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Criminal Legal Tools in the Fight Against Irregular Migration in Hungary

I. INTRODUCTION

International migration has intensified in the past two decades. Europe has been receiving an increasing number of migrants from the developing countries. The number of irregular migrants entering the European Union reached unprecedented levels for the past four years, and this flow affected all of the Member States. In 2015, when Hungary was in the centre of the migratory flow, a political decision on taking the necessary criminal measures to stop the irregular migrants was made by the Hungarian Government. In many European countries, including in Hungary, the public opinion related to the irregular migration has forced the legislators to take the necessary and effective measures against it. In Hungary, among others, the criminal law and the criminal procedure law have been in focus. The Hungarian Criminal Code was amended with three new crimes, which are the following: damaging the border barrier, unlawful crossing the border barrier and obstruction of the construction work on border barrier. These crimes mentioned are called in the Hungarian practice „crimes against the border barrier”. The aim of the paper is to present the Hungarian criminal legal framework, which hallmarks the Hungarian fight against the irregular migration.

As a starting point, it shall be underlined that – according to our interpretation – an irregular migrant can be defined as an individual who crosses the border without proper permission or by violating conditions for entering a country.^[1] The migration – whether irregular or legal – is not a new phenomenon in Europe, it has presented on the European continent for decades. “Migration has been a natural phenomenon of changes in the world since the formation of mankind, which at times intensifies, becomes explosive, and sometimes eases.”^[2] In the past decades, a number of serious political and economic changes have taken place in the world. It shall be underlined, that one of its detrimental effects was the uptrend of the migratory pressure. However, at the same time, its nature and method have changed as well.

[1] Kuschminder et al., 2015, 10.

[2] Tóthné Demus, 2005, 53.

This interpretation mentioned can also be applied related to the irregular migratory flow, which has put high pressure on the European borders since 2015. The irregular migrants usually use the following ways entering the territory of EU: (a) border-crossing “without proper permission, either through clandestine entry or with fraudulent documents; (b) entering with authorization, but overstaying it; (c) deliberately abusing the asylum system; or under the control of the smugglers and traffickers.”^[3]

In connection with the mentioned thoughts, it shall be emphasized that the international migration has intensified during the last two decades.^[4] Europe has been forced to detect increasing number of migrants from the developing countries, which will be shown by the first table of our paper. Until between 2009 and 2010 the number of the irregular migrants crossed the border of the EU was about 100.000 each year,^[5] this number rose to more than 280.000 by 2014 at the pan-European level. The mentioned number represents a high increase over the years mentioned. Furthermore, the irregular enterings detected by the Member States in the EU has increased to an unprecedented level in 2015 and 2016. According the FRONTEX data the Member States recorded nearly 1.800.000 illegal border crossings at the peak of the migration crisis in 2015, while in 2016 this number - although much less - was 511.047 illegal border crossing which can be considered still extremely high^[6]. Contrary to the previous trends, between 2014 and 2015, partly from the Balkan states and from the destabilized countries in the Middle East and North Africa, mass emigration began to the countries of the European Union, which meant a big challenge for not only for the Member States themselves, but also for the European integration. This trend has not changed significantly in the recent years. Based on data published by the FRONTEX annual reports the European migratory crisis developed in the last 5 years, which will be presented by our first table.

[3] Uehling, 2004, 77-109.

[4] Triandafyllidou et al., 2012, 1.

[5] Morehouse et al., 2011, 8.

[6] FRONTEX, 2018, 8.

YEAR/ROUTE	2014	2015	2016	2017	2018	2019
Western African	276	874	671	421	1531	2718
Western Mediterranean	7842	7164	10231	23143	57034	23969
Central Mediterranean	170664	153946	181459	118962	23485	14003
East Mediterranean	50834	885386	182277	42305	56561	83333
Circular route from Albania to Greece	8841	8932	5121	6396	4550	1944
Black Sea	433	68	1	537	0	2
Western Balkan	43357	764038	130261	12178	5869	15152
Eastern borders route	1275	1920	1349	776	1084	722

Table 1: Detections of illegal border-crossing in the EU between 2014 and 2019 (Source: FRONTEX Annual Risk Analysis for 2015-2020, <https://frontex.europa.eu>)

Mass immigration – considering on the one hand the origin of people arriving with the migratory wave, and the other hand their belief in belief, furthermore, the feeling of disappointment for the attitude of the Western states – poses a serious public security risk in the host societies, and unfortunately – as a result of the mentioned facts – it can also be seen in criminal statistics. In the recent years, the wave of intensive migration pointed out that the European Union’s liberal policy pursued by the majority of the European Member States has caused a serious security deficit in Europe. The positive expectations and impacts that have served and serve nowadays as well in many Member States for a permissive immigration policy are becoming unmanageable in the current, uncontrolled migration situation. Irregular migration is accompanied by other forms of crime, including the intensification of human trafficking and terrorism.

For the above-mentioned facts, irregular migration is defined in different ways by the Member States. Most of them give an administrative legal answer to this problem. However, it can be underlined that the criminalization is not a widespread response; the illegal border crossing and the illegal residence are not considered a criminal offence in the western European countries^[7]. Europe is still divided on how to handle the irregular migration. In the political dialogue, it is often described as a phenomenon, which threatens the state sovereignty and the public security. The news show that the public security can be influenced by the irregular migration. Therefore, different legal measures have been adopted by many Member States after 2015 to control the illegal migration and to deal with its harmful consequences.^[8]

[7] Guild et al., 2016, 24.

[8] Broaders et al., 2007, 1592.

Although, there is a shift towards criminalization^[9] of certain forms of illegal migration, it is not considered as a criminal offense in the domestic law of the most Member States. It is, of course, another question that according to the so-called “marginalization theory”, illegal immigrants who are marginalized in the country of destination often drive their fate towards committing crimes,^[10] which should be judged in accordance with the substantive criminal law of that state. It shall be emphasized that as a primary response to the phenomenon of illegal immigration itself, the criminal law action reacts more likely to that criminal activities based on illegal migration, such as trafficking in human beings, smuggling of human beings and related organized crime.^[11] The illegal immigration has been used by the mentioned crimes in order to reinforce its status in the European Union, taking advantage of Europe’s openness and its declared fundamental freedoms.^[12] In accordance with the above-mentioned fact, in the political dialogue, illegal immigration is often regarded as a threat to state sovereignty as well as to public security, whereby the states have the right to protect their borders. The emphasis of the mentioned aspects is justified by the need on the one hand to respond to the conduct - videlicet the illegally enters the territory of a foreign state - itself, and on the other hand to the security challenges concerning the illegal stay.^[13]

The irregular migration generally appears in the European internal legal systems as a misdemeanor, or a legal phenomenon, which shall be handled on the level of the administrative law. It shall be emphasized that the degree of *de jure* criminalization is limited - in the most Western countries illegal residence as such is not crime.^[14] However, the irregular migration is often described as a threat to state sovereignty and to public security.^[15] This unfavorable effect was recognized by the Hungarian Government in 2015, and at the peak of the migratory pressure decided on using criminal legal tools in the fight against the irregular migration. In many Member States, including in Hungary, public opinion related to the irregular migration has forced the legislators to take quick and effective measures against it. In Hungary - although the irregular migration is a multifaceted phenomenon,^[16] therefore the legal responses effect many parts of the internal legal system - the law enforcement and the criminal law were in the focus.

The first step was the construction of the physical border fence, and as a second stage, the Hungarian Parliament adopted the legal framework on its protection. The Hungarian legal response concerned widely the Hungarian legal

[9] Lévy, 2017, 153-162.

[10] Leekers et al., 2012, 17.

[11] Mitsilegas, 2015, 48.

[12] Galateanu, 2017, 601.

[13] Spina, 2017, 354.

[14] Guild et al., 2016, 24-25.

[15] Koser, 2005, 10-11.

[16] Hegyaljai, 2016, 12.

system. In the centre of the amendment were the criminal law and the criminal procedure law. Within the frame of the mentioned decision, the Hungarian Criminal Code was amended with three new crimes, which are the following: damaging the border barrier, unlawful crossing the border barrier and obstruction of the construction work on border barrier. The aim of the paper is to present on the one hand the Hungarian criminal legal solution with special reference to the new statutory definitions concerning the irregular migration and to present the mentioned elements of crimes. However, before it, we have to deal with the legality of the Hungarian border fence, because it is no reason to analyze the mentioned statutory definitions, if the construction of the border barrier can be considered as an unlawful step. Furthermore, finally – using the criminal statistical analyzing method – we want to highlight some anomalies concerning the Hungarian situation and practice.

II. ABOUT THE HUNGARIAN BORDER FENCE

The migratory flow intensified in 2015 put a high pressure on Hungary, which fact is underlined by the data on numbers of asylum seekers between 2014 and 2015. By July 2015, this number had risen to 78,000, compared to the about 43,000 asylum applications filed in 2014. By the end of 2015, the number of asylum seekers was already close to 180,000.^[17] Only during September 2015 – before the finishing the construction work concerning the fence by the Hungarian-Serbian border - there was a total number of 138.396 irregular migrant entries.

Under this migratory pressure, the Hungarian government has adopted a package of legal measures, mainly for the sake of the security of Hungary. The first step was the establishment of a physical border barrier and the creation of legal regulations facilitating its construction. As the legislator pointed out in 2015: “the state borders can be protected only by the installation of ever more serious facilities. The function of these facilities is not only to complete the state’s self-defense, but also to signal that the state has right to self-defense, and that right must be respected by everyone.”^[18]

The first step in process on realization of this legal policy was Resolution of the Government Nr. 1401/2015, which set a deadline of 1 July 2015 on the one hand to “prepare for the construction of a 4 meter-high border barrier on the Serbian-Hungarian border at about 175 km length”^[19] and on the other hand to

[17] Póczik, 2018, 11.

[18] Part of the general legislative justification on Act CXL of 2015.

[19] There were a lot of legal measures in order to reach the mentioned internal policy, for example: the following resolutions of Ministry of Interior, 50/2015. (IX.16.) BM r., 51/2015. (IX.20.) BM r., 56/2015. (X.17.) BM r., 60/2015. (XI.16.) BM r., 3/2016. (I.20.) BM r., 6/2016. (II.18.) BM r.

make the necessary legal measures in order to protect it. The construction of the border barrier began in early July 2015, and it was completed by Monday, 14 September 2015. After the first step of the construction works had been finished by the Serbian-Hungarian border, Hungary started – as a second step – the construction of a second fence along the Croatian-Hungarian border.^[20] It should be noted that – as Tamas Hoffman a senior researcher at the Institute of Law of the Hungarian Academy of Sciences said – the application of a temporary physical border lock is not “devilish” either. In its view, a State is entitled, by virtue of its sovereignty, to defend its own borders in this way, provided that it meets its obligations under international law.^[21]

After the mentioned decision, the Hungarian legislator declared the goal to protect the construction of the border fence. Due to the mentioned political aim, the Government adopted the Resolution Nr. 213/2015 in August, which punished by fine^[22] that acts, which violated partly the construction site of the border fence and partly its construction.^[23]

Following these precedents, the Hungarian Parliament adopted the Act CXL of 2015 on 4 September 2015. This act mentioned above amended many parts of the Hungarian legal system, not only the criminal law and the criminal procedural law, but also the legal regulation concerning the migration policy and also the Act on State Borders. The legislation created a criminal legal protection for the border barrier and also inserted special procedural rules into the Hungarian Act on Criminal Procedure.

III. ABOUT THE CRIMES AGAINST THE BORDER BARRIER

As we mentioned above, three new elements of crime has been inserted by the Act CXL of 2015 into the Hungarian Criminal Code (Act C of 2012) – due to the aim of stopping the irregular migratory flow – in 15 September 2015, which are the following: unlawful crossing of the border barrier (Sec. 352/A.), damaging the border barrier (Sec. 352/B.), and the obstruction on construction work on the border barrier (Sec. 352/C.).

[20] An interesting data that after Hungary closed the Hungarian-Serbian border with the barrier, the number of the irregular migrants entered Hungary decreased to only 315 in November and to 270 in December 2015.

[21] Póczik, 2018, 15.

[22] The fine – depending on its gravity – was from HUF 30.000 to HUF 500.000.

[23] The scope of these practices is set out in Sections 2-3 of the decree: (a) entry into the area of the temporary closing of border during its construction and maintenance; (b) obstructing construction work in any form; (c) introducing a drone or other unmanned remote control device into the construction site; (d) obstructing the access of persons working in the area of the closing of border; (e) obstructing the access of vehicles and means of transport to the area affected by the construction of the boundary lock.

According to the Section 325/A of the Hungarian Criminal Code: „any person who enters unlawfully the territory of Hungary across the border barrier commits the crime titled the unlawful crossing of the border barrier”. The mentioned crime can be considered as a „*delictum commune*”; therefore, its perpetrator can be anyone. However, if we look at the reason of creation this statutory definition, it is quite clear that the Hungarian legislator drafted it specifically in order to curb the irregular migration. This fact is also confirmed by the Unified Hungarian Criminal Statistic of the Investigation Authorities and Prosecution. Namely, according to relevant data the most of the perpetrators of the crime mentioned had the following nationality: Afghan, Iraqi, Syrian, Pakistani, Iranian and Kosovo.

This crime is – in practice typically – committed either by breaking the physical border fence – rarely by crossing it without using violence against it – or by entering unlawfully the border fence damaged earlier by someone. Therefore, it shall be emphasized that who is caught in the act by the authorities in the territory of Hungary near to the border fence, or not so far from it, there is a reasonable cause to believe that this person entered irregularly Hungary – in violation of the border fence – and therefore committed the crime mentioned. However, in order to speed up the back-redirects to the gates built up on the Hungarian border fence, the Act on State Border was amended by the Hungarian legislator in 2016. According to this modification, if an irregular migrant is held up by a police officer within 8 kilometers from the Hungarian-Serbian and the Hungarian-Croatian border (the Schengen external borders), the authority shall redirects this migrant to the border barrier – except if it is reasonable cause to believe that the migrant committed a crime – to ensure that the migrant retires back where he or she came unlawfully from. If we look at the statistical data, we can see how the migratory routes have changed because of creating the border barrier and how the number of criminal procedures have changed for the past few years in context of the legal amendment mentioned above.

The decreasing number of procedures clearly show how the measures applied by the authorities have modified due to the amendment of the Act on State Border. The data also shows how the authorities moved from the strictly application of principle of legality towards the law enforcement methods avoiding the criminal procedure.

In the following table, we summarize the registered unlawful crossings of the border barrier based on the Unified Hungarian Criminal Statistic mentioned above:

Years	Unlawful crossing of the border barrier (Sec. 352/A)
2015	914
2016	2843
2017	22
2018	16
2019 – April 2021	33

Table 2. (Source: the Unified Hungarian Criminal Statistic of the Investigation Authorities and Prosecution)

According to the Sec. 352/B. of the Hungarian Criminal Code any person who damages or destroys the border barrier and its devices commits the damaging of the border barrier, insofar as the act did not result in a more serious criminal offence. Following the definition mentioned, it shall be underlined that this crime can be considered as a subsidiary statutory definition. The legal object protected by the legislator is not only the territorial integrity of Hungary, but also the protection of the border barrier. The reason of creating the mentioned crime is that it is required to punish that perpetrator who endangers with his conduct the protection function of the border barrier built by the state.^[24]

Nevertheless, it shall be emphasized that the border barrier built in 2015 and 2016 at the Serbian-Hungarian and the Croatian-Hungarian border is protected not only by the statutory definition mentioned above, but also by the crime regulated under the Sec. 352/C of the Hungarian Criminal Code. According to the mentioned Section, any person who obstructs the construction or the maintaining work of the border barrier commits a crime titled obstruction on construction work on the border barrier. This crime is also a subsidiary statutory definition because the perpetrator can be punished for this crime only that case if the act committed by the perpetrator did not result another criminal offence. Any conduct by which the perpetrator can obstruct the works on the border closure may constitute according to the mentioned Section.^[25] For the past few years, the crime titled damaging of border barrier occurred in the judicial practice, however, the obstruction on construction work on border barrier is not at all.

In the following table, we summarize the relevant data of the Hungarian criminal statistic according to the mentioned two criminal offences:

[24] Hautzinger, 2016, 191-192.

[25] Madai, 2016, 253.

Years	Damaging of the border barrier (Sec. 352/B.)	Obstruction on construction work of the border barrier (Sec. 352/C.)
2015	22	0
2016	1543	0
2017	863	0
2018	115	0
2019 – April 2021	192	0

Table 3. (Source: the Unified Hungarian Criminal Statistic of the Investigation Authorities and Prosecution)

Common characteristics of these crimes mentioned in Table 2-3 that each crime could be committed only with intent. Furthermore, several qualified cases were linked by the legislator to the statutory definition of damaging of border barrier and to the unlawful crossing of the border barrier. These are the following: perpetration by displaying a deadly weapon, or by carrying a deadly weapon, and perpetration as a member of a mass riot. The most serious qualified case by both above-mentioned crimes is if the perpetration results in death.

The following table summarizes the statutory definitions of all of the crimes against the border barrier:

Unlawful crossing of the border barrier (Btk. 352/A.§)	Any person who enters unlawfully the territory of Hungary across the border barrier
Damaging of the border barrier (Btk. 352/B.§)	Any person who damages or destroys the border barrier and its devices, insofar as the act did not result in a more serious criminal offence
Obstruction on construction work of the border barrier (Btk. 352/C.§)	Any person who obstructs the construction or the maintaining work of the border barrier, if the act committed by the perpetrator did not result another criminal offence

Table 4: The crimes against the border barrier based on the Hungarian Criminal Code (Source: Act C of 2013)

IV. PROCEDURAL LEGAL PROBLEM IN CONNECTION WITH THE CRIMES AGAINST THE BORDER BARRIER

According to the principle of legality, the criminal procedure shall be initiated and conducted, and the defendant shall be punished by the authorities, if the act committed by the defendant can be qualified as a crime, furthermore, if the defendant is punishable. Namely, if there is a reasonable cause to believe that the act committed by the perpetrator could be qualified as crime according to the Hungarian Criminal Code, the authorities must conduct the procedure, and must examine the elements of crime committed. It means that the investigating authorities must investigate the circumstances of the crime, the prosecutor must arraign against the perpetrator – if there isn't any other opportunity to finish the criminal procedure –, and the judge must sentence the perpetrator if the commission of the crime is proved, and the defendant is punishable.

As it can be understood on base of content of the criminal procedural principle mentioned, in case of caught in the act or of detecting a crime, the authorities are not in that position to decide on starting a criminal procedure. The procedure must be started.

The Hungarian Police Force weekly publishes the actual data related to the irregular migration in Hungary. The data published concerns the number of irregular crossings hindered, the number of held up irregular migrants who were redirected to the gates built up on the border fence, and the number of arrested migrants against whom procedures were started by the authorities. If we check up the data, it isn't in the same street in comparison with the number of crimes mentioned above in Table 2-3, and it is not in accordance with the real content of the principle of legality.

Namely, that person, who is held up or arrested, or hindered during or after the irregular crossing the border fence, or this person is caught in the act during the attempt of crossing, commits at least the unlawful crossing of the border barrier and the criminal procedure must be started against her or him. Otherwise, how could the migrants get to the Hungarian territory within 8 kilometers from the mentioned borders, if not by committing the mentioned crime? According to our opinion, without committing the crime mentioned, it is impossible in most of these cases.

In the following table, we will summarize the data published, however, for the sake of simplicity, only with reference to the last three years.

Years	Number of irregular crossings hindered by the authorities	Number of held up migrants who were redirected to the gates	Number of captured and arrested irregular migrants
2019	3008	12973	943
2020	14160	30097	2078
2021 (till 4 of April)	9766	8311	518

Table 5. (Source: the official website of the Hungarian Police Force)

As we see earlier, according to the statutory definition of the unlawful crossing of the border barrier, anyone who try to enter the territory of Hungary unlawfully – across the installed border fence avoiding the appointed gates –, commits the crime mentioned. On the base of data summarized by Table 4, we could also see that the data concerns those cases, when the irregular migrants entered or tried to enter unlawfully the territory of Hungary. All of migrants who were hindered or held up and redirected, or captured and arrested by the Hungarian Police, committed this crime mentioned above, because they could enter Hungary only through the border barrier, namely, they were caught in the act either by the fence or not so far from it. Therefore, - at least - in most of the cases mentioned above by the Table 4, the authorities should have had to apply the Hungarian Criminal Code, and according to the principle of legality, they should have had to start the criminal procedure.

However, if we compare the data summarized by the tables, we can emphasize that from 2019, the authorities preferred mostly the law enforcement methods than the criminal procedural ones to ensure the rapidity, efficiency, and the cost-effectiveness of the procedure. The criminal procedural principle on legality has become a contentless principle in these procedures; therefore, the following question occurs justifiably: is there any reason to regulate the unlawful crossing of the border barrier as crime in the Hungarian Criminal Code? On the other hand, if the answer is yes, is there any reasonable cause to carry on managing the problem caused by the irregular migration such a method like the mentioned one? We are going to try to find out the correct answer in our conclusion.

V. CONCLUSION

According to our opinion, there are two different ways to give the appropriate answer for these questions. The first way connects to the field of criminal law and needs to deal with the real criminal-political aim declared by the legislator in 2015. The second way is the law enforcement one. However, it shall be underlined that there is no reason to apply mixed these methods mentioned above in the practice. Namely, if someone committed the unlawful crossing the border barrier, the criminal law must be applied against this perpetrator.

If we want to analyze the first way – the criminal legal one –, the first question to be answered is whether maintaining the criminal legal regulation concerning the unlawful border crossing would be justifiable in the future or not? In order to give an answer for our question, we have to examine the legislator's aim related to the crime mentioned. In 2015, when this crime was inserted into the Hungarian Criminal Code, the legislator appointed that – among others – Hungary can fight efficiently against the irregular migration with construction the physical border, therefore, in order to improve the defending of the Hungarian borderline, there is

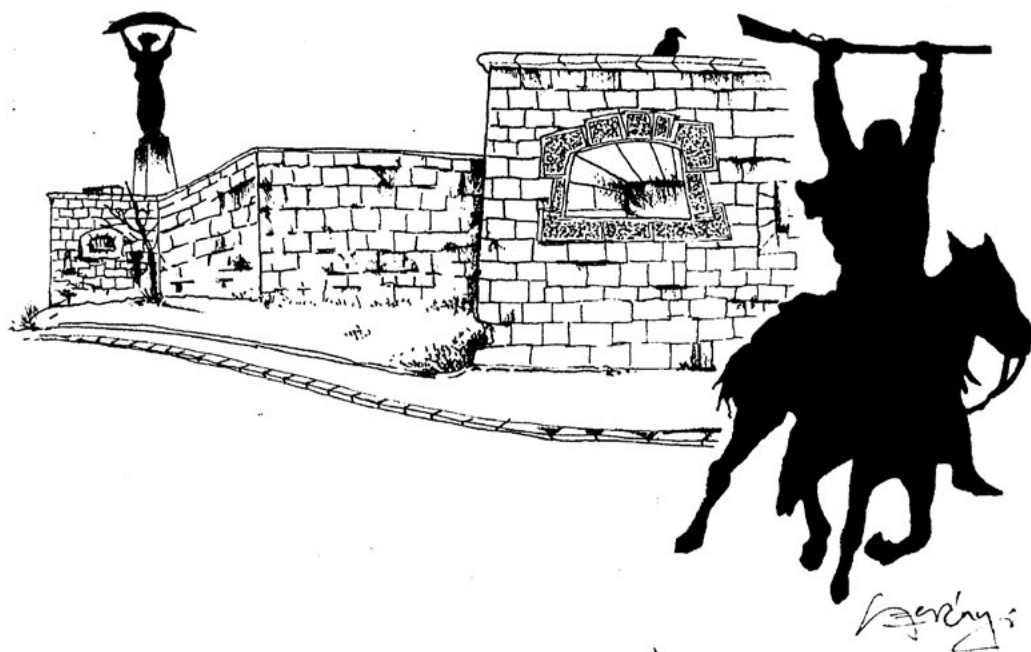
necessary to make such a crime, which can support this political aim. Therefore, it is a relevant question whether repealing the crimes against the border barrier can be expected in the near future or not. However, it should be considered with reference to the criminal statistical data and the practice. Thus, if the legal situation will not get be changed, and if a crime against the border barrier will be committed by someone, the authorities must conduct the criminal procedure against the perpetrator. In addition, this expectation is coincide with the main content of the criminal procedural principle on legality. If Hungary wants to follow the way assigned by the legislator in 2015 changing of viewpoint of the authorities is to be needed.

Enforcement of the traditional legal principles can be considered as an advantage of this way; however, there are many disadvantages to be seen. First, it can increase the number of the criminal procedures, which can enhance the administrative border of the authorities working on every stage of the criminal procedure, and it will also increase the costs of the procedures, which won't probably pay off for the state. If we have a look at data, it can be clear that the authorities – even for the aim of avoiding the burdens mentioned – do not follow the traditional practice, and mainly choose the law enforcement one. However, this law enforcement method is not in accordance with the criminal legal regulations, and this is why it can be criticized. Furthermore, according to our opinion, the border barrier has deterrent effect as itself for the migrants. Not the fact of criminalization, but the border barrier and the effective police measures alone can deter and hinder the irregular migrants from unlawfully entering Hungary.

However, if Hungary wants to follow the current method, the law enforcement one, the first and the most important condition to be changed is the viewpoint of the legislator. What does it mean exactly? The justification of the criminal legal steps should be thought over by the legislator. Namely, the rules of criminal law should enforce only in the field of criminal law and criminal procedure law. Therefore, the opportunity of decriminalization arises, which would have to effect all of crimes against the border barrier. It would be a reasonable step, because it would be based on not only the criminal statistical data mentioned in the Table 2-3., but also on the handling method worked out by the police force to stop the irregular migratory flow. It would ensure the rapidity and efficiency of the procedures against the detected irregular migrants and would not cause a huge economic and administrative border (can we think here about the cost of practical application of the right on use of native language – the cost of translations, and the cost of the officially appointed defense counsel) for the authorities conduct the criminal procedures. For the reasons mentioned above, creating the accordance between the practice and the legal rules is to be considered in the near future in Hungary.

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