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Illegal Legality and the Façade of Good Faith – Migration and Law in Populist Hungary

Tamás Hoffmann
Senior Research Fellow, Centre for Social Sciences Institute for Legal Studies, Budapest, Hungary; Associate Professor, Corvinus University of Budapest, Budapest, Hungary
hoffmann.tamas@tk.hu

Abstract

Hungarian migration regulation has undergone a radical transformation since 2015, resulting in a system that essentially deprives asylum seekers of any international protection. This was a strategic move by the government to portray itself as the defender of Hungary and even Europe of the menace of uncontrolled migration. This article critically analyzes this transformation by first giving a comprehensive account of the major legislative changes and showing how they were framed to boost the populist political propaganda of the government. Then it argues that even though such populist legalism is in clear contravention of Hungary's international legal obligations and thus constitute bad faith action, the European Union is still powerless to effectively oppose these measures since its own asylum policies are aimed at maintaining "Fortress Europe", i.e. restricting irregular migration as much as possible through legal and informal measures. In conclusion, the only real antidote to populist legalism would be acting in good faith.

Keywords

migration – populism – Hungary – European Union – good faith

1 Introduction

Migrants are the ideal "enemies of the people" in a populist regime. They can be portrayed as potential criminals or even terrorists, spreading diseases, leeching

off the welfare system and simultaneously stealing the jobs of the hard-working common folk, while threatening the cultural and Christian values of the nation. Since populism creates the narrative of an eternal battle between 'the people', that needs protection, and 'the elite', that tries to deny the popular will and distort it through various ways,[1] exploiting anti-immigrant attitudes could be seen as "the Holy Grail of populists".[2] It is thus hardly surprising that in Hungary, the model illiberal populist country,[3] the government has spared no effort since 2015 to muster all legal and rhetorical resources to stop irregular migration through Hungary, invoking the nefarious menace of non-European migrants and justifying its action as a heroic defense of Western civilization.

This article aims to show how Hungarian populist lawmaking concomitantly appeals to the 'will of the people' and creates it, relying both on a procedural understanding of legality – i.e. compliance with legal norms adopted by the competent authorities –, and a substantive concept of justice, claiming that the adopted measures protect even those whose legal entitlements are actually denied. Even though this narrative has been repeatedly contradicted by judicial decisions of the European Court of Human Rights and the Court of Justice of the European Union that found Hungarian asylum legislation incompatible with Hungary's international obligations, the Hungarian government can still assert that Hungary complies with its international commitments by amending its domestic legislation, seemingly implementing the verdict but in reality creating yet another violation of international norms. This perverse legal game

1 See Tamás Hoffmann and Fruzsina Gárdos-Orosz, "Populism and Law in Hungary – Introduction to the Special Issue," 46 *Review of Central and East European Law* (2021).

2 Vera Messing and Bence Ságvári, "Are Anti-immigrant Attitudes the Holy Grail of Populists? A Comparative Analysis of Attitudes Towards Immigrants, Values, and Political Populism in Europe," 7(2) *Intersections* (2021), 100–127.

3 Viktor Orbán, the Hungarian Prime Minister himself declared in 2014 that 'the new state that we are building is an illiberal state, a non-liberal state'. Available at http://hungarianspectrum.wordpress.com/2014/07/31/viktor-orbans-speech-at-the-xxv-balvanyos-free-summer-university-and-youth-camp-july-26-2014-baile-tusnad-tusnadfurdo/. There is a broad agreement in political science literature that Hungary manifests all the traits of a populist regime. See inter alia Robert Csehi and Edit Zgut, "'We won't Let Brussels Dictate Us': Eurosceptic Populism in Hungary and Poland," 22(1) *European Politics and Society* (2021), 53–68.; Bojan Bugarić, "Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism," 17(2) *International Journal of Constitutional Law* (2019), 597–616.; Emilia Palonen, "Performing the Nation: The Janus-faced Populist Foundations of Illiberalism in Hungary," 26(3) *Journal of Contemporary European Studies* (2018), 308–321.; András L. Pap, *Democratic Decline in Hungary – Law and Society in an Illiberal Democracy* (Routledge, Oxon, 2017); Péter Csigó and Norbert Merkovity, "Hungary, Home of Empty Populism," in Toril Aalberg, Frank Esser, Carsten Reinemann, Jesper Strömbäck and Claes H. de Vreese (eds.), *Populist Political Communication in Europe* (Routledge, Oxon, UK, 2016), 339–349.

of tag continues, partly because the European Union itself can hardly enforce the existing legal commitments, given its own track record of employing or allowing arguably unlawful measures to combat irregular migration and regularly turning a blind eye to the denial of application of international, European Union, and human rights norms to protect migrants.

2 Hungarian Migration Law and Policy – From Reluctant Humanitarianism to Effective Denial of Asylum

2.1 *Hostile Indifference – Hungarian Migration Law and Policy Before 2015*

Hungary, along with all other communist countries, did not ratify any international human rights instruments before the end of the communist era except for the 1966 International Covenant on Civil and Political Rights[4] and the International Covenant on Social, Economic and Cultural Rights.[5] The 1951 Refugee Convention[6] and its 1967 Protocol Relating to the Status of Refugees[7] were actually the first human rights conventions adopted by Hungary in 1989, shortly followed by others, such as the European Convention on Human Rights.[8] While these international commitments and Hungary's 2004 accession to the European Union required a profound restructuring of the Hungarian institutional approach to asylum-seekers to provide for international protection, the overwhelming majority of the Hungarian population has consistently displayed a negative attitude concerning foreign immigration to Hungary,[9] rooted

4 International Covenant on Civil and Political Rights, opened for signature on 19 December 1966, Vol. 999 U.N.T.S. 171 (entered into force 23 March 1976). Hungary acceded to the Covenant on 17 January 1974.

5 International Covenant on Economic, Social and Cultural Rights, opened for signature on 19 December 1966, Vol. 999 U.N.T.S. 3 (entered into force 3 January 1976). Hungary acceded to the Covenant on 17 January 1974.

6 Convention relating to the Status of Refugees, signed on 28 July 1951, Vol. 189 U.N.T.S. 137 (entered into force 22 April 1954). Hungary acceded to the Convention on 14 March 1989.

7 Protocol relating to the Status of Refugees, signed on 31 January 1967, Vol. 606 U.N.T.S. 267 (entered into force 4 October 1967). Hungary acceded to the Convention on 14 March 1989.

8 Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, Vol. 213 U.N.T.S. 221 (entered into force 3 September 1953). Hungary acceded to the Convention on 5 November 1992.

9 The percentage of the population completely rejecting foreign immigration steadily rose between 1992 and 1995 from 15% to 40% and then stabilized around 30% between 1996 and 2012. Then it started to increase again and reached 41% in 2015. By then, only 6% of the population agreed with statement that all asylum-seekers should be received. See Endre Sík, Bori Simonovits and Blanka Szeitl, "Az idegenellenesség alakulása és a bevándorlással

partially in a strong folk memory of conquest and partial occupation by the Ottoman Empire in the 16th century and numerous subsequent occupations right up to the fall of its communist government.[10]

Despite that prevailing sentiment, migration was not a salient issue in Hungarian domestic politics until 2015. Even though the right-wing Fidesz government, that won the 2010 elections with a two-thirds majority, aimed to fundamentally overhaul the Hungarian legal system, changing migration policies were not part of its agenda. On the contrary, initially the new government even seemed to encourage migration into the country. In 2012 the Hungarian Parliament even established an investor settlement system that offered a residence permit to those third-country nationals and their family members who bought at least 250,000 Euros worth of special state bonds,[11] and in October 2013 the government adopted a Migration Strategy that included a commitment to foster the integration of legal migrants and people enjoying international protection.[12] The clearest evidence that the question of migration was deemed uninteresting in Hungarian domestic politics is that in the run-up to the 2014 parliamentary elections, none of the campaigning parties even mentioned it in their manifestos.[13]

While even during this period the operation of the Hungarian asylum system was criticized by the United Nations High Commissioner for Refugees (UNHCR) for the low recognition rate of asylum applications, and inadequate institutional support,[14] and the absence of integration support resulted in

kapcsolatos félelmek Magyarországon és a visegrádi országokban," 24(2) *REGIO* (2016), 81–108, at 82–83.

10 Daniel Gyollai, "Controlling Irregular Migration: International Human Rights Standards and the Hungarian Legal Framework," 16(4) *European Journal of Criminology* (2019), 432–451, at 439.

11 Act CCXX. of 2012 On the Amendment of Act II. of 2007 Concerning the Travel and Settlement of Third Country Nationals. Between 2013 and 2017, almost 20,000 foreign citizens settled in Hungary this way. See Richard Field, "Settlement Bond Program Gives 20,000 Foreigners Right to Settle in Hungary, Schengen Region," *Budapest Beacon* (14 December 2017), available at https://budapestbeacon.com/settlement-bond-program-gives-20000-foreigners-right-to-settle-in-hungary-schengen-region/.

12 Witold Klaus, Miklós Lévay, Irena Rzeplińska and Miroslav Scheinost, "Refugees and Asylum Seekers in Central European Countries: Reality, Politics and the Creation of Fear in Societies," in Helmut Kury and Sławomir Redo (eds.), *Refugees and Migrants in Law and Policy* (Springer, Cham, Switzerland, 2018), 457–494, at 470.

13 Paula Beger, "Party Rhetoric and Action Compared: Examining Politicisation and Compliance in the Field of Asylum and Migration Policy in the Czech Republic and Hungary," in Astrid Lorenz and Lisa H. Anders (eds.), *Illiberal Trends and Anti-EU Politics in East Central Europe* (Palgrave Macmillan, London, UK, 2021), 137–156, at 141.

14 UNHCR, "Hungary as a Country of Asylum" (24 April 2012), available at http://www.refworld.org/docid/4f9167db2.html.

structural homelessness among recognized refugees,[15] the formal regulatory framework of Hungarian asylum law was generally in conformity with the EU asylum acquis.[16]

2.2 *Migration Regulation as the Primary Policy Issue*

The indifferent political attitude towards migration changed drastically in 2015, following the Islamist terrorist attack against the Paris office of French satirical magazine Charlie Hebdo on 7 January 2015. In the immediate aftermath Prime Minister Viktor Orbán gave an interview on Hungarian national television portraying the act as the result of unregulated migration and argued that economic migration must be stopped since it is "bad for Europe" and creates "sizable minorities with different cultural characteristics and backgrounds among ourselves".[17]

This launched an avalanche of articles and reports in Fidesz-controlled media outlets that depicted migration as an existential threat for Hungary that must be stopped at all costs,[18] emphasizing the religious, cultural and behavioral otherness of migrants.[19] The official government communications reinforced this view by repeatedly equating asylum-seekers with economic migrants and labeling them as potential terrorists, which culminated in the government conducting a "National Consultation on Immigration and Terrorism" between 24 April and 27 July 2015. The "National Consultation" included a survey comprising 12 highly suggestive multiple-choice questions mailed to every Hungarian household, with the intention of gauging people's opinion on issues such as whether Hungary could become a target of a terrorist attack in the future, to what extent the inadequate regulation of immigration policy by "Brussels" had contributed to the spread of terrorism, and whether the Hungarian people would support the introduction of more restrictive legal measures against immigrants illegally crossing the Hungarian border. The document also included a foreword by the Prime Minister, who claimed

15 Annastiina Kallius, "The East-South Axis: Legitimizing the "Hungarian Solution to Migration", 33(2&3) *Revue Européenne des Migrations Internationales* (2017), 133–135, at 133.

16 For an overview see Boldizsár Nagy, *A magyar menekültjog és menekültügy a rendszerváltozástól az Európai Unióba lépésig* (Gondolat, Budapest, Hungary, 2012).

17 Available at https://hirado.hu/2015/01/11/orban-a-gazdasagi-bevandorlast-meg-kell-allitani/#.

18 Robert McNeil and Eric Carstens, "Comparative Report on Cross-Country Media Practices, Migration, and Mobility", REMINDER – *Role of European Mobility and Its Impacts in Narratives, Debates and EU Reforms* (June 2018) 22–24, available at https://www.reminder-project.eu/wp-content/uploads/2018/08/Final-June-2018_with-cover.pdf.

19 János Tóth, "Negative and Engaged: Sentiments towards the 2016 Migrant Quota Referendum in Hungarian Online Media," 35(2) *East European Politics and Societies: and Cultures* (2020), 1–26, at 5.

that "Economic migrants cross our borders illegally, and while they present themselves as asylum-seekers, in reality they come for welfare benefits and the employment opportunities."[20] Moreover, the Government launched a billboard campaign where messages – ostensibly targeting migrants but written in Hungarian – warned the readers to "respect our culture", "don't take away our jobs", and "respect our laws".[21]

The number of asylum-seekers had indeed risen dramatically in this period. Over one million migrants arrived in Europe by sea in 2015, predominantly from Syria, Afghanistan, and Iraq.[22] Most of those who entered Europe in Greece wanted to reach a Western European Union country by crossing the West Balkan route through North Macedonia and Serbia to reach their desired destination, using Hungary as a transit country. During 2015 more than half a million people entered into Hungarian territory from Serbia.[23] Still, notwithstanding the immense number of new arrivals, the situation hardly constituted a 'crisis' from the Hungarian point of view as very few people wanted to access the registration process and request asylum from the Hungarian authorities and almost all of those who were forced to register by the Hungarian authorities immediately left Hungary.[24] Nevertheless, a crisis narrative was consistently employed to bolster the official rhetoric,[25] and in order to "to protect the Hungarian people", the government decided to erect both physical and legal barriers to keep migrants out. Between July and September 2015, 19 acts and 19 government decrees were adopted that amended the existing laws in 473 sections.[26] On 13 July 2015, construction works started to build a barbed wire fence on the Serbian border that was later expanded to the Croatian border.[27]

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20 Available at https://2015–2019.kormany.hu/download/b/33/50000/nemzeti_konz_2015_krea12.pdf.

21 Ákos Bocskor, "Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015," 52(3) *Sociology* (2018), 551–568, at 563.

22 See Frontex Risk Analysis Unit, *FRAN Quarterly, Quarter 4* (October – December 2015), 8.

23 See Judit Tóth, "Hungary at the Border of Populism and Asylum," in Sergio Carrera and Marco Stefan (eds.), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union – Complaint Mechanisms and Access to Justice* (Routledge, Oxon, UK, 2020), 64–86, at 70.

24 Altogether 177,000 persons were registered by the Hungarian authorities in 2015. *Ibid.*

25 *Ibid.*, at 65.

26 See Balázs Majtényi, Ákos Kopper and Pál Susánszky, "Constitutional Othering, Ambiguity and Subjective Risks of Mobilization in Hungary: Examples from the Migration Crisis" 26(2) *Democratization* (2019), 173–189, at 178.

27 See Art. 49 of Act CXXVII of 2015 On the Temporary Closure of Borders and the Amendment of Migration-Related Acts. The border fence is currently 523 km long and

The Hungarian migration system has undergone a dazzling transformation to deny international protection to asylum-seekers. Act CXL of 2015 created the new category of "transit zones" at the border between Serbia and Hungary where asylum-seekers were obliged to stay "before their entry to the territory of Hungary" to initiate their asylum proceedings and wait in designated containers until a decision about the recognition of international protection is made.[28] Justice Minister Trócsányi explained that even though these zones were physically located on Hungarian territory, under Hungarian asylum regulations they would legally not be deemed part of Hungary so "the entry into the transit zone does not qualify, in immigration terms, as an entry into the state."[29] The most important element of this "legal barrier", however, was including Serbia in the list of safe countries of origin and transit, which imposed on asylum-seekers the onus of proving that they would not be safe there.[30] This was in clear contravention of the Curia (Hungarian Supreme Court)'s opinion holding that the country reports of the UNHCR have to be taken into account in determining whether a country is safe,[31] which implied that Serbia is not a safe country for asylum-seekers.[32] Indeed, between 2013 and 2015 Hungary stopped applying the safe third country concept altogether.[33] Nevertheless, the government's

parts of it are constituted of two fences. See https://www.behance.net/gallery/67412979/Hungarian-Border-Fence.

28 Art. 15 of Act CXL of 2015 On the Amendment of Certain Acts Related to Mass Migration.

29 László Trócsányi, Hungarian Ministry of Justice, "On the Management of Mass Migration," (4 September 2015), available at http://www.kormany.hu/en/ministry-of-justice/news/ministertrocsanyi-on-the-management-of-mass-migration.

30 Government Decree No. 191 of 21 July 2015. The government was authorized by Act CVI On the Amendment of Act LXXX On Asylum.

31 Curia of Hungary, Opinion No. 2/2012 (10 December 2012) of the Administrative and Labour Department On Determining Certain Questions Concerning Safe Third Countries, available at https://kuria-birosag.hu/hu/kollvel/22012-xii10-kmk-velemeny-biztonsagos-harmadik-orszag-megitelesenek-egyes-kerdeseirol.

32 The UNHCR rejected the assumption that Serbia could provide adequate protection to asylum-seekers, stating that "Serbia lacks the resources and performance necessary to provide sufficient protection against *refoulement*, as it does not provide asylum-seekers an adequate opportunity to have their claims considered in a fair and efficient procedure." UNHCR, "Serbia as Country of Asylum. Observations on the Situation of Asylum-seekers and Beneficiaries of International Protection in Serbia", (August 2012), available at https://bit.ly/2SevotT. Montserrat Feixas Vihé, the Regional Representative of the UNHCR in Central Europe UNHCR even sent an open letter to the Members of the Hungarian Parliament before the adoption of Act CVI arguing that it was incompatible with the spirit of humanitarianism. See UNHCR, "Open Letter to the Members of the Hungarian Parliament," (3 July 2015), available at https://www.unhcr.org/ceu/426-ennews2015open-letter-to-the-members-of-the-hungarian-parliament-html.html.

33 Gyollai, *op.cit.* note 10, at 443.

decision had an immediate impact as in the following months over 95% of all asylum applications were summarily rejected as inadmissible simply because the applicants transited through Serbia.[34] These inadmissibility decisions also resulted in a one or two year entry ban registered in the Schengen Information System; thus the applicants could no longer legally enter into any Schengen countries.[35]

Act CXL of 2015 also created a new category of "crisis situation due to mass migration" during which the police are authorized to execute measures necessary to counter mass migration including restricting or closing down traffic or entering private property, and the army can use firearms to protect the border.[36] On 15 September 2015, the government declared a "crisis situation" in Hungarian counties bordering Serbia and Croatia. The crisis situation was extended to the entire territory of Hungary on 9 March 2016 and has been renewed ever since every six months, even though the underlying conditions of its application are arguably no longer met.[37] Finally, three new crimes were also introduced to deter irregular migration – the crimes of illegal crossing of a border closure, vandalization of a border closure and obstructing construction works related to a border closure.[38] The perpetrators of these crimes are

34 In the transit zones the average time taken to process asylum decisions – and almost inevitably reject them – was about ten minutes. Ashley Binetti Armstrong, "Chutes and Ladders: Nonrefoulement and the Sisyphean Challenge of Seeking Asylum in Hungary," 50(2) *Columbia Human Rights Law Review* (2019), 46–115, at 56.

35 Hungarian Helsinki Committee, "No Country for Refugees – New Asylum Rules Deny Protection to Refugees and Lead to Unprecedented Human Rights Violations in Hungary," (18 September 2015), available at https://www.helsinki.hu/en/no-country-for-refugees-information-note/.

36 Act CXLII of 2015 On the Amendment of Certain Acts in Relation to the Treatment of Mass Migration and the More Efficient Protection of the State Border of Hungary.

37 A crisis situation due to mass migration can only be declared when the number of people applying for refugee status exceeds (1) an average of 500 people per day within a month, (2) an average of 750 people per day within a two-week period or (3) an average of 1500 people per day within a week; or if the number of persons residing in the transit zone exceeds (1) an average of 1000 persons per day within a month (2) an average of 1500 persons per day within two consecutive weeks, or (3) an average of 2000 persons within a week. See Art. 16 of Act CXL On the Amendment of Certain Acts Related to Mass Migration. The official justification of the repeated extension of the state of national crisis situation is classified.

38 Art. 31 of Act CXL of 2015 On the Amendment of Certain Acts Related to Mass Migration. The respective criminal offences are Art. 352 *bis*, Art. 353 *ter* and Art. 353 *qat*. of Act C of 2012 On the Criminal Code. While in 2015 and 2016 these criminal norms were applied quite frequently – with 906 criminal proceedings in 2015 and 2810 criminal proceedings in 2016 -, by 2017 only 21 persons were charged. See Szilveszter Póczik, Orsolya Bolyky and Eszter Sárik, "Migrációs válság, embercsempészés, büntetéskiszabás. Külföldi bűnelkövetők

subject to mandatory expulsion and a minimum of 2 years ban on entry.[39] Even though several international actors expressed concerns about the Hungarian measures, including the United Nations High Commissioner for Refugees,[40] the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),[41] and Amnesty International,[42] the Hungarian authorities officially remained adamantly determined to exclude all irregular migrants from the country,[43] claiming that these actions defend not only Hungary but also Europe.[44]

However, the actual Hungarian practice was much more haphazard. In the first half of 2015, more than 100,000 migrants were allowed to cross Hungary and use the Hungarian railway services to reach Western Europe; however, in July Hungarian authorities forbade any people to board the trains in Budapest without a valid Schengen visa. This caused a tumultuous situation including the creation of a temporary refugee camp around the Keleti Station in Budapest,

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Magyarországon és a 2015-ben kezdődött migrációs válság," 26(6) *Ügyészek Lapja* (2019), 35–58, at 55.

39 Art. 60(2)(a) of Act C of 2012 On the Criminal Code. Interestingly, since these offences are explicitly linked to the "border closure", i.e. the barbed wire fence, they are only applicable to irregular entry through the Serbian or the Croatian border.

40 UNHCR, "Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent Practice Implemented Between July 2015 and March 2016," (May 2016), available at https://www.refworld.org/docid/57319d514.html.

41 The CPT notified the Hungarian government of its doubts "whether border asylum procedures are in practice accompanied by appropriate safeguards, whether they provide a real opportunity for foreign nationals to present their case and involve an individual assessment of the risk of ill-treatment in case of removal and thus provide an effective protection against refoulement." Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 27 October 2015. CPT/Inf (2016) 27.

42 John Dahlhuisen, Amnesty International's Director for Europe called the Hungarian regulation "a cynical ploy to deter asylum-seekers from Hungary's ever more militarized borders." John Dahlhuisen, "Hungary: Appalling Treatment of Asylum-Seekers a Deliberate Populist Ploy," (27 September 2016), available at https://www.amnesty.org/en/press-releases/2016/09/hungary-appalling-treatment-of-asylum-seekers-a-deliberate-populist-ploy.

43 Tóth points out that the terms of art currently used in Hungarian law, official statistics, police instructions, and official reports for the public are specifically coined to reflect this. They only use the terms "illegal migrant", instead of irregular migration and the word 'deportation' is used instead of return, expulsion, or removal. Tóth, *op.cit.* note 23, 65.

44 Prime Minister Orbán thus declared in the Parliament that "Hungary has been a respected member of the large European family. It is our historical and moral duty to defend Europe, since thereby we defend ourselves. The inverse is also true: when we defend the borders of Hungary, at the same time we protect Europe." Viktor Orbán, Speech in the Hungarian Parliament (21 September 2015), available at http://www.parlament.hu/documents/10181/56618/2015.09.21.+napl%C3%B3/077af232-5782-4653-a36fee75ae4b6959.

and thousands attempting to reach the Austrian border on foot walking along a highway. Eventually, the migrants were allowed to leave for Germany after Chancellor Angela Merkel personally guaranteed their acceptance. After the completion of the border fence at the Serbian border, the migration flow was simply diverted to Croatia through which more than 200,000 migrants were able to enter into Hungary without difficulty, and the Hungarian authorities even offered them train services to reach the Austrian-Hungarian border.[45] Ultimately, despite official rhetoric to the contrary, the Hungarian actions did not even slow down the migration flow, as in 2015 more than 500,000 people passed through Croatia to reach Western Europe.[46]

Hungary maintained its hardline stance on the European plane as well, firmly opposing every action leading to the admission of asylum-seekers. On 22 September 2015 the Council of the European Union passed Decision 2015/1601 by qualified majority establishing a relocation scheme for 120,000 people entitled to international protection, for the benefit of Italy and Greece, until 26 September 2017,[47] complementing an earlier Decision adopted with a consensus on the relocation of 40,000 individuals.[48] Even though Hungary was supposed to receive only 1294 persons, it refused to comply with the decision and even challenged its legality at the Court of Justice of the European Union (CJEU). The Hungarian Government repeatedly pronounced that it would not accept the relocation of a single asylum-seeker to Hungary,[49] Prime Minister Orbán

45 Boldizsár Nagy, "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation," 17(6) *German Law Journal* (2016), 1033–1081, at 1059–1060.

46 Tóth, *op.cit.* note 23, 70. Nagy rightly points out that by closing its borders, Hungary simply "relocated the responsibility of conducting a refugee status determination procedure, giving protection, or removing the persons not in need of protection to another member state". *Ibid.*, at 1034. Eventually, however, the construction of the Hungarian fence spurred the neighboring countries to complete their own border barriers, such as Austria's fence on its border with Slovenia, Slovenia's fence on its border with Croatia and finally Croatia's fence on its border with Austria. See Ashley Binetti Armstrong, "You Shall Not Pass! How the Dublin System Fueled Fortress Europe," 20(2) *Chicago Journal of International Law* (2020), 332–383, at 335.

47 Council Decision (EU) 2015/1601 of 22 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece. Apart from Hungary, the Czech Republic, Romania, and the Slovak Republic also voted against the measure, and Finland abstained.

48 On 14 September 2015 the Council adopted a Decision to relocate 40.000 individuals from Greece and Italy by consensus. See Council Decision (EU) 2015/1523 of 14 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece.

49 See, for example, the 29 October 2015 press briefing of Cabinet Minister János Lázár. available at https://2015–2019.kormany.hu/hu/miniszterelnokseg/videok/kormanyinfo-28-elutasitja-a-kvotarendszert-a-magyar-kormany.

publicly stating that "Quotas is [sic!] an invitation for those who want to come. The moral human thing is to make clear, please don't come."[50] Subsequently the Hungarian Parliament adopted Act CLXXV of 2015 On the Actions against the Mandatory Migrant Quota for the Protection of Hungary and Europe. The preamble of the Act declared that the Hungarian Parliament "supports the protection of the borders of the country and the building of the fence, condemns the mistaken migration policies of the European Commission, and opposes the mandatory migrant quota since the quota is pointless and dangerous, as it would increase crime, spread terror and endanger our culture…"[51]

Debates about the Relocation Decision remained one of the most important domestic political issues and the government consistently positioned itself as the defender of the Hungarian people against pro-migration "Brussels" and the Hungarian opposition parties. In October 2016 it launched a new billboard campaign claiming that Brussels wanted to settle "a whole city's worth of illegal immigrants into Hungary"[52] and adopted new laws to bolster the fight against migration. It introduced a deep border control policy, whereby the police was authorized to expel any foreigner illegally staying on Hungarian territory within 8 kilometers from the border through the nearest border entry point.[53]

Eventually, on 2 October 2016 the Hungarian Government even conducted a national referendum against the EU Relocation Scheme. Hungarian citizens could vote on whether they "want the EU to be able to prescribe the mandatory resettlement of non-Hungarian nationals in Hungary even without the consent of the Hungarian Parliament." Even though the overwhelming majority of voters rejected the "mandatory resettlement", the plebiscite became invalid as voter turnover did not exceed the minimally required 50 percent.[54] Nevertheless, the Fidesz leadership felt that the referendum had provided

50 Ian Traynor, "*Migration Crisis: Hungary PM Says Europe in Grip of Madness,*" *The Guardian* (3 September 2015), available at https://www.theguardian.com/world/2015/sep/03/migration-crisis-hungary-pm-victor-orban-europe-response-madness.

51 Preamble, Act CLXXV of 2015 On the Actions against the Mandatory Migrant Quota for the Protection of Hungary and Europe.

52 Lydia Gall, "Hungary's War on Refugees," *Human Rights Watch* (16 September 2016), available at https://www.hrw.org/news/2016/09/16/hungarys-war-refugees.

53 Act XCIV. of 2016 On the Amendment of Certain Laws Necessary to Provide for the Widespread Application of Procedures Conducted On the Border. The government also decided to recruit 3000 police personnel for the newly-created "border hunter" units that became tasked with patrolling border regions. See Eszter Csobolyó Nagyné, "A migráció kezelésével jelentkező biztonsági kérdések orvoslásának keretei a nemzetközi együttműködésben," 67(11) *Belügyi Szemle* (2019), 83–98, at 87.

54 While 98 percent of the participants voted no, the participation rate was merely 41 percent.

sufficient moral and political support to proceed with their anti-immigration policies.[55] Even though in the absence of a constitutional two-thirds parliamentary majority they could not carve the opposition to the EU Relocation Scheme into the Fundamental Law,[56] in March 2017 the practice of expulsion was extended to the entire territory of Hungary so any irregular migrant could be transported back to the neighboring country from which the person entered into Hungary,[57] and asylum seekers that sought refuge in Hungary were forced to apply for international protection in the transit zones.[58] Since the Hungarian authorities gradually reduced the number of asylum-seekers admitted into the transit zones from 20–30 persons per working day in 2016 to 1 in 2018,[59] applicants were forced to wait for an indefinite time in dire conditions for the almost inevitable denial of their refugee claims.[60]

The Fidesz party brought "the migrant question" to the center of its 2018 national election campaign, starting the campaign with yet another round of national consultation in the spring of 2017. Even though it was entitled "Let's Stop Brussels", the questions focused on the "Soros plan", an alleged nefarious conspiracy of philanthropist George Soros, who was accused of orchestrating a plot through non-governmental organizations and the opposition parties to enable uncontrolled migration into Hungary and thus into Western Europe, destroying its Christian identity.[61] To support this narrative, Act LXXXVI of 2017

55 Viktor Orbán even decried the EU asylum policies at the 2017 European People's Party Congress as "threatening the Christian identity of Europe and supporting migration, which is the Trojan horse of terrorism". Jim Brunsden, "Europe Refugee Policy is 'Trojan Horse of Terrorism,' Says Orban," *Financial Times* (30 March 2017), available at https://www.ft.com/content/538b2a0a-154e-11e7-80f4-13e067d5072c.

56 The Hungarian Constitutional Court, however, declared that Hungary's constitutional identity is a fundamental value that cannot be in any way limited, even by an international agreement. This implied that even if the rejection of the EU Relocation Scheme violates the supremacy of EU law, it is legal under the Hungarian constitutional order. Hungarian Constitutional Court, Decision No. 22/2016 (5 December 2016), para. 67. For an analysis see Gábor Halmai, "National(ist) Constitutional Identity? Hungary's Road to Abuse Constitutional Pluralism," 2017(8) *EUI Working Papers* 1–16.

57 Art. 11 of Act XX of 2017 On the Amendment of Certain Acts to Tighten the Procedures Conducted On the Border.

58 Ibid., Art. 3 (7).

59 European Council on Refugees and Exiles (ECRE), "Country Report: Hungary," (2018 Update), 17. Available at https://tinyurl.com/y4cm2dc3.

60 Anikó Bakonyi, András Léderer and Zsolt Szekeres, "Foszladozó védőháló – Menedékkérő gyermekek Magyarországon 2017," (Budapest, Hungarian Helsinki Committee, 2017), 5.

61 Reuters, "Hungary's Fidesz Prepares Campaign Against 'Soros Plan' For Migrants," (14 September 2017), available at https://www.reuters.com/article/us-europe-migrants-hungary-soros-idUSKCN1BP26O.

obliged NGOs receiving foreign financial contributions to report to the authorities that they are "organizations supported from abroad", and even to display this label on all their published materials and websites.[62]

This strategy paid a huge dividend – at the 2018 parliamentary elections the ruling party regained its two-thirds parliamentary supermajority and the ability to yet again transform the Hungarian legal system. Subsequently, on 20 June 2018 the parliament passed the "Stop Soros" laws.[63] This legislative package declared that asylum applications are inadmissible if the applicant has passed through a country entering Hungary where an adequate level of protection exists, thus denying asylum even if the applicant could prove well-founded fear of persecution.[64] It also created the new criminal offense of "Facilitating and assisting illegal immigration" that also punished assistance in the initiation of asylum procedures on behalf of individuals who are not subject to persecution in their country of origin or in the transit countries they travelled through on their way to Hungary.[65] Notwithstanding the Hungarian Constitutional Court's assessment that its scope obviously could not extend to "conduct that selflessly assist the poor and destitute",[66] it – in conjunction with a further amendment of the tax law that imposed a 25 percent special tax on financial support to any organization "supporting illegal migration"[67] – seemed to be primarily targeting NGOs providing humanitarian assistance to asylum-seekers.[68]

However, the most important development came with the adoption of the seventh amendment of the Fundamental Law, which created new constitutional norms to ensure that the international and European legal framework of refugee law could only have a limited impact on the Hungarian legal system. Thus, "the protection of constitutional identity and Christian culture

62 Act LXXXVI. of 2017 On the Transparency of Organizations Supported from Abroad.

63 Act VI. of 2018 On the Amendment of Certain Acts Concerning Measures Related to Unlawful Migration.

64 *Ibid.*, at Art. 7. The Hungarian Constitutional Court found that there is no obligation flowing from the Fundamental Law to grant asylum to an applicant who came through a transit country where she was not subject to a well-founded fear of persecution. However, the Court emphasized that even in such cases the principle of non-refoulement should be respected. Hungarian Constitutional Court, Decision No. 2/2019 (5 March 2019), para. 46.

65 Art. 353 (bis) of Act. C on the Hungarian Criminal Code.

66 Hungarian Constitutional Court, Decision No. 3/2019 (7 March 2019), para. 81.

67 Art. 253 of Act XLI of 2018 On the Amendment of Certain Tax Laws and Other Related Laws and On the Special Immigration Tax.

68 Accordingly, the European Commission decided to initiate an infringement procedure against Hungary. European Commission, "Asylum: Commission Takes Next Step in Infringement Procedure Against Hungary for Criminalizing Activities in Support of Asylum Applicants," Press Release, Brussels, 24 January 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_469.

of Hungary" has become the fundamental obligation of the state,[69] and the decisions of EU organs "shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure."[70] Finally, the Fundamental Law now prohibits "the settlement of foreign population in Hungary"[71] and expounds that "[A] non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution."[72]

These new regulations completed the new Hungarian asylum system which effectively prevented asylum-seekers receiving international protection.[73] However, even though the official governmental communication remained adamant that migrants present a mortal danger to Hungary and the rest of Europe,[74] and refused every international attempt to regulate migration,[75] the Hungarian legal regulation was amended yet again in 2020 after the Court of Justice of the European Union found that the operation of the transit zones violated European Union law.[76] Instead of granting access for asylum-seekers, Act 2020 of LVIII, which was promulgated and entered into force on 17 June 2020, completely denied the right to even apply for asylum on the territory of Hungary and appointed Hungarian embassies in the transit countries as the

69 Preamble and Article R(4) of the Fundamental Law of Hungary.

70 Article E(2) of the Fundamental Law of Hungary.

71 Article XIV(1) of the Fundamental Law of Hungary.

72 Article XIV(4) of the Fundamental Law of Hungary.

73 For a comprehensive overview see Judit Tóth, "A menedékjogi eljárás buktatói," 60(4) *Állam- és Jogtudomány* (2019), 105–119.

74 In August 2020 the Prime Minister even made a connection between migration and the SARS-Covid-2 pandemic. Kossuth Rádió, "Interview with Prime Minister Viktor Orbán," (7 August 2020), available at https://index.hu/belfold/2020/08/07/orban_viktor_kossuth_radio_interju/. However, linking irregular migration with pandemics had occurred even before the outbreak of the Covid-SARS-2 epidemic. In 2018 István Nagy, the newly appointed Minister of Agriculture claimed that the swine flu epidemic was caused by a sandwich discarded by a migrant. Available at https://444.hu/2018/05/14/az-uj-agrarminiszter-szerint-egy-migrans-eldobott-egy-szendvicset-ezert-van-magyarorszagon-sertespestis.

75 In December 2018, the Hungarian Government voted against the adoption of the United Nations Global Compact for Safe, Orderly and Regular Migration. Even though it is not a legally binding document, the Compact created a universal and comprehensive framework of standards and commitments concerning migration, with active involvement of the European Union. For a detailed explanation see Tamás Molnár, "The EU Shaping the Global Compact for Safe, Orderly and Regular Migration: The Glass Half Full or Half Empty?," 16(3) *International Journal of Law in Context* (2020), 321–338.

76 ECJ, Joined Cases C-924/19 and C-925/19, *TDC* (2020) EU:C:2020:367.

sole venue for submitting asylum applications.[77] Thus, Hungarian asylum law has finished its drastic transformation from compliance with EU regulation to the complete rejection of asylum seekers.

3 A Perverse "Legal Game of Tag" – The Price of Bad Faith

The transformation of the Hungarian asylum system was heavily criticized by the international community and Hungary became the subject of numerous legal proceedings at the European Court of Human Rights and the Court of Justice of the European Union.[78] While every single judgment found that the Hungarian legal regulation violated human rights and European Union law, which incurred substantive amendments of the domestic law, the essence of the Hungarian asylum system remained unchanged – ensuring that all legal avenues remain closed for irregular migrants that enter Hungary, even if Hungary formally complied with the judicial decisions. In order to investigate how this apparent breach of good faith by Hungary could endure without adverse ramifications, this section will first focus on the content and application of the legal principle of good faith and the consequences of acting in bad faith, and will then examine whether the European Union actually has an interest in enforcing compliance with EU and international legal standards through this principle, by analyzing the EU-Turkey agreement and its ramifications. This will eventually allow to problematize the jurisprudence of the CJEU concerning the Hungarian detention of asylum-seekers and the temporary relocation scheme.

3.1 *The Principle of Good Faith in International and EU Law*

The obligation of states to fulfill their international obligations in good faith is a general principle of public international law.[79] Even though good faith, in

77 Art. 268 (2) of Act 2020 of LVIII On the Provisional Rules in Connection with the End of the State of Emergency and Pandemics Preparation. Art. 1 of Government Decree No. 292 of 17 July 2020 specified that asylum applications can only be filed in Hungarian embassies situated in non-EU Member States in neighboring countries, i.e. in Serbia or in Ukraine.

78 For an overview of these cases see Boldizsár Nagy, "Hungary, 'In Front of Her Judges,'" in Paul Minderhoud, Sandra Mantu and Karin Zwaan (eds.), *Caught In Between Borders: Citizens, Migrants and Humans – Liber Amicorum in Honour of Prof. Dr. Elspeth Guild* (Wolf Legal Publishers, Tilburg, Netherlands, 2019), 251–260.

79 See Markus Kotze, "Good Faith (Bona Fide)," in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law, Vol. IV.* (Oxford University Press, Oxford, UK, 2012), 508–516, at 510.

isolation, is a highly flexible concept[80] and cannot be "in itself a source of obligation where none would otherwise exist",[81] it is nevertheless "one of the basic principles governing the creation and performance of legal obligations."[82] This is reflected in such international instruments as the Friendly Relations Declarations,[83] the Vienna Convention on the Law of Treaties[84] or the United Nations Convention on the Law of the Sea.[85] In its narrowest sense, good faith can be deemed a "doctrine of erroneous beliefs", i.e. "lack of knowledge by some subject on some fact, which is thought to exist while it does not, or which is thought to be without defects while it is not."[86] At the very least, it encompasses a requirement that the behavior of international actors should be in conformity with their stated intentions. Indeed, it is arguably an indispensable element of a functioning international legal order.[87]

Consequently, if a state demonstrably and repeatedly acts in bad faith, the legal validity of its commitments should no longer be presumed. However, international courts have generally been reluctant to establish a bad faith conduct of a state. The International Court of Justice repeatedly affirmed that "As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed."[88] Even when it was ready to

80 Hugh Thirlway, *Sources of International Law* (Oxford University Press, Oxford, UK, 2019), 113.

81 ICJ, Border and Transborder Armed Actions (Nicaragua v. Honduras) (1988), ICJ Reports 105, para. 94.

82 ICJ, Nuclear Tests, (New Zealand v. France) (1974), ICJ Reports 473, para. 49.

83 UN GA Res 2625 (XXV) of 24 October 1970, "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States." This provides that "every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law."

84 Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969, Vol. 1155 U.N.T.S. 331 (entered into force 27 January 1980). Art. 26 prescribes that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

85 United Nations Convention on the Law of the Sea, opened for signature on 10 December 1982, Vol. 1833 UNTS 396 (entered into force 16 November 1994). Art. 300 stipulates that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

86 Robert Kolb, *Good Faith in International Law* (Hart Publishing, Oxford, UK, 2017), 15.

87 Virailly even submits that "If this postulate is not taken for granted, the whole fabric of international law will collapse." Michel Virailly, "Review Essay: Good Faith in Public International Law," 77(1) *American Journal of International Law* (1983), 130–134, at 132.

88 ICJ, Navigational and Related Rights (Costa Rica v Nicaragua) (2009), ICJ Reports 267, para. 150. See also PCIJ, Factory at Chorzów, (Germany v. Poland) (1928), PCIJ, Series A, No. 17, 63; ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, ICJ. Reports 437, para. 101.

consider that the applicant had potentially acted in bad faith, it eventually did not find it substantiated.[89]

The principle of good faith is equally relevant in EU law, both as an obligation deriving from international law, and as a *sui generis* EU law principle. Even though the European Union legal order is based on the concept of autonomy from public international law,[90] but the EU is still bound by rules of general international law,[91] and EU law must be interpreted as far as possible in a manner which is consistent with the rules of international law.[92] Accordingly, in a ruling concerning the application of the International Dairy Agreement, the European Court drew on international law to prove that parties to any international agreement have an obligation to show good faith in its performance.[93] Going even beyond, the Court also affirmed that good faith forms part of EU law, and the principle of legitimate expectations is actually a corollary of this general principle.[94] Thus the determination of good faith often plays an important part in European Union jurisprudence.[95]

No matter how well-established the principle of good faith might be, international courts prefer to avoid declaring that a state acted in bad faith out of policy considerations, and also because proving bad faith conduct is riddled with evidentiary challenges. After all, "it is difficult to establish what is supposed to amount to an abuse, as distinct from a harsh but justified use, of a right under international law",[96] and declaring that legislative acts were adopted in bad

89 ICJ, Application of the Interim Accord (FYROM v Greece) (2011), ICJ Reports 685, para. 132.

90 In the Van Gend en Loos case the European Court of Justice pronounced that the "Community constitutes a new legal order of international law for the benefit of which Member States have limited their sovereign rights". ECJ, Case 26/62, *TDC* (1963) EU:C:1963:1. More recently the CJEU emphasized that "an international agreement cannot affect the allocation of responsibilities defined in the Treaties, and consequently, the autonomy of the Community legal order." ECJ, Case C-459/03, *TDC* (2006) EU:C:2006:345, paras. 123 and 282. For a convenient summary of the concept of the autonomy of the EU legal order see Tamás Molnár, *The Interplay between the EU's Return Acquis and International Law* (Edward Elgar, Cheltenham, UK, 2021), 12–59.

91 Molnár, *ibid.*, 46.

92 ECJ, Case C-61/94, *TDC* (1996) EU:C:1996:313, para. 52.

93 *Ibid.*, para. 30.

94 ECJ, Case T-115/94, *TDC* (1997) EU:T:1997:3.

95 See also ECJ, Case C–392/93, TDC (1996) EU:C:1996:131. The European Commission has even initiated an infringement procedure against the United Kingdom for violating its good faith obligation under the Withdrawal agreement. European Commission, "Withdrawal Agreement: Commission Sends Letter of Formal Notice to the United Kingdom for Breach of its Obligations under the Protocol on Ireland and Northern Ireland," (15 March 2021), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1132.

96 Georg Schwarzenberger and Edward Brown, *A Manual of International Law* (Milton Professional Books, Oxon, UK, 1976), 84.

faith requires proof that the legislators deliberately acted to avoid the country's international obligations. Nevertheless, considering that Hungary has demonstrated a manifest pattern of violation of its obligations under international and EU law since 2015 concerning the regulation of asylum, which was publicly acknowledged by Hungarian policymakers, the presumption that Hungary would act in good faith is highly implausible. It therefore seems somewhat surprising that the European Union has allowed time and again one of its Member States to deliberately breach its rules – unless the European Union itself has an incentive to avoid swifter and more decisive action.

3.2 *From Humanity to Hypocrisy – The Reality of "Fortress Europe"*

The Lisbon Treaty provides for the adoption of a Common European Asylum System (CEAS)[97] to ensure the creation of efficient asylum procedures[98] with due regard to the principle of solidarity and fair sharing among Member States.[99] However, it seems that the principle of the sharing of the responsibility to protect refugees has been entirely ignored in actual EU practice. While the Preamble of the 1951 Refugee Convention firmly establishes it as an overarching principle of international refugee law,[100] in practice EU asylum policy was designed to prevent asylum-seekers from entry and shift the burden of their accommodation to the economically less developed transit countries and

97 The term Common European Asylum System itself has never been used in primary EU law. However, it has been consistently employed in EU strategic policy documents, since its first appearance in the Conclusions of the Tampere summit of 15 and 16 October 1999, which stated that "The European Council… agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement." Presidency Conclusions, Tampere European Council 15 and 16 October 1999. The European Commission also uses it to describe EU asylum policies. See https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

98 Art. 78(1) provides that "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."

99 Art. 80 states that "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."

100 The Convention pronounces that "Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which

the southern and eastern EU states.[101] Even though the European Commission seemingly supported the opening of legal avenues for migrants to reach the European Union,[102] in reality the EU introduced a range of *non-entrée policies*, such as visa and carrier sanctions legislation that prevented asylum-seekers from arriving in Europe and concluded agreements with several source and transit countries, such as Albania, Moldova or Pakistan, to prevent the irregular entry of migrants into the EU, failing which they have to accept their readmission.[103] This encouraged individual Member States to externalize migration control by negotiating bilateral arrangements with other countries to achieve similar effects.[104]

The political agreement between the European Union and Turkey to limit the influx of asylum-seekers entering Greece amply demonstrates the hypocrisy of European politics. On 15 October 2015 the EU and Turkey concluded a Joint Action Plan to tackle the increasing flow of Syrian refugees into EU territory, bring order to migratory flows and stem the influx of irregular migration. The EU agreed to provide Turkey with 3 billion Euros in financial support

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the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation." For an analysis see Rebecca Dowd and Jane McAdam, "International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How?," 66 *International and Comparative Law Quarterly* (2017), 863–892, at 868–71.

101 Maryellen Fullerton, "Refugees and the Primacy of European Human Rights Law," 21 *UCLA Journal of International Law & Foreign Affairs* (2017), 45–69, at 56. The Dublin III Regulation assigns to the Member State where an asylum-seeker lodged an asylum application responsibility "for examining an application for international protection". Dublin Regulation Art. 1. Thus the responsibility for asylum-seekers largely depends on the geographical location of states.

102 European Commission (2015) "A European Agenda for Migration," COM(2015) 240 final, 13 May 2015.

103 The full list of agreements is available at https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en. For an analysis see Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, "Understanding The Crisis of Refugee Law: Legal Scholarship and the EU Asylum System," 33(4) *Leiden Journal of International Law* (2020), 871–892, at 876. Since the outbreak of the armed conflict in Syria, Algeria, Egypt, Libya, Morocco and Tunisia have introduced visa requirements for Syrians, most likely under pressure from the EU. Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, "Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System," 53(3) *Common Market Law Review* (2016), 607–642, at 618.

104 See, for example, the *Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders Between the State of Libya and the Italian Republic*. Signed on 2 February 2017, renewed on 2 February 2020. Available at https://tinyurl.com/y22vq4fk.

to cope with Syrian refugees needing temporary protection. The Joint Action Plan was activated on 18 March 2016 under the EU-Turkey Statement with new key elements. The EU pledged an extra 3 billion Euros for Turkey to defray the costs related to accommodating the asylum-seekers until the end of 2018 and undertook to accelerate Turkey's accession negotiations.[105]

Even though the Statement prescribed that "[A]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey", it also emphasized that this "will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion."[106] This scheme is based on the assumption that Turkey is a safe third country, which is highly debatable given the fact that Turkey refuses to recognize the refugee status of non-European asylum seekers[107] and only provides for limited access to its labor market for persons it grants temporary asylum.[108] An even more problematic aspect of the agreement, however, is that a commitment to returning all irregular migrants could breach the fundamental principle of individual assessment of asylum claims and lead to mass expulsions. Unsurprisingly, the UNCHR expressed its concerns about the document[109] and Nils Muiznieks, the Commissioner of Human Rights of the Council of Europe opined that the agreement violated fundamental human rights.[110] The President of the European Commission, Jean-Claude Juncker, however, emphasized that "countries could refuse to consider refugee claims if there was a safe place to send them back to. As Greece had decided Turkey was a safe country, the returns policy was legal."[111]

105 European Council, "EU-Turkey Statement," (18 March 2016), available at https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

106 *Ibid*.

107 Turkey restricted the scope of application of the 1951 Refugee Convention to "events occurring in Europe".

108 See Roman Lahner, "The EU-Turkey-'Deal': Legal Challenges and Pitfalls," 57(2) *International Migration* (2018), 176–185.

109 UNHCR, "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," (23 March 2016), available at https://www.unhcr.org/56f3ec5a9.pdf. The UNHCR implied that Turkey should grant non-European asylum-seekers refugee status and consequently extend the benefits conferred by the 1951 Refugee Convention to be considered as a safe country.

110 Nils Muiznieks, "Stop Your Backsliding, Europe," *The New York Times* (14 March 2016), available at https://www.nytimes.com/2016/03/15/opinion/stop-your-backsliding-europe.html.

111 The Guardian, "EU-Turkey Deal Could See Syrian Refugees Back in War Zones says UN," (8 March 2016), available at https://www.theguardian.com/world/2016/mar/08/un-refugee-agency-criticises-quick-fix-eu-turkey-deal.

Notwithstanding the questionable legality of the ramifications of the execution of the Statement, it became a "legal wall" to limit irregular migration.[112] Its very nature is uncertain: even though it can be regarded as a non-binding instrument that only creates a political commitment,[113] given that the Statement establishes duties on behalf of the European Union and was accepted by all heads of state and governments of the EU, the interpretation that it actually constitutes a binding international treaty 'in disguise' seems to be more persuasive.[114] Nevertheless, the Court of Justice of the European Union refused to assess the compatibility of the agreement with EU law. Accepting the arguments of the European Commission and the European Council, the Court held that even though the Statement was adopted during the meeting of the European Council and by the members of the European Council, it was actually not concluded by the European Council but by the representatives of the Member States, even if the Statement itself clearly stated that it was made by "Members of the European Council."[115] Thus the CJEU regarded the Statement as the act of individual Member States, whose validity falls outside its review competence.

The Court employed a similar approach when it ruled on the alleged obligation of Member States to issue visas on humanitarian grounds that would enable asylum-seekers to enter the territory of the European Union and there lodge an application for international protection. Even though even the Advocate General argued that the effective protection of the fundamental rights of refugees imposed a positive obligation on the Member States to issue

112 Armstrong, *op.cit*. note 46, 366.

113 Mauro Gatti and Andrea Ott, "The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law," in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar, Cheltenham, UK, 2019) 175–200, at 176.

114 *Ibid*.,179–181. See also Lynn Hillary, "Down the Drain with General Principles of EU Law? The EU-Turkey Deal and 'Pseudo-Authorship'," 23(2) *European Journal of Migration and Law* (2021), 127–151.; Eva Kassoti, Alina Carrozzini, "One Instrument in Search of an Author: Revisiting the Authorship and Legal Nature of the EU-Turkey Statement," in Narin Idriz, Eva Kassoti (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (T.M.C. Asser, The Hague, Netherlands, 2022) (forthcoming). For a contrary view see Gloria Fernández Arribas, "The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?," 2(1) *European Papers* (2017), 303–309.

115 ECJ, Case T-192/16, *TDC* (2017) EU:T:2017:128, paras. 56–57. and 70–72. Interestingly, the European Parliament's website still affirms that "On 18 March 2016, the European Council and Turkey reached an agreement aimed at stopping the flow of irregular migration via Turkey to Europe." Available at https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan.

humanitarian visas "where there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing persons seeking international protection to torture or inhuman or degrading treatment",[116] the Court of Justice of the European Union concluded that it is a matter of national sovereignty "as European law currently stands".[117] While this decision is arguably difficult to reconcile with its previous case-law concerning the broad scope of application of the Charter of Fundamental Rights of the EU,[118] it further demonstrated that the European Court is more than willing to support European *non-entrée* policies that maintain "Fortress Europe".

3.3 *Hungary at the Court of Justice of the European Union – The False Pretense of Humanity*

In stark contrast to its jurisprudence outlined above, the CJEU has consistently found that Hungarian migration legislation violated the Common European Asylum System. In its most recent decisions, it even declared that the Hungarian legislation establishing the transit zones amounted to illegal detention since even though the applicants could leave the transit zones and return to Serbia, they would risk losing their chances of obtaining refugee status in Hungary and would be exposed to penalties in Serbia.[119] This was somewhat surprising as only a few months earlier, the European Court of Human Rights (ECtHR) had actually come to the conclusion that the operation of transit zones did not qualify as detention since the applicants had the option to leave the territory for Serbia, i.e. they were physically not prevented from leaving the transit zones.[120] Thus, the Court of Justice of the European Union proved to be more humanitarian than an actual human rights court. While the Charter of Fundamental Rights allows European Union law to provide "more extensive protection" than the European Convention of Human Rights,[121] the Court

116 ECJ, Case C-638/16, *TDC* (2017) EU:C:2017:93, para. 3.

117 ECJ, Case C-638/16, *TDC* (2017) EU:C:2017:173, para. 45.

118 See Malu Beijer, "The Limited Scope for Accepting Positive Obligations Under EU Law: The Case of Humanitarian Visas for Refugees," 11(1) *Review of European Administrative Law* (2018), 37–48, at 47.

119 ECJ, Joined Cases C-924/19 and C-925/19, *TDC* (2020) EU:C:2020:367, paras. 229–230. See also ECJ, Case C-808/18, *TDC* (2020) EU:C:2020:1029.

120 ECtHR, *Ilias and Ahmed v. Hungary*, ECtHR Judgment (21 November 2019), App. No. 47287/15, paras. 231–249. This can be regarded as part of a trend in the recent jurisdiction of the European Court of Human Rights that restricts migrant rights. See Carola Lingaas, "A Threat to the European Identity? A Legal Analysis of the Borders and Boundaries of the European Homeland," in Margaret Franz and Kumarini Silva (eds.), *Migration, Identity, and Belonging – Defining Borders and Boundaries of the Homeland* (Routledge, Oxon, UK, 2020), 39–47, at 42.

121 Art. 52(3) of the Charter of Fundamental Rights of the European Union.

never explicitly justified this divergence.[122] This remarkable difference, however, might be explained more by the open Hungarian defiance of European migration policies than the newly found interest of the Court in the protection of the human rights of migrants.

The European Court's 2017 judgment on the relocation mechanism supports this assumption. The case concerned the legality of the Council's 22 September 2015 decision, which established the relocation of asylum-seekers from Greece and Italy to other Member States.[123] Hungary and Slovakia sought to annul the decision, invoking perceived procedural and substantive issues. Among other arguments, Hungary submitted that its rejection of the Council Decision was actually the result of defending the human rights of the participants in the relocation program as their preferences for final destination are disregarded during the transfer. Hungary argued that "the fact that applicants may possibly be relocated to a Member State with which they have no particular connection" raised serious compatibility issues of the Relocation Decision with the Refugee Convention.[124] Even though the sincerity of the plea was dubious, given Hungary's actual migration policies and public rhetoric, the employed line of reasoning seemed to reflect the humanitarian scope of the Convention.

Nevertheless, the CJEU summarily rejected this argument, claiming that the 1951 Refugee Convention does not provide a right for asylum seekers to remain in the country where the application was lodged while it is pending but simply

122 While the material time of the pleaded violations significantly differed, as the Ilias and Ahmed v Hungary case concerned the rejection of asylum applications in October 2015, and the CJEU decision involved asylum applications submitted in February 2019, the question of whether confinement in the transit zone could be deemed as deprivation of liberty was essentially the same. Therefore, arguably the Court of Justice of the European Union established a broader concept of detention than the European Court of Human Rights. This is underlined by a recent judgment of the ECtHR, examining asylum applications in 2017, in which the Court found that that due to "lack of any domestic legal provisions fixing the maximum duration of the applicants' stay, the excessive duration of that stay and the considerable delays in the domestic examination of the applicants' asylum claims, as well as the conditions in which the applicants were held during the relevant period… the applicants' stay in the transit zone amounted to a *de facto* deprivation of liberty." ECtHR, *R.R. and Others v. Hungary*, ECtHR Judgment (2 March 2021), App. No. 36037/17, para. 83. Still, the Court emphasized that "the risk of the applicants' forfeiting the examination of their asylum claims in Hungary and their fears about insufficient access to asylum procedures in Serbia… did not render the possibility of them leaving the transit zone in the direction of Serbia merely theoretical…" and thus could not have qualified as deprivation of liberty. *Ibid*, para. 81.

123 See *op.cit*. note 47.

124 ECJ, Joined Cases C-643/15 and C-647/15, *TDC* (2017) EU:C:2017:631, paras. 315–316.

aspires to protect the applicants from expulsion to third countries. Since the relocation operation is actually aimed at ensuring that the applications would be examined within a reasonable time, it cannot be regarded as a violation of the principle of *non-refoulement* and as such complies with both the Refugee Convention and Art. 18 of the Charter of Fundamental Rights.[125] This conclusion demonstrates that the Court clearly values the "objective system" created by the Dublin III Regulation[126] over humanitarian concerns. After all, even if the prevailing concern motivating the adoption of the Refugee Convention was the prevention of expulsion of asylum seekers, the international regulation of refugee law has clearly evolved to give more consideration to the individual needs of applicants. Allowing that the existence of the right to remain is not universally acknowledged,[127] the Council Decision is still a radical departure from the authoritative standards set by the UNHCR constituting a veritable "dystopia of sharing people."[128] While the Relocation Decision indeed urged Member States to take into account links with particular EU countries, it still remained possible for asylum seekers to be transferred to a country with which they had no connection at all.[129]

These contrasting approaches arguably reveal differing conceptions of the identity of the "demos", the people, whose interests should be protected. The CJEU – unsurprisingly – prioritizes the interests of the citizens of EU states, implying that it will concomitantly benefit the asylum-seekers as well. Thus, the asylum-seekers' intentions are only of secondary importance. The Hungarian line of argumentation, however, posits that the "people" in this situation are actually the asylum-seekers. While this position seems more reconcilable with the humanitarian goal of the Refugee Convention, it is utterly incompatible with actual Hungarian policies. Since Hungary obviously did not actually intend to protect the interests of the asylum-seekers, but simply opportunistically employed this strand of legal argumentation, it is made in bad faith. Thus, it is actually a populist argument as it claims to defend the interests of the people (the asylum-seekers) against a system that would transfer them against

125 *Ibid.*, paras. 338–343.

126 *Ibid.*, para. 332.

127 But see Sieglinde Rosenberger and Alexandra König, "Welcoming the Unwelcome: The Politics of Minimum Reception Standards for Asylum Seekers in Austria," 25(4) *Journal of Refugee Studies* (2011), 537–554, at 538.

128 Francesco Maiani, "The Reform of the Dublin System and the Dystopia of 'Sharing People'," 24(5) *Maastricht Journal of European and Comparative Law* (2017), 622–645.

129 Bruno de Witte and Evangelia Tsourdi, "Confrontation on Relocation – The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers Within the European Union: Slovak Republic and Hungary v. Council," 55(5) *Common Market Law Review* (2018), 1457–1494, at 1491.

their own will to other, potentially more hostile countries, when in reality it is a projection of Hungarian populist domestic policy to the European plane. At the same time, the Court's rejection of the Hungarian argument is ultimately also populist as it relies on a concept of general good embodied by the principle of solidarity between European states for the benefit of the people (the European citizens) over the actual interests of the asylum-seekers.

In the end, the jurisprudence of the CJEU is ineffective in addressing the systemic violations committed by Hungary, as the European asylum system is constructed to reflect the reality of "Fortress Europe", which aims to exclude migrants through both legal and extralegal practices. Hence, even though the Hungarian policies avowedly aim at denying asylum, the apparent bad faith itself that underlines Hungarian actions is never addressed, as that would inevitably raise delicate questions about the underlying good faith of the Common European Asylum Policy itself.

4 Conclusion

Hungary remains in open defiance of European Union Migration policies. Its current legal regulation effectively prevents any asylum-seekers entering into the country to lodge applications for international protection, and the Hungarian Parliament issued a resolution rejecting the adoption of the proposed European Union Pact on Migration and Asylum.[130] At the same time, the Government is willing to give allowances to groups or individuals that do not "threaten" Christian Hungarian identity, such as Egyptian Coptic Christians,[131] Venezuelans with proven Hungarian ancestry[132] or even Nikola Gruevski, the former Northern Macedonian Prime Minister, who fled the country after being convicted of corruption.[133]

130 Hungarian Parliament, Resolution No. 40/2020, 16 December 2020. The resolution claims that the proposed Pact violates the principle of subsidiarity and does not take into account the national characteristics of Member States including the Hungarian Fundamental Law that prohibits settling in foreign population.

131 Daniel McLoughlin, "Hungary to Help Christians while Rejecting Muslim Migrants," *Irish Times* (27 September 2016), available at https://www.irishtimes.com/news/world/europe/hungary-to-help-christians-while-rejecting-muslim-migrants-1.2807543.

132 Nick Thorpe, "Venezuela crisis: Secret Escape to Anti-migration Hungary," *BBC News* (4 March 2019), available at https://www.bbc.com/news/world-europe-47401440.

133 Mr. Gruevski fled to Hungary in November 2018 with the assistance of the Hungarian government. Even though he transited Macedonia and Serbia to enter Hungary – two countries that were designated as safe by the Hungarian government – his asylum claim, based on alleged political persecution, was promptly recognized. This, however, implies

The European Union, on the other hand, ostensibly acts decisively to enforce EU law. Apart from the usual political declarations, the Commission has initiated yet another infringement procedure against Hungary for the latest amendment of asylum legislation[134] which will no doubt – after a few years – result in yet another European Court decision determining the violation of EU law, which can initiate a new round of "creative" Hungarian legislation. Thus, this perverse legal game of tag can continue unabated, a game where both sides can claim to be winners. The Fidesz government can proudly proclaim that it not only protects the people of Hungary, but Hungarians have reasserted their role as "the Defenders of Christendom"[135] and the public image of Prime Minister Orbán taking a bold stance against Brussels to defend Europe from uncontrolled migration boosts his party's popular approval.[136] Contrarily, by publicly denouncing the Hungarian policies, the European Union can demonstrate its apparent commitment to humanitarian values while tacitly introducing measures and supporting national policies that aim at curbing migration without challenging the EU political and legal order. Indeed, when immigration consistently remains one of the main concerns in European Union countries,[137] it is hardly surprising that the EU fails to address even systemic violations of migration law committed in other countries.[138]

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that not even the Hungarian government considers Serbia as a safe country under all circumstances. Sinisa Jakov Marusic, "Fugitive Macedonian Ex-PM 'Seeking Asylum in Hungary," *Balkan Insight* (13 November 2018), available at https://balkaninsight.com/2018/11/13/macedonia-s-fugitive-ex-pm-seeking-asylum-in-hungary-11-13-2018/.

134 Available at https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687.

135 Paul Lendvai, *The Hungarians. A Thousand Years of Victory in Defeat* (Princeton University Press, Princeton, 2003), 75.

136 Unsurprisingly, on 1 September 2021, Orbán publicly reaffirmed that Muslim immigrants should be denied entry to the European Union. The Prime Minister stated that "If we invite others from outside Europe, that will change the cultural identity of Europe… the migrants who are coming now are all Muslims." "PM Orbán Calls on EU to Give All Rights Relating to Migration Back to Member States," *Hungary Today* (1 September 2021), available at https://hungarytoday.hu/orban-migration-eu-16th-bled-strategic-forum/.

137 European Commission, "Standard Eurobarometer 93: Public Opinion in the European Union," (Summer 2020) 31.

138 One obvious example is the militarization of the external border at the Spanish enclaves of Ceuta and Melilla that resulted in the death of numerous asylum seekers. Carolina Kobelinsky, "Border Beings. Present Absences among Migrants in the Spanish Enclave of Melilla," 44(11) *Death Studies* (2020), 709–717. See also the recent allegations of Frontex complicity in pushbacks at the Greece-Turkey border. Giorgos Christides, Emmanuel Freudenthal, Steffen Lüdke und Maximilian Popp, "EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign," *Der Spiegel* (23 October 2020), available at https://www.spiegel.de/international/europe/

This vicious circle could, of course, be easily broken by establishing the bad faith of Hungarian actions and applying legal sanctions until the Hungarian legal framework is compatible with the Common European Asylum Policy once more. However, as long as European Union countries are committed to maintain "Fortress Europe", this is unlikely to happen. All in all, the Hungarian regulation is the textbook example of "populist legalism", a system of regulation that seemingly complies with the requirements of the rule of law, while in reality betrays its spirit by rejecting to actually comply with international obligations in bad faith.[139] Its only effective countermeasure is actually enforcing compliance but that would call for good faith in all actors.

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eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7?utm_source=dlvr.it&utm_medium=twitter#ref=rss.

139 Ghezelbash recently coined the term hyper-legalism to describe how states employ an overly formalistic bad faith approach to interpreting international law with the aim to avoid their international legal obligations towards refugees. See Daniel Ghezelbash, "Hyper-legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees," 68(3) *The American Journal of Comparative Law* (2020), 479–516. While this seems to be a common phenomenon, Hungarian asylum policies clearly exceed this, as Hungarian laws are adopted with the publicly stated intention to avoid the application of Hungary's international and EU law obligations, i.e. they even dispense with the pretense of complying with international obligations.