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Research Paper

The Legality of Asylum Deterrents as a Result of Securitization:

The United States and Hungary

Abstract

The United States and Hungary have used securitization to frame migration as a threat to society, which has enabled the creation of strict policy designed to deter asylum seekers. This paper first addresses how the securitization of migration has contributed to the formation of these policies through government manipulation of the public. An analysis is conducted using four case studies to determine if the resulting policies are legal according to the United Nations *1951 Convention Relating to the Status of Refugees*, the *1967 Protocol Relating to the Status of Refugees*, and the *1948 Universal Declaration of Human Rights*. The case study concludes it is not explicitly clear whether these resulting policies breach international law. Though, it is likely that it does reveal existing loopholes within the United Nations' asylum framework.

Introduction

Both the United States and Hungary employ deliberate policies to deter asylum applications. The label 'asylum seeker' is used a "general term for someone who is seeking international protection. Sometimes, this can refer to someone who has applied for refugee status but has not yet received a decision on their claim" (Nicholson & Kumin, 2017, p.18). The United Nations *1951 Convention Relating to the Status of Refugees* and its extension in the *1967 Protocol Relating to the Status of Refugees* are the core of international legislation for the protection of asylum seekers. Both these documents are supplemented by the *1948 Universal*

Declaration of Human Rights (Nicholson & Kumin, 2017). In accordance with these documents, each state has “the right to determine to whom they do or do not offer asylum” (Örkény & Csepeli, 2017, p.7).

The United States and Hungary have attempted to avoid their international responsibility to protect asylum seekers by deterring asylum applications. Both states have attempted to deter applications by: creating barriers to obstruct borders, attempting to use a “safe third country” policy to create grounds of inadmissibility, forcing applications to be processed externally without right of entry, and using physical tactics as punishment for illegal entry. The implementation of these policies are operating under the framework of emergency protocols undertaken by both states. This emergency framework is a product of the securitization of migration, which has politicized the idea of allowing asylum seekers entry into the state as a threat to the host country and its citizens.

This paper will primarily attempt to answer if the actions undertaken by the United States and Hungary, which are designed to deter asylum seekers, breach international law as outlined by the United Nations *1951 Convention Relating to the Status of Refugees*, the *1967 Protocol Relating to the Status of Refugees*, and the *1948 Universal Declaration of Human Rights*. It will also address how the securitization of migration has contributed to the formation of these policies and the general implications of them within the framework of international law. In the first section, *The Securitization of Migration*, I will discuss the how migration has been securitized in the United States and Hungary and how the narratives created impact policy development. In the second section, *International Asylum Law*, four case studies are presented on specific policy areas to analyze if there is state compliance with the international documents. The last section, *Analysis*, will present the overall analysis of the findings and their implications.

There are some limitations within this paper which must first be acknowledged. This paper does not take into account the legality of the government's actions within said country, which would be determined through courts. This paper also does not take into account regional legislation, such as that of the European Union, or any other international legislation. The policies presented are not the limitation of the methods each government uses to deter asylum seekers and are only a few large-scale examples. These policies are also consistently evolving with multiple actors contributing to the discussion, creation, and advocacy of policy.

Securitization of Migration

Securitization is the process by which an actor employs a speech act to treat something as an existential threat and call for “urgent and exceptional measures to deal with the threat” (Stritzel, 2017, p. 358). It is the process by which an ordinary issue can be transformed into a security issue. There are three steps to a successful securitization: the actor must identify existential threats, emergency action is called for, and an impact is created on the audience by breaking free of the rules of normal politics (Taureck, 2006, p. 55). The outcomes of securitization as a whole can include: raising an issue on the agenda, deterrence, legitimizing past actions, reproducing the security status of an issue, or control (Balzacq, 2010, p. 7). Today, “there is a growing awareness of how far right parties participate in the securitization of migration and asylum seeking” (Nagy, 2016, p. 1041). In both the United States and Hungary, there have been strong examples to prove there has been a securitization of migration.

United States President Donald Trump's tough immigration policy became the cornerstone of his presidential campaign and created the idea of migration as a security issue within the United States (Berenson, 2016). In 2015, during Donald Trump's presidential announcement speech, he said Mexico is sending people who have “lots of problems” and stated,

“it’s got to stop fast”. He then began to identify illegal immigrants as a threat to United States citizens (TIME, 2015). In January 2019, amid a government shutdown over border security funding, President Trump addressed the United States via a public broadcast (Al Jazeera, 2019). He stated, “over the years, thousands of Americans have been brutally killed by those who illegally entered our country, and thousands more lives will be lost if we don’t act right now” (Trump, 2019). In this example, the actor, President Trump, identifies illegal immigrants as a threat and calls for emergency action.

In 2014, the Prime Minister of Hungary, Viktor Orban, began to introduce anti-immigrant and anti-refugee rhetoric (Nagy, 2016). In 2015, during the aftermath of the Charlie Hebdo attacks, Orban said, “We will never allow Hungary to become a target country for immigrants. We do not want to see significantly sized minorities with different cultural characteristics and backgrounds among us. We want to keep Hungary as Hungary” (Thorpe, 2018). Orban also stated, “Economic immigration is a bad thing in Europe, it should not be seen as having any benefits, because it only brings trouble and danger to the peoples of Europe” (Rettman, 2015). Through the speech act, Orban has identified immigrants as a threat to not only Hungary, but to the EU as a whole. “Growing perceptions of migration as a threat to security, legitimizes this securitization of migrations” (Ferreira, 2018, p. 67).

Political rhetoric has begun to frame migrants as source of destabilization for public order due to a growing awareness of their presence within society (Huysmans, 2000, p. 754). “Western societies are witnessing the emergence of many existential and conceptual anxieties and fears about their identity, security, and well-being” (Ceyhan & Tsoukala, 2002, p. 21). After September 11, 2001, migration became increasingly linked to terrorism and acted as a further catalyst for securitization. According to international relations scholar, Georgios Karyotis,

“Migration appeared prominently in the discussion of the campaign against terrorism. The measures adopted by the EU after September 11 and the rhetoric used in reference to immigrants and asylum seekers touched on migration as an issue directly linked to terrorism” (Karyotis, 2007, p. 6). In the United States, a similar approach has been taken as well. Since 9/11, border controls which were originally established to combat illegal immigration have been used for countering terrorism (Schmid, 2016, p. 48). As a result, “terrorism and migration - have been combined in public discourse so that the impression has been created that terrorist and migrant populations significantly overlap and that we are dealing with one and the same problem” (Schmid, 2016, p. 49). Orban’s speech in the aftermath of the Charlie Hebdo attacks is a prime example of this mixing narrative and this fear of outsiders has allowed politicians to target marginalized groups of people such as migrants.

Nonetheless, the general securitization narratives in both states are more complex than solely focusing on terrorism. While both actors criminalize migrants and link them to terrorists, they also depict them as a threat to society in other ways. Trump consistently labels migrants as a threat to the American labor force and economic prosperity. Orban, on the contrary, creates the idea that migrants are a threat to Hungarian identity and culture. Objectively, there is no threat associated with migration. According to the New York Times, migrants “tend to bring economic and cultural benefits to their communities. They typically come to America to find work, not to commit crimes” (Flagg, 2019). In most cases, “Refugees are not potential perpetrators but potential victims of terrorism. That is why they are fleeing” (Nagy, 2018). These facts contrast with what has been said in both states regarding migrants. The securitization of migration is therefore a manipulation of the public which enables the administration to develop the type of strict policies highlighted within this paper.

International Asylum Law

The United Nations *1951 Convention Relating to the Status of Refugees* and its extension in the *1967 Protocol Relating to the Status of Refugees* are the core of international legislation for the protection of asylum seekers (Nicholson & Kumin, 2017). Both of these documents are supplemented by the *1948 Universal Declaration of Human Rights*. “In order to respond to regional specificities, states in different parts of the world have [also] developed regional laws and standards that complement the international refugee protection regime” (Nicholson & Kumin, 2017, p. 19). Within the analysis, no regional laws will be taken into account to determine the legality of actions undertaken by the Hungarian and United States governments.

Border Obstruction

The Hungarian government’s state of crisis allowed for the erection of a fence along the Hungarian-Serbian and Hungarian-Croatian borders. The government deemed this a “Temporary Security Border Closure” under the declaration of a *State Crisis due to Mass Migration* (Nagy, 2016, p. 1047). In October 2015, the number of asylum applicants within Hungary fell from over 30,000 in September, to just 615 as a result of the barrier while numbers in the EU as a whole were continuing to rise. In February, numbers in Hungary began to rise again, showing the lack of success in the country’s attempts to deter applicants with the fence (Nagy, 2016, p. 1040).

Similarly, in the United States, President Trump is arguing for the need to address the “humanitarian and security crisis” at the United States Southern Border with Mexico. As of now, there are already 654 miles of existing wall/barriers to prevent the flow of people from entering the US. Trump’s 2016 campaign promise entails building a wall along the border’s entire 2000 miles/supplementing the border with a wall in areas where there are no natural barriers. In 2017, eight wall prototypes were revealed using a combination of concrete and steel and are currently

undergoing testing (Rodgers & Bailey, 2019). On February 15th, 2019 Trump declared a national emergency in order to secure funding to construct his unspecified barrier. It is unclear whether or not construction will be followed through due to various lawsuits which have ensued after the announcement (Baker, 2019).

In neither the *1951 Convention* nor the *1967 Protocol*, are there any statements about obstruction of borders or barriers to entry. Therefore, this action is not explicitly illegal. However, in the *1948 Universal Declaration of Human Rights*, Article 14 Clause One states, “everyone has the right to seek and to enjoy in other countries asylum from persecution” (United Nations General Assembly, 1948, p. 74). This clause brings to question if a physical barrier to entry is violating a basic human right because it is denying people the opportunity to seek asylum. According to law scholar Moria Paz, the “notion of basic human rights demands a porous border, at least with respect to process rights, and constructing a wall interferes with this demand” (Paz, 2017, p. 604). Paz argues the obstruction of a border using a wall “affects the ability of a non-national on the ground to enter a state and, thus, to make a claim on those rights [of protection]” (Paz, 2017, p. 604). Essentially, the barriers of entry could be deemed illegal as a violation the *Universal Declaration of Human Rights*. The barrier could also indirectly result in refoulement which violates Article 33 of the convention: “no state shall expel or return a refugee in any manner whatsoever” to the country of origin (United Nations General Assembly, 1951, p. 176).

Grounds of Inadmissibility

In 2015, the Hungarian government designated Serbia a “safe third country”. Asylum seekers are considered inadmissible if they have traveled through a safe third country, meaning anyone applying for Hungarian asylum from Serbia would automatically be rejected (The

Hungarian Helsinki Committee, 2017, p. 5). The Hungarian government claimed, “Serbia was a safe third country, which should, therefore, process the applications of hundreds of thousands of persons reaching the EU via the Western Balkan route” (Nagy, 2016, p. 1046). According to Marta Pardavi, Co-Chair of the Hungarian Helsinki Committee, “every single asylum seeker who enters the transit zone from the direction of Serbia, there is no other entrance, will be considered to have come from a first country of asylum, which renders their claim in-admissible” (Pardavi & Roth, 2019). The United States has suggested a similar policy but has yet to implement it. The idea is to “bar Central Americans from applying for asylum in the United States, on the grounds that they would no longer face persecution after arriving in Mexico,” essentially, making them ineligible for humanitarian protections in the US and establishing Mexico as a safe third country (Partlow & Miroff, 2018).

This policy tactic is not new, and nor is it an isolated phenomenon. In most cases this policy manifests within a bilateral or multilateral agreement between states, as demonstrated in the Dublin System. While it does not explicitly violate the framework of the international law in which it is being analyzed, failures in the system may produce violations. “Any agreements must therefore be based on the understanding that any system designed to articulate international cooperation in this field must always guarantee the full range of refugee rights, including the right to asylum” (Gil-Bazo, 2015, p. 73). Miscommunication can primarily result in refoulement which would violate Article 33 of the convention which states “no state shall expel or return a refugee in any manner whatsoever” to the country of origin (United Nations General Assembly, 1951, p. 176).

“External” Processing of Applications

In 2015, “Transit Zones” were established along the Hungarian border which served as asylum processing locations. These zones have become the only locations where asylum applications are eligible for submission; the permanent asylum reception facilities in the country have since been closed. The Hungarian government later required that all “asylum-seekers are to be held in the transit zones for the entire asylum procedure without any legal basis for detention or judicial remedies” (The Hungarian Helsinki Committee, 2017, p. 6). Entrance to Hungary was further restricted when a limit was placed on the number of asylum seekers who had access to the zones each day (The Hungarian Helsinki Committee, 2017, p. 3). The transit zones have “made access to the country basically impossible, only two persons are allowed to enter the detention centers, the so-called transit zones, at the border and to apply for asylum” (Pardavi, 2019). These actions, in turn, have resulted in longer waiting periods in Serbia.

In the United States a similar approach has been taken. The “Remain in Mexico” policy, officially called the *Migration Protection Protocols* was proposed by President Donald Trump in late 2018. The policy outlines that once asylum applicants reach the United States border, they will apply for asylum but will be denied entry into the US until their claims have been fully processed. This is unlike the current policy, where applicants can reside within the US while claims are being processed and can file for asylum within up to one year of entering the US. In result, applicants will now be forced to remain in Mexico while they wait to be granted asylum, and ultimately, entry into the US (Partlow & Miroff, 2018). The aim of this is to deter false claims of asylum by those seeking to gain entry into the US with the intention of disappearance before their case is heard (The Department of Homeland Security, 2019). Though this policy was created with the intention of deterring false asylum claims, this policy may inadvertently work to

deter legitimate asylum seekers from employing legal channels to gain entry into the US. According to Joshua Partlow, international relations journalist, and Nick Miroff, national security journalist, the Mexican border states are some of the most violent in the country and there is a large possibility “that such a plan could put migrants at risk and undermine their lawful right to apply for asylum” (Partlow & Miroff, 2018).

In Article Nine of the Universal Declaration of Human Rights it states, “No one shall be subjected to arbitrary arrest, detention or exile” (United Nations General Assembly, 1948, p. 73). The establishment of the transit zones in Hungary are in clear violation of this because there is no reasoning as to why applicants must remain in the zone during the entire period of processing. Conversely, Article 31 Clause Two states, “The Contracting States shall not apply to the movements of such refugees’ restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country” (United Nations General Assembly, 1951, p. 174). In both the cases of Hungary and the United States, their actions are legal under this framework because an asylum seeker has not yet achieved “regularized status”. However, according to legal scholars Rafiqul Islam and Jahid Hossain Bhuiyan, ideally “all applicants who claim asylum at the border should be allowed to enter the territory and be given temporary right to remain there until a final determination has been made on their applications” (Islam & Bhuiyan, 2013, p. 630).

Punishment of Illegal Entry

According to Article 31 of the *1951 Convention Relating to the Status of Refugees*, states, “shall not impose penalties, on account of their [refugees] illegal entry or presence... provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence” (United Nations General Assembly, 1951, p. 174). In 2017, the state of crisis

allowed for the Hungarian government to utilize the sometimes-violent push back of those who attempted to cross the border into Hungary illegally seeking asylum. Police and military were granted explicit authority to push back asylum seekers found within five miles (and farther) of the Hungarian borders with Croatia and Serbia. “These push-backs have also been accompanied and reinforced by violence as a further deterrence measure as reported by many persons who had attempted to cross into Hungary” (The Hungarian Helsinki Committee, 2017). Between July 2016 and August 2017, 14,438 were pushed back across the border with no legal opportunity to challenge the action. Fifty-six reports have been filed alleging abuse of migrants at the border (The Hungarian Helsinki Committee, 2017, p. 3-5).

These actions undertaken by the Hungarian government violates Article 31 of the convention. However, according to Article 32 of the *1951 Convention Relating to the Status of Refugees*, states “shall not expel a refugee lawfully in their territory save on grounds of national security or public order” (United Nations General Assembly, 1951, p. 174). The state of crisis due to mass migration was created on the grounds that the migration into Hungary was a threat to both national security and public order, which allows these actions to be justified. Article 32 also states, “except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority” (United Nations General Assembly, 1951, p. 174). Because, the migrants had no legal opportunity to challenge the actions of the government, they are violating the article, but because the actions are again working within the framework of a national security crisis, the government can justify these actions as being legal. The phrase “compelling reasons” leaves room for interpretation.

In April 2018, the US introduced a zero-tolerance policy to increase the repercussions for those entering illegally. This policy inadvertently resulted in family separation for those traveling with children. Previously, when this policy had been enacted, those traveling with children were not criminally prosecuted. There is debate over whether or not this result was intentional in this instance. “The Trump Administration had stated more than a year earlier that it was considering separating families to deter them from entering the US (Human Rights Watch, 2018).” Regardless, this resulted in an overall increase in persecutions of those entering illegally, as previously only those re-entering and those with criminal backgrounds had been prosecuted. Specifically, asylum applicants who entered illegally are being persecuted and their actions are being held against them (Human Rights Watch, 2018).

According to Article 31 clause one of the convention, the United States is also in violation of this policy by choosing to criminally prosecute and hold illegal entries against asylum seekers. However, according to Article 32 Clause One, states “shall not expel a refugee lawfully in their territory save on grounds of national security or public order” (United Nations General Assembly, 1951, p. 174). This again leaves room for the government to justify that asylum seekers are a threat to national security and public order.

Analysis

Within the *1967 Protocol*, additional state obligations are outlined regarding signing these pieces of legislation. Both Hungary and the United States signed the documents without any formal declarations, meaning they adhere to all parts of the document as stated (United Nations General Assembly, 1967). There are also administrative provisions that each state must adhere to, which could determine the legality of their actions. First, Article Three states “The States Parties to the present Protocol shall communicate to the Secretary-General of the United

Nations the laws and regulations which they may adopt to ensure the application of the present Protocol” (United Nations General Assembly, 1967, p. 270). This paper has not explored what channels of communication exist between the two states and the United Nations, and if the UN has approved or reviewed any of the laws and regulations the states have implemented. Second, Article Four outlines that any dispute between states regarding the protocol “shall be referred to the International Court of Justice at the request of any one of the parties to the dispute” (United Nations General Assembly, 1967, p. 270). This paper has also not explored whether any of these policies are being presented to the international court.

Essentially, it is challenging to identify if the states are violating the international legislation presented. According to *The Universal Declaration of Human Rights*, established in 1948, it “recognizes the right of persons to seek asylum from persecution in other countries” (United Nations General Assembly, 1948, p. 1). Many of the policies highlighted are questionable in their legality as they may violate the human right to seek asylum. Overall, the United Nations lacks the enforcement mechanisms to create universal compliance with international law, allowing for possible breaches to go unreprimanded, especially if they are not explicitly clear. Regardless of the technicalities however, the actions conducted by the United States and Hungary in order to deter asylum seekers is unethical.

One key question is “could there be justification for the group to disallow entry to human beings driven by need and destitution to the territory it controls simply because those individuals are strangers to their land?” (Örkény & Csepeli, 2017, p. 5). The process of securitization, in both of these cases, fuels a narrative that construes asylum seekers and general migrants as dangerous. As previously mentioned, migration has become increasingly tied to terrorism. “Migrations are mainly conceived as a threat to societal and internal security, particularly

irregular migrations. Thus, this approach translates into the policy design in the field of migration” (Ferreira, 2018, p. 61). There is a fine line between the obligation to uphold international law and maintaining state sovereignty and national security. “Legislation regulating the granting of asylum is rooted in the idea of national sovereignty and the primacy of national interests. The human right of free movement contradicts the right to national sovereignty, which at present predominates” (Örkény & Csepeli, 2017, p. 5). Politicians have justified the denial of entry through securitization. With the growing securitization of migration, there is a high possibility other states may continue to exploit the gaps found if they have not already and actors will continue to push a securitization narrative at the will of the public’s acceptance.

This overall trend may point to the failures in international law to close loopholes or the general lack of enforcement mechanisms within the UN governing bodies, neither of which have been explored for the purposes of this paper. Though these gaps may be closed by other levels of international law, they are not addressed by the UN which is a fundamental international body. If further research is conducted, these policies should be analyzed in the framework of other international bodies to determine whether or not these loopholes have been closed elsewhere. However, if these gaps do exist, it would allow for states not only including the US and Hungary, to securitize their migration procedures without repercussion. It would also allow for systematic violation of human rights, as if all states abandon their international obligations to protect those seeking asylum, refugees will continue to be persecuted. Essentially, the framework of international law is not strong enough to protect asylum seekers if these deterrent methods are in practice and are legally occurring.

Conclusion

In summation, the United States and Hungary have employed several methods to deter asylum seekers using the process of securitization. Political actors President Donald Trump and Prime Minister Viktor Orban have created narratives which construe migrants as dangerous and a threat to society, even when there is no evidence to support their claims. Due to the way migrants are framed within this securitization narrative, there are limited policy options regarding how they can be dealt with. In the cases of the United States and Hungary, the resulting policies that have emerged include: creating barriers to obstruct borders, attempting to use a “safe third country” policy to create grounds of inadmissibility, forcing applications to be processed externally without right of entry, and using physical tactics as punishment for illegal entry. Under the framework of international asylum law, which includes the United Nations *1951 Convention Relating to the Status of Refugees*, the *1967 Protocol Relating to the Status of Refugees*, and the *1948 Universal Declaration of Human Rights*, it is not explicitly clear whether or not the resulting state policies are internationally regarded as legal. Mainly, these deterrent methods may indirectly violate a person’s human right to seek asylum. This is important because it may point to gaps within the international framework established by the United Nations to protect asylum seekers. If said loopholes do exist, other states may be able to take advantage of them which may in the future lead to a more systematic violation of a person’s right to seek asylum.

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