



# General Assembly

Distr.: General  
27 April 2020

English only

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## Human Rights Council

Forty-fourth session

15 June–3 July 2020

Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Report of the Special Rapporteur on the human rights of migrants on his visit to Hungary**

**Comments by the State\***


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\* The present document is being issued without formal editing.

GE.20-06066(E)



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## Security and human rights

It has to be taken into account that only a small proportion of people arriving to Hungary were asylum seekers during the migration crisis in 2015, which shall be reflected in the report when speaking about migration/migrants in general.

The report refers to the protection needs of migrants at the time of mass influx. However, under such circumstances it was not possible to take into account these needs. As it is suggested also by FRONTEX, 6 hours is needed for the thorough hearing of an applicant.

### Conditions at the transit zones

#### The question of qualification of the transit zones as places of detention

In its judgment in case *Ilias and Ahmed v. Hungary* (delivered on 21 November 2019) the ECtHR accepted that, in accordance with the rules of public international law, States have a right to control entry into their territory.

We would like to highlight the following statements of the judgment:

“1. The Court considers that in drawing the distinction between a restriction on liberty of movement and deprivation of liberty in the context of the situation of asylum seekers, its approach should be practical and realistic, having regard to the present-day conditions and challenges. **It is important in particular to recognise the States’ right, subject to their international obligations, to control their borders and to take measures against foreigners circumventing restrictions on immigration.**

2. [...] It is also clear that, **at all events, the Hungarian authorities were entitled to do the necessary verifications and examine their claims before deciding whether or not to admit them.**

3. [...] in situations generally similar to those in the present case, **as long as the applicants’ stay in the transit zone does not exceed significantly the time needed for the examination of an asylum request and there are no exceptional circumstances, the duration in itself should not affect the Court’s analysis on the applicability of Article 5 [i.e. qualification as detention] in a decisive manner.**

4. The Court thus considers that **the applicants’ situation was not influenced by any inaction of the Hungarian authorities** and that no action was imputable to them other than what was strictly necessary to verify whether the applicants’ wish to enter Hungary to seek asylum there could be granted.”

Furthermore the ECtHR also made it clear, repeatedly, that **only a direct threat to the asylum-seekers lives and physical integrity would call into question the voluntary nature of their stay in the transit zone:**

“5. [...], the Court also notes that **the applicants did not cross the border from Serbia because of a direct and immediate danger for their life or health in that country but did so of their free will.**

6. It is further of relevance that what **the applicants feared in case of return to Serbia, [...], was not a direct threat to their life or health but deficiencies in the functioning of Serbia’s asylum system [...].**

7. The Court reiterates however that, in the absence of a direct threat to the applicants’ life or health, known by or brought to the attention of the Hungarian authorities at the relevant time, **the discontinuation of the applicants’ asylum proceedings in Hungary was a legal issue** which did not affect their physical liberty to move out of the transit zone by walking into Serbian territory.”

The above-mentioned circumstances still prevail in the transit zones, therefore the asylum-seekers’ accommodation in the transit zones cannot be qualified as detention. As to the duration of their stay in the transit zones, its legality can be assessed only on a case-by-case basis, but the length of stay is generally not due to the authorities’ inaction (c.f. § 229 of the judgment).

The possibility of the asylum seekers to leave the transit zones in the direction of Serbia shall be mentioned and taken into account in point 33 of the report.

### **General conditions, accommodation**

In the transit zones asylum seekers are accommodated in sectors, and inside the sectors in containers. Containers can be heated; each person has a bed and a cupboard, which can be locked.

In each sector there is a community room, there is TV, room for prayer, playground for children, dining room for meals- with microwave ovens, cookers and water heaters-, and there are sanitary blocks. Community rooms are air-conditioned. Wi-Fi is also accessible, asylum seekers can connect to the internet free of charge.

In line with the relevant legislation, meals are provided three times a day, or five times a day in case of children, pregnant women, nursing mothers.

Each month asylum seekers receive sanitary bags containing shampoo, soap, detergent, toothbrush, toothpaste, toilet papers.

Sectors were created for security reasons and for taking into account the different characters of the applicants- for example due to their vulnerability, unaccompanied children or single men and women if necessary are accommodated in distinct sectors-. This is the reason for regulating movement between sectors.

The visits between sectors/in other sectors may be longer than one hour as social programmes-, which are the most frequent reasons for the visits-, last longer than one hour. On average the length of visits between sectors is much longer than 1 hour.

### **Education provided in the transit zones**

According to Act LXXX of 2007 on asylum procedures and its implementing act the Alien Policing Directorate provides conditions for education in schools and nursery schools.

Education is provided immediately after lodging their claim. Educational activities are pursued in each sector in the rooms for community use. Educational material is provided by the Ministry of Human Capacities and teachers are sent by the relevant educational districts, in case of Rösztke from Szeged, in case of Tompa from Kiskőrös.

Children between ages 6-16 are obliged to take part in educational activities. The system corresponds to the system provided for Hungarian nationals.

Equipment necessary for the education is at the disposal of the children (exercise book, pens, pencils, colour pencils, rubbers, highlighter, paint, plasticine, crayons). Laptops, radios, CD players, flipchart tables, smart cubes, drawing boards are also provided in the zones.

When it's necessary a special education teacher is also provided for children with special needs.

Social workers and civil society organizations organize programmes for children, however according to our experience children above 12 years do not like to participate at these events.

The Baptist Church Charity Service also arranged a foreign language library and video collection.

### **Provision of health care in the zones**

As regards the provision of health care in the transit zones, the provision of general practitioners' services coincides with those provided for Hungarian citizens, the GP has visiting hours each working day.

Emergency health care and care provided by specialized doctors, surgeries are provided at hospitals after transport by ambulance to a hospital. A nurse and a paramedic is available in the transit zones.

Psychologist and a psychiatrist is also available in the zone on a weekly basis. Despite the fact that Gynaecologist is not available on a permanent basis, it is possible to visit a gynaecologist on a predefined date and time outside the transit zone. Paediatricians are available in the transit zone twice a week.

All persons suffering from chronic diseases or cancer have access to adequate treatment and if it cannot be provided in the hospitals of the relevant district, it is possible to move the person to another facility for refugees in another district where the treatment is available.

All persons in hospital get the same type of boarding; the type and quantity of the meals depend on their medical condition and not their status. After or before an operation it may be possible that eating is not medically advised.

The necessary medicines needed are provided free of charge.

Interpretation is provided by cross interpreters or social workers.

It may happen that the person concerned is not satisfied with a diagnosis but this does not mean that the doctor was unable to make a diagnosis.

The Alien Policing Directorate can provide several good examples on human and professional treatment that was not experienced by the asylum seekers in earlier stages of the route.

Asylum seekers receive information on services - including health care services - available in the zones during their stay and upon arrival with the help of the interpreters.

The report mentions that *„Asylum seekers, including women and children, with serious chronic diseases and cancer remained untreated for months”*.

The aforementioned minor’s medical examination started right after they had arrived. Although due to the lack of documentation (what the family had left in Serbia) the Hungarian doctors had to start over the examination to decide the best possible treatment for the child. During this time the family left the country, so the doctors couldn’t start the proper treatment.

Since the family had left without any medical documentation again to move to Austria, the Austrian medical team couldn't start the treatment of the child without the proper tests and examination, thus they had to start over just like the Hungarian medical team. The child died in Austria.

#### **Monitoring activities of NGOs and legal representation**

As concerns the monitoring activities of NGOs and the provision of legal representation for asylum seekers, currently several NGOs are admitted to the transit zones, on a permanent or temporary basis and legal representatives attend the facilities regularly, among others also representatives of the Helsinki Committee.

#### **Unaccompanied and separated children and families with children**

The statement that the „ad hoc guardian who primarily engages with the child during asylum procedure but not in general child protection” in point 36 of the report does not correspond to the facts. The ad hoc guardian not only represents the child in the asylum procedure, but also acts in any other matter concerning them, such as their placement, care, state of health, and their application for asylum. The ad hoc guardian can also enter the transit zone, so they can keep in touch with the child in person.

Contrary to what is contained in the report unaccompanied minors aged 14-18 in the transit zone are not deprived of protection measures as they are placed separately from adults, with different care content according to their age (more food options, education, participation in play and leisure activities, etc.) and their legal representation is also ensured.

Child protection guardians are not only assigned to unaccompanied minors under the age of 14, but unaccompanied minors aged 14-18 are also placed in the special child protection system after a positive assessment of their asylum application, where their legal representation is provided by a child protection guardian the same way as for all children in child protection care, including Hungarian citizens.

#### **Inadmissibility ground, judicial review**

The fact that only the inadmissibility was reviewed does not mean that there was no substantial judicial review. The court examined in each case whether the claim is well-

founded or not. Which is also reflected in the fact that 90% of the decisions were annulling the decision of the Alien Policing Directorate.

In cases where an in merit decision was made at the Szeged Administrative and Labour Court the system for distance hearing was available all the time.

## **Legislative measures –**

### **civil society organisations –points 56 and 67, point 6**

Comments on point 56 of the Report of the Special Rapporteur on the human rights of migrants

The crime “Facilitating and Supporting Illegal Immigration” was introduced in Act C of 2012 on the Criminal Code on 1 July 2018 as the increasing migratory pressure, we have experienced in recent years, has led to the emergence of new forms of crime.

One of the new forms of crime that became more and more common was the organisational activity aimed at exploiting the weaknesses of the European and Hungarian border protection and asylum systems, which, at the same time, promoted the abuse of the asylum procedure.

**The purpose of the new crime was to guarantee the right tools for fighting against persons who organise activities in order to help unauthorised persons to submit an application for asylum or to stay legally in Hungary.**

The first basic case of the criminal offence [section 353/A (1) a)] sanctions a person who acts as an organiser in order to enable a person to receive international protection, **knowing that the person is not persecuted** for any of the five reasons listed in Article XIV (4) of the Fundamental Law of Hungary **or the fear of this person for such persecution is not justified (thereby circumventing the essence of right to asylum).**

The second basic case of the criminal offence [section 353/A (1) b)] **prohibits any type of organising activity, which is aimed at assisting a person who has entered Hungary illegally or have been staying in Hungary illegally to get a residence permit.**

This provision aims to provide protection against abusive practices like entering into a marriage of convenience or giving a voluntary acknowledgement of paternity only for avoiding the expulsion of a person staying illegally in Hungary, or if expulsion has been ordered, only for legalising the stay within Hungary. Usually, organising activities lie behind such practices.

**Organising activities cannot be listed exhaustively;** therefore, section 353/A (5) gives a quite abstract definition as to what behaviours should be considered typically as organising activities (e.g. organisation of border surveillance or dissemination of information materials).

At the same time, however, **it must be pointed out that such organising activity does not include legal advice and information, providing humanitarian assistance, or presenting the relevant legal regulation, thus, these actions are still allowed.**

**The criminal offence furthermore can only be committed for a specific purpose** and can, therefore, be punishable only if committed with direct intent (*dolus directus*). This means that the perpetrator should **anticipate** and **desire** the outcome of his activity.

That is, **the perpetrator must know at the time of the commission that he or she is engaged in an organising activity for a person who is not subjected to persecutions, or the fear of such direct persecution is unfounded.**

The perpetrator must also know that their action is capable of helping a person entering the country illegally or staying within the country illegally to obtain a residence permit. The perpetrator’s intent should specifically be aimed at this outcome. The investigating authority should prove beyond a reasonable doubt whether the perpetrator had such knowledge and intent or not.

These aspects are reaffirmed in Decision 3/2019. (III.7) AB of the Hungarian Constitutional Court, which was based on a constitutional complaint submitted by a non-governmental

organisation regarding the conformity of Section 353/A of the Criminal Code with several dispositions of the Fundamental Law<sup>1</sup>:

„[63] Section 353/A of the Criminal Code does not punish committing the offence negligently. **The offence can only be committed intentionally.** This is expressed in paragraph (1) by stating that the prohibited organising activity **shall be carried out “in order to” make it possible to initiate asylum procedure for a person not entitled to asylum in Hungary; the organising activity shall be carried out “in order to” allow the person illegally entering to or illegally staying in Hungary to obtain residence title in Hungary.** Paragraph (5) explicitly refers to the purpose when it provides support to interpret the term of organising activity: it shall be qualified as an organising activity when border monitoring is organised at the borderline of the external Schengen border or at the border sign, or information materials are prepared “with the purpose specified in Paragraph (1)

[64] With regard to Section 353/A (1) a), **it is irrelevant whether the person committing the criminal offence can foresee the result of the procedure of the authority.** Several elements shall be examined in the asylum procedure on the basis of which a decision shall be made about granting the status or rejecting the application. These elements include whether the applicant is able to verify or at least substantiate persecution or the well-founded fear of it due to any of the so called five causes, the fact that his or her country of origin or country of habitual residence is unable or unwilling to provide protection to him or her; the authority shall examine the existence of the causes of inadmissibility (e.g. whether the applicant arrived from a safe country, where the applicant may provide evidence to the contrary), the causes of exclusion (e.g. terrorist act, Section 8 of AA), the entitlement to subsidiary protection is also assessed, just as the existence of non-refoulement etc. These questions should be assessed subject to a procedure of taking evidence. On the other hand, with regard to the purpose, the offence shall be deemed to have been committed when the perpetrator is conscious of – i.e. knows that – being engaged in the organising activity in the interest of a person who is not subject to persecution due to the so called five causes (e.g. the future applicant tells him or her that he/she is in fact not subject to persecution, but intends to settle down in the territory of Hungary or any other country of the European Union without the authorisation to do so), or whose fear of persecution is not well-founded. **It is the duty of the investigating authorities to prove that the perpetrator was aware of the above.**

[65] With regard to Section 353/A (1) b) of the Criminal Code, on the basis of the statutory definition, the perpetrator shall be aware of the fact that the person, in the interest of whom he or she carries out organising activity in the interest of obtaining residence title had entered illegally into the territory of Hungary or is staying illegally in Hungary. The first part of Section 353/A (1) b) applies to the persons entering the country illegally that may include persons whose right to asylum is subsequently verified. **However, the statutory definition covers engagement in the organising activity to be performed with straight intention, in the context of the prohibited purpose. Providing legal representation in itself does not mean an engagement in organising activity.**

[80] [...]According to Article 28 of the Fundamental Law, **in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law.** In the interpretation of the Fundamental Law and of the laws one should assume that they serve a moral and economic purpose, which is in line with common sense and the public good. **Threatening with punishment the altruistic organising activity aimed at the obligation of helping the vulnerable and the poor would be incompatible with the obligation laid down in the Fundamental Law on helping the vulnerable and the poor,** with common sense and with the moral purpose complying with the public good. **This is not referred to in the text of the statutory definition reviewed and neither may any court reach such conclusion based on a reasonable interpretation required by the Fundamental Law.**

<sup>1</sup> The full text of the decision is available in English here: [http://public.mkab.hu/dev/dontesek.nsf/0/db659534a12560d4c12583300058b33d/\\$FILE/3\\_2019\\_EN\\_final.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/db659534a12560d4c12583300058b33d/$FILE/3_2019_EN_final.pdf).

*[81] [...] Therefore, based on the review of Section 353/A (1) of the Criminal Code, the Constitutional Court established that the concern raised by the petitioner is completely unfounded, as it is evident that the new statutory definition included in the Criminal Code only orders to punish the intentional conducts contained therein and it does not order to punish any other conduct, i.e. the new statutory definition shall not be applicable to any conduct not related to the purpose prohibited in the statutory definition and carrying out the altruistic obligation of helping the vulnerable and the poor.*

*Regarding the new regulation, it shall be up to the judicial practice to specify the conditions under which an organising activity should be considered as humanitarian assistance, to state which forms of assistance are not punishable and when these limits are deemed to be crossed.*

*[82] Considering the above, the Constitutional Court rejected the constitutional complaint.”*

Based on the above, it is also clear that the wording does not create ‘chilling effect’. The concern that it can be subject to biased interpretation or application, is unsubstantiated.

**The wording also does not violate the requirement of transparency and legal certainty, thus is not aimed at deterring civil society organisations and their advisors working in the transit zones, nor should it have such an effect.**

Other criminal offences of the Criminal Code has already included definitions of organisational activities, which was also highlighted by the Constitutional Court, and the legal practice related to these can provide points for interpretation as to what should be considered as organising activity.

**The Hungarian Government further adds that, to its knowledge, no proceedings (even unfounded) have been initiated on the basis of Section 353/A so far,** so the assumption that it is aimed at the pursuance of the activities of legal aid providers and advisers is also incorrect on the basis of practice.

**Since the entry into force of Section 353/A of the Criminal Code (on 1 July 2018) it has not been observed that the pursuit of the activities of legal advice and legal assistance in this field has decreased.** Likewise, it is also unfounded by the evidence available, that there have been unjustified proceedings, abuses by the authorities or over-execution based on the new statutory definition.

**Given that the courts are bound by the decisions of the Constitutional Court, it is clear that there will be no change in the jurisdiction, either now or in the future, extending the criminal liability under Section 353/A to activities such as bona fide support of migrants or humanitarian aid.**

The Hungarian Government notes that similar line of argument is set out in Case C-821/19 Commission versus Hungary.

### **Consultations between the Government and Civil Society Organisations**

In point 6 of the draft report the Special Rapporteur states that the Government adopted restrictive measures against the operation of civil society and restricting them to express their views. In this context, activities of the **Human Rights Working Group and its Thematic Working Group Responsible for Refugees and Migration** should be underlined. The Working Group and the Thematic Working Group aim to conduct consultations with civil society on a regular basis.

The Government established the Human Rights Working Group in its decision adopted in February 2012 (Government Resolution 1039/2012 (II.22).) with the main purpose of monitoring the implementation of human rights in Hungary, conducting consultations with civil society organisations, representative associations and other professional and constitutional bodies as well as of promoting professional communication on the implementation of human rights in Hungary. The Working Group monitors the implementation of the fully or partially accepted recommendations in relation to Hungary of the United Nations, Human Rights Council, Universal Periodic Review (UPR) Working Group.

Due to the modification of the Government Resolution, the Working Group also reviews and monitors the enforcement of human rights conventions and agreements – of which Hungary

is a signing party – adopted in the framework of the UN, the Council of Europe, the OSCE, and the obligations arising from Hungary’s EU membership. It makes recommendations to the Government and the other central administration bodies involved in legislation and application of the law to provide regulations that allow for a wider representation of human rights and reviews the implementation of these regulations.

The participation in the working group and the roundtable is based on an invitation by the president of the working group, and the organisation is free to decide whether to accept it or not.<sup>2</sup>

The Working Group operates the Human Rights Roundtable, which currently operates with 72 NGO members and further 40 organisations take part in the activities of the thematic working groups with the right of consultation. The Roundtable holds its meetings in 11 thematic working groups.

The chair of the Thematic Working Group Responsible for Refugees and Migration is the State Secretary for Administration of the Ministry of Interior. The Thematic Working Group has 11 NGO members, and further 5 NGOs take part in its activities with consultative status. The Thematic Working Group holds two meetings annually.

It is responsible for

- (a) monitoring the migration trends of Hungary,
- (b) disclosing and identifying any dysfunction that impedes the enforcement of human rights,
- (c) making proposals for the more effective application of protection of human rights,
- (d) holding consultations with civil organisations and professional bodies representing the interests of refugees and migrants.

It should be underlined that the Human Rights Working Group and the thematic working groups not only hold personal meetings, but continue their work in writing as well.

#### **Comments specifically on the conclusions of the report**

The conclusions of the report also refers to the independence of the judiciary, although judicial independence is not affected by the subject matter of the report.

The legal rules mentioned in the report do not raise concerns about the independence of the Hungarian judiciary. Furthermore, the Constitution, the Act on the status and remuneration of judges and the Act on the organization and administration of courts provide necessary guarantees both for the independence of individual judges and for the judicial system itself.

It has to be highlighted that related to the use of the newly introduced inadmissibility ground - which rendered all applications for applicants entering from Serbia inadmissible - the administrative judges dealing with asylum cases frequently referred the case back to the asylum authority for an in-merit assessment.

As concerns point 70 we have the following comment:

The Criminal Code provides for several criminal offences to fight against hate crimes. These include public denial of the crimes committed by the National Socialist and Communist regimes (section 333), use of symbols of despotism (section 335), incitement against a community (section 332) and violence against a member of a community (section 216).

The targeted persons and groups of the criminal offences of incitement against a community and violence against a member of a community includes namely “other groups of the society”. Every group of the population cannot be listed exhaustively since there can be numerous grounds for bias motivation due to the diversity of the looks, circumstances and beliefs of human beings. This wording makes it possible to include any kind of bias motivation as ground for incitement or violence against persons belonging to a community or a certain group of the population and their members. **This means that, taking into**

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<sup>2</sup> Article 11 and 24 of Government Decree 1039/2012. (II. 22.) on the Human Rights Working Group.



**account all circumstances of a given case, incitement to hatred or violence, or violence against migrant people can be punishable under the Criminal Code.**

Since the entry into force of the new Criminal Code and the Fourth Amendment of the Fundamental Law, it can be concluded that the attitude of the authorities regarding such criminal offences have been evolving. More and more investigations are initiated, and the prosecutors and courts are able to establish the liability of the perpetrators in more and more cases, and prescribing special behavioural rules for the convicts, such as visiting certain holocaust memorials or reading specific books on the subject.

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