



OPEN BORDERS, CLOSED MINDS: EU ASYLUM POLICY IN CRISIS

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List of Abbreviations

Charter	Charter of Fundamental Rights of the EU
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IOM	International Organisation for Migration
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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Introduction

The EU is facing a number of crises which are testing its values and policies. These crises can be felt across all policy areas, including asylum policy – one of the most prominent crises faced by the EU today. This policy area cuts across many themes: how costs and burdens should be shared across countries with one external border, how politics and populism effects policy making in an international and supranational arena, and the balance between security and promoting a ‘social Europe’. This report discusses these cross cutting issues by tracing EU values in asylum policy at the EU and national level. The rising number of asylum seekers entering Hungary, and the related and ongoing government anti-immigration campaign, makes this country a particularly good case study, highlighting how asylum policy connects the social, political and economic spheres. This situation allows us to examine how a challenging national political environment can come into conflict with the EU, and how EU values such as human rights can be diluted through the politics of policy-making and implementation.

The devastation and destruction of the Second World War gave roots to the idea of an European Union, grounded by economic cooperation, that would give rise to peace between European nations. As the end of World War II left millions displaced, national governments struggled to cope with some of the largest population movements in European history. It is worth remembering that the same context that gave birth to the idea of a unified Europe also engendered the principal elements of international refugee law, emerging from a deep sense of responsibility for the fate of those fleeing the Holocaust who were often refused entry when in desperate need of asylum (Malkki 1995). The 1951 Geneva Convention Relating to the Status of Refugees, a key legal document defining the rights of refugees and the legal obligations of states towards this vulnerable population, was initially only "intended to address the European refugee situation (covering events occurring before January 1, 1951) and not refugees as a universal phenomenon" (Malkki 1995).

Sixty years later, political upheavals and conflict have produced what the United Nations now describes as the largest pool of refugees, asylum-seekers and internally displaced persons since the humanitarian catastrophe of World War II (Hadid and Krauss 2014). The dramatic increase of migrants and asylum seekers fleeing instability in the Middle East and Africa poses a challenge for European policymakers grappling with a stagnating economy and a rise anti-immigration political rhetoric. With the recent capsizing of several boats carrying asylum seekers in the Mediterranean, the lack of a unified European response to the migration crisis has garnered global attention. According to a 2014 report from the International Organization for Migration (IOM 2014), Europe has emerged as the most dangerous destination for irregular migration in the world, and the Mediterranean Sea as the world's most dangerous border crossing, claiming the lives of 22,000 migrants since 2000 (IOM 2014).

An increasing awareness of the perilous nature of this sea crossing and the dire asylum conditions in Italy and Greece has led to the development of alternate migration routes, in particular through the Balkans to Hungary (see Figure 1). According to Frontex, the EU border control agency, 7,000 migrants and refugees crossed the border between Serbia and Hungary in April 2015 alone, compared to 900 in April 2014. The recent surge in asylum seekers has made Hungary a particularly interesting case study for assessing asylum policy. Shifting from a country of emigration to immigration, Hungary is in second place behind Sweden for the most asylum applicants per capita among EU countries (HRW 2015). This report aims to uncover how EU values connect with crisis policy responses, and how these responses are received and translated in the national arena through the case of Hungary. After analyzing the role that fundamental rights play in framing EU asylum policy, this report will detail the evolution of EU asylum policy tools. By focusing on the political situation and the asylum framework of Hungary, this report shows how piecemeal implementation of EU policy contradicts the underlying message expressed by the ruling party in Hungary. A key element of the report is the importance of political actors in these policy decisions, and how anti-immigration rhetoric can impact on the rights of refugees. It concludes with policy recommendations at the EU and national level for both state and non-state actors.

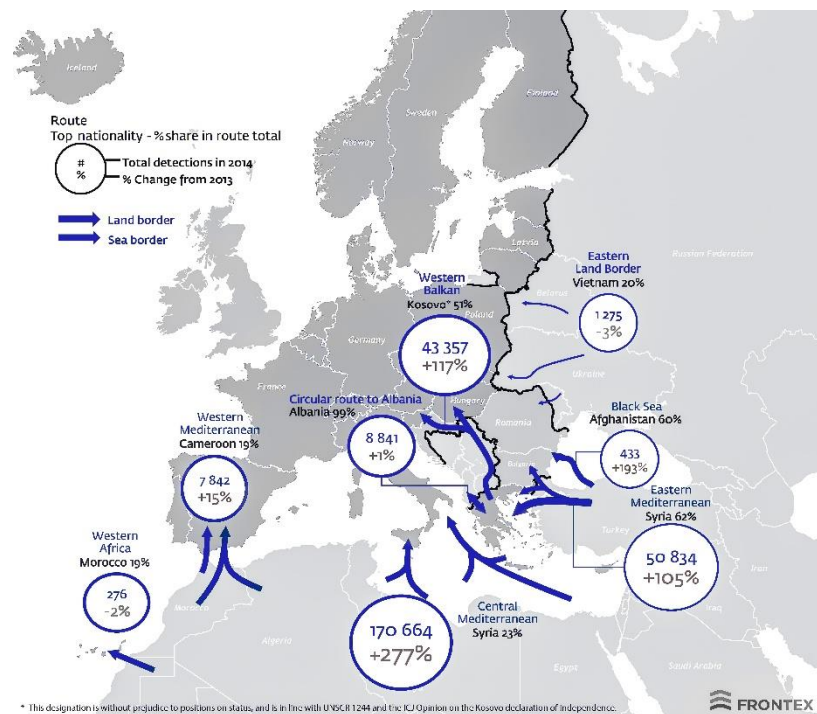


Figure 1: Migration routes into Europe
(Source: Frontex Annual Risk Report 2015, p.16).

Part 1. Do EU Values Frame Asylum Policy in the EU?

The increasing awareness of the perilous nature of migration routes and the rise in Mediterranean migrant deaths has been accompanied by harsh criticism of the European Union and its member states. Critiques of the situation are rife. Some are harsh on the EU because its alleged failure to protect the security of its citizens from 'dangerous' migration flows (e.g. Zbytniewska and Kokoszczyński 2015). In general, however, the criticisms refer to international obligations and basic principles of human dignity and the right to life, principles on which the EU was founded. Policy makers and media sources alike view these tragedies as proof of the 'disgrace' or 'failure' of EU policies (e.g. Schlamp 2013, Lopez 2015). Their concern is rooted in the understanding that there are basic European values, including fundamental rights that are being violated by the mismanagement of the migration crisis. The values of democracy and fundamental rights are a building block of the European Union. To conform to these values, European policies towards refugees should be rooted in the openness of borders, the protection of human lives and the guarantee of basic security for those who reside in the region.¹

These core values are often lacking in contemporary realities where there are significant limits to EU's cosmopolitanism, which is prominently revealed in the EU's restrictive asylum policies (Brown 2013). The following section will outline these EU values in more detail, and demonstrate how any EU policy must adhere to these normative standards, otherwise such policies will run contrary to the EU's core nature and weaken its legitimacy..

EU Values and Fundamental Rights: An Overview

The fundamental values of the EU are enshrined in Article 2 in the Treaty on the European Union (TEU) and further elaborated in Article 3. These are the respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values manifest the concrete objectives of the European Union: the promotion of peace, the Union's values and the well-being of its peoples. In this sense, the Lisbon Treaty is 'deeply rooted in human rights' (Piris 2010: 71-73).

Human rights have gradually become incorporated into the legally binding framework of EU law, providing for one of the most advanced systems of human rights protection in the world. The European Union protects fundamental rights through a 'three-pronged approach': the Charter of Fundamental Rights elevated to Treaty status, the prospect of EU accession to the European Convention on Human Rights (ECHR) and finally, the reaffirmation that EU law should be inexorably linked with human rights² (Rosas and Armati 2012: 161). These translate EU values in Article 2 TEU into legally binding norms, as the EU 'legalized' the universal concept of human rights under the title of fundamental rights (Rosas and Armati 2012: 168).

¹ In one view, migrants not only bring economic benefits to Europe but they play a vital role in the *construction* of a European political community. Their efforts to become residents in Europe create an 'imagined community' of Europeans that they are unable to create on their own. In other words, '[European polity] is rendered possible by acts of immigrants, who paradoxically contribute to constituting the borders of the EU, and thereby the EU as a political community, in the very process of crossing them' (Zapata-Barrero 2009: 31).

² 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law' (Article 6 para 3 TFEU).

EU institutions must comply with those fundamental rights. EU instruments may be annulled if they are not in accordance with fundamental rights.³

Similarly, member states are bound by these principles when they act as ‘agents of the EU’ by implementing EU policies or applying EU legislation (Craig and De Búrca 2011: 382-384). While there is a significant debate on the extent to which certain policies fall under EU competences, asylum policy clearly falls within the scope of application of EU law, given the harmonization of member state policies and the establishment of the Common European Asylum System. From a legal point of view, there is no way to legitimize non-compliance with EU values in asylum policy - either at a European or a national level.

The European Court of Human Rights (ECtHR) in Strasbourg interprets and applies the ECHR. As such, it operates as the ‘last resort’ remedy for human rights violation by state organs. The EU as an organization is not (yet) a party to the Convention, therefore the ECtHR cannot directly rule on the compliance of an EU instrument with fundamental rights as set out in the Convention. Moreover, the ECtHR qualifies the EU’s system of protection of fundamental rights as equivalent to the ECHR. On this basis, the Strasbourg Court presumes that EU instruments, and their domestic implementations, are in accordance with the ECHR, unless this presumption is rebutted in a particular case.⁴ Despite these limitations, the ECtHR may still exert pressure to ensure EU Directives and Regulations are implemented and applied in conformity with the Convention. One of the most fundamental challenges to EU policies came in the *MSS vs. Belgium and Greece* case,⁵ where the ECtHR arguably positioned itself as the final arbiter, indirectly assessing the compliance of domestic implementation of EU law, specifically the Reception Conditions Directive, with fundamental rights. This approach is backed by Article 53 of the Charter of Fundamental Rights of the EU (Charter), according to which its interpretation cannot justify lowering of human rights protection in the member states. A ‘race to the bottom’ in human rights in terms of adoption of regressive measures is thus generally not acceptable.

Fundamental rights in Asylum Policy and the Role of the Court of Justice

If there is one area where the EU has been criticized for its lack of a firm human rights approach, it is the field of the refugee and asylum policy (Craig and De Búrca 2011). This is particularly problematic since the right to asylum is enshrined in Article 18 of the Charter, which also refers to the 1951 Convention relating to the Status of Refugees (Geneva Convention). However the Court of Justice of the European Union (CJEU) seems to have constructed a largely self-contained refugee regime with little consideration for international refugee law (Bank 2015: 30).

³ Unlike EU institutions and Member States, which can bring actions for annulment before the Court of Justice of the European Union (CJEU) against EU legislative acts, such as Regulations and Directives, individuals lack standing to do so. They may, however, bring actions before domestic courts against national acts implementing those EU Directives or applying EU Regulations, and then ask national judges to refer to the CJEU questions pertaining to the validity of the EU instruments.

⁴ The principle was laid down in the ECtHR’s *Bosphorus* case (*Bosphorus Airways v. Ireland*, [Hudoc, Application no. 45036/98] 2005. see also De Schutter 2014), according to which the EU system of protection of fundamental rights is considered equivalent to the one provided by the ECHR.

⁵ *MSS v Belgium and Greece* [Hudoc, Application No. 30696/09], 2011.

The CJEU's possibilities to influence EU asylum policy are limited because, as a court, it can only act in an ad hoc and piecemeal manner. Therefore, even though the CJEU may have adopted a 'human rights mindset,' it may still not be able to annul controversial provisions in EU asylum law. In addition, some scholars stress there is no clear understanding of 'justice,' and therefore 'fundamental rights' provided by the Court, that is influential enough to affect other institutions and actors in the system (Douglas-Scott 2011).

In sum, the implementation of the right to asylum and asylum policies in general within the Area of Freedom, Security and Justice (AFSJ) of the EU is a 'test case' for the EU's commitment to human rights (Askola 2015). The EU appears very much 'inward-looking' at the initial stages of policy design, more concerned with security and stability within its borders than with providing solid human rights guarantees. People who do not have EU citizenship, or EU family members, receive limited protection within the European Union. (Askola 2015: 117).

What Asylum Policy is needed to Comply with EU Values?

Given the commitment of the European Union to the values of democracy and human rights, when a policy is not in accordance with these values, it can weaken the EU as a whole. The next section will demonstrate that EU asylum policies fail to meet these requirements, already in the initial stages of policy-making. Policy makers ignore human rights objectives, favoring instead other policy goals such as reducing the number of irregular migrants into the EU. Later on, these policies are mildly repackaged to make them compatible with core EU values (with the introduction of principle such as non-refoulement, non-discrimination and the right to asylum (Goodwin-Gill 2011). Fundamental inconsistencies arise that – combined with external factors – result in the tragic loss of lives, which in turn, supports criticism of the EU's policies and sometimes the European Union as a whole.

Part 2. EU Asylum Policy Tools

The Common European Asylum System: An Overview

The right to seek asylum was originally enshrined in the Geneva Convention Relating to the Status of Refugees in 1951 and the associated Protocol in 1967 of which all European Union (EU) member-states are signatories. However, the procedures, conditions and qualifications for asylum seekers differed across member-states until the establishment of the Common European Asylum System (CEAS) in 1999, which sought to harmonize the existing national asylum procedure and coordinate the handling of asylum applications across the EU.

The negotiation process and approval of current EU asylum instruments reveal the adverse consequences of ‘bargaining’ between the member states. It has been argued that these negotiations, and the ‘minimum standards’ created by the CEAS, have led to a ‘race to the bottom’ in asylum policy standards (Slingenberg 2014, Boeles et al 2014, Ripoll and Trauner 2014). While the Commission usually proposed more pro-refugee provisions, the member states in the Council more often than not rejected these proposals and lowered the standards.

There are inconsistencies between connected policies, such as asylum and migration, which may undermine the protection of asylum seekers. For example, the goal of the CEAS is to “offer appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement” (Article 78 TFEU). In comparison, the objective of the EU’s common immigration policy is to “shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in member states, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings” (Article 79 TFEU). The common external border aims to ensure a high and uniform level of control of persons. The goal of the common immigration and borders policy, when protecting the border from illegal migration, thus runs counter to the humanitarian objective of the CEAS. Asylum seekers, by necessity, often take risks to enter the EU as they can only apply for asylum once they have entered a member-state.

Main Directives

There are five major directives associated with the CEAS: four harmonize the treatment and rules for asylum within member-states, while the fifth provides rules that establish which country is responsible for the process. The Temporary Protection Directive, adopted in 2001,⁶ established universal provisions and procedures for member-states experiencing a mass influx of displaced persons. This was created in response to previous conflicts in the former Yugoslavia and Kosovo, however, despite its existence for more than a decade this Directive has never been used. In order to activate it, the Council must declare a mass influx of asylum seekers who would then be given temporary permits to enter the EU because of an armed conflict. Some contend that the increasing numbers of asylum seekers fleeing the recent

⁶ Council Directive 2001/55/EC of 20 July 2001.

upheavals and conflicts of the Middle East would warrant the activation of this Directive, but no steps have been taken in this direction by Brussels.

The Reception Conditions Directive,⁷ the Procedures Directive⁸ and the Qualification Directive⁹ together establish how asylum seekers should be treated during the application procedure, and under what circumstances a Member-State should grant asylum. These three Directives arguably have the closest links with EU fundamental rights as they establish minimum protections for those seeking asylum. It is important to note here that the Reception Conditions Directive states that sufficient information on the asylum process should be available, provides provisions for freedom of movement and residence permits, and insists on the maintenance of the family unit during the asylum process. It also establishes the right to medical services, schooling of minors, access to employment and vocational training and material reception conditions. It also provides the conditions under which withdrawal of reception can take place, and creates standards for persons with special needs such as minors and those who have undergone traumatic experiences (Council Directive 2003).

The Procedures Directive establishes minimum standards for granting or withdrawing refugee status to asylum seekers. It provides baseline procedural standards for access to asylum procedures, and the right to remain in the state pending application examination. It also sets requirements for the examination and decision rendered by the determining authority, as well as the guarantees and obligations of the asylum seeker through the process. It further lays out the process for a personal interview and the right to legal assistance. Lastly, the Directive forbids the detention of asylum seekers and provides the right of appeal (Council Directive 2005).

The Qualification Directive establishes common grounds across the EU member states for granting asylum or refugee status. These are namely the persecution or the threat of serious harm for reasons of race, religion, nationality, or membership of a certain group social group (Directive 2011).

Recent developments and not-so-recent criticisms of these Directives have resulted in clarifications, as well as political and legal amendments. New versions of the Reception Conditions Directive¹⁰ and the Asylum Procedures Directive¹¹ will come into force in July 2015. The former provides specific conditions for detention facilities including access to fresh air and communication with lawyers, NGOs and family members, and clarifies the obligation of member states to conduct individual assessments to identify vulnerable persons who should have access to additional support (Directive 2013b). The latter provides clearer rules on applications and appeals, a time limit of six months for normal asylum procedures, and guarantees adequate support for those in need of special assistance during the procedure. Lastly, it provides for accelerated and broader procedures where a case is seen to be unfounded or

⁷ Council Directive 2003/9/EC.

⁸ "Council Directive 2005/85/EC.

⁹ Directive of the European Parliament and of the Council 2011/95/EU.

¹⁰ Directive of the European Parliament and of the Council 2013/33/EU.

¹¹ Directive of the European Parliament and of the Council 2013/32/EU.

abusive (Directive 2013c). It is unclear how these new Directives will affect asylum procedures, and will remain largely unassessed here as they have yet to come into full force.

The Dublin Agreement: Challenges and Implementation

Finally, the Dublin Convention, which was replaced by the Dublin II Regulation in 2003¹² and Dublin III Regulation in 2013,¹³ provides legal clarity as to which country is responsible for the asylum procedure. Under the Dublin regime, the member state where the asylum seeker first entered the EU - whether legally or illegally - is the country responsible for processing the asylum claim. This controversial Regulation has come under frequent criticism, primarily that it puts an unfair pressure on peripheral states where asylum seekers most frequently enter the EU. Many of these States have also been hit hardest by the crisis and have weaker infrastructure and institutions. This has resulted in overcrowded and under-resourced migrant reception centers in Italy, Greece and Malta, further fueling anti-EU and anti-migrant political rhetoric

Fundamental challenges to the implementation of EU asylum law instruments, in particular Dublin II and the Reception Conditions Directive have arose before the highest European courts. The CJEU, backed by the approach of the ECtHR in the MSS case,¹⁴ ruled that an asylum seeker in a CEAS member state cannot be transferred to another member state where she/he may face a "real risk to be subjected to ill-treatment" (Mink 2012: 123, see also Buckley 2012 on the NS Case).¹⁵ This judgment seems to confirm that the CJEU has developed into a more human rights centred court since the Charter became legally binding. The CJEU established the 'rebuttable presumption' here, which provides that a member state cannot transfer an asylum seeker to the country of entry when the state "cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions in that member state amount to substantial grounds for believing that the asylum seeker would face a real risk of being subject to inhuman or degrading treatment" (Xing-Yin Ni, 2014).

In addition, analysis of third-party interventions in asylum law cases also confirm the more active role of the Court of moving the law from books into practice, but indicates room for improving the procedural standards at the Court (Carrera, De Somer and Petkova 2012). The CJEU has also succeeded in dealing with numerous challenging questions related to asylum law instruments in the recent years, such as about the scope of non-refoulement principle, cooperation with the UNHCR (the United Nations' refugee agency), criteria for evaluating claims of asylum applicants or allocation of state responsibility for determining asylum claims (Garlick 2015).

In sum, although the CEAS was put in place to harmonize asylum procedures across the EU, this has not occurred in practice. Implementation of the directives have been piecemeal in many countries (including Hungary, discussed in detail below). The creation of 'minimum standards' has led to a race to the bottom in many cases, resulting in lowered standards in some countries hoping to dissuade refugees from applying for asylum in their country. Furthermore, these

¹² Council Regulation (EC) No 343/2003 of 18 February 2003.

¹³ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013.

¹⁴ MSS v Belgium and Greece [Hudoc, Application No. 30696/09], 2011.

¹⁵ NS v Secretary of State for the Home Department (NS) (C-411/10), 2011.

minimum standards have not been achieved in some countries, and a key principle of the EU – the presumption of compliance – has been abolished as a result. EU asylum policy does not reflect the core EU principles of human rights, instead it focuses on allocating the ‘burden’ of the asylum seeker, and dissuading refugees from travelling and applying for asylum – a basic right in itself.

Part 3. Assessing Hungarian Asylum Policy During a Time of Crisis

International Migration and the Hungarian Border

Hungary is a peripheral country that has seen a rise in irregular migration – many who begin the asylum process there. It is also a key migratory route into the EU. Most (although not all) of the policy tools discussed above have been transcribed into law. However, this signals neither implementation of the tools, nor compliance with the spirit of the law and a belief in the fundamental right of asylum. In these areas, particularly the latter, there is grave cause for concern in Hungary, where the governing party has launched an extreme anti-immigration campaign and is currently threatening to suspend the Dublin regulation. This case illustrates how an economic crisis can stimulate political change at a national level, which can ripple through society and challenge the founding values of the EU. The situation in Hungary and the EU is unfolding very quickly, therefore it is impossible to say how it will turn out. This report is current up until 28 June, 2015, however by the time of publication it is likely that the situation will have evolved. However, the Hungarian case illustrates the fundamental questions that we are facing about the purpose and values of the EU.

While immigrants make up only 1.4 percent of Hungary's population, nearly three quarters of them come from neighboring countries and national migration policies are geared towards integrating ethnic Hungarians. Other migrant groups are perceived as foreign, and recent political developments reveal a tendency to securitize migration policies. Asylum seekers have increased substantially over the last decade and exponentially over the past two years, from 2,157 in 2012, to 18,900 in 2013 and 42,777 in 2014 (OIN Figures in Asylum Information Database 2015). This has turned the Hungarian-Serbian border into the 3rd largest entry point into the EU and the heart of the Western Balkan migration route (see Figure 2).

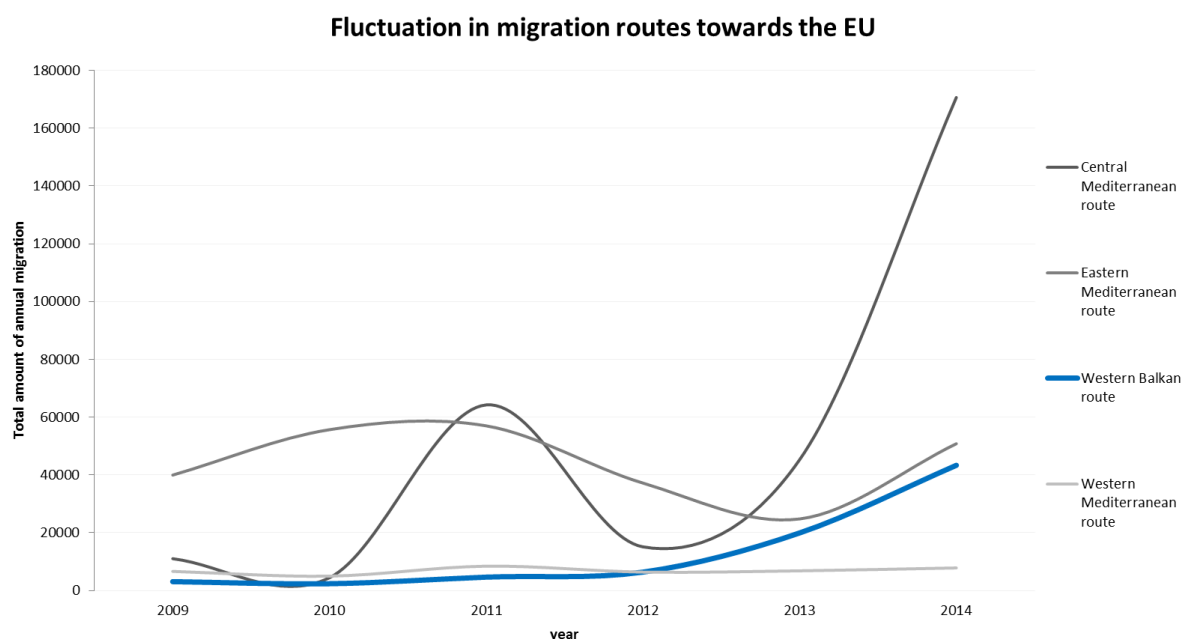


Figure 2 Migration traffic per route into the EU. Hungary sits on the Western Balkan route (Source: Frontex Annual Risk Report 2015, p.16).

However, according to the National Office of Immigration and Nationality (OIN), 80% of asylum-seekers leave Hungary within ten days of asking for asylum, mostly to Western European countries. (Hungarian Helsinki Committee 2015) Better economic prospects lure migrants to the West, but migrants are also deterred from staying in Hungary by a lack of any cohesive integration and asylum model in Hungary. Problematic policies of detention, strict asylum claim assessment and difficult integration into Hungarian society send away many who would otherwise consider staying. Less than .001 per cent of refugee applications were accepted in 2014 (see Figure 3) (EUROSTAT 2015). The Council of Europe, the UNHCR, and the European Commission have all reprimanded Hungary for its discriminatory policies. Anti-immigrant rhetoric continues to shape political debates, fueled by nationalist agendas, and backed by proposed amendments to national laws that would prove catastrophic to the lives of asylum-seekers in Hungary (EUROSTAT 2015). This section will outline the current dangerous political context of Hungary, and then elaborate on the slightly contradictory picture that the legislative framework reveals. This illustrates how legal transposition of EU directives (although perhaps flawed in and of themselves as discussed in the previous section) cannot be construed as adherence to the spirit of the law.

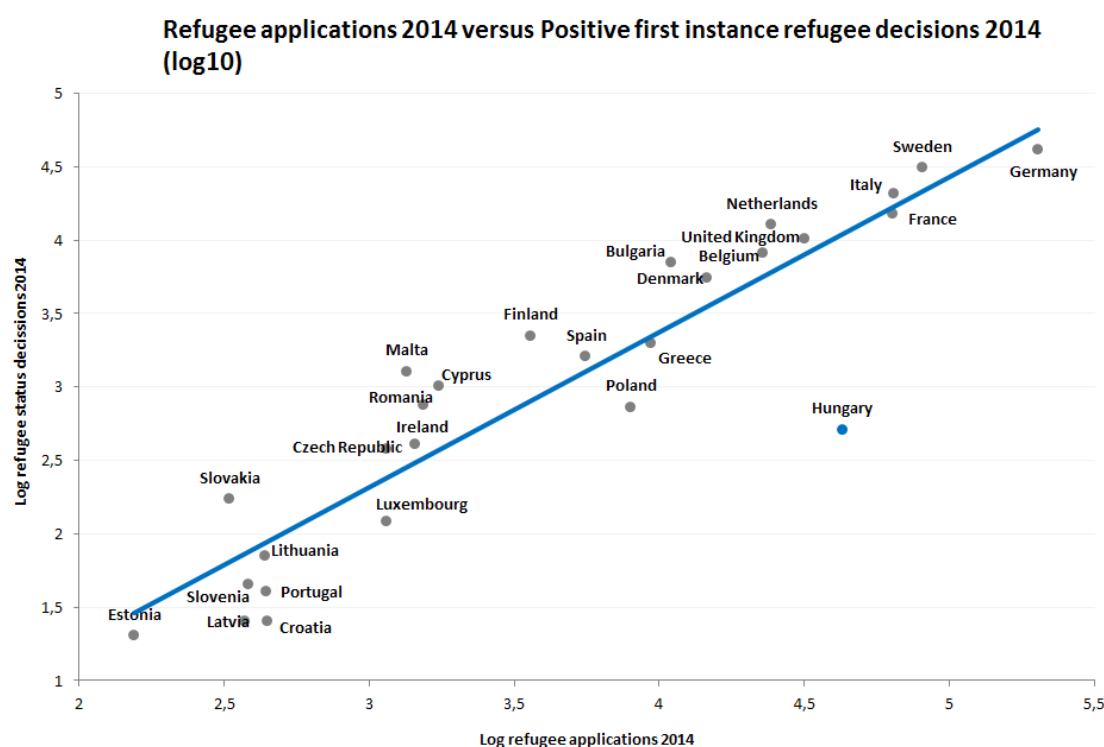


Figure 3: Graph shows countries most likely to approve refugee applications (EUROSTAT Data 2014)

Recent Policy Developments: Politics and the Quota system?

Ongoing political developments in Hungary reveal a worrying disregard to not only EU governance, but also the fundamental principles of human rights to which Hungary agreed to upon accession. These developments include a sustained anti-migrant campaign ongoing in Hungary, a wholesale rejection of the proposed quota system, and the recently announced – and then retracted – suspension of accepting transfers of asylum seekers according to the Dublin

regulation. These recent developments expose the disconnect between values of fundamental rights laid out legally, and how these are interpreted and expressed on the ground.

Hungarians continue to have few personal experiences with asylum seekers, yet the sheer scale of the increase in asylum applications, coupled with political fear mongering, have lent the matter a sense of urgency. This asylum crisis makes migrants and asylum seekers ideal scapegoats for political mobilization (Hungarian Helsinki Committee 2015). Hungarian politicians have used the issue of migration to reinforce a discourse of 'Hungarian national identity', and deflect criticism of their economic and social policies. In a speech reacting to the Paris terrorist attacks, Prime Minister Viktor Orbán announced that immigration "only brings pain and threat to the people of Europe; therefore, immigration must be stopped...this is the Hungarian position" (Hungarian Helsinki Committee 2015). The immigration debate has turned into an attack on the European Union, identified by the government as a "delusion of a multicultural society" that Hungary must abolish "before it turns Hungary into a refugee camp" (Orbán 2015). In May 2015, the rhetoric was raised to a new level by legislative propositions for a new system of national regulations and directives that "will be different in many ways from the current European Union regulations" (Keszthelyi 2015). The Hungarian government is soliciting popular support to contradict European regulations, arguing that Hungary cannot wait for EU action on migration. Hungarian politicians from the ruling party portray EU policies as ineffective, overly bureaucratic, and slow acting.

The Hungarian government's rejection of integration and policy coordination at the EU level has been proven throughout the crisis in EU migration policy in the last six months. Prime Minister Viktor Orbán has been one of the harshest critics of the EU proposal to distribute more than 40,000 asylum seekers to other member states on the basis of a quota system based on population size and GDP, a proposal which aims to distribute more equally the burden of caring for asylum seekers. On 23 June, the Visegrad countries (Czech Republic, Hungary, Poland and Slovakia) jointly rejected the EU proposed mandatory quotas, stating that the notion of mandatory quotas is unacceptable. The rationale behind this decision is the idea that EU policy blurs the "distinction between persons in need of international protection and economic migrants" (Virostkova 2015). Hungary announced that it would suspend acceptance of any transfers through the Dublin regulation. It retracted the suspension the next day, but the threat sent out a strong message to both the EU and the ruling party's voters that Hungary may be willing to take such actions. The Hungarian Ministry of Interior justified the suspension by arguing that "any asylum seeker coming from Syria or Afghanistan filing an application in Hungary must have crossed the borders of at least four states, likewise illegally, before submitting his or her application to the Hungarian immigration authority" (OIN 2015). They claim that Hungary's share in the management of asylum seekers is not proportional to its resources, or as a government spokesman put it, "the boat is full" (AFP 2015). This sentiment is echoed across many EU Southern border states - particularly Greece and Italy. Prime Minister Orbán further inflamed the situation by announcing that Hungary will build a four-meter high fence on the border with Serbia to keep out illegal migrants (AFP 2015).

Most disturbingly, in the months following the originally proposed amendments in the EU, the Orbán administration has amplified its anti-immigration campaign. New legislation has been proposed that would directly violate EU law and the above directives. The Fidesz Party announced that “it will, at the behest of the government, create immigration rules which are far more stringent than the applicable European rules, since the solution to the problem [of irregular migration] cannot be postponed any longer” (Kahlweit 2015). Orbán, in a February radio interview, led the party charge by suggesting that the new policy changes will mean that immigrants and asylum-seekers “will be arrested, will be detained, will be deported, and while they are here, they will be forced to work” (Hungarian Helsinki Committee 2015). The Hungarian Helsinki Committee, in a March 2015 analysis of the proposed changes, found that the new plans would enable the state to:

- a) Immediately detain all irregular migrants, including asylum-seekers;
- b) Immediately deport irregular migrants, including asylum-seekers considered as “livelihood immigrants”;
- c) Accelerate asylum procedures so that a final decision could be taken within a few days; and
- d) Oblige irregular migrants and asylum-seekers to work while in Hungary in order to “earn their keep.”

The Orbán administration has sought to find public support for these changes. During the debates in Brussels on this proposal, the Hungarian government sparked controversy by launching a national consultation blatantly linking issues of migration with terrorism and national security. The consultation involves a national questionnaire which asks for citizen input on a series of manipulative and deliberately misleading questions including the following: “According to some, immigration, which is badly handled by Brussels, is connected with the expansion of terrorism. Do you agree?” and, “Do you agree with the Hungarian government that instead of supporting immigrants, the support of Hungarian families and future babies is needed?” (Translation by Migszol 2015). The United Nations Human Rights Office has expressed its shock at the questionnaire, fearing that it could further bolster anti-immigration sentiments. As another way to garner public support for the ongoing anti-immigration campaign, the government has plastered billboards around Budapest, stating that: “If you come to Hungary, don’t take the jobs of Hungarians!” (Figure 4) (Thorpe 2015). Civil society has protested these posters with civil disobedience and sponsoring counter posters that proclaim ‘Please excuse our empty country, we’ve gone to England’ (for government and oppositions posters, see appendix).

The response from Brussels to the hardening Hungarian anti-immigration stance lays bare deep divisions within the European Union, but may also expose the ineffectiveness of EU rule of law (Traynor 2015). Neighboring Austria expressed its disapproval of Hungary’s refusal to take back refugees, a decision that will inevitably exacerbate the ever-increasing flux of immigration towards Austria (AFP 2015). A spokesperson for the EU commission further emphasized that the Dublin III regulations do not foresee the possibility of a member state suspending transfer (AFP 2015). The Vice-President of the European Commission, Frans Timmermans, has

criticised Orbán's anti-immigrant and anti-refugee rhetoric, warning that “if Hungary does not abide by the constitution of the European Union, the European Commission will not hesitate to use sanctions that are at its disposal.” (Free Hungary 2015) If the national consultation manages to muster support for the proposed populist and anti-migrant legislation, then parliamentary passage seems plausible. However, should that occur, the European Commission will almost certainly initiate infringement proceedings against Hungary as it did in 2012. Yet, infringement procedures are lengthy, and a financial sanction is unlikely. Continued confrontation between the EU and the Hungarian Government suits the current administration, but any benefits to the Hungarian citizenry and incoming migrants seems highly improbable. As it stands, the asylum process – and migration policy in general – is in a state of flux in Hungary – it is impossible to say how far the government will go, and how this will affect those seeking asylum in Hungary. Despite this unstable political environment, the legislative and institutional structure of asylum procedures seems broadly in line with EU policy – if not the EU values discussed in the first section. The remainder of the paper will discuss how the asylum application process works in Hungary as it stands, however it is important to keep in mind how this may change in the future, and how the EU may react to this direct challenge of their economic, social and political framework.

The Hungarian Institutional And Legal Framework

The institutional and legal framework for asylum seekers within Hungary paints a relatively good picture. Most of the directives discussed above have been transposed into law. Although the EU and international organizations drew attention to some problematic conditions within the asylum system, many of these issues have been improved in recent years. Institutionally, the Office of Immigration and Nationality (OIN) retains most responsibility for asylum procedures and policies. Governed by the Ministry of the Interior, the OIN attends to the application of asylum-seekers, assessment of Dublin II transfer provisions to other EU states, and determines the ultimate refugee status of applicants (Asylum Information Database 2015). The OIN also oversees the reception centers and, until recently, a number of controversial asylum detention facilities across Hungary. Though official governmental policies are set at the parliamentary level, the OIN retains effective control over most implementation steps. EU bodies also play a role in setting the legal framework of asylum-policy, but actual implementation is left up to the country itself. On the ground, several NGOs – most notably the Hungarian Helsinki Committee and the Migszol migrant solidarity group, as well as the UNHCR – serve as watchdog and advocacy groups for the rights of asylum-seekers

The Hungarian national legal framework pertinent to asylum procedures has several key elements, including recent modifications to bring it into harmonization with EU level directives. The primary legislation is the Asylum Act that, along with two other short acts governing law enforcement and the entry and stay of third-country nationals, was passed in 2007. Two other government decrees were given the same year, forming the crux of relevant government policies. In 2013, in response to widespread criticism of mandatory detention policies of asylum-seekers, the government issued another decree shifting rules of detention and bail.

Inside Hungary, the directives associated with the CEAS have been transposed into the Asylum Act at the national level to varying degrees (Asylum Information Database 2015; UNHCR 2015; Noll and Gunneflo 2007).

The Qualification Directive (2011), designed to establish common grounds for granting asylum of refugee status, was fully transposed into Hungarian legislation in 2013.

The Temporary Protection Directive (2001), aimed at harmonizing temporary protecting for displaced persons in times of mass movement, was adopted along with the Qualification Directive, though optional provisions have not been transposed.

The Reception Conditions Directive (2003), created minimum standards for the treatment of asylum seekers. Hungary, notably, has not transposed most of the Directive, choosing instead to only transpose portions related to the detention in 2013.

The Dublin II Regulation, responsible for determining the state responsible for examining asylum applications, has been fully adopted inside Hungary – recently, however, the Hungarian government has threatened to suspend the regulation (more on this below).

The Procedures Directive, created in 2005 to install minimum standards for accessing asylum procedures, has yet to be adopted in Hungary, but the country is far from being the only EU state to not yet harmonize.

The current general adherence to EU Directives has come about slowly. Following widespread mandatory detention and poor conditions for applicants outlined in a damning 2012 UNHCR report, the European Commission initiated infringement proceedings against Hungary in 2012. As a result, Hungary introduced changes in 2013 that brought the above framework into effect and resolved issues with applicants returned under the Dublin II rules (European Parliament 2014).

The problematic lack of transposition of the Asylum Procedures and incomplete transposition of the Reception Conditions Directives is currently the focus of new amendments and legal changes under consideration by the Hungarian government. Proposed in December 2014, these generally enhance compliance with both Directives, but serious shortcomings will remain even if the changes are adopted. In a report about the new proposal, the UNHCR notes that it is particularly concerned about the unresolved “lengthy period for automatic judicial review of detention, the lack of judicial remedy against a detention order, the detention of families with children and unaccompanied/separated children and the fact that the newly established system on alternatives to detention has not yet been reviewed” (2015).

Applying for Asylum in Hungary: An Overview

Under the current legal framework, the OIN handles all asylum procedures. Asylum seekers can apply either at the border, usually after consulting Hungarian police who are obligated to forward the request to the OIN, or inside Hungary (Asylum Information Database 2015; bordermonitoring.eu and Pro Asyl 2014). The application is considered through several stages. Firstly, an interview with an asylum official takes place, biometric data and fingerprints are collected, and the preliminary reasons for seeking asylum are gathered. The applicant is then

either placed in an open reception centre, or is ordered, illegally by international law, to be sent to an asylum detention centre (Hungarian Helsinki Committee 2014). The official then determines if the Dublin Regulation applies and whether another EU member state will be responsible for assessing the asylum request. If the Regulation does not apply, and Hungary is indeed the first country accessed by the applicant, then the processing of admissibility begins.

The next phase depends on a decision made by the OIN to continue reviewing the request, or to simply deny it outright. If a negative initial decision is made, then the applicant can challenge the process at a local appellate court, though they are often ill-equipped to handle the processing of asylum cases. Though entitled to free legal aid, few seekers are able to access it due to a lack of information about services, and those who do must still pay for translation and interpretation costs (Asylum Information Database 2015). If the request moves on, then the decision should be issued within two months after another personal interview. Applicants can appeal a second negative decision through the courts, but must register their intent to do so within eight calendar days, and wait a further 3-5 months for a final verdict. The average length of the initial procedure by OIN and the appeals phase through the judiciary is 5-12 months (Asylum Information Database 2015).

Reception Conditions and Detention

Officially, first-time asylum applicants are entitled to housing, food, and a subsistence allowance while their case is being processed. Following the 2013 incorporation of portions of the Reception Conditions Directive, Hungary has started five open reception centres and two homes for unaccompanied children in Hungary. Conditions vary, but are generally of sufficient quality and, while large influxes do reduce the overall quality of reception conditions, all asylum seekers have their own bed, food, and access to medical care (Asylum Information Database 2015). The UNHCR has full access to the facilities, and NGOs can access the facilities with advanced notice. However, the current asylum system is not equipped to handle persons with special needs. Unaccompanied minors and vulnerable asylum seekers are not adequately identified, and the seeker must advocate his or her own needs instead of being properly screened (Muižnieks 2014; Asylum Information Database 2015). This stands in stark contrast to the Reception Conditions Directive, and illustrates a clear divergence from EU policy and law.

Among the most controversial elements of Hungarian asylum policy and practice is the widespread detention of asylum seekers. While reception centres are open, many asylum seekers are detained in closed facilities. Amendments to the formerly mandatory detention policy were made in 2013, but asylum applicants are still frequently detained for up to 6 months. The legal basis for detention was changed to bring it into line with EU Directives, but the tangible impact on asylum-seekers' treatment has proved negligible. When last measured in April 2014, over 40% of adult male applicants were detained and a total of 4829 asylum seekers were detained in 2014 (Hungarian Helsinki Committee 2014; Asylum Information Database 2015). Though families with children are not meant to be detained and unaccompanied children cannot legally be detained, in practice they are often are. Six detention facilities across Hungary with a capacity of around 600 places are used for this purpose. Conditions inside the facilities have generally improved in the past years, but widespread police brutality and poor health assistance remain significant concerns (bordermonitoring.eu and Pro Asyl 2014;

bordermonitoring.eu and Pro Asyl 2012). The Council of Europe Human Rights Commissioner visited Hungary in 2014 and decried the extensive use of detention for asylum seekers, recalling that “these persons are not criminals and should not be treated as such” (Muižnieks 2014).

Integration

Very few refugees and successful asylum seekers actually live in Hungary. Only 140,000 foreign nationals live in the country, of which only some 3,000 are refugees. Of those 3,000 reported in official figures, NGOs estimate that one-third to one-half actually live in Western Europe (Hungarian Helsinki Committee 2015). In 2013, a total of only 415 persons, including 198 refugees, were granted international protection in Hungary. EU targets for 2015 specify a quota of only 300 refugees (Access-Hungary Kft. 2015). Thus, a rough estimate of the actual number of refugees living in Hungary stands around 1500 people. The few who do stay on suffer from governmental systems ill-suited to support their integration. While legally refugees have access to support for accommodation and job opportunities, as well as education and language training, the implementation of such benefits is poor. Insufficient human resources, a dearth of political will, and few financial resources dedicated to benefits for asylum seekers create the gap between law and reality. Lack of adequate support mechanisms to facilitate integrate pushes even successful asylum seekers, refugees, onward towards other EU states (Zitnanova 2014).

Concluding Remarks

The Hungarian migration system in its current state is unable to cope with large numbers of people arriving, yet 2015 is likely to bring even more migrants. Temporary tent camps have been set up and emergency solutions devised, but the current situation is untenable at best. Additionally, though Hungary has harmonized more elements of its asylum policy with EU Directives on paper, the implementation gap is significant. In particular, the improper application of elements of the Dublin III Regulation, as well as the failure to integrate all of the Procedures Directive and much of the Reception Conditions Directive illustrates the unwillingness of Hungarian authorities to competently deal with asylum seekers in a respectful and legal manner. Other long-standing problems, including the illegal detention of asylum seekers, seem unlikely to be resolved in the current political climate. Given the brazen anti-migrant policy changes proposed in 2015, the long term prospects for improving the treatment of asylum-seekers inside Hungary look pessimistic. The recent rhetoric on the side of the populist government of Prime Minister Orbán goes beyond denouncing immigrants to curate vitriolic anti-migrant sentiments (Adam 2015). This paints a grim picture of the Hungarian government's compliance with EU values.

Of course, there are shortcomings in the incorporation of EU values into EU instruments themselves. Notable issues with EU policy include the lack of willingness to truly spread the costs across member states, the political hesitation to use all available policy tools, and the priority given to security over human rights. Still, these issues lag far behind the questions that the recent Hungarian approach raises. Orbán's move to the right might be caused more by his effort to secure public support for his party and his own personality cult. Without more firm action by the EU, the country is likely to undermine the strength and normative power of EU values (Shekhovtsov 2015). This would affect not only Hungary, but other countries, both EU and non-EU, in a negative way, by serving as fuel to further anti-immigrant and populist rhetoric. Inspired by the Hungarian success, some commentators now call the anti-immigrant posturing of Hungary “Orbánization” (Schuller 2015, Verseck 2015).

The asylum policy area brings to light many issues that have emerged in Europe in the past five years. First, the increasing flow of refugees signal the increasing instability of the world – economically, socially and politically – and the EU is faced with the central issue of how it should face this instability. This is being discussed at the national and international level, and since the financial crisis governments on both the right and the left have emerged who refuse to adhere to EU policy and values. The EU is left with a difficult, but ever more urgent, question of how to deal with this: through hard power such as material sanctions or soft power such as peer pressure and shaming. Such issues are often discussed in terms of economic unity, but this report shows how this central question relates to all policy areas. Moreover, it emphasizes the fundamental values that the EU was founded on, and outlines how consistent promotion of these values – particularly in times of crisis – are essential in order to keep the founding message of the EU alive.

Recommendations

To EU Institutions

- **Activate Temporary Protection.** The Council should activate the Temporary Protection Directive that provides a clear institutional arrangement for situations of mass influx, as in the current case regarding Syria and Northern Africa. This arrangement already includes a mechanism of 'burden-sharing' that is framed in more clear-cut and general terms than the recently proposed quota system. The quota system should be approved in case of not activating the directive as it still is a (limited and interim) solution that can be built upon.
- **Accede to the ECHR.** In the interest of higher standard of protection of fundamental rights and elimination of a conflict between them and actual policies, that can lead to 'race to the bottom' in human rights protection in the EU, the EU should accede to the ECHR. The accession would, among others, guarantee a multi-layered and effective system of evaluation of compliance of EU policies, including asylum policies, with human rights principles.
- **Be More Strict on Post-Accession Conditionality.** The EU should actively promote a 'welcoming spirit' towards people coming to the EU in the hope of better life, as this is the embodiment of European values, in particular respect towards human rights. This can begin with implementation of more strict requirements of compliance with EU values in post-accession conditionality, which should be legally binding for member states.
- **Redraft the Dublin Regulation.** A longer term solution would involve the redrafting of the Dublin Regulation to include the 'burden-sharing' principle and ensure equal involvement of all member states in asylum policy. Conditions for entrance into the EU should be eased to discourage the profits of smuggling business and dangerous sea crossings that have cost thousands of lives.
- **Proceed Towards More Harmonization in Asylum Policies.** Harmonization should focus on raising standards and increasing infrastructure for periphery states, and work to prevent the 'race to the bottom' effect that the CEAS has been criticized for. By improving standards in peripheral countries, this will also work towards preventing the irregular migration within the EU of asylum seekers who avoid applying for asylum in countries like Greece and Hungary where their chance of acceptance is lower, and reception conditions are worse.

To the Hungarian Government

- **Stop the Anti-Immigration Rhetoric.** The Hungarian government should stop the anti-immigration campaign and ensure the continued successful integration of refugees and encourage a harmonization of asylum and integration policies within host communities.

The current hostile rhetoric of the Hungarian government towards immigrants exudes a sense of an un-welcoming society towards the ‘new-comers’ within Hungary. Promoting correct information on refugee matters by the government coupled with beginning integration programs upon arrival of asylum seekers would assist in creating a welcoming environment which would encourage recognized refugees to stay rather than continue into the interior of the region.

- **Transpose Directives.** The Hungarian government should fully transpose the Recast Reception Conditions Directive and the Recast Procedures Directive in order to ensure that the standards of treatment for asylum seekers are met. As described above, the former is currently only partially transposed into Hungarian state policy, and the latter has not been transposed. Transposition of the EU Directive would provide refugees with better living conditions and ensure consistent procedures during their asylum application.

To International and National Civil Society Actors:

- **Promote the Benefits of Migration.** The benefits of migration should be better promoted, and the hypocritical nature of the Hungarian anti-immigration campaign should be highlighted. Campaigns such as the counter posters should be increased and sustained. Proper information on the benefit of immigration should be widely dispersed nationally, and active promotion of how Hungarians have benefitted from open migration policies in the EU should be highlighted.
- **Counter the Government's Anti-Immigration Rhetoric.** Internationally, civil society can expose the Hungarian government's campaign, which will put pressure on both the EU and Hungary to enforce legal asylum procedures. Actions here have begun, for instance with a poster campaign in London, however more can be done to put pressure on the EU to respond.
- **Create Initiatives in Education.** Civil society actors should pursue initiatives in both formal and non-formal education of the public and especially youth about the benefits of immigration and principles of human rights in order to prevent mushrooming of populist parties that build their success on anti-immigration rhetoric a large portion of the public listens to.
- **Act as a watchdog.** Civil society actors should act as watchdogs to monitor the migration crisis in Hungary. A specific way to do this would be to launch an investigation into the Hungarian government through the Hungarian Equal Treatment Authority. Under their mandate the Equal Treatment Authority pursues cases of discrimination and racism which would be applicable in the case of the recent xenophobic billboards and national consultation.

Appendix: Government and Opposition posters in Hungary

Government Poster



Translation: “If you come to Hungary, do not take away the jobs from Hungarians. National Consultation on Immigration and Terrorism.”

Opposition Poster



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