate rules of the review of administrative acts, up to now, Chapter XX of our Code of Civil Procedure applied to such procedures – thus a special procedure within the general framework of civil procedure was available for asylum-seekers. However, this situation is about to be changed: the codification of a separate Administrative Judicial Procedure is on the way and expected to enter into force in 2017. Then, a new body of procedural law shall cover the review of BM BÁH decision.

Returning to the procedure as entered into force, an applicant had 15 days to lodge the claim with the BM BÁH, but addressed to the Metropolitan Court, which – upon receiving the claim for review – must forward it and the complete case-file to the Court. Having lodged the claim shall suspend the enforcement of the BM BÁH decision. The Court had 60 days to deliver a final decision on the legality of the BM BÁH decision. Since this is a contentious procedure, the applicant must be

heard. The hearing of the applicant may not be ignored, only if certain circumstances apply, such as the applicant is not available for notice on his/her residence, he/she left to unknown place or the repeated application is based on the same set of facts. Again, as seen before, the court may amend the administrative decision, thus having more than mere cassation force, and this decision of the Court shall not be appealable. The first application for asylum shall be free of administrative and judicial costs; however, this shall not apply for repeated applications.

3. Asylum procedure before the courts – as amended

The number of asylum-seekers was constantly growing; still Hungarian authorities had the human and material resources to keep pace. According to the statistics of BM BÁH[3] there was 18900 application lodged in 2013, which has risen to 42.777 application in 2014, but in 2015 it has reached a dramatic 200.000. application until only mid-September. Many of the migrants have travelled from Syria, Afghanistan, Pakistan to enter the European Union through Greece then the Balkan route, of which Hungary was the gateway to Austria and Germany. During the summer months, a constant rise of mainly trafficked migrants gave a serious concern to the Hungarian authorities and the Courts as to whether they are able to maintain law and order on the Schengen border line. Part of the government strategy, a physical barrier was set up on the southern green border of Hungary, bordering Serbia and Croatia, which evidently stopped the flow of migrants through Hungary (though not the flow itself, which seemed to have switched to an even faster gear: 10.000 migrants per day through the Croatia-Slovenia-Austria route was rather common in the days of late October).

Though the flow of migrants through Hungary has run dry, it necessitated a set of amendments to the Acts and other legal regulations of asylum-procedure. As part of this, certain parts of the administrative and even the civil procedure had to be amended to meet the needs created by the massive numbers experienced through 2015. Thus, the legisla-

[3] http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en (21 October 2015)

tor enacted Act 127 of 2015 on the Security Border-close and on the Amendment of Migration Related Acts (hereinafter: First Amendment of Asylum Act); then later on Act 140 of 2015 on the Amendment of Related Acts Due to the Massive Migration (hereinafter: Second Amendment of Asylum Act). Both Acts were subject to wide international criticism, dismay, so to say, but in certain aspects, by creating the border fence, they have reached their goal to dispose of the problem (though, as a rather unilateral action they were neither intended nor aimed at solving the European crisis, not as if it was solvable by one small country). The evaluation of the whole Acts is not our goal; however, we try reviewing those regulations that have affected the asylum-procedure and the related court-procedure.

The most important changes of the First Amendment of Asylum Act are related to the structure of the court procedure. First of all, the administrative section of the asylum procedure – which was divided into a preliminary and a substantial part – shall be unified. Thus, the Dublin transition procedure and the substantial asylum claim shall be adjudicated in the same unified procedure, allowing the court to review both parts of the procedure in the same review.

Until the First Amendment of the Asylum Act, the review of the BM BÁH decision had a suspensive effect on the enforcement of the administrative decision. As a result of this amendment, even the expelling administrative decision shall be enforceable despite the judicial review. According to the reasoning of the legislator, the Dublin Regulation does not impose the regulation with automatic suspensive effect, furthermore, the applicant may apply for the judicial suspension of the enforcement of the administrative decision. Thus, this amendment ensures the efficiency and the timely fashion of the procedure.

Before this amendment, the Court (as mentioned before: From 2012, it is the Administrative and Labor Court) – as generally in administrative review cases – based its decision regarding the legality of the administrative decision on the same set of facts that were known and proved before the BM BÁH. Even though new information was available regarding the "true victim" status or any other factor, which would render the former decision void, the Court had no power to renew the set of facts.

According to the new, now effective rules, the Court must consider those facts, information on the country that became available after the administrative decision, but before the judicial decision. One must note that this might have a positive effect on the asylum-seeker, also, when the newly available information substantiates his/her administratively rejected claim. However, the contrary is also possible, namely that a positive administrative decision is overturned after the Court, having learnt new information, reverses a then-legal decision in the light of new evidence. Nota bene, this is not general in the jurisprudence of the review of administrative decisions, the Act must specifically call for such a method – as here it was called for.

If there was no possibility of the application of non-refoulement, the Court must also decide *ex officio* on the expulsion or deportation of the claimant and also determine the duration of entry ban – a further important procedural change.

Also, there is a possibility for the Court to proceed in an expeditious procedure, if the conditions of the amended Asylum Act §51 (7) apply. Most important in this exhaustive list, if the migrant has disposed of his/her identity papers, or tried to deceive the authorities, rejects the taking of fingerprint, then the BM BÁH may deliver a summary order rejecting the application. The legality of such decision is reviewable before the Court.

Courts have learnt during their 2015 procedures that only few or no migrants intended to wait for their asylum-procedure in their appointed refugee camp, but they have left for Germany or other destinations. Since the possibility of asylum-detention was reduced to practically zero, the administrative authorities and courts had no tools to ensure the presence of migrants during the procedure. Thus, the personal presence, which was a necessary element of the trial as drafted, was impossible to guarantee. Still, the procedures had to be closed; therefore the legislator annulled the obligatory personal presence of the claimant. Also, if the claimant cannot be notified due to his/her leave of country, the trial – as main procedural guarantee – may be disposed of. There is an important exception, namely if the claimant is available, due to his detention in a refugee camp (a most rarely occasion), the trial must be held.

A connected amendment: the place of the trial was usually the building of the Court, thus the detained migrant had to be transported there – a cost incurred on the state. This amendment changed the order and the court may hold an on-site trial. If well organized, the court may hold chain trials, so reducing the administrative costs of procedures.

These amendments were an important step to regain the control over the administrative and judicial processes. However, they were not enough according to the legislator. Thus the Second Amendment of Asylum Act was passed on September 4, promulgated then entered into force on 8th of September. This amendment was a reaction to the growing pressure on the Serb-Hungarian border.

First of all, the Szeged Administrative and Labor Court gained exclusive jurisdiction over the review of the admissibility decisions. Since most of the migrants arrived through the Serb-Hungarian border, this was a necessary change. One must also note that the National Office for the Judiciary (Országos Bírósági Hivatal, abbr. OBH) reacted to the crisis and ordered a special work schedule for the affected courts: they worked on week-ends also. (The prosecutor offices and police authorities did the same.)

Another structural change of the procedure is that the courts have lost their reformative license, from then on, they have had only cassation power. Still, the remedy against the administrative decision is existent, only the reformative power of the court is limited and only in the border-proceedings.

A new type of procedure was established: procedure on the border. This is how the legislator tried to avoid letting the migrants on Hungarian soil, so enabling their full rights. This is a summary, expeditious procedure, according to which authorities have 8 days to decide on the admissibility. If the applicant is still in the transit-zone after 4 weeks of the application, he/she will be admitted on the soil of Hungary, therefore a general asylum procedure shall be given. However, if the application is inadmissible, the following rules shall apply. A law-clerk may proceed and even deliver a final decision regarding the judicial review. The judge or clerk shall hold the personal hearing in the transit-zone, *in personam* or through video-conference (which is a brand new, a migration crisis-

driven innovation of the procedural codes). The decision of the court shall be delivered to the claimant through publication (practically communicating it in speech is a fiction) on the native tongue of the claimant.

The civil procedure and the courts of administrative jurisdiction had serious pressure on them due to the migration crisis. Although the number of the asylum applications has dramatically decreased by reason of the border fence, the legislator has prepared the procedural and judicial system for a new wave of migrants. However, these rules and the judicial decision based on them were not tested by the Constitutional Court or the European Court of Human Rights or the European Court of Justice. It remains to be seen that the new rules shall pass their test…

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Photo by Hajni Valczer. Röszke, Hungary, 2015.

Tamás Hoffmann

Can Asylum-seekers Be Penalized for Illegal Entry to the Country? Some Comments on the Compatibility of the Hungarian Regulation with Article 31 of the 1951 Geneva Convention[1]

1. Introduction

As a response to "rising asylum-pressure", the Hungarian legislature decided to erect a "legal barrier" to complement the actual physical fence completed in September 2015. Act CXL of 2015 was adopted on 4 September 2015 and introduced sweeping changes in the Hungarian legal system. *Inter alia*, through an amendment of Act C of 2012 on the Hungarian Criminal Code and Act XIX of 1998 on Criminal Procedure, several breaches of the new provisions, connected to the border, have now become criminal offences. These legislative changes have been passed in the Hungarian Parliament with remarkable speed.

One new crime introduced to the Hungarian Criminal Code, the criminalisation of unauthorized border crossing, attracted particular attention. Unauthorised entry into the territory "protected by the border closure" has become a criminal act, which can be punished with a prison sentence of up to 3 years. If such an offence is committed as part of a riot, this act is punishable with a prison sentence of up to 5 years, while the sentence can be between 2 to 8 years if committed armed, with the use of weapons and as part of a riot. The law also provides that in case the criminal act of irregular border crossing results in death, the perpetrator

[1] This chapter was written with the funding of the Hungarian Scientific Research Fund OTKA (Project PD 113010).

can be sentenced to imprisonment between 2 and 8 years. Moreover, these criminal proceedings have priority over ordinary crimes.

The Hungarian legislation drew the criticism of international human rights organizations.[2] The Hungarian Helsinki Committee claimed[3] that the criminalization of illegal border-crossing is a violation of Article 31 (1) of the 1951 Geneva Convention.[4] This short paper aims at focusing only on this particular question, i.e. to investigate whether the Hungarian legislation is in contravention to Article 31 (1) of the 1951 Geneva Convention. Consequently, the scope of the paper is limited and will not examine other aspects of the Hungarian legal regime and its conformity to other legal regulation, for instance with European human rights law or European Union law.

2. The legal regime established under the 1951 Geneva Convention

The 1951 Geneva Convention explicitly deals with the question of the penalization of asylum-seekers illegally crossing the border. Art. 31 (1) of the Convention provides that:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

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2 Amnesty International, *Fenced Out – Hungary's Violations of the Rights of Refugees and Migrants*, (Amnesty International Publication, 2015); Human Rights Watch, 'Hungary: New Border Regime Threatens Asylum Seekers - Closed Borders, Prosecution, and Forcible Returns' https://www.hrw.org/news/2015/09/19/hungary-new-border-regime-threatens-asylum-seekers (last accessed 1 December 2015).

3 No Country for Refugees – New Asylum Rules Deny Protection to Refugees and Lead to Unprecedented Human Rights Violations in Hungary, Information Note, 18 September 2015 http://helsinki.hu/wp-content/uploads/HHC_Hungary_Info_Note_Sept_2015_No_country_for_refugees.pdf (last accessed 15 November 2015)

4 Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force 22 April 1954.

This provision exempts refugees[5] from legal sanctions for illegal entry or presence if they fulfil all the criteria set out in Art. 31 (1) since the drafters aimed at establishing a well-functioning, orderly system of processing refugee claims. Hathaway explains that '[B]ecause of the drafters' instrumentalist orientation, protection against penalization for illegal entry or presence is only granted to those refugees who take affirmative steps to make themselves known to officials of the asylum country, who do so within a reasonable period of time, and who satisfy authorities that their breach of immigration laws was necessitated by their search for protection. If any of these three requirements is not met, there is no exemption from forms of penalization that fall short of *refoulement*.'

The notion, however, does not elucidate on the meaning of its key notions. In the following therefore it is necessary to explicate the significance of penalties and the requirements of 'coming directly', 'present themselves to the authorities without delay' and 'show good cause for illegal entry or presence'.

2.1. *Penalties*

In the official English text of the 1951 Convention the term 'penalties' is left undefined. In itself, the term could possibly refer to not only criminal sanctions but to administrative penalties as well. However, the French version of the text that is equally authoritative unambiguously mentions 'sanctions pénales.' According to the generally accepted rules of treaty interpretation in case of real or perceived difference of meaning between different language versions of the same treaty 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'[6] Accepting that the term 'penalties' should be

5 The Divisional Court in the United Kingdom pronounced that 'article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees)…' See R. v. Uxbridge Magistrates' Court and Another, ex parte Adimi, [1999] Imm AR 560. However, that is doubtful since the text of the Convention clearly indicates that it only applies to refugees.

6 Art. 33 (4) of Vienna Convention on the Law of Treaties, 1155 UNTS 331, entered into force 27 January 1980.

read as 'criminal penalties' seems to perfectly reconcile the two versions. Moreover, given that Article 31 of the Convention was based on the initiative of France, it might be suggested that the French text might even be more authoritative than the English.[7]

Nevertheless, Goodwin-Gill suggests that this 'narrow interpretation' should be discarded in light of the humanitarian objective of the treaty. To achieve that, he suggests that 'the object and purpose of the protection envisaged by Article 31(1) of the 1951 Convention is the avoidance of penalization on account of illegal entry or illegal presence. An overly formal or restrictive approach to defining this term will not be appropriate, for otherwise the fundamental protection intended may be circumvented and the refugee's rights withdrawn at discretion.'[8] However, this argumentation seems unpersuasive. The objective of Article 31 (1) is not the avoidance of penalties but the avoidance of penalties for those refugees who meet the requirements spelt out in the provision. It is difficult to see why the drafters crafted this elaborate structure if they did not envisage its actual application.

One possible way to circumvent this problem is by proving that the provision is no longer valid as it has fallen into desuetude. The notion of desuetude was defined by Fitzmaurice as 'where the parties themselves, without denouncing or purporting actually to terminate the treaty, have, over a long period, conducted themselves in relation to it more or less as though it did not exist, by failing to apply or invoke it, or by other conduct evincing lack of interest in or reliance on it, it may be said that there exists what amounts to a tacit agreement of the parties, by conduct, to disregard the treaty and to consider it as being at an end…'[9]

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7 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.35 (M. Rochefort, France).

8 Guy S. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Erika Feller, Volker Türk and Frances Nicholson (eds.) *Refugee Protection in International Law* (CUP, 2003) 194-195.

9 Gerald G. Fitzmaurice, 'Second Report of the Special Rapporteur on the Law of Treaties', *Yearbook of the International Law Commission*, 1957, Vol. II., 48. See more in detail Robert Kolb, 'La desuetude en droit international public' 111 *Revue Général de Droit International Public* (2007) 577-608.

Nonetheless, sanctions – including criminal sanctions - are actually repeatedly applied by a number of countries[10] and this approach does not seem to be accepted in legal scholarship, either.[11] Therefore it might be concluded that the term 'sanctions' comprises criminal sanctions as well.

2.2. *Coming directly*

The criterion of 'coming directly' from the territory where the refugee's life or freedom was threatened is probably the most controversial element of Article 33 (1). During the drafting repeated attempts were made to remove it from the text, however, these endeavours were ultimately defeated.[12]

The Adimi case attempted to strike a balance between the textual requirement of 'directness' and the individual circumstances of refugees fleeing from peril through other countries to reach their final destination. The judge held that:

I conclude that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing.[13]

Noll criticizes this approach since he finds it insufficiently lucid and claims that 'an approach still retaining an element of intent should be rejected for reasons of principle. The movements of the refugee in space and time are often simply a way to draw inferences on the true intention

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10 Gregor Noll, 'Article 31' in: Andreas Zimmermann (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (O.U.P., 2011) 1251.

11 Tellingly, not even the United Nations High Commission for Refugees doubts that refugees can be subject to sanctions. See e.g. UNHCR Position on Article 31 (1) of the Geneva Convention of 1951, HUNBU/OIN/HCR/0131

12 See Hathaway, op. cit., 392-395.

13 Adimi case, op. cit.

of that refugee. Ultimately, the analysis of such movements rests on assumptions that they reveal the refugee's subjection to the State at the end of the trajectory from which asylum is sought. Under the rule of law, this premise would need to be rejected, as it would make Art. 31, para. 1 into a separate test of personal credibility.'[14] Yet, since even the determination of the refugee status is in part based on assessment of the claimant's credibility it is not entirely understandable why the determination of 'directness' could rest on the same approach, provided it is applied in a bona fide way, giving the asylum-seeker the benefit of the doubt.

Noll also submits that based on the essential demand of international cooperation 'the 'object and purpose' of the 1951 Convention would not sit well with the penalization of those who might hypothetically find protection in a transit country geographically closer to the country of origin. Such penalization would lead to a concentration of reception burdens in that transit State, and thereby promote the 'tensions' which the Preamble exhorts States to prevent. An interpretation of the criterion of 'coming directly' in its context and in the light of the 1951 Convention's object and purpose therefore leads to the following result. The benefit of Art. 31, para. 1 must be accorded to any refugee, with the exception of those who have been accorded refugee status and lawful residence in a transit State to which they can safely return.'[15]

However, this approach is actually contrary to the very rationale of the 1951 Geneva Convention. Hathaway persuasively argues that 'exemption from penalization is granted because of the urgency of the refugee's need to flee. A refugee denied assimilation in the country of first asylum, but who faces no real risk of persecution there, is not imminently at risk.'[16] Therefore only those refugees can claim the protection of Article 31 (1), who have not spent a substantial time in another country after fleeing their country.[17] Applying this approach, the New Zealand High

14 Noll, op. cit., 1256.

15 Ibid., 1256-1257.

16 Hathaway, op. cit., 395.

17 In this vein, the Swiss Federal Court has held, that an Afghan asylum-seeker who spent one month in Pakistan and two days in Italy before arriving in Switzerland had still come "directly" to Switzerland. Dec.6S.737/1998/bue, ASYL 99/2 (Sw. FC, Mar. 17, 1999).

Court ruled that a refugee from Ghana was not 'coming directly' to New Zealand because she had spent two weeks in Swaziland, and ten months in South Africa.[18] Accordingly, refugees who have spent longer periods in interim countries are normally not exempt from penalties. Still, it must be emphasized that the refugee not coming directly from a country where his or her life or freedom was in danger might lose the protection of Article 31 (1) but will still be protected by Article 33, the prohibition of non-refoulement.[19]

2.3. *Present themselves without delay to the authorities*

Refugees have to present themselves to the competent local authorities of their own initiative, demonstrating their good faith. Refugees taken into custody during flight from the local authorities clearly do not fulfil this requirement. Small delays due to the exigencies of the situation on the other hand will not result in the loss of protection of Article 33 (1).[20]

2.4. *Show good cause for their illegal entry or presence*

The requirement for the refugees to 'show good cause for their illegal entry or presence' is intertwined with the requirement of 'coming directly' and based on the premise that the illegal entry or presence of the refugee is 'the result of some sort of compulsion'.[21] The French delegate clearly stated that the refugees are expected to present evidence that 'owing to outside pressure, [they] had been obliged to enter or re-enter particular countries illegally.'[22]

Consequently, if asylum-seekers have spent considerable time in a safe country have to explain their inability or unwillingness to apply for asylum in that country. There can be, however, compelling reasons

18 Abu v. Superintendent of Mount Eden Women's Prison, 199 NZAR Lexis 58 (NZ HC, Dec. 24, 1999).
19 Noll, op. cit., 1254.
20 Hathaway, op. cit., 390-391.
21 Ibid., 392-393.
22 UN Doc. E/AC.32/SR.40, Aug. 22, 1950, 6.

for that. 'Courts have, for example, accepted as reasonable the decision not to seek asylum in intermediate states which were not clearly secure, where basic human rights were not respected, which were culturally or linguistically foreign to the refugee, or in which the individual had few or no social or family connections.'[23] Moreover, refugee law scholars approvingly cite a Swiss Federal Court decision that pronounced that fear of summary rejection at the Swiss border also constitutes good cause for illegal entry into the country.[24]

3. The Hungarian regulation and its compatibility with the 1951 Geneva Convention

Under the new Hungarian legislation, asylum seekers can immediately be prosecuted for simply crossing the border outside of the official border crossing point, while criminal proceedings relating to their irregular entry are not suspended in case they subsequently submit an application for refugee status in Hungary. The Hungarian regulation does not prescribe that the judges examine whether the asylum-seeker charged with illegal border-crossing could be exempt from penalties based on Article 31 (1). If the asylum-seeker is judged to have come from a 'safe country' – which is inevitable since all neighbouring countries of Hungary have been declared safe by the government – then the accused will be found guilty.

Based on the above analysis, it seems clear that this regulation is incompatible with the text and the rationale of the 1951 Geneva Convention. Even though Article 31 (1) clearly allows for applying even criminal sanctions for illegal entry and presence, during the criminal proceedings the judges should determine whether the illegal entry could be excused for fulfilling the three criteria. Actually, it seems that probably most asylum-seekers could still be subject to punishment since some of them are not entitled to refugee status and most of them have lived in other countries after fleeing their country of origin (for instance, most Syrians have lived in Turkey and some Afghans in Iran). Finally, most

[23] Hathaway, op. cit., 398.

[24] Dec. 6S.737/1998/bue, ASYL 99/2, at 21 (Sw. FC, Mar. 17, 1999).

of the asylum-seekers did not present themselves to the authorities and even their good cause could be questioned.

4. Conclusion

This brief analysis undertook to examine under what conditions could asylum-seekers be punished for illegal entry and presence in a country and whether the Hungarian legal regulation was compatible with this international regime. While many other elements of the Hungarian regulation could be questionable from international, European and human rights law perspective, concerning this very narrow question this study found that criminalization itself was not contrary to international law, the rejection to take into account the requirements of Article 33 (1) during the criminal proceedings did violate the international legal obligations of Hungary. Hopefully this unfortunate state of affairs will soon be remedied.

Szilvia Dobrocsi[1]

Special Rules of Criminal Procedure in Crimes Related to the Border Closure

1. General remarks about Hungarian criminal procedure

In Hungary criminal procedures are conducted upon rules regulated by act XIX of 1998 on criminal procedure (herein after referred to as: CCP).

1.1. *The CCP*

The CCP distinguishes between three forms of criminal procedure: (i) *general procedure*: most of the CCP's regulations define the general rules of criminal procedure. In lack of any special circumstances the general rules should be applied for determining the guilt of the accused; (ii) *special procedures*: if special circumstances occur in the procedure, either related to the subject of the procedure (accused) or its subject matter (the crime committed), or the circumstances and the rules allow the simplification and speed-up of the procedure. Within the latter ones there is a procedure within which the prosecutor brings the case to court within 30 days following the first hearing of the accused. This means that it is an expedient procedure in which some of the general rules are disregarded of, for the sake of a quick decision. Another one is the waiver of the accused's right to trial, which is somewhat similar to plea bargaining used in the United States, but the agreement made between the accused and the prosecutor concerns the waiver of the right to trial and the application of some special rules of the Penal Code; in general real bargaining about the crime and the legal consequences is not allowed; (iii) *specific procedures*: applied against final court judgments any correction or amendment of the judgment is necessary.

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1.2. *Sources and principles of criminal procedure*

Since 1 January 2012 Hungary's Fundamental Law defines the basic framework of the legal system. Its provisions are relevant for criminal procedure law, because it lists human rights (right to life, personal freedom, human dignity, right to use one's mother tongue, etc.) and declares their protection, defines the conditions of their restriction. Article XXVIII is especially important, because it contains several principles and guarantees which are essential in order to conduct fair criminal procedures (right to defence, *nullum crimen sine lege*, right to appeal, presumption of innocence, right to court and right to fair trial). The Fundamental Law also regulates the basic framework of state organisations which proceed in criminal cases, such as the police, the prosecutor's office and the courts. It protects children in several ways, which includes their special status in a criminal procedure. In addition to the Fundamental Law, the CCP also declares the most important principles[2] and contributes to their protection with its detailed rules. It protects juvenile offenders by ordering the use of special procedural rules in their cases. It allows everyone to use their mother tongue in the procedure, even though the official language of the procedure is Hungarian, but no one may suffer any disadvantage due to the lack of Hungarian knowledge.

The level of human rights' protection in Hungarian legal instruments reaches the European standard, it complies with all obligations derived from human rights conventions, primarily from the European Convention on Human Rights[3].

1.3. *Some rules of criminal procedure*

During the procedure authorities may apply several coercive measures in order to ensure its success. These may contribute to the successful completion of the procedure in several ways, for example by preventing

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2 These are, for example, the presumption of innocence, the burden of proof, right to defence, the prohibition of self-incrimination, the right to use one's mother tongue.

3 Especially Article 6 of the European Convention on Human Rights.

the escape of the accused, by this ensuring his presence in the procedure, or preserving evidence until further use. Coercive measures are authority actions which assume the use of force, and they restrict the rights of the subject (usually the accused) in order to reach a certain goal. It is very important that the Constitutional Court of Hungary has ruled on the conditions of restriction several times: it has held that a necessity-proportionality test shall be applied in order to determine which form of coercive measures is the most appropriate in the given case to reach the desired goal. As criminal procedures may affect the most important human rights of the accused, it is essential to restrict these rights only if it is absolutely necessary, only with the lightest possible restriction and only for the necessary period of time.[4]

The court procedure requires lawful indictment in which the prosecutor requests the court to judge upon the guilt of the accused. The court shall act upon the indictment, but shall not exceed its framework. After the proper preparations for the trial the court holds public hearing in order to review the evidence. The publicity of the hearing may be limited only in special cases. In some of the special procedures or if the CCP otherwise allows the court may hold a public meeting, at which the prosecutor and the accused (with the defence lawyer) may be present and the evidence procedure is very limited. The prosecutor shall prove the guilt of the accused during the trial, the threshold of guilt for the court is certainty without any reasonable doubt, which means that if there is any doubt about the accused person being guilty, they shall be acquitted.

Against the judgment of the court of first instance appeal may be filed to the court of second instance. In general, this right to appeal is very broad, entitles all participants of the procedure and covers all material grounds. In principal, the right to legal remedy may be restricted only under certain conditions defines by law (e.g. in case of procedural decisions).

The above brief description of Hungarian criminal procedure is necessary because the modifications of the CCP related to the mass migration situation concern some of these basic rules.

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[4] For details see: Section 2.2 of Decision 30/1992. (V. 25.) AB of the Constitutional Court.

2. The modification of the rules of criminal procedure due to mass migration

In September 2015 Articles 24 and 25 of Act CXL of 2015 on the modification of certain acts with regard to the management of the mass migration situation modified some provisions of the CCP and introduced a new chapter which contains all special rules about the management of crimes which were newly introduced into the Criminal Code with the same act due to the mass arrival of immigrants to the Hungarian border. These are crimes related to the closure of the state border, namely illegal crossing of the closure, damaging the border closure and obstructing the construction or maintenance of the border fence. The provisions were promulgated on 7 September and entered into force on the 15th. Government Decree 269/2015. (IX. 15) proclaimed national crisis situation due to mass migration which forms basis of the use of the modified rules of the CCP. The crisis situation ends on 15 March 2016.[5] Later the government extended the territorial scope of the crisis situation to four more counties, therefore today it applies to six counties out of 19.

2.1. *The nature of modifications*

The new rules aim at managing the cases related to mass migration in a way which is more reasonable and feasible under the given circumstances. The reasons for introducing the new provisions mainly concerned the length and speed of the general procedure and the (expected) massive increase of the number of cases in the remaining part of the year. These were the main problems which the legislator wanted to handle. It chose the legal technique of introducing some new rules which deviate from the general rules of the CCP, adding that in all other issues not regulated by the new chapter the general provisions of the CCP apply. This means that the modification created a new special procedure with regard to mass migration. It also modified some rules of two already existing special procedures, the quick procedure and the waiver of the right to trial. In

[5] http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1500269.KOR#lbj0id752

addition to rules concerning adult perpetrators the modification also touches upon some sensitive issues regarding minors. It may be stated in advance that the modifications, even though they were adopted in relation with a so-called emergency situation due to mass migration, and are applicable only during the emergency period, concern some of the most fundamental principles and guarantees of criminal procedure and human rights law, which definitely raises concerns about their justification.

2.2. *Introducing a new special procedure*

The new Chapter XXVI/A[6], a procedure in case of crimes related to the border closure regulates the special rules which deviate from the general procedural provisions.

First of all, it lists those already mentioned three crimes which belong to its subject matter jurisdiction, meaning that these rules apply only in these cases. It stipulates that these cases shall be managed out of turn, which means that they shall be completed as soon as possible. It refers to the delivery of official documents related to the case and states that if the accused persons' whereabouts is unknown and he has no residence, either permanent or temporary, in Hungary, the documents shall be delivered to the defence lawyer. Regarding the participants of the procedure, the participation of a defence lawyer is obligatory in these procedures. The National Judicial Office's president appoints the proceeding judge who acts alone, without the participation of lay judges. The modification (together with a later amendment) appoints the tribunals of certain counties concerned and the district courts at their county seats as proceeding courts in these cases with exclusive jurisdiction.[7]

A very clever legal technique is used in the modifying act to exclude the application of some of the most important legal principles and guarantees during the aforementioned procedures. The act only refers

6 Articles 542/D-542/M of the CCP.

7 Article 17 paragraphs (6) and (6a) of the CCP. This means that the Szeged District Court, the Szeged Tribunal, the Pécs District Court and the Pécs Tribunal, finally the Zalaegerszeg District Court and the Zalaegerszeg Tribunal may proceed, depending on the place and nature of the crime.

to some provisions of the CCP [e.g. article 219 paragraph (3), chapter XXI] without actually detailing their content and the related changes. In case of a less thorough examination of the modifying act, one may even miss these rules due to this legislative solution.

The mentioned rules, which are not applicable in the criminal procedures conducted upon the three relevant crimes in the situation of mass migration stipulate the right to the use of mother tongue and the special provisions regarding juveniles. Therefore, in these procedures it is no longer a requirement to translate the indictment filed to the court by the prosecutor and the judgment delivered by the court to the language the accused understands. Interpreters may be used on the spot though if the accused requires so, to clarify certain issues.

Regarding juveniles (minors above the age of 14) the modification excludes the use of the set of rules which aim at protecting juveniles from the harmful effect of criminal procedure and at ensuring increased protection they might require due to their age. The reason for this is mainly that a mass arrival of minor immigrants was expected, many of them were expected to arrive without their legal guardian, therefore applying the special procedure would have been difficult. But with excluding all rules of the special procedure from the scope of application, all possible and necessary protections of minors were abolished. This means that there is no requirement to appoint a guardian for unaccompanied minors and parents or legal guardians cannot exercise their rights related to the case of a minor even if they reside within Hungary. Neither the favourable rules relating to deferred prosecution, nor the specialized rules of evidence pertaining to juveniles (e.g. the prohibition of the use of lie detectors) apply in these cases. This modification is definitely not in favour of the protection of children, as defined in several relevant international agreements.

Furthermore, in the abovementioned cases the court shall primarily apply house arrest as a coercive measure, which shall be realised in immigration or asylum facilities. The court shall act with the outmost care, considering the interests of minors. However, it is questionable whether these centres are ready and suitable for ensuring the success of such coercive measures. Moreover, the modification stipulates that

in necessary cases pre-trial detention may also be ordered and may be realised in police jail or at the mentioned immigration or asylum facilities (in addition to prisons, as general rules allow). The before mentioned concern remains, especially because jail and prison population in Hungary is rather high, the conditions are quite poor, therefore it is doubtful whether it is possible to find proper institutions for the realisation of these measures. Finally, the outmost consideration of the interest of minors is not detailed further in the law, therefore it might be considered simply a reassuring, but empty rule, especially in light of the aforementioned situation of minor offenders.

Criminal procedures shall be terminated if the accused persons' whereabouts is not known and he does not have a permanent or temporary residence in Hungary, except if the crime caused death or if the procedure is already at the court of second instance.

2.3. *Modified rules of existing special procedures*

The general rules of expedient procedures and the waiver of the right to trial have been also modified, simplified in order to facilitate a simpler and faster completion of procedures.

Instead of the general 30 days the prosecutor may bring the accused to court within 15 days following the first hearing if the case is simple, evidence is ready and the accused confessed. If the accused was caught in action, the third condition is not relevant and the 15 days period is reduced to 8 days. The prosecutor presents the indictment at the hearing, this is the first time when the judge and the accused hear it. The general requirement about the punishability of the crime, i.e. that it shall not exceed 8 years is not applicable, which means that any relevant crime may be brought to court within few days, even if the law allows the use of long imprisonment of 10-20 years. This clearly raises concerns about the fairness of the procedure and the enforcement of human rights.[8]

The general rules of the waiver of the right to trial were also modified. Public court meeting shall be held instead of public hearing within 15 days following the first hearing of the accused during the investigation.

[8] Article 542/N of the CCP.

Not only the accused, but also the defence lawyer may initiate this special procedure. Before initiating the court's procedure, the accused and the prosecutor enter an agreement containing the description of the crime, the sanction proposed by the prosecutor and its details (length and other features). If the court agrees, it judges accordingly. The general rules of this special procedure are obviously not applicable in these cases.[9]

3. Conclusion

As it may be seen from the abovementioned facts, significant changes occurred in the Hungarian criminal procedure in September. Even though they apply only for a specific period of time and concern only a certain group of perpetrators, they do raise concerns. As it has been experienced in practice since September most people accused leave before the end of the procedure and do not suffer real harm due to the new rules. Usually, due to their intention to leave as soon as possible, they do not participate actively in the procedure and do not resort to interpreters on the spot. Mostly minors and those held in custody remain, and they have to face court proceedings conducted upon the modified regulations. In September an ambitious Hungarian defence lawyer decided to take the case of his client through the complete criminal procedure (resort to all of the available remedies) and if possible challenge the regulations at the European Court of Human Rights in Strasbourg in the end. A judgment of the ECHR, either way, would put these issues into a new context and would make a statement about the protection standards of human rights in present day Europe.

[9] Articles 542/O-U of the CCP.

Andrea Domokos[1]

Legal Regulation of Human Smuggling within the Hungarian Criminal Law

1. Preliminaries

Human smuggling, as a sui generis delictum has been incorporated lately into the material criminal law - as Kőhalmi László points out.[2] Kőhalmi collects those legal characterisation of facts, which might be regarded as preliminaries of classical human smuggling. Act XXXVIII of 1881 about emigration agencies classified the illegal mediation of emigrants as trespass. Act VIII of 1903 considers the act against women smuggling as a task of the border police. Act XXXVI of 1908 considers it a qualified type of pandering if the perpetrator transports women abroad. Act XLVIII of 1948 punished the help to use banned passport or illegal border crossing[3]. Act V or 1961 penalised human smuggling within the terms of crimes against public safety and public order. At this time, illegal border crossing was a criminal offence as well as the failure to report human smuggling or illegal border crossing. The following ones were the different conducts of human smuggling for illegal border crossing in a pattern of business operation:

a) help
b) offer
c) collusion

1

2 Kőhalmi László: A határőrség hatáskörébe tartozó bűncselekmények az új Btk Novella tükrében. http://www.pecshor.hu/periodika/2002/kohalmi.pdf (3 November 2015)

3 Ibid. 147-151.

From the list above, it is obvious that the criminal offence covers sui generis conspirator conduct in connection with illegal border crossing.

2. Act IV of 1978

Smuggling of Human Beings [4]
Section 218.
'(1) Any person who, for financial gain or advantage, provides aid to another person for crossing the state borders:
a) without authorization;
b) in an unauthorized manner;
is guilty of a felony punishable by imprisonment for up to three years.
(2) The punishment shall be imprisonment between one to five years for smuggling illegal aliens:
a) for financial gain or advantage;
b) if it involves several persons.
(3) The punishment shall be imprisonment between two to eight years for smuggling illegal aliens:
a) by tormenting the smuggled person;
b) by force of arms;
c) in a pattern of business operation.
(4) Any person who engages in preparations for smuggling illegal aliens, as set forth in Subsections (1)-(3), is guilty of a misdemeanour punishable by imprisonment for up to two years.
(5) Expulsion may also be imposed as ancillary punishment against persons engaged in the smuggling of illegal aliens.'

Those commit human smuggling according to law who 'for financial gain or advantage or as a member or a person commissioned of a group that provides aid for such acts, helps, offers such or undertakes such acts.'

Compared to the previous one, the novelty of this regulation is that the pattern of business operation became a qualified circumstance.

[4] Chapter XV: Crimes of Corruption in the Administrative and Law Enforcement Sectors and Other Segments of Society, Crimes Against Law and Order

Expulsion appeared as sanction due to the fact that human smugglers bearing their special knowledge about locations provide aid to illegal boarder crossing. Until the effective regulation, the act has been modified a couple of times.[5]

Article 27 of the Schengen acquis was also taken into account during the modifications imposed in 2001 that provides the following:

'*The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens*'.

From the case law:

Communication concerning the decision of the Curia of Hungary in the criminal case no Bfv.II.573/2012/5.

In the criminal proceedings initiated against Mr. M and his accomplices for trafficking in human beings, the defence attorney of the second accused submitted a petition for judicial review to the Curia of Hungary which upheld – as regards the second accused – the judgement of the Municipal Court of Sopron and the second instance order of the County Court of Győr-Moson-Sopron.

In its judgement, the Municipal Court of Sopron found the second accused guilty of trafficking in human beings by providing aid, for financial gain and in a pattern of business operation within the framework of a criminal organisation, to multiple persons for crossing the state borders in an unauthorised manner [Article 218, paragraph (1), point b), and paragraph (3), point c) of the Criminal Code].

Acting as an appellate court, the County Court of Győr-Moson-Sopron confirmed the first instance judgement concerning the second accused, and held that the incriminated acts constituted the crime of trafficking in human beings as defined by Article 218, paragraph (1), point b), paragraph (2), points a-b), and paragraph (3), point c) of the Criminal Code.

The factual background of the case can be summarised as follows: between May and October 2007, the accused persons provided aid, for financial gain, to Serbian migrants for crossing the Hungarian-Austrian border in an unauthorized manner, organised their illegal entry into Italy or transported

[5] Act XXVIII of 1989, Act LXXIII of 1997, Act LXXXVII of 1998, Act CXXI of 2001.

them to their places of accommodation in Hungary. The first, second, fourth and fifth accused transported the illegal migrants to the close vicinity of the Hungarian-Austrian border. The first accused, in co-operation with the second accused, arranged the crossing of state borders. The transportation of migrants to Italy was aided by the sixth accused.

The defence attorney of the second accused submitted a petition for judicial review against the first and second instance decisions and put forward the following arguments: Hungary aligned to the provisions of the Schengen Borders Code on 21 December 2007 by placing its Schengen borders from the western regions to the eastern and southern frontiers, and eliminating border controls at the Hungarian-Austrian border. Since the above date, Hungary has been bound by the Regulation n° 562/2006/EC of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (also known as the Schengen Borders Code, hereinafter referred to as the Regulation). The Regulation and its annexes provide for internal and external borders. Article

20 of the Regulation stipulates that internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. Consequently, the control of persons has been abolished at the Hungarian-Austrian border, being an internal border within the meaning of the above Article.

The defence attorney argued that the crime of trafficking in human beings could have been committed only at the external borders of the Schengen Area. The legal representative of the second accused also pointed out that persons, who provided aid to foreign nationals illegally residing in the territory of any Member State of the European Union for crossing the internal borders of the Schengen Area, could only commit the crime of aiding in illegal residence as defined by Article 214/A of the Criminal Code.

The General Prosecution Service motioned for the Curia to reject the petition for judicial review. The Prosecution explained that the definition of the crime of trafficking in human beings had not changed during criminal proceedings, and the commission of such crime remained punishable by the Criminal Code. As a result of Hungary's accession to the Convention implementing the Schengen Agreement, the amended provisions of the Criminal Code regulated that Hungarian nationals who provided aid, within the

territory of Hungary or abroad, to other persons for crossing the state borders in an unauthorised manner, as well as foreign nationals who provided aid within the territory of Hungary to other persons for crossing the state borders in an unauthorised manner should be punishable for the commission of trafficking in human beings. The prosecution noted that the act of trafficking could be committed not only in the vicinity of state borders, but anywhere in or outside the territory of the country as well, consequently the decisions of the lower instance courts were justified concerning the second accused.

With regard to the above arguments, the General Prosecution Service motioned for the Curia to uphold the first and second instance decisions. The Curia agreed with the motion tabled by the General Prosecution Service and rejected the petition for judicial review.

By virtue of Article 218, paragraph (1) of the Criminal Code, persons who provide aid to other persons for crossing the state borders (of Hungary or any other country) without authorisation or in an unauthorised manner shall be punishable for the commission of trafficking in human beings.

The incriminated acts, enlisted in Article 218 of the Criminal Code, are considered criminal offences, not because the perpetrator violates the imaginary border-line between different countries, but because they violate or threaten state sovereignty.

The provisions of the Regulation shall be applicable to all persons crossing the internal or external borders of the Member States of the European Union. Article 1 of the Regulation sets out as a general principle that the Regulation shall provide for the absence of border control of persons crossing the internal borders between the Member States of the European Union. Article 2 of the Regulation gives the definitions of the key terms. With regard to the present case, the Curia emphasizes the following definitions:

Article 2, point 1 – internal borders means: (a) the common land borders, including river and lake borders, of the Member States; (b) the airports of the Member States for internal flights; (c) sea, river and lake ports of the Member States for regular ferry connections.

Article 2, point 2 – external borders means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders.

Article 2, point 6 – third-country national means any person who is

not a Union citizen within the meaning of Article 17, paragraph (1) of the Treaty and who is not covered by point 5 of this Article (persons enjoying the Community right of free movement).

Pursuant to the correct interpretation of Article 11 of the Act n° LXXXIX of 2007 on the State Border (hereinafter referred to as the State Border Act), border checks on European citizens and non-European citizens at the internal borders of the Schengen Area are eliminated, however, the absence of crossing points and the lack of controls over border-crossers do not exempt persons from fulfilling the required entry conditions. Hence, the creation of internal borders within the Schengen Area have not resulted in

abolishing state borders, it only led to the elimination of border controls of persons at the internal borders.

Article 5 of the Regulation provides for the entry conditions for third-country nationals. The Curia points out the importance of the following three conditions: a) third-country nationals shall be in possession of a valid travel document or documents authorizing them to cross the border; b) they shall be in possession of a valid visa or a valid residence permit; c) they shall justify the purpose and conditions of the intended stay, and they shall have sufficient means of subsistence.

Crossing the state borders in an unauthorized manner means that the perpetrator violates the legal rules governing the movement of persons across borders.

With regard to Article 11 of the State Border Act, if foreign nationals seeking to enter the country do not meet the relevant entry conditions, their residence in Hungary shall be considered illegal. In this case, the movement of foreign nationals across state borders shall be qualified unlawful, regardless of whether border checks are carried out at the frontiers. Thus, the absence of border controls does not exempt foreign nationals from fulfilling the required entry conditions.

Budapest, the 18th of February 2013
Criminal Department of the Curia of Hungary

3. Human smuggling as per Act C of 2012[6]

According to the latest codex we have, human smuggling can only be committed intentionally and its perpetrator can be anybody. The conduct of the criminal offence is sui generis conspirator-like.

Qualified circumstances of the offence - when it is carried out

a) for financial gain or advantage
b) involves several persons for crossing state borders
c) by tormenting the smuggled person;
d) by displaying a deadly weapon;
e) by carrying a deadly weapon;
f) on a commercial scale;
g) in criminal association with accomplices.

Preparation shall also be punished. The preparations of illegal immigrant smuggling is also punishable. Expulsion - as per Section 364 - might also be applied as sanction.

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[6] Illegal Immigrant Smuggling
Section 353.
(1) Any person who provides aid to another person for crossing state borders in violation of the relevant statutory provisions is guilty of a felony punishable by imprisonment not exceeding three years.
(2) The penalty shall be imprisonment between one to five years if illegal immigrant smuggling:
a) is carried out for financial gain or advantage; or
b) involves several persons for crossing state borders.
(3) The penalty shall be imprisonment between two to eight years if illegal immigrant smuggling is carried out:
a) by tormenting the smuggled person;
b) by displaying a deadly weapon;
c) by carrying a deadly weapon;
d) on a commercial scale; or
e) in criminal association with accomplices.
(4) Any person who engages in preparations for illegal immigrant smuggling is guilty of misdemeanor punishable by imprisonment not exceeding two years.

3.1. *Modifications after 15 September 2015*

'(1) Any person who provides aid to another person for crossing state borders in violation of the relevant statutory provisions is guilty of a felony punishable by imprisonment between one to five years.
(2) The penalty shall be imprisonment between two to eight years if illegal immigrant smuggling:
a) is carried out for financial gain or advantage; or
b) involves several persons for crossing state borders.
(3) The penalty shall be imprisonment between five to ten years if illegal immigrant smuggling is carried out:
a) by tormenting the smuggled person;
b) by displaying a deadly weapon;
c) by carrying a deadly weapon;
d) on a commercial scale; or
e) in criminal association with accomplices.'

A criminal offence that was punishable with imprisonment not exceeding three years now shall be punished with imprisonment from one to five years. A criminal offence that was punishable with imprisonment from one to five years now shall be punished with imprisonment from two to eight years, the offence that was punishable with imprisonment from two to eight years now shall be punished with imprisonment from five to ten years as per the provisions of the new law. The law introduces new qualified circumstances to human smuggling with regards to the organiser or director of the criminal offence.

Regulations of confiscation of property became stricter with regards to the perpetrators as it is a must to order confiscation of property to the money gained during the perpetration of the signed criminal offence.[7]

[7] Act CXL of 2015.

Photo by Hajni Valczer. Röszke, Hungary, 2015.

Dr. László Christián[1]

Handling of the Migration by the Police and Law Enforcement[2]

1. Special aspects, special method

The situation related to the migration can be interpreted in many ways. One of these is the analysis of the governmental law enforcement organisations as key actors and their participation in the handling of the situation, and what their internal viewpoit was? There are lots of factors of the law enforcement acts, beyond the media news. It is worth searching under the surface, and highlight some very important circumstances, thus we can see clearer, and can easily understand the role of law enforcement.

The study is based on interviews with police officers in leading positions who 'combatted' in the front line, and coordinated police actions. Thanks to Dr. János Balogh major-general, Head of Intervention Police Department, Deputy Commander-in-Chief of the National Headquaters of the Hungarian Police, for the permission to do the following interviews. Special thanks to the following persons, for being at service.
a) Ferenc Szabó colonel,
b) dr. Sándor Levente Karsai major
c) dr. Balázs Pethő lieutenant-colonel
d) other law enforcement officers, who handled the migration in practice

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[2] I am grateful to my collegaue dr. Violetta Rottler for her efforts in stylistics.

2. Start-up grounds, relevant circumstances

The official website[3] of the Hungarian Police reported that the number of the acts against the illegal migrants from 01.01.2015 to 24.10.2015. on the Hungarian external Schengen- borders was 390 861. The number of the criminal processes based on the new Penal Code, form 15.09.2015. to 24.10.2015. on the Hungarian-Serbian border was 849.

Illegal migration is a very serious, complex problem. If it is uncontrolled, it can result in a catastrophe in different countries, and in the European Union. The borders of the souvereign nations are permeable only under strict conditions, in the escalated situation that was in question. This is a new kind of invasion, and we are at the beginning of the process. The problem is not new, and it did't appear all of a sudden. Over the years we have already had migrants. In 2014 the number of them was increasing, and the problem slowly became current. The Schengen Area is a great achievement, but the Area without borders, and in particular the deep control, was underrated for years.

The uncontrolled inflowing of people into Europe has serious security risks. According to the experiences gained by the police officers who are doing their service in the first line, the migrants at all costs want to avoid registration. One of the interviewed persons held a lecture in January this year, and he estimated the number of the migrants this year about 80-100 thousand people. In January the majority was sceptic about that, nowdays we can see that in reality much more migrants arrived in Hungary.

According to the respondents, firstly the majority of migrants was Iraqi and Afghan, they were war refugees. This tend is changing, this year there are already more people, who don't directly escape from wars. Earlier more families arrived, now 70-80% of the refugees are single males, at the age of 17-35. It is worth highlighting that the families who arrived earlier were much more cooperative, whereas the young men more often have conflicts, which sometimes lead to clashes. The mass invasion as a coplex problem can be handled temporarily and symptomatically. But

[3] http://www.police.hu/hirek-es-informaciok/legfrissebb-hireink/hatarvadasz/napi-tajekoztato-14 (26. 11.2015.)

the problem could be solved by the European countries working together in the refugees' homelands.

Unfortunately, the illegal migration has become the biggest global business for the organized crime. Is has big profit with small risk, for instance the penalty of this crime is much smaller than the penalty of drug smuggling. Beyond the human smuggling networks there is an accurate organisation and conspiracy. The organised groups of criminals abuse the migrants' credulity. In spite of the new criminal regulations is Hungary a lot of migrants are sent to Hungary, because this is the shortest way. There is also an all inclusive way, where migrants can travel mainly without registration on the Serbian, Croatian, Slovenian, Austrian corridor towards Germany, the country of their dreams. In spite of the fence and the stricter regulation, migrants still arrive at the southerrn border of Hungary, who after trespassing the fence will be caught by the police and tried. Here the journey is stopped, because the majority are expelled. By the middle of September daily 2-3 thousand migrants came to Hungary, and the registration process was a big burden for the officers. Due to the stricter regulation and the fence, the number of illegal migrants decreased by 20-30 capita, but there were days, when measures were taken against only 4 people.

3. The Law Enforcement System: living up to its commitments

Since the Act CXLVII of 2010, the Hungarian Police Forces are divided into three parts: the National Police, the National Protective Service and the Counterterrorism Centre. The police organisation and the national security forces are regulated by separate Acts which must be approved of by the two thirds majority of the Parliament.[4] In 2008 the former Border Guard was integrated in the Police.

The priorities both of the new Criminal Code (Act C of 2012) and the Petty Offence Act II of 2012 are transparent, simple and effective regulations which are more rigorous than the previous ones, in the interest

[4] László Christián: Law Enforcement, In: *The Basic Law of Hungary (second edition 2015)*, Clarus Press, Dublin, Editors: Lóránt Csink, Balázs Schanda, András Zs. Varga (manuscript).

of fighting against property crime. The rights and properties of citizens are much more protected by the new Acts.

Our authorities usually do the regular tasks, this big pressure caused by the migrational wave must have been handled hard. The main problem was the number of the deployable police officers of the Intervention Police. We can state that the effective handling of the situation without soldiers couldn't have been achieved.

During the last months it turned out that the Hungarian Police, supported by cooperative partners, working hard, could handle the situation. The international professional feedback was also extraordinary positive; the colleagues abroad commended appreciatively about the Hungarian Police. In their opinion the Hungarian Police Officers did their job at a high level. From some problematic countries the police officers will come to study to us.

The Borderguard earlier was an organisation with slighter task and good equipment. The police has every tool and support that is necessary to the effective handling of the situation.

Only law enforcement can give an adequate response to this question, but this response is alone not enough. To handle this situation the following conditions are required: a determined manner based on political authorization, creating technical conditions to guard the border (fence), changing regulations. The earlier acceptable legal environment had several loopholes, for instance the migrants could leave any time from the open receptive station. It caused additional difficulty that the activities in connection with illegal migration evaluated as human smuggling was not enough in discretion of a prosecutor or judge. Nevertheless these were obviously human smugglings. Thus the vehicles of the apparent human smugglers vehicles had to be escorted to the border, then the investigation or jurisdiction authority could testify the assumption only at the moment of tresspassing the border. The illegal transport-contractors and their passengers had standard, prepared answers. Without the new legislation of 15 September naming new crime categories, the closed border wouldn't have been enough to solve the problem.

The efforts were multiplied by the wide social support. Fortunately the social expectation and the governmental vision regarding the saving

our border are the same. This consensus is an important start to handle the situation in a successful and efficient manner.

The most frequently asked question in connection with the topic is whether the revival of the Border Guard is resonable or not. The opinion of the majority of professionals is that it isn't resonable, because its conditions aren't available, and the police can fulfil the law enforcement tasks at the border. Let us not forget, that the National Police Headquarters has a Border Law Enforcement Department, and in this situation a similar department was created in the Intervention Police from 1 September, while in the country different 'border ranger' units were organized.

Another opinion is that the long term solution would be the revival of the Border Guard, because a big part of the forces were redeployed from the original police service. Due to the changing of the organisation of the work, the forces can be moved simultaneously, therefore police cooperation became fast and effective. For that very reason the human power has been the neuralgic point in the last few months, concerning whether they can send enough police officers to the border. 870 young officers started work. Contrary to the strain, workforce turnover was small, and the media news was false. We must take into account that the Hungarian Police have never done such a huge operation. The multiple task consisted of building logistical basis, transformation based on the needs, and establishing the background conditions. Several decisions had to be made very fast, the preconditions had to be created all of a sudden, and the tasks had to be executed immediately. Mistakes can naturally occure but on the whole, the balance is very positive. Under the given circumstances an effective program has been executed.

The Military and the Police have never been so cooperative like now, it is of historical importance. Soldier-police officer patrol worked together. There was a constant active dialogue under the leadership of the Military and the Police. They have been learning lots of know-how from each other. This cooperation is an important result of the last months.

Meanwhile they had to work against the criminality in the country. The officers spent 4-5 days on the border, and they went home to supply the background work, after that back to the border again. The police staff were very respectable to fulfil their commitment. In the second half

of October, when the situation became significantly better in Hungary, the government made a decision to help Slovenia by sending there 100 (2 × 50) experienced Hungarian police officers. The exhausted officers undertook the mission as volunteers, there was overapplication for the mission unit, though the service could have lasted to all soul's day.

For the sake of reaching the appropriate number of police officers, 870 Police Academy students were deployed on probation as sergeants. The employment of these determined youth was successful. One of their commandant asked if they preferred to stay at the border service, or go back to school. The answer was unanimous: all of them wanted to stay on the border to help the other officers. This attitude is very important, because it is imaginable that the emergency will endure for a long time. The information that the migration-crisis resulted in a serious denunciation wave was desinformation. The workforce turnover was minimal.

The media broadcast the events from a special viewpoint that was sometimes different from the internal experience of police officers. The media priority is marketability. This may be the explanation why there was a journalist in the migrant mass in incognito for a long time. His aim was to criticise the work of the Hungarian Police. Is is very difficult to find a good solution, when the migrants are not willing to queue up at food providing, therefore the police officers threw sandwiches to the people who were in the back. From the viewpoint of the media it was wrong and inhuman, but we can hear that the Austrian police officers also did the same.

We can divide the media as a fact-announcer, and an informative medium, which are manipulative, influential, and the latter often misuses their position. The goal sholud have been to provide credible information. The media influenced the migrant-situation, several times the rebellion was started when the broadcast-vehicles appeared. It seemed that is was an artificially generated situation. Apart from that, the media-presence was not obstructive, they were cooperative.

4. Cooperation in Hungary and abroad

The cooperation in the last few months has been without precedent. A strong social support resulted in creative, innovative initiatives, for in-

stance it created a common website, and in 2 months it attracted 40 000 followers, who supported the soldiers and police officers serving on the border. On the one hand these people gave big mental support, on the other hand they organized material support. Another website, which is also very popular, undertook the task of supplying the officers with things they specifically needed. One of the officers said feelingly that they got everything, for example vitamin C, from these winsome people.

The whole administration also colligated, everybody helped, particularly important was the help provided for the medical corps, the IRS gave jeeps, the paramedics cooked stew, so everybody supported the military and law enforcement, therefore their energy was multipled.

The internal colleagues could also be seen, the previously hidden conflicts came out, and by handling these problems the governmental organization gained profit. The active officers who earlier served at the Border Guard offered their unselfish help, and were determined to work together.

In international relations it is outstanding that the European national police departments with increasing numbers identify themselves with the Hungarian law enforcement, principally the V4-countries. Beside the solidarity and the unselfish help people came to us to learn, which is a professional appreciation.

Frontex is present in this region, gives extra source to solve the emergency situation, but the reaction of this organization is tardy, this is a sudden problem with forward moving masses.

5. Conclusion

The most urgent question is how long we can keep the status quo? It can be sustainable as long as there exists an open corridor toward Germany. If Germany closed the corridor, the question would be what will happen to the huge masses of migrants who move toward Europe. The European countries have no means to hinder the thousands of people. When one border is closed, the less protected Hungarian border will be a passageway again. Despite the expectations, the cool weather hasn't decreased the migration. The evidence is: since the closing of the Hungarian border,

250 thousand migrants have crossed the Croatian border, meaning that an average of 5-10 thousand people have passed the border a day. According to the professionals, this is only the beginning of the phenomenon, so we need a solution on a European level, and the solution can be found at the roots of the problem.

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Gábor Kecskés[1]

Environmental Migrants: A Term and Global Challenge to Learn?

1. Introduction and the Context

Environmental migrants, climate change refugees, environmentally displaced persons, victims of environmental abuse…[2] These are brand new terms and phrases of the last decade that we should learn and put these words into the centre of attention of global migration and movement studies. As of 2015, however, the migration cannot directly and excusively be interlinked to environmental changes, but experts say that today's migration situation has partially taken place due to climate changes with subsequent desertification, water and food shortage and their (political, economic, etc.) consequences in some certain regions.

The researches forecast that this problem is going to reach a higher level of global importance within the next decades; however, there are two approaches within the leading literature to pose this issue as a myth or reality.[3] Nevertheless, the former myth-side does not deny the severity of environmental changes and the phenomenon itself, but tends to interlink it to other more apparent migration-forcing causes (primarily political ones, wars, etc.) and the representatives cannot prove convincingly that solely and exclusively environmental changes lead to migration without other forcing negative effects. Astri Suhrke distinguishes two clear ap-

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[2] Although the terms 'migrant' and 'refugee' do not have the same meaning, the environmental-based migration studies mostly use these terms interchangeably within the special terminology.

[3] See e.g. Black, Richard: *Environmental Refugees: Myth or Reality?* UNHCR Working Papers, 2001. No. 34, 1-19.

proaches; therefore, with his wording, a 'minimalist' and a 'maximalist' approach can be apprehended: the „*minimalist view – sees environmental change as a contextual variable that can contribute to migration, but warns that we lack sufficient knowledge about the process to draw firm conclusions. The other perspective sets out a maximalist view, arguing that environmental degradation has already displaced millions of people, and more displacement is on the way.*"[4] This Janus-faced inherent reality is apparently mirrored in the studies of environmental migration.

This article deals with the phenomenon itself by setting the problem and analyzing its appearance in the relevant literature by highlighting the most prominent scholar views and basic key findings of the given field.

2. Environmental Migration and its Current Legal Status

First and foremost, it is worth mentioning that the global treaties on migration do not contain any rules on the „wellfounded fear" of environmental changes; the definition of refugees exclusively focuses on life-threatening fears due to mostly political motivations. The socio-economic as well as environmental vulnerability of the individual goes beyond the domain of such treaties.

The milestone treaty, namely the 1951 Convention relating to the Status of Refugees and its 1967 Protocol define the term of „refugee" as an individual who has a „*…wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*"[5]

Upon this definition, solely the climatic and other environmental detrimental effects do not provide basis for guaranteeing refugee status

[4] Suhrke, Astri: *Pressure Points: Environmental Degradation, Migration and Conflict*. Cambridge, American Academy of Art and Science, 1993. 4.

[5] *1951 Convention relating to the Status of Refugees* and its *1967 Protocol*. Article 1, A. (2).

to those people who voluntarily leave their countries as refugees. The causes are simple: first, in 1951 the negative effects of environmental changes could not be proven in such a way as we got to know them in the last two decades; secondly, the historical and political context of adopting these instruments rather favoured the settlement of the post-World War II refugees' status (who were, of course, not environmentally displaced persons).

Hence, the legal answer is unequivocally negative concerning the recognition of the environmentally displaced person's refugee status; however, the social reality of environmental migration is clear and palpable and it is getting increasing importance.

3. Working Definitions of the Relevant Term

Essam El-Hinnawi, one of the forerunners of the analyzed field made an attempt (first-ever) to define the term 'environmental refugee', which reads as follows: „*those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life. By 'environmental disruption' in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life.*"[6] However, in 2008 Dun and Gemenne pointed out that „there is currently no consensus on definitions in this field of study" and „the main reason for the lack of definition relating to migration caused by environmental degradation or change is linked to the difficulty of isolating environmental factors from other drivers of migration."[7]

But afterwards, the field of analysis has a relatively wide-scale and all-inclusive definition on 'environmentally displaced person' adopted by the research report of 2009 International Organisation for Migra-

6 El-Hinnawi, Essam: *Environmental Refugees.* Nairobi, United Nations Environment Programme, 1985. 4.

7 Dun, Olivia – Gemenne, François: Defining 'Environmental Migration'. *Forced Migration Review*, Vol. 31, October 2008, 10.

tion, which reads as follows: „*persons or groups of persons who, for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad*."[8]

The similar term of 'environmental migrants' has also been defined by the Organization in its 2007 working report, thereupon these individuals „*are persons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.*"[9]

Due to the well-known post-2009 events (economic crisis, wars in ecologically vulnerable territories, signs of climate changes, accelerating environmental damages), the number of studies and reports dealing with such issues are expected to rise significantly, which could provide grounds to create a definition within the text of obligatory documents (e.g. treaties). In reality, the political interest and will of negotiating a draft treaty text on environmental refugees (or distinct environmental migration-related issues) cannot be detected due to the divergent *raison d'État* and the subsequent multi-faced political aims of the states, clearly shown in contemporary (as of 2015) refugee crisis.

4. The Relevant Studies and Scientific Literature on Environmental Migration

The phenomenon of environment-related migration is coeval with mankind, whether these migration flows took place in the ancient times (when states, and thus, state borders did not exist) or they were and are attached

[8] The State of Current Knowledge and Gaps: A Summary of Key Findings. In: Laczko, Frank – Aghazarm, Christine (eds.): *Migration Environment and Climate Change: Assessing the Evidence*. Geneva, International Organisation for Migration, 2009. 17-27.

[9] *International Organisation for Migration Discussion Note: Migration and the Environment*, MC/INF/288, 1 November 2007.

to inter-state migrations across state borders (from the antiquity to the contemporary period). Nevertheless, the search and pursuit of natural resources (and to leave the exploited and run-down areas) was always the motive of human migration and settlement throughout the history of mankind. Still, the studies of the analyzed field only emerged in the late 1980s. First and foremost, Essam El-Hinnawi's work (*Environmental Refugees.* United Nations Environment Programme, Nairobi, 1985.) was the first scholar contribution to put this issue into the limelight in order to raise the attention of the global actors as well as the public.

The general migration studies overwhelmingly agreed on the fact – firstly published by the United Nations High Commissioner for Refugees in 1993[10] – that refugee flows have four main reasons, namely: i) political instability; ii) economic tensions; iii) ethnic conflicts and iv) environmental degradation.[11]

Suhrke divided the category of environmental refugees into six groups upon six vulnerabilites and the six most dangerous detrimental changes in our environment. Suhrke pointed out that environmental migrants are forced to leave their homes, regions (internal migration) and countries (international cross-border migration) due to the threats of i) deforestation; ii) rising sea level; iii) desertification and drought; iv) land degradation; v) water and air degradation and vi) pressure points.[12]

Nowadays, Norman Myers estimated that 'environmental refugees' are driven by three major sources: i) population growth, ii) sea-level rise and iii) an increase in extreme weather events.[13] Furthermore, he carried out a case-study and within this work Myers surveys the Haitian experience

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10 *The State of the World's Refugees 1993: The Challenge of Protection. United Nations High Commissioner for Refugees*. Geneva, Switzerland, 1993.

11 On the environmental degradation and its impacts on migration, see Lonergan, Steve. The role of environmental degradation in population displacement. *Environmental Change and Security Program Report*. Washington, Woodrow Wilson International Center for Scholars, 1998. Issue 4, 5-15.

12 Suhrke: *op. cit.* 11-15.

13 Myers, Norman: Environmental Refugees: A Growing Phenomenon of the 21st Century. *Philosophical Transactions of the Royal Society: Biological Sciences,* 2002, 609-613.

on the migration of the people due to weather changes.[14] Besides, the most graphic and shocking examples primarily come from the African and South-Asian overpopulated and ecologically vulnerable regions.[15]

However, the most elaborated and complex system for the classification is carried out by Diane Bates, who identified three 'refugee terms' for three 'forcing levels' to three 'types of threats and disruptions'. She set out the system of i) involuntary migration of environmental refugees due to disasters; ii) the compelled migration of environmental emigrants due to expropriation of environment and iii) voluntary migration of migrants due to deterioration of environment.[16] Such kind of triple division aptly explains the three different migration motivations as well as it makes the basically sociological analysis more focused and problem-based on the root causes and causality, as well.

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14 *Ibid.* 609-610.

15 See e.g. Otunnu, Ogenga: Environmental Refugees in Sub-Saharan Africa. Causes and Effects. *Refuge,* Vol. 12 (June 1992) No. 1, 11-14. Babu, Suresh Chandra – Rashid, Hassan: International Migration and Environmental Degradation – The Case of Mozambican Refugees and Forest Resources in Malawi. *Journal of Environmental Management*, March 1995, 233-247., Swain, Ashok: Displacing the Conflict: Environmental Destruction in Bangladesh and Ethnic Conflict in India. *Journal of Peace Research*, Vol 33 (1996) No. 2, 189-204. From the Hungarian language literature, see Erdő, Mariann: A környezeti menekült jelensége [The Phenomenon of Environmental Refugee]. In: Smuk Péter (ed.): *Az állam és jog alapvető értékei II.* [Fundamental Values of State and Law, Volume II.]. Győr, SZE Állam- és Jogtudományi Doktori Iskola, 2010. 150-166. On the political and ecological aspects of African migration flows from the Hungarian literature, see Glied Viktor: Klímaváltozás, klímamigráció és globális NGO-k Afrikában [Climate Change, Climate Migration and Global NGOs in Africa]. *Afrika Tanulmányok* [Studies on Africa], Vol. 5 (2011) No. 3, 4-32. There is also a well-articulated view that the case of the Oceanic state of Tuvalu provided the best examples for environmental refugees. See Farbotko, Carol – Lazrus, Heather (2012). The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu. *Global Environmental Change*, Vol. 22 (2012) No. 2, 382-390.

16 Bates, Diane: Environmental Refugees? Classifying Human Migrations Caused by Environmental Change. *Population and Environment*, Vol. 23 (2002) No. 5, 468-475.

Gaim Kibreab is most noted for his critical approach of the issue and the encroaching literature by emphasizing that the term 'environmental refugee' was „invented at least in part to depoliticise the causes of displacement, so enabling states to derogate their obligation to provide asylum. The rationale is that states have no obligation to provide asylum to those who flee their homes because of environmental deterioration rather than political persecution."[17] Kibreab further stated that „environmental change and population displacement are the consequences of war and insecurity rather than their causes."[18] These thoughts articulated by Kibreab are, however, shared by only the minority of authors of the research community studying environmental migrants.

Nowadays, irrespective of the scholarly definitions and their acceptance, some facts are very clear within our field: i) yet, the environmental changes have deep but not exclusive impacts on migration; ii) the environmental detrimental effects are closely interconnected to multiple problems (political, cultural); iii) the elements of such complex systems have a characteristic internal interaction therein (the impacts are strengthening each other); iv) the clear evidence of solely environmental change-induced refugee flows and 'climatic migration' has never been proven; but v) the climatic changes had great influence on the vulnerability of societies and state powers, which could easily lead to turmoils and even wars and then voluntary migration, as well.

5. Conclusion

The notion and relevance of migration studies on environmental changes will be gaining more and more importance due to the increasing number of migration hot-spots as well as accelerating and deteriorating ecological

[17] Kibreab, Gaim: Environmental Causes and Impacts of Refugee Movements: A Critique of the Current Debate. *Disasters*, Vol. 21 (1997) Issue 1, 21.

[18] Kibreab: *op. cit.* 33. The argumentation reads as follows: „war and insecurity force people and their animals to congregate in safer areas. Over time, the safer areas get over-exploited while the unsafe areas remain un- or under-used. If the duration of the state of confinement is extended, as it is for many, flight in search of safety and livelihood then becomes the only option." Ibid.

conditions;[19] furthermore it should be surveyed within the context of social resilience, adaptation technics and other factors reducing vulnerability. This study contributes to the problem-framing and the review of literature of the given field.

However, Dun and Gemenne clearly outlined that the over-emphasizing of self-standing and 'environmentally displaced persons' as a separate term has two drawbacks. „Firstly, many scholars would like to establish environmental migration as a specific field within migration studies (…) to fence off this area and consider it apart from classical migration theories (…) Secondly, there is a widespread appetite for numbers and forecasts amongst journalists and policymakers. In order to make their research policy-relevant, many feel compelled to provide some estimation of the number of those who are or may become 'environmentally displaced'. These numbers, obviously, need to rely on a clear definition of who is an environmental migrant."[20]

But to sum up, it seems to be certain that the decades yet to come will be echoed by the migration partially caused by detrimental effects, such as water and food shortage and worsening basic living standards of some regions due to extreme weather conditions and potentially man-made ecological decline.

To prove this fact, among the primarily European migration situation, these issues got more attention compared to the previous years. E. g. one of the leading Hungarian news portal, 'index.hu' recently published an article entitled 'Vagy víz fog folyni vagy vér' [Either the water will flow or the blood],[21] which deals with one of the layers of political-social-cultural conflicts, namely the scarcity of water in Syria and the relation of India and Pakistan. Besides, a leading Hungarian national security expert, Péter Tálas gave an interview, in which he stated that one of the root causes of the Arab Spring is the severe drought which perished 75% of the crops and 85% of the stock in certain regions of Syria, having

19 See further Keane, David: Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees". *Georgetown International Environmental Law Review*, Vol. 16 (2004) 209-223.

20 Dun-Gemenne: *op. cit.* 10-11.

21 http://index.hu/kulfold/2015/03/22/azert_a_viz_az_ur/.

forced the huge amount of farmers and village population into the cities. This internal migration *inter alia* generated heavy social turmoils leading to civil unrest, then civil war.[22] The Hungarian press widely cited the speech of President Barack Obama too, who shared his view that climate change and its collateral effects are immediate risks to national security.[23]

The above-mentioned Hungarian online website, 'index.hu' just days after the Paris attacks published a thought-provoking article on the direct relations between terrorism, vulnerable societies and the societal turmoils caused by climatic changes.[24]

These signs show us and forecast that environmental refugees and primarily the phenomenon of climate change-induced migration are worth being the subject of researches and considerations of the political actors as well as scholars.

22 http://inforadio.hu/hir/belfold/talas-peter-az-eghajlatvaltozas-a-migracio-egyik-alapveto-oka-769200.

23 The original news can be found on the webpage of usnews.com: http://www.usnews.com/news/articles/2015/05/20/obama-climate-change-an-immediate-risk-to-national-security.

24 http://index.hu/gazdasag/2015/11/18/klimavaltozas_terror_sziria/.

Photo by Hajni Valczer. Röszke, Hungary, 2015.

Júlia T. Kovács[1]

Refugee Crisis in the Aspect of the Human Right to Food

1. Introduction

It is well-known that in the year 2015 thousands of refugees from the Middle East and Asia arrived in Hungary as it is the main entry point to Europe across the Balkan Peninsula. We heard in the news about immigrants throwing away the food and the water they were given.[2]

This indicates that one of the biggest problems about refugee crisis is their supply with adequate food. The question may arise whether it is the obligation of the state to supply refugees with adequate food (and water) and to what extent. In other words, does a human right to food exist in international human rights law and if it does, can it be enforced, for whom and to which extent.

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2 See: http://www.liveleak.com/view?i=344_1441354394#V4Pfs46Qs2bkvgH0.99. There can be several explanations why refugees in Hungary threw away the food they received. For example, if a package is opened, it's hard to keep bacteriologically safe without refrigeration. Eating spoiled food isn't going to help anyone. Another explanation could be that Hungarian diet relies considerably on pork, which is forbidden to Muslims and most of the refugees are Muslim. It can be also taken into consideration that even starving people prefer to avoid food that they cannot recognize. While Hungarian cooking certainly has some Ottoman influences (as does Arabic cooking), there are enough differences that it could make the food questionable. (https://www.quora.com/Why-do-refugees-in-Hungary-throw-away-the-food-they-receive)

In this paper I am trying to find the answer to how we can assess this situation, that is, the legal status and possibilities of refugees in the aspect of the human right to food.[3]

2. Article 11 of the International Covenant on Economic, Social and Cultural Rights

The human right to food is mostly discussed in the context of Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11 ICESCR stipulates human rights with regard to an adequate standard of living, including food.[4]

However, for the enforceability of the human right to adequate food, it would be necessary for the courts to accept *direct applicability* of the ICESCR and especially Article 11. However, I could not find any court judgment *in Hungary* in which Article 11 of ICESCR was directly applied by the court.[5] Neither have I found any decision of the Constitutional

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3 In this paper only the international human rights law is taken into consideration. The EU law aspects of the question are ignored in this paper.

4 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, (…).'

5 According to "*Search* by TEXT" on the official search website of the online database of the Hungarian courts' judgments: http://birosag.hu/en/information/find-jurisdiction, the answer to the issue of judicial control of compliance with the ICESCR shouldn't ignore the manner of reception of international treaties, (in the present situation the Covenant's provisions), that is, for example Hungary applies a dualistic system, but the Netherlands (the Dutch law is essential in our topic) applies a monistic system. B.M.J. van der Meulen – dr. F.M.C. Vlemminx: An adequate right to food? In: Otto Hospes – Bernd van der Meulen (eds.): Fed up with the right to food? The Netherlands' policies and practices regarding the human right to adequate food. Wageningen Academic Publishers, The Netherlands, 2009. p. 36.

Court in which Article 11 of ICESCR would have been applied as the basis of examination of Conflicts with International Treaties.[6]

In other countries, the question of *direct applicability of the ICESCR* has also emerged with regard to refugees and Article 11 of ICESCR.

In *the Netherlands*, *the courts reject direct applicability* of the right to food (and other social, economic and cultural rights enshrined in the Dutch constitution and in ICESCR).[7] That said, in the Netherlands, normally, the Courts deal quickly with a request to directly apply an ICESCR provision, that is, they reject it immediately. This way they hardly provide us with any further explanation beyond the standard considerations just mentioned. An *exception* is found in a ruling from 2007 *in the case of an asylum seeker*, in which the Central Court of Appeal expressed its opinion on the status of some ICESCR provisions. An asylum seeker, awaiting a decision on his application for a residence permit, contested the decision of the local Public Social Welfare Centre to withhold a social security benefit that would enable him to provide for himself and his younger brother. One of the arguments he put forward was that the State has the duty to provide at least some care, because he was residing lawfully in the Netherlands. However, the Court's message

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6 In Hungary the Constitutional Court shall examine whether rules of law are in conflict with international treaties. However, this proceeding may be initiated *ex officio* or may be requested only by certain state organs, such as for example the Government, the Prosecutor General or the Commissioner for Fundamental Rights, and they have not ever done so yet with respect to the Article 11 of ICESCR. In case a natural person initiated the examination of a legal provision whether in conflict with ICESCR, the Constitutional Court rejected the petition for having been filed by an ineligible person. (See Resolution of the Constitutional Court of Hungary no. 737/E/2001.) For further details about the review of international treaties by the Constitutional Court of Hungary see: András Patyi: Protecting the Constitution. The Characteristics of Constitutional and Judicial Review in Hungary 1990 – 2010. Schenk Verlag, Passau, 2011. p. 22. Regarding the important features and functions of the new constitution (Fundamental Law) of Hungary see: Ádám Rixer: Features of the Hungarian legal system after 2010. Patrocinium, Budapest, 2012. pp. 98 – 114.

7 Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 69.

was clear and consistent with the legal practice: there is no direct applicability of Article 11 ICESCR in the Netherlands.[8]

In the Netherlands, most cases in which Article 11 ICESCR is invoked concern asylum seekers.[9] According to *Bart Wernaart,* in the Dutch courts, Article 11 ICESCR is generally invoked to support demands for social

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8 Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 72.

9 Apart from asylum seekers, most cases in which Article 11 ICESCR is invoked concern people on low income, prisoners, elderly, disabled persons. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. In: Otto Hospes – Bernd van der Meulen (eds.): Fed up with the right to food? op. cit. p. 73. It is interesting to note that bilateral investment agreements between states are increasingly being scrutinised by human rights activists for violating e.g. right to food. In 2006, the investment agreement between Germany and Paraguay even became a matter of discussion before the Inter-American Court for Human Rights, which came to the conclusion that the state of Paraguay shall redistribute the land and pay compensation for the loss of life of eighteen children who died of hunger and malnutrition as a result of the fact that their families lacked land. In Paraguay, one percent of the population owns seventy-seven percent of the land. This is the highest concentration of land in the hands of few in Latin America. The unequal distribution of land is a major reason for the fact that fourteen percent of the population are suffering from hunger. Ute Hausmann: The hungry challenging the global elite – Extraterritorial state obligations under the Human Right to Food. In: Otto Hospes – Bernd van der Meulen (eds.): Fed up with the right to food? op. cit. pp. 141–142. The Hawaiian legislature solved such a concentration of ownership in the mid–1960s by passing the Land Reform Act of 1967, which authorized the Hawaiian Housing Authority, when asked by people leasing the land on which they lived, to condemn large tracts of land occupied by single family homes, pay the land owner(s) a fair price as determined either by negotiation between the lenders and the lessees or by arbitration, and resell the land to the home owners at the purchase price, with the provision that no person could purchase more than one lot. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), cited by: Téglási András: A tulajdonhoz való jog alkotmányos védelme [The constitutional protection of the right to property]. Pólay Elemér Alapítvány, Szeged, 2013. p. 48. footnote 166.

benefits, providing the claimant with a minimum means of subsistence.[10] The cases relating to Article 11 of ICESC fall in two categories.

The first consists of the cases in which the level of social benefits is under discussion. In these cases, the claimant enjoys social benefits, but s/he considers these benefits to be inadequate and thus not guaranteeing minimum means of subsistence.[11] Here, the right to food is seldom explicitly an issue: the focus is on Dutch legislation and procedures concerning social benefits.

The second category consists of cases in which the claimant has no access to social benefits at all, and, as a consequence, has no means of subsistence that are provided for by the government. The claimants are mostly asylum seekers residing in the Netherlands.[12] A majority of the 'Article 11 ICESCR cases' concern this last category.[13]

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10 Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 69.

11 For instance: Central Court of Appeal, 1 November 2005, LJN: AU5600, 9 May 2006, LJN: AX2177, 1 October 2008, LJN: BF4589. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 73. footnote 152.

12 For instance: Central Court of Appeal, 25 May 2004, LJN: AP0561; 8 July 2005, LJN: AT910211; Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 73. footnote 153.

13 Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 73. According to *Bernd van der Meulen* and *Otto Hospes*, the policy adopted in the Netherlands in respect of failed asylum seekers and (other) illegal immigrants in the early 1990s was initially also referred to as 'smoking out' but later called 'linking'. Under this policy rejected immigrants were no longer able to make use of the 'bed and bread' scheme in force at that time nor were they granted access to (any other) social facility. The only thing they could expect from the Dutch government was a return ticket to their country of origin. This latter belief, not expressed quite as emphatically as in the beginning, is that the withdrawal of all facilities encourages people to leave the country. In this sense it can be seen as a policy instrument. Bernd van der Meulen – Otto Hospes: Introduction: what is there to celebrate in the Netherlands on World Food Day? In: In: Otto Hospes – Bernd van der Meulen (eds.): Fed up with the right to food? op. cit. p. 24.

According to *Bart Wernaart,* two situations can be distinguished in which an asylum seeker invokes Article 11 ICESCR. In the first situation, the asylum seeker *stays legally* in the Netherlands, while awaiting a final decision concerning a residence permit, or concerning certain administrative procedures.[14] In this situation, the asylum seekers 'are housed in one of a number of reception centres scattered throughout the country,' but generally have no further rights concerning income support or other social benefits.[15] In the second situation, the asylum seeker *stays illegally* in the Netherlands, and generally has no access to social benefits,[16] or possibility to stay in a reception centre.[17] The above is based on the so-called 'Koppelingswet', an Act that partly excludes asylum seekers without residence permit from entitlements to general social benefits in the Netherlands. In 'normal' circumstances, an asylum seeker, *unlawfully residing* in the Netherlands, or lawfully residing but not having a residence permit, cannot make a successful claim to most general social benefits, and thus *cannot make a successful appeal to a right to food either*.[18]

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14 Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 73.

15 For instance: District Court of Amsterdam, 13 March 2001 LJN: AB0942. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 74. footnote 156.

16 For instance: Central Court of Appeal, 21 November 2007 LJN: BB9625. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 74. footnote 157.

17 District Court of Amsterdam, 13 March 2001, LJN: AB0942. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 74. footnote 158.

18 For instance: Central Court of Appeal, 25 May 2004 LJN: AP0561; 8 July 2005, LJN: AT9102; 11 October 2007, LJN: BB5687; 21 November 2007, LJN: BB9625; District Court of The Hague 30 August 2000, LJN: AA6959; 23 January 2006 LJN: AV0548; District Court of Arnhem, 25 May 2007; LJN: BA6562; District Court of Rotterdam, 24 December 2007, LJN: BC0852, District Court of Haarlem 8 April 2008 (summary trial), LJN: BD3399; District Court of Amsterdam: 4 August 1999, LJN: AA4043. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 74. footnote 160.

Remarkably, in some cases the presence of charity-help is held against the claimant: the fact that an asylum seeker received shelter in a care facility owned and operated by a charity organisation, was one of the arguments on which the summary trial court of Haarlem judged that the municipality of Haarlem rightfully rejected an application for housing.[19] Remarkably, in other cases dependence on charity-help, is taken into account by the Courts to establish the severe circumstances the claimant is facing.[20] The exceptions to the standard legal practice are the most interesting in this context, and may possibly determine whether the Dutch courts let those suffering from hunger down in practice.[21]

Bart Wernaart draws attention to a case[22] in which the court, despite the rejection of direct applicability of Article 11 ICESCR, was willing to consider other arguments to determine whether the claimant should be granted certain benefits.[23] The specific circumstances played a role: the strict policy of the COA[24] with regard to the interpretation of 'distressing humanitarian circumstances' had to be reviewed in this case, for the situation in which a woman with a child is not entitled to any means

19 Summary Trail Court of Haarlem, 29 July 2008, LJN: BE9491. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 74. footnote 161.

20 For instance, District Court of Amsterdam, 13 March 2001, LJN: AB0942. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 74. footnote 162.

21 Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 74.

22 District Court of Amsterdam, 13 March 2001, LJN: AB0942. 163 District Court of Amsterdam, 13 March 2001, LJN: AB0942. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. pp. 74. footnote 163.

23 Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 74.

24 COA is the agency charged with caring for and the housing of asylum seekers. To this end they operate so-called reception centres.

of subsistence, including food, could not reasonably be regarded as not being a distressing humanitarian situation.[25]

However, limiting the right to food to the interpretation of this Article would do no justice to the full meaning of the right to food.[26] A survey of international human rights instruments shows that the right to food is also recognised directly in other documents that mostly aim at the protection of a particular group of individuals,[27] and is furthermore inextricably linked to other human rights or human rights-related issues, that is, in the Convention relating to the Status of Refugees[28] and the International Convention on the Protection of the Rights of All Migrant

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25 The ruling was given in a dispute between on the one hand a refugee from Somalia with her 23-month old child and on the other hand the COA. In this case the lady from Somalia contested a decision made by the COA denying her access to a reception centre. The reason was that her request for a residence permit had been denied. She was awaiting the decision on a second request. It was COA's policy only to house people awaiting a first decision. In her argument she took recourse to inter alia Article 11 ICESCR. She argued that denying her and her child shelter in a reception centre, in combination with the circumstance that she was not allowed to work in the Netherlands, left her without (adequate) means of subsistence and fully dependent on charity help. The case was decided by the District Court in Amsterdam, which first rejected direct applicability of Article 11 ICESCR. This did not, however, keep the court from ruling in favour of the claimant. The applicable policy guidelines required COA to take account of distressing humanitarian circumstances. In the light of the circumstances of the case, among them the fact that the claimant did not have sufficient means of subsistence – including food – to provide for herself and her child, the reasoning given by COA did not convince the court that COA had sufficiently taken account of distressing humanitarian circumstances. The District Court of Amsterdam quashed COA's decision, and ruled that COA had to reassess the case. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. pp. 72-73.

26 Bart Wernaart: The enforceability of the human right to adequate food. op. cit. p. 60.

27 See: Bart Wernaart: The enforceability of the human right to adequate food. op. cit. pp. 60-61.

28 A/RES/429 (IV), 14 December 1950, Draft Convention relating to the Status of Refugees, Article 24 (1)(b).

Workers and Members of Their Families[29] the right to social security is recognized. The Committee on Economic, Social and Cultural Rights held that the right to social security must at least provide the benefited with access to a minimum life standard, in accordance with Article 11 ICESCR.[30]

3. Conclusions

The refugee crisis in Europe increased the importance of the existence and enforceability of the right to adequate food.

If one tries to find the legal basis for this right in international human rights law, we have to go back to Article 11 of ICESCR.

Legally, two main questions arise regarding this provision. On the one hand, there are the provisions of ICESCR directly applicable in front of the country's court. On the other hand, how and who can enforce this right against the state?

As in Hungary there hasn't been any precedent either in front of the courts, or in the Constitutional Court, we took the example of the Netherlands, where these questions had already emerged in the last decades, especially with regard to asylum seekers, refugees.

From the Dutch example we can draw the conclusion, that rejecting direct applicability of the human right to food does not mean that the courts deprive those suffering from hunger of all rights. If not in its form, at least there seems to be a right to food in its substance for asylum seekers who lawfully reside in the Netherlands without a residence permit and find themselves in distressing humanitarian circumstances,

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29 This Convention states that 'independent of their legal (documented) or illegal (undocumented) status, migrants are entitled to the full respect, protection and fulfilment of their fundamental rights, including economic, social and cultural rights.' A/RES/45/158, 18 December 1990, The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 27.

30 E/C.12/GC/19, 4 February 2008, CESCR, General Comment 19, The Right to Social Security (Art. 9). See in particular Sections 18, 22, 28, and 59. Bart Wernaart: The enforceability of the human right to adequate food. op. cit. p. 64. footnote 139.

or are children, though only the latter is formally recognised. For asylum seekers staying illegally in the Netherlands no right to food could be found in the cases concerning Article 11 of ICESCR, either in its substance or in its form.[31]

[31] As it is provided for in Switzerland: BGE 121 I 367, 27 October 1995, available at: www.servat.unibe.ch/law/dfr/c1121367.html#Opinion. Bart Wernaart: Veiled justice. The courts' compassionate case law regarding hunger. op. cit. p. 76. footnote 169.

Olivér Árpád Homicskó[1]

The Basic Social Rights of the Migrants

1. Introduction

Migration has become a large-scale phenomenon affecting a wide number of countries. Due to a number of factors, more and more people choose to leave the country/region where they were born and move somewhere else. Sometimes this happens temporarily (if they decided to work for a certain period in another country and then, when a certain income is obtained, they return back home). In other situations they choose to leave their native country and establish themselves in a different one on a permanent basis.

The starting point is that international human rights law does not generally make distinction among nationals and non-nationals in respect of the rights afforded to them and this is clearly demonstrated by the all-encompassing nature of the Universal Declaration of Human Rights (UDHR)[2], which guarantees the civil and political rights, and economic and social rights listed in the document to everyone without distinction of any kind.[3] The principle of general equality in respect of the enjoyment of all human rights has been highlighted by the Special Rapporteur on the rights of non-citizens, being noted at the same time that it can only derive from exceptional situations: „Based on a review of international human rights law, the Special Rapporteur has concluded that all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinction, for example, among citizens

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2 See: United Nations: The Universal Declaration of Human Rights.. http://www.un.org/en/documents/udhr/

3 See: the Study on obstacles to effective access of irregular migrants to minimum social rights. Ryszard Cholewinsky. European Committee on Migration, 48th meeting. 24-26 November 2004, 14. p.

and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective."[4]

Undocumented migrants can also be considered in the terminology as being in an 'irregular situation'.[5] It means that they have not obtained legal authorisation for admission or stay or for their activity during such stay in a particular country; or they no longer fulfil the conditions governing their stay or activity. It makes a distinction between 'irregular entry', 'irregular residence' and 'irregular activity or employment' as characteristics of the various routes to the status of undocumented migrants. Irregular entry includes clandestine entry or entry without, or with incomplete, travel documents. Irregular residence refers to situations where non-nationals within a country have not complied with the formalities or have not obtained legal clearance to stay in the country. Individuals who overstay the period allowed by their residence permit or visa are a typical example. Irregular activity or employment occurs when non-nationals engage in activities within a country which are either unlawful or for which they do not have, or cease to have the necessary legal authorisation. Irregular employment can arise when a non-national enters a country with a tourist visa and starts working without legal permission, or a seasonal worker with a short-term work permit is employed beyond the period of their work permit. Undocumented migrants' weak legal status and economic position make them extremely vulnerable to employer pressure, abuse and exploitation. A corollary is that they inevitably come to constitute an under-paid and less protected group that contributes to economic and social inequality in the receiving country.[6]

The international community has developed a number of legal bodies that can be relevant to persons involved in migration. The application of

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4 See UN, ESCOR, CHR, Sub-Commission on the Promotion and Protection of Human Rights, 55th Session, Item 5 of the Provisional Agenda. The rights of non.citizens, Final report of the Special Rapporteur, Mr. David Wissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283, Doc. E/CN.4/Sub.2/2003/23 (26 May 2003), para. 29.

5 See: Platform for International Cooperation on Undocumented Migrants. Routes into Irregular Migration. http://www.picum.org/article/terminology

6 See: http://www.homeoffice.gov.uk/rds/pdfs06/rdsolr0306.pdf

these rights largely depends on whether the person involved falls within one of the traditional categories of migrant or refugee. Instruments concerned with migrant workers lay down basic rights which should be enjoyed by all persons employed outside their State of nationality. In addition, norms exist under international humanitarian law which guarantee certain rights to civilians in times of conflict, and human rights instruments exist which guarantee basic rights to all human beings. All migrants are human beings who possess fundamental and inalienable human rights and freedoms.[7]

There are three fundamental human rights which are very important for migrants. The first is the right to adequate food. It is recognised in the Universal Declaration of Human Rights, where it is stated that „everyone has the right to a standard of living adequate for health and well-being of himself and of his family, including (among other necessities) food"[8] This right is guaranteed in similar terms in the International Covenant on Economic, Social and Cultural Rights. The Covenant also records the specific commitment of states parties to take measures to ensure that all are free from hunger, including measures aimed at boosting „production, conservation and distribution" and measures designed to secure an "equitable distribution of world food supplies in relation to need". The right to adequate food is likewise affirmed in other human rights treaties. The UN Commission on Human Rights established a mandate for a Special Rapporteur, contains extensive commentary on the scope of this right and the obligations it entails, both in general terms and in relation to particular situations. A recent initiative, undertaken under the auspices of the UN Food and Agriculture Organization, is the elaboration of a set of "Voluntary Guidelines" setting out key elements of an "enabling

7 Labour Rights as Human Rights. Edited: Philip Alston. Academy of European Law. European University Institute in collaboration with the Center for Human Rights and Global Justice, New York University School of Law. OXFORD University Press.

8 Art 25. On the right to food, see further P. Alston and K. Tomasevski (eds), The Right to food (Dordrecht: Martinus Nijhoff, 1984); A. Eide et al. (eds), Food as a Human Right (Tokyo: United Nations University, 1984) and Food and Agriculture Organization, The Right to Food in Theory and Practice (Rome: FAO, 1998).

environment" for food security. By food security the access by all illegal migrants to adequate food on the basis of stability of supply is understood. The Guidelines seek to promote at the national level what is referred to as a "right-based approach to food security", which emphasizes "human rights, the obligations of States and the roles of relevant stakeholders".

The second is the access to adequate housing, which affects the enjoyment of a wide range of human rights. In the first place, it affects the right to health. The World Health Organization has stated that housing is the single, the most important environmental factor influencing the incidence of disease and the extent of life expectancy. Access to adequate housing also affects the right to work, as the prospects of earning a living are severely reduced when a person is homeless or has access only to housing that is beyond reach of places where a living can be earned. Inadequate housing arrangements do not generally get improved unless demands are made by those affected, and in turn, effective demands depend on organised and collaborative activity. It follows that, where rights to free expression, assembly and association are not protected, the prospects for securing change in the sphere of housing are substantially weakened. Non-discrimination guarantees are also crucial to access to adequate housing, as discrimination usually works on multiple, mutually reinforcing levels. International human rights law protects the right to adequate housing as a human right in and of itself. This right is proclaimed, as a component of the "right to a standard of living adequate for health and well-being", in the Universal Declaration of Human Rights. In similar terms, it is guaranteed in the International Covenant on Economic, Social and Cultural Rights, article 11 (1) of the Covenant affirms the right of everyone to an adequate standard of living, including adequate housing. The right to adequate housing is both less and more than right to a house – less in the sense just indicated that it does not entail that governments must provide housing free of charge to everyone who requests it, but more in the sense that it asserts the right of everyone to housing which is adequate. The obligation that is associated with the right to housing concerns the principle of non-discrimination. Another obligation that is associated with the right to housing concerns the issue of international co-operation. In principle, the same obligations which

apply to a government's activities with respect to its own population also apply to its activities in the field of international development assistance.

The third is the right to education. It is proclaimed in the 1948 Universal Declaration of Human Rights, and reaffirmed in a number of specific declarations, such as the 1990 World Declarations on Education for All.[9] Among treaties, it is enunciated in the International Covenant on Economic, Social and Cultural Rights. It is also protected in regional treaties and other instruments, among them the First Protocol to the European Convention on Human Rights and in the full range of levels of education, from primary to higher education.

International Covenant on Economic, Social and Cultural Rights, Article 11.1: 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.'

2. Social benefits of the migrants in Hungary

Migrants may stay in Hungary temporarily, or live permanently in the country. In this latter case, the migrants have moved his/her residence to Hungary for the purpose of taking up employment, or as an old-age pensioner, or studies, or having a refugee, asylum seeker or admitted status. In the case of migrants studying in Hungary, entitlement to health care services in Hungary is restricted to foreign nationals who pursue full-time studies at an institution of secondary or higher education and whose student status is based on an international agreement or a fellowship granted by the Ministry. Non-national students who fail to meet these requirements may become entitled to health care services only if they sign an "Agreement" with the Health Insurance Fund. Migrants without permanent residence status who are employed in Hungary are insured by the employer who has its residence in Hungary (principle of *lex loci laboris*). The insurance is paid by the employer and the employee, and the insurance lasts only for the employment period.

[9] Adopted by the World Conference on Education For All, held at Jomtien (Thailand), March 1990. See UN GA Res. 37/178 of 17 December 1982.

Migrants without any permanent residence in Hungary who are not employed, cannot be participants of the statutory health insurance but they can sign a contractual health insurance contract. The most problematic group is the group of ~~the~~ migrants living in Hungary illegally. Some of them have insurances of their countries which are not valid in Hungary. Illegal migrants must pay for health care directly. Usually, legal migrants that have been granted work and residence permit are entitled to the same health treatments as nationals. Illegal migrants have no rights to use health care services in Hungary except emergency service.

Act III of 1993 on Social Administration and Social Services extends, among others, to persons living in Hungary, who have been recognised as refugees or who are under protection. With regard to night shelters, the scope of the law extends to anyone whose detention under an alien control, expulsion or asylum procedure has been terminated, or whose residence at an institution operated by the alien control authority or the asylum authority, or at a location prescribed in an alien control procedure, or in a compulsory location of residence prescribed in an asylum procedure has been terminated, or for who no institution operated by the alien control authority or the asylum authority may be prescribed in an alien control or asylum procedure as a dwelling or a location of residence, and who qualify as homeless. Foreign nationals may use it if they possess a permit for temporary residence issued by the alien control authority or the asylum authority, or a humanitarian permit of residence and an official certificate stating the existence of the above conditions. With regard to night shelters, a homeless person may only use its residential and grooming facilities. As for old age allowance, the scope of the law extends to third-country nationals who lawfully reside in Hungary and have a joint permit.[10]

Persons recognised as refugees, persons under protection, beneficiaries of temporary protection, and immigrants or landed residents have the same rights and the same obligations as Hungarian citizens, with regard to rights and obligations determined under the Law on Employment and its rules of execution. Any employee from a third country, who has a permit issued on the basis of the joint application procedure determined

[10] See: Act III of 1993 on Social Administration and Social Services.

under the Law on the Entry and Residence of Third-Country Nationals and has had an employment in Hungary for at least six months, has the same rights and the same obligations with regard to registration in the database of job-seekers and their support, as a Hungarian citizen with regard to rights and obligations determined under this law and its executory provisions. Any third-country national, as determined under the Law on the Entry and Residence of Third-Country Nationals (hereinafter: third-country national), may establish a legal relationship aiming at employment in Hungary on the basis of a residence permit issued by the alien control authority in a joint application procedure, determined under the Law on the Entry and Residence of Third-Country Nationals, or on the basis of a work permit issued for the employment in Hungary of a third-country national who applied for a residence permit issued in a non-joint application procedure. A contract necessary for the establishment of a legal relationship aiming at employment falling under an obligation of having a permit may only be entered into after having received such a permit. Third-country nationals are deemed foreign employees. Third-country nationals are such non-Hungarian citizens as well as stateless persons who do not possess the right of free movement and free residence. The employment of such persons falls, then, under the obligation of receiving a permit.[11]

Refugees and persons under protection, who reside at reception centres, are entitled to the following services and benefits:

a) continued provision of material conditions of reception,
b) health care services,
c) reimbursement of education costs,
d) payment of schooling allowance,
e) help to leave the country permanently.

Refugees and persons under protection residing at private residences are entitled to the following services and benefits:

a) health care services,
b) help to leave the country permanently,

[11] See: Act IV of 1991 on Furthering Employment and Provisions for the Unemployed.

c) complementary benefits for refugees and persons under protection,
d) housing benefits for refugees and persons under protection,
e) support services provided on the basis of an integration agreement,
f) integration benefits.[12]

[12] See: Dr. Oliver Árpád Homicskó: The employment of foreigners in Hungary. HR§Munkajog 2015/9 Issue.