REFUGEES AND THE HUMAN RIGHT TO SEEK ASYLUM: TO DEROGATE OR NOT TO DEROGATE, THAT IS THE QUESTION

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To repeal or abrogate in part, to destroy and impair the force and effect of, to lessen the authority of, take away or detract from, deteriorate, diminish, depreciate; it also means to curtail or deprive a person of any part of his rights.

Derogation is a partial abrogation or repeal of a law, contract, treaty, legal right etc.[1]

(on derogation)

Introduction

In 2015 the Republic of Slovenia became one of the countries along the Balkan refugee route. The first minor increase of migration movement was noted in September 2015 when 2,500 migrants crossed the territory. Hungarian closure of green borders in October that year precipitated redirection of the route to Slovenia, which resulted in 326,956 refugees crossing Slovenia between 20 October and 15 December 2015 alone.[2] The situation in the country resembled a state of emergency; the government activated its entire national security system, including

[1] I would like to thank dr. Neža Kogovšek Šalamon for her thorough reading of the text and even more for valuable and insightful comments that helped me greatly to sharpen my arguments and improve the precision of discussion offered in this paper.

Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), 73.

[2] "Seznanitev Vlade Republike Slovenije s poročilom o opravljenih aktivnostih ob drugem valu migracij na ozemlje Republike Slovenije," Ministry of Internal Affairs, december 22, 2015, www.vlada.si/fileadmin/dokumenti/si/sklepi/seje_vlade_gradiva/VRS-migrant2-3_20_68.pdf.

humanitarian and civil protection organizations,[3] and commenced intensive multi-level cooperation with neighbouring countries on a daily basis in order to manage migration movement, exchange information from the field and harmonize measures. Further, 135 kilometres of razor-wire fence were installed by police, army forces, firemen and external service providers by the end of the year.[4] Shortly after, however, the Balkan route started closing. The border between Greece and Macedonia was closed at the beginning of March 2016, while the agreement between the EU and Turkey allowing the return of migrants from Greece to Turkey came into force two weeks later. The number of refugees arriving in the Republic of Slovenia dropped substantially.

Yet, one year later, on 26 January 2017, when the situation had calmed entirely, the National Assembly of the Republic of Slovenia adopted amendments to the Aliens Act, which introduced a concept of "*changed conditions in the field of migration*" in Article 10a; the new Article 10a put forward an assumption that migration can directly threaten the public order and internal security of the state, and hinder the functioning of the central institutions of the state and its vital functions. Correspondingly, new measures have been introduced with Article 10b of the Aliens Act, which stipulate that in case migration flows might have or have already seriously endangered public order or internal security of the Republic of Slovenia, then any application for international protection, irrespective of the provisions of the International Protection Act, should be rejected as inadmissible while foreigners are brought to the state border by the police and directed into the state from which the migrant illegally entered.

The Aliens Act was heavily criticized by national and international human right organizations and was submitted to the Constitutional Court for review of constitutionality of the Article 10b by the Human Rights Ombudsman.[5] Despite the fact that the Constitutional Court

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[3] Maja Ladić and Katarina Vučko, "Slovenia's response to increased arrivals of refugees: we don't want them, but we also don't understand why they don't want to stay," in *Razor-wired: Reflections on Migration Movements through Slovenia in 2015*, eds. Neža Kogovšek Šalamon and Veronika Bajt (Ljubljana: Mirovni inštitut, 2016).

[4] "Seznanitev Vlade Republike Slovenije," Ministry of Internal Affairs, 2018.

[5] "Claim for review of the constitutionality of the Article 10b of the Aliens Act," Human Rights Ombudsman, April 19, 2017, www.varuh-rs.si/fileadmin/user_upload/word/Zahteve_

has not delivered judgment to this date, the Aliens Act remains illuminating about how the right to seek asylum works in practice; by in fact codifying the state of exception (without naming it as such) in which the Republic of Slovenia is – according to the political actors at least – allowed to derogate from legally binding provisions of the 1951 UN Convention on the Status of Refugees (the Refugee Convention), the Aliens Act demarcates the defining principles of this right in practice.

The paper examines "changed conditions in the field of migration" as a situation, which offers an insight into the constitutive elements of the right to seek asylum beyond its declarative universality; that is, it turns to conditions that in the political reality of nation-states define whether or not a theoretically universal right would be implemented in practice. Following Schmitt[6], the paper maintains that "the exception proves everything. It [the exception] confirms not only the rule but also its existence, which derives only from the exception."[7] Agamben explains that the state of exception constitutes a point of imbalance between public law and political fact, which reflects the paradoxical position where juridical measures cannot be understood in legal terms and "the state of exception appears as the legal form of what cannot have legal form."[8] Such an approach to explaining the right to seek asylum can be considered ontological since it outlines its categorical and political preconditions. Nonetheless, the paper delivers basic conclusions by empirical examination, description and contextualization of the right to seek asylum within the Slovenian social, legal and political setting, specifically in relation to the recent amendments of the Aliens Act.

The paper starts with a brief description of the amendments to the Aliens Act and their impact on the legal and political standing of refugees, and examines possibilities of lawful derogation as practised in the domain of international human rights law. Further on, it takes a

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6 Despite his work is distinguished by great analytical quality, it has to be noted that Carl Schmitt is recognized as one of the most controversial political thinkers of the 20th century for his close collaboration with and contribution to theoretical background of the Nazi regime.

7 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago and London: University of Chicago Press, 2005), 15.

8 Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago and London: University of Chicago Press, 2005), 1.

critical approach to the legal interpretation of the "changed situation in the field of migration" and attempts to assess whether this situation could be understood to be equal to derogation in event of a "public emergency threatening the life of the nation", which, in contemporary international law, is recognized as a condition for a valid derogation from human rights obligations in the event of war or a public emergency to the extent strictly required by the exigencies of the situation. An assessment of the situation in Slovenia made thereafter indicates serious difficulties in considering refugees to be an imminent or actual threat to the life of a nation. Finally, the paper addresses *non-refoulement* as an exemption from the sovereign exception of the Aliens Act, which does not offer a suitable solution to the question of refugees and their right to seek asylum.

Amendments to the Aliens Act: Perspective of the Sovereign Exception

Despite differences at the national and regional levels, the overarching goal of the modern refugee regime is to provide protection to individuals who are forced to flee their homes because their countries are unwilling or unable to protect them. Slovenia has committed to respecting the right to seek asylum by joining the Refugee Convention in 1992 (by succession)[9] and again on becoming a member of the European Union in 2004.[10] In addition, in the EU pre-accession programme Slovenia expanded the scope of protection provided under the Refugee Convention by introducing humanitarian or subsidiary protection first in the Asylum Act in 2001 and then, after accession to

[9] On 6 July 1992 National Assembly of the Republic of Slovenia adopted the Act notifying succession to the United Nations Conventions and Conventions Adopted by the International Atomic Energy Agency and thereby accepted that the Republic of Slovenia is the legal successor of the international treaties signed and ratified by former Socialist Federal Republic of Yugoslavia.

[10] As a member of EU, the Republic of Slovenia accepted the Charter of Fundamental Rights of the European Union, the Treaty on European Union, the Treaty on the Functioning of the European Union, and Treaty establishing the European Community, all of which directly or indirectly refer to an obligation to respect the right to seek asylum.

the EU, also in the International Protection Act in 2008;[11] these acts included individuals who do not qualify as refugees but face a risk of suffering serious harm if returned to their country of origin.[12] Slovenian legislation also guarantees protection under the Temporary Protection of Displaced Persons Act, which is applied in the event of the arrival of large numbers of displaced persons from third countries, when the national asylum system is not able to process their applications for international protection without adverse effects on the outcome of the asylum procedures.

As a response to the refugee situation in 2015, the Slovenian government adopted amendments to the Aliens Act on 26 January 2017, which diminished the above-mentioned achievements and developments of Slovenian asylum law. The amending Act introduced a concept of "changed conditions in the field of migration" in Article 10a of the Aliens Act. The new article instructs the Ministry of Internal Affairs to regularly monitor the conditions in the field of migration, and assess whether a serious threat exists, indicating that public order or the internal security of Slovenia might be endangered. Supposing such conditions occur, the National Assembly of the Republic of Slovenia is called to decide upon the application of a measure from Article 10b of this Act, which stipulates that:

> If the National Assembly adopts a decision from paragraph 2 of the previous Article, the police do not allow entry to a foreigner who does not meet the conditions for entry, while they [the police] bring an alien [...] to the state border and direct him or her into the state where he or she illegally entered from.
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> (2) Without prejudice to the provisions of the law which regulates international protection, the police acts *on the basis of the previous paragraphs also when an alien [...] expresses his or her intention to apply for international protection*. The police act this way when an alien wishes to illegally enter or

[11] International Protection Act, adopted in 2008, succeeded the former Asylum Act, which was adopted in 1999 but introduced the subsidiary protection in 2001, at that time called asylum under humanitarian reasons.

[12] See International Protection Act; also, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

has already illegally entered the territory of the Republic of Slovenia outside the border crossing with another safe European Union member state and is present at the territory [of the Republic of Slovenia] where the measure from this article is enforced. (emphasis added)

It should be stressed that the activation of Article 10b is left to the National Assembly to decide upon in the event of changed conditions in the field of migration, and therefore one must acknowledge it is legally valid but currently not in use. Nevertheless, it is exactly this article that is crucial for understanding the ontology of asylum; namely, the activation of Articles 10a and 10b by the National Assembly gives rise to denial of the right to seek asylum to foreigners who have entered Slovenian territory, and at the same time also stipulates their expulsion to the country from which they entered.

In this manner the Aliens Act creates a situation of rightlessness:[13] first, because it creates a legal channel through which the *de facto* violation of the right to seek asylum is *de jure* denied *as violation*; and, second, because it does not establish any judicial mechanism allowing individuals, confronted with this violation, to legally claim restoration of this right. This essentially means that the Aliens Act disables the legal recognition of victimhood while entirely dismissing the accountability of the state in relation to refugees as legitimate right-holders. The impact of such politics is expressed not only in specific violations of rights but, even more importantly, in creating a legal vacuum which does not allow the individual to claim their rights and renders void even the rights that he or she formally has.[14] In fact, this is, in the words of Arendt, "the fundamental deprivation of human rights [...] manifested first and

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[13] For discussion on rightlessness, cf. Hannah Arendt, *Origins of Totalitarianism* (Cleveland and New York: Meridian Books, 1976); Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford: Oxford University Press, 2015).

[14] Analogously to Arendt's stateless people, refugees may also be seen as formally being granted certain rights such as the rights to life, freedom of opinion or movement, but they are in a fundamental condition of rightlessness to the extent that the prolongation of their lives is due to charity (and not to right), freedom of movement gives them no right to residence, and their freedom of opinion is void as nothing they think matters anyhow. See Arendt, *Origins of Totalitarianism*, 296.

above all in the deprivation of a place in the world which makes opinions significant and actions effective".[15]

Along these lines, the Aliens Act articulates the margins of the universality of the right to seek asylum and thereby elucidates also the perplexities of human rights in general – that is, of the rights that are, on the one hand, grounded in inherent human dignity, but are, on the other hand, in practice constrained by the logic that is contradictory to the reasoning found in the idea of human rights. What we have here is the right to seek asylum as a universal right confronted with the concept of "changed conditions in the field of migration", which works as a sovereign exception and legally allows derogation from the duties of international human rights law. The exception is crucial for understanding the ontology of asylum as it goes beyond what appears on the manifest level and exposes what asylum is contingent upon.[16]

The exception put forward in form of "changed conditions in the field of migration" points to the conditions of the existence of the right to seek asylum and discloses elements that are certainly not hidden, but are not presented explicitly to our perception as its fundamental features either. However, there is more to it: the exception in fact annihilates the inalienability of this human right, indicates the preconditions of its "universality" and pins down the essential rules of its functioning – that is, the rules that derive from the very exception. Thus, the Aliens Act strips the right to seek asylum of its neutral, apolitical and universal character and opens up a gap – a divide between the universality of the right to seek asylum and the *realpolitik* conditions of its implementation, between what people say about human rights and what they do when rights are put in practice.

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[15] Ibid.

[16] See Schmitt, *Political Theology*; Agamben, *State of Exception*; Ayten Gündoğdu, "Potentialities of Human Rights: Agamben and the Narrative of Fated Necessity," *Contemporary Political Theory* 11, no. 1 (2012): 2–22.

Derogation from the 1951 Refugee Convention

By suspending the obligations that would apply in ordinary circumstances, the Aliens Act announced the possibility to lawfully derogate from the Refugee Convention. One should bear in mind that there is no general inconsistency between the provisions of the Aliens Act and international law, in view of the fact that the latter acknowledges derogation as the legally mandated authority of states to allow suspension of certain individual rights in exceptional circumstances of emergency or war, which is necessary, temporary, and lawful given the state necessity of self-preservation.[17] For instance, both the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the UN International Covenant on Civil and Political Rights (ICCPR) allow derogations from state obligations in the event of a "public emergency threatening the life of the nation", to the extent strictly required by the exigencies of the situation, in a temporary, limited and supervised manner. This means that international human rights law accepts the idea of derogations but then limits it with set of principles that constrain their scope and operation — necessity, proportionality, non-discrimination, and consistency with other obligations under international law.[18]

As stressed by Edwards,[19] it should be highlighted that the 1969 Vienna Convention on the Law of Treaties permits the suspension of conventional obligations "in conformity with the provisions of the treaty" rather than on the application of other sources of international law or general principles of "what is not forbidden is allowed" as a common principle of international law. The 1951 Refugee Convention does not include a general derogation clause comparable to other international human rights treaties; however, it contains provisions allowing derogation, as, for example, in Article 9, which provides that:

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17 Alice Edwards, "Temporary protection, derogation and the 1951 Refugee Convention," *Melbourne Journal of International Law* 13 (2012): 19.

18 Dominick McGoldrick, "The interface between public emergency powers and international law," *International Journal of Constitutional Law* 2, no. 2 (2004): 389.

19 Ibid., 21.

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security *in the case of a particular person*, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security. (emphasis added)

The derogation provision indicates that exceptional measures are applied individually, in the case of a *particular* person who poses a threat, and are not used against groups of individuals collectively. The argument for the individual application of the limitation of rights in the interest of national security or public order is also implied in Article 32 of the Refugee Convention, which stipulates that:

1. The Contracting States shall not expel a refugee lawfully in their territory saves on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached *in accordance with due process of law*. 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 or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.[20] (emphasis added)

and:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having *been convicted by a final*

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[20] The Aliens Act bypasses the rules of the Dublin procedure for it does not follow the requirement that the state responsible for processing a migrant's asylum application must formally affirm acceptance of the migrant, while returns cannot be implemented collectively or without the consent of the receiving state.

judgment of a particularly serious crime, constitutes a danger to the community of that country. (Article 33, emphasis added)

One could say that on first sight the Aliens Act is compliant with the second paragraph of Article 33 of the Refugee Convention, given that the latter does not provide protection to asylum seekers who constitute a danger to the security of the country. However, this is not true. The problem with Article 10b of the Aliens Act is that it *a priori* denies the right to seek asylum to all refugees and instructs their refoulement without examining the danger individuals might represent to the security of the country as well as without examining the potential dangers to refugees' lives or freedom or the likelihood that they would be exposed to inhuman treatment in the country to which they would be deported.

Moreover, the Aliens Act significantly departs from the Convention's safeguards put forward by ensuring equality before the law, right to fair trial and right to effective legal remedy. According to these principles, a refugee who is considered to be a threat to national security or public order must be informed about the factual basis for this allegation, and have an opportunity to respond to the government's factual assertions in a fair judicial procedure. Due process of law, mentioned in the Refugee Convention, is clear in that a fair hearing requires that the affected person is informed of the case against him or her, and is allowed to respond to it. The Aliens Act omits these requirements as it does not foresee legal procedures before the removal of refugees.

The Aliens Act similarly entirely neglects an individual approach, which is generally applied when dealing with disturbances of public order and national security threats. In other words, if violations of public order are indeed caused by some refugees, this generally would not make it a lawful reason to deport all refugees collectively. In this sense, the Aliens Act importantly breaks away from the Refugee Convention, for it does not assess the factual basis for considering an individual to be a threat to public order but regards refugees as a whole group as a threat to national security. Furthermore, the Aliens Act does not derogate from particular rights in the Refugee Convention, as is usually the case with other international human rights treaties, but rather derogates from the Refugee Convention as a whole. Hence, it also derogates from the right to seek asylum, which operates at a different level to other

human rights for it can be principally understood in terms of Arendt's notion of the right to have rights. An important implication of the Aliens Act, as previously specified, is the fact that it equates the arrival of refugees *as such* with a threat to public order and internal security.

The State of Emergency and the "Changed Situation in the Field of Migration"

As indicated in the previous section, derogation is a legally recognized technique of supervised, lawful and necessary suspension of particular international law norms and obligations, which is applied by states in exceptional circumstances. Although the Aliens Act derogates from the Refugee Convection in a way that is not consistent with the Convention, it is worth looking at derogation clauses within other legally binding legal documents to establish whether or not the Aliens Act can be regarded as being in line with international law. For instance, both Article 15 of the ECHR and Article 4 of the ICCPR specify that:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[21]

The next possible step of the analysis is therefore to examine if a changed situation in the field of migration (mass arrival of refugees) could indeed be regarded as equivalent to a state of emergency as understood in international law and, consequently, could rightfully be considered by the government as a lawful argument paving the way to activating derogation from the Refugee Convection. Needless to say, the concept of the changed situation in the field of migration has no corresponding category in legal practice; however, it is possible to view it analogously to a "public emergency threatening the life of the nation", given that both refer to public order and internal security on the one hand and

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[21] The wording of the derogation clause of Article 15 of the ECHR and of Article 4 of the ICCPR are almost identical.

serve as a depiction of exceptional circumstances that allow suspension of international law provisions on the other hand.

The closest we come to an explanation of the meaning of the "changed situation in the field of migration" is indirectly, through the wording of Article 10a of the Aliens Act, which declares:

(2) If the Ministry of the Interior assesses on the basis of information from authorities and institutions [...] that circumstances might have or have already occurred, when *public order* and *internal security* are endangered due to the changed situation in the field of migration, which could hinder the *functioning of the central institutions of the state* and the *working of its vital functions*, it proposes to the Government of the Republic of Slovenia to propose to the National Assembly of the Republic of Slovenia to decide upon the application of a measure from the Article 10b of this Act, for the duration of no more than six months. (emphasis added)

In international law, one definition of the public emergency threatening the life of the nation has been offered by the European Court of Human Rights (ECtHR), which defined an exceptional situation as a "crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".[22] A similar characterization of a public emergency has been put forward by members of the American Association for the International Commission of Jurists in the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights,[23] which concludes that a "threat to the life of the nation" is one that:

(a) affects the whole of the population and either the whole or part of the territory of the state; and

(b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic func-

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22 "The case of Lawless v Ireland," ECtHR, July 01, 1961, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57518%22]}.

23 "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights," American Association for the International Commission of Jurists, April 1985, www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf.

tioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

It is important to note that according to the Siracusa Principles, internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation and economic difficulties *per se* cannot justify derogations under Article 4 of the ICCPR[24]. However, if economic circumstances may not justify a derogation, their consequences may do so, says McGoldrick, in case they create a situation of serious internal unrest.[25]

For better understanding what constitutes a threat to the life of a nation we can turn to ECtHR case law. For instance, ECtHR has recognized imminent danger to the life of a nation in the continuing unlawful activities in Northern Ireland of the IRA and various associated groups, operating from the territory of the Republic of Ireland.[26] The imminent threat was likewise recognized by the Court on the evidence, which confirmed the existence of a danger of serious terrorist attacks planned against the United Kingdom.[27] Similar conclusions were drawn in relation to Kurdish separatist violence that gave rise to a "public emergency" in Turkey[28] and the attempted military coup in Turkey in 2016.[29]

Generally speaking, in ECtHR case law public emergency normally refers to the actual or imminent inability of the ordinary law to check the growing danger which threatens the state; inability of the ordinary

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24 "Siracusa principles," 11.

25 Ibid.

26 "The case of Lawless v Ireland ECtHR; Ireland v The United Kingdom," ECtHR, January 18, 1978, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57506%22]}; "The case of Brannigan and McBride v the United Kingdom," ECtHR, May 25, 1993, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57819%22]}; "The case of Marshall v the United Kingdom," ECtHR, July 10, 2001, http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-5967&filename=MARSHALL%20v.%20THE%20UNITED%20KINGDOM.pdf&logEvent=False.

27 "The case of A. and others v United Kingdom," ECtHR, February 19, 2009, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-91403%22]}.

28 "The case of Aksoy v Turkey," ECtHR, December 18, 1996, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58003%22]}.

29 "The case of Mehmet Hasan Altan v Turkey," ECtHR, March 20, 2018, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-181862%22]}; "The case of Şahin Alpay v Turkey," ECtHR, March 20, 2018, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-181866%22]}.

criminal courts to restore peace and order; the existence of military, secret and terrorist groups and the fear they create among the population; killings among the civilian population, destruction of property; violence and civil disorder and organized violence for political ends. Similarly, the UN Human Rights Committee (HRC) has referred to a number of situations that could, in principle, constitute a "state of emergency", including international and non-international armed conflict, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident.[30]

Turning back to the Aliens Act, to fit the concept of the "changed situation in the field of migration" into the definition of public emergency, the government would need evidence to show that refugees in Slovenia represent a threat that is likely to cause armed conflict or to overthrow the state by illegal means, terrorism or other serious violations of public order. What could count in favour of the Slovenian government and its attempt to equate a "changed situation in the field of migration" with a public emergency, is the fact that ECtHR considers that the national authorities are in principle in a better position than an international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.[31] Also, the ECtHR has confirmed that a state may derogate from international law obligations under Article 15 of ECHR if the threat is *actual* or *imminent*, given that there is evidence to show the existence of a threat and that the danger is credible even though the emergency situation does not yet actually exist.[32]

Furthermore, the ECtHR considered that national authorities cannot be criticized for fearing an imminent threat if sufficient evidence of that is available to them at the time, as the requirement of imminence cannot be interpreted so narrowly as to require a state to wait for disaster to strike before taking measures to deal with it. The purpose of Article 15 of the ECHR is also, in the view of the ECtHR, to take derogating measures to protect the state's population from future risks

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30 McGoldrick, "The interface between public emergency powers", 392–3.

31 "The case of A. and others v United Kingdom," ECtHR; "The case of Aksoy v Turkey", ECtHR; "The case of Brannigan and McBride v the United Kingdom," ECtHR.

32 "Case of A. and Others v United Kingdom," ECtHR.

with reference to the facts that are known at the time of the derogation. However, this does not mean that governments can activate a derogation clause in any given circumstance; on the contrary, governments have to prove, based on evidence, not only that there is an imminent or actual threat, but also that derogation is applied as the last resort and only because there is no other means that could reasonably be expected to safeguard public order and national security.[33]

Refugees as an Actual or Imminent Threat to Life of a Nation

Despite the fact that the ECtHR allows a wide margin of appreciation in deciding whether the life of a nation is threatened by a public emergency and, if so, how far it is necessary to go in attempting to overcome the emergency, it is for the Court to rule on whether a state has gone beyond the "extent strictly required by the exigencies" of the crisis and whether the derogation was valid.[34] In the same vein, the United Nations Human Rights Committee argued that the "measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature"[35] in order to avoid the derogation measures being taken under the pretext of the existence of a "public emergency which threatens the life of the nation" or "threats to its national security".[36] Derogation must thus correspond to the needs of the situation and be used only insofar as the government cannot keep public institutions functioning more or less normally by using means available under ordinary legislation.

It is true that the increased arrival of refugees can pose a security challenge to state authorities. But can we also accept as true that a group of unarmed and defenceless refugees represents an actual or imminent threat to the physical integrity of the population in the state of

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[33] Christoph Schreuert, "Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights," *Yale Journal of International Law* 9 (1982), http://digitalcommons.law.yale.edu/yjil/vol9/iss1/6.

[34] Ibid.

[35] "CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency," UN Human Rights Committee (HRC), August 31, 2001, www.refworld.org/docid/453883fd1f.html.

[36] "Siracusa Principles," 3.

their arrival? Or to the political independence and territorial integrity of that state? Or to the existence and basic functioning of that state's institutions? In the Contingency Plan of the Republic of Slovenia to Ensure the Accommodation and Supply in Case of Increased Number of Applicants for International Protection, the government indicated that the necessary measures would involve organizational measures, such as the appointment of an interdepartmental coordination group of the Government of RS, activating the national system of protection against natural and other disasters, allocating additional financial resources, providing additional staff, ensuring the daily presence of professional civil servants (social services, medical services), operational service (acceptance of applications), providing legal guardianship (training for legal representatives), translators, NGOs, local community organizations and volunteers.[37]

These measures clearly imply that the arrival of refugees is different to the situation of a public emergency threatening the life of nation in which the "threatening elements" – for example, terrorists, political opponents, dissidents, insurgents, rioters and similar – are typically dealt with by policies of control, detention and removal, rather than through the assistance of social services, NGOs, local community organizations and volunteers. Despite the fact that refugees put a certain amount of pressure on the working of the police, courts, schools, social services, national economy and so on, the challenges they pose to the government are qualitatively incongruent with the threat to the life of a nation, which, as previously explained, had been recognized in ECtHR case law in matters referring to terrorist activities, attempts to overthrow governments, killings among the civilian population, destruction of property and so on.

The problem with understanding the large arrival of refugees in terms of a threat to the life of a nation also arises from the fact that, as seen from the Aliens Act, the possible impact of the changed migration situation on the state's functioning would be considered by taking into

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[37] "Contingency plan of the Republic of Slovenia to ensure the accommodation and supply in case of increased number of applicants for international protection," Government of Republic of Slovenia, personal communication, 2018.

account (a) the situation in the countries from which foreigners intend to enter or have entered the Republic of Slovenia; (b) the situation in the field of migration in countries in the region; (c) the number of illegally staying foreigners and foreigners with a decision pending on their right to to stay in the Republic of Slovenia; (d) the number of applicants for international protection; (e) the number of persons with recognized international protection in the Republic of Slovenia; (f) the accommodation and integration capacities of the Republic of Slovenia; (g) other factors that could affect public order and internal security.

Evidently, the number of refugees, accommodation and integration capacities are the decisive factors in the assessment of the possible effects of the changed migration situation. Assessment would not be based on the evaluation of the actual or imminent threats to state functioning such as real (danger of) incidents, disturbances of public order, violence, civilian losses, attacks and property destruction. In other words, the government would apparently not activate the derogation clause on the basis of evidence proving *beyond reasonable doubt* that refugees pose an actual or imminent threat to the life of a nation; that there is *truly* an actual or imminent threat of violence against the government and local population; or that there *really* is an actual or imminent risk to the existence of state institutions and national constitutional order; or that the rights of nationals are *certainly* at risk; or that the national territorial integrity is *undeniably* endangered.

No objection can be made against the government's decision and commitment to protect public order and internal security as this means that the government is devoted to ensuring living conditions in which constitutional rights and duties are unimpeded.[38] Ironically, however, the activation of Article 10b of the Aliens Act itself unarguably causes a violation of constitutional rights (and thereby disrupts public order) since refugees who are present on Slovenian territory are, just like nationals, entitled to (some) rights under the constitution – for example, equality before the law (Article 14), prohibition of torture, inhuman or degrading treatment or punishment (Article 18), the right to equal protection of rights (Article 22), the right to legal remedy (Article 25)

[38] See Protection of Public Order Act.

and the right to personal dignity and security (Article 34) – and all these constitutional rights would *undoubtedly* be violated if asylum seekers are deported from the country under Article 10b of the Aliens Act.[39]

On the other hand, it is difficult to acknowledge that refugees could cause similar direct and structural violations of rights of citizens, which is often unfoundedly presumed. In this view, saying that refugees pose a threat to public order and national security means creating a connotative connection between the two without giving a factual answer to the question of *which rights exactly* are jeopardized by the arrival of refugees and *whose rights precisely* are violated.

Exemption from the Exception

Siracusa Principles say that when a conflict exists between a right protected in the Covenant and one that is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms – in this context, particular weight should be afforded to rights that are not subject to limitations whatsoever.[40] The Alien Act indicates that the government was aware of some limitations stemming from international law and therefore included specific circumstances in which Article 10b does not apply:

> This article is not used when the life of the alien is directly endangered; or where there is a serious danger that the alien will be subject to torture, inhuman or degrading treatment or punishment in the state in which he would be directed to; or when his or her health circumstances would clearly make the implementation of the measure from paragraph 1 of this article impossible; or when it is assessed that according to the appearance, behaviour or other circumstances the alien is an unaccompanied minor.

Prohibition of torture and inhuman treatment, if read correctly, implies a vital political position. While states have the right to control the entry of aliens under international law, including residence permits and expulsions or extradition, their sovereign right to remove, expel or

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[39] "Claim for review of the constitutionality of the Article 10b of the Aliens Act," Human Rights Ombudsman.

[40] "Siracusa Principles," 9.

extradite is limited by the principle of *non-refoulement*, which draws from the prohibition of torture and inhuman treatment and bans both direct and indirect refoulement.[41] Therefore, the principle of *non-refoulement* guarantees the right of the applicant to *enter* and *stay* in the state where he is applying for protection and the right to access a fair and effective procedure in which the competent authority decides whether the principle of *non-refoulement* could be violated by the removal, expulsion or extradition of the applicant.

This rule should be read in conjunction with another *non-derogable* human right set out in Article 16 of the ICCPR, specifying that everyone shall have the right to recognition everywhere as a person before the law as well as in connection to the aforementioned constitutional rights of equality before the law (Article 14), prohibition of torture, inhuman or degrading treatment or punishment (Article 18), the right to an equal protection of rights (Article 22), right to legal remedy (Article 25) and right to personal dignity and security (Article 34). Removal of the asylum seeker to another country without examination of his application is regarded a violation of the principle of *non-refoulement*.[42] Does this mean that, stemming from this exception, different rules defining the ontology of asylum can be identified? Rules that build on respect for human rights after all?

This can hardly be the case, particularly in view of the fact that states, when faced with large numbers of displaced persons, who cannot return to their country of origin, normally set up exceptional schemes to offer them immediate temporary protection at refugee reception camps. In the view of Edwards, granting temporary protection instead of refugee status in many cases already amounts to *de facto* derogation from the Refugee Convention since these individuals could be granted refugee status *prima facie*.[43] Camps do not bring a solution in respect of human

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[41] Indirect refoulement is considered when an individual is handed over to a country in which there is no immediate direct danger for him to be subjected to inhuman treatment, but there is a possibility that from that country he will be handed over to a country in which there is a serious risk of being exposed to inhuman treatment.

[42] "Constitutional Court, Constitutional Court Decision U-I-155/11," Constitutional Court of Republic of Slovenia, December 18, 2013, http://odlocitve.us-rs.si/sl/odlocitev/US30287.

[43] Edwards, "Temporary protection," 11–12.

rights, for they are sites constructed "in a situation of emergency as a protective device intended to provide for the physical, food and health safety of all kinds of survivors and fugitives from wars, at a minimum level and at a distance from the existing socio-economic [and political] areas".[44] The camp appears as space "outside" the state but subject to the state's power through abandonment, while state agents define political life by classifying various types of "bare life,"[45] some of which can move up in the hierarchy and gain greater degrees of recognition, while others remain stripped of political subjectivity and face deportation[46]. In this sense, a camp may deliver immediate relief to refugees, but, because it is intended only as a temporary form of protection, it also causes a loss of their political subjectivity.

Conclusion

Agamben is right in saying that every time, when refugees no longer represent individual cases but rather a mass phenomenon, states and international organizations are absolutely incapable not only of solving the problem but also of facing refugees as human beings with an inalienable right to seek asylum.[47] This paper is very much congruent with this view in that it points to the *realpolitik* impossibilities of interpreting the right to seek asylum as a universal right specifically in a world composed of nation-states. The paper adopted an empirical approach to analysing the right to seek asylum, which differs from philosophical approaches in their distinct purpose to understand and explain why, how, when and where certain social phenomena are put in practice, and not what they should be. The nonexistence of the universality of the right to seek asylum is therefore understood in implementational

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[44] Michel Agier, "Between War and City: Towards an Urban Anthropology of Refugee Camps," *Ethnography* 3 (2002): 320.

[45] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller Roazen (Stanford: Stanford University Press, 1998).

[46] Olga Zeveleva, "Biopolitics, borders, and refugee camps: exercising sovereign power over nonmembers of the state," *Nationalities Papers* 45, no. 1 (2017): 58, DOI: 10.1080/00905992.2016.1238885.

[47] Giorgio Agamben, "Beyond Human Rights," in *Radical Thought in Italy*, ed. Paolo Virno and Michael Hardt (Minneapolis: University of Minnesota Press, 1997), 160.

terms, not on the basis of principles. The breach of universality materializes as a situation in which people, seemingly holders of particular rights, cannot enact their rights in practice. This universality is ultimately void, which indicates a real crisis of humanitarian and human rights law that can no longer be denied – a crisis seen from the fact that the state suspends the human rights law on the basis of its right of self-preservation.

The Aliens Act shows that the argument of preserving the existence of the state cancels out humanity and dignity as the foundation of the right to seek asylum and at the same time points to the constitutive principles that predefine the implementation of this right, its subject and the scope of state responsibilities. In this way, it modifies the meaning of the right to seek asylum; it adjusts it to match the interests of the state, particularly in relation to ensuring the conditions for the optimal functioning of state structures without denying its universality on the declarative level. Theorizing a situation of mass displacement has shown that political practice of the right to seek asylum, driven by *raison d'etat*, circumvents the elemental qualities of the human rights concept – for example, universality, inalienability, human dignity and equality. Such an interpretation fails to recognize each human being with inherent human rights.

Moreover, the Aliens Act indicates who decides on what constitutes the public interest or interest of the state and how public safety and public order are to be achieved. The Aliens Act directly touches upon the issue of power by defining who (or not) is recognized as the holder of the right to seek asylum and under what conditions, what exactly is considered a violation of human rights and why (not) and what constitutes the legitimacy of duty or omission of the respect for rights. By putting forward decision-making processes in the light of the arguments that justify the ways of distinguishing between legitimate and illegitimate right-bearers, it also reveals relationships of social domination, which are thereby maintained.

The Aliens Act obviously recognizes the prohibition of torture or cruel, inhuman or degrading treatment or punishment as a non-derogable right under contemporary human rights law, and also that no one should be returned to a place where they would directly or indi-

rectly face a risk of violation of this right.[48] The Aliens Act is, in this view, invested with a slightly more humanitarian tone, which in the opinion of Durieux may be seen as advantageous;[49] as he argues, the framework of a humanitarian approach to emergency, disaster and the rescue of refugees offers a space for the emergence of new concepts that have the power to effectively challenge traditional refugee/migration law concepts such as the selectivity of national borders. The Aliens Act somehow proves that by introducing the exemption from exception.

It remains problematic, however, that such an approach does not acknowledge refugees as political actors who have the ability to enact their rights, but turns them into objects of charity, puts them into a precarious position in which rights depend on the generosity and goodwill of compassionate others.[50] Gündoğdu maintains, following Arendt, that such a position undermines understanding of the political dimension of human rights as a right to have rights, or a right to action and speech, for refugees do not "appear" to the state as a "humans", political beings to whom human rights obligations are owed, but are instead viewed as suffering bodies in a vulnerable position, whose rights will be respected out of pity. The distinction that exists between obligation and charity has an important effect in terms of recognizing one's political membership and granting rights.

Finally, political practice implied in the Aliens Act illustrates that the right to seek asylum remains an essential part of exercising a state's authority and does not transcend it. It also shows that the right to seek asylum and the state do not stand in an equal position; in spite of the fact that the right to seek asylum is presented as an entitlement that goes above and beyond the state, it is actually the state which predicates the right to seek asylum. The right to seek asylum may in some cases be

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48 "The Case of M.S.S. v Belgium and Greece," ECtHR, January 21, 2011, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-103050%22]} shows that violation of articles 2 and 3 of the ECHR may arise if a government deports a migrant to a country where he or she is exposed to the risks arising from the deficiencies in the asylum procedure of that country.

49 Jean-François Durieux, "The duty to rescue refugees." Conference paper at a symposium at All Souls College, Oxford, April 14–15, 2016, https://soundcloud.com/kaldorcentre/jean-francois-durieux-celebrating-the-scholarship-of-professor-guy-s-goodwin-gill.

50 Gündoğdu, *Rightlessness*; Didier Fassin, "Compassion and Repression: The Moral Economy of Immigration Policies in France," *Cultural Anthropology* 20, no. 3 (2005).

implemented to protect individuals against the state, but in other cases it can also be interpreted in a way that guarantees protection of the state against individuals – even in the event of unarmed, powerless and vulnerable individuals fleeing from violence in their home countries.

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