

**CREATING PARALLEL REALITIES:
THE HUNGARIAN GOVERNMENT'S
EFFORTS TO REPLACE PROTECTION BY
DENIAL, DETERRENCE AND
PUNISHMENT**

Presentation by
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at the
Cleary Gottlieb Steen & Hamilton Alumni
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CNN reports, 28 August, 2015



Fleeing war to be left dead in truck

Austria says 71 bodies likely those of Syrians who suffocated

Tide of death: Migrants' bodies wash in | One migrant's journey | 'Better bombed in my homeland than die here'

THREE LEVELS OF REGULATION

- International law (1951 Geneva Convention, 1950 European Convention on Human Rights, etc.)
 - European Union Law (in EU member states)
 - National law – implementing both
-

Control (enforcement):

UNHCR

European Court of Human Rights („Strasbourg“)

Court of Justice of the European Union („Luxembourg“)

Domestic courts

DEFINITIONS

Geneva Convention relating to the status of refugees – 1951

Article 1. *Definition of the term “refugee”*

...

(2) As a result of events occurring before 1 January 1951 and **owing to well-founded fear of being persecuted** for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is **unable, or owing to such fear, is unwilling to avail himself of the protection of that country;** or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

DEFINITIONS – EU

Council Directive

2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304/12 2004 09 30,)

EU Qualification Directive

2004/2011

DIRECTIVE **2011/95/EU** OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

Art 2 2004:(e) 2011: (f)

„person eligible for subsidiary protection” [means someone], „who **does not qualify as a refugee** but in respect of whom **substantial grounds have been shown for believing** that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, **would face a real risk of suffering serious harm** as defined in Article 15,is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

Art 15 (in both)

Serious harm consists of:

- (a) **death penalty or execution**; or
- (b) **torture or inhuman or degrading treatment or punishment** of an applicant in the country of origin; or
- (c) **serious and individual threat** to a civilian's life or person by reason of **indiscriminate violence in situations of international or internal armed conflict”**

ASYLUM ACQUIS

Adopted measures

1. Directive on **temporary protection**: **2001 TPD**
2. **Reception conditions** directive (2003) recast: **2013 RD**
3. **Dublin III** Regulation and its implementing rules (2003) recast: **2013**
4. Regulation on **Eurodac** (2000) recast: **2013**
5. Qualification (**Refugee definition**) directive (2004) recast: **2011 QD**
6. **Asylum procedures** directive (2005) recast: **2013 PD**
7. Establishment of an **European Asylum Support Office**: **2010**
8. Decision on the new **Asylum Migration and Integration Fund** : **2014 AMIF**
9. Solidarity measures of 2015 on **relocation and resettlement**

SYMPTOMS OF MALFUNCTIONING OF THE CEAS

- Thousands of **deaths** at sea and inland
- The overall **impression of a „crisis“**, which is **seen as a European crisis**
- The increasing **tension between Member States** (e.g. Sweden-Denmark, Austria – Greece, Hungary – Austria, Slovenia, Croatia, etc.)
- The uneasy relationship with Turkey**
- The grossly **unfair participation in the provision of protection** to refugees reaching EU territory
- The repeated, but **largely fruitless sweeping legislative and political efforts**, including negotiations with transit countries (Western Balkan conference, 2015) and states of the regions of origin (Valetta summit, 2015), decisions to resettle and relocate refugees and asylum seekers
- The breakdown of the Dublin system**
- Fences** at the external and internal borders & **reintroduction of border controls** at Schengen **internal borders**

CAUSES OF FAILURE

Design failure

- the Dublin regulation puts undue pressure on external border state, it is manifestly unjust
- limited instruments of solidarity among MS - AMIF and the never applied temporary protection directive of 2001

Overload/Uneven distribution of applications

2015: EU total 1,3 million

Germany: 450 000 (1 million in reality) UK: 39 000

Sweden: 160 000 Spain: 14 000

Austria: 90 000 Poland: 10 000

France: 74 000 Portugal: 896

(Rounded figures. Source: UNHCR „Latest monthly data at: <http://www.unhcr.org/pages/49c3646c4d6.html> (20160513)

Free riding/beaches of the EU law

Greece, Hungary, Croatia, Slovenia, Austria, all ignoring Schengen and Dublin rules

Hungary: epochs of the refugee history

- 1945 – 1989 - **closure** (Greeks, Chileans. Escape from Hungary)
- 1988 – 1991 – **arrival from Romania** (mainly ethnic Hungarians, informal, swift integration)
- 1991 – 1995 - The **Southern Slav** wars – welcome, but temporary protection
- 1995 – 2004 - In the **mainstream** (1998 Lifting of the geographic limitation)
- 2004 – 2014 - **Co-operative member** of the EU. Manageable application numbers, lots of absconding
- 2015 - - **Betrayal** of refugee and human rights law, antisoladaristic attitude within the EU

- Hungary: no genuine response to the increased flows with a view to protection. Instead of protection

• DENIAL

• DETERRENCE

• OBSTRUCTION

• PUNISHMENT

Hungary does not need **livelihood immigrants**” title of the parliamentary debate day on 22 February 2015

„National consultation on **terrorism and immigration**” (May 2015)

“**Waves of illegal immigration** threaten Europe with explosion...The **European Union is responsible for the emergence of this situation...** We have the right to **defend our culture**, language, values...” Parliament’s resolution 22 November 2015

Reluctant reception and transport to reception centers

Fence at the border

Systemic **detention** of asylum seekers

Non-access to basic services / inhuman treatment

Unpredictable denial / permission to move on to Austria

Crisis situation caused by mass immigration, renewed without legal ground in March 2016

No creation of new reception and processing capacities / **Closing** down the largest in Debrecen

„**Transit zones**” with **100/day** capacity – decreased in March 2015 to 50

Serbia declared **safe third country**

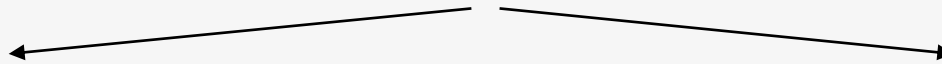
Unauthorised crossing the „border closure” is a **crime**

Ineligible applicants are **banned from the EU** and detained even if removal is hopeless

Applying to people-smuggler rules to **volunteers** transporting refugees

Unlawful **detention** of applicants **in the transit zone** (w/out court control)

- **Hungary: no genuine response to the increased flows with a view to protection. Instead of protection**



FREE RIDING

BREACHING THE LAW

LACK OF SOLIDARITY

Closing of the border (September and October 2015) only rerouted the flow	Building the fence in violation of environmental and nature conservation rules
Waving though approximately 233 000 persons without registration	Violating procedural guarantees in the border procedure (Including the lack of effective remedy)
Attacking the relocation decision in the CJEU in December 2015	Violating rights of minors and access to translation in the criminal procedure
Refraining from resettlement , including under the Turkey – EU deal of March 18	Systemic return to Serbia without obeying the EU-Serbia return agreement
Initiating a referendum against the compulsory relocation	Inhuman conditions in front of the „transit zones”

THIRD STEP: THE EU-TURKEY „STATEMENT” – THE DEAL OF 18 MARCH 2016

„[A]ny application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR”

- right to stay till first instance decision, unless inadmissible
- right to appeal

„All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion.”

- Contradicts to the promise to process every claim
- EU law: return directive = voluntary departure preferred, appeal against removal decision, strict conditions for detention

„[T]emporary and extraordinary measure”

- For how long? Does extraordinariness waive rights?

„Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey”

- So far very few applied in Greece (11 370 out of 880 000), now they will
- Inadmissibility: is Turkey a safe third country and/or a country of first asylum?!

THE EU-TURKEY „STATEMENT” – THE DEAL OF 18 MARCH 2016

„For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria”

- How can Syrians be returned if they applied for asylum (recognition rate in EU above 98% in Q4 of 2015)?

- What about Dublin and the right to join family and be processed there?

„[R]esettlement under this mechanism will take place, ... honouring the commitments [of 20 July 2015], of which 18.000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons.” ... The Commission's will propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken to be offset from non-allocated places under the decision... Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued.”

- A mechanism up to 72 000 resettlements. No plan for afterwards

- Purely voluntary

Visa liberalisation among Schengen states for Turkey by the end of June 2016

Opening Chapter 33 in the accession negotiations

FUTURE MOVES OF THE EU

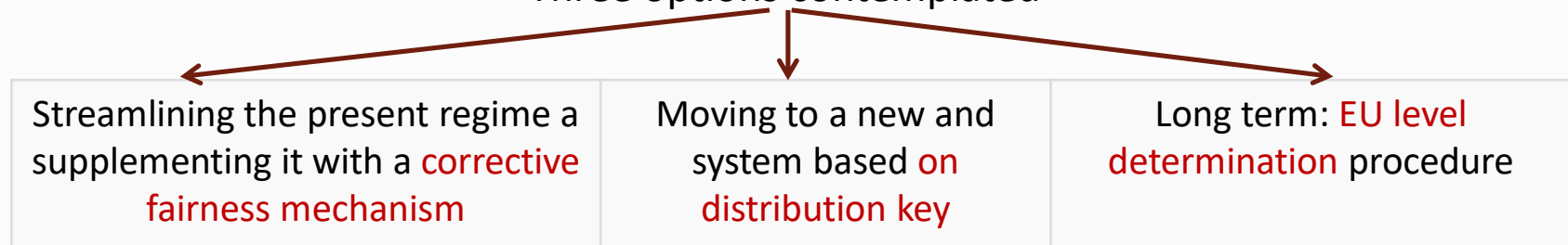
THE 6 APRIL COMMUNICATION AND THE 4 MAY PACKAGE

„Towards a reform of the Common European Asylum system and Enhancing Legal Avenues to Europe” COM (2016) 197 Final, 6.4.2016

Priorities

- 1) Establishing a **sustainable and fair system** for determining the Member State **responsible for** asylum seekers

Three options contemplated



- 2) **Reinforcing the Eurodac** system: expanding the data stored and uses extended beyond asylum
- 3) **A new mandate for the EASO** : a new policy-implementing role as well as a strengthened operational role and providing sufficient financial resources and legal means for that purpose

Proposals on these three items published on 4 May 2016

- COM(2016)270 = Dublin recast
- COM(2016)271 = Replacing EASO with the European Union Asylum Agency
- COM(2016)272 = Extending Eurodac

Thanks!

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