

Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation

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Abstract

The study describes Hungary's policy towards asylum seekers and refugees in the tense period of 2015–2016 before and after the erection of fences at its southern borders of Hungary. It offers a theoretical explanation of the legal measures and practical actions. After briefly reviewing the factual basis, that is the magnitude of the movements and the number of decisions taken in the EU and in Hungary and the pertinent legal changes in 2015–2016 it elaborates the theoretical fundamentals. Securitization, majority identitarian populism and crimmigration are invoked as explanatory frames. The paper then re-assembles the factual elements under six headings showing them in a new light. These are: denial, deterrence, obstruction, punishment, free riding constituting lack of solidarity and breaching the law (international, European, domestic). Finally the question is raised if all these moves are compatible with the duty of loyal co-operation of Member States with each other and the EU as prescribed by article Article 4 (3) TEU.

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A. Introduction

The Common European Asylum System (CEAS) has never been exposed to such intensive—and system-transforming—pressure as in 2015–2016. This Article describes and explains how one of the twenty-eight EU member states, Hungary, has reacted.

Singling out Hungary is justified by a number of factors. Hungary lies at the external border of the EU Schengen area and directly neighbors a third state, Serbia, which was and may again become the main transit country within the Western Balkan route. Hungary's action constitutes a zero sum game; closing its borders shifts the task of admitting the asylum seekers—and returning the migrants with no right to stay—to another member state. Letting persons move on from Hungarian territory to another member state—and not taking charge of them later under the Dublin system—again, is at the expense of another member state. None of these actions decrease the number of asylum seekers; they only relocate the responsibility of conducting a refugee status determination procedure, giving protection, or removing the persons not in need of protection to another member state. Another reason for concentrating on Hungary is its idiosyncratic attitude towards the CEAS and its unprecedentedly hostile propaganda against forced migrants and others crossing the borders. Taken together, the Hungarian actions, including the challenge to the September 22, 2015 relocation decision at the CJEU, constitute an attack against the CEAS, unparalleled in gravity by any other member state's action. This Article may deliver a service to the English reading audience by explaining certain processes that can only be understood by those with access to the primary sources, which only exist in Hungarian. Logically, the Hungarian case will be embedded into the international, foremost into the EU, context.

Going beyond a descriptive and structuring exercise, the study locates the events in a theoretical frame with three pillars: Securitization, majoritarian identitarian populism, and crimmigration. The assumption is that the seemingly irrational and grossly harmful measures adopted by the Hungarian government regarding refugee law and its neighboring branches of law in 2015–2016 cannot be understood along the lines of an inherent logic of the legal development. Extra-legal factors have to be included to explain how and why the increasingly restrictive measures unfolded, leading to direct conflict with binding EU law and the spirit of the EU acquis.

B. The Factual Basis—The Magnitude of the Movements and the Number of Decisions

For a number of overt—and maybe covert¹—reasons, the number of persons arriving to Europe and seeking asylum has significantly increased since 2013. Between the years of 2003–2012, the number of applications in the EU never exceeded 350,000 annually and in 2006, the EU reached its minimum with 197,410 applications in twenty-seven EU member states.² Small numbers of applications—between 1,600 and 4,600³ per year—characterized the Hungarian scene in the same period. Change came in 2013. The number of asylum applications for twenty-eight EU member states as compared to Hungary during the years of 2013 until 2016 are enumerated in Table 1.

Table 1. Number of asylum applications⁴

	2013	2014	2015	2016 until last available ⁵
EU 27/28	431,090	626,960	1,321,600	632,000
Hungary	18,895	42,775	177,135	24,357

The overt reasons include a number of factors: The protracted civil war in Syria; the cruel treatment of the civilians both by the Assad regime and by ISIS (Daesh); and frustration at having to wait for years in miserable conditions in the neighboring countries where most Syrians—who managed to cross the border at all⁶—fled, pending an eventual return to

¹ Conspiracy theories about forces behind the sudden surge abound listing ISIS (Daesh), Putin, the EU, and “invisible powers,” including George Soros. See, e.g., *Report of the Hungarian Public Television* (Aug. 7, 2016), <https://www.youtube.com/watch?v=iyuyI51AvOI&feature=youtu.be> (noting that Human Rights Watch and migrants similarly describe the treatment in Hungary as “being treated like animals,” and implicitly suggesting that migrants are acting upon the instructions of NGOs).

² EU Commission, EU Home Affairs Background Statistics Migration. Asylum, Schengen and Borders, Security. Multi-annual financial framework 2014–20 7, http://ec.europa.eu/dgs/home-affairs/e-library/docs/infographics/ha-in-numbers/home_affairs_in_numbers_en.pdf.

³ *Online Database 1.9. Asylum-Seekers in Hungary and Persons Granted International Protection Status*, HUNGARIAN STATISTICAL OFFICE (2000), http://www.ksh.hu/docs/eng/xstadat/xstadat_annual/i_wvvn003.html.

⁴ *Asylum and First Time Asylum Applicants—Annual Aggregated Data (rounded)*, EUROSTAT, <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tps00191> (last visited Oct. 29, 2016); *Asylum and First Time Asylum Applicants by Citizenship, Age and Sex Monthly Data (rounded)*, EUROSTAT, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctzm&lang=en (last visited Oct. 29, 2016).

⁵ End of June for EU 28+, end of July for Hungary. Cumulated figures. EASO Latest Asylum Trends – June 2016 (EU Data), EUROSTAT, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report (last visited Oct. 29, 2016). Hungarian data from Office of Migration and Nationality.

⁶ 2016 July figures suggest 6.6 million IDPs in Syria. *Syrian Arab Republic*, UNOCHA, <http://www.unocha.org/syria> (last visited Oct. 29, 2016).

Syria. The other major source country, Afghanistan, is still a country with unpredictable and uncertain circumstances⁷ to which the more restrictive Iranian policy towards the resident Afghan refugees must be added as an aggravating factor. Iraq and Eritrea are also sources of large groups of asylum seekers. Whereas, in the case of Syria and Afghanistan, the recognition rates are fairly high across the EU, there was a large group of asylum seekers whose recognition rate was extremely low—the nationals of the Western Balkan countries (Albania, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, and Kosovo).⁸ Of the 166,746 decisions on Syrian applications in the EU, Iceland, Norway, and Switzerland, ninety-seven percent resulted in the recognition of protection needs. Eritreans succeeded in ninety percent of their applications, Iraqis in eighty-three percent, and more than sixty percent of the Afghan applicants found protection in the region.⁹ As Syrians, Afghans, Iraqis, and Eritreans together with the Western Balkans nationals submitted 958,325 applications to these countries in 2015,¹⁰ the surge in numbers is largely accounted for, especially if we consider that there is a lot of double counting, particularly of those who first submitted an application in Greece or Hungary and then again in Austria, Germany, or Sweden, or any other EU member state.

A closer look at the Hungarian developments may help clarify the substantive arguments to come, both in terms of national composition and actual numbers' significant changes characterize the period under scrutiny.

⁷ Just an illustration from the most recent EASO country of origin report: "On 4 May 2015, the Taliban stopped public buses in Khak-e-Safed district, abducted 15 civilians on suspicion of working for the government and beheaded two of them. Since May, 2015, the district of Gulistan is contested by the Taliban. On June 28, 2015, insurgents abducted the 17-year-old son of an ANP officer in Farah city and killed him." EASO, COUNTRY OF ORIGIN INFORMATION REPORT AFGHANISTAN SECURITY SITUATION UPDATE MALTA (Jan. 2016), https://coi.easo.europa.eu/administration/easo/PLib/EASO-COI-Afghanistan_Security_Situation-BZ0416001ENN_FV1.pdf.

⁸ 201,405 Western Balkan nationals applied for asylum making up 14 % of all applications in the EU+ in 2015. EASO, ANNUAL REPORT – 2015 10 (2016). Recognition rates: the former Yugoslav Republic of Macedonia 1 %, Serbia 2 %, Kosovo 3 %, and Albania 3 %. *Id.*

⁹ EASO, LATEST ASYLUM TRENDS – 2015 OVERVIEW 4 (2016); EASO, ANNUAL REPORT – 2015 23 (2016).

¹⁰ Authors calculation based on Annex D 1 (Asylum applicants in the EU+ by Member States and main citizenship, 2011-2015) of the 2015 EASO Annual Report.

Table 2. Asylum applications and decisions in Hungary 2013–2016¹¹

	2011	2012	2013	2014	2015	2016
Application, total	1,693	2,157	18,900	42,777	177,135	22,491 (till 1 July)
3 Main countries of origin	Afghanistan (649) Kosovo (211) Serbia (27)	Afghanistan (880) Pakistan (327) Kosovo (226)	Kosovo (6,067) Pakistan (3,052) Afghanistan (2,279)	Kosovo (21,453) Afghanistan (8,796) Syria (6,587)	Syria (65,079) Afghanistan (46,675) Kosovo (24,746)	Afghanistan (8,380) Pakistan (3,392) Syria (3,389)
Some form of protection ¹²	191	415	415	512	502	253
Refugee	52	87	198	260	146	87
Subsidiary protection	139	328	217	252	356	165
Rejection	740	751	4,185	4,553	2,917	1,772
Termination	623	1,110	11,339	23,406	152,260	39,656

Certain important patterns appear:

(1) Termination decisions are the most frequent. In fact, during the period between January 1, 2014 to June 30, 2016, 215,322 procedures ended without any decision on the merits. Termination almost exclusively refers to situations when the applicant absconds or expressly revokes the application.¹³ This practically means that there was hardly any substantive decision-making in the system. In the same period, 1,267 recognitions of some form of protection and 9,222 denials compared to the figure of terminations, point to the fact that in more than ninety-five percent of the cases, the substantive evaluation of the application are left to another member state—unless the person simply remains in the EU without authorization.

¹¹ Author's calculations based on Eurostat and OIN data.

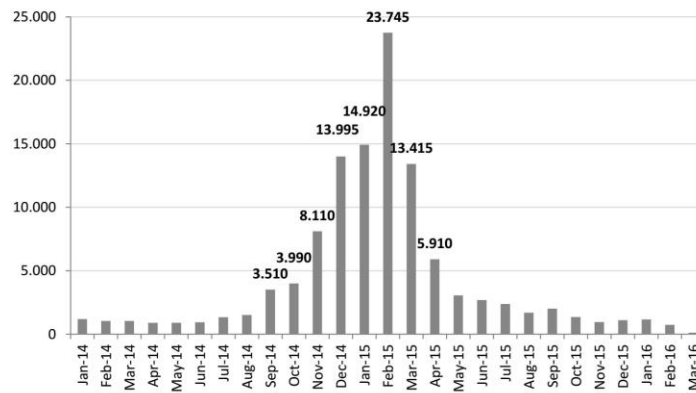
¹² The yearly less than 10 "tolerated to stay." The non-removable persons are not included in this table.

¹³ Other termination grounds exist (i.e. death, change of immigrant status), but they hardly ever occur.

(2) The national composition of the applicants reflects identifiable patterns. There is a constant flow of Afghan asylum seekers. The numbers may fluctuate, but Afghans always constitute one of the three largest national groups among the asylum seekers. That can probably be explained by the fact that the arrival of Afghan refugees to Hungary goes back to the early 1990s, so local networks are well established as may be the smuggler routes. The surge in 2015 was part of the general mobilization of the Afghan asylum seekers caused by the deteriorating conditions at home and in Iran and the window of opportunity offered by the open Western Balkan corridor.¹⁴

The arrival of the Kosovars reflects a particular pattern that is not independent of visa liberalization for Serbia, but also, not wholly explained by it. There was an eruption of applications, starting in 2013 and culminating in the first two months of 2015, and then a sudden drop to levels below 100 per month. In fact, the total number of European asylum seekers arriving to Hungary in the first half of 2016 amounted to 557—including all applicants from the western Balkans during that period among others—showing an almost total halt of Kosovar applications.¹⁵ Figure 1, depicting the total number of Kosovo asylum applications in these states, clearly reflects what happened.

Figure 1. Kosovo asylum applications in member states and Schengen Associated States during Kosovo migration crisis 2014–2015¹⁶



Source: Eurostat

¹⁴ Iran: Afghan Refugees and Migrants Face Abuse, HUM. RIGHTS WATCH (Nov. 20, 2013) <https://www.hrw.org/news/2013/11/20/iran-afghan-refugees-and-migrants-face-abuse>.

¹⁵ OIN, STATISTICAL BOOKLET—FIRST HALF OF 2016 (in Hungarian), http://www.bmbah.hu/images/statisztikak/160712%20KIADV%20%81NYF%20%9CZET_2015_2016_I_F%20%89L%20%89V.xls at p.8.

¹⁶ Comm'n Staff Working Document (SWD (2016) 160 final) Accompanying the document Report From The Commission to the European Parliament and the Council Fourth Report on Progress by Kosovo in Fulfilling the Requirements of the Visa Liberalisation Roadmap 8 (2016).

As a result of pressure from the EU and some especially affected member states, Kosovar authorities adopted several measures to stem the outflow of people, who were deluded by a kind of mass hysteria and decided to uproot at any price. Speedy returns from the countries where asylum was unsuccessfully sought also assisted the return to normalcy in Europe by late 2015, and by March, 2015 in Hungary.

The tenfold increase in Syrian applications from 2014–2015 does not need a Hungary-specific explanation. The wide highway of smuggler routes between Turkey and Greece, the inability of Greece to genuinely offer protection, and the lack of resistance of the affected states against the free transit of persons on the Western Balkan route logically led to the very high number of Syrian refugees. These refugees had every reason not to linger in Lebanese, Jordanian, or Turkish refugee camps or urban settlements. They had no hope of returning to Syria and were excluded from the labor market and most of the social services in those countries.

(3) The extremely low recognition rates are alarming. Naturally, recognition depends on whether the applicant's fear is well-founded or whether there are substantial grounds for believing that a serious risk of harm for the applicant exists, which varies greatly depending on the country of origin and individual narratives. Nevertheless, it can plausibly be argued that the Hungarian recognition rate is intimidatingly low in light of the fact that, in the first quarter of 2016, the EU-wide recognition rate of Syrian refugees was ninety-nine percent, of Eritreans was ninety-four percent, and of Iraqis was seventy-three percent.¹⁷ Even twenty-three percent of the Pakistani applicants found a form of protection, including humanitarian status.¹⁸

(4) There is one more important detail which is not apparent from the aggregate data: The stop-and-go character of access to Hungarian territory and to the asylum procedure.

¹⁷ STATISTICS EXPLAINED ASYLUM QUARTERLY REPORT, EUROSTAT 12 (July 14, 2016), http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report

¹⁸ *Id.* at 14.

Table 3. Monthly breakdown of the asylum application, Hungary 2015 January – 2016 March¹⁹

	Q1 2015			Q2 2015			Q3 2015			Q4 2015			Q1 2016		
	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.
EU-28	61 455	66 165	61 970	59 085	68 090	90 140	116 200	141 250	165 305	167 060	154 605	104 360	90 285	102 715	94 080
Hungary	11 925	16 695	4 925	6 690	9 970	16 580	31 285	47 095	30 795	615	325	230	435	2 175	4 575

The monthly figures pinpoint the dramatic drop in asylum applications in October, 2015. The 30,795 figure for September already indicated a sharp decrease compared to the previous month—a time when the overall figures in the EU were still growing. In turn, the much smaller figures for the period from October 2015 to January 2016 clearly show the impact of the fences erected first at the Hungarian-Serbian border and later at the Hungarian-Croatian border.²⁰ In contrast, note the steep rise in the numbers of asylum applications starting in February. After January and until the end of June, 2016, an average of 4,411 applications were submitted monthly in Hungary—which is practically as many as after the Kosovar wave and before the open door policy at the Western Balkan route, indicating that fences do not make a difference in the long term, especially if pressure grows.

C. The Theoretical Frame: Securization at Large, Majority Identitarian Populism, and Crimmigration

Before turning to the legal developments and their interpretation, it is appropriate to introduce the theoretical framework employed in this study. It relies heavily on non-legal disciplines, not least because migration lawyers, including refugee lawyers, rarely bother with locating their research beyond the positivist-comparativist jurisprudential space. Instead, the seemingly unsolicited actions of the Hungarian government in starting an anti-immigration campaign at a time when immigration was a total non-issue in Hungary,²¹ and later, the harsh treatment of the asylum seekers, combined with large scale violation of both domestic and European law, call for explanations that are not offered by classical international law or European law scholarship. This explanation is offered at the juncture of securization, the political theory of identitarian populism, and crimmigration.

¹⁹ *Id.* at 6.

²⁰ For details, see *infra* Part D.II.

²¹ Boldizár Nagy, *Hungary's Hypocritical Migration Policy*, HEINRICH BÖLL STIFTUNG (May 29, 2015), <https://www.boell.de/en/2015/05/29/hungarys-hypocritical-migration-policy>.

Securitization refers to a set of speech acts and practices which posit a phenomenon or process as threatening the well-being of the society and calls for extraordinary reaction on behalf of the securitizing agent—most frequently entailing the demand to set aside the normal functioning of the legal system and its guarantees, as “extraordinary challenges require exceptional responses.”

In its early formulation by the Copenhagen school, securitization²² concentrated on the speech act which transformed a phenomenon into a threatening menace and changed the discourse about it. Think of the image of the welcome *Gastarbeiter* who helped rebuild part of Europe after the Second World War giving way to the undesired immigrant who wants to “steal our jobs.” A classic formulation of the theoretical core, not limited to refugees, comes from Jef Huysmans:

- Migration is identified as being one of the main factors weakening national tradition and societal homogeneity. It is reified as an internal and external danger for the national community or western civilization. This discourse excludes migrants from the normal fabric of society, not just as aliens but as aliens who are dangerous to the reproduction of the social fabric. The discourse frames the key question about the future of the political community as one of a choice for or against migration. The discourse reproduces the political myth that a homogenous national community or western civilization existed in the past and can be re-established today through the exclusion of migrants who are identified as cultural aliens.²³

Jef Huysmans’s words fit the Hungarian migration and refugee policy like a powerskin racing swimsuit fits its wearer. This Article will demonstrate that the securitizing actor is the government in close association with the government-controlled public media together with commercial outlets that are under Fidesz²⁴ influence. The existential threat—as required by the theory—will take different forms from loss of the national culture to losing jobs and from terrorist threats to the creeping deprivation of our sovereignty by migration promoting forces. The referent object, that is the entity to be protected with the help of the exceptional measures, will also change according to the context: Be it the ethnic-cultural nation extending beyond the borders, the sovereign Hungarian state, and, even occasionally, the integrity of the EU. The audience of these securitization speech acts and actions is the voter community of Fidesz and a wider segment of the society, who need to be convinced that,

²² B. BUZAN, O. WÆVER, & J. DE WILDE, *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* (1998).

²³ J. Huysmans, *The European Union and the Securitization of Migration*, 38 *J. OF COMMON MKT STUDIES* No. 5, p 758, (2000).

²⁴ Fidesz stands for Fidesz—Magyar Polgári Szövetség (Fidesz—Hungarian Civic Alliance). “Fidesz” itself is an acronym for Alliance of young democrats (Fiatal demokraták szövetsége). It is no longer used in its full form.

due to these threats, the country needs a powerful and response-ready leadership—which can be none other than the present government.

Securitization studies have developed²⁵ and attention shifted from the mere speech act to the technologies and the security professionals who generate securitization.²⁶ There is a growing awareness of how far right parties participate in the securitization of migration and asylum seeking.²⁷ Recent academic commentaries stress the absence of causality between the purported source of the threat and the actual policy problems while pointing out that the actions of the securitizing agent actually frequently produce the problem.²⁸

Huysmans and Squire note that, in the broader field of security studies, essentially two strands may be observed: One sees security “as a value or condition to be achieved” and the other approaches it in critical terms “as a knowledge, discourse, technology or practice.”²⁹ This Article aligns with the second strand and is intended to serve as a response to the call that:

- more work needs to be done to address the ways in which securitisation can become a self-legitimizing and self-fulfilling mode of governing migration. This precisely demands an analysis that is sensitive to the ways that debates around migration and its control interrelate with practices in the constitution of migration as a ‘threat.’³⁰

Whereas securitization theory is the dominant optic through which the Hungarian policy will be seen, the idea of identitarian populism will help to understand the motivation and the technique. The term “Identitarian populism” here is understood as defined by G. Lazaridis and A. M. Konsta.³¹ They carve out the term on the basis of the overall components of

²⁵ See, e.g., *THE SECURITISATION OF MIGRATION IN THE EU: DEBATES SINCE 9/11* (G. Lazaridis & W. Khurshed eds., 2015) [hereinafter *SECURITISATION OF MIGRATION*].

²⁶ D. Bigo, *Security and Immigration: Toward A Critique of the Governmentality of Unease*, 27 *ALTERNATIVES* 75–76 (2002).

²⁷ G. Lazaridis & V. Tsagkroni, *Securitisation of Migration and Far Right Populist Othering in Scandinavian Countries*, in *SECURITISATION OF MIGRATION*, *supra* note 25, at 207–36.

²⁸ V. Squire, *The Securitization of Migration: An Absent Presence?*, in *SECURITISATION OF MIGRATION*, *supra* note 25, at 29.

²⁹ J. Huysmans & V. Squire, *Migration and Security*, in *HANDBOOK OF SECURITY STUDIES* 171 (M. Dunn Cavelty & V. Mauer eds., 2010).

³⁰ Squire, *supra* note 28, at 29.

³¹ G. Lazaridis & A. M. Konsta, *Identitarian Populism: Securitization of Migration and the Far Right in Times of Economic Crisis in Greece and the UK*, in *SECURITISATION OF MIGRATION*, *supra* note 25, at 184–206.

populism as developed by academic literature.³² These components include: (1) Speaking on behalf of the national community as if it was a culturally, religiously, and linguistically homogenous genuine community sharing the same values; (2) accusing the political elite and the intellectuals of being undemocratic, “incapable, unproductive, and privileged, distant or alienated from the people, or lacking in the plebescitarian quality of common sense”;³³ and (3) identifying a threatening Other—one or more groups the whose members allegedly undermine the community’s values or prosperity. These Othered persons do not belong to the “heartland.”

The narrative of majority identitarian populism centers on the dividing line between us and the Other. This difference may be found in religion, ethnicity, and values, among others. “Majority *identitarian populists* claim to speak for what they see as the (current) majority group.”³⁴ The populist actors distance themselves from an elite, which may be presented as conspiring against the people. Politicians may be presented as being complicit “in mass immigration or European integration or both (depending on the nature of the Other).”³⁵

I apply the above described theory in a somewhat modified form. Lazaridis and Konsta had radical or far right parties in mind and excluded “mainstream parties that may make populist calls.”³⁶ My claim is that Fidesz, the government and Viktor Orbán, in their struggle to deprive Jobbik—the Hungarian far right party—of its own agenda, actually occupy far right positions.³⁷ The other factor allowing the extension of the theory to the ruling party-coalition is that constructing enemies and then defeating them is the pattern through which Fidesz has ruled the country since 2010. Instead of engaging the body politic by discussing what would serve the public good and instead of designing the large social systems—taxation and redistribution to municipalities, education, and health care—in dialogue with the stakeholders, a long chain of us versus Other dichotomies have been produced by government propaganda. Neighboring countries with large Hungarian minorities, foreign owned banks, large multinational food store chains, and partly foreign-owned utility companies all have been targeted as acting against the imagined collective interest of the Hungarian nation. Once those battles were concluded, a new Other and in turn, a new enemy had to be invented. That became the migrant especially, if she irregularly crossed the

³² *Id.* at 185–86.

³³ *Id.* at 186.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 187.

³⁷ C. Mudde, *The Hungarian PM Made a “Rivers of Blood” Speech . . . and No One Cares*, GUARDIAN (July 30, 2015), <https://www.theguardian.com/commentisfree/2015/jul/30/viktor-orban-fidesz-hungary-prime-minister-europe-neo-nazi>.

border. In that context, the elites from which the populists differentiate themselves are the “bureaucrats in Brussels.”³⁸

The third theoretical framework invoked for the interpretation of the recent Hungarian refugee policy and legislation is crimmigration. Commentators usually point to Juliet Stumpf’s article, published in 2006, as the start of the approach stressing the intersection of criminal law and immigration law—referred to as crimmigration.³⁹ The novelty of the crimmigration approach is that it refutes the claim that immigration is a civil or administrative law matter. Crimmigration scholars show that ever more criminal law measures are applied to persons who have not committed crimes unrelated to their desire to enter or stay in the country of their choice and are punished solely because they circumvented immigration rules and border controls. A key idea within the literature is that these kinds of criminal sanctions have no element of rehabilitation—of preparing the “criminal” for participation in the society the rules of which she may have violated. Instead criminalization of immigration related acts serves the purpose of deterrence and retribution.⁴⁰ In his introduction to what is probably the first textbook on crimmigration law, César Cuauhtémoc García Hernández identifies three components of crimmigration law:

- [C]riminal convictions now lead to immigration law consequences ever more often; violations of immigration law are increasingly punished through the criminal justice system; and law enforcement tactics traditionally viewed as parts of one or the other area of law have crossed into the other making enforcement of immigration law resemble criminal law enforcement and turning criminal law enforcement into a semblance of immigration law enforcement.⁴¹

In the European context, Woude and Berlo draw attention to the emergence of crimmigration thinking, both at the external and the internal borders.⁴² They highlight the selective restoration of control at the internal borders, which may manifest crimmigration tendencies. This study will show how the practice of Hungary and the neighboring states established controls and exclusions based on the assumption that foreigners may indeed be criminals or may have committed entry-related crimes, including people smuggling.

³⁸ See *infra* Part D.I. (providing details and quotes).

³⁹ J. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 367–419 (2006).

⁴⁰ *Id.* at. 402.

⁴¹ C. C. GARCIA HERNÁNDEZ, *CRIMMIGRATION LAW* 3 (2015).

⁴² M. A. H. van der Woude, & P. van Berlo, *Crimmigration at the Internal Borders of Europe? Examining the Schengen Governance Package*, 11 UTRICHT L. REV. 61, 61–79 (2005). See also MARIA JOÃO M. J. GUIA, M. A. VAN DER WOUDE & J. VAN DER LEUN, *SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR* (2013).

D. Summary of the Legal Changes⁴³

This study does not aim at giving a comprehensive overview of the Hungarian asylum law in force. Instead, it concentrates on the changes in 2015–2016 where necessary, describing the *status quo ante*. The present chapter offers a short descriptive summary enabling the reader to assemble the timeline and combine facts with the legislative turns. The application of the theoretical framework to these developments, as well as a detailed assessment in the light of European and International Law, will follow in the analytical part of this study.⁴⁴

The year 2015 witnessed two major overhauls and several minor changes in Hungary's asylum legislation, including amendments to the Asylum Act of January 1, 2008,⁴⁵ and to many other laws, including the Penal Code.

I. Safe Third Country Rules

The first change was the law passed by Parliament allowing the government to adopt a list of safe third countries.⁴⁶ On July 21, 2015, government Decree 191/2015 (VII. 21) promulgated two identical lists: One containing safe third countries and the other containing the safe countries of origin. It determined as safe countries of origin and as safe third countries "Member States and candidate states of the European Union—except for Turkey, Member States of the European Economic Area, and those States of the United States of America that do not apply the death penalty, furthermore: 1. Switzerland 2. Bosnia and Herzegovina 3. Kosovo 4. Canada 5. Australia 6. New-Zealand." After the deal between the EU and Turkey on asylum matters,⁴⁷ Turkey was added to both lists⁴⁸ and not removed, even after the purges following the failed coup of July 15, 2016. Nobody in the government noted that "safe third countries" may not refer to an EU member state, only to a state outside the EU. Nor did they note that by failing to designate Japan and many other countries as safe countries of origin, those left out may feel insulted.

⁴³ This section relies on and incorporates certain paragraphs of my blog entry on EU Immigration and Asylum Law and Policy entitled *Parallel Realities: Refugees Seeking Asylum in Europe and Hungary's Reaction*, EU IMMIGRATION L. BLOG (Nov. 4, 2015), <http://eumigrationlawblog.eu/parallel-realities-refugees-seeking-asylum-in-europe-and-hungarys-reaction/>.

⁴⁴ See *infra* Part D.

⁴⁵ Act LXXX. of 2007 as amended.

⁴⁶ 2015. Act CVI. On the amendment of Act LXXX of 2007 on asylum. Published in the Official Journal (Magyar Közlöny) on July 8, 2015, in force since July 9, 2015.

⁴⁷ Press Release 144/16, EU-Turkey Statement (Mar. 18, 2016).

⁴⁸ Government decree 63/2016. (III. 31.).

II. First Revamping of the Refugee Status Determination Procedure

The first major overhaul of the refugee status determination procedure came in July, 2015, with a view to accelerating and simplifying the asylum procedure in general and in particular with a view to the establishment of a physical barrier at the Serbian-Hungarian border.⁴⁹ The amendment had a dual character. On the one hand, it had the effect of transposing the content of the 2013 recasts of the EU asylum *acquis*, including on accelerated asylum procedures, ineligible applications, reception conditions, and enhanced protection of minors. On the other hand, it reflected the recent securitizing changes of the Hungarian asylum policy. Therefore, the amendment, which entered into force on August 1, combined the safe third country rule—which in the government’s view, was applicable to Serbia—with a procedure conducted and completed right at the border in specifically established installations.

Major changes included the following:

- Curtailing deadlines for the authorities to decide an asylum-seeker’s case and for the applicant to legally challenge a negative decision. Accelerated procedures are to be finished within fifteen calendar days—not thirty as before—and an appeal must be submitted within three days.⁵⁰ Courts have eight days to decide and may abstain from holding a personal hearing. The distinction between preliminary procedure—on admissibility—and procedure on the merits has been abolished, only one unitary procedure remained;
- Denying suspensive effect of any appeal in most of the accelerated procedures and with respect to the ineligible applications—with the exception of the application of the safe third country rule—meaning that, in a great number of cases, persons could be removed from the country before the first judicial review even starts; and
- Expanding possible places of detention.

This amendment did not introduce any element which would be unknown in the EU *acquis*, however, it is worth noting that legislators chose the options least favorable to the asylum seeker. They also assumed that Serbia was a safe third country, which should, therefore, process the applications of hundreds of thousands of persons reaching the EU via the Western Balkan route.

⁴⁹ 2015. Act CXXVII. On the establishment of a temporary security border-closure and on the amendment of laws relating to migration. Published in the Official Journal (Magyar Közlöny) on July 13, 2015, in force since August 1, 2015.

⁵⁰ The next amendment that entered into force on Sept 15, 2015 extended the appeal period to seven days.

III. Large Scale Overhaul of the Regime: More Securitization and Crimmigration: Barbed Wire, Transit Zones, Border Procedures, Criminalization

The next round of amendments, adopted by the Hungarian Parliament at an extraordinary session, on September 4⁵¹ went far beyond the already restrictive steps of July, 2015 and essentially, introduced a specific regime for asylum-seekers coming across the fenced external border. These amendments deprived asylum-seekers of elementary human rights guarantees, and in essence, introduced a state of exception. The new rules were developed as a legal framework for the newly erected fence at the Hungarian-Serbian border, which was about to be completed.⁵² The sweeping amendments, affecting not less than ten different acts, including the Asylum Act, the Criminal Code, the Borders Act, and the Act on Construction, just to name a few, entitled the authorities to disregard laws including rules on the environment, on construction of new buildings, and on criminal procedures. In these fields, as well as in land use, the government secured itself exceptional powers and became empowered to declare a “crisis situation caused by mass immigration.”

The main features of the newly introduced institutions and rules are as follows:

- The rules on amending the Asylum Act designated the barbed wire dual fence at the Serbian-Hungarian border a “temporary security border closure.”⁵³ The illegal crossing of the 175 km long fence was made a criminal act by introducing Articles 352 A, B, and C into the Criminal Code.⁵⁴ A maximum of three years imprisonment threatens all who cross the fence illegally (Article 352A). Under Article 352B, the damaging of the fence is a separate crime with a maximum penalty of five years imprisonment. Even obstructing the construction of the fence was made a separate crime. (Article 352 C). It should be noted that crossing the international border at sections where no fence has been erected—e.g. the Hungarian-Romanian border—remains a minor offence. In summary, whoever managed to cross the border before the completion of the fence at the Hungarian-Serbian border on September 15 or at the Hungarian-Croatian section by October 16 did not face penalties under the Criminal Code.

⁵¹ 2015. Act CXL. On the amendment of certain acts in connection with the mass immigration. Published in the Official Journal (Magyar Közlöny) on Sept. 7, 2015, in force since Sept. 15, 2015.

⁵² The date of the entry into force of the amendments and the closure of the border with the fence was the same: September 15, 2015.

⁵³ Government resolution 1401/2015 (VI. 17) “on certain measures necessitated by the exceptional immigration pressure (Magyar Közlöny, No 83 of 2015) referred to this as “a provisional fence serving border control” (Point 1).

⁵⁴ Act C. of 2012.

- So-called “transit zones” have been established, actually as parts of the fence.⁵⁵ They consist of a series of containers which host public officials responsible for refugee status determination procedures. The chain of authorities occupying the linked containers starts with the police who record the flight route, followed by a refugee officer to take a decision in case an asylum application is submitted. Finally, a judge—or a court clerk— is present in a “court hearing room,” however, they might only be present through internet communication to adjudicate appeals.
- It introduced a new notion, the “crisis situation caused by mass immigration.” The situation may be declared in a government decree and may cover parts or the entirety of the country. In fact, it was immediately declared for the counties neighboring the fence at the Hungarian-Serbian border.⁵⁶ The precondition for declaration of the crisis situation is that certain statistical conditions are met in terms of flow⁵⁷ or stock data⁵⁸ of asylum seekers.⁵⁹ An additional basis of declaring the crisis situation is unrest. It is defined as “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 center or other facilities used for accommodating foreigners located within or in the outskirts of the settlement concerned.”⁶⁰
- A new border procedure was introduced,⁶¹ only applicable in the transit zone, which combines detention without court control with an extremely fast procedure entailing no real access to legal assistance and dramatically reducing legal remedies. Hungary had not applied border procedures on land before, only an “airport procedure” was part of the Asylum Act. The new procedure is based on a fiction, untenable after *Amuur v France*.⁶² namely that the person in the transit zone

⁵⁵ The concept is described in Act LXXXIX. of 2007 on the state border. See Articles 5 A-D and 15.

⁵⁶ 269/2015 (IX. 15) Korm rend.

⁵⁷ Flow data: Arrivals on average in excess of 500 per day for a month, or 750 per day for two weeks or 800 per day for a week.

⁵⁸ Stock data: On average the number of persons in the transit zone exceeds 1,000 per day for one month, 1,500 per day for two weeks, or 1,600 per day for one week.

⁵⁹ See Article 80/A of the Asylum Act.

⁶⁰ *Id.* at point c). On this basis, the government declared a crisis situation caused by mass immigration covering the whole country on March 9, 2016. Government decree 41/2016 (III.9.).

⁶¹ See Article 71/A of the Asylum Act.

⁶² *Amuur v. France*, App. No. 17/1995/523/609 (June 25, 1996), <http://hudoc.echr.coe.int/>.

has not yet entered Hungary. As a consequence, while the person is in the transit zone rules on deprivation of liberty, applicable in Hungary, are disregarded. The procedure only extends to the admissibility phase, which is once the application is found to be admissible, the applicant is allowed to enter the country and the normal reception conditions must be provided, however, the authority must decide on their admissibility within eight days. If the application is deemed inadmissible, the person who is detained in the transit zone may request a judicial review of the decision declaring the application inadmissible within seven days and review must be completed in eight days. The court may exercise discretion on whether to hold a hearing. The persons may be actually held—in effect, detained—in the transit zone for the whole period. People with special—procedural or reception conditions—needs (“vulnerable persons”) are not subjected to the procedure in the transit zone; they are also transferred to the regular reception centers and exempted from the border procedure.

- A number of criminal procedural rules have been changed in a manner that removes guarantees, protecting those accused of crimes related to the irregular crossing of the fence.

The practical consequence of the new scheme is that persons without special needs are supposed to wait for the outcome of the admissibility procedure in the transit zone. So far, practically all applications submitted by persons who came through Serbia were declared inadmissible on safe-third-country grounds. Those who do not request judicial review are legally expelled and physically “accompanied” by a police officer to the Serbian border, a few meters from the door of the “transit zone” container, expecting the refused persons to illegally cross the green border in the reverse direction and to re-enter Serbia.

The legislation has been changed on many further points: Exempting the fence and the transit zone from environmental impact assessment and other—otherwise obligatory—administrative procedures, ordering the military to assist the police guarding the border, and permitting the requisitioning of “any movable item or real property owned or managed by the State or the local government” or owned or used by a company the majority of which is owned by these. Police are entitled to enter private homes to ensure the implementation of measures against epidemics.

IV. Deprivation of All Integration Assistance

The discourse that has been ongoing since 2015, aimed at presenting all irregular migrants—including asylum seekers—as illegal, led to a further contradictory amendment of the

Asylum Act in 2016. Act XXXIX of 2016⁶³ amended it on several minor points and entailed two fundamental changes:

- It took away all integration assistance from recognized refugees or beneficiaries of subsidiary protection. That is a self-defeating move, as those who have been recognized as in need of international protection are certainly not abusers of the system. Nevertheless, the scrapping of all measures which could help them integrate into society—regular financial assistance and support of establishing the first accommodation—suggests that they are. Indeed, the justification of the measure proposed by the government used this argument, claiming that “the purpose of the restrictions is to decrease the social services to . . . those granted international protection as by this measure it can be avoided that the so called economic migrants submit asylum applications in Hungary, exclusively in hope of a better life.”⁶⁴ The length of permitted—and supported—stay in the reception center after recognition has been cut in half, from sixty to thirty days. This is available for anyone recognized as in need of protection in order to enable them to find a job and a home for themselves and their families, where applicable.
- It has introduced a compulsory review of the status of refugees. After three years, the authority must, in every single case, review whether the conditions of recognition still apply. The same exercise is to be repeated with the same frequency in respect to the beneficiaries of subsidiary protection. Before this change, the latter group had already been subject to review, but only every five years.

V. Another Turn of the Screw: Introducing the 8 km Zone from the Border, With Extraordinary Law-Enforcement Rights

If all of the above had not been enough to deter arriving asylum seekers—and the statistics presented above suggest that it was not, another turn of the screw was introduced by a further amendment to the Asylum Act.⁶⁵ This very peculiar move resembles Australia’s excision practice.⁶⁶ It essentially orders that if an “illegally present” third country national is apprehended “within an 8 kilometer strip from the border line or border sign of the external border” of the EU, then this person may be forcefully escorted to the fence and pushed

⁶³ Adopted on May 10, 2016, published on May 20, 2016 and entered into force (in respect of the asylum provisions) on June 1, 2016.

⁶⁴ Bill T/9634, at 46.

⁶⁵ Act no. XCIV of 2016, entry into force on July 6, 2016.

⁶⁶ UNHCR, *New “Excision” Law Does Not Relieve Australia of its Responsibilities Towards Asylum-Seekers*, UNHCR (May 22, 2013), <http://www.unhcr.org/news/press/2013/5/519ccec96/new-excision-law-relieve-australia-its-responsibilities-towards-asylum.html>.

through using the doors available in the fence with a view towards making this person submit their application for protection from outside, by approaching the transit zone from the external side—i.e. from the Serbian green border. In other words, persons intercepted in the eight kilometer vicinity of the border are subject to checks and if the police find that the person has no right to stay, the police may refrain from starting a formal expulsion procedure with guarantees of the rule of law—legal representation, public hearing, and right of appeal. Instead, the law enforcement agents may simply push the person across to the Serbian or Croatian side of the border, if necessary, using physical force.

The new legal constellation created in 2015–2016 would seem to be incompatible with EU law and international law on many points. The Commission has noted this and even before it was officially informed about the changes, addressed a 12-page letter to the Hungarian government on October 6, 2015,⁶⁷ sharing its concerns about the compatibility of the new rules with EU law. Later, on December 10, 2015, the Commission started formal infringement procedures in respect to some of the concerns mentioned in its October letter.⁶⁸ It challenged the lack of any possibility of referring to or adducing new facts and circumstances in the context of appeals and that Hungary will not automatically suspend decisions in cases of appeals. Further, it expressed its dissatisfaction with the fact that in the fast tracked criminal law cases about violations of the rules relating to the fence, the accused person's right to an interpreter and to receiving translations of documents used in criminal proceedings appears to be violated as no written translation of every document used in the criminal procedure is provided, including the judgment itself. The third set of presumed infringements relate to the lack of an effective remedy due to the lack of a personal hearing and the fact that the case may be decided by a court secretary—a judge to be, who is not yet a judge with full powers. The conflict with international norms has been noted by many stakeholders. The UNHCR has grown increasingly anxious as have many other UN agencies. European international officers and a large number of NGOs have also expressed serious concerns, as will be seen below in the more detailed evaluation of the branches of law.⁶⁹

E. Interpretation of the Hungarian Measures

What is happening in and with Hungary? How can the mere description of the law be enriched by an interpretative framework which reconstructs the link between the affected persons, the power wielders, the general public, and the norms? I propose arranging the norms and the events around six categories which may reveal the deeper meaning of the

⁶⁷ Ref. Ares(2015)4109816 (June 10, 2015), <http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf>.

⁶⁸ European Commission Press Release IP/15/6228, Commission Opens Infringement Procedure Against Hungary Concerning its Asylum Law (Dec. 10, 2015).

⁶⁹ See *infra* Part D.VI.

measures taken or planned. Each of these categories is derived from one or several of the key theoretical concepts of securitization, identitarian populism, and crimmigration outlined above. The following analysis aspires to enlist a maximal number of quotes from primary sources, originally in Hungarian, to allow direct access to the roots and to the “raw material” not yet distilled through external—English speaking—commentators.

The six organizing categories are the following:

(1) Denial: Systematically denying that most of those who came irregularly to Hungary were bona fide asylum seekers and that the majority of them probably would qualify as in need of international protection. Denial is the core element of securitization; if arriving persons are not potential refugees but “illegal immigrants,” as the government refers to them, then all the hazards and menaces linked to illegal migrants in the identitarian populist discourse can be linked to them and the logical consequence is their criminalization.

(2) Deterrence: Measures adopted in order to deter potential asylum seekers from entering Hungary or, once here, from applying. Deterrence is not limited to the narrative but includes creating harsh conditions and erecting obstacles in order to dissuade persons from seeking international protection. Deterrence includes actions against certain domestic groups, opposing the policy of the government. Deterrence partly overlaps with the next key category: obstruction.

(3) Obstruction: Physical and legal hurdles on the route to safety and on the way to acquiring refugee status or subsidiary protection. Strictly speaking, the actions may be legal—such as discontinuing the operation of a reception center—but the context, including the public statements reveal the intention of obstructing access to the territory, to the procedure, or to a decent life in human dignity. Both deterrence and obstruction construe the approaching migrant as the threatening ‘Other,’ combining securitization and crimmigration.

(4) Punishment: Responding to migration challenges with the toolkit of criminal law or with nominally immigration law sanctions, which, nevertheless, entail a retributive element, such as a ban from the whole of the EU for having committed a minor offence in Hungary. These tools are textbook examples of crimmigration.

(5) Free riding—lack of solidarity: Measures, which, in effect, have the consequence that another state must provide the public good of protection or decide that the person is not in need of protection and provide for their removal from the EU territory. Drastic and unjustified burden-shifting is the name of the game. That is accompanied by a covert or overt denial of participating in the collective responses suggested or decided by the EU, from relocation and resettlement to funding the most affected third countries’ efforts. Free riding fits into the frame of identitarian populism, referring to the “bureaucrats in Brussels” as to the alien, remote decision makers, whose commands have to be escaped, by non-cooperative responses resulting in, free-riding “in the interest of the Hungarian nation.”

(6) Breaching superior law: Several rules adopted by the Hungarian legislature and actions of the executive appear to be in violation of international, European, and Hungarian law, such as the way the fence was erected and the forced and informal removal of persons without access to any legal procedure. A permanent state of the exception is heaven for the securitizing agent: It allows trespassing the constraints of the rule of law and of the EU legal order.

I. Denial and Securitization

In 2014, Hungarian Prime Minister Viktor Orbán introduced anti-immigration and anti-refugee rhetoric. In a speech delivered to the assembly of the Hungarian diplomatic corps on August 25, 2014, Mr Orbán promised “rock-hard official and domestic policy not supporting immigration at all.”⁷⁰ Whereas before January, 2015, asylum seekers and “illegal” migrants were not yet mixed up in the rhetoric, the Prime Minister’s interview after the attack on *Charlie Hebdo* brought a change. It indicated that everyone, whether protection-seeker or not is undesirable. “Economic immigration is a bad thing in Europe. One should not regard it as useful because it only brings trouble and dangers to the European people, therefore it has to be stopped—this is the Hungarian position.”⁷¹ Orbán then continued, claiming that “we do not want to have significant minorities with different cultural traits and backgrounds; we’d like to retain Hungary as Hungary.” On February 20, 2015 a political debate was held in the Hungarian Parliament entitled “Hungary does not need subsistence⁷² migrants.” Speakers from the governing parties—FIDESZ and the Christian Democrats—constantly confused asylum seekers with irregularly entering persons without protection needs, as well as with regular migrants.

The campaign of anti-immigration rhetoric continued with a letter of the Prime Minister accompanying a “questionnaire” about “terrorism and immigration”⁷³ (described as the

⁷⁰ The summary of Mr. Orbán’s speech to the Hungarian diplomatic corps: *Józan ésszel és bátorsággal kell képviselni az országot* (the country has to be represented with sober mind and bravery), KORMÁNYZAT (Aug. 25, 2014), <http://www.kormany.hu/hu/a-miniszterelnok/hirek/a-leggyorsabban-novekvo-eu-s-orszagok-koze-fogunk-tartozni>.

⁷¹ The weekly *HVG* quoting the Hungarian News Agency MTI. *Orbán: gazdasági bevándorlóknak nem tudunk menedéket adni*, *HVG.HU* (Jan. 2015), http://hvg.hu/itthon/20150111_Orban_gazdasagi_bevandorloknak_nem_tudunk.

⁷² The term in Hungarian is “megélhetési” which is a pejorative expression usually referring to someone who pursues a profession without vocational drive, i.e. merely to earn money. The records of the debate are available at <http://www.parlament.hu/documents/10181/308218/ny150220.pdf/7817140d-c961-441d-b21c-29c26963684c>.

⁷³ The letter and questionnaire are downloadable in English from: <http://www.kormany.hu/en/prime-minister-s-office/news/national-consultation-on-immigration-to-begin> (July 21, 2016).

“national consultation”). The questionnaire included leading questions such as: “Do you think that Hungary could be the target of an act of terror in the next few years?” and “Do you agree with the view that migrants illegally crossing the Hungarian border should be returned to their own countries within the shortest possible time?” It also asked whether, in contrast to Brussels’s lenient policy, the government should introduce more stringent regulations and whether the citizen was in support of more stringent regulations, including that “migrants illegally crossing the Hungarian border could be taken into custody.”⁷⁴ The term refugee was not used in any of the questions, but all the framing, including the introductory letter, made it clear that “migrant” and “illegal immigrant” referred to those people who reached Hungary through the Western Balkan route.

In May 2015, a poster campaign contributed to the securitizing narrative depicting any migrant as a source of danger. The billboards carried one of the three messages of the campaign: “If you come to Hungary, you must respect our laws”; “If you come to Hungary, you must respect our culture”; and, finally, “If you come to Hungary, you must not take the jobs of the Hungarians.” In a clear indication of their intended audience, all of the billboards were in Hungarian. In September, a new set of the billboards and advertisements in print and online media appeared, referring back to the “results” of the national consultation, with the following text: “The people have decided: The country must be defended.”

In a similar tenor, the Hungarian Parliament adopted a resolution, on September 22,⁷⁵ with the ambitious title “Message to the leaders of the European Union,” which among other things claimed that

- [w]aves of illegal immigration threaten Europe with explosion . . . The European Union is responsible for the emergence of this situation . . . Irresponsible are the European politicians, who with the illusion of a better life encourage the immigrants to leave everything behind and by risking their lives set out towards Europe . . . We have the right to defend our culture, language, values . . .⁷⁶

The tone has not changed, even after the border closure was complete and the actual numbers of daily arrivals dropped to a fraction of the September figures. Three days after the Paris terror attacks, on November 16, 2015, the Prime Minister delivered a speech in the Parliament, claiming that

⁷⁴ Three answers were offered: “Yes, I would fully support the government; I would partially support the government; I would not support the government,” i.e. two in weak or strong support of the government, one neutral (neither support nor opposition). Weak or strong disagreement could not be expressed.

⁷⁵ Resolution 36/2015 (IX. 22) of the Parliament, Magyar Közlöny No. 136 of 22 September 2015, http://www.magyarokozlony.hu/dokumentumok/30d4e493298b407e098990414cb8387e7c1caaf8/megtekintes_

⁷⁶ *Id.*

- [w]e Hungarians have been advocating the closure of our borders to stop the flood of people coming from the Middle East and Africa . . . Which approach is more humane: To close the borders in order to stop illegal immigration, or to put at risk the lives of innocent European citizens? . . . We feel that the very existence of Europe is at stake . . . We have warned the leaders of the EU not to invite these people into Europe.⁷⁷

In order to sustain the securitizing momentum, even in the absence of asylum seekers and others actually arriving in Hungary irregularly, the spin-doctors used the relocation system, adopted in September 2015,⁷⁸ and the expected proposal for a stable, non-emergency redistribution of applicants, called for by the Commission in the Agenda for Migration, published in May 2015, as targets.⁷⁹ In that context, Minister János Lázár, cabinet minister of the Prime Minister, declared at a press conference in February 2016:

- The Hungarian government expects that it has to fight with Brussels in order to defend the country and in order to avoid the coerced settlement [of refugees resettled from Turkey—but never named as refugees in the press conference –BN].

⁷⁷ *Országgyűlési Napló, 2014–2018. országgyűlési ciklus Budapest, 2015. november 16. hétfő 116. szám.* [Records of the National Assembly, cycle 2014-2018, November 16, 2015, Monday, no. 116] He ended his speech with four proposals: “A new European policy is needed. . . . I suggest to push dogmas aside, let us discard political correctness and talk straight and openly. I suggest to return from the world of ideologies to natural reason”

1 “First we have to defend the external borders of the EU, as security starts with the defence of borders.”

2 “We have to defend our culture as the essence of Europe is its spiritual and cultural identity.”

3 “We have to defend our economic interests as we, Europeans must remain in the center of the world-economy.”

4. People must be given the right “to influence European decisions, because the union must be based on a democratic edifice.”

⁷⁸ See Part D.V (providing details on free-riding).

⁷⁹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration*, at 4, COM (2015) 240 final (May 13, 2015). “The EU needs a permanent system for sharing the responsibility for large numbers of refugees and asylum seekers among Member States. The Commission will table a legislative proposal by the end of 2015 to provide for a mandatory and automatically-triggered relocation system to distribute those in clear need of international protection within the EU when a mass influx emerges.”

- Even the pressure from Brussels will not lead to concessions with regard to our legal system which enables that the personal security closure [sic – meaning the fence] and the legal guarantees [meaning the threats against refugees] keep illegal immigrants away from Hungary.⁸⁰

A last long quote may indicate that the situation is deteriorating and that, in the vein of identitarian populism, the governing forces represent themselves as the *vox populi* against the alienated elite, this time in Brussels. Viktor Orbán delivered a public speech televised on March 15, the national holiday celebrating the Hungarian revolt against Hapsburg rule in 1848. In that oration, he brought together the leading securitizing and populist elements:

- Europe is not free, because freedom begins with speaking the truth. In Europe today it is forbidden to speak the truth. A muzzle is a muzzle— even if it is made of silk. It is forbidden to say that today we are not witnessing the arrival of refugees, but a Europe being threatened by mass migration. It is forbidden to say that tens of millions are ready to set out in our direction. It is forbidden to say that immigration brings crime and terrorism to our countries. It is forbidden to say that the masses of people coming from different civilisations pose a threat to our way of life, our culture, our customs, and our Christian traditions. It is forbidden to say that, instead of integrating, those who arrived here earlier have built a world of their own, with their own laws and ideals, which is forcing apart the thousand year old structure of Europe. It is forbidden to say that this is not accidental and not a chain of unintentional consequences, but a planned, orchestrated campaign, a mass of people directed towards us. It is forbidden to say that in Brussels they are constructing schemes to transport foreigners here as quickly as possible and to settle them here among us. It is forbidden to say that the purpose of settling these people here is to redraw the religious and cultural map of Europe and to reconfigure its ethnic foundations, thereby eliminating nation states, which are the last obstacle to the international movement. It is forbidden to say that Brussels is stealthily devouring ever more slices of our national sovereignty, and that in Brussels today many are working on a plan for a United States of Europe, for which no one has ever given authorisation.⁸¹

⁸⁰ See *Fokozódik a migrációs nyomás Magyarországon*, KORMÁNYZAT (Feb. 11, 2016), <http://www.kormany.hu/hu/miniszterelnokseg/hirek/fokozodik-a-nyomas-magyarorszagon>; *Fokozódik a nyomás magyarországon*, FIDESZ.HU (Feb. 11, 2016), <http://www.fidesz.hu/hirek/2016-02-11/fokozodik-a-nyomas-magyarorszagon/>.

⁸¹ The talk is translated into English and posted on the Prime Minister's official website: <http://www.miniszterelnok.hu/speech-by-prime-minister-viktor-orban-on-15-march/> (June 1, 2016).

To complete the denial of the fact that Hungary was confronted with hundreds of thousands of persons potentially in need of international protection, that again a growing number of people wish to apply for refugee status, and that the EU seeks genuine solidarity measures when it proposes various forms of resettlement from outside the EU and relocation within the EU, the government invited the Parliament to commence a referendum on the issue.

Parliament adopted its resolution on May 10, 2016.⁸² The question posed in the referendum was unclear, but survived all legal attacks. The Government website translated it as “Do you agree that the European Union should have the power to impose the compulsory relocation of non-Hungarian citizens to Hungary without the consent of the National Assembly of Hungary?”⁸³ In reality, the Hungarian text differs from the translated version. In the original Hungarian text, the term used is not the EU-conform and legally clear “compulsory relocation.” The Hungarian term *betelepítés*—which means “make to settle into”—was used at times when large German and other populations were invited into Hungary by the queen or king to repopulate areas devastated by the Tatars and later by the Ottomans. Therefore, the referendum sought an answer to a question which is not raised by EU law or practice. Nevertheless, it pretended to be a term referring to EU law and action. So, the fabricated image of the long term immigrant was used to oppose the EU’s refugee policy and gather popular support to the resistance. The referendum took place on October 2, 2016.⁸⁴

The Hungarian government has, effectively, constructed a full parallel reality. With all these moves, the government and Parliament intentionally replaced the figure of the refugee in need of protection with the (imagined) illegal migrant, who arrives in an unlawful manner and only has sinister intentions, against whom Hungary has to be defended.. The reality on the ground was concealed behind a narratively constructed alternative, which according to the logic of securitization created an enemy figure threatening vital interests, against whom the whole nation has to defend itself, in part by criminalizing the actions of that undesired Other. The logical consequence: deterrence, obstruction, punishment. Allies of that Other are also under attack; they are accused of being a vehicle of unfettered “immigration” threatening the destruction of Europe.⁸⁵

⁸² 8/2016. (V. 10.) OGY határozat országos népszavazás elrendeléséről (Resolution on ordering national referendum).

⁸³ *President of Hungary Sets 2 October as the Date for the Referendum*, KORMÁNYZAT (July 5, 2016), <http://www.kormany.hu/en/news/president-of-hungary-sets-2-october-as-the-date-for-the-referendum>.

⁸⁴ The compatibility of the referendum with the obligation of loyal cooperation will be taken up in the breaches of law section.

⁸⁵ See, e.g., *Nyolc tétel sorosgyuri migránspolitikájáról*, 888.HU (Oct. 10, 2015), <http://888.hu/article-nyolc-tetel-sorosgyuri-migranspolitikajarol>.

II. Deterrence

If those seeking access to the territory are “threatening foreigners,” then the best response is to deter them from arriving at all, or at least from wishing to legalize their stay in Hungary by way of formally applying for international protection.

Hungary has been notorious in detaining even *bona fide* asylum seekers.⁸⁶ The European Court of Human Rights (“ECtHR”) adopted several judgments condemning its practice.⁸⁷ The rules in force entitle the authorities to detain asylum seekers for up to six months based on a number of “fairly flexible” conditions.⁸⁸ Alternatives to detention are hardly ever used.

⁸⁶ UNHCR in 2012 expressed concern about the serious challenges asylum seekers face in accessing protection in Hungary. It noted that “Since April 2010, asylum detention has become the rule rather than the exception,” mentioned that the practice between 2008 and 2010 was unlawful and continued to criticize the regime after 2010 for lack of effective remedies, unpredictability, and the lack of legitimate aims in many cases. UNHCR, HUNGARY AS A COUNTRY OF ASYLUM (Apr. 24, 2012), <http://www.refworld.org/docid/4f9167db2.html> [hereinafter HUNGARY AS A COUNTRY OF ASYLUM]. The Council of Europe’s Commissioner of Human Rights also noted the deterring effect of detention, by criticising the 2015 changes and claiming that they “rendered access to international protection extremely difficult and unjustifiably criminalised immigrants and asylum-seekers.” *Visit to Hungary*, COUNCIL OF EUR. (Nov. 27, 2015), <http://tinyurl.com/gvvp8be>. In his third party intervention into an Austrian case about returning an asylum seeker to Hungary, he deplored the detention system as arbitrary, implemented in a “particularly worrisome” mode, lacking effective remedy and alternatives. See *Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36 of the European Convention on Human Rights Applications No. 44825/15 and No. 44944/15, S.O. v. Austria and A.A. v. Austria 5 – 7*, COUNCIL OF EUR. (Dec. 17, 2015), <http://www.coe.int/en/web/commissioner/third-party-interventions> [hereinafter *Third Party Interventions*].

⁸⁷ *Lokpo et Touré v. Hungary*, App. No. 10816/10 (Sept. 20, 2011), <http://hudoc.echr.coe.int/>. *Al-Tayyar Abdelhakim v. Hungary*, App. No. 3058/11, (Oct. 23, 2012), <http://hudoc.echr.coe.int/>. *Nabil and Others v. Hungary*, App. No. 62116/12 (Sept. 22, 2015), <http://hudoc.ecgr.coe.int>.

⁸⁸ Asylum Act, 2016 July version, Asylum detention, Art. 31/A:

(1) The refugee authority can, in order to conduct the asylum procedure and to secure the Dublin transfer – taking the restriction laid down in Section 31/B into account – take the person seeking recognition into asylum detention if his/her entitlement to stay is exclusively based on the submission of an application for recognition where

a) the identity or citizenship of the person seeking recognition is unclear, in order to establish them,

b) a procedure is ongoing for the expulsion of a person seeking recognition and it can be proven on the basis of objective criteria – inclusive of the fact that the applicant has had the opportunity beforehand to submit application of asylum - or there is a well-founded reason to presume that the person seeking recognition is applying for asylum exclusively to delay or frustrate the performance of the expulsion,

c) facts and circumstances underpinning the application for asylum need to be established and where these facts or circumstances cannot be established in the absence of detention, in particular when there is a risk of escape by the applicant,

If that had not been enough, Hungary deterred the arrival of asylum seekers by creating inhuman conditions at their route and after their arrival. Long hours of waiting for the first registration, dire conditions, no organized transportation to the reception centers, lack of state assistance to those who refrained from moving into the designated reception center, overcrowded centers with *ad hoc* tent camps all contributed to the intention of deterring asylum seekers from arriving—and deterring them from applying within Hungary if already within the country. Images of thousands camping at the railway stations of Budapest, supported solely by volunteers, were followed by pictures showing thousands of people starting to walk on the M1 motorway towards Vienna.⁸⁹

The totally unpredictable behavior of the Hungarian authorities with respect to the forward movement of the migrants also served as a deterrent. In the past, the authorities turned a blind eye to the fact that a majority of the asylum seekers disappeared before receiving a final decision in their case. After all, as Hungary, belongs to the Schengen area, travel only necessitated a public transportation ticket, or a car heading to Vienna or Bratislava. This approach has lately been abandoned. In early February 2015, as a prelude to the xenophobic propaganda, hundreds of Kosovars were forcefully taken off the train to Vienna and transferred to refugee reception centers.⁹⁰ That practice was silently abandoned after a few days to allow more than 100,000 thousand people to move on, when again in July 2015 people were not allowed to board the trains in Budapest. This created chaos, and, in early September, this unrest culminated in the march of thousands of people on the highway,

d) the detention of the person seeking recognition is necessary for the protection of national security or public order,

e) the application was submitted in an airport procedure, or

f) it is necessary to guarantee Dublin transfer procedures and there is a serious risk of escape.

[Article 31/B exempts unaccompanied minors from detention and excludes detention solely on the basis that the person has applied for asylum].

⁸⁹ For a comprehensive account, see B. SIMONOVITS & A. BERNÁT ET AL., THE SOCIAL ASPECTS OF THE 2015 MIGRATION CRISIS IN HUNGARY (2016), http://www.tarki.hu/hu/news/2016/kitekint/20160330_refugees.pdf; see also Annastiina Kallius et al., *Immobilizing Mobility: Border Ethnography, Illiberal Democracy, and the Politics of the “Refugee Crisis” in Hungary*, 43 AM. ETHNOLOGIST 25, 25–37 (2016).

⁹⁰ Havassy Anna Katalin, *Megint dráma a vasútállomáson: újabb koszovói menekülteknek jelentette a végállomást Győr – fotók* (Drama again at the railway station: for further Kosovar refugees Győr meant the final station – photos), KISALFÖLD ONLINE, (Apr. 2, 2015), http://www.kisalfold.hu/gyori_hirek/megint_drama_a_vasutallomason_ujabb_koszovoi_menekulteknek_jelentete_a_vegallomast_gyor_-_fotok/2416482/.

which finally ended in government intervention providing buses to deliver people to the Austrian border.⁹¹

The unpredictable behavior of the authorities continued. When the fence between Serbia and Hungary state was ready, migrants and refugees from Serbia crossed into Croatia and from there into Hungary. Then, the Hungarian state offered train services to more than 200,000 of the migrants, without registering them and politely delivering them to the Austrian-Hungarian border, enhancing their walking through it, without a hint of intention to prevent their departure.⁹²

The major deterrent is, of course, the fence itself. This study cannot investigate the dubious effectiveness but certainly deadly consequences of physical barriers erected in the way of migrants from the Berlin wall (to ignore earlier examples) to the wall at the US-Mexican border and their spreading offspring in Europe. Recall M. R. Rosenblum's reference to several empirical research studies showing that more than 90 percent of those Mexicans who really wanted to cross the closed and fenced border eventually managed to do so.⁹³ The Hungarian border may have deterred new arrivals for a while, and may still lead them to opt for the Serbia-Croatia-Slovenia route, but the increasing number of asylum seekers in Hungary in 2016 indicates that when the hurdles to other routes increase, crossing the fence re-appears as a viable option.

Threatening asylum seekers with imprisonment if they cross the fence⁹⁴ is a grave deterrent as well, to be taken up in the context of punishment.⁹⁵

Deterrence is not only targeted at the irregular migrant. The population at large and especially groups in support of the asylum seekers are also under fire. The whole xenophobic propaganda, the polyphonic securitizing discourse endeavors to deter the population at large from showing, feeling and practicing sympathy with the forced migrants. It intends to

⁹¹ *Migrant Crisis: Hungary Migrants Start Walk to Border*, BBC NEWS (Sept. 4, 2015), <http://www.bbc.com/news/world-europe-34155701>; see also Kallius et al., *supra* note 90, at 25–26, 29–30.

⁹² *Croatia Migrant Scramble for Hungary Train*, BBC NEWS (Sept. 20, 2015), <http://www.bbc.com/news/world-europe-34307014>.

⁹³ MARC R. ROSENBLUM, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 29 (2012), <http://fpc.state.gov/documents/organization/180681.pdf>.

⁹⁴ *Supra* Part C.III.

⁹⁵ See *infra* Part D.IV.

block gestures of solidarity and to generate shame if nevertheless some persons remain on the side of the threatening Other. As was to be expected, vigilantes have appeared.⁹⁶

The government depicts the helpers of asylum seekers as agents of foreign powers, including of the well-known philanthropist George Soros.⁹⁷ Media outlets controlled by the government refer to Hungarian NGOs raising their voice in favor of the asylum seekers as liberal agents of foreign forces. These NGOs are targets of serious attacks on their websites and activists have to endure harassment in the social media. The UN Special Rapporteur on the Situation of Human Right Defenders Michel Forst was very critical at the end of his visit to Hungary in February 2016, noting that. “In the context of the refugee crisis and the excessively manipulated fear of the ‘other’ in society, defenders face public criticism by government officials, stigmatisation in the media, unwarranted inspections and reduction of state funding.”⁹⁸

The state of the exception, deterring both the asylum seeker and the sympathizing public is, confirmed by the “crisis situation caused by mass immigration”⁹⁹ entitling the police to enter private homes under suspicion without a warrant, taking into state use real estate and mobile items owned or possessed by other state or municipal agencies, when none of the legally prescribed conditions are met probably only serve the securitizing intent.

III. Obstruction

Any obstacle deters (forced) migrants from moving on. Deterrence and obstruction form an overlapping continuum. A fence deters, and if nevertheless one wishes to cross it, then it becomes a tool of obstructing access to protection. This section concentrates on further legal and practical moves of the government which—together with the fence—aim to make access to a refugee status determination procedure extremely difficult, or even impossible, within Hungary.

⁹⁶ Márk Zoltán Kékesi, *A Hungarian Mayor Makes a Show of "Migrant-Hunting"*, OBSERVERS (Aug. 2, 2016), <http://observers.france24.com/en/20160802-hungary-mayor-migrant-hunting-asotthalom>.

⁹⁷ “Senior government officials have described NGOs as ‘paid political activists who are trying to help foreign interests’, which encouraged authorities to target human rights organizations through surprise financial audits, criminal investigations and public shaming, thus curtailing their activities.” Michael Forst, End of Mission Statement by Special Rapporteur on the Situation of Human Rights Defenders, Visit to Hungary 8 – 16 February 2016 (2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17048&LangID=E>.

S. Pogany, *Where Left Meets Right: Anti-Semitism in Europe, Social Europe*, <https://www.socialeurope.eu/2016/08/where-left-meets-right-anti-semitism-in-europe/> (Aug 1, 2016).

⁹⁸ *UN Expert Urges Hungary Not to Stigmatise and Intimidate Human Rights Defenders*, UN SPECIAL RAPPORTEUR (Feb. 16, 2016), <https://www.protecting-defenders.org/en/news/un-expert-urges-hungary-not-stigmatise-and-intimidate-human-rights-defenders>.

⁹⁹ See *supra* Part C.III.

The first government action to be mentioned is the designation of Serbia as a safe country of origin. This, together with the idea that Greece, Croatia or Slovenia may be the responsible states under the Dublin regulation, means that Hungary in fact wishes to avoid any deliberation of the protection claims on their merits. Instead it intends to declare applications inadmissible either on the safe third country rule or according to the Dublin regulation. Serbia's safety for asylum seekers may be approached as a matter of political morality and as a legal issue. As to the first: More than 800,000 persons have crossed through Serbia in 2015. If Serbia were a safe third country, all the EU member states would be entitled to return all the asylum seekers to Serbia. Is that politically conceivable? No. May EU member states legitimately expect Serbia to handle those cases? No. Neither may Serbia pass on the buck further to Macedonia. So political morality in itself ought to discard the idea of returning asylum seekers in excessive numbers to Serbia.

The reliance on the legal entitlement derived from Article 38 of the Procedures Directive is not acceptable either.¹⁰⁰ The directive identifies eight major criteria which all have to be fulfilled before a country outside the EU may be considered so safe that, instead of examining the merits of the application by the member state responsible under the Dublin regulation, that member state may return the applicant to the safe third country with a view to have the full refugee status determination procedure conducted in that non-EU country.¹⁰¹ From these conditions at least two are not met.

¹⁰⁰ 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, 2013 O.J. (L 180) 60–95.

¹⁰¹ Article 38. In the safe third country,

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) there is no risk of serious harm as defined in Directive 2011/95/EU [the Qualification Directive];

(c) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. The application of the safe third country concept shall be subject to rules laid down in national law, including:

(a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant.

Applicants still do not have a chance “to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.” Nor can it be shown that a few days’ transit creates “a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country.” Authoritative commentators on this matter agree that Serbia does not meet the criteria of the Procedures Directive.¹⁰² Nevertheless, the Hungarian authorities consistently declare applications inadmissible if applicants have crossed the border from Serbia.¹⁰³

Obstruction manifests itself in the elimination of reception capacity and in the dismissal of trained personnel. The reception capacity available for asylum seekers has been dramatically contracted and deteriorated. Whereas at the times of daily hundreds of arrivals the existing facilities were stretched and new tent-based reception facilities were created,¹⁰⁴ after the

Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

¹⁰² HUNGARY AS A COUNTRY OF ASYLUM, *supra* note 87, at 25 § 71 reports the following:

In any event, UNHCR maintains the position taken in its observations on the Serbian asylum system in August 2012 that asylum-seekers should not be returned to Serbia. While the number of asylum-seekers passing through that country has since greatly increased, leaving its asylum system with even less capacity to respond in accordance with international standards than before, many of UNHCR’s findings and conclusions of August 2012 remain valid. For example, between 1 January and 31 August 2015, the Misdemeanour Court in Kanjiža penalized 3,150 third country nationals readmitted to Serbia from Hungary for illegal stay or illegal border crossing, and sentenced most of them to a monetary fine. Such individuals are denied the right to (re) apply for asylum in Serbia.

¹⁰³ “Within the period 1 August 2015 to 31 March 2016, OIN found 1,184 applications to be inadmissible (although whether this was always on safe third country grounds, is unclear). In the same period, 387 applicants submitted a request for judicial review of the OIN’s inadmissibility decision – including 114 submitted in the transit zones. In 246 cases, the Courts annulled OIN’s decision and referred them back to the OIN.” *Id.* at 17, § 41.

¹⁰⁴ This is a description of the conditions by a competent observer:

Notwithstanding an ever-increasing influx of asylum-seekers since 2013 and significant amounts of EU-funding, the Hungarian government has failed to properly extend the country’s reception capacities. The open reception centres for asylum-seekers have become extremely overcrowded in Hungary by mid-2015. The facility in Debrecen (the largest in the country), with a capacity of 800, is now hosting over 1 800, on occasions even 2 000 asylum-seekers. The reception centre in Bicske is constantly home to up to 1 200 asylum-seekers, while its maximum capacity is only 450 places. At all reception facilities, asylum-seekers have to sleep on the corridors, in community areas or, especially during heat waves, outside in

completion of the fence the largest reception center in Debrecen was closed,¹⁰⁵ without being replaced with a facility of comparable permanent capacity and staff. Instead, in the yard of a police training school, a tent-assemblage set up in Körmend, close to the Austrian border. The calculation—so far corroborated by the facts—must have been that asylum seekers will abscond from it, finding the dire circumstances extremely uninviting.¹⁰⁶

Two additional combined techniques of obstruction warrant a mention. The first is the creation of so-called transit zones.¹⁰⁷ Access to these zones is limited. The authority decides at will, depending on capacity, how many applicants to allow to enter the container, and in which order. UNHCR and other observers are very critical of the regime which makes people wait in a muddy meadow for days, occasionally for weeks, before they can even submit an application.¹⁰⁸ The obstruction to access to procedures for submitting applications for international protection takes extreme forms. UNHCR has expressed alarm about the increasing violence used against asylum seekers, including alleged push-backs by the border-police of those who try to reach Hungary over the Tisza River, which led to the death of a 22-year-old Syrian man.¹⁰⁹ The twin brother of these measures is the so-called “8 Kilometer

tents or often on plain mattresses. Hygienic conditions are frequently very problematic, there are not enough showers and lavatories, and crucial services – such as individual social assistance or psycho-social care – are not available.

HUNGARIAN HELSINKI COMMITTEE, BUILDING A LEGAL FENCE – CHANGES TO HUNGARIAN ASYLUM LAW JEOPARDISE ACCESS TO PROTECTION IN HUNGARY (Aug. 7, 2015), <http://helsinki.hu/wp-content/uploads/HHC-HU-asylum-law-amendment-2015-August-info-note.pdf>.

¹⁰⁵ Government Resolution 1724/2015 (X. 7.) announcing the closure in Debrecen of the open reception center on October 31, 2015 and of the asylum detention facility on December 15, 2015.

¹⁰⁶ On July 22, Hungarian daily *Magyar Nemzet* reported that, at the time, 1,300 asylum seekers were accommodated in open or closed reception centers of the more than 22,000 that arrived in 2016 (and some may have come in 2015). The same article refers to news reports according to which 20–30 asylum seekers arrive daily in Austria from Hungary. Markotay Csaba, *Kihaszánlatlan menekülttáborok* (Underused refugee camps), *MAGYAR NEMZET ONLINE* (July 22, 2016), <http://mno.hu/belfold/kihasznalatlan-menekulttaborok-1353085>.

¹⁰⁷ See *supra* Part C.III.

¹⁰⁸ “Currently, only 15-17 people are admitted daily at each zone, leaving hundreds to suffer day and night without any proper support at the EU border,” said Samar Mazloum, head of UNHCR’s field office in Szeged.” Fearing rejection in Hungary’s cold comfort transit zones UNHCR expresses concern over Hungary’s restrictive approaches and the dire situation asylum-seekers face outside the transit zones. Helen Womack, *Fearing Rejection in Hungary’s Cold Comfort Transit Zones*, UNHCR (June 7, 2016), <http://www.unhcr.org/news/latest/2016/6/5756b4374/fearing-rejection-hungarys-cold-comfort-transit-zones.html>.

¹⁰⁹ “Since May, UNHCR staff and partners have collected information on over 100 cases with disturbing allegations of excessive use of force as people try to cross the border.” UNHCR Alarmed at Refugee Death on Hungary-Serbia Border, UNHCR (June 6, 2016), <http://www.unhcr-centraleurope.org/en/news/2016/unhcr-alarmed-at-refugee-death-on-hungary-serbia-border.html>.

Rule”.¹¹⁰ If access to the transit zones is in itself hardly possible and entails a long, humiliating waiting in the field on the Serbian side, then being returned through the fence by the sheer use of force and without granting any legal defense against the action is the ultimate form of obstruction.

IV. Punishment

Doctrinally it has been debated whether detention on other than criminal grounds constitutes punishment, but this Article takes the position of Manfred Nowak and the many commentators who quote him. According to Nowak, “every sanction that has not only a preventive but also a retributive and/or deterrent character is . . . to be termed a penalty, regardless of its severity or the formal qualification by law and by the organ imposing it.”¹¹¹ Detention of those who have not committed a crime is a penalty, even if present EU law permits it under strictly defined conditions.¹¹²

Similarly, the ban from the whole Schengen territory for entering Hungary irregularly is a punishment in this broad sense, accompanying the expulsion order served on those asylum seekers, who are found returnable to a safe third country and/or who were subject to a formal criminal legal procedure for having crossed the fence irregularly.

Detention during the border procedure is a legally indefensible punishment.¹¹³ According to Article 71/A of the Asylum Act, if the person submits an application “before entering the territory of Hungary, in the transit zone,” including when application submission follows the forceful arrest and removal through the fence if found within eight kilometers of the border line or the fence constituting the external border of the EU, then the person may be detained there for 4 weeks. The only option to reduce the days of deprivation of liberty is to withdraw the application. Only those whose claims were found admissible in the “in-merit phase”, who belong to vulnerable groups or in whose case the absolute deadline of 4 weeks has expired, can leave the transit zone towards Hungary. That detention, which may extend to 28 days without *habeas corpus*, without judicial oversight, is certainly punishment.

¹¹⁰ *Supra* Part C.V.

¹¹¹ MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS—CCPR COMMENTARY 278 (1993) cited by Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 195 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003). For an elaborate discussion leading to a wide interpretation of the term “penalty,” see JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 405–12 (2005).

¹¹² *Supra* Part D.II.

¹¹³ For the rules see *supra* Part D.III.

The top of the punishment “ladder” is occupied by newly created crimes.¹¹⁴ A prime example for the crimmigration approach is the crime of “crossing the border barrier.”¹¹⁵ The somewhat convoluted formulation of the criminal act translates to:

- Any person who without due authorization enters the protected territory of Hungary protected by the facility securing the order of the State border through that facility is guilty of a felony punishable by imprisonment not exceeding three years.¹¹⁶

In practice, persons are not sentenced to imprisonment, but are instead given the criminal penalty of expulsion and ban on re-entering the Schengen territory.”¹¹⁷ However, as Serbia is reluctant to readmit third country nationals, most of them linger in detention until finally freed.¹¹⁸

The last form of punishment to be mentioned is the use of the crime of human smuggling. Whereas the government has transported hundreds of thousands of persons to the Austrian borders,¹¹⁹ when private parties offered the same transport, they have been, in some

¹¹⁴ *Supra* Part C.III.

¹¹⁵ An unofficial translation of the laws in force (WolterKluwers jogtár) uses this expression.

¹¹⁶ Act C. of 2012 Article 352/A. Author’s translation.

¹¹⁷ “According to the Szeged court, 2,353 individuals were convicted of unauthorized crossing of the border fence between 15 September 2015 and 31 March 2016. Of these, 1,331 were sentenced to expulsion for one year, 943 to expulsion for two years, 33 to expulsion for three years, one to expulsion for four years and one to expulsion for five years. In addition, two were sentenced to actual imprisonment, 36 to suspended imprisonment, four were issued a warning and two were put on probation.” HUNGARY AS A COUNTRY OF ASYLUM, *supra* note 87, at 22 § 57.

¹¹⁸ UNHCR notes that between September 15, 2015, the completion of the fence with Serbia, and March 31, 2016, only 298 individuals were readmitted by Serbia, seventy-eight of them Serbian nationals. *Id.* at 25 § 68.

¹¹⁹ The Government’s homepage reported the statement of the director of the Office of Nationality and Immigration, according to which more than 414,000 irregular entries into Hungary have been recorded in 2015. As the number of applications for international protection 177,135, the almost 240,000 difference includes persons who did enter, but did not apply for asylum, most of whom were actively transported by the Government to the Austrian border. The source of the 414 000 figure is: *Rendkívüli migrációs nyomás érte Magyarországot tavaly*, KORMÁNYZAT (Jan. 18, 2016), <http://www.kormany.hu/hu/belugyminiszterium/parlamentiallamtitkarsag/hirek/rendkivuli-migracios-nyomas-erte-magyarorszagot-tavaly>.

instances, indicted for human smuggling,¹²⁰ as was the case in with Austrian volunteers in 2015.¹²¹

All these elements—together with others which were not even discussed here, such as the tightening of the rules on human smuggling, making the preparation punishable even if no border was crossed—clearly show that the legislature has adopted the crimmigration approach, inflicting punishment for purely retributive purposes for acts which do not entail any direct social danger or harm, simply are not in harmony with the prevailing rules on entry and exit.

V. Free Riding—Lack of Solidarity

Closing off an escape route does not stop the flight itself if people are persecuted; the refugees, or the smugglers, will open another route. Preventing or impeding the arrival of asylum seekers never cures the root causes, nor does it eliminate the need to start and continue the forced migration. The Greek-Turkish relationship clearly shows this; as long as crossing the Evros river was an option, very few chose the sea passage to the small Greek islands. After the fence was built, the route was relocated to the more dangerous sea crossing.

Similarly, building the fence at the southern border of Hungary has not stopped any Afghan, Syrian or Eritrean asylum seeker from departing for Europe, once the person perceived their situation as untenable. The Hungarian government knew very well that this was the case. An interview with the Prime Minister summarizes:

- one has to assume that the huge mass, which earlier intended to get into Austria through Hungary, will still pass by Hungary's southern borders" — he [V.O.] explained. "The question was ☐ he continued—how the immigrants will continue their journey from Croatia. It is clear that they plan one of the not minor routes through Hungary. "And we try to prevent that" — he said.¹²²

¹²⁰ "Két magyar embercsempészt és hat illegális bevándorlót fogtak el Hegyeshalom közelében a mosonmagyaróvári rendőrök" (Two Hungarian human smugglers and six illegal immigrants have been arrested in the vicinity of Hegyeshalom by the police of Mosonmagyaróvár). Erről Tudnia Kell, *Embercsempészeket fogtak el Hegyeshalom közelében*, ORIGO (Aug. 31, 2015), <http://www.origo.hu/itthon/20150831-embercsempesz-menekult-hegyeshalom.html>.

¹²¹ The author was informed about such cases directly. See Von Lena Greiner, *Privatleute holen Flüchtlinge von der Straße*, SPIEGEL ONLINE (Sept. 6, 2015), <http://www.spiegel.de/politik/ausland/fluechtlinge-im-autokonvoi-von-ungarn-nach-oesterreich-a-1051662.html>.

¹²² The daily newspaper Magyar Nemzet reporting on a radio interview of Viktor Orbán broadcasted by the radio station "Kossuth" on September 18, 2015. *Orbán: Épül a kerítés a horvát határon*, MNO (Sept. 18, 2015), <http://mno.hu/belfold/orban-epul-a-kerites-a-horvat-hataron-1304874>.

Frank words. “The huge mass will . . . still pass.” And so it happened. But the full denial of reality forced the government propaganda to claim the opposite.

Three days later, the same Prime Minister pretended in Parliament that the fence would stop the arrival of asylum seekers and others (in his terminology, “illegal migrants”):

- Hungary has been the respected member of the large European family. It is our historical and moral duty to defend Europe, since thereby we defend ourselves. The inverse is also true: when we defend the borders of Hungary, at the same time we protect Europe.¹²³

The language the Prime Minister used here reflects the total denial of the fact that a very significant portion of the population for which the fence was intended to block are not attacking Europe; they are not an enemy force against which one has to defend oneself. They are overwhelmingly forced migrants seeking asylum and safety.

As could be foreseen, the fence on the southern border of Hungary merely diverted the arrivals to Croatia and Slovenia.¹²⁴ The installation of the fence simply was an instance of responsibility and burden-shifting. In the same period, the Dublin returns to Hungary fell to minimal numbers, even though Hungary would have been the “responsible state” for close to 200,000 persons if Greece’s responsibility were excluded.

In fact, Cabinet Minister János Lázár indicated at a press briefing on behalf of the government that Hungary would not take back or take charge of a single asylum seeker.¹²⁵ Remarkably, Lázár avoided this terminology and spoke instead of the government’s refusal to take back “illegal immigrants facing deportation to Hungary.” Nevertheless, the context revealed that Lázár was talking about asylum seekers as he added, by way of justification, that Greece is the responsible state as its external borders were crossed by those to be sent to Hungary. That statement was preceded by a short *intermezzo* in June 2015, when the government announced that “Hungary [was] suspending re-admission of asylum-seekers

¹²³ Viktor Orbán, Parliament, (Sept. 21, 2015), <http://www.parlament.hu/documents/10181/56618/2015.09.21.+napl%C3%B3/077af232-5782-4653-a36f-ee75ae4b6959>.

¹²⁴ RAZOR-WIRED: REFLECTIONS ON MIGRATION MOVEMENTS THROUGH SLOVENIA IN 2015 8–10 (V. Bajt & N. Kogovšek Šalamon eds., 2016).

¹²⁵ *Elutasítja a kvótarendszert a magyar kormány* (The Hungarian Government refuses the quota-system), KORMÁNYZAT (Oct. 29, 2015), <http://www.kormany.hu/hu/miniszterelnokseg/hirek/elutasitja-a-quotarendszert-a-magyar-kormany>.

from other EU Member States¹²⁶; an idea that was hastily revoked in light of its total illegality. The actual strategy the Hungarian government is now pursuing is to slow down the take charge or take back procedure and to create such reception conditions and legal framework that an increasing number of courts in several EU member states prohibit Dublin transfers to Hungary.¹²⁷

The most conspicuous manifestation of Hungary's freeriding is its total refusal¹²⁸ to participate in the relocation system¹²⁹ and in the resettlement system¹³⁰ adopted or proposed by the EU.¹³¹ Both the relocation and the resettlement systems are expressions of solidarity. In order to avoid the appearance of denying that solidarity, the Hungarian authorities have constructed a parallel reality in which those seeking access to EU territory are not forced migrants or others trying to enjoy a decent living, but potential or actual terrorists, abusers, threats—in short, the Others.

On November 17, 2015 the Hungarian Parliament adopted an act¹³² calling the government to challenge Council Decision (EU) 2015/1601 of September 22, 2015, which envisaged the

¹²⁶*Hungary is Suspending Re-Admission of Asylum-Seekers from Other EU Member States*, KORMÁNYZAT (June 23, 2015), <http://www.kormany.hu/en/ministry-of-interior/news/hungary-is-suspending-re-admission-of-asylum-seekers-from-other-eu-member-states>.

¹²⁷ EUR. COUNCIL ON REFUGEES AND EXILES, CASE LAW FACT SHEET: PREVENTION OF DUBLIN TRANSFERS TO HUNGARY (2016), http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Fact%20sheet%20-%20Case%20law%20on%20Hungary_FIN.pdf.

¹²⁸ On the process see Kees Groenendijk & Boldizsar Nagy, *Hungary's Appeal Against Relocation to the CJEU: Upfront Attack or Rear Guard Battle?*, EU IMMIGRATION & ASYLUM LAW & POL'Y (Dec. 16, 2015), <http://eumigrationlawblog.eu/hungarys-appeal-against-relocation-to-the-cjeu-upfront-attack-or-rear-guard-battle/>.

¹²⁹ Relocation decisions, adopted as of September 14, 2015 and Council Decision (EU) 2015/1601, of 22 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece, 2015 O.J. (L 248/80). The resettlement decision took the form of conclusions of the (JHA) Council Doc. No. 11130/15, Conclusions of the Representatives of the Governments of the Member States Meeting Within the Council on Resettling Through Multilateral and National Schemes 20,000 Persons in Clear Need of International Protection (July 22, 2015) [hereinafter JHA Council Doc. No. 11130/15].

¹³⁰ JHA Council Doc. No. 11130/15, *supra* note 132.

¹³¹ The Commission proposed an in-depth redesign of the Dublin system, including a "corrective allocation mechanism" based on a reference number. The mechanism re-distributes asylum applicants into other member states if, in the given member state, their number exceeds 150% of the reference number, which in turn is established on the basis of a reference key giving 50–50% weight to the size of the population and the total GDP. *Proposal for a Regulation of the European Parliament and of the Council 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 (Recast)*, COM (2016) 270 Final (May 4, 2016).

¹³² Act CLXXV. "In defence of Hungary and Europe, for the action against the compulsory in-settlement quota." (Magyarország és Európa védelmében a kötelező betelepítési kvóta elleni fellépésről). Note that the word used to

relocation of 1294 asylum seekers “in clear need of international protection” to Hungary, intending to have their case processed there. That entailed a bit more than one percent of all asylum seekers to be relocated from Italy and Greece (or other qualifying Member States). Ironically, Hungary could have been on the beneficiary side as the original proposal serving as the basis for the decision envisaged the relocation of 54,000 asylum seekers from Hungary.¹³³ The Hungarian government, however, refused the suggestion and moved over to the receiving side,¹³⁴ and on December 3, 2015 challenged the validity of the decision before the CJEU.¹³⁵ Slovakia also contested the decision.¹³⁶

The main arguments submitted by Hungary are the following, whereby “(S)” indicates that Slovakia’s pleas are more or less the same:

- 1) Art 78(3) TFEU does not empower the Council to adopt a legislative act, so the decision ought not to have amended the Dublin III. regulation (604/2013) (S);
- 2) Measures lasting or having effects for 3 or more years are not provisional as required by 78 (3) (S);
- 3) The decision-making ought to have been unanimous as the Council departed from the Commission proposal;
- 4) As the decision is a legislative act because of its content, national parliaments ought to have had a right to form an opinion (S);
- 5) After changing the content of the proposal the European Parliament was not consulted again (S);
- 6) The decision contradicts the conclusions of the European Council adopted on 25 and 26 June 2015 envisaging voluntary relocation and so violates Art 68 TFEU;
- 7) The decision infringes the principles of legal certainty and legislative clarity as rules of procedure and selection for relocation were left in the dark;
- 8) Violates 51 Geneva Convention guaranteed right of the asylum seekers to stay in the country in which the application was submitted if there are no material links to the state to which the transfer is envisaged;

designate the attacked EU measure is not the Hungarian term for “relocation” which is “áthelyezés,” but a different expression, “betelepítés,” which has a sinister overtone in Hungarian, referring to an alien power which against the will of the local population brings in “alien” settlers.

¹³³ *Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy, Greece and Hungary*, COM (2015) 451 final (Sept. 9, 2015).

¹³⁴ “As Hungary however does not wish to be included as beneficiary of the emergency relocation scheme, the Council agreed that (an)other Member State(s) confronted with a similarly evolving pressure following a sudden inflow of nationals of third countries could benefit instead.” European Commission - Fact Sheet: Refugee Crisis – Q&A on Emergency Relocation, *What is the European Agenda on Migration and What is its State of Play?*, EUR. COMM’N (Sept. 22, 2015), http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm.

¹³⁵ Case C-647/15, *Hungary v. Council of the European Union*, 2016 E.C.R. 43.

¹³⁶ Case C-643/15, *Slovak Republic v. Council of the European Union*, 2016 E.C.R. 41.

9) The measure is contrary to the principle of proportionality (S).

Some of the arguments may be well founded in law,¹³⁷ but the overall impact of the case is different, especially in light of the practical fiasco of the scheme as a whole.¹³⁸ Kees Groenendijk and this author came to the conclusion that “[w]hat appears to be a legalistic challenge to a Council Decision may be part of a larger strategy representing a genuine threat to the functioning of the CEAS. Alternatively, it may turn out to be a rear guard battle.”¹³⁹

That battle is fought on another front too. As already mentioned,¹⁴⁰ Parliament has ordered a heeding the wishes of the government.¹⁴¹ The adult population of Hungary and of residents of other countries possessing Hungarian nationality are invited to vote on a question which is devoid of any legally ascertainable meaning and object.¹⁴²

The question is devoid of legal meaning because the Hungarian term used (*betelepítés* settling-in), is neither part of the EU *acquis* (in Hungarian), nor of Hungarian law. The Supreme Court (*Kúria*) has adopted an order eventually refusing legal challenges to the referendum question.¹⁴³ Nevertheless the order itself declared that a referendum “may not be considered legitimate, if the voting citizen does not exactly know on what she/he votes.”¹⁴⁴ The Court added that the question must contain precise notions subject to legal interpretation (“construction”).¹⁴⁵ The Court stated further that “neither Hungarian nor international law describes the content of the expression settling-in [*betelepítés*], it is linked

¹³⁷ Zuzana Vikarska, *The Slovak Challenge to the Asylum-Seekers’ Relocation Decision: A Balancing Act*, EW LAW ANALYSIS (Dec. 29, 2015), <http://eulawanalysis.blogspot.de/2015/12/the-slovak-challenge-to-asylum-seekers.html>.

¹³⁸ Of the 160,000 persons to be relocated on the basis of the two September 2015 decisions, 2,280 people have been relocated by June 15, 2016. *Relocation and Resettlement - State of Play*, EUR. COMM’N (June 15, 2016), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160615/factsheet_relocation_and_resettlement_-_state_of_play_en.pdf.

¹³⁹ Groenendijk & Nagy, *supra* note 131.

¹⁴⁰ *Supra* Part D.I.

¹⁴¹ Decision of the Hungarian Parliament. 8/2016. (V. 10.) OGY. határozat. http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A16H0008.OGY×hift=ffffff4&xtreferer=00000001.TXT

¹⁴² Due to the enhanced access to Hungarian nationality without moving to Hungary several hundred thousand persons were naturalized in a simplified process. 754,347 persons have acquired Hungarian nationality (and voting rights) by April 30, 2016. Dániel Kacsoh, *Hétszázötvennégyezer új honosítás* (Seven hundred fifty four thousand new naturalizations), *MAGYARHIRLAP.HU* (June 15, 2016), http://magyarhirlap.hu/cikk/58382/Hetszazotvennegyezer_uj_honositas.

¹⁴³ KnK.IV.37.222/2016/9 5004 (May 3, 2016). Published in *Magyar Közlöny* (Official Gazette).

¹⁴⁴ *Id.* at § 41.

¹⁴⁵ *Id.* at § 43.

to a new social phenomenon, the legal determination of which primarily depends on the EU and Hungarian legislation directed at it.”¹⁴⁶ So the Court establishes that settling-in is a legally non-existent notion, which could be filled with content if there emerged appropriate EU or national legislation. But then, in a more than surprising turn, the Court declared that “from the point of view of the referendum, settling-in has a content which may be interpreted, it portrays the situation when the accommodation and placement (*elhelyezés*) of large numbers of non-Hungarian nationals would take place.”¹⁴⁷ The Court first established that the term applied in the Hungarian version of the referendum question had no legal meaning as of yet, but then assumed people would nevertheless understand it. In order to produce a conceivable interpretation, the Court itself invented a meaning for the expression settling in.

As to the object of the referendum, the Supreme Court made clear that it believed the referendum concerned Council decision 2015/1601. That follows from the fact that the court interpreted “settling-in” as referring to “a longer term placement/accommodation of the persons affected by the council decision [2015/1601].”¹⁴⁸ Other dicta corroborate that, according to the Court, the object of the referendum is the September 22, 2015 Council decision on the compulsory relocation of 120,000 asylum seekers. The government in its campaign, however, has repeatedly referred to the draft Dublin regulation recast as the target of the referendum. State Secretary for Government Communication, Bence Tuzson, said at a press briefing

- The Hungarian people must stop Brussels which wants to settle in Hungary a town full of illegal immigrants, thereby increasing the risk of terrorism and crime . . . The European Union would extend an invitation to the continent to millions if—by curtailing national sovereignty—it withdrew within its own competence the assessment of asylum requests and implemented a mandatory mechanism for the distribution of those arriving in Europe . . .¹⁴⁹ He stressed: the Hungarian Cabinet finds it unacceptable, and it is likewise contrary to EU[law], that Brussels would impose a penalty of HUF 78 million per immigrant on the Member States that reject the forced settlement of immigrants. “Hungary will not sign any

¹⁴⁶ *Id.* at § 44.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at § 42.

¹⁴⁹ Meaning “extended its competence.”

contract or agreement in which it would resign its fundamental right to decide whom we may live together with in Hungary.”¹⁵⁰

So the language of the referendum question was unclear, as was its object. Still, constitutional actions against it could not stop the process.¹⁵¹ The events culminated in the legally irrelevant but politically far from negligible referendum on October 2, 2016.¹⁵²

The legal irrelevance was corroborated by the fact that the referendum according to the constitution (Fundamental Law of Hungary) ended in an invalid result as much less than fifty percent voted for or against it.¹⁵³ The total number of “electors” (persons entitled to vote in and outside of Hungary) was 8.3 million, of whom 41.32% cast a valid vote. More than 98% of the vote was “no” heeding to the government propaganda. The large number of invalid votes (0.2 million) shows that more than 6% of the voters accepted the argument, according to which there was no reasonable answer to a meaningless question with an ill-defined object.

As expected, the invalidity of the outcome has not prevented the government from communicating it as a great success and from amending the Fundamental Law. It plans to introduce a paragraph banning “mass settling-in” into Hungary. The precise text of the amendment is not known at the moment of writing, but in a letter sent to Jean-Claude Juncker, president of the Commission, Prime Minister Orbán assured the Commission that “the constitutional amendment proposed by the government will be in full harmony with EU law and Hungary’s international commitments.”¹⁵⁴

Whether this will be the case remains to be seen, but it is beyond doubt that the referendum could hardly be seen as an expression of loyal co-operation as required by Article 4 (3) TEU, and it is also dubious if any amendment to the Constitution would qualify as an expression

¹⁵⁰ *Brussels Must be Stopped*, KORMÁNYZAT (Aug. 1, 2016), <http://www.kormany.hu/en/cabinet-office-of-the-prime-minister/news/brussels-must-be-stopped>.

¹⁵¹ For details see KRISZTINA KOVÁCS, ACCESS TO JUSTICE? MIGRATION CASES BEFORE THE CONSTITUTIONAL COURT OF HUNGARY 4–5 (July 27, 2016).

¹⁵² Whatever the outcome, neither the Hungarian Parliament nor the EU bodies is obliged to adopt or to revoke any legislation. On the one hand, even if the subject matter of the referendum was the future Dublin regime—which the Supreme Court could not envisage, as the Commission proposal came later than the submission to it—the Government would not need its support. In the ordinary legislative procedure it may cast a negative vote. On the other hand, no referendum may exempt it from implementing binding EU regulations.

¹⁵³ *Data Relating to the Result of the National Referendum*, NAT’L ELECTION OFFICE (Oct. 8, 2016), http://www.valasztas.hu/en/ref2016/481/481_0_index.html.

¹⁵⁴ Prime Minister Viktor Orbán Informs EC President of Referendum Result Via Letter, KORMÁNYZAT (Oct. 6, 2016), <http://www.kormany.hu/en/the-prime-minister/news/prime-minister-viktor-orban-informs-ec-president-of-referendum-result-via-letter>.

of the constitutional identity of Hungary and as such opposable to EU law—to which the government is hinting at, as a justification.¹⁵⁵

VI. Breaching the Law (International, European, Domestic)

Assuming that only courts and tribunals may establish the existence of a breach of law, the text that follows should be seen as a compendium of plausible hypotheses. The author assumes that, if these matters were brought to a judicial forum (and some of them actually have been), then they would be seen as arguable at least. The list is not extensive, it only proves that the securitization logic, combined with majority identitarian populism exercised by an actor in power may—and does—lead to setting aside ordinary law, either by replacing it with “extraordinary measures” or simply by ignoring and violating it.

In the context of international law, the most important issue is the compatibility of the regime with Article 31 of the Geneva Convention relating to the Status of Refugees,¹⁵⁶ guaranteeing impunity after irregular crossing of the border. It is also open to question if it is in harmony with the principle of non-refoulement in the broad sense, entailing not only the protection of Article 33 of the Geneva Convention but the wider shield provided by the human rights prohibition on exposing someone to inhuman or degrading treatment or punishment and torture.¹⁵⁷

¹⁵⁵ “The change will set down a framework that includes our constitutional identity, which covers territory, people and population, as well as state structure and form of government”—Statement by the Minister of Justice, Mr. Trócsányi at a press conference on October 5, 2016. The constitutional amendment will protect our national and constitutional identity.

¹⁵⁶ United Nations, Treaty Series, vol. 189, p. 137. Article 31 states that Refugees unlawfully in the country of refuge:

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.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country

¹⁵⁷ An ocean of literature surrounds this topic. *See generally, e.g.*, On Article 31: Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, in *Refugee Protection in INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 185–252 (E. Feller, V. Türk & F. Nicholson eds., 2003); G. Noll, *Article 31*, in *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 1243–76 (A. Zimmermann, F. Machts & J. Dörschner eds., 2011); Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in *Refugee Protection in INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 89–177 (E. Feller, V. Türk & F. Nicholson, eds., 2003); Guy S. Goodwin-Gill & J. McAdam, *The Refugee in International Law* 201–67 (3d ed. 2007); James Hathaway, *Leveraging Asylum*, 45 *TEX. INT’L L. J.* 503 (2009–2010); Hemme Battjes, *In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement Under Article 3 ECHR Reassessed*, 22 *LEIDEN J. OF INT’L L.* 583 (2009); Cathryn Costello, *The Search of the Outer Edges of Non-refoulement in Europe: Exceptionality and*

Without engaging in a detailed legal analysis, which would require an article of its own, suffice it to say that there are serious grounds for believing that punishing asylum seekers for having crossed the border irregularly (with or without a fence) does violate Article 31 of the Geneva Convention, provided the criteria found in the article concerning direct arrival and contact with the authorities without delay, as presently interpreted, were fulfilled. UNHCR's 2016 country paper on Hungary recalls that lawyers have invoked, though in vain, Article 31 as a defense in penal cases following irregular entry. The UNHCR concludes that it "considers that Hungary's law and practice in relation to the prosecution of asylum-seekers for unauthorized crossing of the border fence [is] likely to be at variance with obligations under international and EU law."¹⁵⁸

In the context of non-refoulement, a recent decision of the High Court of England and Wales (Administrative Court) offers guidance.¹⁵⁹ In *Ibrahimi and Abasi v SSHD*, decided on August 5, 2016, Mr. Justice Green dealt with the case of two Iranian nationals who resisted return from the UK to Hungary in application of the Dublin regulation after Hungary had accepted responsibility for their cases. The judge established that the issue to be resolved was "whether removal from the UK to Hungary gives rise to a risk of indirect refoulement to Iran?"¹⁶⁰ The judgment investigated the safety and the conditions transited on the Western Balkan route (Hungary, Serbia, Macedonia, Greece and Turkey) and established in respect of Hungary that "[t]he reality remains that there are systemic flaws in the system of a substantial nature which create a real risk of refoulement. This is a view shared by other Courts in the EU."¹⁶¹

It is worth considering whether the propaganda of the government, condemned by many observers as racist and xenophobic, is compatible with the relevant human rights treaties, foremost the requirement enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination of 1965,¹⁶² according to which

Flagrant Breaches, in HUMAN RIGHTS AND THE REFUGEE DEFINITION COMPARATIVE LEGAL PRACTICE AND THEORY 180–209 (B. Burson & D. J. Cantor eds., 2016).

¹⁵⁸ HUNGARY AS A COUNTRY OF ASYLUM, *supra* note 85, at 23 § 62.

¹⁵⁹ Mr. Husain Ibrahimi and Mr. Mohamed Abasi v. The Secretary of State for the Home Department, [2016] EWHC 2049 (Eng. & Wales).

¹⁶⁰ *Id.* at Para. 148.

¹⁶¹ *Id.* at Para. 161. The Evidential Summary of the judgment contains a long list of judgments and decisions reversing decisions on return to Hungary.

¹⁶² G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195.

- States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination¹⁶³

Compare this with the statement according to which “[f]or us [Hungarians], migration is not a solution, but a problem . . . not medicine but a poison, we don’t need it and won’t swallow it,”¹⁶⁴ and the worries of the Council of Europe Commissioner for Human Rights appear more justified than ever before.

- However, the Commissioner regrets that anti-migrant sentiment has since [April 2015] been further fueled, including at the highest political level. The Commissioner is particularly shocked at repeated references by the Hungarian Prime Minister to the danger for Hungary’s culture posed by the arrival of Muslim migrants. The Commissioner was all the more dismayed to learn during his November visit that the government was planning a new media campaign under the headline: “The quota increases the terror threat!” (Referring to the EU plans to relocate asylum seekers in different countries according to quotas) and other statements reading: “An illegal immigrant arrives in Europe on average every 12 seconds”; other messages read: “We don’t know who they are, or what their intentions are”; and “We don’t know how many hidden terrorists are among them.”¹⁶⁵

In the context of breaches of EU law , good guidance is offered by the Commission’s “administrative letter” of October 6, 2015 and by the summary of the Hungarian Helsinki Committee of changes that entered into force in September 2015.¹⁶⁶ A non-exhaustive list of concerns would include the following items:

¹⁶³ *Id.* at Art. 4.

¹⁶⁴ Viktor Orbán at a press conference with Austrian chancellor Kern. *Hungarian Prime Minister Says Migrants are ‘Poison’ and ‘not needed’*, GUARDIAN (July 26, 2016), <https://www.theguardian.com/world/2016/jul/26/hungarian-prime-minister-viktor-orban-praises-donald-trump>.

¹⁶⁵ *Third Party Interventions*, *supra* note 87, at 7 § 31.

¹⁶⁶ Ref. Ares(2015)4109816 (June 10, 2015), <http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf>; HUNGARIAN HELSINKI COMM., NO COUNTRY FOR REFUGEES – NEW ASYLUM RULES DENY PROTECTION TO REFUGEES AND LEAD TO UNPRECEDENTED HUMAN RIGHTS VIOLATIONS IN HUNGARY (2015), http://helsinki.hu/wp-content/uploads/HHC_Hungary_Info_Note_Sept_2015_No_country_for_refugees.pdf.

- 1) Forcing people to wait on the Serbian side of the transit zone (but on Hungarian territory) may violate the Charter of Fundamental Rights (Article 4, Prohibition of torture and inhuman or degrading treatment or punishment Art. 18, right to asylum) in connection with the application of the reception Conditions Directive (RD)¹⁶⁷ and the Procedures Directive (PD);¹⁶⁸
- 2) The border procedure in the transit zone, occasionally only lasting less than an hour, may violate the principle to be heard (Charter of Fundamental Rights of the European Union, Art. 41 (2), *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, 22 November 2012);
- 3) The return to Serbia under the Hungarian safe third country rules may not meet the requirements enshrined in Article 38 PD. Serbia is not a safe third country.¹⁶⁹ Moreover, people returned are not provided “with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.” The return is not in conformity with the applicable Serbia-EU return agreement¹⁷⁰ as, instead of the formalities envisaged in the agreement, it simply forces persons to illegally re-enter Serbia, for which they may be punished there;
- 4) Persons in the transit zone may be deprived of access to information on legal assistance, and voluntary legal assistance providers may not have access to potential clients in violation of Art 5 RD and of Art 12 PD;
- 5) The current border procedure deprives applicants of all the guarantees surrounding detention according to RD (9-11) because presence in the transit zone is not considered detention by the authorities asylum;
- 6) The right to an effective remedy (Art 46 PD, general principle of EU law, Art. 47 of the Charter of Fundamental Rights) is prejudiced by the extremely short deadlines (seven calendar days for the appeal in the border procedure) as well as by the fact that courts are not entitled to reverse the decision. If the court establishes the insufficiency of the decision, it may only annul it and return the case to the

¹⁶⁷ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection, at 96–116, 2013 O.J. (L 180).

¹⁶⁸ 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, at 60–95, 2013 O.J. (L 180).

¹⁶⁹ See *infra* Part D.IV.

¹⁷⁰ Agreement between the European Community and the Republic of Serbia on the Readmission of Persons Residing Without Authorisation, 2007 O.J. (L 334/46).

administrative authority for renewed procedure. No new facts may be produced in the appeal phase, which is an unjustified curtailment of the principle of effective remedy. Furthermore, oral hearing in the appeal phase is not compulsory and the appeal may be decided by someone not having the full powers of a judge;

- 7) The identification of persons with special needs is neither formalized nor guaranteed, which may run counter to Articles 21–22 RD and Article 24 PD;
- 8) The informal return from the transit zone to Serbia, as well as the application of the “8 Km Rule,” is arguably in conflict with the Return Directive,¹⁷¹ as its main principle is the voluntary return of the “illegally staying” person before enforced removal;
- 9) The “waving through” of hundreds of thousands of migrants who neither applied for international protection, nor could produce the conditions for entry envisaged by the Schengen border code;¹⁷²
- 10) The specific accelerated criminal procedure in relation to the crime of crossing the fence and allowing the omission of the translation of documents of the case is in conflict with the Directive on interpretation and translation in criminal proceedings.¹⁷³

The point here is not to engage in a detailed and exhaustive analysis of the potential infringements, rather to show that the national securitization actions within a system, namely EU law—which itself did not accept that logic and mostly used the ordinarily available tools for the “emergency situation characterised by a sudden inflow of nationals of third countries” (Art 78 (3) TFEU)—inevitably led to clashes. The EU treated the events as manageable within the existing legal framework, or at least as manageable by way of the orderly change of the law.¹⁷⁴

In contrast, the Hungarian government constructed a narrative of extraordinary urgency created by the appearance of the threatening Other. Instead of confronting the reality on

¹⁷¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals, at 98–107, 2008 O.J. (L 348).

¹⁷² At present, Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), at 1–52, 2016 O.J. (L 77). At the most material time, Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), at 1–32, 2006 O.J. (L 105).

¹⁷³ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, at 1–7, 2010 O.J. (L 280).

¹⁷⁴ The whole new package of the EU acquis recast was presented in Spring and Summer of 2016.

the ground, namely the large scale mixed flow of persons in need of protection and others, the government resorted to measures breaching both domestic and EU law to avoid performing duties stemming from the asylum *acquis* and from the Schengen *acquis*. It will be up to the CJEU and other tribunals to decide if suspending normalcy and implementation of the binding norms may be excused based on the arguments used by the Hungarian government.

Violations of national law have also been abundant, but very frequently—as in case of the ignored obligation to conduct environmental impact assessment in case of such an enormous intervention into the nature as the fence—they were eliminated by laws giving *ex tunc* waiver of them. One type of violation deserves specific mention: the government repeatedly violates the Act,¹⁷⁵ which obliges the government to publicize bills for public comment before their adoption. Both UNHCR and domestic non-government organizations (“NGOs”) have heavily criticized this practice as it paralyzes the watchdog function and excludes channeling in expert views as well as practitioners’ knowledge.¹⁷⁶

F. Conclusion

- Article 4 (3) TEU codifies the principle of loyal (sincere) co-operation in the following words:
- Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
- The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
- The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

One does not have to reach out for detailed commentaries on the topic to establish that the asylum policy and law as developed in Hungary in 2015–2016 defies all requirements of loyal cooperation.¹⁷⁷ They certainly do not assist the Union in carrying out its goal of responding

¹⁷⁵ Act CXXXI of 2010 on the public participation in the preparation of laws.

¹⁷⁶ See, e.g., The Hungarian Helsinki Committees Comments in Spring 2016 (Mar. 7, 2016), http://www.helsinki.hu/wp-content/uploads/Menekultugyi_modositasra_Helsinki_eszrevetelek_20160307.pdf.

¹⁷⁷ See, e.g., MARCUS KLAMERT, THE PRINCIPLE OF LOYALTY IN EU LAW (2014).

in the spirit of solidarity to the extraordinary situation entailing the arrival of more than 1.6 million asylum seekers and other migrants until mid-2016. The long list of potential breaches of EU law indicate the lack of willingness to take appropriate measures to ensure the fulfillment of obligations arising out of the Treaties, secondary legislation and other acts, like the relocation decision.¹⁷⁸ Specific, secondary law-based rights of refugees and asylum seekers are threatened. Others, not in need of international protection are deprived of some of their human rights, as well as their rights concerning voluntary departure. The xenophobic and anti-Brussels rhetoric beyond doubt jeopardizes the attainment of the Union's objective. The burden shifting triggered by the erection of the fence, the total denial to participate in the relocation and in the resettlement system all testify a lack of willingness to co-operate with other member states in a sincere (or any) way.

This study further showed that Parliament and government intentionally replaced the figure of the person in need of international protection and assistance with the (imagined) illegal migrant, who is arriving in an unlawful manner and only has evil intentions, against whom "Hungary and Europe has to be defended." Erecting the fence at the border, crimmigration, exposure to harsh conditions and neglect followed. The pro-refugee actors are under attack, accused of being a vehicle for unfettered "immigration," threatening with the destruction of Europe as well as with undermining the national culture, job market and internal security. So the parallel reality is now complete: the persona of the refugee (and of anyone else driven by a human ambition to have a secure and dignified life) is concealed behind the narratively constructed and overblown menacing Other.¹⁸⁷ To exacerbate matters, this construction of the parallel reality as combined with the most myopic political move of diverting the approaching people to neighboring countries and pretending that the "refugee problem" has been "solved."

This was noted in the 2016 August judgment in the *Ibrahimi & Abasi v. SSHD* case. The individual decision entailed an impartial overall assessment of the Hungarian asylum system.

- Care is of course required: political rhetoric does not necessarily translate into action particularly in a state governed by the rule of law. Whilst not all of the reforms to the Hungarian asylum rules are relevant to the facts of this case (such as the border reforms) the broader context is of a state that is prepared to adopt an asylum regime which is deliberately designed to deter immigrants and to weaken judicial supervision with a view to removing those who are temporarily present in Hungary to third countries. In these circumstances [...] the presumption that Hungary *qua* EU Member State adheres to the *acquis Communautaire* and can be relied upon to

¹⁷⁸ The CJEU will decide if in fact it is a legislative act or not.

¹⁸⁷ Asylum seekers, refugees, and other migrants are involved in crimes, but not to the extent justifying the extent of hostility produced by the Hungarian Government's discourse.

respect relevant international law and ECHR rights of the Claimants cannot carry much weight. The objective facts suggest otherwise.¹⁷⁹

The conclusion is not reassuring. The ambitions of the Hungarian government and of the EU are widely divergent; they do not run in parallel as they should. The words uttered are about “defending Europe,” but the deeds actually destroy it.

¹⁷⁹ *Ibrahimi*, [2016] EWHC § 159.

