ASYLUM-SEEKERS' ACCESS TO TERRITORY

Balance between the right to asylum and the combat against illegal migration

Summary of Doctoral Theses

by

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I. Research objectives and grounds

Europe, the European Union including Hungary is affected by a migratory pressure of unexperienced measure in the last decades. The reasons of this migration are ranging from wars and civil wars through genocides, crimes against humanity and pogroms to unemployment and the lack of proper health-care. This influx of people coming to Europe leads to social and political conflicts and the sheer volume of migration requires new solutions and managing methods.

The migratory pressure has mixed attributes considering its reasons, among the newcomers there are some who are in need of international protection while others do not. These mixed attributes are making hard to give proper response to the migratory pressure because there are different rules for those who are in need of international protection – asylum – and for those, who are not entitled to enter to or stay in the territory of a member state.

According to the Charter of Fundamental Rights, the right to asylum is a fundamental right and the Members States of the Union have to grant asylum for those in need and – in order to this obligation be more than an empty promise – have to grant access to their territory.

However Members States are trying lawfully to keep outside or expel from their territories those who are not entitled to enter or to stay. Several types of crimes are attached to irregular migration quite strongly and states have the right and obligation to fight these crimes.

My research is based on the hypothesis that the requirement to ensure the possibility of receiving international protection and the rules of it are not harmonized with the rules against irregular migration, and because of this, neither is effective enough. The system of rules and actions against irregular migration actively hinders the access to territory (and to asylum), while on the other side the rules of asylum are preventing the effective expulsion of those foreigners who are not in need of international protection.

The aim of my research is to introduce the rules governing asylum and the rules, legal instruments and actions created to manage or prevent illegal migration which can affect negatively a core element of the right to asylum, the access to territory and its natural continuation, the right to remain. Analyzing the past and recent solutions and their impacts I make recommendations de lege ferrenda, keeping in mind, that the migratory crisis can not be solved solely with tools of migration-control. Beside the management or cessation of the reasons of mass migration any other tool is only capable to mitigate the negative effects of the crisis.

My research does not have the aim to give comprehensive introduction of the asylum law, it only focuses on one particular aspect, the access to territory. I only deal with border-guard or border management issues if they have an effect on the asylum-seekers' access to territory. So the history and organization of asylum, the status-determination, the rights and obligations of refugees and other protected persons are outside the scope of my research, these topics are only present in depth necessary to the context.

II. Methodology

The methodology of the research included the study of the corresponding foreign and Hungarian literature, analyzing legislations and statistical trends, processing administrative

and judicial case-law. Regarding the international case-law I consulted primarily the online databases of the European Court of Justice and the European Court of Human Rights.

Regarding the Hungarian regulations, I spent more than a decade working with asylum law, and I had direct knowledge of the practical impact of various amendments of the legislation, the feasibility and possibility to enforce certain legal instruments. With the direct knowledge of thousands of cases I tried to reach scientific conclusions.

The research is based primarily on written materials, secondarily on consultations with stakeholders (including: experts and managers of the Hungarian asylum authority, Police, national security authorities, UNHCR Regional Representation and NGOs) on the field of asylum.

I used the statistical data of the Office of Immigration and Nationality, Police, EASO, EUROSTAT, IOM and UNHCR.

Regarding the evolvement of certain legal instruments I followed strict chronological order to reveal the changes and their reasons.

III. Short conclusion of the results of the research

1. Several form of the international protection came into existence but the territorial asylum can be considered the most effective one and the one able to help the most people in need. The territorial asylum is the only form of international protection which is considered – at least in the European Union – as a fundamental right and as such, it can be enforced – through national courts of justice – from Member States. This right is given to those persons in need of international protection who are present in the territory of the given state. It can be provided in form of refugee status or other similar statuses like subsidiary or temporary protection, or in various forms of humanitarian protection.

2. To get territorial asylum one has to have access to the territory. As long as the person in need of protection is not present at the territory of the state from which the person is seeking protection (country of asylum), there is no possibility to grant territorial protection, the right to asylum can not be enforced from the state in question.

The territory of the state covers transit zones, border-area and international waters as well, if the state has jurisdiction there (for example through a vessel under its flag). The sole presence in such territory creates the possibility to require territorial asylum and creates an obligation for the states to ensure actual possibilities for requiring such protection and at the same time bans tools, actions and measures which can prevent or degrade to a virtual possibility of seeking asylum.

3. According to the experiences of the last decades even those with real need of international protection are forced to use illegal tools and means in order to gain access to the territory of the country of asylum. The reasons of this can be found either in the circumstances of the individual asylum-seeker, or of the country of asylum. The prosecution by the authorities of the country of origin can take the form of the denial of issuing proper documents required for regular travel; the denial of regular exit or generally the restriction of freedom of movement. The restrictive circumstances in the country of asylum can take

various forms e.g. certain visa-requirements, the non-acceptation of documents issued by the country of origin, or prevention of the physical entry.

The illegal way has its dangers and risks. There is a whole criminal business built on irregular migration, which tries to maximize its profit to the cost of the smuggled migrants. The wealth, physical well-being, personal freedom and even the life of the irregular migrants can be at risk. Beside these material dangers, the hazard of the irregular way is that the people in need of international protection will be dealt under the rules governing illegal migration. These strict alien policing and border management rules have the explicit aim to prevent the entry of irregular migrants.

4. The developed countries, including Member States of the EU, created a whole system of illegal migration-prevention in the last decades. These measures are serving the legitimate purpose of states to use their sovereign right to decide who and on what grounds to allow entering their territory. However when they use these measures, it is often forgotten that the sovereignty is not absolute, international obligations such as the obligation to grant asylum can overwrite it.

As a result, these irregular migration preventing measures can hinder the access to territory and because of this the acquiring of protection as well. In theory in this clash of values and interests the right to asylum, as a fundamental right should triumph over fight against irregular migration. However the fact that there is a real need for international protection in the individual case can not be decided in the very moment where one must decide on the question on granting access to territory. So in practice in many cases the migration-controlling measures are prevailing.

5. The simplest grouping of the obstacles against access to territory is to divide these to physical or legal barriers. Physical barriers can be natural ones like seas, rivers, mountains or deserts; and artificial ones, typically in a form of a system of walls or fences.

In modern ages the physical barriers should not be absolute, however as experiences shows because the mass scale of migration and the unacceptable conditions of human smuggling a lot of lives is taken en route. Many suffocate in high seas or in overcrowded, airless trucks or lorries.

The role and effectiveness of artificial barriers as migration-managing or -preventing measures is highly disputed. On global or even regional level such measures are mostly unable to affect the international migration, however they can have a local and temporary impact. This is primarily a detouring effect, easing the pressure on the border-section protected by a wall or fence while transferring the pressure to another border-section.

Legal barriers – necessarily relying on the required physical force behind them (e.g. denial of issuing documents, not allowing to board on vessels) – are covering every tool, action, measure based on legal instruments and having the capability to hinder or prevent the access to (the extended) territory even for those in need of international protection.

6. The legal barriers against entry are arising from the acceptance of certain travel documents and from the issuance of entry permits (visas) by states trying to control migration. It is a just and lawful requirement by the states that people trying to get to their territories have to prove their identity with proper documents and have to have valid documents

enabling them to travel to that country (not every passport is valid to every country). However the requirement to have such documents is not to be expected in every case from persecuted people. But even if they do have such documents not every country accepts every formally valid document. Because of this, people in need of international protection may find themselves in situations where they are simply unable to travel in a regular manner regardless of their intentions.

The same is true for entry permits or visas. Persons in need of international protection are rarely in the position to go freely to the embassy or consulate of the country of asylum, lodge a visa-application there and be able to wait until the visa is issued to travel to the destination country. The embassies and consulates are mostly in areas (e.g. well-guarded districts) which are not-accessible for people in need of international protection and such people are not in the position to fulfill all the criteria required for a visa. According to the Visa-Code of the EU there is no EU-visa for international protection but visa-authorities have to ascertain the willingness of the visa-applicants to return from the destination country. Naturally this is not the case for most asylum-seekers, who do not want to return, so people in need of international protection are forced to mislead the visa-authorities, or bypass the whole regular route and use irregular means.

Based on statistical data the correlation between the visa-issuing practice and need of international protection is evident: the more people seek asylum from a country of origin the less will be the willingness to issue visa to citizens of this country. It also can be seen from another perspective: visa-liberalization is only imaginable in relation of countries from which mass influx of asylum-seekers is unlikely. It is worth to note that experiences regarding visa-liberalization may differ wildly depending on whether the country in question is only a transit-country or a destination-country.

7. Sanctioning of unlawful entry is a typical area where fight against illegal migration may clash with rules regarding international protection originating from international law.

The sanctions in case of unlawful entry have – due to their general-prevention attributes – a preventing effect. The problem is that people in need of international protection often do not have any other choice than to use irregular – formally illegal – ways. The threat of sanctions can motivate the people in need of international protection to choose other, riskier ways over regular ones.

According to international law if certain criteria are met – the applicant arrives directly form a place where his/her life and safety was threatened – people in need of international protection may enjoy immunity from sanctions of unlawful entry. Beside the question whether this immunity is granted broadly or in a restrictive manner, the necessary sequence of procedures is also problematic in practice. The procedure to ascertain the need for international protection should be conducted prior any procedure regarding the possible sanctions. Unfortunately this is not always the case.

A clear distinction has to be made between sanctions of illegal entry and detention serving administrative purposes (not prevention). The later one – either asylum detention or aliens policing detention – is a safeguard for the effective conducting of the administrative procedure and not the punishment of the illegal entry, regardless of the fact that foreigners are sensing their confinement as punishment.

8. The rules obliging the carrier companies to make identity and eligibility to enter-checks on passengers can be considered as an extension of the sanctioning of illegal entry. The responsibility to make these checks prior the travel and to deny the boarding in case of need can be seen as an outsourcing of state tasks and duties.

These rules of responsibility can have the consequence that people in need of international protection will not have access to the territory of the country of asylum. This can be morally ambiguous but such practice can not be considered as unlawful. By creating the rules on carrier's responsibility the state does not automatically has authority over the situation as the state does not have the foreigner under its jurisdiction. Any other interpretation would have consequences where enforcement of rules would not be possible at all.

9. The activity of immigration liaison officers is one of the least regulated tools against illegal migration. In lack of clear legal boundaries they are not publicly accountable for their activities. The task of the immigration liaison officers deployed in the countries of origins and transit is to prevent illegal migration with information-gathering and -sharing and to provide professional assistance to the respective authorities. Among other things their task is to evaluate the "migratory risk" generally and in individual cases, and to help in visa-matters and checking of documents. Taking into consideration that they do not necessary have authority, their activities are hard to control although they can have serious impact on asylum-seekers access to territory.

The matter is aggravated by the fact that according to available information and political statements states consider the intention to seek asylum as a "migratory risk" so the task of the immigration liaison officers is to identify the foreigners who apply for visa under false pretences (or enter under visa-free regime) with the real intention to seek asylum; and if the identification is successful, to prevent the entry.

As their activities are not formal, not governed by publicly available sources or legal acts – meanwhile can have a serious impact on the access to territory and asylum – there should be clear boundaries and legal framework governing their duties with proper accountability-rules.

10. In case of a foreigner who is able to reach the country and seeks asylum, an asylum procedure starts, where the responsible authorities will decide on the eligibility for and the necessary form of international protection. Certain principles and rules of the asylum-procedure are serving as tools against illegal migration too. Every rule and notion which can reduce the duration of stay of an asylum-seeker in the country (of asylum) can be considered as a barrier before the access to territory.

These principles and notions became burdened by different safeguards in order to minimize the risk of a foreigner loosing his/her right to stay in the territory while having real need of international protection. In my opinion those principles or managerial decisions resulting in faster procedures (prioritization, accelerated procedures etc.) can not be considered as restrictions of the right to remain in the territory as long as the assessment of the claim is guaranteed with proper procedural and material safeguards.

Only those legal notions can be accounted as restriction of the right to remain, where the need of international protection – the merit of the case – is not assessed. The safe third country notion (and its special form, the Dublin regime). In this case the authority conducting the procedure is not assessing the merit of the claim, only the question: is there a country where it

is rational for the applicant to claim asylum or not? If the answer is yes, than the country of "asylum" can revoke the right to remain, without ever assessing the risk of prosecution or serious harm in case of return to the country of origin.

The merit of the claim is also not assessed if the notion of first country of asylum is applied. In this case the foreigner already enjoys international protection but it is not provided by the country where s/he seeks asylum right now but another based on a previous application. This constitutes no fundamental right issue as the necessary international protection is already granted.

11. Similarly to the biometric matching systems only a tool-role is played by the readmission agreements. Based on these international treaties there is an obligation of a state to readmit migrants from another country. The previous forms of readmission agreements covered only citizens of the readmitting state but nowadays it is typical to accept responsibility for foreigners, third country citizens travelling through the country too.

Without such agreements states would not be able to force sovereign countries to readmit people, as the main rule is that it is every sovereign's right to decide who and on what grounds to admit to its territory.

Readmission agreements are clearly irregular migration managing tools but without them notions like the previously mentioned safe third country, or the first country of asylum would be rendered useless. So these international treaties themselves do not affect the access to territory or the right to remain but are playing a crucial role in the whole system against irregular migration.

12. Beside the tools and notions present in the legal framework, states are using means against illegal migration outside or even against the law. Aside the physical violence against migrants the most severe is to deny port of ships or to tow them to international waters. These are not only against to maritime law and humanitarian rules but also against asylum law.

Beside the above mentioned life-threatening and clearly unlawful means there are a whole set of tools and activities with the aim to force the foreigners to leave the country, independent from the real need of international protection. Such "tool" is the unnecessary prolongation of procedures, substandard reception conditions, reduction or denial of certain provisions and services.

13. In order to enjoy the rights of an asylum-seeker, including the right to remain, a foreigner has to seek asylum. If s/he does not lodge an application for asylum s/he can not be considered as an asylum-seeker, so is has utmost importance where and when s/he is able to do that. In a simple geographical approach: it may happen abroad, at the border and inland. In my research I applied the term "seeking asylum" in the broadest sense taking into consideration every possibility where someone can receive access to territory of the country of asylum based on his/her need of international protection.

The identified cases where entry or protection is granted based on need of international protection are the following: diplomatic asylum, protected entry procedure, Dublin procedure, relocation and resettlement of asylum-seekers and beneficiaries of international protection and other humanitarian admission programs.

14. Diplomatic asylum is a right granted by the immunity of the embassy/consulate but it is not a fundamental right, it can not be enforced from the country of the embassy. Due to its nature it can not provide territorial asylum and the granting of diplomatic asylum can be a huge burden on the connection between the country of the embassy and the country where it is located.

There has to be a clear distinction between diplomatic asylum and the case where only the possibility to lodge an application for asylum is provided but protection is not granted at the embassy/consulate. It is the right of the sovereign countries to decide whether to provide the later possibility or not, and if they do so, the procedure is unlike a regular asylum procedure, it can be considered only as an application for protected entry procedure, humanitarian visa, resettlement or other schemes.

15. In the protected entry procedure the applicant can indicate his/her need for international protection at the consulate. The detailed application is sent to the asylum authority of the consulate's country, which decides on the necessity to grant access for the applicant in order to lodge an application for asylum. This notion can be good in small quantities but as practice has shown not in large scale; due to its immanent problems those countries introducing the protected entry procedure have already terminated it.

Protected entry procedure can be a huge help for people with a real need of international protection because they can evade costly and dangerous irregular ways, although is not fit to manage mixed migration, or irregular migration.

16. The take back in Dublin-procedure has a Janus-face. From the transferring country's point of view, it is a restriction of the right to remain, but from the other member state's point of view it is necessary to grant access to territory even if the applicant never ever been in this country.

Dublin procedure is nothing else than a special application of the safe third country notion among EU Member States with distinctive legal framework and infrastructure. With the hierarchy of criteria set up by the Dublin III regulation it can be identified which member state is responsible to conduct the asylum procedure of an asylum-seeker already present in the territory of a member state.

Due to the difficulty and complexity of a Dublin procedure and the appeal procedure against a take-back/take-charge decision, and the extremely low rate of successful Dublin transfers the system is not effective, and in its current form it is not fit for its purpose. The number of Dublin transfers is very low since years because the applicants are evading the transfer (which is possible only because of the reluctance in some member states to use detention) and the presumption of the safety of some Member States is questioned. Above all of this it is often cheaper, faster and easier to conduct a proper asylum procedure and to execute an expulsion order to the country of origin than to conduct a Dublin procedure and a successful transfer.

The critics of the Dublin-regime are complaining too because the Dublin framework does not take into consideration the intentions and desires of asylum-seekers. In my opinion this is not a legal problem, as even people with real need of international protection are not entitled to choose the country of asylum, they only have the right to receive international protection from one, undefined member of the international community.

17. Relocation of asylum-seekers means that one state is overburdened by a mass influx of refugees (or people in need of international protection) and this state can not deal with the situation alone. The personal scope of these programs is covering only people with real need of international protection (as it was the case with the Hungarians in 1956 and with the Bosnians in the ‘90s). At present time Greece and Italy can be considered as overburdened and sought help and solidarity. One of the biggest political (and legal) debates of 2015-2016 was and is about the quality of this help, whether is it an obligation or only a mere possibility.

The original concept of resettlement and relocation – contrary to the relocation of asylum-seekers – covers beneficiaries of international protection where real need for international protection is already recognized by a responsible body. In case of resettlement this body is UNHCR, in case of relocation the asylum authority of a Member State. The international solidarity can be identified in these cases too, because the resettlement or relocation is from a country where local integration is not possible or the sheer mass of people with protection needs constitutes danger to the social, economical, political etc. stability of the country. These programs are on voluntary basis for the people in need of protection and for resettling or relocating state too. Participation in a resettlement program is based on the application of the beneficiary of international protection.

These programs are odd among the before mentioned notions and actions as in these cases the foreigner in question is not an asylum-seeker but someone who already received protection. Their access to territory of the resettling/relocating country is granted on the basis of real protection needs. However in practice most resettling/relocating countries are still conducting an asylum procedure placing foreigners to similar situation like other asylum-seekers.

Due to the voluntariness of resettlement the annual number of resettled people is far less than the actual need. It also mitigates the effectiveness of the resettlement that beneficiaries of international protection are safe in the first country of asylum and they are willing to give up their life there only if certain circumstances and expectations are met. To be resettled to certain (e.g. Middle- or Eastern-European) countries is simply not appalling enough, or if the resettlement is done they tend to travel further to more appalling destination countries.

18. According to the Schengen Border Code the border can only be crossed at appointed border-crossing points but asylum-applications lodged at these point should be considered as ones lodged inland. This is in line with the rules present in the so called Asylum Procedures Directive which clearly stipulates that the border and the transit-zones are part of the territory of a country so the possibility to seek territorial asylum should be granted there too. Keeping in mind that there is a need of a decision to take on the issue of entering the Asylum Procedures Directive allows Member States to conduct so called border procedures.

There are strict and short deadlines present in the border procedure due to the limited capacity of the transit-zones, and in case of a deadline is missed by the authority the applicants are to enter and the general rules will be applied. The rules of the border procedure can not be used for vulnerable applicants, for other asylum-seekers the assessment only covers the issue of inadmissibility (practically: the safe third country notion), and in case of airport procedure the possibility of accelerated procedure as well.

19. If the application is lodged inside the territory it is no longer an issue of access to territory but the logical extension of it, the right to remain. As a main rule a state has to grant

the right to remain for an asylum-seeker as long as a decision is taken in his/her case. If this is not granted than the whole system of international protection would be meaningless.

It is not detailed for how long is it necessary to grant the right to remain. Is it enough for the administrative procedure or should it cover the judicial phase too? If it should, than should it be granted automatically, or on a request only? For how many subsequent procedures have the state to grant the right to remain? Does the result of the previous procedures matter?

In the EU the Asylum Procedures Directive defines when the right to remain can be revoked from an asylum-seeker. As it was mentioned, the main rule is that an asylum-seeker has the right to remain, and the exceptions are determined in relation to this rule. In case of a first subsequent (that is, the second) application it is exceptional to revoke the right, only if special criteria are fulfilled. Typically the right can be revoked if in the second procedure a final – that is, no longer challengeable – decision is done on the merit of the case, the issue of international protection. So not only the number of previous procedures are taken into consideration but also the result of them.

Derived from the principle of the right to effective remedy as a main rule the right to remain should also cover the judicial phases, however according to the directive in certain cases (e.g. some inadmissible claims, or in some accelerated procedures) it is not necessary to grant automatic suspending effect to the appeal. In cases where the suspending effect – the right to remain – is not automatic, courts have to have the jurisdiction to decide on granting the right to remain.

20. The restriction or the possibility of the revocation of the right to remain in necessary. The main rule granting the right to remain is to be ensured, but as the Hungarian experiences had clearly shown in 2005-2007 the limitless application opens the gates to misusing the right. When the right to remain is granted in every subsequent application it makes impossible to fight effectively against illegal migration. In extreme cases the quantity of the misuse of the subsequent asylum claims can threaten the functioning of the whole asylum system so the interests of the people in real need of international protection will be at risk.

21. Within unchanged EU framework the right to remain in Hungary changed quite rapidly between to two most extremes. In some periods the right to remain was granted without any limitations not depending from the number of previous procedure or their results, and for a short period there was a rule which granted the right to remain only for the duration of the first procedure, and not even for the second, independently form the result of the first procedure. There was an intention – reacting still to the situation before 2008 – to create a strict legal framework against the misuse of the system. On the other hand there was another approach trying to be in line with the EU directive.

22. The most important result of the revocation of the right to remain is that the asylum procedure will be no longer an obstacle before the alien policing procedure so it will be possible to expel the foreigner. It is important to note that the revocation of the right to remain does not mean that the asylum authority should not conduct a new procedure based on the subsequent application, and it also does not mean that expulsion is carried out shortly. The rate of not enforced or not enforceable orders on expulsion is quite high.

Another important effect of the revocation of the right to remain is that the asylum-seeker is no longer falling under the scope of the Reception Conditions Directive, so s/he will be no

longer enjoying the rights derived from it. Keeping in mind that s/he will fall under the scope of the Return Directive which provides almost the same rights, this change will have limited real effects. In Hungary it mostly has organizational or jurisdictional effects (e.g. the asylum-seeker can not be in asylum-detention only in alien policing detention, in the lack of detention the accommodation will be done by the alien policing not the asylum authority).

23. The current legal framework – even on EU-level and on Hungarian too – is not even fit to handle normal migratory movements. Not ensuring the right to asylum nor the effective fight against irregular migration can be fulfilled, if the legal frameworks of these two fields are not comprehensive and aligned.

Without the successful enforcement of expulsion orders – including Dublin transfers – the effectiveness of the efforts to manage migration will remain moderate. As the rate of successful expulsion is so low, states are trying to prevent the entry and to assess the migratory risk at the earliest stage. These could serve as barriers before the right to asylum, and – given the experiences of the last 1-2 years – are unfit to prevent or manage mass migration.

The future migration system should ensure the regulated entry of people in real need of international protection and firmly enforce the rules even with the comprehensive approach to detention applied in every member state.

The present legal framework is only able to sustain a bad status quo. There is a need for a new framework which takes into consideration

- the different situation and role of transit- and destination countries,
- the ability to its enforcement, and
- the reasonable inttentions of the foreigners.

However, even if it comes to life, the mixed migratory flow will grow without the solving of the root causes of the migration. The most effective complex asylum and immigration managing system is only able to mitigate the social, political and economical tension caused by mass migration.