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

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ABSTRACT

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

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

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INTRODUCTION

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

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

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1. INT’L ORG. FOR MIGRATION, MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW 1 (July 6, 2017), http://www.iom.hu/sites/default/files/untitled%20folder/HUNGARY%202016%20-%20FINAL.pdf [https://perma.cc/9T45-4X75] [hereinafter MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW]. In 2016, the number of arrivals decreased to 387,739. See id.
3. See generally, Moria Paz, Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls, 34 BERKELEY J. INT’L L. 1 (2016) (discussing the increasing number of countries that have built border walls as a strategy of immigration control). For additional examples, see Moria Paz, The Law of Walls, 28 EUR. J. INT’L L. 601, 602 (2017) (governments have constructed walls or fences between the USA and Mexico, Israel and Egypt, Greece and Turkey, Bulgaria and Turkey, Hungary and Serbia, Austria and Slovenia, Macedonia and Greece, the Spanish territories and Northern Africa, and elsewhere).
international and regional law prohibiting refoulement; they have made seeking asylum like a game of Chutes and Ladders—where the ladders are few and far between, and the chutes are plentiful. Refugees simply cannot win. The first half of this Article broadly explores barriers to seeking asylum in Hungary, while the second half focuses its analysis on one particular “chute”: Hungary’s designation of Serbia as a safe third country.

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

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


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

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

\begin{itemize}
\item\textsuperscript{13} Migration Issues in Hungary, supra note 7. This sharp decrease can be attributed to the restrictive measures Hungary began implementing in summer 2015.
\item\textsuperscript{14} Id. Out of 54,586 total decisions in 2016, only 425 persons received either refugee status (154) or subsidiary protection (271). See Country Report: Hungary, 2016 Update, supra note 12, at 7. Subsidiary protection is a form of protection that Hungary grants non-citizens who do not meet the 1951 Convention definition of a refugee, but who are still in need of protection. 2007. évi LXXX. törvény a menedék jogról (Act LXXX of 2007 on Asylum), §§ 12(1), 19 (Hung.), http://www.refworld.org/docid/4979cc072.html (on file with the Columbia Human Rights Law Review). However, subsidiary protection does not afford the recipient the same family reunification rights as refugee (asylum) status, and any access to naturalization (process to obtain citizenship) is also nearly impossible. Skype Interview with Katinka Huszár, Protection Associate, UNHCR Hungary, in Budapest, Hung. (June 13, 2018).
\item\textsuperscript{15} There were 154 refugee grants out of 54,586 decisions made in 2016. Country Report: Hungary, 2016 Update, supra note 12, at 7 (outlining the number of refugee grants in 2016); Migration Issues in Hungary, supra note 7 (noting total decisions on refugee status in 2016).
\end{itemize}
allowing one applicant per zone per workday to enter; and (4) arbitrarily detaining refugees in the transit zone shipping containers while their applications are processed.

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

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

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

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

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

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


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

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

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

22. BYRNE ET AL., supra note 17, at 149 (87% of the refugees were Yugoslav).
grant rate decreased to only 15%, and further decreased to 3% in 2000. While low grant rates and other criticisms have been lodged against Hungary’s asylum process almost since its inception, in the past few years Hungary has shifted even further away from its international and regional protection obligations.

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

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23. See id. at 151.
24. See id. at 154.
25. See generally Fullerton, supra note 17, at 501–02 (detailing how “refugee status in Hungary . . . is largely reserved for ethnic Hungarians.”).
28. See Migration crisis: Hungary PM says Europe in grip of madness, THE GUARDIAN (Sept. 3, 2015, 6:09 AM), https://www.theguardian.com/world/2015/sep/03/migration-crisis-hungary-pm-victor-Orban-europe-response-madness [https://perma.cc/TE46-FLTJ] (“Hungary’s nationalist prime minister, Viktor Orbán, has claimed Europe is in the grip of madness over immigration and refugees, and argued that he was defending European Christianity against a Muslim influx.” PM Orbán stated, “[q]uotas is an invitation for those who want to come. The moral human thing is to make clear, please don’t come.”).
29. See, e.g., PM Orbán: We must protect our religious traditions in order to keep Hungary Hungarian, ABOUT HUNGARY (Mar. 27, 2018), http://abouthungary.hu/news-in-brief/pm-Orban-we-must-protect-our-religious-traditions-in-order-to-keep-hungary-hungarian/ [https://perma.cc/Y4BE-NZCY] (PM Orbán emphasized the importance of Christianity and preserving traditions and cultures; he noted, “We don’t want them to turn Europe into an immigrant continent and Hungary into an immigrant country” and underscored his desire to “keep Hungary Hungarian.”).
repeatedly passed amendments to Hungary’s asylum law and related
directives, particularly since the height of the refugee crisis in
summer 2015. While Hungary’s Constitution (The Fundamental Law)
nominally acknowledges its obligations under international law,
these amendments were intended to chip away at legal protections for
refugees and have made applying for and obtaining asylum a
Sisyphean undertaking.

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

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

30. See Act LXXX of 2007 on Asylum, supra note 14. The 2007 Asylum Law,
which was adopted on June 25, 2007 and entered into force on January 1, 2008, sets
out the fundamentals of Hungarian asylum law. See id. § 3(1).
31. See MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF
ensure harmony between international law and Hungarian law in order to fulfil its
obligations under international law”; “Hungary shall accept the generally
recognised rules of international law.”).
32. In Greek mythology, Sisyphus was condemned to push a large boulder
up a hill. As the boulder approached the summit, it would roll back to the base,
forcing him to repeat this futile task for eternity.
33. See INT’L ORG. FOR MIGRATION, MIGRATION FLOW TO HUNGARY: FIRST
files/untitled%20folder/HU%20Handout%202017%20Update-HJ.pdf [https://perm
a.cc/4S5Y-KLP8] [hereinafter MIGRATION FLOW TO HUNGARY: FIRST HALF OF
2017 OVERVIEW].
34. Id. at 2.
35. See id.
36. See MARTA PARDAVI ET AL., ASYLUM INFO. DATABASE, COUNTRY REPORT:
37. See MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW, supra note 1, at 2.
38. See id. at 2; see also MIGRATION FLOW TO HUNGARY: FIRST HALF OF 2017
OVERVIEW, supra note 33, at 2 (74% of survey respondents reported leaving their
country of origin due to war). UNHCR notes that individuals fleeing war may be
considered refugees and urges countries to allow them to apply for asylum under
of asylum seekers hailed from Afghanistan, Syria, Pakistan, Iraq, Iran, and Kosovo. Comparatively, the percentage of individuals migrating for economic reasons was only about 5%—reinforcing that the majority are asylum seekers rather than economic migrants.

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

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

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


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

42. See Migration Flow to Hungary: 2016 Overview, supra note 1, at 1.

43. See Migration Flow to Hungary: First Half of 2017 Overview, supra note 33, at 1 (only 17% intended to remain in Hungary in 2017).

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

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

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

2018. Currently, persons who receive protection are only allowed to stay in an open camp for a maximum of thirty days before they must find their own housing. See Hungarian Helsinki Committee, EUROPEAN ASYLUM SUPPORT OFFICE, INPUT BY CIVIL SOCIETY TO THE EASO ANNUAL REPORT 2017 7 (2017), https://www.easo.europa.eu/sites/default/files/hungarian-helsinki-committee.pdf [https://perma.cc/EL67-W8MT].
45. See infra Section I.B, “Sealing the Border: Fences and Transit Zones.”
47. See id.
48. See supra note 45.
49. See id.
50. See id.
51. See infra Section I.C, “Serbia as a Safe Third Country.”
52. See infra Section II.C.3, “The Safe Third Country Concept Under EU Law.”
they passed through Serbia—which Hungary considers a “safe third country.” Those refugees were then—once again—sent back to the Serbian side of the fence.

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

**Figure 1—Chutes and Ladders in Hungary**

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53. See *supra* note 51.
54. The actual law is more complicated, and its idiosyncratic nuances have evolved from the initial anti-migration amendments of 2015 to the writing of this paper, as described herein.
A. The Never-Ending Immigration “Crisis”

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

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

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

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


Since September 2015, Hungary has relied on its declaration (and continuous renewal) of this state of emergency to justify its migration-related activities. Yet the criteria required to legally justify such a state of emergency has not yet been met in Hungary approximately since the country began sealing its borders. While Hungary received 411,515 arrivals in 2015, this figure dramatically shrunk to 19,221 arrivals in 2016. The decrease resulted from the legal and physical barriers Hungary began implementing in summer 2015. At the height of that summer, Hungary received an average of 1,500 persons per day. However, by November 2015, after the
construction of the border fences and the passage of several amendments to Hungary’s asylum law, this number dropped to only ten arrivals per day.\textsuperscript{66}

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

in transit zones for the duration of the asylum procedure. \textit{Migration Issues in Hungary, supra} note 7.

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


\textsuperscript{68} \textit{See AMNESTY INT’L, supra} note 67, at 17.

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

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

Today, legal access to Hungary for asylum seekers is limited to these two transit zones on the Hungarian-Serbian border. These centers are made of containers and form part of the border fence. The fence itself is set back on Hungary’s territory, such that some asylum seekers waiting to enter the transit zones are actually on Hungarian territory. The Hungarian government did not provide any humanitarian aid to the persons waiting outside the fence. See U.N. High Comm’r for Refugees, Hungary as a Country of Asylum: Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016, ¶¶ 8, 9, 23 (May 2016), http://www.refworld.org/docid/57319d514.html (on file with the Columbia Human Rights Law Review); see, e.g., Nóra Köves, Hungary 2017: Detained refugees, persecuted NGOs, lack of legal certainty, HEINRICH BÖLL STIFTUNG (Dec. 29, 2017), https://www.boell.de/en/2018/01/03/hungary-2017-detained-refugees-persecuted-ngos-lack-legal-certainty [https://perma.cc/L9ZP-Z3KF] (“Once in Serbia, asylum-seekers need to wait to get into the transit zones, as these are the only places where they can apply for asylum in Hungary.”). The Hungarian government did not provide any humanitarian aid to the persons waiting outside the fence. See U.N. High Comm’r for Refugees, supra, ¶ 9, 23 (May 2016).
Nevertheless, Hungary considers the fence, including the transit zones and its own territory on the other side of the fence as a “no man’s land,” and not part of Hungary. However, the European Court of Human Rights has held that there is no such legal concept as an “international zone” where States are free to evade international human rights norms and that a State is responsible for human rights violations wherever it exercises jurisdiction.

When the transit zones first opened in mid-September, 2015, 185 asylum seekers were permitted entrance. Steadily, Hungarian authorities reduced the number of persons allowed to enter the transit zones over the course of the next three years. As of mid-January 2018,
only one person per workday, per transit zone is permitted entrance. At this rate, experts estimate that some asylum seekers could be forced to wait upwards of ten years before they are able to enter a transit zone and apply for asylum. Critically, the availability of space in the transit zone has no bearing on this policy: as of May 15, 2018 there were only 112 individuals in the transit zones, despite that these units have the capacity to accommodate over 700 persons.

1. Accelerated Border Procedure, Pre-March 2017

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

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

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

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

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

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

89. Mole & Meredith, supra note 21, at 106.
State must still respect fundamental international and regional rights and protections—including minimal procedural guarantees.90

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

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

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

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

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

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

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

96. See COUNTRY REPORT: HUNGARY, 2016 UPDATE, supra note 12, at 36 (noting that, in practice, only those with visibly identifiable needs were exempted from the border procedure—i.e., pregnant women, families, etc.). Compare with UNHCR definition. U.N. High Comm’r for Refugees, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum
2. Asylum Procedure, Post-March 2017

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

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


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

100. Id.

101. Id. at § 51(2) (Inadmissibility applies if “a) the applicant is a national of one of the Member States of the European Union; b) the applicant was recognized by another Member State as a refugee or it granted subsidiary protection to him/her; c) the applicant was recognized by a third country as a refugee, provided that this protection exists at the time of the assessment of the application and the third country in question will admit the applicant; d) the application is repeated and no new circumstance or fact occurred that would suggest that the applicant’s recognition as a refugee or beneficiary of subsidiary protection is justified; or e) for the applicant, there is a third country qualifying as a safe third country for him/her.”).
not automatically expellable, the Government must decide on the merits of the applicant’s claim within 60 days.\textsuperscript{102}

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

This new law also requires all asylum seekers to remain in the transit zone for the entire duration of their asylum procedure, excluding children\textsuperscript{106} under 14 years of age.\textsuperscript{107} Thereby asylum seekers’ freedom of movement is severely restricted, on average, for three to six months, and sometimes longer, in shipping containers.\textsuperscript{108}

C. Serbia as a Safe Third Country

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

\begin{itemize}
  \item 102. \textit{Id.} § 47(3). This period can be extended once for a maximum of three weeks (twenty-one days); however, several loopholes exist regarding how time is counted towards that limit. \textit{Id.} §§ 32/G(2),(3). Researchers have observed several cases where children are kept in transit zones for more than eighty days without a decision. See \textit{Country Report: Hungary, 2017 Update, supra} note 59, at 23.
  \item 105. \textit{See Act XX of 2017, supra} note 97, §5(7) (Adding Art. 80/K § 1, applicable during a declared mass migration crisis).
  \item 106. \textit{See Act LXXX of 2007 on Asylum, supra} note 14, § 80/J(6).
  \item 107. \textit{See id.} § 80/J(5).
  \item 108. This is the average reported length of the asylum procedure (including both the first-instance application adjudication and the judicial review process). See \textit{Country Report: Hungary, 2017 Update, supra} note 59, at 23.
  \item 109. \textit{See Act LXXX of 2007 on Asylum, supra} note 14, § 51.
though the border Hungary shares with Serbia. Hungary's decision to list Serbia as a "safe third country" on July 21, 2015 swiftly facilitated the automatic rejection of over 95% of asylum seekers' applications as inadmissible.
While the safe third country presumption is rebuttable,\footnote{See Decree 191/2015. (VII.21.), supra note 112, § 3(2).} in practice it is essentially impossible to challenge.\footnote{See infra Section III.A (explaining how the STC presumption is incredibly difficult to challenge given that applicants have three days to present their rebuttal before a decision is rendered, among other procedural challenges).} Furthermore, Hungarian law provides that if a safe third country fails to take a refugee back, the Hungarian government must continue to process his or her application.\footnote{See Act LXXX of 2007 on Asylum, supra note 14, § 51/A, amended by Act CXXVII of 2015, supra note 78, § 35.} However, Serbia suspended its readmission agreement with Hungary shortly after the border fence was completed; it has refused to readmit asylum seekers since then, leaving the refugees stranded in limbo between two countries that will not fairly assess their protection claims.\footnote{See U.N. High Comm’r for Refugees, supra note 77, ¶ 69 (“Asylum-seekers whose applications have been found inadmissible . . . on the grounds that Serbia was a safe third country for them were not returned under the readmission agreement, but were simply made to leave the transit zones in the direction of Serbia.”); see also Hungary: Latest amendments “legalise” extrajudicial push-back of asylum-seekers, in violation of EU and international law, HUNGARIAN HELSINKI COMMITTEE (July 5, 2016), http://www.helsinki.hu/wp-content/uploads/HHC-info-update-push-backs-5-July-2016.pdf [https://perma.cc/7UTZ-BW6T].} Finally, Serbia is not regarded as “safe” by any other EU Member State because of the severe deficiencies in its asylum system.\footnote{See, e.g., U.N. High Comm’r for Refugees, supra note 77, ¶ 13; see also infra, Section III.B (detailing Serbia’s barely-functioning asylum system, inadequate reception conditions, and the great risk of refoulement that refugees face in-country).}

While Hungary temporarily stopped issuing inadmissibility decisions on the basis of safe third country in 2017,\footnote{In 2017, the IAO stopped issuing inadmissibility decisions based on STC grounds. See COUNTRY REPORT: HUNGARY, 2017 UPDATE, supra note 59, at 38. “It was only the change in practice, the Gov. decree was not repealed. It has happened before that they would just suddenly stop using STC grounds for a while with regard to Serbia. This was one of the critics [sic] also in Ilias and Ahmed case where E CtHR explicitly pointed out that it is not clear why despite unchanged circumstances in Serbia, the Government suddenly started applying STC grounds for Serbia again.” Email from Gruša Matevžič, Senior Legal Officer, Hungarian Helsinki Committee, to author (May 15, 2018, 3:32 AM EST) (on file with author).} on June 20, 2018 it passed the “Stop Soros” laws,\footnote{See, e.g., T/332. számú javaslat Magyarország Alapítványének hetedik módosítása (Bill No. T/332, Seventh Amendment of the Basic Law of Hungary) (Hung.) www.parlament.hu/irom41/00332/00332.pdf [https://perma.cc/C77A-3X5D], (Eng.) https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf [https://perma.cc/42W9-2T3F] [hereinafter Bill} which incorporated the concept of
ineligibility for asylum based on the safe third country concept in its national constitution and amended a series of laws that affect asylum seekers. Nominally, the Fundamental Law still prohibits collective expulsion and refoulement, but it now includes a provision, article 5(4) of Bill No. T/332, whereby “[a]ny non-Hungarian citizen arriving to the territory of Hungary through a country where he or she was not exposed to persecution or a direct risk of persecution shall not be entitled to asylum.” This provision will most likely be used to justify the denial of almost all asylum claims, because Hungary’s national law considers all of its neighboring countries—including Serbia (the main point of entry into the country)—as safe third countries. Moreover, T/332 establishes that regulations on applications for, and grants of, asylum shall be “established by a cardinal Act.” T/333, the provision regarding the methods of “combatting illegal immigration” by military and police force, was adopted as a cardinal law. Amendments to
such “cardinal laws” require a two-thirds supermajority, which “tie[s] the hands of future parliaments” who “might wish to amend the Fundamental Law to bring it into conformity with Hungary’s international human rights commitments.”

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

D. The Push-Back Law: Deep Border Control

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


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


135. Europe’s Refugee Emergency Response – Update #5, supra note 134, at 5. The UNHCR has identified a number of unaccompanied minors in adult detention facilities in Hungary. See, e.g., U.N. High Comm’r for Refugees, Europe’s
brought almost 3,000 people to court, with the majority of cases resulting in convictions.\textsuperscript{136} However, while this criminal law has not been repealed, today the authorities rarely prosecute these cases.\textsuperscript{137} Instead, Hungary instituted and expanded a policy of deep border control to deal with irregular entries and further dissuade asylum seekers from entering the country outside of the transit zones.

In 2016, Hungary increased the “border region” through deep border control (DBC).\textsuperscript{138} The new “8-km-push-back law” authorized Hungarian officials to expel anyone lacking status found within 8 kilometers of the Hungarian border without first assessing individual vulnerabilities or allowing them to apply for asylum.\textsuperscript{139} The Office of the United Nations High Commissioner for Refugees (UNHCR) and the UN High Commissioner for Human Rights reproached Hungary’s government for making it even more challenging for asylum seekers to obtain protection in Hungary.\textsuperscript{140} In the first year after DBC went into effect, 14,438 migrants were forcefully returned to the external side of
the border fence.\footnote{Hungarian Helsinki Committee, Two Years After: What’s Left of Refugee Protection in Hungary? at 3 (2017), https://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf [https://perma.cc/W7ER-T3S8].} Between July 2016 and March 2017, almost 22,000 migrants were sent across the Southern border in the direction of Serbia under this law.\footnote{See Migration Issues in Hungary, supra note 7.}

In 2017, Hungary expanded DBC to apply to the entire country when a state of crisis due to mass migration is in effect.\footnote{Hungarian Helsinki Committee, Hungary: Government’s New Asylum Bill on Collective Push-backs and Automatic Detention 1 (2017), http://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-New-Asylum-Bill-15.02.2017.pdf [https://perma.cc/XNW8-74B6] (March 2017 amendments extended applicability of the 8km-rule to the entirety of Hungary when a “state of crisis due to mass migration” is in effect) (citing Act XX of 2017, supra note 97).} Since then, police have been empowered to apprehend asylum seekers anywhere in Hungary and expel them across the Southern border. This applies not only to persons who have passed through Serbia to enter Hungary, but all individuals—regardless of their point of entry.\footnote{Email from Gruša Matevžič, Senior Legal Officer, Hungarian Helsinki Committee, to author (July 30, 2018, 9:55 AM) (on file with author).}


E. Hungary’s Response to the EU Relocation Quota

In response to the one million individuals who migrated to Europe in 2015,\footnote{See Migration Flow to Hungary: 2016 Overview, supra note 1, at 1.} the European Union adopted a relocation scheme
(Council Decision 2015/1601) to ease pressure on EU member states who were experiencing the brunt of these mass arrivals.\footnote{147} However, Hungary and the other Visegrad countries\footnote{148} rejected the relocation plan,\footnote{149} citing security and economic reasons, “consider[ing] mass migration as a threat to the European civilization as a whole.”\footnote{150} To demonstrate popular approval of its immigration policy and refusal to implement the relocation quota, Hungary held a referendum in October 2016, asking citizens if they would allow the EU to prescribe mandatory settlement of asylum seekers in the country.\footnote{151} The Government framed this as a question about “Hungary’s future,”\footnote{152} following a government-sponsored campaign portraying immigrants as terrorists and criminals:\footnote{153} “[w]e do not know how many of them are...
terrorists in disguise.” The Government has also launched several national consultations to spread its xenophobic, nationalist message and garner support for its policies—including the May 2015 “National Consultation on Immigration and Terrorism” and the September 2017 “National Consultation on the Soros Plan.” The questions in these national consultations are constructed to inspire fear and promote the Government’s anti-immigration policies.

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


157. See generally id. (Question 1: “George Soros wants to convince Brussels to resettle at least one million immigrants from Africa and the Middle East annually on the territory of the European Union, including Hungary as well. Do you support this point of the Soros Plan?”). See also Hungarians “Unanimously Reject the Soros Plan” Following Return of 2,356,811 National Consultation Surveys, KORMANY - WEBSITE OF THE HUNGARIAN GOVERNMENT (Jan. 11, 2018), http://abouthungary.hu/news-in-brief/hungarians-unanimously-reject-the-soros-plan-following-return-of-2356811-national-consultation-surveys/ [https://perma.cc/3JDU-UHQ8] (noting “Hungarians reject all arguments, plans and attempts aimed at persuading Hungary to become an immigrant country . . . the government will continue to consistently reject all attempts to blackmail and threaten it into ‘giving in’ and submitting to Brussels’ intentions.”).

158. Prime Minister Viktor Orbán was re-elected in April 2018. See Victor Orbán: Hungary PM Re-elected for Third Term, BBC NEWS (Apr. 9, 2018), https://www.bbc.com/news/world/europe-43693663 [https://perma.cc/24V4-LMZM]. The government has referred to the popular support of its anti-immigration stance when enacting new legislation. See, e.g., Bill No. T/332, supra note 121, (“General Reasoning”): “At the parliamentary elections held on 8 April [2018], the Hungarian
of Hungarians consider immigration to be the most important issue facing the EU (outranking terrorism and the economy), 81% of Hungarians feel negatively towards immigration from outside the EU, and 94% would like additional measures to combat irregular migration.\footnote{See Standard Eurobarometer 86: Public Opinion in the European Union, European Comm’n (Dec. 2016), https://bit.ly/2mEczTx [https://perma.cc/73WB-9KCP] (Annex, QB4.2/T119 (eighty-one percent) and QB5/T120 (ninety-four percent)).} Survey instruments also have demonstrated public support for the Government’s position and reveal that citizens believe there is a strong link between migration and terrorism.\footnote{One study of Hungarian popular opinion found “78% saw a direct relation between the wave of migration and the increased number of terrorist acts.” Further, “83% thought that mass migration would contribute to the spread of radical Islam, 90% thought that it would lead to extremist anti-Islam groups gaining more strength, and 70% believed that it would result in the deterioration of public security.” See Gallai, supra note 149 (citing a joint survey by the Migration Research Institute and Századvég).}

referendum were inconclusive, Hungary refused to implement the EU’s relocation scheme. The Government brought an action before the European Court of Justice (ECJ) to challenge the legality of Council Decision 2015/1601, which was ultimately dismissed by the ECJ on September 6, 2017.

UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, admonished Hungary for “violating international law in response to [the] migration crisis.” The European Commission also rebuked Hungary for its failure to share the responsibility to aid asylum seekers, instituting infringement proceedings on December 10, 2015. None of these actions stymied the Hungarian government’s plans, as it adamantly refused to change its laws. The Commission therefore referred the matter to the ECJ on July 19, 2018. That same day, the Commission initiated a second infringement proceeding against Hungary regarding its “Stop Soros” legislation—which places

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


further restrictions on asylum seekers and criminalizes the act of assisting refugees.\textsuperscript{169}

F. Protection Denied: Grant Rates and Statistics

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

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
 & 2014\textsuperscript{170} & 2015\textsuperscript{171} & 2016\textsuperscript{172} & 2017\textsuperscript{173} \\
\hline
Total number of registered asylum seekers & 42,777 & 177,135 & 29,432 & 3,397 \\
\hline
Granted refugee/asylum status & 240 & 146 & 154 & 106 \\
\hline
Granted subsidiary protection & 236 & 356 & 271 & 1,110 \\
\hline
Otherwise authorized to stay (Nonrefoulement/temporary protected status, etc.) & 32 & 6 & 7 & 75 \\
\hline
Suspension\textsuperscript{174} & 24,326 & 152,260 & 49,479 & 2,049 \\
\hline
\end{tabular}
\end{table}

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

\textsuperscript{170.} COUNTRY REPORT: HUNGARY, NOVEMBER 2015, supra note 36, at 6.

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


\textsuperscript{174.} See Act LXXX of 2007 on Asylum, supra note 14, § 44/A (note that § 49(2) governs suspensions under the Dublin Regulation).
Understanding Hungary’s asylum application statistics is complicated for a few reasons. First, the “total number of decisions” made each year does not necessarily equal the “total number of registered asylum seekers.” This is due to the backlog of pending cases that the Government reported each year. Second, while grants of refugee status appear to remain somewhat stable between 2015 and 2017, this is misleading since the total number of applications decreased dramatically after the Government amended its laws to severely limit the number of refugees who could submit applications.180

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

<table>
<thead>
<tr>
<th>Rejection175</th>
<th>4,815</th>
<th>2,917</th>
<th>4,675</th>
<th>2,880</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pending Cases176</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total number of decisions177</td>
<td>29,649</td>
<td>155,685</td>
<td>54,586</td>
<td>6,220</td>
</tr>
<tr>
<td>Protection Rate178</td>
<td>1.71%</td>
<td>0.33%</td>
<td>0.79%</td>
<td>20.75%</td>
</tr>
<tr>
<td>Asylum grant rate (refugee protection)179</td>
<td>0.81%</td>
<td>0.09%</td>
<td>0.28%</td>
<td>1.70%</td>
</tr>
</tbody>
</table>

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


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

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

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

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

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

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

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

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

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

184. HUNGARIAN HELSINKI COMMITTEE, supra note 182.

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

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

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

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

189. See HUNGARIAN HELSINKI COMMITTEE, supra note 182.

190. See Immigration Stats for 2014–2015, supra note 16 (Out of roughly 65,000 Syrian applicants, only 159 received some form of protection—19 received refugee status and 140 received subsidiary protection).
II. A NON-DEROGABLE OBLIGATION: INTERNATIONAL AND REGIONAL LAW PROHIBIT REFOULEMENT

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

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

A. Sovereignty Cannot Justify State Noncompliance

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

191. Third Party Intervention in S.O. v. Austria and A.A. v. Austria, supra note 162, ¶ 44.
192. States must also implement these obligations without discrimination. See 1951 Convention, supra note 4, art. 3.
193. See, e.g., U.N. Charter art. 2, ¶ 1 (sovereign equality of all Member States); see also U.N. Charter art. 2, ¶ 7 (United Nations noninterference in Member States’ domestic matters).
the 1951 Convention, it is obligating itself to respect, protect, and fulfill
the rights of refugees announced in the Convention. Hungary has been
obligated to protect refugees under the 1951 Convention and the 1967
protocol since its accession on March 14, 1989. Sovereignty might
be the rule, but refugees are the exception.

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

195. 1951 Convention, supra note 4; 1967 Protocol relating to the Status of
évi július hó 28. napján elfogadott egyezmény valamint a menekültek helyzetére
vonatkozóan az 1967. évi január hó 31. (Government Decree No. 15/1989 on the
publication of the Convention relating to the Status of Refugees adopted on 28 July
1951 and of the Protocol relating to the Status of Refugees entered into force on 31
January 1967). Hungary initially signed with reservations—agreeing only to accept
European refugees—but it lifted the geographic reservation in 1998, after pressure
from the European Union. See BYRNE ET AL., supra note 17, at 152–53. Hungary
was the first East bloc country to sign the Refugee Convention. Fullerton, supra
note 17, at 511.
197. Guy S. Goodwin-Gill, Professor of Law at Univ. of New South Wales,
Presentation at Georgetown Univ. Law Ctr. Human Rights Inst.: Refugees and
Rights, Asylum and Solutions: Can International Law Provide the Answers? (April
4, 2018) (on file with author).
198. See, e.g., M. S. Janis, Sovereignty and International Law: Hobbes and
Grotius, in ESSAYS IN HONOUR OF WANG TIEYA 391, 393 (Ronald Macdonald ed.,
1994) (“Sovereignty was the crucial element in the peace treaties of Westphalia.”).
199. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND
PRACTICE 212 (3d ed. 2013) (”International law can be seen as the body of
restrictions on sovereignty that have been accepted by states through the
mechanisms of custom and treaty.”); see also id. at 261–62 (noting that sovereignty
“never has been unconditional”).
200. See infra note 222 (defining customary international law).
201. See infra note 227 (defining jus cogens).
202. C. Harvey, Taking Human Rights Seriously in the Asylum Context? A
Perspective on the Development of Law and Policy, in CURRENT ISSUES IN UK
(emphasis added).
persons to seek and enjoy asylum and nonrefoulement. Asylum must be afforded to those persons deserving of its protection—any other interpretation would pervert the spirit and intent of the 1951 Convention and 1967 Protocol. And, at a minimum, asylum seekers must not be refouled.

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

204. See 1951 Convention, supra note 4, art. 33(1); see also, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (no State may send a person to another State where s/he would be in danger of being subjected to torture and/or inhuman or degrading treatment.).
205. See MAGYARORSZÁG ALAPTÖRVÉNYE, supra note 31, arts. XIV(1)-(3) (Article XIV(2) (nonrefoulement); Article XIV(3) (right to asylum); and Article XIV(1) (no collective expulsions)).
207. See “Hungary’s Response to the EU Relocation Quota,” supra Section I.E; see also AMNESTY INT’L, supra note 73 (describing a media campaign intended to inspire negative sentiment towards refugees).
fence has been erected, Orbán’s brazen attitude towards migration remains that it is “a dangerous, harmful phenomenon which Hungary does not want to participate in.”\textsuperscript{209}

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

B. International Law and Nonrefoulement

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

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

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

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

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


216. See, e.g., UNHCR Advisory Opinion on Extraterritorial Application of Non-Refoulement, supra note 210, ¶ 8 (explaining that even if the State cannot provide asylum in their own territory, they owe refugees “access to [their] territory and to fair and efficient asylum procedures.”); see also Global Consultations on International Protection, supra note 96, ¶¶ 5, 50(a) (emphasizing the importance of making available a fair and appropriate procedure for asylum-seekers). Several UNHCR Executive Committee Conclusions discuss a right to “fair and efficient” asylum procedure. See, e.g., ExCom Conclusion No. 99, ¶ l (2004), http://www.unhcr.org/excom/exconc/41750ef74/general-conclusion-international-protection.html [https://perma.cc/3CWG-LPD7]; see also ExCom Conclusion No. 71, ¶ i (1993), http://www.refworld.org/docid/3ae68c6814.html [https://perma.cc/8Z8N-TALW]; ExCom Conclusion No. 81, ¶ h (1997), http://www.refworld.org/docid/3ae68c690.html (on file with the Columbia Human Rights Law Review); ExCom Conclusion No. 82, ¶ d(ii) (1997), http://www.refworld.org/docid/3ae68c958.html [https://perma.cc/JB8P-8YY5].

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

The principle of nonrefoulement is captured in both the 1951 Convention and its 1967 Protocol: no State is allowed to push back “a refugee in any manner whatsoever220 to the frontiers of territories where his life or freedom would be threatened.”221 Even those States who are not party to the Convention and/or its Protocol must abide by the prohibition on refoulement as it is considered customary international law.222

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

218. 1951 Convention, supra note 4, art. 1A(2).
220. See UNHCR 2001 Note on International Protection, supra note 215, ¶ 16, (“This includes rejection at the frontier, interception and indirect refoulement, whether of an individual seeking asylum or in situations of mass influx.”).
221. 1951 Convention, supra note 4, art. 33 (describing the prohibition on refoulement “on account of [one’s] race, religion, nationality, membership of a particularly social group or political opinion.”). State Parties to the 1951 Convention and/or the 1967 Protocol have a treaty obligation to respect the principle of nonrefoulement. See 1967 Protocol, supra note 195, art. I(1) (State Parties agree to comply with 1951 Convention Arts. 2-34).
222. See UNHCR Advisory Opinion on Extraterritorial Application of Non-Refoulement, supra note 210, ¶¶ 14–16 (stating that nonrefoulement is a rule of customary international law and, as such, is binding on all States regardless of whether they are party to the 1951 Convention and/or 1967 Protocol). Customary international law is binding and represents “well-established state practices to which a sense of obligation has come to be attached.” DONELLY, supra note 199, at 5, 29. Further, “customary international [law] binds all governments whether or not they have accepted it so long as they have not expressly and persistently objected to its development.” CONNIE DE LA VEGA, DICTIONARY OF INTERNATIONAL HUMAN RIGHTS LAW 34 (2013).
broader context. Unlike the 1951 Convention, human rights law does not require the risk of harm to be based on one of the five protected grounds. The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “CAT, 1984”) prohibits refouling individuals to any State where they would be “in danger of being subjected to torture.” Article 16 further expands the CAT’s application to inhuman and degrading treatment that would not otherwise fall under Article 1’s definition of torture. The obligations set forth in the CAT are non-derogable and represent not only customary international law, but _jus cogens_.

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

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

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

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

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

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

228. UDHR, _supra_ note 203.
Rights (ICCPR, 1966),\textsuperscript{229} and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)\textsuperscript{230}—also implies a prohibition on refoulement. The UDHR affirms that all persons have “the right to seek and to enjoy in other countries asylum from persecution,”\textsuperscript{231} and underscores that persons must not be subject to “torture or to cruel, inhuman or degrading treatment or punishment.”\textsuperscript{232} Certain rights enshrined in the ICCPR\textsuperscript{233} have also been interpreted as prohibiting the refoulement of persons at risk of irreparable harm.\textsuperscript{234}

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

\begin{itemize}
\item \textsuperscript{231} UDHR, supra note 203, art. 14(1).
\item \textsuperscript{232} Id., art. 5.
\item \textsuperscript{233} See, e.g., ICCPR, supra note 229, arts. 6, 7 (Article 6 dealing with deprivation of life and the inherent right to life; Article 7 dealing with torture and cruel, inhuman, or degrading treatment or punishment).
\item \textsuperscript{234} See Human Rights Comm., General Comment No. 31, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), http://www.refworld.org/docid/478b26ae2.html [https://perma.cc/734B-2XUW]. (States have “an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”).
\item \textsuperscript{235} See UNHCR Advisory Opinion on Extraterritorial Application of Non-Refoulement, supra note 210, ¶¶ 23–43; see also supra Section I.B (Hungary considers the transit zones to be an international “no man’s land,” but the ECtHR has held that a State is responsible for human rights violations wherever it exercises control) (citing Amuur v. France, App. No. 19776/92, ¶ 52 (Eur. Ct. H.R. June 25, 1996)).
\item \textsuperscript{236} Global Consultations on International Protection, supra note 96, ¶ 50(c).
\end{itemize}
seeker . . . in accordance with accepted international standards, will ensure effective protection against refoulement, and will provide the asylum-seeker . . . with the possibility to seek and enjoy asylum.”

C. EU Law and Nonrefoulement

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

237. UNHCR ExCom Conclusion No. 85, supra note 214, § aa.
242. See, e.g., T.I. v. United Kingdom, App. No. 43844/98, 14 (Eur. Ct. H.R. Mar. 7, 2000) (“[T]he fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3 . . . imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3.”); see also Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 114 (Eur. Ct. H.R. Feb. 23, 2012) (“[E]xtradition or any other measure to remove an alien may give rise to an issue under Article 3.”); Ilias and Ahmed v.
States must extend these guarantees and protections to anyone within their jurisdiction. While jurisdiction is typically understood as applying to acts within a country’s own territory, it also applies wherever a country exercises “control” over an individual—even if technically outside of the State’s territory. Therefore, the nonrefoulement obligation of the removing State extends to both the removing State and to the possibility that the receiving State might return the applicant to his or her country of origin. Furthermore, European human rights law affirms that the prohibition on nonrefoulement is non-derogable: given its “absolute” nature, not even an “increasing influx of migrants” can “absolve a State of its obligations” under Article 3.

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

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

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

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


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

1. Nonrefoulement Under the ECHR

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

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

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

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

252. UNHCR ExCom Conclusions, supra note 216.
collective expulsion under ECHR Protocol No. 4, Article 4. Additionally, individualized assessments can demonstrate that a group of negative decisions does not equate to collective expulsion.

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

2. Nonrefoulement and ECtHR Jurisprudence

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

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

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


257. See id. ¶ 211.

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

259. See Hirsi Jamaa, App. No. 27765/09, ¶¶ 197–200; see also Abdolkhani v. Turkey, App. No. 30471/08, ¶ 108 (Eur. Ct. H.R. Sept. 22, 2009) (noting that an effective remedy under Article 13 requires “(i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant’s expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect.”); Jabari v. Turkey, App. No. 40035/98, ¶ 50 (Eur. Ct. H.R. July 11, 2000) (noting that an effective remedy under Article 13 requires “independent and rigorous scrutiny of a
and effective, and not theoretical and illusory." The only way to ensure protection is to meaningfully assess an asylum seeker’s individual application. In addition to ECHR Article 3, violations of the prohibition on nonrefoulement also typically incorporate a violation of Article 13—the right to an effective remedy. Under this provision, an applicant must have the right to appeal a decision before being expelled.

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

In Hirsi Jamaa v. Italy, the Court found that Italy violated ECHR Article 3 and 13, and Article 4 of Protocol 4 when it returned a group of individuals to Libya without first examining their individual cases or providing them an opportunity to challenge their removal. As part of the required individual assessment, the Court noted that the responsible State must seek assurances that the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned); Mole & Meredith, supra note 21, at 75–76 (“The test under the ECHR remains the same for all these cases. Is there a real risk of exposure to ill-treatment, either in the state of proposed destination or through chain refoulement? If there is an arguable violation, is there an effective remedy?”). 260. Hirsi Jamaa, App. No. 27765/09, ¶ 175.

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

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

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

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


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

Id. ¶¶ 185–86 (finding a collective expulsion violation).
destination country will not harm the applicants\textsuperscript{268} or arbitrarily repatriate them.\textsuperscript{269} This inquiry further supports the analysis of whether a violation of ECHR Protocol No. 4, Article 4 has occurred, in that lack of individualized assessment may demonstrate that a group of negative decisions equals collective expulsion.\textsuperscript{270}

The ECtHR emphasized the importance of analyzing individual protection needs prior to expulsion—even where an individual does not explicitly seek asylum.\textsuperscript{271} Related to this assertion, the Court underscored that States will be held accountable where authorities “knew or should have known,” based on the abundance of readily available information from “multiple sources,” that expulsion would expose the applicants to treatment proscribed by ECHR Article 3.\textsuperscript{272} In this vein, the Court also noted that exposing applicants “to the risk of arbitrary repatriation” violates Article 3\textsuperscript{273} and that States not only have a duty to make themselves aware of what awaits a potential returnee,\textsuperscript{274} but are accountable where they “knew or should have known that there were insufficient guarantees” to prevent repatriation.\textsuperscript{275}

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

\begin{footnotes}
\item[268]  See id. ¶ 211 (The Court required the responsible State to seek assurances that the destination country would not subject the applicants “to treatment incompatible with Article 3 of the [European Human Rights] Convention” or arbitrary repatriation).
\item[269]  See id. ¶¶ 152, 156.
\item[270]  See id. ¶¶ 185–86 (finding collective expulsion violation where State failed to ensure each applicant’s circumstances were subject to a “detailed examination” and stating where a “number of aliens are subject to similar decisions,” it is not collective expulsion if everyone has had an individualized assessment).
\item[271]  Id. ¶ 133 (stating that the applicants did not necessarily have to request asylum—instead, “it was for the national authorities, faced with a situation in which human rights were being systematically violated . . . to find out about the treatment to which the applicants would be exposed after their return.”).
\item[272]  Id. ¶ 131.
\item[273]  Id. ¶ 158.
\item[274]  Id. ¶ 157 (“[T]he Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees.”).
\item[275]  Id. ¶ 156 (“Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin.”).
\end{footnotes}
contrary to Article 3." To justify its assertion, the Court underscored the irreparable nature of the harm that would befall an asylum seeker “if the risk of torture or ill-treatment materialises,” and “the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.” Finally, the Court reiterated that the remedy must be “effective in practice,” which includes ensuring that applicants can access these procedures and information about them.

In *Ilias v. Hungary*, the ECtHR held that expelling two Bangladeshi nationals to Serbia, without first assessing whether a “real risk of inhuman or degrading treatment” awaited them, violated ECHR Article 3. In particular, the Court noted that Hungary’s Government Decree announcing Serbia as a safe third country did not absolve it of the obligation to provide a fair, effective determination as to whether Serbia was safe for the specific applicants in question. The Court noted that Hungary ignored a multitude of reports from reputable international sources on the abysmal conditions in Serbia and instead required the applicants to present individual circumstances, thus placing an “unfair and excessive burden of proof”

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

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


279. *Id.* ¶ 197.

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


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

The Court determined it would not analyze the potential violation of Article 13—whether there was an effective opportunity to challenge the expulsion decision—since it had already found that the applicants’ expulsion to Serbia violated Article 3.\textsuperscript{286}

3. The Safe Third Country Concept Under EU Law

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

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

\textsuperscript{284.} Id. ¶ 124.
\textsuperscript{285.} Id.
\textsuperscript{286.} Id. ¶ 127. If the Court did entertain this allegation, it likely could have found a violation of Article 13 taken together with Article 3. \textit{See, e.g.}, Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 207 (Eur. Ct. H.R. Feb. 23, 2012) (finding such a violation).
\textsuperscript{287.} Mole & Meredith, \textit{supra} note 21, at 72.
\textsuperscript{288.} COUNTRY REPORT: HUNGARY, 2017 UPDATE, \textit{supra} note 59, at 57.
\textsuperscript{290.} \textit{See generally} Violeta Moreno-Laz, \textit{The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties, in MIGRATION &}
pervert the STCC, shirking their protection obligations by shuffling asylum seekers abroad. While using the STCC correctly is legally permissible under EU law, if applied incorrectly, it exposes vulnerable persons to the threat of refoulement—both directly and indirectly. Thus, an expelling State must not only examine the safety of the country to which it will send a particular refugee (direct refoulement), but it must also research whether the receiving country itself will refoul the individual to a place where his or her life would be at risk (indirect refoulement). Proper use of the STCC comports with both international and regional law on nonrefoulement as delineated in this article.

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

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

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


293. See, e.g., Harabi v. The Netherlands, App. No. 10798/84 112, 122 (Eur. Ct. H.R. March 5, 1986) (“[T]he repeated expulsion of an individual . . . to a country where his admission is not guaranteed, may raise an issue under Article 3 (Art. 3) of the Convention. Such an issue may arise . . . if an alien is . . . deported repeatedly . . . without any country taking measures to regularise his situation.”).
accessing asylum and expose them to the danger of ill-treatment in contravention of a State’s nonrefoulement obligation.

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

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

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

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

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

²⁹⁶. See supra note 98 and accompanying text.


²⁹⁹. U.N. High Comm’r for Refugees, An Overview of Protection Issues in Europe: Legislative Trends and Positions Taken by UNHCR, European Series, Sept. 1995 at 30 (discussing specifically transfers under the Dublin Convention, but the concept is applicable broadly to all transfers to a third country).
remain; and accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including protection from refoulement.\footnote{U.N. High Comm’r for Refugees, Legal Considerations on the Return of Asylum-seekers and Refugees From Greece to Turkey as Part of the EU-Turkey Cooperation in Tackling the Migration Crisis Under the Safe Third Country and First Country of Asylum Concept, at 2 (Mar. 23, 2016), www.unhcr.org/56f3ec5a9.pdf [https://perma.cc/24N3-GKNP].}\footnote{Directive 2013/32/EU, supra note 90, art. 38(2)(a)–(c).} Aligned with these rules, the EU has specifically enumerated the requirements that a country must include in its national law to apply the safe third country concept: laws requiring that there be a “connection between the applicant and the third country” in question and the opportunity for an applicant to challenge such a connection; rules on how national authorities determine what constitutes a safe third country and how the concept shall apply to an applicant or a country (“including case-by-case consideration”); and procedural safeguards that entail “individual examination of whether the third country concerned is safe for a particular applicant” and the opportunity for an applicant to challenge such a determination.\footnote{Id. art. 34(1).}

Additional procedural safeguards include, among others, a personal interview on admissibility,\footnote{Id. art. 38(3)(a).} informing the applicant that the “safe third country” concept is being applied to his or her asylum application if the decision is solely based on this concept,\footnote{Id. art. 38(3)(a).} the “right to an effective remedy” (i.e., appeal),\footnote{Id. art. 46 (1)(a)(ii).} and “the opportunity to consult . . . in an effective manner a legal adviser or other counsellor.”\footnote{Id. art. 22(1).} EU law also announces a set of principles that must be followed for a third country to be deemed “safe.” These include no risk of serious harm based on one of five protected grounds\footnote{Id. art. 38(1)(a) (“[L]ife and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion”).} or otherwise,\footnote{Id. art. 38(1)(b) (“[N]o risk of serious harm”).} respect for nonrefoulement as required by the 1951 Refugee Convention\footnote{Id. art. 38(1)(c) (“[T]he Geneva Convention”).} and international law more broadly,\footnote{Id. art. 38(1)(d) (“[F]reedom from torture and cruel, inhuman or degrading treatment”).} and the ability to apply for refugee status and receive protection if eligible.\footnote{Id. art. 38(1)(e).} EU law also urges States to consider the relevant UNHCR guidelines and other reputable

302. Id. art. 34(1).
303. Id. art. 38(3)(a).
304. Id. art. 46 (1)(a)(ii).
305. Id. art. 22(1).
306. Id. art. 38(1)(a) (“[L]ife and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion”).
307. Id. art. 38(1)(b) (“[N]o risk of serious harm”).
308. Id. art. 38(1)(c) (“[T]he Geneva Convention”).
309. Id. art. 38(1)(d) (“[F]reedom from torture and cruel, inhuman or degrading treatment”).
310. Id. art. 38(1)(e).}
publications when making a safe third country determination. 311 Finally, where the designated safe third country refuses to take back the applicant, the current host State itself must process the asylum seeker’s application for international protection. 312 The UNHCR has echoed both these procedural safeguards and rules regulating what constitutes a safe third country with approval, and further reiterates that a third country must be considered safe “for a particular applicant.” 313

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

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

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

311. Id. ¶ 46.
312. Id. art. 38(4) (“Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II” of this document.).
313. UNHCR Legal Considerations on the Return of Asylum-seekers and Refugees from Greece to Turkey, supra note 300, at 5–6.
314. See supra note 80, Minister Trócsányi on the Management of Mass Migration.
315. 1951 Convention, supra note 4, art. 33(1) (emphasis added) (“[O]n account of [one’s] race, religion, nationality, membership of a particular social group or political opinion.”); see also 1967 Protocol, supra note 195, art. I(1) (stating that “[t]he States Parties to [this] Protocol undertake to apply articles 2–34 inclusive of the 1951 Convention to refugees.”).
316. See discussion supra Sections II.B, II.C.
317. While it is not the focus of this Article, one could also successfully argue that a number of Hungarian laws and policies—including the push-back law
Hungary began systematically ignoring its obligation not to refoule asylum seekers during the height of the 2015 refugee crisis. The passage of Govt. Decree No. 191/2015, naming Serbia a safe third country, is one major mechanism that facilitated this violation. Under this Decree, any person who enters the country via Serbia is presumptively ineligible for asylum in Hungary. By declaring Serbia a safe third country, the Hungarian government can “legally” reject asylum applications from roughly 95% of asylum seekers under its national law. While, at the time of writing, Hungary has temporarily stopped issuing inadmissibility decisions on this basis, it recently passed a law incorporating safe third country inadmissibility in its Constitution—an indication that Hungary fully intends to resume employing the safe third country concept to keep refugees out.


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

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

320. See supra Section I.C, “Serbia as a Safe Third Country” (discussing Hungary’s “Stop Soros” amendment package—including Bill T7332, which amended Hungary’s Constitution).
refoule refugees on two fronts: (1) Hungary is not complying with the procedural safeguards required to ensure its use of the STCC does not violate its nonrefoulement obligation; and (2) Serbia is not a safe third country for asylum seekers.

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

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

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

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

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

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

324. See COUNTRY REPORT: HUNGARY, 2017 UPDATE, supra note 59, at 59 (“[T]his means the quasi-automatic rejection at first glance of over 95% of asylum claims, without any consideration of protection needs.”).
Until recently, if an asylum seeker passed through a safe third country, their application was deemed inadmissible unless they rebutted the presumption within three days of being informed, before the asylum authorities rendered a decision on their application. However, in practice, this procedural safeguard had little meaning—three days did not allow adequate time to collect evidence, seek legal help, or traverse other insurmountable barriers. Furthermore, the authorities at the border provided asylum seekers with superficial declarations to sign, indicating that they disagreed with the designation of the safe third country. The authorities considered these declarations as the applicant’s rebuttal and decided the asylum seeker’s fate without taking any further statements.

Initially, when Hungary first implemented the National List of Safe Third Countries, applicants had seven days to appeal inadmissibility decisions. This was extremely difficult to achieve since officials expelled asylum seekers to the other side of the fence immediately after receiving a negative admissibility decision. Refugees found themselves without any access to authorities,
completely unable to lodge an appeal. They were able to wait in line again to access the transit zone but, given extremely long wait times, it was extremely unlikely that they would make the seven-day appeal deadline.

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

332. UNHCR has underscored the importance of a functioning appeal mechanism. See Global Consultations on International Protection, supra note 96, ¶ 41 ("[S]tandards of due process require an appeal or review mechanism to ensure the fair functioning of asylum procedures."). The UNHCR has further highlighted that “an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory.” Id. ¶ 32.
333. COUNTRY REPORT: HUNGARY, NOVEMBER 2015, supra note 36, at 32.
335. This has only become more difficult with the recent passage of T/333 in June 2018. See, e.g., Vanessa Romo, Hungary Passes ‘Stop Soros’ Laws, Bans Aid To Undocumented Immigrants, NPR (June 20, 2018), https://n.pr/2IMmcbu [https://perma.cc/H2PR-8D8P] (remarking that human rights organizations criticize Hungary for criminalizing “essential and legitimate human rights work” by amending its criminal laws to prohibit “facilitating . . . illegal immigration.”).
336. See COUNTRY REPORT: HUNGARY, NOVEMBER 2015, supra note 36, at 28 (noting “no access to legal assistance;” “complicated” legal concepts; and “lack [of] awareness about their right to turn to court.”); see also COUNTRY REPORT: HUNGARY, 2016 UPDATE, supra note 12, at 37 (describing how “in practice . . . asylum seekers are deprived of the opportunity to challenge the application of the safe third country concept on the merits.”).
337. See COUNTRY REPORT: HUNGARY, NOVEMBER 2015, supra note 36, at 29 (“The procedure is in Hungarian and the decision on inadmissibility is only translated [in oral communication to] . . . the applicant.”).
338. Act LXXX of 2007 on Asylum, supra note 14, art. 53 § 4 (“If necessary, there shall be a personal hearing in the procedure.”). Officials do not tell the applicant that he or she must request a hearing. See COUNTRY REPORT: HUNGARY, NOVEMBER 2015, supra note 36, at 29 (“Applicants are not informed that they have to specifically request a hearing in their appeal.”).
circumstances in the request for review. 339 The judge, who until recently was not required to be a real judge, 340 only has eight days to render a decision. 341 Additionally, the arbiter is only empowered to annul a decision and request that the authorities conduct a new procedure. 342 The March 2017 amendments make contesting an unfavorable decision even more difficult, as asylum seekers now have only three days to appeal an inadmissibility decision. 343

Imperatively, if a safe third country “fails to take back the applicant,” Hungarian law requires that the asylum authority continue to assess the applicant’s protection claim. 344 Serbia has refused to honor its readmission agreement with Hungary since September 15, 2015; 345 however, Hungary continues expelling refugees to Serbia, arguing that Serbia could change this practice and accept returns “at any time.” 346 Thus, while Serbia has denied reentry to those expelled from Hungary, Hungary has refused to proceed with their claims, trapping these refugees in an unnavigable legal limbo.

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

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

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


342. Id. art. 53 § 5.

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

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


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

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

B. Serbia is Not a “Safe” Third Country

Serbia is not a safe country for asylum seekers. This is critical when analyzing Hungary’s failure to fulfill its nonrefoulement
obligations in designating Serbia a safe third country. The ECtHR emphasized that States shall be held accountable where authorities “knew or should have known,” based on the abundance of readily available information from “multiple sources,” that expulsion would expose applicants to treatment proscribed by ECHR Article 3.\footnote{Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 131 (Eur. Ct. H.R. Feb. 23, 2012); see also Ilias and Ahmed v. Hungary, App. No. 47287/15, ¶ 115 (Eur. Ct. H.R. Mar. 14, 2017) (noting that States have an obligation under ECHR Article 3 to carry out a risk assessment of their own initiative in asylum cases based on a “well-known general risk”).} In this vein, the Court also noted that exposing applicants “to the risk of arbitrary repatriation” violates Article 3,\footnote{Hirsi Jamaa, App. No. 27765/09, ¶ 158.} and that States not only have a duty to make themselves aware of what awaits a potential returnee,\footnote{See id. ¶ 157 (“[T]he Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees.”).} but are accountable where they “knew or should have known that there were insufficient guarantees” to prevent repatriation.\footnote{Id. ¶ 156 (“Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin.”).}

The following section exposes Serbia’s barely-functioning asylum system, inadequate reception conditions, and the great risk of onward refoulement that refugees face in-country. It demonstrates the abundance of “readily available” information, from “multiple [reputable] sources,”\footnote{See id. § 131; see also Ilias and Ahmed, App. No. 47287/15, § 11.} that the Hungarian government has refused to acknowledge. Accordingly, Hungary is completely alone in its assessment; no other EU Member State considers Serbia a safe third country.\footnote{COUNTRY REPORT: HUNGARY, 2017 UPDATE, supra note 59, at 58.}

In August 2012, UNHCR found that Serbia was not a safe third country because of deficiencies in its asylum system\footnote{U.N. High Comm’r. for Refugees, Serbia as a Country of Asylum: Observations on the Situation of Asylum-seekers and Beneficiaries of International Protection in Serbia, ¶ 81 (Aug. 2012), http://www.refworld.org/docid/50471f7e2.html [hereinafter U.N. High Comm’r. for Refugees, Serbia as a Country of Asylum] (“UNHCR recommends that Serbia not be considered a safe third country of asylum, and that countries therefore refrain from sending asylum-seekers back to Serbia on this basis.”).}—a position it
maintains today.

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

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


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

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


367. AMNESTY INT’L, EUROPE’S BORDERLANDS, supra note 365, at 40.
368. AMNESTY INT’L, EUROPE’S BORDERLANDS, supra note 365, at 35–37 (“Although there are multiple reasons why individual refugees move onward to another country rather than seeking asylum in Serbia, deficiencies in the asylum system do appear to play a role in such decisions.”).
369. BELGRADE CTR. FOR HUM. RTS., 2017 SERBIA REPORT, supra note 365, at 13; see also AMNESTY INT’L, EUROPE’S BORDERLANDS, supra note 365, at 35–37.
370. AMNESTY INT’L, EUROPE’S BORDERLANDS, supra note 365, at 36.
completed 160 interviews and granted asylum to nineteen individuals. In 2017, of 6,199 asylum seekers, 236 successfully submitted asylum applications. Serbia’s Asylum Office interviewed 106 of the applicants and issued three grants of asylum.

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

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374. Id. at 38.
375. Id. at 39.
377. Id.
382. Id.
383. Id.
384. Id.
1,300 refugees were living in abandoned warehouses, “often in sub-zero temperatures.”385 The Serbian government ultimately transported these refugees to government centers five months later—but conditions were still substandard due to overcrowding and other shortcomings.386

Serbia’s use of safe third countries and the risk of refoulement to other countries is another serious concern that all refugees face—including those returned from Hungary.387 The UNHCR has repeatedly raised concerns about Serbia’s designation of all its neighboring countries as “safe,” upon which it bases blanket denials of asylum claims.388 Many asylum applications are dismissed on this basis, and administrative and judicial appeals “cannot be described as effective legal remedies.”389 Serbia’s use of the STCC leaves asylum seekers vulnerable to refoulement to neighboring countries—which also deny refugee status to the majority of asylum seekers on the basis of safe third country, and from where refugees would ultimately be refouled onward.390

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


386. See id.

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

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

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

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

391. Id. at 40–41.

392. These certificates allowed refugees to stay legally in Serbia at either Reception Centers or Asylum Centers. See BELGRADE CTR. FOR HUM. RTS., 2016 SERBIA REPORT, supra note 365, at 21.
location in 2016 where asylum authorities would process their applications.\footnote{Id. at 21.} These individuals were “de facto deprived” of their right to apply for asylum.\footnote{Id. at 26–27.} Beyond this serious human rights violation that prevents refugees from accessing Serbia’s asylum process, Serbia’s reception of refugees returned from Hungary has been particularly unwelcoming. It is extremely difficult for asylum seekers returned from Hungary to lodge a claim for protection in Serbia, as both police and asylum officers are “informally of the view . . . that people returned from Hungary are not entitled to seek asylum in Serbia.”\footnote{Id. at 26, 34 (explaining that this view is not supported by Serbia’s asylum law).} In one demonstrative case, a group of Syrian refugees who were returned to Serbia reported that police officers refused to issue them certificates and threatened to jail or deport them to Turkey.\footnote{See id. at 26.} This is not an isolated incident; refugees expelled to Serbia are not guaranteed access to its asylum procedure and face a serious risk of chain refoulement.\footnote{BELGRADE CTR. FOR HUM. RTS., 2017 SERBIA REPORT, supra note 365, at 32 (“There is a well founded risk of [returned refugees] being treated like illegal migrants [and] expelled into countries such as [Macedonia] and Bulgaria.”).}

In observing the totality of the circumstances refugees face in Serbia, the UNHCR notes that “[t]here are absolutely no procedures that enable access to those who make a serious effort to find international protection.”\footnote{AMNESTY INT’L, EUROPE’S BORDERLANDS, supra note 365, at 37 (quoting Senior Protection Officer, UNHCR, Belgrade).} The Committee Against Torture also has expressed “serious concern” regarding both the small number of persons granted asylum in Serbia, as well as Serbia’s near automatic application of the safe third country concept, which violates nonrefoulement.\footnote{Comm. Against Torture, Concluding Observations on the Second Periodic Report of the Republic of Serbia, ¶¶ 14–15, U.N. DOC. CAT/C/SRB/CO/2 (June 3, 2015).} These inadequacies make it nearly impossible to obtain asylum in Serbia and demonstrate that Serbia cannot be considered a safe third country for asylum seekers.

\footnote{393. \textit{Id.} at 21.} \footnote{394. \textit{Id.} at 26–27.} \footnote{395. \textit{Id.} at 26, 34 (explaining that this view is not supported by Serbia’s asylum law).} \footnote{396. See \textit{id.} at 26.} \footnote{397. BELGRADE CTR. FOR HUM. RTS., 2017 SERBIA REPORT, \textit{supra} note 365, at 32 (“There is a well founded risk of [returned refugees] being treated like illegal migrants [and] expelled into countries such as [Macedonia] and Bulgaria.”).} \footnote{398. AMNESTY INT’L, EUROPE’S BORDERLANDS, \textit{supra} note 365, at 37 (quoting Senior Protection Officer, UNHCR, Belgrade).} \footnote{399. Comm. Against Torture, Concluding Observations on the Second Periodic Report of the Republic of Serbia, ¶¶ 14–15, U.N. DOC. CAT/C/SRB/CO/2 (June 3, 2015).}
CONCLUSION

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

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

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

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400. See UNHCR 2001 Note on International Protection, supra note 215, ¶ 2.
401. See MIGRATION FLOW TO HUNGARY: 2016 OVERVIEW, supra note 1, at 1.
402. See supra Figure 1, “Chutes and Ladders in Hungary”; see also supra Section I (describing the evolution of Hungary's asylum system since Summer 2015 and how it has prevented asylum seekers from accessing protection).
403. In addition to expulsion, rejecting a refugee at the frontier has the same effect as refoulement if it forces the refugee back to a place where s/he would otherwise be persecuted or harmed. See Goodwin-Gill, The Language of Protection, supra note 211, at 12.
404. No State is allowed to push back "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened." 1951 Convention, supra note 4, art. 33 (emphasis added).
405. U.N. Sec'y-Gen., In Safety and Dignity, supra note 2, ¶ 37; see also id. ¶ 56 ("All refugees and migrants, regardless of status, are entitled to due process of law in the determination of their legal status, entry and right to remain.").
406. Id. ¶ 28.
increasing their vulnerability to human trafficking, reinforcing racism,\footnote{407} and ultimately contributing to the growing numbers of refugee deaths in transit.\footnote{408}

From its inception, the EU stated its intent to be “fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity.”\footnote{409} However, EU efforts thus far—including European Commission infringement proceedings, referral to the ECJ, ECtHR rulings,\footnote{410} and cases referred to the ECtHR\footnote{411}—have not stymied Hungary’s illegal actions. This EU Member State has no intention of upholding its nonrefoulement obligations, which the recent incorporation of safe third country inadmissibility in its Constitution\footnote{412} further demonstrates. Despite the uphill battle and seemingly insurmountable political stalemate, Hungary needs to be challenged\footnote{413}—especially when it undertakes these actions in the name of “Fortress Europe.”\footnote{414}

\footnote{407} Id. ¶ 37.
\footnote{408} Id. ¶ 29 (“At least 50,000 persons, including thousands of children, have died in the past two decades while seeking to cross international borders.”).
\footnote{410} See, e.g., “Hungary’s Response to the EU Relocation Quota,” \textit{supra} Section I.E (discussing the international and regional backlash Hungary has faced in response to its refugee policy); \textit{see also} “European Court of Human Rights Jurisprudence: The ECHR and Nonrefoulement,” \textit{supra} Section II.C.2 (discussing \textit{Ilia\textsuperscript{c} v. Ahmed}).
\footnote{412} \textit{See supra} note 320.
\footnote{413} \textit{See, e.g.,} Jacopo Barigazzi & Quentin Ariès, \textit{5 Ways the EU Could Send a Message to Viktor Orbán}, \textit{POLITICO} (Apr. 18, 2017, 4:09 AM CET), https://www.politico.eu/article/5-ways-eu-could-send-viktor-Orban-message/ [https://perma.cc/F4BW-ZTPF] (suggesting five ways that the European Union could challenge Hungary, including instituting infringement proceedings, reducing funding, etc.).
\footnote{414} \textit{See AMNESTY INT’L, EUROPE’S BORDERLANDS,} \textit{supra} note 365, at 67 (discussing Fortress Europe, a term used to describe the efforts to seal and enhance control over EU borders, which “has severely limited the safe and legal avenues of entry for refugees to the EU”); \textit{If There Were No Fence, Tens of Thousands of Migrants Would be Arriving in Hungary Each Year, KORMANY - WEBSITE OF THE}
The warning of Hungary is also one that the international community at large must not ignore. It must study how countries evade their legal obligations to refugees and devise solutions to bring rogue States in line—particularly if there is any hope for coordinated efforts to manage refugee crises\textsuperscript{415} “in a humane, sensitive, compassionate and people-centred manner.”\textsuperscript{416} The international community needs a culture of accountability to guarantee that asylum seekers can access protection, and to ensure that refugees are not refouled in violation of the 1951 Refugee Convention and human rights treaties.

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

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