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CHUTES AND LADDERS: NONREFOULEMENT AND THE SISYPHEAN CHALLENGE OF SEEKING ASYLUM IN HUNGARY

Ashley Binetti Armstrong*

ABSTRACT

Recent developments in Hungary's asylum law and policy demonstrate an extraordinary subversion of the refugee rights regime and serve as a case study of how a State can pervert its national laws to shirk its international and regional treaty obligations. This Article has two major goals. First, it traces the devolution of Hungarian asylum law from the height of the 2015 refugee crisis to July 2018 through a critical lens. Second, it argues that Hungary is in violation of its nonrefoulement obligations, which prohibits States from returning refugees to countries where they will likely face harm. This Article focuses its nonrefoulement analysis on Hungary's designation of Serbia as a safe third country. However, in showing that Serbia is not safe for refugees, this Article concludes that Hungary's entire "Chutes and Ladders" asylum system violates its nonrefoulement obligations, as Hungary expels or pushes back almost all asylum seekers to Serbia.

The international community must study how countries like Hungary evade the global norm of responsibility-sharing, and devise solutions to hold rogue States accountable—particularly if there is any hope for coordinated efforts to manage refugee crises and uphold the rights of asylum seekers enshrined in the 1951 Refugee Convention and human rights treaties.

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INTRODUCTION

In 2015, over one million individuals fled to Europe.¹ In the midst of one of the largest refugee crises in recent history,² a growing number of States have turned to constructing legal and physical barriers³ to exclude asylum seekers from accessing protection. These actions contravene the protection and rights regimes enshrined in international and regional law—such as the 1951 Refugee Convention⁴ and the European Convention on Human Rights⁵—which prohibit States from refouling refugees, that is, returning refugees to a country where they may face persecution or serious harm.⁶

The devolution of Hungary's asylum law since the summer of 2015 illustrates how a European Union Member State can egregiously stray from its international and regional legal obligations, virtually unobstructed. Hungary's most recent laws and policies violate not only

1. INT'L ORG. FOR MIGRATION, MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW 1 (July 6, 2017), <http://www.iom.hu/sites/default/files/untitled%20folder/HUNGARY%202016%20-%20FINAL.pdf> [https://perma.cc/9T45-4X75] [hereinafter MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW]. In 2016, the number of arrivals decreased to 387,739. *See id.*

2. *See, e.g.*, U.N. High Comm'r for Refugees, Worldwide Displacement Hits All-Time High as War and Persecution Increase (June 18, 2015), www.unhcr.org/en-us/news/latest/2015/6/558193896/worldwide-displacement-hits-all-time-high-war-persecution-increase.html [https://perma.cc/8V7X-DM64] (describing how worldwide displacement has risen to the highest level ever recorded). In 2014, the UNHCR reported there were roughly 19.6 million refugees around the world. U.N. Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, ¶ 5, U.N. Doc. A/70/59 (Apr. 21, 2016).

3. *See generally*, Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1 (2016) (discussing the increasing number of countries that have built border walls as a strategy of immigration control). For additional examples, *see* Moria Paz, *The Law of Walls*, 28 EUR. J. INT'L L. 601, 602 (2017) (governments have constructed walls or fences between the USA and Mexico, Israel and Egypt, Greece and Turkey, Bulgaria and Turkey, Hungary and Serbia, Austria and Slovenia, Macedonia and Greece, the Spanish territories and Northern Africa, and elsewhere).

4. Convention relating to the Status of Refugees, *adopted* July 28, 1951, art. 1, 19 U.S.T. 6259, 189 U.N.T.S. 137, 150 (entered into force Apr. 22, 1954) [hereinafter 1951 Convention].

5. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 1, E.T.S. No. 005, 213 U.N.T.S. 221, 222 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights].

6. *See infra* Section II, "A Non-Derogable Obligation: International and Regional Law Prohibit Refoulement."

international and regional law prohibiting refoulement; they have made seeking asylum like a game of *Chutes and Ladders*—where the ladders are few and far between, and the chutes are plentiful. Refugees simply cannot win. The first half of this Article broadly explores barriers to seeking asylum in Hungary, while the second half focuses its analysis on one particular “chute”: Hungary’s designation of Serbia as a safe third country.

In 2015, Hungary received over 400,000 arrivals.⁷ In an effort to halt irregular entries and minimize the number of persons who would be able to seek asylum, the Hungarian government (“the Government”) erected a fence on its southern border with Serbia on September 15, 2015.⁸ One month later, Hungary completed a fence on its border with Croatia⁹ and announced that it would build yet another fence on its border with Romania.¹⁰ Hungary then opened two container camp “transit zones” on the Hungarian-Serbian border where refugees were required to wait in line to apply for asylum.¹¹ The fences severely restricted access to Hungary’s territory—particularly the fence on the border with Serbia, where over 95% of refugees tried to enter Hungary.¹² As a result of Hungary’s militarized borders, while there were 177,135 asylum applications lodged in 2015; by 2016, only

7. *Migration Issues in Hungary*, INT’L ORG. FOR MIGRATION, www.iom.hu/migration-issues-hungary [<https://perma.cc/4N66-XSVA>] (last updated June 29, 2018) (reporting that 441,515 people irregularly entered Hungary in 2015, most of whom were refugees fleeing war in their home countries). See MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW, *supra* note 1 (“Three out of four migrants left their country of origin because of war/conflict or political reasons.”).

8. *Hungary: New Border Regime Threatens Asylum Seekers*, HUMAN RIGHTS WATCH (Sept. 19, 2015, 2:00 AM), <https://www.hrw.org/news/2015/09/19/hungary-new-border-regime-threatens-asylum-seekers> [<https://perma.cc/QBW6-RV7G>].

9. *Migrant crisis: Hungary closes border with Croatia*, BBC NEWS (Oct. 17, 2015), <http://www.bbc.com/news/world-europe-34556682> [<https://perma.cc/AM6F-B3YE>].

10. U.N. High Comm’r for Refugees, *Europe’s Refugee Emergency Response - Update #3, 17-24 September 2015*, 5 (Sept. 24, 2015), <https://bit.ly/2Lz4GfZ> [<https://perma.cc/T8SS-NDVP>].

11. 2015. évi CXL. törvény egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról (Act CXL of 2015 amending certain laws related to the management of mass migration), (Hung.), <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK15124.pdf> [<https://perma.cc/XN9P-R3M9>] (detailing amendments regarding asylum applications in transit zones).

12. See, e.g., MÁRTA PARDAVI ET AL., ASYLUM INFO. DATABASE, COUNTRY REPORT: HUNGARY, 2016 UPDATE 52 (2017), <http://www.asylumineurope.org/reports/country/hungary> [<https://perma.cc/79NK-GG3J>] [hereinafter COUNTRY REPORT: HUNGARY, 2016 UPDATE] (stating “[o]ver 95% of asylum seekers enters [sic] Hungary at the Serbian-Hungarian border.”).

29,432 individuals submitted applications.¹³ Hungary recorded the lowest protection rate in the European Union in 2016, granting either refugee status or subsidiary protection to less than 1% of applicants.¹⁴ The grant rate for persons receiving refugee status (asylum) was only 0.28%.¹⁵ Still, this was larger than its acceptance rate at the height of the crisis in 2015, when Hungary granted asylum in 0.09% of its decisions.¹⁶

The construction of the Hungarian border fences, while deeply problematic as a symbol of the Government's refusal to uphold international and regional legal obligations, also marked the deterioration of domestic legal protections for persons seeking refuge from war and persecution. While the fences pose a challenging physical barrier, the truly insurmountable hurdles are the legal barriers Hungary has adopted to dissuade vulnerable men, women, and children from *entering* its territory. Hungary's new laws also enable the Government to *expel* refugees virtually upon entry. These laws and policies include: (1) naming Serbia a safe third country and issuing inadmissibility decisions on that basis; (2) relying on a "push-back" law that provides that anyone found in Hungary without status can be immediately expelled over the Southern border in the direction of Serbia—even if they wish to claim asylum; (3) restricting asylum applications to two transit zones on the border with Serbia and only

13. *Migration Issues in Hungary*, *supra* note 7. This sharp decrease can be attributed to the restrictive measures Hungary began implementing in summer 2015.

14. *Id.* Out of 54,586 total decisions in 2016, only 425 persons received either refugee status (154) or subsidiary protection (271). See COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 7. Subsidiary protection is a form of protection that Hungary grants non-citizens who do not meet the 1951 Convention definition of a refugee, but who are still in need of protection. 2007. évi LXXX. törvény a menedékjogról (Act LXXX of 2007 on Asylum), §§ 12(1), 19 (Hung.), <http://www.refworld.org/docid/4979cc072.html> (on file with the Columbia Human Rights Law Review). However, subsidiary protection does not afford the recipient the same family reunification rights as refugee (asylum) status, and any access to naturalization (process to obtain citizenship) is also nearly impossible. Skype Interview with Katinka Huszár, Protection Associate, UNHCR Hungary, in Budapest, Hung. (June 13, 2018).

15. There were 154 refugee grants out of 54,586 decisions made in 2016. COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 7 (outlining the number of refugee grants in 2016); *Migration Issues in Hungary*, *supra* note 7 (noting total decisions on refugee status in 2016).

16. *Statistics: Issue 2014–2015*, HUNGARIAN OFFICE OF IMMIGRATION AND NATIONALITY (Jan. 21, 2016), http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en [<https://perma.cc/4YCX-A2SR>] [hereinafter Immigration Stats for 2014–2015].

allowing one applicant per zone per workday to enter; and (4) arbitrarily detaining refugees in the transit zone shipping containers while their applications are processed.

This Article situates itself within the strand of critical human rights scholarship that seeks to identify laws and policies that abrogate human rights obligations and have detrimental implications for humanity. The recent developments in Hungary demonstrate an extraordinary undermining of refugee and human rights regimes and serve as a case study of how a State can pervert its national laws to shirk its treaty obligations. However, recent legal scholarship on Hungary's asylum law is limited to a 1996 article and a 2002 book chapter.¹⁷ No legal scholarship has addressed the appalling developments in this area of law from the 2015 refugee crisis to the present. This Article has two primary goals: First, it traces the devolution of Hungary's asylum law and policy from the height of the refugee crisis in 2015 to summer 2018—whereby the Government has made it nearly impossible for refugees to access asylum in Hungary (Section I). Second, it argues that Hungary is in violation of its obligation not to refole refugees. The Article evaluates Hungary's nonrefoulement duty in the context of international and European law (Section II), and then specifically focuses on Hungary's noncompliance with its nonrefoulement obligations in designating Serbia as a safe third country (Section III).

In showing that Serbia is not safe for refugees, this Article concludes that Hungary's entire *Chutes and Ladders* asylum system violates its international and regional legal obligations not to refole persons to places where they are at risk of harm, as Hungary expels or pushes back almost all asylum seekers to Serbia. This Article contends that the case of Hungary illustrates a compelling problem whereby States use domestic law to undermine and attack the refugee protection and rights regime, demonstrating how both physical and legal barriers jeopardize the international community's commitment to nonrefoulement.

17. See Maryellen Fullerton, *Hungary, Refugees, and the Law of Return*, 8 INT'L J. REFUGEE L. 499, 502 (1996) (exploring shortcomings in early iterations of Hungary's asylum law, focusing on how asylum was "largely reserved for ethnic Hungarians"); ROSEMARY BYRNE, GREGOR NOLL, & JENS VEDSTED-HANSEN, *NEW ASYLUM COUNTRIES?: MIGRATION CONTROL AND REFUGEE PROTECTION IN AN ENLARGED EUROPEAN UNION* 138–99 (2002) (providing an overview of Hungary's asylum law through 2000). NGOs, however, have published excellent reports discussing Hungary's changing asylum law, to which this Article refers throughout its text.

The international community must not ignore Hungary's conduct. If there is any hope for coordinated efforts to manage refugee crises and uphold the rights of asylum seekers enshrined in the 1951 Refugee Convention and human rights treaties, the international community must study how countries evade the global norm of responsibility-sharing and devise solutions to hold rogue States accountable.

I. DIMINISHING INTERNATIONAL PROTECTION: THE (D)EVOLUTION OF HUNGARY'S ASYLUM LAW SINCE SUMMER 2015

“Appalling treatment and labyrinthine asylum procedures are a cynical ploy to deter asylum-seekers from Hungary’s ever more militarized borders.”¹⁸

Migration in Hungary is not a new phenomenon.¹⁹ However, for much of the twentieth century Hungary was primarily a source country for refugees; only relatively recently, in the late 1980s, has Hungary transitioned from a refugee-producing country to a refugee-receiving country.²⁰ Around this time, western European states began implementing asylum laws and policies to dissuade asylum seekers from coming to western Europe.²¹ From summer 1991 to the end of 1992, Hungary received 54,693 asylum seekers.²² Hungary's asylum grant rate during these years was fairly high: in 1993, the Government granted roughly 77% of asylum applications. However, by 1997 the

18. See *Hungary: Appalling Treatment of Asylum-Seekers a Deliberate Populist Ploy*, AMNESTY INT'L (Sept. 27, 2016, 8:01 PM) (statement of John Dalhuisen, Amnesty International Director for Europe), <https://www.amnesty.org/en/press-releases/2016/09/hungary-appalling-treatment-of-asylum-seekers-a-deliberate-populist-ploy/> [<https://perma.cc/HQ3Y-UF4P>].

19. See BYRNE ET AL., *supra* note 17, at 138 (describing how migration flows have featured prominently in Hungarian society and politics since the Ottoman Empire).

20. See, e.g., Fullerton, *supra* note 17, at 500 (noting that Hungary became a refugee-receiving country in 1987 and describing the “dramatic pendulum swings” in the size of the refugee population during Hungary’s first decade as destination for persons fleeing violence and persecution).

21. See Nuala Mole & Catherine Meredith, *The Role of the European Convention on Human Rights in Protection from Expulsion to Face Human Rights Abuses*, in *ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 17, 103 (2010) (western European states “tightened regulations and procedures in order to reduce the incentives for asylum seekers to come to western Europe and thus to reduce the number of claims they are required to process . . .”).

22. BYRNE ET AL., *supra* note 17, at 149 (87% of the refugees were Yugoslav).

grant rate decreased to only 15%,²³ and further decreased to 3% in 2000.²⁴ While low grant rates and other criticisms²⁵ have been lodged against Hungary's asylum process almost since its inception, in the past few years Hungary has shifted even further away from its international and regional protection obligations.

The shift became increasingly pronounced after the 2010 elections, when Prime Minister Viktor Orbán, leader of the national populist party *Fidesz*,²⁶ came to power.²⁷ Prime Minister Orbán has been clear in his message to refugees: "Don't come."²⁸ Alongside the Prime Minister's rhetoric, the Hungarian government further crystalized xenophobia²⁹ into law by implementing robust legal and policy reforms to deter asylum seekers and other vulnerable migrants from seeking refuge on Hungarian soil. The Hungarian Parliament has

23. See *id.* at 151.

24. See *id.* at 154.

25. See generally Fullerton, *supra* note 17, at 501–02 (detailing how “refugee status in Hungary . . . is largely reserved for ethnic Hungarians.”).

26. “Fidesz – Magyar Polgári Szövetség” (“Alliance of Young Democrats – Hungarian Civic Union”). See FIDESZ, <http://www.fidesz.hu/> [https://perma.cc/L7RG-UKE4] (last visited July 16, 2018) (official website of the Fidesz political party); see also *Fidesz – Hungarian Civic Union*, DAILY NEWS HUNGARY (Sept. 11, 2013), <https://dailynewshungary.com/fidesz-hungarian-civic-union/> [https://perma.cc/7RNP-FKEN] (detailing the history of the party).

27. See HUNGARY: DEMOCRACY UNDER THREAT – SIX YEARS OF ATTACKS AGAINST THE RULE OF LAW, INT’L FED’N FOR HUM. RTS. 4 (Nov. 2016), https://www.fidh.org/IMG/pdf/hungary_democracy_under_threat.pdf [https://perma.cc/8PD6-JC2T] (detailing Hungary’s recent constitutional and legislative reforms aimed at weakening democracy, rule of law, and human rights).

28. See *Migration crisis: Hungary PM says Europe in grip of madness*, THE GUARDIAN (Sept. 3, 2015, 6:09 AM), <https://www.theguardian.com/world/2015/sep/03/migration-crisis-hungary-pm-victor-Orban-europe-response-madness> [https://perma.cc/TE46-FLTJ] (“Hungary’s nationalist prime minister, Viktor Orbán, has claimed Europe is in the grip of madness over immigration and refugees, and argued that he was defending European Christianity against a Muslim influx.” PM Orbán stated, “[q]uotas is an invitation for those who want to come. The moral human thing is to make clear, please don’t come.”).

29. See, e.g., *PM Orbán: We must protect our religious traditions in order to keep Hungary Hungarian*, ABOUT HUNGARY (Mar. 27, 2018), <http://abouthungary.hu/news-in-brief/pm-Orban-we-must-protect-our-religious-traditions-in-order-to-keep-hungary-hungarian/> [https://perma.cc/Y4BE-NZCY] (PM Orbán emphasized the importance of Christianity and preserving traditions and cultures; he noted, “We don’t want them to turn Europe into an immigrant continent and Hungary into an immigrant country” and underscored his desire to “keep Hungary Hungarian.”).

repeatedly passed amendments to Hungary's asylum law³⁰ and related directives, particularly since the height of the refugee crisis in summer 2015. While Hungary's Constitution (The Fundamental Law) nominally acknowledges its obligations under international law,³¹ these amendments were intended to chip away at legal protections for refugees and have made applying for (and obtaining) asylum a Sisyphean³² undertaking.

Today, the vast majority of migrants seeking to enter Hungary enter through Serbia, and typically pass through Bulgaria, Greece, the Former Yugoslav Republic of Macedonia, and Turkey.³³ This journey through the Balkan route takes roughly six months.³⁴ The physical, emotional, and material investment required for this expedition is substantial: 89% of refugees report significant travel by foot,³⁵ many are traumatized by what they have experienced in their home country and on their journey,³⁶ and most have paid more than \$5,000 to reach Hungary.³⁷

Notably, roughly 75% of all migrants coming to Hungary left their country because of war.³⁸ Between 2014 and 2017, the majority

30. See Act LXXX of 2007 on Asylum, *supra* note 14. The 2007 Asylum Law, which was adopted on June 25, 2007 and entered into force on January 1, 2008, sets out the fundamentals of Hungarian asylum law. See *id.* § 3(1).

31. See MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, Arts. Q(2)–(3) (2011), https://www.constituteproject.org/constitution/Hungary_2011.pdf [<https://perma.cc/2R5G-FTKS>] (“Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law”; “Hungary shall accept the generally recognised rules of international law.”).

32. In Greek mythology, Sisyphus was condemned to push a large boulder up a hill. As the boulder approached the summit, it would roll back to the base, forcing him to repeat this futile task for eternity.

33. See INT'L ORG. FOR MIGRATION, MIGRATION FLOW TO HUNGARY: FIRST HALF OF 2017 OVERVIEW 1 (Aug. 14, 2017), <http://www.iom.hu/sites/default/files/untitled%20folder/HU%20Handout%202017%20Update-HJ.pdf> [<https://perma.cc/4S5Y-KLP8>] [hereinafter MIGRATION FLOW TO HUNGARY: FIRST HALF OF 2017 OVERVIEW].

34. *Id.* at 2.

35. See *id.*

36. See MÁRTA PARDAVI ET AL., ASYLUM INFO. DATABASE, COUNTRY REPORT: HUNGARY, NOVEMBER 2015 43 (2015), http://www.asylumineurope.org/sites/default/files/report-download/aida_hu_update.iv_0.pdf [<https://perma.cc/M96D-JK8G>].

37. See MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW, *supra* note 1, at 2.

38. See *id.* at 2; see also MIGRATION FLOW TO HUNGARY: FIRST HALF OF 2017 OVERVIEW, *supra* note 33, at 2 (74% of survey respondents reported leaving their country of origin due to war). UNHCR notes that individuals fleeing war may be considered refugees and urges countries to allow them to apply for asylum under

of asylum seekers hailed from Afghanistan, Syria, Pakistan, Iraq, Iran, and Kosovo.³⁹ Comparatively, the percentage of individuals migrating for economic reasons was only about 5%⁴⁰—reinforcing that the majority are asylum seekers rather than economic migrants.

Finally, Hungary is categorized as a transit country on the Balkan (or Eastern Mediterranean) Route.⁴¹ The majority of migrants do not intend to stay in Hungary. In 2016, 46% of migrants aimed for Germany as their ultimate destination,⁴² and in 2017, the top destination countries for migrants passing through Hungary included the United Kingdom, Austria, and Germany.⁴³ The preference for these destinations can be attributed to the hostile climate refugees face in Hungary, virtually nonexistent integration programs and funds,⁴⁴ and

the 1951 Refugee Convention. *See, e.g.*, U.N. High Comm'r for Refugees, International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic, Update IV, ¶¶ 31–37, U.N. Doc. HCR/PC/SYR/01 (Nov. 2015), www.refworld.org/pdfid/5641ef894.pdf [<https://perma.cc/8GUB-7P97>] (noting most Syrian asylum seekers are likely to fulfill the 1951 definition of a refugee under Article 1A(2), as “they will have a well-founded fear of persecution,” with the nexus of “being perceived as one of the parties to the conflict.”).

39. In 2014, the largest number of asylum seekers hailed from Kosovo (21,453), Afghanistan (8,796), and Syria (6,857). In 2015, there was a jump in Syrian (64,587) and Afghan (46,227) refugees, while refugees from Kosovo (24,454) remained fairly constant. There was also an uptick in refugees from Pakistan and Iraq. In 2016, the composition of refugees was divided: Afghanistan (41%), Pakistan (20%), and Iran, Syria, and Iraq (about 6.7% each). By 2017, the composition changed slightly, with Afghan nationals (33%), Syrian nationals (17%), Pakistani nationals (13%), Iraqi nationals (13%) and Iranian nationals (8%) comprising the bulk of asylum seekers in Hungary. Finally, in 2018, the composition of asylum seekers was comprised of persons from Afghanistan (53%), Iraq (32%), Syria (5%), Iran (4%), and Pakistan (3%). *See* MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW, *supra* note 1, at 1; MIGRATION FLOW TO HUNGARY: FIRST HALF OF 2017 OVERVIEW, *supra* note 33, at 1; *Migration Issues in Hungary*, *supra* note 7, ¶ 4.

40. *See* MIGRATION FLOW TO HUNGARY: FIRST HALF OF 2017 OVERVIEW, *supra* note 33, at 2 (survey instrument allowed for multiple responses).

41. Hungary is one of the main transit countries for migration to other EU Member States. *See Migration Issues in Hungary*, *supra* note 7.

42. *See* MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW, *supra* note 1, at 1.

43. *See* MIGRATION FLOW TO HUNGARY: FIRST HALF OF 2017 OVERVIEW, *supra* note 33, at 1 (only 17% intended to remain in Hungary in 2017).

44. Hungary terminated state supported integration on June 1, 2016. *See* 62/2016 (III. 31.) Korm. r. az egyes migrációs és menekültügyi tárgyú kormányrendeletek módosításáról (Government Decree No. 62/2016 (III.31.) (amending some government decrees on migration and asylum) (Hung.), <https://bit.ly/2OdZE7q> [<https://perma.cc/B5EM-UEJS>]. As a result, civil society organizations became dependent on monetary assistance from the EU's Asylum, Migration and Integration Fund (AMIF) to provide integration-related benefits. However, on January 24, 2018, the Government announced it would end AMIF funding in June

the desire to reunite with family already present in other European Union countries.

However, there are refugees who want—and merit—protection in Hungary, and they face an extraordinary uphill battle. The fence is the first barrier.⁴⁵ If refugees can break through or climb over the fence without authorities stopping them, the second obstacle is traversing Hungary without being apprehended through deep border control (also known as the “push-back” law).⁴⁶ Persons without legal status can be captured anywhere in Hungary sent back in the direction of Serbia—even if the apprehended individual wishes to claim asylum, and even if the individual never passed through Serbia.⁴⁷

Then there are the refugees who wait months for their turn to enter one of the two transit zones⁴⁸ where they hope their asylum claims will be granted. They do not fare much better. Authorities detain asylum seekers in the transit zones, where they must remain while they wait for the outcome of their asylum application. Or, if they are willing to forgo their chance to obtain asylum, they may exit the transit zone through a gate that leads back to Serbia.⁴⁹ When the transit zones were first made operational, asylum decisions were made in an average of ten minutes.⁵⁰ Immigration officers often did not consider the merits of individual claims, deeming asylum-seekers inadmissible on the basis of the safe third country concept.⁵¹ The safe third country concept holds that if an asylum seeker passed through a country where s/he could have (and therefore should have) applied for protection, a State may send the asylum seeker back to that country.⁵² Thus, when Hungary actively applied the safe third country concept as a ground for inadmissibility, the majority of refugees presenting themselves at the border were automatically denied asylum because

2018. Currently, persons who receive protection are only allowed to stay in an open camp for a maximum of thirty days before they must find their own housing. *See* Hungarian Helsinki Committee, EUROPEAN ASYLUM SUPPORT OFFICE, INPUT BY CIVIL SOCIETY TO THE EASO ANNUAL REPORT 2017 7 (2017), <https://www.easo.europa.eu/sites/default/files/hungarian-helsinki-committee.pdf> [<https://perma.cc/EL67-W8MT>].

45. *See infra* Section I.B, “Sealing the Border: Fences and Transit Zones.”

46. *See infra* Section I.D, “The Push-Back Law: Deep Border Control.”

47. *See id.*

48. *See supra* note 45.

49. *See id.*

50. *See id.*

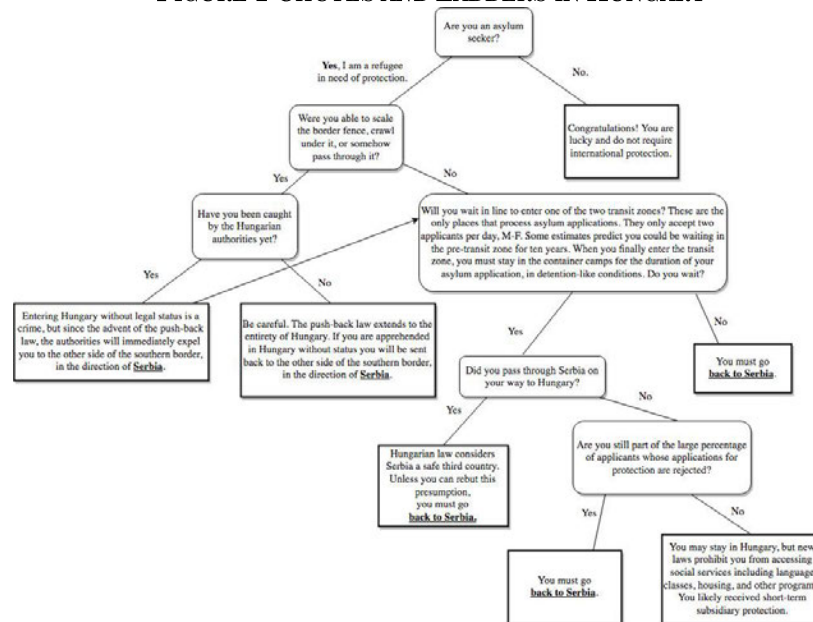
51. *See infra* Section I.C, “Serbia as a Safe Third Country.”

52. *See infra* Section II.C.3, “The Safe Third Country Concept Under EU Law.”

they passed through Serbia—which Hungary considers a “safe third country.”⁵³ Those refugees were then—once again—sent back to the Serbian side of the fence.

The *Chutes and Ladders* flowchart below is a heuristic,⁵⁴ but it is a powerful visual representation of how Hungary’s asylum law treats refugees. Nearly all roads lead back to Serbia. This section examines the nuances of Hungarian asylum law and policy as it has developed since the height of the refugee crisis in 2015, including the Government’s state of emergency doctrine and antimigration campaign, the construction of fences on its borders with Serbia and Croatia, the naming of Serbia as a safe third country, the implementation of deep border control (the “push-back” law), and its response to the European Union’s relocation quota. This section concludes with a close examination of asylum application grant rates and statistics to illustrate how these laws and policies have affected access to protection in Hungary.

FIGURE 1-CHUTES AND LADDERS IN HUNGARY



53. See *supra* note 51.

54. The actual law is more complicated, and its idiosyncratic nuances have evolved from the initial anti-migration amendments of 2015 to the writing of this paper, as described herein.

A. The Never-Ending Immigration “Crisis”

Between July and September 2015, the Hungarian government initiated a campaign that made seeking asylum in Hungary increasingly difficult in an effort to halt the “immigration crisis.” As part of this campaign, the Government implemented a series of amendments and decrees to prevent refugees from accessing asylum procedures, deter future arrivals, and justify sending away those who had already made it to the border. To support the creation of these laws and policies, on September 15, 2015, Hungary formally announced a “crisis situation due to mass immigration.”⁵⁵

This declared state of emergency was used to justify changes to Hungary’s asylum law and policy. The Government called upon military and police to support immigration officers, enabled expedited border procedures in “transit zones,” and limited judicial review of Office of Immigration and Nationality (OIN) decisions.⁵⁶ Significant military force was deployed to the fence on the Serbian border, and the army and police were allowed to use rubber bullets, pyrotechnical instruments, tear gas grenades, and gun nets to control migrants.⁵⁷ Additionally, the state of emergency provided the legal basis for the border fence, extended detention of asylum seekers, use of the army in migration affairs, and deep border control.⁵⁸ This doctrine also later allowed Hungary to limit asylum applications to “transit zones,” except for those persons who were legally present in-country, and limit the deadline to appeal inadmissibility decisions and rejections to three days.⁵⁹

55. See 269/2015. (IX. 15.) Korm. r. a tömeges bevándorlás okozta válsághelyzet kihirdetéséről, valamint a válsághelyzet elrendelésével, fennállásával és megszüntetésével összefüggő szabályokról (Government Decree No. 269/2015 (IX. 15.) on the announcement of the crisis situation caused by mass immigration and the rules related to the ordering, existence, and termination of the crisis) (Hung.), <https://bit.ly/2JRmoq6> [<https://perma.cc/S8VH-NN2A>]; Act CXL of 2015, *supra* note 11, § 80/A.

56. See Act CXL of 2015, *supra* note 11, § 80/A.

57. See *Europe's Refugee Emergency Response – Update #3*, *supra* note 10, at 1.

58. See, e.g., Kim Lane Scheppele, *Orbán’s police state: Hungary’s crackdown on refugees is shredding the values of democracy*, POLITICO (Sept. 14, 2015, 10:54 AM), <https://www.politico.eu/article/orbans-police-state-hungary-serbia-border-migration-refugees/> (on file with the Columbia Human Rights Law Review) (discussing the state of emergency doctrine and how it affects asylum seekers in Hungary).

59. ANDRÁS ALFÖLDI, ET AL., HUNGARIAN HELSINKI COMM., COUNTRY REPORT: HUNGARY, 2017 UPDATE 15 (2018), <http://www.asylumineurope.org/>

Since September 2015, Hungary has relied on its declaration (and continuous renewal) of this state of emergency to justify its migration-related activities.⁶⁰ Yet the criteria⁶¹ required to legally justify such a state of emergency has not yet been met in Hungary approximately since the country began sealing its borders.⁶² While Hungary received 411,515 arrivals in 2015,⁶³ this figure dramatically shrunk to 19,221 arrivals in 2016.⁶⁴ The decrease resulted from the legal and physical barriers Hungary began implementing in summer 2015. At the height of that summer, Hungary received an average of 1,500 persons per day.⁶⁵ However, by November 2015, after the

sites/default/files/report-download/aida_hu_2017update.pdf [https://perma.cc/J2CM-39RN]; see also Act CXL of 2015, *supra* note 11, § 80/J(1). See *infra* Section I.B.2, “Asylum Procedure, Post-March 2017.”

60. See Scheppele, *supra* note 58 (explaining that under a declared state of emergency, law enforcement may detain refugees throughout the duration of the asylum process, and explaining that the state of emergency declaration also “created a number of new crimes, including illegally entering the country, damaging state property (e.g., the border fence), or interfering with the fence’s construction. Now virtually all migrants present in Hungary have committed a crime just by virtue of their presence.”).

61. See Act CXL of 2015, *supra* note 11, § 80/A (stating that the Government may declare a crisis situation caused by mass immigration when the number of asylum seekers exceeds an average of 500 people per day for a month, 750 people per day for two subsequent weeks, or 800 people per day for a week 80/A(1)(a-ac); or when the number of asylum seekers in Hungary’s transit zones exceeds an average of 1,000 people per day for a month, 1,500 people per day for two subsequent weeks, or 1,600 people per day for a week. 80/A(1)(b-bc). Additionally, there is a catchall provision that empowers the Government to declare a state of emergency in the event of “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 another facility used for accommodating foreigners located within or in the outskirts of the settlement concerned.” 80/A(1)(c).)

62. See, e.g., Nóra Köves, *Serious human rights violations in the Hungarian asylum system*, HEINRICH BÖLL STIFTUNG (May 10, 2017), <https://www.boell.de/en/2017/05/10/serious-human-rights-violations-hungarian-asylum-system> [https://perma.cc/59SY-QER7] (“[C]onditions justifying the state of emergency had not been present . . . approximately since the closing of the Hungarian-Croatian border” in October 2015).

63. *Migration Issues in Hungary*, *supra* note 7.

64. MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW, *supra* note 1, at 1.

65. This is the average figure for June, July, and August 2015. The overall average for 2015, before the construction of the fences, was 274 arrivals per day. Factors responsible for the decrease include: the fence, designating Serbia as a safe third country, expedited asylum determinations, limited procedural safeguards, criminalizing crossing through the fence or damaging it, and automatic detention

construction of the border fences and the passage of several amendments to Hungary's asylum law, this number dropped to only ten arrivals per day.⁶⁶

Initially the state of crisis only applied to the counties bordering Serbia, but by March 9, 2016, the Government extended the crisis situation and its subsequent policies to the entire country.⁶⁷ Then, in June 2016, as part of a wave of disproportionate responses to national security threats in the EU, Hungary adopted an amendment that made it easier to declare a state of emergency.⁶⁸ The most recent declaration is set to expire on March 7, 2019; it will most likely be renewed.⁶⁹

in transit zones for the duration of the asylum procedure. *Migration Issues in Hungary*, *supra* note 7.

66. The average number of arrivals fluctuated in the next two years as laws and policies changed; however, in December 2017, the average was ten persons per day. *Id.*

67. See 41/2016. (III. 9.) Korm. r. a tömeges bevándorlás okozta válsághelyzet Magyarország egész területére történő elrendeléséről, valamint a válsághelyzet elrendelésével, fennállásával és megszüntetésével összefüggő szabályokról (Government Decree No. 41/2016 (III. 9.) on the imposition of a crisis situation in the whole of Hungary due to mass immigration, and the rules related to the ordering, existence, and termination of the crisis) (Hung.), <https://bit.ly/2v2uu9Z> [<https://perma.cc/2Z8K-ZZAF>]; see also AMNESTY INT'L, DANGEROUSLY DISPROPORTIONATE: THE EVER-EXPANDING NATIONAL SECURITY STATE IN EUROPE 1, 21 (2017), <https://www.amnesty.org/download/Documents/EUR0153422017ENGLISH.PDF> [<https://perma.cc/LEV3-Y67T>] (citing Government Decrees No. 269/2015 (IX. 15.), No. 270/2015 (IX. 18.), and No. 41/2016 (III. 9.)).

68. See AMNESTY INT'L, *supra* note 67, at 17.

69. See 41/2016. (III. 9.), *supra* note 67, art. 3(5)(2); see also Orbán's Cabinet Again Extends State of Emergency Due to Migration Crisis, DAILY NEWS HUNGARY (Feb. 17, 2017), <https://dailynewshungary.com/orbans-cabinet-extends-state-emergency-due-migration-crisis/> [<https://perma.cc/XW6Z-L5W8>] (discussing the extension of the state of emergency in Hungary until September 7, 2018). In 2018, the Hungarian government announced that "[i]n order to ensure the security and border protection of Hungary, the government will extend the crisis situation caused by mass immigration to Hungary as a whole," and that "[t]here are still thousands of migrants on the Balkan route, some of them still trying to cross the Hungarian border, and in the absence of Hungarian border protection, Hungary would again be subject to massive immigration." *Magyarország biztonsága érdekében a kormány meghosszabbítja a tömeges bevándorlás okozta válsághelyzetet*, MAGYARORSZÁG KORMÁNYA (Sept. 3, 2018), <http://www.kormany.hu/hu/miniszterelnoki-kabinetiroda/hirek/magyarorszag-biztonsaga-erdekeben-a-kormany-meghosszabbitja-a-tomeges-bevandorlas-okozta-valsaghelyzetet> [<https://perma.cc/D6BX-LCNU>].

B. Sealing the Border: Fences and Transit Zones

On September 15, 2015, Hungary completed the construction of a fence on its southern border with Serbia.⁷⁰ Shortly thereafter, Hungary reported that it had begun building a fence on its border with Croatia⁷¹ and announced its intentions to build another fence on its border with Romania.⁷² Additionally, the Government amended its laws to create two “transit zones” on its southern border with Serbia at Tompa-Kelebia and Röske-Horgos,⁷³ and established criminal penalties for illegal entry through the border fence.⁷⁴

Today, legal access to Hungary for asylum seekers is limited to these two transit zones on the Hungarian-Serbian border.⁷⁵ These centers are made of containers and form part of the border fence.⁷⁶ The fence itself is set back on Hungary’s territory, such that some asylum seekers waiting⁷⁷ to enter the transit zones are actually on Hungarian

70. *Hungary: New Border Regime Threatens Asylum Seekers*, *supra* note 8.

71. On October 17, 2015, Hungary closed its border with Croatia. *See Migrant crisis: Hungary closes border with Croatia*, *supra* note 9.

72. The fence on the Croatian border was completed by mid-October 2015. *See* U.N. High Comm’r for Refugees, Europe’s Refugee Emergency Response - Update #6, at 1 (Oct. 15, 2015), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=562f2d544&skip=0&query=europe%27s%20refugee%20response> (on file with the Columbia Human Rights Law Review).

73. AMNESTY INT’L, HUNGARY: STRANDED HOPE – HUNGARY’S SUSTAINED ATTACK ON THE RIGHTS OF REFUGEES AND MIGRANTS, 1, 15–16 (2016), <https://www.amnesty.org/download/Documents/EUR2748642016ENGLISH.PDF> [<https://perma.cc/QLZ6-U2PZ>].

74. Hungary amended its Criminal Code to criminalize illegal entry, vandalizing the fence, and impeding the fence’s construction. *See* Act CXL of 2015, *supra* note 11, art. 8 (amending Criminal Code §§ 352A-C of Act C, 2012).

75. The transit zones on the Croatian border were never made operational. *See* COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 17.

76. *Id.* at 17–20.

77. *See* U.N. High Comm’r for Refugees, Hungary as a Country of Asylum: Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016, ¶¶ 8, 9, 23 (May 2016), <http://www.refworld.org/docid/57319d514.html> (on file with the Columbia Human Rights Law Review); *see, e.g.*, Nóra Köves, *Hungary 2017: Detained refugees, persecuted NGOs, lack of legal certainty*, HEINRICH BÖLL STIFTUNG (Dec. 29, 2017), <https://www.boell.de/en/2018/01/03/hungary-2017-detained-refugees-persecuted-ngos-lack-legal-certainty> [<https://perma.cc/L9ZP-Z3KF>] (“Once in Serbia, asylum-seekers need to wait to get into the transit zones, as these are the only places where they can apply for asylum in Hungary.”). The Hungarian government did not provide any humanitarian aid to the persons waiting outside the fence. *See* U.N. High Comm’r for Refugees, *supra*, ¶¶ 9, 23 (May 2016).

soil.⁷⁸ Nevertheless, Hungary considers the fence, including the transit zones and its own territory on the other side of the fence as a “no man’s land,”⁷⁹ and not part of Hungary.⁸⁰ However, the European Court of Human Rights has held that there is no such legal concept as an “international zone” where States are free to evade international human rights norms and that a State is responsible for human rights violations wherever it exercises jurisdiction.⁸¹

When the transit zones first opened in mid-September, 2015, 185 asylum seekers were permitted entrance.⁸² Steadily, Hungarian authorities reduced the number of persons allowed to enter the transit zones over the course of the next three years.⁸³ As of mid-January 2018,

78. The fence is set back on Hungary’s territory. *See* 2007. évi LXXXIX (Act LXXXIX of 2007 on the State Border) (Hung.), *amended by* 2015. évi CXXVII. törvény az ideiglenes biztonsági határzár létesítésével, valamint a migrációval összefüggő törvények módosításáról (Act CXXVII of 2015 on the establishment a temporary security barrier and on the amendment of the laws related to migration) (Hung.), art. 4, § 49, http://njt.hu/cgi_bin/njt_doc.cgi?docid=176690.296216 [<https://perma.cc/43ZD-FQMH>] (the fence is set within a 10-meter band from the Serbian border), *amended by* Act CXL of 2015, *supra* note 11, art. 5, § 22 (the fence is set up to 60 meters from the Serbian border).

79. *See* COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 17.

80. *See* László Trócsányi, Minister of Justice, Minister Trócsányi on the Management of Mass Migration, HUNGARIAN GOV’T MINISTRY OF JUSTICE (Sept. 4, 2015, 4:16 PM), <http://www.kormany.hu/en/ministry-of-justice/news/minister-trocsanyi-on-the-management-of-mass-migration> [<https://perma.cc/FR72-PXH9>] (“The essence of a transit zone – similar to an airport transit zone – is that while it is located in the territory of the given state, the entry into the transit zone does not qualify, in immigration terms, as an entry into that state.”).

81. *See* *Amuur v. France*, App. No. 19776/92, ¶ 52 (Eur. Ct. H.R. June 25, 1996) (“Despite its name, the international zone does not have extraterritorial status” as they were “subject to French law” in the transit zone.); *see also* *Ilias and Ahmed v. Hungary*, App. No. 47287/15, ¶ 54 (Eur. Ct. H.R. Mar. 14, 2017) (“[T]he border zone – a facility which, for the Court, bears a strong resemblance to an international zone . . . being under the State’s effective control irrespective of the domestic legal qualification.”); *Hirsi Jamaa v. Italy*, App. No. 27765/09, ¶ 69 (Eur. Ct. H.R. Feb. 23, 2012) (stating that the test for state responsibility is whether a person falls “under the effective control and authority of that State.”).

82. COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59 at 17 (“[O]n 15–16 September 2015 only 185 asylum-seekers were allowed to enter the transit zones.”).

83. Initially, the Government announced it would process a maximum of 100 asylum-seekers per day, per zone. The Government then reduced this number to fifty people in February 2016, and to thirty people per day in March 2016. *See* U.N. High Comm’r. for Refugees, *supra* note 77, ¶ 22. From November 2016 this number was reduced to ten persons per working day, per zone; and by 2017, only five per day, per zone were allowed to enter. *See* COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 17.

only one person per workday, per transit zone is permitted entrance.⁸⁴ At this rate, experts estimate that some asylum seekers could be forced to wait upwards of ten years before they are able to enter a transit zone and apply for asylum.⁸⁵ Critically, the availability of space in the transit zone has no bearing on this policy: as of May 15, 2018 there were only 112 individuals⁸⁶ in the transit zones, despite that these units have the capacity to accommodate over 700 persons.⁸⁷

1. Accelerated Border Procedure, Pre-March 2017

The transit zones had their own special admissibility “border procedure” for asylum seekers from September 2015 until March 28, 2017, when the procedure was temporarily suspended by an amendment to Hungary’s Asylum Law.⁸⁸ While the border procedure is not currently applied, for over one-and-a-half years it contributed to the refoulement of hundreds of thousands of asylum seekers to Serbia due to its “accelerated” nature. European Union (EU) countries utilize accelerated procedures to help quickly decide cases that are “manifestly unfounded” and disincentivize economic migrants and persons whose claims will eventually be rejected upon examination.⁸⁹ A State can legally employ these truncated procedures; however, the

84. *Migration Issues in Hungary*, *supra* note 7 (“Since mid-January 2018 only 1 person/day is allowed to enter Hungary in each transit zone, which will most probably result in the increase of the already long waiting time (often up to 1 year) in Serbia.”); see Soraya Sarhaddi Nelson, *Hungary Reduces Number Of Asylum-Seekers It Will Admit To 2 Per Day*, NPR (Feb. 3, 2018, 10:30 AM), <https://www.npr.org/sections/parallels/2018/02/03/582800740/hungary-reduces-number-of-asylum-seekers-it-will-admit-to-2-per-day> [https://perma.cc/T2VA-TVFH] (“‘This means only unaccompanied minors or single men can get in – no families whatsoever.’ . . . They ‘are very worried,’ especially the families . . . ‘Some of them were waiting there for more than one year.’”).

85. Interview with Balazs Lehel, Head of Office, Int’l Org. for Migration, in Budapest, Hung. (June 6, 2018) (“If you’re a single male in your 20’s with no sign of vulnerability you could end up waiting for 10 years—[now that’s a] theoretical figure. But [it is] true that the waiting time is really, really long, and no one can tell you how long you’ll be waiting.”). Before the one-person per transit zone per working day policy, the reported wait-time to access the transit zones could be up to one year. See *Migration Issues in Hungary*, *supra* note 7 (noting that the wait time was “often up to 1 year” prior to the policy change in January 2018).

86. See *Migration Issues in Hungary*, *supra* note 7 (noting only 61 individuals at Rószke and 51 at Tompa).

87. Skype Interview with Katinka Huszár, *supra* note 14.

88. See *infra* notes 97–108 and accompanying text.

89. Mole & Meredith, *supra* note 21, at 106.

State must still respect fundamental international and regional rights and protections—including minimal procedural guarantees.⁹⁰

When the accelerated border procedure was enforced, immigration officers did not assess applicants' protection needs, and the majority of applications were declared inadmissible on the basis of the safe third country concept without ever reaching the merits of the individual asylum claims.⁹¹ While the authorities had up to eight days to decide admissibility, reports indicated that these decisions were often made in less than one hour,⁹² with some interviews lasting roughly ten minutes.⁹³ Asylum seekers were then immediately expelled from the transit zone to the other side of the fence, and the Government issued a ban on entry and stay for one-to-two years.⁹⁴ Furthermore, while the transit zone procedure was not applicable to persons with special needs,⁹⁵ there was no guidance on what constituted special needs, or how to assess vulnerability. Thus, the responsible government officials could decide who was exempted from the accelerated border procedure based only on obvious, visible vulnerabilities that they could easily identify.⁹⁶

90. See Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing Int'l Protection (recast), art. 43(1). Even in cases where there is a large influx of refugees applying for protection at the border, the State must still accommodate asylum seekers "normally" near the "border or transit zone." *Id.* at art. 43(3); see also Council of Europe: Comm. of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, 8–10 (July 1, 2009), <http://www.refworld.org/docid/4a857e692.html> (on file with the Columbia Human Rights Law Review) (discussing guidelines for procedural guarantees in accelerated procedures).

91. See COUNTRY REPORT: HUNGARY, NOVEMBER 2015, *supra* note 36, at 31.

92. See U.N. High Comm'r for Refugees, *supra* note 77, ¶ 25.

93. Skype Interview with Dr. Gruša Matevžič, Senior Legal Officer, Hungarian Helsinki Comm., in Budapest, Hung. (May 24, 2018); COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 38 (noting that in some cases, "the interview lasted only 10 minutes, which included the reading back of the interview minutes.").

94. See also COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 36 ("This ban is entered into the Schengen Information System and prevents the person from entering the entire Schengen area in any lawful way.").

95. See Act LXXX of 2007 on Asylum, *supra* note 14, §§ 71/A(7), 72(6). The Asylum Act defines "persons with special treatment needs." *Id.* at § 2(k).

96. See COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 36 (noting that, in practice, only those with visibly identifiable needs were exempted from the border procedure—i.e., pregnant women, families, etc.). Compare with UNHCR definition. U.N. High Comm'r for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum*

2. Asylum Procedure, Post-March 2017

The accelerated transit zone border procedure was in place until March 28, 2017, when the Hungarian government declared that asylum applications would *only* be accepted in the transit zones during announced “mass migration crises.”⁹⁷ Under this new state of emergency “regular procedure,” authorities first determine if the Dublin Regulation⁹⁸ applies to the asylum applicant.⁹⁹ If the Dublin Regulation does not allow for the transfer of the applicant to another EU country, the Hungarian officials issue an admissibility determination within 15 days.¹⁰⁰ This admissibility decision considers whether an applicant passed through a safe third country, among other factors.¹⁰¹ If the applicant is not deemed inadmissible, and therefore

Procedures), ¶ 44, U.N. Doc. EC/GC/01/12 (May 31, 2001), <http://www.refworld.org/docid/3b36f2fca.html> (on file with the Columbia Human Rights Law Review) [hereinafter “Global Consultations on International Protection”] (Vulnerable persons include “torture victims, victims of sexual violence, women under certain circumstances, children particularly unaccompanied or separated children, the elderly, psychologically disturbed persons, and stateless persons”).

97. See Act XX of 2017, *supra* note 97, at § 3(7) (Adding Art. 80/J § 1—During a declared crisis due to mass migration, “asylum application[s] may be submitted personally to the asylum authority only in the transit zone [with limited exceptions; for example, excluding persons lawfully present in Hungary].”).

98. Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 2013 J.O. (L180) 1, 31. For additional information, see *Country responsible for asylum application (Dublin)*, EUR. COMM., https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en [<https://perma.cc/2A6D-XDAK>].

99. See Act LXXX of 2007 on Asylum, *supra* note 14, § 47(2).

100. *Id.*

101. *Id.* at § 51(2) (Inadmissibility applies if “a) the applicant is a national of one of the Member States of the European Union; b) the applicant was recognized by another Member State as a refugee or it granted subsidiary protection to him/her; c) the applicant was recognized by a third country as a refugee, provided that this protection exists at the time of the assessment of the application and the third country in question will admit the applicant; d) the application is repeated and no new circumstance or fact occurred that would suggest that the applicant’s recognition as a refugee or beneficiary of subsidiary protection is justified; or e) for the applicant, there is a third country qualifying as a safe third country for him/her.”).

not automatically expellable, the Government must decide on the merits of the applicant's claim within 60 days.¹⁰²

Notably, under the current procedure, if an individual does not immediately indicate an intention to apply for asylum upon entry into the transit zone, s/he is expelled to the other side of the fence.¹⁰³ The new amendments also introduced an additional justification for terminating asylum claims and expelling refugees—failure to submit a requested document in time or provide a timely statement.¹⁰⁴ Furthermore, as of the March 2017 amendments, asylum seekers now have only three days to appeal an inadmissibility decision.¹⁰⁵

This new law also requires all asylum seekers to remain in the transit zone for the entire duration of their asylum procedure, excluding children¹⁰⁶ under 14 years of age.¹⁰⁷ Therefore asylum seekers' freedom of movement is severely restricted, on average, for three to six months, and sometimes longer, in shipping containers.¹⁰⁸

C. Serbia as a Safe Third Country

As mentioned in the previous section, the accelerated border procedure was primarily an admissibility decision based on whether an asylum seeker had entered Hungary from a safe third country.¹⁰⁹ Hungary is located on the Balkan Route, a popular route for migrants fleeing the Middle East for the EU.¹¹⁰ The majority of migrants enter

102. *Id.* § 47(3). This period can be extended once for a maximum of three weeks (twenty-one days); however, several loopholes exist regarding how time is counted towards that limit. *Id.* §§ 32/G(2),(3). Researchers have observed several cases where children are kept in transit zones for more than eighty days without a decision. See COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 23.

103. See COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 21.

104. See Act LXXX of 2007 on Asylum, *supra* note 14, § 32/I. A new ground for dismissal was included in amendments to the Asylum Act that entered into force on January 1, 2018. See COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 23.

105. See Act XX of 2017, *supra* note 97, §3(7) (Adding Art. 80/K § 1, applicable during a declared mass migration crisis).

106. See Act LXXX of 2007 on Asylum, *supra* note 14, § 80/J(6).

107. See *id.* § 80/J(5).

108. This is the average reported length of the asylum procedure (including both the first-instance application adjudication and the judicial review process). See COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 23.

109. See Act LXXX of 2007 on Asylum, *supra* note 14, § 51.

110. Alice Greider, *Outsourcing Migration Management: The Role of the Western Balkans in the European Refugee Crisis*, MIGRATION POLICY INST. (Aug.

though the border Hungary shares with Serbia.¹¹¹ Hungary's decision to list Serbia as a "safe third country"¹¹² on July 21, 2015 swiftly facilitated the automatic rejection of over 95%¹¹³ of asylum seekers' applications as inadmissible.¹¹⁴

17, 2017), <https://www.migrationpolicy.org/article/outsourcing-migration-management-western-balkans-europes-refugee-crisis> [<https://perma.cc/D22N-R87C>].

111. See *Migratory Routes*, FRONTEX: EUROPEAN BORDER AND COAST GUARD AGENCY, <https://frontex.europa.eu/along-eu-borders/migratory-routes/western-balkan-route/> [<https://perma.cc/E4EF-8DPK>]. To learn more about this migration route and others, see Patrick Boehler & Sergio Peçanha, *The Global Refugee Crisis, Region by Region*, N.Y. TIMES (Aug. 26, 2015), <https://www.nytimes.com/interactive/2015/06/09/world/migrants-global-refugee-crisis-mediterranean-ukraine-syria-rohingya-malaysia-iraq.html> [<https://nyti.ms/2kajroV>] (on file with the Columbia Human Rights Law Review).

112. Hungary initially incorporated the concept of Safe Third Country in its Asylum Law in November 2010. See 2010. évi CXXXV egyes migrációs tárgyú törvények jogharmonizációs célú módosításáról (Act CXXXV of 2010 amending certain migration-related acts for the purpose of legal harmonization), § 2(i) (Hung.), <https://net.jogtar.hu/jogszabaly?docid=A1000135.TV&txtreferer=99700031.TV> [<https://perma.cc/2SDD-VL4P>]. However, Government Decree 191/2015 promulgated a list of Safe Third Countries. See 191/2015. (VII. 21.) (Korm. rendelet a nemzeti szinten biztonságosnak nyilvánított származási országok és biztonságos harmadik országok meghatározásáról) (Government Decree No. 191/2015 (VII.21.) on national designation of safe countries of origin and safe third countries) (Hung.), <http://www.refworld.org/docid/55ca02c74.html> [<https://perma.cc/3YE5-39LL>]. The list includes all countries on the Balkan route: Greece, Macedonia, Serbia, etc. See *id.* Government Decree No. 63/2016 (III.31.) amended Government Decree No. 191/2015 (VII.21.), adding Turkey to the list of safe countries. See 63/2016 (III. 31.) A nemzeti szinten biztonságosnak nyilvánított származási országok és biztonságos harmadik országok meghatározásáról szóló 191/2015. (VII.21.) Korm. rendelet módosításáról (Government Decree No. 63/2016 (III.31.) on amending Government Decree 191/2015 (VII.21) on national designation of safe countries of origin and safe third countries) (Hung.), <http://www.kozlony.magyarorszag.hu/hivatalos-lapok/44a130b731dd57b5b176dbd71242f7982fd0e11a/dokumentumok/7e11691d1761bf8b847abc6bfaadc68e9de2983f/letoltes> [<http://perma.cc/ZXL4-H7W4>].

113. See, e.g., COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 52 ("As over 95% of asylum seekers enters [sic] Hungary at the Serbian-Hungarian border section, this means the quasi-automatic rejection at first glance of over 95% of asylum claims, without any consideration of protection needs.").

114. See Act LXXX of 2007 on Asylum, *supra* note 14, § 51 (an asylum application is "inadmissible" when the applicant stayed or passed through a country where he or she had, or would have had, the opportunity to "apply for effective protection.").

While the safe third country presumption is rebuttable,¹¹⁵ in practice it is essentially impossible to challenge.¹¹⁶ Furthermore, Hungarian law provides that if a safe third country fails to take a refugee back, the Hungarian government must continue to process his or her application.¹¹⁷ However, Serbia suspended its readmission agreement with Hungary shortly after the border fence was completed; it has refused to readmit asylum seekers since then, leaving the refugees stranded in limbo between two countries that will not fairly assess their protection claims.¹¹⁸ Finally, Serbia is not regarded as “safe” by any other EU Member State because of the severe deficiencies in its asylum system.¹¹⁹

While Hungary temporarily stopped issuing inadmissibility decisions on the basis of safe third country in 2017,¹²⁰ on June 20, 2018 it passed the “Stop Soros” laws,¹²¹ which incorporated the concept of

115. See Decree 191/2015. (VII.21.), *supra* note 112, § 3(2).

116. See *infra* Section III.A (explaining how the STC presumption is incredibly difficult to challenge given that applicants have three days to present their rebuttal before a decision is rendered, among other procedural challenges).

117. See Act LXXX of 2007 on Asylum, *supra* note 14, § 51/A, amended by Act CXXVII of 2015, *supra* note 78, § 35.

118. See U.N. High Comm’r for Refugees, *supra* note 77, ¶ 69 (“Asylum-seekers whose applications have been found inadmissible . . . on the grounds that Serbia was a safe third country for them were not returned under the readmission agreement, but were simply made to leave the transit zones in the direction of Serbia.”); see also *Hungary: Latest amendments “legalise” extrajudicial push-back of asylum-seekers, in violation of EU and international law*, HUNGARIAN HELSINKI COMMITTEE (July 5, 2016), <http://www.helsinki.hu/wp-content/uploads/HHC-info-update-push-backs-5-July-2016.pdf> [<https://perma.cc/7UTZ-BW6T>].

119. See, e.g., U.N. High Comm’r for Refugees, *supra* note 77, ¶ 13; see also *infra*, Section III.B (detailing Serbia’s barely-functioning asylum system, inadequate reception conditions, and the great risk of refoulement that refugees face in-country).

120. In 2017, the IAO stopped issuing inadmissibility decisions based on STC grounds. See COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 38. “It was only the change in practice, the Gov. decree was not repealed. It has happened before that they would just suddenly stop using STC grounds for a while with regard to Serbia. This was one of the critics [sic] also in Ilias and Ahmed case where ECtHR explicitly pointed out that it is not clear why despite unchanged circumstances in Serbia, the Government suddenly started applying STC grounds for Serbia again.” Email from Gruša Matevžič, Senior Legal Officer, Hungarian Helsinki Committee, to author (May 15, 2018, 3:32 AM EST) (on file with author).

121. T/332. számú javaslat Magyarország Alaptörvényének hetedik módosítása (Bill No. T/332, Seventh Amendment of the Basic Law of Hungary) (Hung.) www.parlament.hu/irom41/00332/00332.pdf [<https://perma.cc/C77A-3X5D>], (Eng.) <https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf> [<https://perma.cc/42W9-2T3F>] [hereinafter Bill

ineligibility for asylum based on the safe third country concept in its national constitution and amended a series of laws that affect asylum seekers.¹²² Nominally, the Fundamental Law still prohibits collective expulsion¹²³ and refoulement,¹²⁴ but it now includes a provision, article 5(4) of Bill No. T/332, whereby “[a]ny non-Hungarian citizen arriving to the territory of Hungary through a country where he or she was not exposed to persecution or a direct risk of persecution shall not be entitled to asylum.”¹²⁵ This provision will most likely be used to justify the denial of almost all asylum claims, because Hungary’s national law considers all of its neighboring countries—including Serbia (the main point of entry into the country)—as safe third countries.¹²⁶ Moreover, T/332 establishes that regulations on applications for, and grants of, asylum shall be “established by a cardinal Act.”¹²⁷ T/333, the provision regarding the methods of “combatting illegal immigration” by military and police force, was adopted as a cardinal law.¹²⁸ Amendments to

No. T/332]. számú törvényjavaslat egyes törvényeknek a jogellenes bevándorlás elleni intézkedésekkel kapcsolatos módosításáról (Bill No. T/333, amending certain laws relating to measures to combat illegal immigration), www.parlament.hu/irom/41/00333/00333.pdf [<https://perma.cc/4EB8-JUDM>] (Hung.), <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf> [<https://perma.cc/5HLM-H7T6>] (Eng.) [hereinafter Bill No. T/333].

122. See *supra* note 121. T/332 amended the Constitution to include the concept of Safe Third Country, and T/333 amended a series of laws relating to asylum—such as the asylum law itself, police and criminal law, border law, and other laws affecting third country nationals.

123. See Bill No. T/322, *supra* note 121, art. 5(2) (“collective expulsion shall be prohibited.”).

124. See *id.* art. 5(3) (“No one shall be expelled or extradited to a State where there is a risk that he or she would be sentenced to death, tortured or subjected to other inhuman treatment or punishment.”).

125. See *id.* art. 5(4).

126. See, e.g., Pablo Gorondi, *Laws to Deter Asylum-Seekers, Aid Workers Passed in Hungary*, AP NEWS (June 20, 2018), <https://www.apnews.com/c399ae10391e4e93af41609941750eec> [<https://perma.cc/4FEE-QGKF>] (explaining that the Stop Soros laws “make it possible to turn back Syrian refugees who cross into Hungary from Serbia” and “[c]riminaliz[e] essential and legitimate human rights work.”); see also Nóra Köves, *Hungary to Imprison NGO Workers Helping Asylum Seekers and Other Migrants*, HEINRICH BÖLL STIFTUNG (June 26, 2018), <https://www.boell.de/en/2018/06/26/hungary-imprison-ngo-workers-helping-asylum-seekers-and-other-migrants> [<https://perma.cc/8Z2R-ERNV>] (“[A]ccording to the Government, Hungary is surrounded by ‘safe third countries’ where asylum-seekers would naturally never be subjected to any persecution, this new modification will probably mean that the authorities are not planning to give one more person refugee status.”).

127. See Bill No. T/332, *supra* note 121, arts. 5(1), 5(5).

128. See Bill No. T/333, *supra* note 121, art. 10 § 13.

such “cardinal laws” require a two-thirds supermajority, which “tie[s] the hands of future parliaments” who “might wish to amend the Fundamental Law to bring it into conformity with Hungary’s international human rights commitments.”¹²⁹

In defending these amendments, the Hungarian government announced that “[t]he mass immigration affecting Europe and the activity of the pro-immigration forces are threatening the national sovereignty of Hungary At the parliamentary elections held on 8 April [2018], the Hungarian people repeatedly made it clear that they do not want Hungary to become an immigrant country.”¹³⁰

D. The Push-Back Law: Deep Border Control

In addition to designating Serbia as a safe third country and setting up transit zones as the only legal points of access for asylum seekers,¹³¹ Hungary established criminal penalties for illegal entry when it erected the fence on its border in September 2015.¹³² By mid-October 2015, Hungary had initiated 825 criminal cases against irregular border-crossers¹³³ and instituted a policy of “automatic” detention for persons found crossing the border illegally—including those who wished to submit asylum claims¹³⁴ and unaccompanied minors.¹³⁵ Between September 2015 and December 31, 2016, police had

129. AMNESTY INT’L, *Hungary: New Laws that Violate Human Rights, Threaten Civil Society and Undermine the Rule of Law Should be Shelved*, 7 (2018), <https://www.amnesty.org/download/Documents/EUR2786332018ENGLISH.PDF> [<https://perma.cc/4UZX-Q6MP>].

130. Bill No. T/332, *supra* note 121, at 4 (“General Reasoning”).

131. See Köves, *supra* note 126; COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 17. The transit zones on the Croatian border were never operational. *See id.*

132. Act CXL of 2015, *supra* note 11, § 16. The government also adopted a law criminalizing damaging the border fence. *See Migration Issues in Hungary*, *supra* note 7.

133. U.N. High Comm’r for Refugees, Europe’s Refugee Emergency Response – Update #7, at 4 (Oct. 22, 2015), <http://www.refworld.org/docid/562f2e264.html> (on file with the Columbia Human Rights Law Review); *see also* AMNESTY INT’L, *supra* note 67, at 22 (describing arrests made in connection with irregular border-crossings).

134. Europe’s Refugee Emergency Response – Update # 7, *supra* note 133, at 4; U.N. High Comm’r for Refugees, Europe’s Refugee Emergency Response – Update #5, at 5 (Oct. 8, 2015), (on file with the Columbia Human Rights Law Review).

135. Europe’s Refugee Emergency Response – Update #5, *supra* note 134, at 5. The UNHCR has identified a number of unaccompanied minors in adult detention facilities in Hungary. *See, e.g.*, U.N. High Comm’r for Refugees, Europe’s

brought almost 3,000 people to court, with the majority of cases resulting in convictions.¹³⁶ However, while this criminal law has not been repealed, today the authorities rarely prosecute these cases.¹³⁷ Instead, Hungary instituted and expanded a policy of deep border control to deal with irregular entries and further dissuade asylum seekers from entering the country outside of the transit zones.

In 2016, Hungary increased the “border region” through deep border control (DBC).¹³⁸ The new “8-km-push-back law” authorized Hungarian officials to expel anyone lacking status found within 8 kilometers of the Hungarian border without first assessing individual vulnerabilities or allowing them to apply for asylum.¹³⁹ The Office of the United Nations High Commissioner for Refugees (UNHCR) and the UN High Commissioner for Human Rights reproached Hungary’s government for making it even more challenging for asylum seekers to obtain protection in Hungary.¹⁴⁰ In the first year after DBC went into effect, 14,438 migrants were forcefully returned to the external side of

Refugee Emergency Response – Update #9, at 5 (Nov. 5, 2015), (on file with the Columbia Human Rights Law Review) (“UNHCR identified at least 12 unaccompanied children from Afghanistan and Syria who were kept in asylum detention facilities along with adults, with little or no support from social services.”).

136. See *Migration Issues in Hungary*, *supra* note 7.

137. The Government no longer prosecutes people under these laws, opting to simply transport them to the other side of the fence in the direction of Serbia under the push-back law. Skype interview with Gruša Matevžič, *supra* note 93.

138. See Köves, *supra* note 77 (describing how a new law gave Hungarian police the power to deport anyone without status found within 8km of the border).

139. See 2016. évi XCIV. törvény a határon lefolytatott menekültügyi eljárás széles körben való alkalmazhatóságának megvalósításához szükséges törvények módosításáról (Act XCIV amending the laws necessary to achieve the broad applicability of the asylum procedure at the border) (Hung.), <https://bit.ly/2LxRLuV> [<https://perma.cc/R9KL-9XZQ>] (The “8km push-back law”).

140. On July 15, 2016, the UNHCR condemned Hungary’s push-back law. See William Spindler, *Hungary: UNHCR concerned about new restrictive law, increased reports of violence, and a deterioration of the situation at border with Serbia*, U.N. HIGH COMM’R FOR REFUGEES (July 15, 2016), <http://www.unhcr.org/uk/news/briefing/2016/7/5788aae94/hungary-unhcr-concerned-new-restrictive-law-increased-reports-violence.html> [<https://perma.cc/SE4A-BQM4>]; see also Rupert Colville, *Press briefing note on Iraq, Saudi Arabia, Kenya, Myanmar, and Hungary*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R (July 5, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20236&LangID=E> [<https://perma.cc/WE92-G3Z3>] (expressing concern that the law “enabl[es] the Hungarian police to escort irregular migrants found within eight kilometers of the border with Serbia to transit zones at the border”).

the border fence.¹⁴¹ Between July 2016 and March 2017, almost 22,000 migrants were sent across the Southern border in the direction of Serbia under this law.¹⁴²

In 2017, Hungary expanded DBC to apply to the entire country when a state of crisis due to mass migration is in effect.¹⁴³ Since then, police have been empowered to apprehend asylum seekers anywhere in Hungary and expel them across the Southern border. This applies not only to persons who have passed through Serbia to enter Hungary, but all individuals—regardless of their point of entry.¹⁴⁴

Furthermore, under DBC, the Government also expels refugees who wish to claim asylum. The asylum seekers must then wait for entry into one of the two transit zones to lodge their claims. These expulsions are “often violent,” with reports of batons, dogs, pepper spray, and other physical and psychological violence.¹⁴⁵

E. Hungary’s Response to the EU Relocation Quota

In response to the one million individuals who migrated to Europe in 2015,¹⁴⁶ the European Union adopted a relocation scheme

141. HUNGARIAN HELSINKI COMMITTEE, TWO YEARS AFTER: WHAT’S LEFT OF REFUGEE PROTECTION IN HUNGARY? at 3 (2017), https://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf [<https://perma.cc/W7ER-T3S8>].

142. See *Migration Issues in Hungary*, *supra* note 7.

143. HUNGARIAN HELSINKI COMMITTEE, HUNGARY: GOVERNMENT’S NEW ASYLUM BILL ON COLLECTIVE PUSH-BACKS AND AUTOMATIC DETENTION 1 (2017), <http://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-New-Asylum-Bill-15.02.2017.pdf> [<https://perma.cc/XNW8-74B6>] (March 2017 amendments extended applicability of the 8km-rule to the entirety of Hungary when a “state of crisis due to mass migration” is in effect) (citing Act XX of 2017, *supra* note 97).

144. Email from Gruša Matevžič, Senior Legal Officer, Hungarian Helsinki Committee, to author (July 30, 2018, 9:55 AM) (on file with author).

145. See *Testimony #10*, MIGSZOL (MIGRANT SOLIDARITY GROUP OF HUNGARY) (June 21, 2017), <https://www.migszol.com/border-violence/testimony-10> [<https://perma.cc/3RHX-63J7>]; *From the Diaries I Lost*, MIGSZOL (MIGRANT SOLIDARITY GROUP OF HUNGARY) (Sept. 14, 2017), <https://www.migszol.com/border-violence/from-the-diaries-i-lost> [<https://perma.cc/C6VW-5L2W>]; *Hungary: Migrants Abused at the Border*, HUMAN RIGHTS WATCH (July 13, 2016, 12:01 AM), <https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border> [<https://perma.cc/2ZCM-UE8T>]; Zsolt Balla, *UNHCR Concerned Hungary Pushing Asylum Seekers Back to Serbia*, U.N. HIGH COMM’R FOR REFUGEES (July 15, 2016), <http://www.unhcr.org/en-us/news/latest/2016/7/5788c85a4/unhcr-concerned-hungary-pushing-asylum-seekers-serbia.html> [<https://perma.cc/B4EZ-W9T7>]; COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 19 (an unaccompanied minor testified that police hit and kicked him and used gas spray and attack dogs).

146. See *MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW*, *supra* note 1, at 1.

(Council Decision 2015/1601) to ease pressure on EU member states who were experiencing the brunt of these mass arrivals.¹⁴⁷ However, Hungary and the other Visegrad countries¹⁴⁸ rejected the relocation plan,¹⁴⁹ citing security and economic reasons, “consider[ing] mass migration as a threat to the European civilization as a whole.”¹⁵⁰ To demonstrate popular approval of its immigration policy and refusal to implement the relocation quota, Hungary held a referendum in October 2016, asking citizens if they would allow the EU to prescribe mandatory settlement of asylum seekers in the country.¹⁵¹ The Government framed this as a question about “Hungary’s future,”¹⁵² following a government-sponsored campaign portraying immigrants as terrorists and criminals:¹⁵³ “[w]e do not know how many of them are

147. See Council Decision 2015/1601, 2015 O.J. (L 248) 80 (EC), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015D1601> [<https://perma.cc/8E3G-A5DA>] (establishing provisional measures in the area of international protection for the benefit of Italy and Greece).

148. Regional alliance of four Central European states: Hungary, Slovakia, the Czech Republic, and Poland. See *About the Visegrad Group*, VISEGRAD GROUP, <http://www.visegradgroup.eu/about> [<https://perma.cc/BS9C-2UP3>].

149. Initially only Hungary, Slovakia, and the Czech Republic rejected the relocation quota, but Poland also ultimately rejected the proposal. See Sándor Gallai, *The Four Visegrad Countries: More Than It Seems*, MIGRATION RES. INST. (Apr. 16, 2018), <https://www.migraciokutato.hu/en/2018/04/16/the-four-visegrad-countries-more-than-it-seems/> [<https://perma.cc/RN89-43JQ>] (describing how anti-migration policy became the rallying cry of the Visegrad (V4) Countries, strengthening their political alliance and ability to shape EU policy). Hungary refused to accept any asylum seekers under the relocation scheme. See *EU: Countries Have Fulfilled Less Than a Third of Their Asylum Relocation Promises*, AMNESTY INT’L (Sept. 25, 2017, 7:41 AM), <https://www.amnesty.org/en/latest/news/2017/09/eu-countries-have-fulfilled-less-than-a-third-of-their-asylum-relocation-promises/> [<https://perma.cc/6E2K-VSSU>].

150. See Gallai, *supra* note 149.

151. See Krisztina Than & Gergely Szakacs, *Hungarians vote to reject migrant quotas, but turnout too low to be valid*, REUTERS (Oct. 1, 2016), <https://www.reuters.com/article/us-europe-migrants-hungary-referendum-idUSKN1213Q3> [<https://perma.cc/TS4N-UQBD>].

152. *Id.*

153. See, e.g., AMNESTY INT’L, *supra* note 73, at 8 n.13 (quoting government-paid billboards that ask, “Did you know? Since the beginning of the immigration crisis, the number of sexual assaults on women has exponentially increased”; “Did you know? Since the beginning of the immigration crisis, over 300 people have died in terror attacks”; “Did you know? Brussels wants to settle a whole town of illegal immigrants to Hungary.”); see also György Bakondi, *Mass Migration is Organised, Aggressive and Illegal*, KORMANY - WEBSITE OF THE HUNGARIAN GOVERNMENT (Aug. 8, 2016, 11:33 AM), <http://www.kormany.hu/en/news/mass-migration-is-organised-aggressive-and-illegal> [<https://perma.cc/ET9Y-W6F6>] (documenting the Chief Security Advisor to the Hungarian Prime Minister’s attribution of illegal

terrorists in disguise.”¹⁵⁴ The Government has also launched several national consultations to spread its xenophobic, nationalist message and garner support for its policies—including the May 2015 “National Consultation on Immigration and Terrorism”¹⁵⁵ and the September 2017 “National Consultation on the Soros Plan.”¹⁵⁶ The questions in these national consultations are constructed to inspire fear and promote the Government’s anti-immigration policies.¹⁵⁷

Polls indicate that the Hungarian government’s campaigns have been very successful in shaping societal attitudes towards immigrants and asylum seekers, and Fidesz has used this momentum to maintain popularity among voters.¹⁵⁸ Survey figures show that 65%

migration to the Islamic State, and his claim that resisting illegal migration is fundamental to fighting terrorism).

154. U.N. High Comm’r for Refugees, Europe’s Refugee Emergency Response – Update #13, at 1 (Dec. 3, 2015), <http://www.refworld.org/docid/56bda21d4.html> (on file with the Columbia Human Rights Law Review) (xenophobic campaign against refugees presented as “government information”). The government also used scare tactics regarding the loss of jobs to foreigners. See HUNGARY: DEMOCRACY UNDER THREAT, *supra* note 27, at 56 (“If you come to Hungary, do not take the Hungarians’ jobs!”).

155. See *National Consultation on Immigration to Begin*, KORMANY - WEBSITE OF THE HUNGARIAN GOVERNMENT (Apr. 24, 2015, 5:07 PM), <http://www.kormany.hu/en/prime-minister-s-office/news/national-consultation-on-immigration-to-begin> [<https://perma.cc/FEY8-JN56>].

156. See *Here’s the Questionnaire [sic] that Allows the People to Have Their Say on the Soros Plan*, KORMANY - WEBSITE OF THE HUNGARIAN GOVERNMENT (Sept. 29, 2017), <http://abouthungary.hu/news-in-brief/national-consultation-on-the-soros-plan/> [<https://perma.cc/YVB3-ZQC5>] (“This seventh national consultation addresses the Soros Plan to resettle one million migrants in Europe per year.”).

157. See *generally id.* (Question 1: “George Soros wants to convince Brussels to resettle at least one million immigrants from Africa and the Middle East annually on the territory of the European Union, including Hungary as well. Do you support this point of the Soros Plan?”). See also *Hungarians “Unanimously Reject the Soros Plan” Following Return of 2,356,811 National Consultation Surveys*, KORMANY - WEBSITE OF THE HUNGARIAN GOVERNMENT (Jan. 11, 2018), <http://abouthungary.hu/news-in-brief/hungarians-unanimously-reject-the-soros-plan-following-return-of-2356811-national-consultation-surveys/> [<https://perma.cc/3JDU-UHQJ>] (noting “Hungarians reject all arguments, plans and attempts aimed at persuading Hungary to become an immigrant country . . . the government will continue to consistently reject all attempts to blackmail and threaten it into ‘giving in’ and submitting to Brussels’ intentions.”).

158. Prime Minister Viktor Orbán was re-elected in April 2018. See *Victor Orbán: Hungary PM Re-elected for Third Term*, BBC NEWS (Apr. 9, 2018), <https://www.bbc.com/news/world-europe-43693663> [<https://perma.cc/24V4-LMZM>]. The government has referred to the popular support of its anti-immigration stance when enacting new legislation. See, e.g., Bill No. T/332, *supra* note 121, (“General Reasoning”: “At the parliamentary elections held on 8 April [2018], the Hungarian

of Hungarians consider immigration to be the most important issue facing the EU (outranking terrorism and the economy), 81% of Hungarians feel negatively towards immigration from outside the EU, and 94% would like additional measures to combat irregular migration.¹⁵⁹ Survey instruments also have demonstrated public support for the Government's position and reveal that citizens believe there is a strong link between migration and terrorism.¹⁶⁰

The European Parliament hastened to condemn Hungary for its "highly misleading" and "biased" referendum.¹⁶¹ The UNHCR, Council of Europe (COE), and Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights further reproached Hungary for its media campaign equating refugees with criminals and terrorists "based on their religious beliefs and places of origin."¹⁶² While the results of the

people repeatedly made it clear that they do not want Hungary to become an immigrant country.").

159. See *Standard Eurobarometer 86: Public Opinion in the European Union*, European Comm'n (Dec. 2016), <https://bit.ly/2mEczTx> [<https://perma.cc/73WB-9KCP>] (Annex, QB4.2/T119 (eighty-one percent) and QB5/T120 (ninety-four percent)).

160. One study of Hungarian popular opinion found "78% saw a direct relation between the wave of migration and the increased number of terrorist acts." Further, "83% thought that mass migration would contribute to the spread of radical Islam, 90% thought that it would lead to extremist anti-Islam groups gaining more strength, and 70% believed that it would result in the deterioration of public security." See Gallai, *supra* note 149 (citing a joint survey by the Migration Research Institute and Századvég).

161. *Hungary: MEPs Condemn Orbán's Death Penalty Statements and Migration Survey*, EUROPEAN PARLIAMENT (June 10, 2015, 7:26 AM), <http://www.europarl.europa.eu/news/en/news-room/20150605IPR63112/hungary-meps-condemn-orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey> [<https://perma.cc/M2XF-3KEH>].

162. U.N. High Comm'r for Human Rights, *Hungary Urged to Refrain from Policies and Practices that Promote Intolerance and Hatred* (Dec. 21, 2015), <http://www.unhcr.org/news/press/2015/12/5677cf666/hungary-urged-refrain-policies-practices-promote-intolerance-hatred.html> [<https://perma.cc/XKG7-9F4R>]; see also *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*, COUNCIL OF EUROPE COMM'R FOR HUMAN RIGHTS (Dec. 17, 2015), <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/16806da997> [<https://perma.cc/9TJ5-HT63>] (finding national consultation and other rhetoric by the Hungarian government created an unacceptable climate of intolerance toward migrants).

referendum were inconclusive,¹⁶³ Hungary refused to implement the EU's relocation scheme. The Government brought an action before the European Court of Justice (ECJ) to challenge the legality of Council Decision 2015/1601, which was ultimately dismissed by the ECJ on September 6, 2017.¹⁶⁴

UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, admonished Hungary for "violating international law in response to [the] migration crisis."¹⁶⁵ The European Commission also rebuked Hungary for its failure to share the responsibility to aid asylum seekers, instituting infringement proceedings on December 10, 2015.¹⁶⁶ None of these actions stymied the Hungarian government's plans, as it adamantly refused to change its laws.¹⁶⁷ The Commission therefore referred the matter to the ECJ on July 19, 2018.¹⁶⁸ That same day, the Commission initiated a second infringement proceeding against Hungary regarding its "Stop Soros" legislation—which places

163. See *Hungary PM Claims EU Migrant Quota Referendum Victory*, BBC NEWS (Oct. 3, 2016), <http://www.bbc.com/news/world-europe-37528325> [<https://perma.cc/4R38-QXXB>] (While ninety-eight percent of voters supported the Government's position, only 40.4 percent cast valid ballots—short of the 50% turnout required: "[the government] said the outcome was binding 'politically and legally,' but the opposition said the government did not have the support it needed. Mr. Orbán . . . said he would change Hungary's Constitution to make the decision binding.").

164. Case C-643/15 and C-647/15, *Slovak Republic & Hungary v. Council*, 2017 E.C.R. 631.

165. See U.N. Office of the High Comm'r for Human Rights, *Hungary Violating International Law in Response to Migration Crisis: Zeid*, (Sept. 17, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16449> [<https://perma.cc/XX76-H5EG>] (Zeid admonished Hungary for "the callous, and in some cases, illegal, actions of the Hungarian authorities . . . which include denying entry to, arresting, summarily rejecting and returning refugees.").

166. See European Commission Press Release IP/15/6228, *Commission Opens Infringement Procedure Against Hungary Concerning its Asylum Law* (Dec. 10, 2015), http://europa.eu/rapid/press-release_IP-15-6228_en.htm [<https://perma.cc/MFM8-FF4X>] (denouncing Hungary for failing to provide effective access to asylum procedures, fast-tracking criminal proceedings for irregular entry, not complying with safeguards in breach of nonrefoulement, and preventing asylum seekers from presenting new facts on appeal, among other violations).

167. Press Release, Hung. Ministry of Justice, *Hungary Does Not Wish to Change Asylum Regulations* (Feb. 12, 2018, 3:59 PM), <http://www.kormany.hu/en/ministry-of-justice/news/hungary-does-not-wish-to-change-asylum-regulations> [<https://perma.cc/8M7N-8KKZ>].

168. European Commission Press Release IP/18/4522, *Migration and Asylum: Commission Takes Further Steps in Infringement Procedures Against Hungary* (July 19, 2018), http://europa.eu/rapid/press-release_IP-18-4522_en.htm [<https://perma.cc/BL56-969C>].

further restrictions on asylum seekers and criminalizes the act of assisting refugees.¹⁶⁹

F. Protection Denied: Grant Rates and Statistics

The chart below reports the total number of asylum applications for each year from 2014 to 2017, as well as decision outcomes in Hungary:

TABLE 1-PROTECTION DECISIONS IN HUNGARY, 2014–2017

	2014 ¹⁷⁰	2015 ¹⁷¹	2016 ¹⁷²	2017 ¹⁷³
Total number of registered asylum seekers	42,777	177,135	29,432	3,397
Granted refugee/asylum status	240	146	154	106
Granted subsidiary protection	236	356	271	1,110
Otherwise authorized to stay (Nonrefoulement/ temporary protected status, etc.)	32	6	7	75
Suspension¹⁷⁴	24,326	152,260	49,479	2,049

169. See *id.* The “Stop Soros” package is comprised of Bill T/332 and Bill T/333. See *supra* note 121.

170. COUNTRY REPORT: HUNGARY, NOVEMBER 2015, *supra* note 36, at 6.

171. See Immigration Stats for 2014–2015, *supra* note 16 (Excel tabs 8 through 11 provide data on asylum seekers and decisions).

172. See, *Issue 2015 - 2016 Annual Statistics*, BEVÁNDORLÁSI ÉS MENEKÜLTÜGYI HIVATAL, IMMIGR. & ASYLUM OFF. (Jan. 26, 2017), http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en#statistics [<https://perma.cc/4YCX-A2SR>] (Excel tabs 8 through 11 provide data on asylum seekers and decisions).

173. See *Annual Statistics 2017*, BEVÁNDORLÁSI ÉS MENEKÜLTÜGYI HIVATAL, IMMIGR. & ASYLUM OFF. (Jan. 31, 2017), http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=492&Itemid=1259&lang=en [<https://perma.cc/4YCX-A2SR>] (Excel tabs five through seven provide data on asylum seekers and decisions).

174. See Act LXXX of 2007 on Asylum, *supra* note 14, § 44/A (note that § 49(2) governs suspensions under the Dublin Regulation).

Rejection ¹⁷⁵	4,815	2,917	4,675	2,880
Pending Cases ¹⁷⁶		36,694	3,413	678
Total number of decisions ¹⁷⁷	29,649	155,685	54,586	6,220
Protection Rate ¹⁷⁸	1.71%	0.33%	0.79%	20.75%
Asylum grant rate (refugee protection) ¹⁷⁹	0.81%	0.09%	0.28%	1.70%

Understanding Hungary's asylum application statistics is complicated for a few reasons. First, the "total number of decisions" made each year does not necessarily equal the "total number of registered asylum seekers." This is due to the backlog of pending cases that the Government reported each year. Second, while grants of refugee status appear to remain somewhat stable between 2015 and 2017, this is misleading since the total number of applications decreased dramatically after the Government amended its laws to severely limit the number of refugees who could submit applications.¹⁸⁰

Similarly, while grants of subsidiary protection appear to have increased significantly from 2014 to 2017, not all asylum seekers who wished to lodge an application were able to do so as Hungary increasingly restricted access to the transit zones. Thus, when evaluating the 20.75% protection rate in 2017, note that there were only 6,220 decisions made that year, and only 3,397 asylum seekers registered. Compare these figures with the pre-fence, pre-"state of emergency" statistics—where the Government processed 29,649

175. Inadmissibility decisions are counted as "rejections." *Id.* at § 53 (stating that the refugee authority shall reject the application if it establishes the existence of any of the criteria set forth in § 51(2), including § 51(2)(e) (safe third country)).

176. See COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 7.

177. This is the sum of asylum and refugee status grants, subsidiary protection grants, other protection grants, rejections, and suspensions. This comports with how IOM calculates the total number of decisions it reports. See *Migration Issues in Hungary*, *supra* note 7 (noting 54,586 total decisions in 2016, and 6,220 total decisions in 2017).

178. This number represents ["Granted refugee/asylum status" + "Granted subsidiary protection" + "Otherwise authorized to stay"] divided by ["Total Number of Decisions"].

179. This number represents ["Granted refugee/asylum status"] divided by ["Total Number of Decisions"].

180. See discussion *supra* Sections I(A)–(E).

decisions and registered 42,777 asylum seekers in 2014. Also note that while the protection rate percentage may be higher in 2017, this figure includes a large portion of individuals who received subsidiary protection—a lesser form of protection that does not carry the same benefits as refugee status.¹⁸¹ The total number of individuals receiving asylum has remained somewhat consistent before and after the height of the immigration crisis (compare 240 persons granted asylum in 2014, 146 in 2015, 154 in 2016, and 106 in 2017), while the need for protection did not remain constant during this timeframe.

The most recent statistics indicate that from January to April 2018, 2,363 refugees were pushed back at the border.¹⁸² During that same period, given the push-back law and the limitations on how many people could enter the transit zones, the number of recorded asylum applications was incredibly low, with 179 applications in January 2018, 56 in February, 48 in March, and 42 in April.¹⁸³ While 267 asylum seekers were granted protection during this period (Jan.–Apr., 2018), only 35 received refugee status while 326 claims were rejected.¹⁸⁴ A closer look at the composition of the applicants' nationalities reveals another layer of this story: during this time frame, 482 in-merit decisions concerned persons hailing from Afghanistan (223), Iraq (217), Somalia (2), and Syria (40). The Government granted refugee status to only six of these individuals.¹⁸⁵

Closely examining statistics on the fault lines of nationality highlights the discrepancy between the actual protection need versus grant rate. For example, the UNHCR has stated that Syrian refugees

181. See sources cited *supra* note 14. Hungary has historically issued temporary and subsidiary forms of protection to legitimate refugees as a way of granting them lesser rights. See, e.g., BYRNE ET AL., *supra* note 17, at 180–81 (noting how stay authorizations became used as a subsidiary form of protection and were “a kind of ‘limited asylum’ for those the authorities did not wish to recognize as (Convention) refugees.”).

182. See *Hungary: Key Asylum Figures as of 1 May 2018*, HUNGARIAN HELSINKI COMMITTEE (June 19, 2018), <https://www.helsinki.hu/wp-content/uploads/HHC-Hungary-asylum-figures-1-May-2018.pdf> [<https://perma.cc/9NJ9-G9SZ>]. Again, this number does not necessarily represent the total number of individuals requiring asylum, as the amendments Hungary passed have deterred many asylum seekers from even approaching the border for protection.

183. *Id.* (57% of applicants were children and 40% were women). These percentages demonstrate how female and young asylum seekers are prioritized on the list for admission to the transit zones at the border with Serbia. It is very difficult for single men to lodge an asylum application in Hungary. See Skype Interview with Gruša Matevžič, *supra* note 93.

184. HUNGARIAN HELSINKI COMMITTEE, *supra* note 182.

185. *Id.*

are eligible for refugee protection.¹⁸⁶ In 2015, roughly 65,000 Syrian asylum seekers presented themselves for protection in Hungary.¹⁸⁷ However, only 19 Syrian asylum seekers were granted refugee status in 2015, and another 140 were granted subsidiary protection.¹⁸⁸ In the first few months of 2018, zero Syrian asylum seekers received refugee status, but thirty-seven received subsidiary protection.¹⁸⁹ Once more, while the “rate” of protection increased in 2018, the total number of Syrians receiving protection is extremely low—and these recent figures do not absolve the Government from responsibility for its role in preventing Syrians from seeking refuge in Hungary during the height of the 2015 refugee crisis, when it admitted only 0.24% of applicants.¹⁹⁰

186. UNHCR published its opinion that most Syrian migrants are likely to fulfill the 1951 definition of a refugee under Article 1A(2), as “they will have a well-founded fear of persecution linked to one of the Convention grounds.” *See International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic, Update IV, supra* note 38, ¶ 36. For many Syrian migrants, UNHCR stated, the link to a 1951 Convention ground “will lie in the direct or indirect, real or perceived association with one of the parties to the conflict.” *Id.*

187. *See* Immigration Stats for 2014–2015, *supra* note 16 (Excel tab eight lists the total number of registered asylum seekers in 2015; excel tab nine includes data on the number of asylum applications in 2015 by nationality).

188. Nineteen Syrian asylum seekers were granted asylum in 2015, and 36.74 percent of the 177,135 recorded asylum seekers hailed from Syria in 2015. *See* Immigration Stats for 2014–2015, *supra* note 16 (Excel tabs eleven, nine and eight, respectively). One hundred forty were granted subsidiary protection in 2015. *Id.* (Excel tab eleven). The remainder were either not granted any protective status or had their cases pending (there were 36,694 cases pending, in total, at the end of 2015). *Id.* (Excel tab ten).

189. *See* HUNGARIAN HELSINKI COMMITTEE, *supra* note 182.

190. *See* Immigration Stats for 2014–2015, *supra* note 16 (Out of roughly 65,000 Syrian applicants, only 159 received some form of protection—19 received refugee status and 140 received subsidiary protection).

II. A NON-DEROGABLE OBLIGATION: INTERNATIONAL AND REGIONAL LAW PROHIBIT REFOULEMENT

“The current asylum law and practice in Hungary are not in compliance with international and European human rights standards. At the moment, virtually nobody can access international protection in Hungary.”¹⁹¹

International law cannot always provide answers, but it does provide an important normative framework. Two of the most important tenets of international human rights law in the context of refugee protection are (1) *nonrefoulement* (the principle that a person should not be sent to a place where s/he will be at risk of harm) and (2) that an individual should not be subject to torture or to cruel, inhuman or degrading treatment. The positive obligation international refugee law requires of States is simple: provide individuals fleeing persecution with the right to *seek* asylum, fairly assess their claim for protection, and do not send them to a place where they will be at risk of ill-treatment or persecution (*refouler*).¹⁹² This section provides an overview of international refugee law and human rights law, as well as the EU’s regional protection framework and jurisprudence, regarding the prohibition on refoulement. It begins with an important caveat on the limits of sovereignty as an excuse for noncompliance with international legal obligations.

A. Sovereignty Cannot Justify State Noncompliance

Traditionally, States retain control over their borders as sovereign powers.¹⁹³ However, this right is not absolute; an important exercise of State sovereignty occurs when States sign and ratify international and regional treaties, legally binding themselves to uphold the duties enumerated therein.¹⁹⁴ Thus, when a State ratifies

191. *Third Party Intervention in S.O. v. Austria and A.A. v. Austria, supra* note 162, ¶ 44.

192. States must also implement these obligations without discrimination. *See* 1951 Convention, *supra* note 4, art. 3.

193. *See, e.g.*, U.N. Charter art. 2, ¶ 1 (sovereign equality of all Member States); *see also* U.N. Charter art. 2, ¶ 7 (United Nations noninterference in Member States’ domestic matters).

194. “[These obligations are] binding upon the parties . . . and must be performed by them in good faith.” Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331, <http://www.refworld.org/docid/3ae6b3a10.html> (on file with the Columbia Human Rights Law Review).

the 1951 Convention, it is obligating itself to respect, protect, and fulfill the rights of refugees announced in the Convention. Hungary has been obligated to protect refugees under the 1951 Convention and the 1967 protocol¹⁹⁵ since its accession on March 14, 1989.¹⁹⁶ Sovereignty might be the rule, but refugees are the exception.¹⁹⁷

While sovereignty is the bedrock of the modern international legal regime,¹⁹⁸ it cannot be used to justify a State's actions to prevent asylum seekers from accessing protection within its borders, particularly when a State has willingly ratified international and regional instruments requiring it to uphold certain standards of protection,¹⁹⁹ or when those obligations are considered customary international law²⁰⁰ or *jus cogens*.²⁰¹ The "right to grant asylum remains a right of the State,"²⁰² but States may not violate treaty obligations and customary international law—including the right of all

195. 1951 Convention, *supra* note 4; 1967 Protocol relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

196. See 15/1989. (VI. 14.) Korm. r. a menekültek helyzetére vonatkozó 1951. évi július hó 28. napján elfogadott egyezmény valamint a menekültek helyzetére vonatkozóan az 1967. évi január hó 31. (Government Decree No. 15/1989 on the publication of the Convention relating to the Status of Refugees adopted on 28 July 1951 and of the Protocol relating to the Status of Refugees entered into force on 31 January 1967). Hungary initially signed with reservations—agreeing only to accept European refugees—but it lifted the geographic reservation in 1998, after pressure from the European Union. See BYRNE ET AL., *supra* note 17, at 152–53. Hungary was the first East bloc country to sign the Refugee Convention. Fullerton, *supra* note 17, at 511.

197. Guy S. Goodwin-Gill, Professor of Law at Univ. of New South Wales, Presentation at Georgetown Univ. Law Ctr. Human Rights Inst.: Refugees and Rights, Asylum and Solutions: Can International Law Provide the Answers? (April 4, 2018) (on file with author).

198. See, e.g., M. S. Janis, *Sovereignty and International Law: Hobbes and Grotius*, in ESSAYS IN HONOUR OF WANG TIEYA 391, 393 (Ronald Macdonald ed., 1994) ("Sovereignty was the crucial element in the peace treaties of Westphalia.").

199. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 212 (3d ed. 2013) ("[I]nternational law can be seen as the body of restrictions on sovereignty that have been accepted by states through the mechanisms of custom and treaty."); see also *id.* at 261–62 (noting that sovereignty "never has been unconditional").

200. See *infra* note 222 (defining customary international law).

201. See *infra* note 227 (defining *jus cogens*).

202. C. Harvey, *Taking Human Rights Seriously in the Asylum Context? A Perspective on the Development of Law and Policy*, in CURRENT ISSUES IN UK ASYLUM LAW AND POLICY 213, 221 (F. Nicholson and P. Twomey eds., 1998) (emphasis added).

persons to *seek* and *enjoy* asylum²⁰³ and nonrefoulement.²⁰⁴ Asylum must be afforded to those persons deserving of its protection—any other interpretation would pervert the spirit and intent of the 1951 Convention and 1967 Protocol. And, at a minimum, asylum seekers must not be refouled.

Hungary nominally recognizes these core responsibilities in its national Constitution.²⁰⁵ Yet, the Hungarian government has relied heavily on security concerns and sovereignty to justify its fences, push-back law, and other barriers to entry it imposes on asylum seekers.²⁰⁶ Prime Minister Orbán has used fearmongering to garner support for his hardline immigration policies, publicly equating migrants with terrorists,²⁰⁷ warning that Hungary's success would be jeopardized “if we are mixed with others and there is a threat of terrorism, if public safety deteriorates, and if our sense of being at home disappears and we feel like foreigners in our own land.”²⁰⁸ Even today, years after the

203. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 14 (Dec. 10, 1948) [hereinafter UDHR].

204. See 1951 Convention, *supra* note 4, art. 33(1); see also, United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (no State may send a person to another State where s/he would be in danger of being subjected to torture and/or inhuman or degrading treatment.).

205. See MAGYARORSZÁG ALAPTÖRVÉNYE, *supra* note 31, arts. XIV(1)-(3) (Article XIV(2) (nonrefoulement); Article XIV(3) (right to asylum); and Article XIV(1) (no collective expulsions)).

206. See, e.g., Strasbourg Ruling: Unacceptable and Unenforceable: Statement of Minister János Lázár, KORMANY - WEBSITE OF THE HUNGARIAN GOVERNMENT (March 23, 2017, 8:38 PM), <http://www.kormany.hu/en/prime-minister-s-office/news/strasbourg-ruling-unacceptable-and-unenforceable> [https://perma.cc/8KBS-8LJG]. (“Hungary insists, based on the principle of the reinforcement of sovereignty . . . the right to decide whom to take in and whom to expel.”). This argument has gained traction around the world in recent history. Alice Edwards, *Human Rights, Refugees, and the Right to Enjoy Asylum*, 17 INT’L J. REFUGEE L. 293, 300 (2005) (“In today’s climate of heightened security concerns, arguments revolving around State sovereignty are gaining renewed vigour as the ultimate right of States to patrol their borders and to reject asylum-seekers at their frontiers.”).

207. See “Hungary’s Response to the EU Relocation Quota,” *supra* Section I.E; see also AMNESTY INT’L, *supra* note 73 (describing a media campaign intended to inspire negative sentiment towards refugees).

208. Orbán, Viktor, *Prime Minister Viktor Orbán’s Speech at the Annual General Meeting of the Association of Cities with County Rights*, KORMANY - WEBSITE OF THE HUNGARIAN GOVERNMENT (Feb. 11, 2018, 5:39 PM), <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-Orbán-s-speech-at-the-annual-general-meeting-of-the-association-of-cities-with-county-rights> [https://perma.cc/TL6A-4J9N].

fence has been erected, Orbán's brazen attitude towards migration remains that it is "a dangerous, harmful phenomenon which Hungary does not want to participate in."²⁰⁹

The following sections explore the binding obligation not to refoule asylum seekers under international and EU law.

B. International Law and Nonrefoulement

Nonrefoulement prohibits States from (directly or indirectly) sending a refugee back to any country "where his life or freedom would be threatened."²¹⁰ This customary international legal norm "clearly place[s] limits on what states may lawfully do" to persons seeking protection in their territory.²¹¹ Under the principle of nonrefoulement, not only are States restricted from sending away refugees who have already entered the country, but they also may not prevent refugees from accessing their territory.²¹²

Rejecting a refugee at the frontier has the same effect as refoulement if it forces the refugee back to a place where s/he would

209. Viktor Orbán, *To Us, Hungary Comes First*, KORMANY - WEBSITE OF THE HUNGARIAN GOVERNMENT (Feb. 8, 2018, 6:19 PM), <http://www.kormany.hu/en/the-prime-minister/news/to-us-hungary-comes-first> [<https://perma.cc/6A78-VXGA>].

210. 1951 Convention, *supra* note 4, art. 33(1) ("[N]o Contracting State shall expel or return ('refouler') a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.") (emphasis added); *see also* U.N. High Comm'r. for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, para. 7, (Jan. 26, 2007) (prohibiting expulsion to any country where there is such a threat, "or from where he or she risks being sent to such a risk.") [hereinafter UNHCR Advisory Opinion on Extraterritorial Application of Non-Refoulement].

211. Guy S. Goodwin-Gill, *Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 INT'L J. OF REFUGEE L. 443, 444 (2011) [hereinafter Goodwin-Gill, *Right to Seek Asylum*]; *see also* Guy S. Goodwin-Gill, *The Language of Protection*, 1 INT'L J. REFUGEE L. 6, 7 (1989) [hereinafter Goodwin-Gill, *The Language of Protection*] ("trac[ing] the emergence and development of the concept of international protection").

212. *See, e.g.,* Edwards, *supra* note 206, at 300 (citing G.A. Res. 2312 (XXIX) art. 3(1), 1967 Declaration on Territorial Asylum (Dec. 14, 1967) and Report of the UN Conference on Territorial Asylum, U.N. Doc. A/CONF.78/12 (Apr. 21, 1977)); *see also* D. JOLY, HAVEN OR HELL? ASYLUM POLICIES AND REFUGEES IN EUROPE 1 (1996) ("[S]tates do not have a completely free hand in deciding whom to admit with regard to refugees.").

otherwise be persecuted or harmed.²¹³ As such, refusal to let a refugee apply for asylum could violate the principle of nonrefoulement.²¹⁴ In fact, the UNHCR has recognized that *nonrefoulement* “is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights.”²¹⁵ States must afford refugees the opportunity to apply for asylum under international human rights law by providing “fair and efficient asylum procedures.”²¹⁶ This is the only way to effectively assess whether or not returning an individual to a specific country would violate nonrefoulement. This section fleshes out the two main strands of nonrefoulement under international law based on 1) the 1951 Convention and 2) the Convention Against Torture.

The 1951 Convention Relating to the Status of Refugees (hereinafter “1951 Convention”) is the seminal international treaty dealing with refugees.²¹⁷ It defines refugees as persons who have a

213. See Goodwin-Gill, *The Language of Protection*, *supra* note 211, at 12 (“*non-refoulement* [includes] non-rejection at the frontier.”).

214. Edwards, *supra* note 206, at 301 (“[W]ithout appropriate asylum procedures, obligations of *non-refoulement*, including rejection at the frontier, could be infringed.”); see also Goodwin-Gill, *Right to Seek Asylum*, *supra* note 211, at 445 (“[States are obligated] not to frustrate the exercise of the right to seek asylum in such a way as to leave individuals at risk of persecution or other relevant harm.”); U.N. High Comm’r. for Refugees, Conclusion on International Protection No. 85, ¶ *q* (1998), <http://www.unhcr.org/excom/exconc/3ae68c6e30/conclusion-international-protection.html> [<https://perma.cc/TU76-DWHX>] [hereinafter UNHCR ExCom Conclusions] (emphasizing “no rejection at frontiers without access to fair and effective procedures for determining . . . protection needs”).

215. U.N. High Comm’r for Refugees, Note on International Protection, ¶ 16, U.N. Doc A/AC.96/951 (Sept. 13, 2001) [hereinafter UNHCR 2001 Note on International Protection].

216. See, e.g., UNHCR Advisory Opinion on Extraterritorial Application of Non-Refoulement, *supra* note 210, ¶ 8 (explaining that even if the State cannot provide asylum in their own territory, they owe refugees “access to [their] territory and to fair and efficient asylum procedures.”); see also Global Consultations on International Protection, *supra* note 96, ¶¶ 5, 50(a) (emphasizing the importance of making available a fair and appropriate procedure for asylum-seekers). Several UNHCR Executive Committee Conclusions discuss a right to “fair and efficient” asylum procedure. See, e.g., ExCom Conclusion No. 99, ¶ 1 (2004), <http://www.unhcr.org/excom/exconc/41750ef74/general-conclusion-international-protection.html> [<https://perma.cc/3CWG-LPD7>]; see also ExCom Conclusion No. 71, ¶ *i* (1993), <http://www.refworld.org/docid/3ae68c6814.html> [<https://perma.cc/8Z8N-TALW>]; ExCom Conclusion No. 81, ¶ *h* (1997), <http://www.refworld.org/docid/3ae68c690.html> (on file with the Columbia Human Rights Law Review); ExCom Conclusion No. 82, ¶ *d*(ii) (1997), <http://www.refworld.org/docid/3ae68c958.html> [<https://perma.cc/8Z8N-TALW>].

217. See, e.g., G.A. Res. 71/1, New York Declaration for Refugees and Migrants (Oct. 3, 2016) (reaffirming the 1951 Convention and its 1967 Protocol as foundational).

well-founded fear of persecution based on their “race, religion, nationality, membership of a particular social group, or political opinion” and must therefore seek protection outside of their home country.²¹⁸ The Protocol Relating to the Status of Refugees (hereinafter “1967 Protocol”), broadened the application of the 1951 Convention beyond its original application in the aftermath of World War II, extending protection to those persecuted around the world.²¹⁹

The principle of nonrefoulement is captured in both the 1951 Convention and its 1967 Protocol: no State is allowed to push back “a refugee *in any manner whatsoever*²²⁰ to the frontiers of territories where his life or freedom would be threatened.”²²¹ Even those States who are not party to the Convention and/or its Protocol must abide by the prohibition on refoulement as it is considered customary international law.²²²

Complementary to international refugee law, international human rights law also prohibits refouling individuals—although in a

218. 1951 Convention, *supra* note 4, art. 1A(2).

219. The 1967 Protocol broadened protection by lifting the territorial and temporal restrictions of the 1951 Convention (the Convention initially protected only those who became refugees because of the events in Europe occurring before January 1951). 1967 Protocol, *supra* note 195, art. 1, ¶ 3. For an overview of the “modern international refugee law regime,” see, e.g., Andrew I. Schoenholtz, *The New Refugees and The Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 CHI. J. INT’L L. 81, 85–86 (2015).

220. See UNHCR 2001 Note on International Protection, *supra* note 215, ¶ 16, (“This includes rejection at the frontier, interception and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx.”).

221. 1951 Convention, *supra* note 4, art. 33 (describing the prohibition on refoulement “on account of [one’s] race, religion, nationality, membership of a particularly social group or political opinion.”). State Parties to the 1951 Convention and/or the 1967 Protocol have a treaty obligation to respect the principle of nonrefoulement. See 1967 Protocol, *supra* note 195, art. I(1) (State Parties agree to comply with 1951 Convention Arts. 2-34).

222. See UNHCR Advisory Opinion on Extraterritorial Application of Non-Refoulement, *supra* note 210, ¶¶ 14–16 (stating that nonrefoulement is a rule of customary international law and, as such, is binding on all States regardless of whether they are party to the 1951 Convention and/or 1967 Protocol). Customary international law is binding and represents “well-established state practices to which a sense of obligation has come to be attached.” DONNELLY, *supra* note 199, at 5, 29. Further, “customary international [law] binds all governments whether or not they have accepted it so long as they have not expressly and persistently objected to its development.” CONNIE DE LA VEGA, *DICTIONARY OF INTERNATIONAL HUMAN RIGHTS LAW* 34 (2013).

broader context.²²³ Unlike the 1951 Convention, human rights law does not require the risk of harm to be based on one of the five protected grounds.²²⁴ The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “CAT, 1984”) prohibits refouling individuals to any State where they would be “in danger of being subjected to torture.”²²⁵ Article 16 further expands the CAT’s application to inhuman and degrading treatment that would not otherwise fall under Article 1’s definition of torture.²²⁶ The obligations set forth in the CAT are non-derogable and represent not only customary international law, but *jus cogens*.²²⁷

In addition to the CAT, the International Bill of Human Rights—comprised of the Universal Declaration of Human Rights (UDHR, 1948),²²⁸ the International Covenant on Civil and Political

223. The 1951 Convention and its 1967 Protocol limit the applicability of nonrefoulement to the danger of persecution on the basis of the five recognized protection grounds (race, religion, nationality, membership of a particular social group or political opinion). See 1951 Convention, *supra* note 4, art. 33(1).

224. *Id.*; see also *id.* art. 33(2) (excluding certain refugees from protection against nonrefoulement when “there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”).

225. See Convention Against Torture, *supra* note 204, art. 3 (“1. No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”).

226. While Article 16 does not list Article 3 explicitly, the Committee Against Torture affirmed the list is not exclusive and that the obligation to prevent ill-treatment “overlaps and is largely congruent with the obligation to prevent torture.” Comm. Against Torture Gen. Comment No. 2, U.N. Doc CAT/C/GC/2, ¶ 3 (Jan. 24, 2008), <http://www.refworld.org/docid/47ac78ce2.html> [<https://perma.cc/QN8U-L5AK>].

227. See *id.* ¶ 1. (“The provisions of article 2 reinforce this peremptory *jus cogens* norm against torture and constitute the foundation of the Committee’s authority to implement effective means of prevention”). “[*Jus cogens* is] a peremptory norm of general international law . . . a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, *supra* note 194, art. 53.

228. UDHR, *supra* note 203.

Rights (ICCPR, 1966),²²⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)²³⁰—also implies a prohibition on refoulement. The UDHR affirms that all persons have “the right to seek and to enjoy in other countries asylum from persecution,”²³¹ and underscores that persons must not be subject to “torture or to cruel, inhuman or degrading treatment or punishment.”²³² Certain rights enshrined in the ICCPR²³³ have also been interpreted as prohibiting the refoulement of persons at risk of irreparable harm.²³⁴

Finally, it is essential to underscore that a State’s obligation to respect the nonrefoulement principle is *not* confined to its territory; it applies wherever the State exercises control.²³⁵ Where a State is deemed to have control, it may only return an asylum seeker to another country if that country will also abide by the principle of nonrefoulement and allow the individual to seek asylum in accordance with international law.²³⁶ As such, the UNHCR has concluded a State must not remove an asylum seeker to a third country before it “establishe[s] that the third country will treat the asylum-

229. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

230. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

231. UDHR, *supra* note 203, art. 14(1).

232. *Id.*, art. 5.

233. *See, e.g.*, ICCPR, *supra* note 229, arts. 6, 7 (Article 6 dealing with deprivation of life and the inherent right to life; Article 7 dealing with torture and cruel, inhuman, or degrading treatment or punishment).

234. *See* Human Rights Comm., General Comment No. 31, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), <http://www.refworld.org/docid/478b26ae2.html> [<https://perma.cc/734B-2XUW>]. (States have “an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”).

235. *See* UNHCR Advisory Opinion on Extraterritorial Application of Non-Refoulement, *supra* note 210, ¶¶ 23–43; *see also supra* Section I.B (Hungary considers the transit zones to be an international “no man’s land,” but the ECtHR has held that a State is responsible for human rights violations wherever it exercises control) (citing *Amuur v. France*, App. No. 19776/92, ¶ 52 (Eur. Ct. H.R. June 25, 1996)).

236. Global Consultations on International Protection, *supra* note 96, ¶ 50(c).

seeker . . . in accordance with accepted international standards, will ensure effective protection against refoulement, and will provide the asylum-seeker . . . with the possibility to seek and enjoy asylum.”²³⁷

C. EU Law and Nonrefoulement

As a European Union member state, Hungary is party to a number of regional treaties and directives that shape its obligations to asylum seekers.²³⁸ The EU’s protection regime further supports the broad international law obligation not to refole persons in danger of serious mistreatment. The Treaty on the Functioning of the European Union (TFEU, 1957), Charter of Fundamental Rights of the European Union (EU Charter, 2000), and European Convention on Human Rights (ECHR, 1950) all prohibit refoulement. The TFEU requires EU asylum law to comply with the principle of nonrefoulement.²³⁹ The Charter of Fundamental Rights guarantees a right to asylum, and protection from “collective expulsions” and refoulement.²⁴⁰ Under Article 3, the ECHR prohibits subjecting an individual to “torture or to inhuman or degrading treatment or punishment,”²⁴¹ which the European Court of Human Rights (ECtHR) has interpreted as prohibiting refoulement.²⁴²

237. UNHCR ExCom Conclusion No. 85, *supra* note 214, § aa.

238. Hungary joined the EU on May 1, 2004. *See* Presidency Conclusions, Copenhagen European Council, art. 1(3), (Dec. 12–13, 2002) <https://www.consilium.europa.eu/media/20906/73842.pdf> [<https://perma.cc/FYP7-X7NR>].

239. Consolidated Version of the Treaty on the Functioning of the European Union art. 78(1), Dec. 13, 2007, 2008 O.J. (C 115) 47.

240. Charter of Fundamental Rights of the European Union arts. 18–19, Dec. 7, 2000, 2012 O.J. (C 326/391) (Article 18 announces a “right to asylum” and Article 19 prohibits refoulement and collective expulsion).

241. European Convention on Human Rights, *supra* note 5, art. 3; *see also* Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto, *opened for signature* Sept. 16, 1963, art. 4, E.T.S. No. 046 (entered into force May 2, 1968) (“Collective expulsion of aliens is prohibited.”), https://www.echr.coe.int/Documents/Convention_ENG.pdf [<https://perma.cc/TQ3P-N9PX>].

242. *See, e.g.*, T.I. v. United Kingdom, App. No. 43844/98, 14 (Eur. Ct. H.R. Mar. 7, 2000) (“[T]he fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3 . . . imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3.”); *see also* Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 114 (Eur. Ct. H.R. Feb. 23, 2012) (“[E]xpulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3.”); Ilias and Ahmed v.

States must extend these guarantees and protections to anyone within their jurisdiction.²⁴³ While jurisdiction is typically understood as applying to acts within a country's own territory, it also applies wherever a country exercises "control" over an individual—even if technically outside of the State's territory.²⁴⁴ Therefore, the nonrefoulement obligation of the removing State extends to both the removing State and to the possibility that the receiving State might return the applicant to his or her country of origin.²⁴⁵ Furthermore, European human rights law affirms that the prohibition on nonrefoulement is non-derogable: given its "absolute" nature, not even an "increasing influx of migrants" can "absolve a State of its obligations" under Article 3.²⁴⁶

This Section provides an overview of the applicable regional laws prohibiting refoulement, focusing on the ECHR, the jurisprudence of the ECtHR concerning nonrefoulement under ECHR Article 3, and the Asylum Procedures Directive (recast)²⁴⁷ under the Common European Asylum System ("CEAS")²⁴⁸ as it applies to the safe third country concept.

Hungary, App. No. 47287/15, ¶ 112 (Eur. Ct. H.R. Mar. 14, 2017) ("Article 3 implies an obligation not to deport" where there is a real risk of the applicant being subjected to treatment contrary to Article 3 in the destination country).

243. See, e.g., *Soering v. United Kingdom*, App. No. 14038/88, ¶¶ 81–91 (Eur. Ct. H.R. July 7, 1989) (discussing Article I, stating that "the engagement undertaken by a Contracting State is confined to 'securing' . . . the listed rights and freedoms to persons within its own 'jurisdiction.'"); see also *Hirsi Jamaa*, App. No. 27765/09 ¶ 70 ("The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it . . .").

244. *Hirsi Jamaa*, App. No. 27765/09, ¶ 74 ("Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation . . .").

245. See *id.* ¶ 146; see also *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 88–89 (Eur. Ct. H.R. Jan. 21, 2011) (holding that transfer of an asylum seeker by Belgium to Greece under the Dublin Regulation violated international and European human rights obligations where Greece did not provide access to an effective remedy, thus exposing the asylum seeker to the risk of refoulement).

246. *Hirsi Jamaa*, App. No. 27765/09, ¶ 122.

247. Directive 2013/32/EU, *supra* note 90, art. 43.

248. The Common European Asylum System ("CEAS") is a legislative framework based on the 1951 Convention Relating to the Status of Refugees, as amended by its 1967 Protocol. It was adopted to harmonize asylum law among EU Member States. Int'l Ass'n of Refugee Law Judges, Eur. Chapter, *An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis*, EUROPEAN ASYLUM SUPPORT OFF. 13 (Aug. 2016), <https://www.easo>.

1. Nonrefoulement Under the ECHR

The ECHR requires “independent and rigorous scrutiny” of an applicant’s claim that deportation will put him/her at risk of inhumane or degrading treatment in violation of Article 3.²⁴⁹

As the obligation not to refole refugees is based on ECHR Article 3, its interpretation not only supports the prohibition on nonrefoulement contained in 1951 Convention Article 33(1), but also supports broader applicability like that of the Convention Against Torture.²⁵⁰ Under ECHR jurisprudence, a Member State’s obligation not to refole refugees is comprised of both: 1) “the duty to advise an alien of his or her rights to obtain international protection,” and 2) “the duty to provide for an individual, fair and effective refugee-status determination and assessment procedure.”²⁵¹ As noted above, a “fair and effective” asylum process is also emphasized in UNHCR Executive Committee Conclusions, and such an assessment is necessary to ensure that the principle of nonrefoulement is upheld.²⁵² The ECtHR jurisprudence further emphasizes the importance of conducting a fair status determination procedure to assess asylum seekers’ protection needs. Without this individualized assessment, it is impossible to know if sending the asylum seeker to another country will expose him/her to irreparable harm. This also comports with the related prohibition on

europa.eu/sites/default/files/public/BZ0216138ENN.PDF [https://perma.cc/D5S7-2WU7].

249. See *Jabari v. Turkey*, App. No. 40035/98, ¶¶ 50, 39 (Eur. Ct. H.R. July 11, 2000); see also *Hirsi Jamaa v. Italy*, App. No. 27765/09, ¶ 116 (Eur. Ct. H.R. Feb. 23, 2012); *M.A. v. Cyprus*, App. No. 41872/10, ¶ 133 (Eur. Ct. H.R. July 23, 2013); *Ergashev v. Russia*, App. No. 12106/09, ¶ 115 (Eur. Ct. H.R. Dec. 20, 2011); *K.A.B. v. Sweden*, App. No. 886/11, ¶ 70 (Eur. Ct. H.R. Sept. 5, 2013); *Chahal v. United Kingdom*, App. No. 22414/93, ¶ 96 (Eur. Ct. H.R. Nov. 15, 1996).

250. ECHR Art. 3 echoes the Convention Against Torture. Compare Convention Against Torture, *supra* note 204, at Art. 3 (prohibiting refoulement where an individual would be at risk of torture); Art. 16 (prohibiting cruel, inhuman or degrading treatment), with European Convention on Human Rights, *supra* note 5, art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”) (which the ECtHR has interpreted as prohibiting refoulement where a risk of that treatment exists, as described herein).

251. *Hirsi Jamaa*, App. No. 27765/09, ¶ 72 (Pinto de Albuquerque J, concurring) (noting that determination of whether refugees would be exposed to harm if removed requires “access to a fair and effective procedure by which their cases are considered individually.”).

252. UNHCR ExCom Conclusions, *supra* note 216.

collective expulsion under ECHR Protocol No. 4, Article 4.²⁵³ Additionally, individualized assessments can demonstrate that a group of negative decisions does not equate to collective expulsion.²⁵⁴

The Court also has emphasized the irreparable nature of the harm that would befall an asylum seeker “if the risk of torture or ill-treatment materializes”²⁵⁵ and, relatedly, “the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and substantiate their complaints.”²⁵⁶ Furthermore, the country seeking to expel the refugee must seek assurances that the destination country will not harm the applicants and also process their asylum applications.²⁵⁷

2. Nonrefoulement and ECtHR Jurisprudence

The ECtHR employs a two-prong test to determine whether the prohibition on refoulement is violated: (1) Is there a real risk of exposing the asylum seeker to degrading/inhumane treatment either directly in the destination country or indirectly in the case of chain refoulement to another country?;²⁵⁸ (2) If there is the possibility of such a risk, is there an effective remedy the asylum seeker can pursue to avoid deportation?²⁵⁹ Additionally, such protections must be “practical

253. See, e.g., *Conka v. Belgium*, App. No. 51564/99, ¶¶ 56–63 (Eur. Ct. H.R. Feb. 5, 2002) (discussing alleged violation of Art. 4); see also *Hirsi Jamaa*, App. No. 27765/09, ¶¶ 159–86 (evaluating petitioners’ collective expulsion claim).

254. See *Hirsi Jamaa*, App. No. 27765/09, ¶ 184 (explaining that a “number of aliens . . . subject to similar decisions” does not constitute collective expulsion if everyone gets the chance to have an individualized assessment).

255. *Id.* ¶ 200 (discussing the importance of a remedy having suspensive effect on the expulsion while it is being contested).

256. *Id.* ¶ 204 (citing *M.S.S. v. Belgium*, App. No. 30696/09, ¶ 304 (Eur. Ct. H.R. Jan. 21, 2011)).

257. See *id.* ¶ 211.

258. See, e.g., *Ilias v. Hungary*, App. No. 47287/15, ¶ 113 (Eur. Ct. H.R. Mar. 14, 2017) (noting that “[i]n cases concerning the expulsion of asylum-seekers . . . [the Court’s] main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled.”) (citing *M.S.S.*, App. No. 30696/09 ¶ 286).

259. See *Hirsi Jamaa*, App. No. 27765/09, ¶¶ 197–200; see also *Abdolkhani v. Turkey*, App. No. 30471/08, ¶ 108 (Eur. Ct. H.R. Sept. 22, 2009) (noting that an effective remedy under Article 13 requires “(i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant’s expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect.”); *Jabari v. Turkey*, App. No. 40035/98, ¶ 50 (Eur. Ct. H.R. July 11, 2000) (noting that an effective remedy under Article 13 requires “independent and rigorous scrutiny of a

and effective, and not theoretical and illusory.”²⁶⁰ The only way to ensure protection is to meaningfully assess an asylum seeker’s individual application.²⁶¹ In addition to ECHR Article 3, violations of the prohibition on nonrefoulement also typically incorporate a violation of Article 13—the right to an effective remedy.²⁶² Under this provision, an applicant must have the right to appeal a decision before being expelled.²⁶³

The European Court of Human Rights has issued a number of decisions that implicate the nonrefoulement principle.²⁶⁴ This section explores two cases that are particularly useful in assessing how Hungary treats asylum seekers: *Hirsi Jamaa v. Italy* (2012) and *Ilias v. Hungary* (2017).

In *Hirsi Jamaa v. Italy*, the Court found that Italy violated ECHR Article 3²⁶⁵ and 13,²⁶⁶ and Article 4 of Protocol 4²⁶⁷ when it returned a group of individuals to Libya without first examining their individual cases or providing them an opportunity to challenge their removal. As part of the required individual assessment, the Court noted that the responsible State must seek assurances that the

claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned”); Mole & Meredith, *supra* note 21, at 75–76 (“The test under the ECHR remains the same for all these cases. Is there a real risk of exposure to ill-treatment, either in the state of proposed destination or through chain *refoulement*? If there is an arguable violation, is there an effective remedy?”).

260. *Hirsi Jamaa*, App. No. 27765/09, ¶ 175.

261. See *Z.N.S. v. Turkey*, App. No. 21896/08, ¶¶ 47–50 (Eur. Ct. H.R. June 28, 2010) (finding that there would be an ECHR Art. 3 violation if Turkish government returned applicant to Iran prior to “conducting a meaningful assessment” of the asylum application).

262. European Convention on Human Rights, *supra* note 5, art. 13.

263. See, e.g., *Abdolkhani*, App. No. 30471/08 ¶ 108 (holding that effective remedy requires “(i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing there was a real risk of treatment contrary to Art. 3 in the event of the applicant’s expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect”).

264. Available caselaw concerning nonrefoulement is somewhat limited, as States will often withdraw their expulsion decision after a case is filed with the ECtHR. See Mole & Meredith, *supra* note 21, at 76.

265. *Hirsi Jamaa v. Italy*, App. No. 27765/09, ¶ 138 (Eur. Ct. H.R. Feb. 23, 2012).

266. *Id.* ¶¶ 205, 207 (finding violation of right to remedy under Article 13 because the applicants were unable to lodge complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 before being removed).

267. *Id.* ¶¶ 185–86 (finding a collective expulsion violation).

destination country will not harm the applicants²⁶⁸ or arbitrarily repatriate them.²⁶⁹ This inquiry further supports the analysis of whether a violation of ECHR Protocol No. 4, Article 4 has occurred, in that lack of individualized assessment may demonstrate that a group of negative decisions equals collective expulsion.²⁷⁰

The ECtHR emphasized the importance of analyzing individual protection needs prior to expulsion—even where an individual does not explicitly seek asylum.²⁷¹ Related to this assertion, the Court underscored that States will be held accountable where authorities “knew or should have known,” based on the abundance of readily available information from “multiple sources,” that expulsion would expose the applicants to treatment proscribed by ECHR Article 3.²⁷² In this vein, the Court also noted that exposing applicants “to the risk of arbitrary repatriation” violates Article 3²⁷³ and that States not only have a duty to make themselves aware of what awaits a potential returnee,²⁷⁴ but are accountable where they “knew or should have known that there were insufficient guarantees” to prevent repatriation.²⁷⁵

Regarding the right to an effective remedy, the Court emphasized that the ECHR necessitates “independent and rigorous scrutiny” of any complaint made by a person in such a situation, where “there exist substantial grounds for fearing a real risk of treatment

268. *See id.* ¶ 211 (The Court required the responsible State to seek assurances that the destination country would not subject the applicants “to treatment incompatible with Article 3 of the [European Human Rights] Convention” or arbitrary repatriation).

269. *See id.* ¶¶ 152, 156.

270. *See id.* ¶¶ 185–86 (finding collective expulsion violation where State failed to ensure each applicant’s circumstances were subject to a “detailed examination” and stating where a “number of aliens are subject to similar decisions,” it is not collective expulsion if everyone has had an individualized assessment).

271. *Id.* ¶ 133 (stating that the applicants did not necessarily have to request asylum—instead, “it was for the national authorities, faced with a situation in which human rights were being systematically violated . . . to find out about the treatment to which the applicants would be exposed after their return.”).

272. *Id.* ¶ 131.

273. *Id.* ¶ 158.

274. *Id.* ¶ 157 (“[T]he Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees.”).

275. *Id.* ¶ 156 (“Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin.”).

contrary to Article 3.”²⁷⁶ To justify its assertion, the Court underscored the irreparable nature of the harm that would befall an asylum seeker “if the risk of torture or ill-treatment materialises,”²⁷⁷ and “the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.”²⁷⁸ Finally, the Court reiterated that the remedy must be “effective in practice,”²⁷⁹ which includes ensuring that applicants can access these procedures and information about them.²⁸⁰

In *Ilias v. Hungary*, the ECtHR held that expelling two Bangladeshi nationals to Serbia, without first assessing whether a “real risk of inhuman or degrading treatment” awaited them, violated ECHR Article 3.²⁸¹ In particular, the Court noted that Hungary’s Government Decree announcing Serbia as a safe third country²⁸² did not absolve it of the obligation to provide a fair, effective determination as to whether Serbia was safe for the specific applicants in question.²⁸³ The Court noted that Hungary ignored a multitude of reports from reputable international sources on the abysmal conditions in Serbia and instead required the applicants to present individual circumstances, thus placing an “unfair and excessive burden of proof”

276. *Id.* ¶ 198 (stating that Art. 13’s guarantee to effective remedy applies to claims where an applicant alleges he/she would face treatment prohibited by Art. 3; see also *Ilias v. Hungary*, App. No. 47287/15, ¶ 113 (Eur. Ct. H.R. Mar. 14, 2017) (stating that the ECtHR’s “assessment of the existence of a real risk must necessarily be a rigorous one”); *Jabari v. Turkey*, App. No. 40035/98, ¶ 50 (Eur. Ct. H.R. July 11, 2000) (“Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned.”).

277. *Hirsi Jamaa v. Italy*, App. No. 27765/09, ¶ 200 (Eur. Ct. H.R. Feb. 23, 2012) (noting that because of this risk, the remedy must have suspensive effect on the expulsion while it is being contested).

278. *Id.* ¶ 204 (citing *M.S.S. v. Belgium*, App. No. 30696/09 (Eur. Ct. H.R. Jan. 21, 2011)).

279. *Id.* ¶ 197.

280. *Id.* ¶ 204 (noting the “importance of guaranteeing anyone subject to a removal measure . . . the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and substantiate their complaints.”). In this case, the Court found that the applicants had neither access to a procedure, nor to interpreters or legal advisers before being deported. *Id.* ¶ 202.

281. *Ilias v. Hungary*, App. No. 47287/15, ¶¶ 124–25 (Eur. Ct. H.R. Mar. 14, 2017).

282. See *supra* Section I.C, “Serbia as a Safe Third Country.”

283. *Ilias*, App. No. 47287/15, ¶¶ 124–25.

on the applicants.²⁸⁴ Furthermore, the Court criticized the ineffectiveness of Hungary's procedure, observing that one of the applicants did not receive any information on his expulsion in his own language (diminishing "his chances of actively participating in the proceedings" to justify his protection concerns), both applicants were prevented from meeting with legal counsel before their hearing, and their attorney only received the court's translated decision after the applicants had been expelled from Hungary.²⁸⁵

The Court determined it would not analyze the potential violation of Article 13—whether there was an effective opportunity to challenge the expulsion decision—since it had already found that the applicants' expulsion to Serbia violated Article 3.²⁸⁶

3. The Safe Third Country Concept Under EU Law

The prohibition on nonrefoulement often overlaps with discussions of the safe third country concept (STCC). In Europe, sending asylum seekers to safe third countries grew in popularity from the 1980s through the 1990s when many Western European States began incorporating the practice in their national laws.²⁸⁷ The STCC holds that if an asylum seeker passed through a country where s/he could have, and should have, applied for protection, a State may send the asylum seeker back to that country.²⁸⁸ However, before expelling someone to a safe third country, the host State must assess whether the prospective receiving country is actually safe for the applicant; otherwise, failure to run a proper assessment could quickly result in a violation of its nonrefoulement obligations.²⁸⁹

The STCC is intended to promote responsibility-sharing for asylum seekers, increase efficiency in asylum procedures, and limit refugees from international forum shopping.²⁹⁰ However, States can

284. *Id.* ¶ 124.

285. *Id.*

286. *Id.* ¶ 127. If the Court did entertain this allegation, it likely could have found a violation of Article 13 taken together with Article 3. *See, e.g.,* Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 207 (Eur. Ct. H.R. Feb. 23, 2012) (finding such a violation).

287. Mole & Meredith, *supra* note 21, at 72.

288. COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 57.

289. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing Int'l Protection (recast), *supra* note 90, art. 38.

290. *See generally* Violeta Moreno-Laz, *The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties*, in *MIGRATION &*

pervert the STCC, shirking their protection obligations by shuffling asylum seekers abroad. While using the STCC correctly is legally permissible under EU law,²⁹¹ if applied incorrectly, it exposes vulnerable persons to the threat of refoulement—both directly and indirectly. Thus, an expelling State must not only examine the safety of the country to which it will send a particular refugee (direct refoulement), but it must also research whether the receiving country itself will refole the individual to a place where his or her life would be at risk (indirect refoulement). Proper use of the STCC comports with both international and regional law on nonrefoulement as delineated in this article.

There are two primary concerns States must consider when employing the STCC—first, the danger of chain refoulement and, second, repeated expulsion. Chain refoulement occurs when the receiving State further pushes the refugee back to his or her country of origin where there is a risk of persecution or other serious harm. Chain refoulement, or onward expulsion, can often result from procedural deficiencies in the receiving country's asylum system.²⁹² Relatedly, the practice of repeated expulsion creates the problem of refugees bouncing from country to country, unable to seek protection anywhere.²⁹³ Both chain refoulement and repeated expulsion prevent refugees from

REFUGEE PROTECTION IN THE 21ST CENTURY: LEGAL ASPECTS 665 (G.S. Goodwin-Gill and P. Weckel ed., 2015) (explaining that the STCC “was born out of the conviction that the uneven distribution of asylum seekers across the European Union was due to ‘forum shopping’ by applicants” and discussing the allocation of responsibility for asylum claims).

291. See, e.g., Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing Int'l Protection (recast), *supra* note 90, art. 38(2)(a)–(c) (defining how STCC shall be applied). The Dublin Regulation (EU regulation determining which State is responsible for examining an asylum application) and bilateral readmission agreements also imply approval of the STCC. See *supra* note 98 and accompanying text.

292. See, e.g., *Ilias v. Hungary*, App. No. 47287/15, ¶ 44 (Eur. Ct. H.R. Mar. 14, 2017) (“[T]o avoid secondary movements of applicants, common principles should be established for the consideration or designation by Member States of third countries as safe.”) (citing Directive 2013/32/EU); see also *Hirsi Jamaa v. Italy*, App. No. 27765/09, ¶ 146 (Eur. Ct. H.R. Feb. 23, 2012) (reiterating that the State is responsible for ensuring applicant does not face risk of treatment contrary to Article 3 “in the event of repatriation”).

293. See, e.g., *Harabi v. The Netherlands*, App. No. 10798/84 112, 122 (Eur. Ct. H.R. March 5, 1986) (“[T]he repeated expulsion of an individual . . . to a country where his admission is not guaranteed, may raise an issue under Article 3 (Art. 3) of the Convention. Such an issue may arise . . . if an alien is . . . deported repeatedly . . . without any country taking measures to regularise his situation.”).

accessing asylum and expose them to the danger of ill-treatment in contravention of a State's nonrefoulement obligation.

When undertaking the safe third country assessment, States are not permitted to rely on "formal criteria," but must examine whether the destination country is safe for a particular applicant.²⁹⁴ In this vein, being a Member State of the EU does not necessarily mean *ipso facto* that a country is safe.²⁹⁵ For example, the return of asylum seekers under the EU's Dublin Regulation²⁹⁶ still implicates State responsibility under ECHR Article 3 if there is a risk the State will send the asylum seeker to a country where he/she would face degrading or inhuman treatment.²⁹⁷ Similarly, State parties to international agreements are not presumed to be "safe" merely by virtue of their ratification of these treaties—they must also honor human rights and refugee law obligations in practice.²⁹⁸

Thus, before sending an individual to another State, the host State must determine whether the receiving State will apply "fair asylum procedures" in line with international refugee law.²⁹⁹

In sum, the STCC requires States to "[conduct] an individual assessment of whether the previous state will readmit the person; grant the person access to a fair and efficient procedure for determination of his or her protection needs; permit the person to

294. Global Consultations on International Protection, *supra* note 96, ¶ 14 (announcing that "formal criteria," such as being a State party to the 1951 Convention and 1967 Protocol, international human rights treaties, etc., do not allow for the presumption that a country is "safe"—an individual assessment is required); *see also*, *Hirsi Jamaa*, App. No. 27765/09 ¶ 128 ("[D]omestic laws and the ratification of international treaties guaranteeing respect for fundamental rights [are] not in themselves sufficient to ensure adequate protection . . .").

295. *See, e.g.*, *T.I. v. United Kingdom*, App. No. 43844/98, 15 (Eur. Ct. H.R. Mar. 7, 2000) (finding that "the indirect removal in this case to an intermediary country [Germany], which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not . . . exposed to treatment contrary to Article 3 of the Convention" and that the United Kingdom cannot "rely automatically in that context on the arrangements made in the Dublin Convention . . .").

296. *See supra* note 98 and accompanying text.

297. *See, e.g.*, *T.I.*, App. No. 43844/98, 15; *see also* *Abdolkhani v. Turkey*, App. No. 30471/08, ¶¶ 88–89 (Eur. Ct. H.R. Sept. 22, 2009) (reiterating that expulsion to another Contracting State does not absolve a State from running this analysis).

298. *See Hirsi Jamaa*, App. No. 27765/09, ¶ 27.

299. U.N. High Comm'r for Refugees, *An Overview of Protection Issues in Europe: Legislative Trends and Positions Taken by UNHCR*, European Series, Sept. 1995 at 30 (discussing specifically transfers under the Dublin Convention, but the concept is applicable broadly to all transfers to a third country).

remain; and accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including protection from refoulement.”³⁰⁰ Aligned with these rules, the EU has specifically enumerated the requirements that a country must include in its national law to apply the safe third country concept: laws requiring that there be a “connection between the applicant and the third country” in question and the opportunity for an applicant to challenge such a connection; rules on how national authorities determine what constitutes a safe third country and how the concept shall apply to an applicant or a country (“includ[ing] case-by-case consideration”); and procedural safeguards that entail “individual examination of whether the third country concerned is safe for a particular applicant” and the opportunity for an applicant to challenge such a determination.³⁰¹

Additional procedural safeguards include, among others, a personal interview on admissibility,³⁰² informing the applicant that the “safe third country” concept is being applied to his or her asylum application if the decision is solely based on this concept,³⁰³ the “right to an effective remedy” (i.e., appeal),³⁰⁴ and “the opportunity to consult . . . in an effective manner a legal adviser or other counsellor.”³⁰⁵ EU law also announces a set of principles that must be followed for a third country to be deemed “safe.” These include no risk of serious harm based on one of five protected grounds³⁰⁶ or otherwise,³⁰⁷ respect for nonrefoulement as required by the 1951 Refugee Convention³⁰⁸ and international law more broadly,³⁰⁹ and the ability to apply for refugee status and receive protection if eligible.³¹⁰ EU law also urges States to consider the relevant UNHCR guidelines and other reputable

300. U.N. High Comm’r for Refugees, *Legal Considerations on the Return of Asylum-seekers and Refugees From Greece to Turkey as Part of the EU-Turkey Cooperation in Tackling the Migration Crisis Under the Safe Third Country and First Country of Asylum Concept*, at 2 (Mar. 23, 2016), www.unhcr.org/56f3ec5a9.pdf [https://perma.cc/24N3-GKNP].

301. Directive 2013/32/EU, *supra* note 90, art. 38(2)(a)–(c).

302. *Id.* art. 34(1).

303. *Id.* art. 38(3)(a).

304. *Id.* art. 46 (1)(a)(ii).

305. *Id.* art. 22(1).

306. *Id.* art. 38(1)(a) (“[L]ife and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion”).

307. *Id.* art. 38(1)(b) (“[N]o risk of serious harm”).

308. *Id.* art. 38(1)(c) (“[T]he Geneva Convention”).

309. *Id.* art. 38(1)(d) (“[F]reedom from torture and cruel, inhuman or degrading treatment”).

310. *Id.* art. 38(1)(e).

publications when making a safe third country determination.³¹¹ Finally, where the designated safe third country refuses to take back the applicant, the current host State itself must process the asylum seeker's application for international protection.³¹² The UNHCR has echoed both these procedural safeguards and rules regulating what constitutes a safe third country with approval, and further reiterates that a third country must be considered safe "for a *particular applicant*."³¹³

III. DEFYING INTERNATIONAL AND REGIONAL LEGAL OBLIGATIONS: HUNGARY'S DESIGNATION OF SERBIA AS A SAFE THIRD COUNTRY VIOLATES NONREFOULEMENT

"An applicant may only be sent back to a third country if the competent authorities are satisfied that the return decision will not lead to direct or indirect refoulement In my view, there is neither direct, nor indirect refoulement in the case of Serbia."³¹⁴

As discussed in the preceding Section, the nonrefoulement principle prohibits States from (directly or indirectly) expelling or returning "a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened."³¹⁵ It also broadly forbids refouling individuals to any State where they would be in danger of being subjected to torture or to inhuman or degrading treatment or punishment.³¹⁶ Hungary's use of the STCC with regard to Serbia unequivocally violates its nonrefoulement duty under refugee and human rights law.³¹⁷

311. *Id.* ¶ 46.

312. *Id.* art. 38(4) ("Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II" of this document.).

313. *UNHCR Legal Considerations on the Return of Asylum-seekers and Refugees from Greece to Turkey*, *supra* note 300, at 5–6.

314. *See supra* note 80, Minister Trócsányi on the Management of Mass Migration.

315. 1951 Convention, *supra* note 4, art. 33(1) (emphasis added) ("[O]n account of [one's] race, religion, nationality, membership of a particular social group or political opinion."); *see also* 1967 Protocol, *supra* note 195, art. I(1) (stating that "[t]he States Parties to [this] Protocol undertake to apply articles 2–34 inclusive of the 1951 Convention to refugees.").

316. *See discussion supra* Sections II.B, II.C.

317. While it is not the focus of this Article, one could also successfully argue that a number of Hungarian laws and policies—including the push-back law

Hungary began systematically ignoring its obligation not to refole asylum seekers during the height of the 2015 refugee crisis. The passage of Govt. Decree No. 191/2015, naming Serbia a safe third country, is one major mechanism that facilitated this violation.³¹⁸ Under this Decree, any person who enters the country via Serbia is presumptively ineligible for asylum in Hungary. By declaring Serbia a safe third country, the Hungarian government can “legally” reject asylum applications from roughly 95% of asylum seekers under its national law. While, at the time of writing, Hungary has temporarily stopped issuing inadmissibility decisions on this basis,³¹⁹ it recently passed a law incorporating safe third country inadmissibility in its Constitution³²⁰—an indication that Hungary fully intends to resume employing the safe third country concept to keep refugees out.

This Section argues Hungary’s designation of Serbia as a safe third country violates its international and regional obligations not to

itself—violates non-refoulement. See *Hirsi Jamaa v. It.*, App. No. 27765/09, ¶ 185–86 (Eur. Ct. H.R. Feb. 23, 2012) (denying entry to a State’s territory “without any form of examination of each applicant’s individual situation” violates collective expulsion). Additionally, one could argue that the mandatory transit zone residency requirement for refugees violates the principle of non-refoulement (forcing a “decision” between *de facto* detention and *de facto* refoulement). See Felix Bender, *Why the EU Condones Human Rights Violations of Refugees in Hungary*, OPEN DEMOCRACY (Apr. 15, 2018), <https://www.open-democracy.net/can-europe-make-it/felix-bender/why-eu-condones-human-rights-violations-of-refugees-in-hungary> [<https://perma.cc/G6LL-NLCU>] (“[I]mprisoned refugees may leave the zone at any time – through a door that leads back to Serbia.”). See also *Based on recent Strasbourg rulings, the European Convention on Human Rights needs reforming*, KORMANY - WEBSITE OF THE HUNGARIAN GOVERNMENT (Mar. 29, 2017, 8:34 AM), <http://www.kormany.hu/en/ministry-of-justice/news/based-on-recent-strasbourg-rulings-the-european-convention-on-human-rights-needs-reforming> [<https://perma.cc/E4EF-DYWT>] (statement of Minister of State Pál Völner, Ministry of Justice) (“[T]hese people were not in fact under detention, because they were free to leave the transit zone at any time and return to the safe third country from which they arrived in Hungary.”).

318. Decree 191/2015 (VII.21.) (Government Decree on national designation of safe countries of origin and safe third countries) (Hung.), *supra* note 112, § 2 (“[C]andidate states of the European Union . . . qualify as safe third countries.”). See discussion *supra* Section I.C.

319. In 2017, Hungary stopped issuing inadmissibility decisions based on STC grounds. See COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 38; Email from Gruša Matevžič, *supra* note 120 (“It was only the change in practice, the Gov. decree was not repealed. It has happened before that they would just suddenly stop using STC grounds for a while with regard to Serbia.”).

320. See *supra* Section I.C., “Serbia as a Safe Third Country” (discussing Hungary’s “Stop Soros” amendment package—including Bill T/332, which amended Hungary’s Constitution).

refoule refugees on two fronts: (1) Hungary is not complying with the procedural safeguards required to ensure its use of the STCC does not violate its nonrefoulement obligation; and (2) Serbia is not a safe third country for asylum seekers.

A. Serbia as a Safe Third Country: Hungary's Procedural Violations

Under Hungarian law, a claim for protection is deemed inadmissible if the applicant passed through a safe third country where he or she had the opportunity to apply for protection.³²¹ Procedurally, Hungary's application of the STCC violates nonrefoulement in a number of ways.

As previously noted, in July 2015, Hungary adopted a *National List of Safe Third Countries*, which named all candidate States of the European Union as safe third countries, including Serbia.³²² The list applied not only to new arrivals, but retroactively as well. This was particularly problematic for refugees who arrived in Hungary prior to September 2015, as over 99% of asylum seekers entered through the Serbian-Hungarian border before that date.³²³ However, even after the government installed a border fence, this remained a serious problem, as over 95% of individuals applying for asylum in Hungary still passed through Serbia.³²⁴ Hungary's national law means that these asylum seekers' claims are vulnerable to automatic rejection on safe third country grounds.

321. Act LXXX of 2007 on Asylum, *supra* note 14, art. 51 §§ 2(e), 4. (stating that the safe third country concept only applies where there is a sufficient connection between the applicant and the country such that the applicant either "(a) stayed [there] . . . (b) travelled [there] and . . . would have *had the opportunity to request effective protection* . . . ; (c) has relatives [there] and . . . may enter the territory of the country; or (d) the safe third country requests extradition of the person seeking recognition") (emphasis added).

322. Decree 191/2015. (VII. 21.), *supra* note 112. This decree established a national list of safe third countries as amended by 63/2016 (III.31.), *supra* note 112 (adding Turkey as a safe third country).

323. COUNTRY REPORT: HUNGARY, NOVEMBER 2015, *supra* note 36, at 45 ("As over 99% of asylum seekers entered Hungary at the Serbian-Hungarian border section until September 2015, this means the quasi-automatic rejection at first glance of over 99% of asylum claims, without any consideration of protection needs.").

324. See COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 59 ("[T]his means the quasi-automatic rejection at first glance of over 95% of asylum claims, without any consideration of protection needs.").

Until recently,³²⁵ if an asylum seeker passed through a safe third country, their application was deemed inadmissible unless they rebutted the presumption within three days of being informed, before the asylum authorities rendered a decision on their application.³²⁶ However, in practice, this procedural safeguard had little meaning—three days did not allow adequate time to collect evidence,³²⁷ seek legal help, or traverse other insurmountable barriers.³²⁸ Furthermore, the authorities at the border provided asylum seekers with superficial declarations to sign, indicating that they disagreed with the designation of the safe third country. The authorities considered these declarations as the applicant's rebuttal and decided the asylum seeker's fate without taking any further statements.³²⁹

Initially, when Hungary first implemented the *National List of Safe Third Countries*, applicants had seven days to appeal inadmissibility decisions.³³⁰ This was extremely difficult to achieve since officials expelled asylum seekers to the other side of the fence immediately after receiving a negative admissibility decision.³³¹ Refugees found themselves without any access to authorities,

325. Email from Gruša Matevžič, *supra* note 120 (on file with author).

326. Act LXXX of 2007 on Asylum, *supra* note 14, art. 51 § 11 (the applicant must “declare . . . within 3 days at the latest why in his or her individual case, the specific country does not qualify as a safe country of origin or safe third country.”). However, the three-day clock starts on day of interview, meaning the asylum seeker effectively has two days to challenge the safe third country presumption. *Country Report: Hungary, 2016 Update*, *supra* note 12, at 37.

327. The applicant must “prove that s/he had no opportunity for effective protection . . . in that country.” Act LXXX of 2007 on Asylum, *supra* note 14, art. 51 § 5. This is difficult given Serbia's inadequate asylum system.

328. For example, at Röszke authorities only accept rebuttals to the STC presumption that are written in English. See COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 37 (“The HHC's lawyers also observed that in Röszke transit zone the IAO case officers only accept the submissions of the asylum seekers on the safety of Serbia in their individual case in written English. When asylum seekers wanted to submit something in their mother tongues, the case officers sent them away saying that they should ask their friends to translate these into English.”).

329. See COUNTRY REPORT: HUNGARY, NOVEMBER 2015, *supra* note 36, at 31.

330. Act LXXX of 2007 on Asylum, *supra* note 14, art. 53 § 3 (“The request for review shall be submitted to the refugee authority within seven days of the communication of the decision.”).

331. COUNTRY REPORT: HUNGARY, NOVEMBER 2015, *supra* note 36, at 31.

completely unable to lodge an appeal.³³² They were able to wait in line again to access the transit zone but, given extremely long wait times,³³³ it was extremely unlikely that they would make the seven-day appeal deadline.

This procedure changed in 2016, when authorities began to wait for the seven-day deadline to pass before expelling asylum seekers to the other side of the fence.³³⁴ However, under the amended process, there are still procedural obstacles to requesting a review and successfully appealing an inadmissibility decision. For example, applicants have almost no access to legal assistance³³⁵ and are not made aware of the right to appeal.³³⁶ Furthermore, asylum seekers are not given a written copy of the inadmissibility decision in their mother tongue—decisions are only provided orally in a language they can understand.³³⁷ Finally, even if an applicant is able to initiate an appeal, a hearing is not required,³³⁸ and judges do not permit any new facts or

332. UNHCR has underscored the importance of a functioning appeal mechanism. See Global Consultations on International Protection, *supra* note 96, ¶ 41 (“[S]tandards of due process require an appeal or review mechanism to ensure the fair functioning of asylum procedures.”). The UNHCR has further highlighted that “an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory.” *Id.* ¶ 32.

333. COUNTRY REPORT: HUNGARY, NOVEMBER 2015, *supra* note 36, at 32.

334. COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 39.

335. This has only become more difficult with the recent passage of T/333 in June 2018. See, e.g., Vanessa Romo, *Hungary Passes ‘Stop Soros’ Laws, Bans Aid To Undocumented Immigrants*, NPR (June 20, 2018), <https://n.pr/2IMmcbu> [<https://perma.cc/H2PR-8D8P>] (remarking that human rights organizations criticize Hungary for criminalizing “essential and legitimate human rights work” by amending its criminal laws to prohibit “facilitating . . . illegal immigration.”).

336. See COUNTRY REPORT: HUNGARY, NOVEMBER 2015, *supra* note 36, at 28 (noting “no access to legal assistance;” “complicated” legal concepts; and “lack [of] awareness about their right to turn to court.”); see also COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 37 (describing how “in practice . . . asylum seekers are deprived of the opportunity to challenge the application of the safe third country concept on the merits.”).

337. See COUNTRY REPORT: HUNGARY, NOVEMBER 2015, *supra* note 36, at 29 (“The procedure is in Hungarian and the decision on inadmissibility is only translated [in oral communication to] . . . the applicant.”).

338. Act LXXX of 2007 on Asylum, *supra* note 14, art. 53 § 4 (“If necessary, there shall be a personal hearing in the procedure.”). Officials do not tell the applicant that he or she must request a hearing. See COUNTRY REPORT: HUNGARY, NOVEMBER 2015, *supra* note 36, at 29 (“Applicants are not informed that they have to specifically request a hearing in their appeal.”).

circumstances in the request for review.³³⁹ The judge, who until recently was not required to be a real judge,³⁴⁰ only has eight days to render a decision.³⁴¹ Additionally, the arbiter is only empowered to annul a decision and request that the authorities conduct a new procedure.³⁴² The March 2017 amendments make contesting an unfavorable decision even more difficult, as asylum seekers now have only three days to appeal an inadmissibility decision.³⁴³

Imperatively, if a safe third country “fails to take back the applicant,” Hungarian law requires that the asylum authority continue to assess the applicant’s protection claim.³⁴⁴ Serbia has refused to honor its readmission agreement with Hungary since September 15, 2015³⁴⁵; however, Hungary continues expelling refugees to Serbia, arguing that Serbia could change this practice and accept returns “at any time.”³⁴⁶ Thus, while Serbia has denied reentry to those expelled from Hungary, Hungary has refused to proceed with their claims, trapping these refugees in an unnavigable legal limbo.

The ECtHR recently ruled on the shortcomings of Hungary’s application of the STCC. On March 14, 2017, in *Ilias and Ahmed v.*

339. Act LXXX of 2007 on Asylum, *supra* note 14, art. 53 §2(a) (“In the judicial review request submitted against the rejection decision new facts or new circumstances cannot be referred to”); *id.* at art. 53 §4 (“The court shall decide on the request for review . . . on the basis of the available documents. The court’s review shall include a complete examination of both the facts and the legal aspects as they exist at the date when the authority’s decision is made.”) (emphasis added).

340. Initially, for the border review procedure, the arbiter did not have to be a judge; rather, “judicial clerks” were empowered to decide these cases. *Id.* at art. 71/A § 9. “Clerks are not yet appointed judges and have significantly less judicial experience.” COUNTRY REPORT: HUNGARY, 2016 UPDATE, *supra* note 12, at 38. This changed in 2018 under § 94 of Act CXLIII of 2017 (“[A]ccording to the new amendments the clerks can no longer issue judgments.”). See COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 34 n.82.

341. Act LXXX of 2007 on Asylum, *supra* note 14, art. 53 §4.

342. *Id.* art. 53 § 5.

343. See Act XX of 2017, *supra* note 97, § 3(7) (adding Section 80/K § 1 to Act LXXX of 2007 on Asylum, and stating that this provision is applicable during a declared mass migration crisis).

344. Act LXXX of 2007 on Asylum, *supra* note 14, art. 51/A. EU law also states this requirement. See Directive 2013/32/EU, *supra* note 90, at art. 38(4).

345. See COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 38. Furthermore, a country cannot rely on a bilateral agreement to “evade its own responsibility [under the Convention].” *Hirsi Jamaa v. Italy*, App. No. 27765/09, ¶ 129 (Eur. Ct. H.R. Feb. 23, 2012).

346. COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 38.

Hungary,³⁴⁷ the ECtHR found that Hungarian authorities did not provide effective guarantees against the risk of refoulement when deciding to return asylum seekers to Serbia.³⁴⁸ In particular, the Court found that Hungary relied solely on the Government Decree declaring Serbia a safe third country and did not adequately assess a case's individualized characteristics,³⁴⁹ despite the sincere risk that the applicants would be chain-refouled by Serbia onward.³⁵⁰ The Court also highlighted the unfair burden of proof placed on the applicants, preventing them from rebutting the presumption that Serbia was safe,³⁵¹ as well as the lack of information provided to asylum seekers on Hungary's asylum procedure.³⁵²

Again, while the Hungarian government has temporarily suspended the practice of issuing inadmissibility decisions on this basis,³⁵³ its recent incorporation of safe third country inadmissibility into its Constitution³⁵⁴ is a harbinger of future use of the STCC to deny refugees the right to protection in Hungary. These procedural deficits will continue to harm asylum seekers in the future, leaving them vulnerable to refoulement in violation of international and regional law.

B. Serbia is Not a "Safe" Third Country

Serbia is not a safe country for asylum seekers.³⁵⁵ This is critical when analyzing Hungary's failure to fulfill its nonrefoulement

347. Hungary's appeal of this judgment is currently pending at the Grand Chamber of the ECtHR. A final decision from the Grand Chamber is expected in 2019. *See* Press Release, Eur. Ct. H.R., Grand Chamber Hearing in Case of Asylum-Seekers Held in Hungarian Border Zone Before Being Sent to Serbia (Apr. 18, 2018); Press Release, Ministry of Just., Hungary Will Not Become a Victim of the Migrant Business (Apr. 17, 2018), <http://www.kormany.hu/en/ministry-of-justice/news/hungary-will-not-become-a-victim-of-the-migrant-business> [https://perma.cc/H3Z8-ETLG].

348. *Ilias and Ahmed v. Hungary*, App. No. 47287/15, ¶ 125 (Eur. Ct. H.R. Mar. 14, 2017).

349. *Id.* ¶ 124.

350. *Id.* ¶ 118.

351. *Id.*

352. *Id.* ¶ 124.

353. Email from Gruša Matevžič, *supra* note 120 (on file with author).

354. *See supra* notes 121–127 and accompanying text.

355. For Hungary's definition of a safe third country, *see* Act LXXX of 2007 on Asylum, *supra* note 14, art. 2, § i(a)–(d) (Hungary defines a safe third country as a place where the applicant is treated "in line with the following principles," including observation of nonrefoulement; no exposure to the death penalty, torture,

obligations in designating Serbia a safe third country. The ECtHR emphasized that States shall be held accountable where authorities “knew or should have known,” based on the abundance of readily available information from “multiple sources,” that expulsion would expose applicants to treatment proscribed by ECHR Article 3.³⁵⁶ In this vein, the Court also noted that exposing applicants “to the risk of arbitrary repatriation” violates Article 3,³⁵⁷ and that States not only have a duty to make themselves aware of what awaits a potential returnee,³⁵⁸ but are accountable where they “knew or should have known that there were insufficient guarantees” to prevent repatriation.³⁵⁹

The following section exposes Serbia’s barely-functioning asylum system, inadequate reception conditions, and the great risk of onward refoulement that refugees face in-country. It demonstrates the abundance of “readily available” information, from “multiple [reputable] sources,”³⁶⁰ that the Hungarian government has refused to acknowledge. Accordingly, Hungary is completely alone in its assessment; no other EU Member State considers Serbia a safe third country.³⁶¹

In August 2012, UNHCR found that Serbia was not a safe third country because of deficiencies in its asylum system³⁶²—a position it

cruel, inhuman, or degrading treatment or punishment; and the option to apply for refugee status).

356. *Hirsi Jamaa v. Italy*, App. No. 27765/09, ¶ 131 (Eur. Ct. H.R. Feb. 23, 2012); *see also Ilias and Ahmed v. Hungary*, App. No. 47287/15, ¶ 115 (Eur. Ct. H.R. Mar. 14, 2017) (noting that States have an obligation under ECHR Article 3 to carry out a risk assessment of their own initiative in asylum cases based on a “well-known general risk”).

357. *Hirsi Jamaa*, App. No. 27765/09, ¶ 158.

358. *See id.* ¶ 157 (“[T]he Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees.”).

359. *Id.* ¶ 156 (“Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin.”).

360. *See id.* § 131; *see also Ilias and Ahmed*, App. No. 47287/15, § 11.

361. COUNTRY REPORT: HUNGARY, 2017 UPDATE, *supra* note 59, at 58.

362. U.N. High Comm’r. for Refugees, Serbia as a Country of Asylum: Observations on the Situation of Asylum-seekers and Beneficiaries of International Protection in Serbia, ¶ 81 (Aug. 2012), <http://www.refworld.org/docid/50471f7e2.html> [<https://perma.cc/67RS-W42X>] [hereinafter U.N. High Comm’r. for Refugees, Serbia as a Country of Asylum] (“UNHCR recommends that Serbia not be considered a safe third country of asylum, and that countries therefore refrain from sending asylum-seekers back to Serbia on this basis.”).

maintains today.³⁶³ Both Serbia's president and minister of foreign affairs have also stated publicly that Serbia cannot adequately handle the refugees Europe is forcing onto its territory.³⁶⁴ Additionally, a multitude of human rights reports—including those from before the height of the refugee crisis to those most recently published—underscore that while Serbia's asylum law nominally provides for the protection of refugees, there are numerous barriers to accessing asylum in practice.³⁶⁵ Serbia's asylum office has neither the capacity nor the human or financial resources to effectively carry out its mission,³⁶⁶ and its asylum officers lack “professional knowledge,

363. U.N. High Comm'r for Refugees, *supra* note 77, ¶¶ 71, 76.

364. President Tomislav Nikolic stated, “If Serbia becomes a ‘blocked bottleneck’ because countries further down the migrant route have closed their borders, it, too, will have to close its borders regardless of its beliefs.” Press Release, Ministry of Foreign Aff. of the Republic of Serb., Nikolic: We Will Close Borders if We Become “Bottleneck” (Oct. 4, 2016), <http://www.mfa.gov.rs/en/daily-survey-rss/15762-daily-survey-04102016> [<https://perma.cc/HLA4-B6N8>]. Additionally, Foreign Minister Ivica Dacic stressed, “We do not have sufficient capacities and there are already problems, which is why we plead with international organizations, the EU and others engaged in resolving this problem to help.” Press Release, Ministry of Foreign Aff. of the Republic of Serb., Dacic: Serbia at Risk of Becoming Victim to E.U.’s Disunited Policy (Feb. 6, 2017), <http://www.mfa.gov.rs/en/daily-survey-rss/16159-daily-survey-06022017> [<https://perma.cc/J5CX-XS98>].

365. See, e.g., AMNESTY INT’L, EUROPE’S BORDERLANDS: VIOLATIONS AGAINST REFUGEES AND MIGRANTS IN MACEDONIA, SERBIA AND HUNGARY 35 (July 7, 2015) (describing Serbia’s inability to effectively implement its asylum law and protect refugees), <https://www.amnesty.org/en/documents/eur70/1579/2015/en/> [<https://perma.cc/4MXM-BUB7>] [hereinafter AMNESTY INT’L, EUROPE’S BORDERLANDS]; see also AMNESTY INT’L, SERBIA: STILL FAILING TO DELIVER ON HUMAN RIGHTS: AMNESTY INTERNATIONAL SUBMISSION FOR THE UN UNIVERSAL PERIODIC REVIEW – 29TH SESSION OF THE UPR WORKING GROUP, JANUARY 2018 at 13–14 (Aug. 17, 2017), <https://www.amnesty.org/en/documents/eur70/6953/2017/en/> [<https://perma.cc/FG6C-ZLEJ>] [hereinafter AMNESTY INT’L, SERBIA: STILL FAILING TO DELIVER ON HUMAN RIGHTS] (reporting failure of Serbian legislation and enforcement of existing laws to meet international human rights standards); see also BELGRADE CTR. FOR HUM. RTS., RIGHT TO ASYLUM IN THE REPUBLIC OF SERBIA 2017, www.bgcentar.org.rs/bgcentar/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2017.pdf [<https://perma.cc/V8FZ-MH8D>] [hereinafter BELGRADE CTR. FOR HUM. RTS., 2017 SERBIA REPORT]; BELGRADE CTR. FOR HUM. RTS., RIGHT TO ASYLUM IN THE REPUBLIC OF SERBIA 2016, <http://www.asylumineurope.org/sites/default/files/resources/right-to-asylum-in-the-republic-of-serbia-2016-2.pdf> [<https://perma.cc/ZG95-TWL2>] [hereinafter BELGRADE CTR. FOR HUM. RTS., 2016 SERBIA REPORT].

366. See generally HUNGARIAN HELSINKI COMMITTEE, SERBIA AS A SAFE THIRD COUNTRY: A WRONG PRESUMPTION (Sept. 2011), <https://helsinki.hu/wp-content/uploads/HHC-report-Serbia-as-S3C.pdf> [<https://perma.cc/3NDN-F6R8>] (describing the shortcomings of Serbia’s asylum system, including in the context of asylum office capacity, decision-making procedure, assistance and reception

expertise and experience.”³⁶⁷ These inadequacies contribute to lengthy delays in registering asylum seekers and adjudicating claims, as well as Serbia’s failure to provide individual assessments and properly identify vulnerable persons.³⁶⁸ This results in the majority of asylum seekers leaving the country to seek refuge in States with “more [developed] asylum systems.”³⁶⁹

Even before the 2015 refugee crisis sent waves of asylum seekers to the country, Serbia’s asylum system was not functioning properly. Each year, since the advent of its Asylum Law in April 2008, Serbia has consistently interviewed only a fraction of its asylum seekers and has granted asylum to a very small number of refugees. From April 2008 through December 2014, a meager six individuals received asylum.³⁷⁰ In 2015, while 577,995 refugees sought asylum, only 583 lodged applications. The Serbian government interviewed 89 of the applicants³⁷¹ and granted refugee status to sixteen individuals.³⁷² In 2016, 12,821 refugees sought asylum in Serbia, and 574 lodged applications.³⁷³ Of the 574 applicants, the Government

conditions, integration, and the danger of chain refoulement, etc.). The Human Rights Watch reports from 2015–2018 also document poor reception conditions, police abuse, and Serbia’s inadequate asylum system. See HUMAN RIGHTS WATCH, WORLD REPORT 2015: SERBIA: EVENTS OF 2014 (2015), <https://www.hrw.org/world-report/2015/country-chapters/serbia/Kosovo> [<https://perma.cc/Q88E-MNJJ>]; HUMAN RIGHTS WATCH, WORLD REPORT 2016: SERBIA: EVENTS OF 2015 (2016), <https://www.hrw.org/world-report/2016/country-chapters/serbia/Kosovo> [<https://perma.cc/K53Z-CEJA>]; HUMAN RIGHTS WATCH, WORLD REPORT 2017: SERBIA/KOSOVO: EVENTS OF 2016 (2017) <https://www.hrw.org/world-report/2017/country-chapters/serbia/Kosovo> [<https://perma.cc/RLZ7-TSKU>]; HUMAN RIGHTS WATCH, WORLD REPORT 2018: SERBIA/KOSOVO: EVENTS OF 2017 (2018) <https://www.hrw.org/world-report/2018/country-chapters/serbia/Kosovo> [<https://perma.cc/S23J-A5TW>].

367. AMNESTY INT’L, EUROPE’S BORDERLANDS, *supra* note 365, at 40.

368. *See id.* at 35.

369. BELGRADE CTR. FOR HUM. RTS., 2017 SERBIA REPORT, *supra* note 365, at 13; *see also* AMNESTY INT’L, EUROPE’S BORDERLANDS, *supra* note 365, at 35–37 (“Although there are multiple reasons why individual refugees move onward to another country rather than seeking asylum in Serbia, deficiencies in the asylum system do appear to play a role in such decisions.”).

370. AMNESTY INT’L, EUROPE’S BORDERLANDS, *supra* note 365, at 36.

371. BELGRADE CTR. FOR HUM. RTS., HUMAN RIGHTS IN SERBIA: 2015 REPORT, 267 (2016), <http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2013/04/Human-Rights-in-Serbia-2015.pdf> [<https://perma.cc/Q49D-QGA7>] (reflecting an asylum grant rate of “0.0052% of all expressed intents in the period”).

372. BELGRADE CTR. FOR HUM. RTS., 2017 SERBIA REPORT, *supra* note 365, at 39.

373. *Id.* at 10.

completed 160 interviews³⁷⁴ and granted asylum to nineteen individuals.³⁷⁵ In 2017, of 6,199 asylum seekers, 236 successfully submitted asylum applications.³⁷⁶ Serbia's Asylum Office interviewed 106 of the applicants³⁷⁷ and issued three grants of asylum.³⁷⁸

Beyond difficulties in accessing protection, asylum seekers in Serbia face awful reception conditions, further demonstrating that Serbia is unsafe for refugees.³⁷⁹ Serbia simply did not have the capacity to handle the influx of refugees in 2015, and it does not have the capacity to handle refugees who are stranded in-country now.³⁸⁰ In addition to the issue of physical capacity, Serbia has made it clear that it does not *want* to welcome refugees. In November 2016, the Government requested that NGOs and other volunteer organizations stop helping refugees in Serbia's capital.³⁸¹ At that time, roughly 25% of refugees were unaccompanied minors.³⁸² Journalists in Belgrade reported that refugees "have little or no access to proper sanitation, running water, healthcare or warm clothing."³⁸³ Additionally, in 2016, Serbia determined that it would accommodate a maximum of 6,000 asylum seekers in its reception centers³⁸⁴—leaving anyone in excess of this figure stranded. In the winter of 2016–17, roughly

374. *Id.* at 38.

375. *Id.* at 39.

376. BELGRADE CTR. FOR HUM. RTS., HUMAN RIGHTS IN SERBIA 2017 (Vesna Petrovic, ed., Duska Tomanovic, trans.), 362 (2018), <http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2018/03/Human-rights-in-Serbia-2017.pdf> [<https://perma.cc/Y6YK-6YAZ>].

377. *Id.*

378. BELGRADE CTR. FOR HUM. RTS., 2017 SERBIA REPORT, *supra* note 365, at 14.

379. *See, e.g.*, HUMAN RIGHTS WATCH, SERBIA/KOSOVO: EVENTS OF 2017 1 (2017), https://www.hrw.org/sites/default/files/serbia_1.pdf [<https://perma.cc/H2D5-Y9C7>] (noting that in 2017, "[r]eception conditions for asylum seekers remained poor and the asylum system flawed").

380. *See, e.g.*, U.N. High Comm'r. for Refugees, Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 3rd Cycle, 29th Session: Serbia, REF WORLD 1 (Jan. 2018), www.refworld.org/pdfid/5b081b9910.pdf [<https://perma.cc/SK85-5STM>] (Serbia is still dealing with more than 230,000 refugees and displaced persons resulting from wars in the former Yugoslavia).

381. Todor Gardos, *Belgrade's Forgotten Child Refugees Burn Rubbish to Keep Warm as Europe Freezes*, INT'L BUS. TIMES (Jan. 23, 2017, 3:10 PM), <https://www.ibtimes.co.uk/belgrades-forgotten-child-refugees-burn-rubbish-keep-warm-europe-freezes-1602537> [<https://perma.cc/KU89-4MVB>].

382. *Id.*

383. *Id.*

384. *Id.*

1,300 refugees were living in abandoned warehouses, “often in sub-zero temperatures.”³⁸⁵ The Serbian government ultimately transported these refugees to government centers five months later—but conditions were still substandard due to overcrowding and other shortcomings.³⁸⁶

Serbia’s use of safe third countries and the risk of refoulement to other countries is another serious concern that all refugees face—including those returned from Hungary.³⁸⁷ The UNHCR has repeatedly raised concerns about Serbia’s designation of all its neighboring countries as “safe,” upon which it bases blanket denials of asylum claims.³⁸⁸ Many asylum applications are dismissed on this basis, and administrative and judicial appeals “cannot be described as effective legal remedies.”³⁸⁹ Serbia’s use of the STCC leaves asylum seekers vulnerable to refoulement to neighboring countries³⁹⁰—which also deny refugee status to the majority of asylum seekers on the basis of safe third country, and from where refugees would ultimately be refouled onward.³⁹¹

The manner in which Serbian authorities receive refugees also detrimentally affects their access to protection. In 2016, police officers who were responsible for issuing certificates³⁹² to migrants often sent refugees to “Reception Centers” instead of “Asylum Centers”—the only

385. AMNESTY INT’L, SERBIA: STILL FAILING TO DELIVER ON HUMAN RIGHTS, *supra* note 365, at 14; *cf.* *Serbia 2017/2018*, AMNESTY INT’L (2018), <https://www.amnesty.org/en/countries/europe-and-central-asia/serbia/report-serbia/> [<https://perma.cc/5EHY-P5J4>] (“In January, up to 1,800 refugees and migrants were still living in abandoned warehouses, often in sub-zero temperatures.”).

386. *See id.*

387. *See* BELGRADE CTR. FOR HUM. RTS., 2016 SERBIA REPORT, *supra* note 365, at 66 (“The Asylum Office’s decisions in these cases clearly demonstrate risks of refoulement [that] refugees returned by Hungary to Serbia are exposed to, and risks of their chain refoulement, because Serbia considers [Macedonia] a safe third country.”).

388. *See, e.g.*, U.N. High Comm’r. for Refugees, Serbia as a Country of Asylum, *supra* note 355, ¶ 36.

389. BELGRADE CTR. FOR HUM. RTS., 2016 SERBIA REPORT, *supra* note 365, at 12.

390. For example, neighboring Macedonia also does not have a functioning asylum system. *See, e.g.*, AMNESTY INT’L, EUROPE’S BORDERLANDS, *supra* note 365, at 19–29 (detailing failures of Macedonia’s current asylum system and related human rights violations).

391. *Id.* at 40–41.

392. These certificates allowed refugees to stay legally in Serbia at either Reception Centers or Asylum Centers. *See* BELGRADE CTR. FOR HUM. RTS., 2016 SERBIA REPORT, *supra* note 365, at 21.

location in 2016 where asylum authorities would process their applications.³⁹³ These individuals were “*de facto* deprived” of their right to apply for asylum.³⁹⁴ Beyond this serious human rights violation that prevents refugees from accessing Serbia’s asylum process, Serbia’s reception of refugees returned from Hungary has been particularly unwelcoming. It is extremely difficult for asylum seekers returned from Hungary to lodge a claim for protection in Serbia, as both police and asylum officers are “informally of the view . . . that people returned from Hungary are not entitled to seek asylum in Serbia.”³⁹⁵ In one demonstrative case, a group of Syrian refugees who were returned to Serbia reported that police officers refused to issue them certificates and threatened to jail or deport them to Turkey.³⁹⁶ This is not an isolated incident; refugees expelled to Serbia are not guaranteed access to its asylum procedure and face a serious risk of chain refoulement.³⁹⁷

In observing the totality of the circumstances refugees face in Serbia, the UNHCR notes that “[t]here are absolutely no procedures that enable access to those who make a serious effort to find international protection.”³⁹⁸ The Committee Against Torture also has expressed “serious concern” regarding both the small number of persons granted asylum in Serbia, as well as Serbia’s near automatic application of the safe third country concept, which violates nonrefoulement.³⁹⁹ These inadequacies make it nearly impossible to obtain asylum in Serbia and demonstrate that Serbia cannot be considered a safe third country for asylum seekers.

393. *Id.* at 21.

394. *Id.* at 26–27.

395. *Id.* at 26, 34 (explaining that this view is not supported by Serbia’s asylum law).

396. *See id.* at 26.

397. BELGRADE CTR. FOR HUM. RTS., 2017 SERBIA REPORT, *supra* note 365, at 32 (“There is a well founded risk of [returned refugees] being treated like illegal migrants [and] expelled into countries such as [Macedonia] and Bulgaria.”).

398. AMNESTY INT’L, EUROPE’S BORDERLANDS, *supra* note 365, at 37 (quoting Senior Protection Officer, UNHCR, Belgrade).

399. Comm. Against Torture, Concluding Observations on the Second Periodic Report of the Republic of Serbia, ¶¶ 14–15, U.N. DOC. CAT/C/SRB/CO/2 (June 3, 2015).

CONCLUSION

“The inspiration for the [1951] Convention was the strong international concern to ensure that the disregard for human life, the displacement and the persecution of the war years would not be repeated.”⁴⁰⁰

In 2015, over one million individuals fled war and persecution, seeking refuge in Europe.⁴⁰¹ Hungary’s actions since the height of the 2015 refugee crisis illustrate how a State can use its domestic law to undermine and attack the refugee protection and rights regimes. This case also demonstrates how physical and legal barriers jeopardize the international community’s commitment to nonrefoulement—and specifically how Hungary has violated its international and regional legal obligations.

While the previous Section examined the implications of one aspect of Hungary’s asylum law vis-à-vis its nonrefoulement obligations (designating Serbia a safe third country), it is imperative to recall that Hungary’s *Chutes and Ladders*⁴⁰² asylum system expels or pushes back almost all asylum seekers to Serbia.⁴⁰³ In this way, Hungary’s asylum law broadly violates nonrefoulement as it forces refugees to a country where they face serious harm—including the genuine risk of chain-refoulement.⁴⁰⁴ In addition to responding to violations of international and EU law, it is crucial that States remember the human cost associated with these actions. The consequences of preventing refugees from accessing asylum are manifold⁴⁰⁵—including incentivizing refugees to use smugglers,⁴⁰⁶

400. See UNHCR 2001 Note on International Protection, *supra* note 215, ¶ 2.

401. See MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW, *supra* note 1, at 1.

402. See *supra* Figure 1, “Chutes and Ladders in Hungary”; see also *supra* Section I (describing the evolution of Hungary’s asylum system since Summer 2015 and how it has prevented asylum seekers from accessing protection).

403. In addition to expulsion, rejecting a refugee at the frontier has the same effect as refoulement if it forces the refugee back to a place where s/he would otherwise be persecuted or harmed. See Goodwin-Gill, *The Language of Protection*, *supra* note 211, at 12.

404. No State is allowed to push back “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.” 1951 Convention, *supra* note 4, art. 33 (emphasis added).

405. U.N. Sec’y-Gen., *In Safety and Dignity*, *supra* note 2, ¶ 37; see also *id.* ¶ 56 (“All refugees and migrants, regardless of status, are entitled to due process of law in the determination of their legal status, entry and right to remain.”).

406. *Id.* ¶ 28.

increasing their vulnerability to human trafficking, reinforcing racism,⁴⁰⁷ and ultimately contributing to the growing numbers of refugee deaths in transit.⁴⁰⁸

From its inception, the EU stated its intent to be “fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity.”⁴⁰⁹ However, EU efforts thus far—including European Commission infringement proceedings, referral to the ECJ, ECtHR rulings,⁴¹⁰ and cases referred to the ECtHR⁴¹¹—have not stymied Hungary’s illegal actions. This EU Member State has no intention of upholding its nonrefoulement obligations, which the recent incorporation of safe third country inadmissibility in its Constitution⁴¹² further demonstrates. Despite the uphill battle and seemingly insurmountable political stalemate, Hungary needs to be challenged⁴¹³—especially when it undertakes these actions in the name of “Fortress Europe.”⁴¹⁴

407. *Id.* ¶ 37.

408. *Id.* ¶ 29 (“[A]t least 50,000 persons, including thousands of children, have died in the past two decades while seeking to cross international borders.”).

409. “Towards a Union of Freedom, Security, and Justice: The Tampere Milestones” in European Commission Press Release DOC/99/14, Presidency Conclusions, Tampere European Council (Oct. 15–16, 1999), http://europa.eu/rapid/press-release_DOC-99-14_en.htm [<https://perma.cc/95PK-3SPE>] (on the development of the European Union).

410. *See, e.g.*, “Hungary’s Response to the EU Relocation Quota,” *supra* Section I.E (discussing the international and regional backlash Hungary has faced in response to its refugee policy); *see also* “European Court of Human Rights Jurisprudence: The ECHR and Nonrefoulement,” *supra* Section II.C.2 (discussing *Ilias v. Ahmed*).

411. *See, e.g.*, *Khurram v. Hungary*, App. No. 12625/17, (Eur. Ct. H.R. Nov. 13, 2017) available at <http://hudoc.echr.coe.int/eng?i=001-179367> [<https://perma.cc/W4HT-QZ6Z>]; *H.K. v. Hungary*, App. No. 18531/17, (Eur. Ct. H.R. Nov. 13, 2017) available at <http://hudoc.echr.coe.int/eng?i=001-179364> [<https://perma.cc/HCH2-NFA2>].

412. *See supra* note 320.

413. *See, e.g.*, Jacopo Barigazzi & Quentin Ariès, *5 Ways the EU Could Send a Message to Viktor Orbán*, POLITICO (Apr. 18, 2017, 4:09 AM CET), <https://www.politico.eu/article/5-ways-eu-could-send-viktor-orban-message/> [<https://perma.cc/F4BW-ZTPF>] (suggesting five ways that the European Union could challenge Hungary, including instituting infringement proceedings, reducing funding, etc.).

414. *See* AMNESTY INT’L, EUROPE’S BORDERLANDS, *supra* note 365, at 67 (discussing Fortress Europe, a term used to describe the efforts to seal and enhance control over EU borders, which “has severely limited the safe and legal avenues of entry for refugees to the EU”); *If There Were No Fence, Tens of Thousands of Migrants Would be Arriving in Hungary Each Year*, KORMANY - WEBSITE OF THE

The warning of Hungary is also one that the international community at large must not ignore. It must study how countries evade their legal obligations to refugees and devise solutions to bring rogue States in line—particularly if there is any hope for coordinated efforts to manage refugee crises⁴¹⁵ “in a humane, sensitive, compassionate and people-centred manner.”⁴¹⁶ The international community needs a culture of accountability to guarantee that asylum seekers can access protection, and to ensure that refugees are not refouled in violation of the 1951 Refugee Convention and human rights treaties.

HUNGARIAN GOVERNMENT (Mar. 17, 2018, 7:08 PM), <http://www.kormany.hu/en/the-prime-minister/news/if-there-were-no-fence-tens-of-thousands-of-migrants-would-be-arriving-in-hungary-each-year> [<https://perma.cc/3VE4-UF4P>] (“This fence not only protects Hungary, but all of Europe.”) (quoting Prime Minister Viktor Orbán).

415. International responsibility-sharing returned to centerstage with the adoption of the UN General Assembly’s *New York Declaration for Refugees and Migrants* in October 2016. States convened to discuss solutions to the growing refugee crisis, while reaffirming the human rights of refugees and migrants. *See*, G.A. Res. 71/1, *New York Declaration for Refugees and Migrants*, ¶¶ 5–6 (Oct. 3, 2016) (“We reaffirm the purposes and principles of the Charter of the United Nations. We reaffirm also the Universal Declaration of Human Rights and recall the core international human rights treaties . . . refugees and migrants have the same universal human rights and fundamental freedoms.”).

416. *Id.* ¶ 11; *see also id.* ¶ 22 (“[W]e will ensure a people-centred, sensitive, humane, dignified, gender-responsive and prompt reception for all persons arriving in our countries, and particularly those in large movements, whether refugees or migrants. We will also ensure full respect and protection for their human rights and fundamental freedoms.”). The Secretary General, in preparation of the high-level meeting that produced the *New York Declaration*, affirmed that “responsibility-sharing stands at the core of the international protection regime.” U.N. Sec’y-Gen., *In Safety and Dignity*, *supra* note 2, ¶ 102(b).