

European Court of Justice Ruling Bolsters Refugee and Migrants Rights Defenders

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Upholding the Right to Defend the Rights of Refugees and Migrants

By: Alex Neve

A recent European Court of Justice ruling dealing with Hungary has shone the spotlight on the insidious array of legal measures that a growing number of governments have resorted to in recent years, criminalizing the efforts of individuals and organizations to defend the human rights of refugees and migrants. It is a reminder that more needs to be done to push back against that criminalization, including through legal challenges and public awareness campaigns.

They are known by many labels, including migrant rights defenders, refugee advocates and humanitarian workers. What they have in common is that, around the world, thousands of people offer support and assistance every day to refugees and migrants along their perilous journeys to safety. That may include heroic rescue efforts on the Mediterranean's cruel seas when boats capsize or are stranded; offering water in the parched desert along the US/Mexico border; providing information or legal advice to refugees held in detention centres or transit zones in sealed-off border areas and airports; or mounting campaigns to counter growing xenophobia and violence directed at refugees and migrants.

They work individually or as part of civil society groups, both local and global. Some offer their help as volunteers, others as staff. All are united in a commitment to upholding the rights of refugees and migrants; rights that are of course enshrined in international law.

That determination to uphold human rights is, itself, protected by human rights. Perhaps most notably, in article 1 of the *United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, known as the Human Rights Defenders Declaration, governments affirmed over twenty years ago that, "everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."

Yet for many years now, as governments around the world have intensified their efforts to make it too dangerous, too frightening, too inhospitable and simply outright impossible for refugees and migrants to reach and cross over their borders, they have also adopted a widening array of measures -- sometimes in law and frequently extra-legally -- meant to punish and deter the work of human rights defenders who seek to provide counselling, advice and humanitarian assistance to refugees and migrants.

Refugee and Migrants Rights Under Siege in Hungary

Hungary's determined campaign to keep refugees and migrants out of the country has received a considerable amount of international attention, perhaps most notoriously captured in images of refugees trying to cross through a razor wire fence erected along the country's border with Serbia and Croatia in 2015. Hungarian Prime Minister Viktor Orbán infamously declared that such measures were necessary as, "he was defending European Christianity against a Muslim influx."

The Orbán government has been unapologetic and relentless in its cruel and racist campaign to deter refugees and migrants from arriving in the country, which Human Rights Watch has described as follows,

"Hungary engages in violent pushbacks at its border with Serbia, forcing those seeking safety out of the country. Restrictions in the past meant that only a handful of people can claim asylum at the border per week. Now, nominally due to the Covid-19 pandemic, the border is closed. The few that

make the cut face lengthy detention while their claims are processed. In detention, children are denied education. Some people acquire mental health conditions as a result of being unjustly locked up behind bars. Orban's government also gained infamy for denying food to asylum seekers trapped at its border with Serbia to deter others from coming."

In June 2018, the Hungarian Parliament adopted a new law, referred to as the "Stop Soros" package, which very deliberately targets individuals and organizations providing support to refugees. The provisions of the new law were outlined by Amnesty International:

"Bill No. T/333, "amending certain laws relating to measures to combat illegal immigration" -- called the "Stop Soros" package -- includes amendments to nine laws, including provisions of the penal code, the police act, the asylum law, and laws regulating the border. The new law creates the criminal offence of "facilitating illegal immigration" and will apply to both individuals and organizations that are accused of engaging in certain "organizational activities" that assist persons who are seeking asylum as well as people who have entered Hungary irregularly and are attempting to secure a residence permit. Persons receiving such support would not have to actually submit an application for asylum or for a residence permit; the very act of assisting them is now a crime. [p.4]"

Amnesty International challenged the law in the courts in Hungary, but it was upheld by the country's Constitutional Court which found that it was "in line with the provisions of the Hungarian constitution." In July 2019 the European Commission announced it was referring the "Stop Soros" law to the European Court of Justice.

Human rights laws prevail

The European Court of Justice ruling, delivered on November 16, 2021, is an important vindication of the importance of international refugee and human rights law in the face of such restrictions. The Court found that the Hungarian government had breached two European Union Directives dealing with refugee protection,

"by preventing any person from the right to approach its external borders who, in connection with an organising activity, is suspected of having provided assistance in respect of the making or lodging of an application for asylum in its territory, where it can be proved beyond all reasonable doubt that that person was aware that that application could not be successful. [para. 164]"

Human rights groups, including the Hungarian Helsinki Committee and Amnesty International, immediately called on Hungary to comply with the ECJ ruling and bring the so-called "Stop Soros" law into compliance with international law. But already there are indications that the Hungarian government will remain defiant:

"State Secretary of Hungary, Zoltán Kovács, said that as long as the current government rules the country, "Stop Soros" will remain effective."

Clearly, this particular battle is not yet over.

A global concern

By no means, however, are these concerns unique to Hungary and the Orbán government's hostile stance on refugees and migrants. UN human rights experts and civil society groups have increasingly been highlighting the risks faced by individuals and groups who defend the rights of refugees and migrants, around the world.

On November 26, 2021 over 100 European civil society organizations "working on asylum, migration, humanitarian assistance and human rights" issued a joint statement responding to the crisis at the border between Belarus and the European Union which has led to at least ten deaths of refugees and migrants. Among the recommendations highlighted was the following, to "counteract repression of civil society, media and legal practitioners":

"The situation at the EU's borders has provoked attempts by Member States to intimidate and repress independent civil society, media and legal practitioners seeking to respond in line with their professional functions. Activities aimed at providing humanitarian assistance and legal aid to people at the border must not be criminalised. Banning access to the border zones for civil society and journalists not only leaves people without support but also has repercussions for the work of independent civil society and media beyond Europe. It is essential that the situation in the border area is monitored by independent actors to ensure that EU and international law is respected. Acts of violence need to be condemned and investigated."

In 2018, the UN Special Rapporteur on the situation of human rights defenders issued a report focusing on the increasing risks faced by "persons acting to defend the rights of all people on the move" and noted that,

"Defenders of people on the move face unprecedented restrictions, including threats and violence, denunciation in public discourse, and criminalization. [para. 1]"

The Special Rapporteur called on states to,

"Recognize publicly the important role played by defenders of people on the move and the legitimacy of their work; and condemn publicly all instances of violence, discrimination, intimidation or reprisals against them, and emphasize that such practices can never be justified… [para. 66(b)]"

In a 2019 report, *Defenders Beyond Borders: Migrant Rights Defenders Under Attack in Central America, Mexico & the United States*, the international NGO Front Line Defenders, in a collaborative research project with the Programa de Asuntos Migratorios (PRAMI, the Migratory Issues Program at the Mexico City Ibero-American University's Tijuana Campus) and the "Todos los Derechos Para Todas y Todos" Red Nacional de Organismos Civiles de Derechos Humanos (Red TDT, the "All Rights For Everyone" National Network of Civil Society Human Rights Organizations) documented

that,

“human rights defenders (HRDs) working with migrants are being criminalised, assaulted, arrested, deported, detained, interrogated, intimidated, digitally surveilled and harassed for carrying out legitimate and peaceful work. These attacks are part of a broader transnational governmental effort to stop the migration of people fleeing violence and persecution following decades of war, poverty, gender violence, mega development projects on indigenous lands without consultations, climate change, threats and extortion from gangs, political instability, corruption, state violence and US military intervention and support for right-wing military dictatorships and governments in Central America. [p. 5]”

In a 2020 report on the *Right to freedom of association of migrants and their defenders*, the UN Special Rapporteur on the human rights of migrants raised concern about the growing criminalization and insecurity faced by organizations defending the rights of migrants,

“In the past several years, a toxic narrative around the role of civil society organizations that provide humanitarian assistance or other services to migrants has taken root in many countries, propelled, among others, by nationalist politicians and far-right groups and media, stating that these organizations act as a pull factor for undocumented migrants. This narrative paints these organizations as inciting, aiding and abetting irregular migration, smuggling or even terrorism. Some civil society organizations that work with migrants have been accused of acting as a pull factor for migrants and assisting smuggler networks, including by government officials in public. [para. 66]”

The Special Rapporteur called on states to,

“Ensure that criminal justice laws are not misused to punish migration related humanitarian acts or to harass civil society organizations that work with migrants; [para. 89(l)]”

Amnesty International has highlighted this growing concern in a number of reports, public statements and campaigns. Currently Amnesty International is pressing the Greek government to drop charges against Sarah Mardini and Seán Binder, presently facing trial on charges related to their humanitarian assistance to refugees arriving in boats off the Greek island of Lesvos. The charges, which include people smuggling, fraud, being part of a criminal organisation, and money laundering, are punishable by prison terms of up to 25 years. Amnesty International has called for the case to be dropped, noting the charges “are farcical and should never have come to trial.”

Amnesty International’s 2020 report, *Punishing Compassion: Solidarity on trial in Fortress Europe*, highlighted that,

“In recent years, human rights defenders and civil society organizations that have helped refugees and migrants have been subjected to unfounded criminal proceedings, undue restrictions of their activities, intimidation, harassment, and smear campaigns in several European countries. Their acts of assistance and solidarity have placed them on a collision course with European migration policies.

These policies are aimed at preventing refugees and migrants from reaching the EU, at containing those who make it to Europe in their first country of arrival, and at deporting as many as possible back to their countries of origin. [p. 8]"

Amnesty International called on all EU states to,

"Revise national legislation to ensure that an unjust financial or other material benefit is required for criminalizing the facilitation of entry, transit and stay of a foreign national in an irregular status. States could also consider the introduction or expansion of a mandatory and broadly defined humanitarian exemption clause, to bar prosecutions against individuals and groups who act peacefully to protect the human rights and dignity of refugees and migrants. [pg. 86]"

And in the 2019 report, '*Saving Lives is not a Crime': Politically motivated legal harassment against migrant human rights defenders by the USA*, Amnesty International noted that,

"Amnesty International has found since 2018 that the United States (US) government has executed an unlawful and politically motivated campaign of intimidation, threats, harassment, and criminal investigations against people who defend the human rights of migrants, refugees and asylum seekers ("migrant human rights defenders") on the US–Mexico border. [p. 6]"

Amnesty International called on the US Congress to,

"Reaffirm the right of every person, individually or in association with others, to defend and promote human rights in accordance with the UN Declaration on Human Rights Defenders. [pg.41]"

Even in Canada…

Canada has not been immune from these practices. In September 2007 a US refugee support worker, Janet Hinshaw-Thomas was arrested and charged under s. 117 of Canada's Immigration and Refugee Protection Act. Ms. Hinshaw-Thomas, 65 years old at the time, was detained at the Canadian border crossing at Lacolle, Quebec and released on $5,000 bail. At the time, section 117 provided that,

"No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act."

Notably, the UNHCR and numerous NGO's had expressed opposition to the broad wording of s. 117 when it was enacted in 2002, concerned it would be used against individuals and groups aiding refugee claimants in reaching and entering Canada, who act for purely humanitarian purposes. At that time, however, they were assured by government officials that it would not be used in that manner and that the fact that a prosecution under this section could only go forward with the consent of the Attorney General would guarantee it would not be misused. Clearly the charges against Ms. Hinshaw-Thomas were not in line with that assurance.

There was widespread criticism of the move to charge Ms. Hinshaw-Thomas and certainly growing concern that other refugee advocates and humanitarian workers might face a similar plight. The Canadian Council for Refugees mounted a "Proud to Aid and Abet Refugees" solidarity campaign. The charges were dropped, but the campaign for law reform continued and in 2012 the provision was amended,

"No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act."

Importantly the offence now requires the person concerned to have knowledge that the entry into Canada of the individual or group they are assisting would be "in contravention" of the Immigration and Refugee Protection Act and, of course, coming into Canada to make a refugee claim is not in itself a contravention. The earlier version of section 117 did not draw that distinction.

Standing up for Standing up for refugees

Given that history, Canada is perhaps particularly well placed to speak out globally about the moves being taken -- by Hungary, Greece, at the US/Mexico border and elsewhere -- to criminalize, punish and deter the work of refugee advocates and migrant rights defenders.

The challenges to uphold the rights of refugee and migrants undeniably figure among the most pressing human rights concerns we face globally. In that context, it is more essential than ever that the space for individuals and organizations working to defend the rights of refugees and migrants be protected and certainly not in any way criminalized.

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About the author

Alex NeveAlex Neve believes in a world in which the human rights of all people are protected. He served as Secretary General of Amnesty International Canada's English Branch from 2000 - 2020. In that role he carried out numerous human rights research missions throughout Africa, Asia and Latin America, and closer to home to such locations as Grassy Narrows First Nation in NW Ontario and to Guantánamo Bay. He speaks to audiences across the country about a wide range of human rights issues, appears regularly before parliamentary committees and UN bodies, and is a frequent commentator in the media. Alex is a lawyer, with an LLB from Dalhousie University and a Master's Degree in International Human Rights Law from the University of Essex. He has served as a member of the Immigration and Refugee Board, taught at Osgoode Hall Law School and the University of Ottawa, been affiliated with York University's Centre for Refugee Studies, and worked as a refugee lawyer in private practice and in a community legal aid clinic. He is a Senior Fellow at the Graduate

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