

Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees

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Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees

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Visegrad countries

Refugees

European Union

Abstract

The key research question of this paper is why the Visegrad group countries (the Czech Republic, Hungary, Poland and Slovakia) are reluctant to participate in the EU schemes on solidarity with third states and within the EU. The notions of solidarity, burden- and responsibility-sharing are clarified (together with related concepts, such as loyal cooperation) before reviewing in a systemic way the possible range of responsibility-sharing in regard to asylum seekers and persons in need of international protection. Scholarly and institutional proposals for burden-/ responsibility-sharing are presented as an arsenal of options available to the Visegrad Group and the EU in general. An analysis of the Visegrad countries documents and actual situation with regard to the irregular movement proves that whereas they uniformly reject the idea of compulsory relocation within the EU of persons applying for international protection, in general the group is far from homogenous. Hungary and Poland significantly differ from the Czech Republic and Slovakia. Even within the group, Hungary may have acquired a specific position with its total denial of the fact that irregularly arriving persons may need protection within the EU. The conclusion is that more responsibility-sharing within the EU as a whole would be needed, leading to a unified protection space, but in reality a shift of the focus emerges, with the effort to move protection into geographic areas outside the EU.

UNHCR's record budget for 2016 [6.5 billion dollars] is substantially lower than the amount US consumers spend each year on Halloween decorations, costumes and candy.¹

I urge you, Secretary-General, to initiate negotiations on sharing this burden at a global level. All major stakeholders of international politics will have to take some of the migrants to their countries as part of a global quota system.²

Introduction

A key issue in the implementation of the Common European Asylum System is the commonality of intentions and determination of the EU Member States.³ Ruptures, larger than before, seem to have appeared during and after the events of 2015. This paper offers a closer look at these events, concentrating on the drifting away of the Visegrad group countries (the Czech Republic, Hungary, Poland and Slovakia) from those EU Member States most

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¹ Thomas Gammeltoft-Hansen and Nikolas F. Tan, "The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy", in *Journal of Migration and Human Security*, Vol. 5, No. 1 (2017), p. 45, <https://doi.org/10.14240/jmhs.v5i1.73>.

² Viktor Orbán, *Statement at the High Level Side Event of the 70th Session of the United Nations General Assembly "Strengthening Cooperation on Migration and Refugee Movements in the Perspective of the New Development Agenda"*, New York, 30 September 2015, <http://www.un.org/en/development/desa/population/migration/events/ga/2015/docs/statements/HUNGARY.pdf>.

³ For the sake of simplicity, I will not mention Iceland, Liechtenstein, Norway and Switzerland separately, unless the context requires a specific mention. In all other locations, "EU Member States" should be understood as including them.

closely involved with the migration crisis (the “core”) and to some extent from each other.⁴

However, before analysing the concrete gaps and disagreements, the article reviews the abstract basis of the unity or disarray of EU states: the concepts of solidarity, responsibility- and burden-sharing. It shows the great variety of interpretations and concrete suggestions for sharing responsibility and the burden of offering protection to those in need. I will attempt to establish a consistent terminology and then compare academic and institutional suggestions for responsibility-sharing, showing the range of proposals including the changing approach of the Commission itself.

With this background it will be easier to note the subtle differences between the Visegrad countries and the radicality of the illiberal and anti-EU position of Hungary.

1. Solidarity, fair sharing of responsibility, allocation of responsibilities

Consideration of the terms “solidarity”, “fair sharing of responsibility”, “allocation of responsibility” and adding to the list “burden-sharing”, “balance of efforts”, “loyal co-operation” can lead to considerable confusion.⁵ Some of the uncertainties are purely terminological, others relate to substance, namely the existence or not of legal obligations, and whether they refer to the simple allocation of tasks/obligations, or in fact point to situations where states (or other actors) are supposed to contribute more than their original obligations, in solidarity with others who are exposed to particular pressures.

Solidarity may mean a collective duty to perform where one member of the collectivity fails to perform according to its obligation. This was identified in Roman law as establishing joint and severe liability.⁶ In that sense it is

4 See the Visegrad Group official website: <http://www.visegradgroup.eu>.

5 Philippe De Bruycker and Evangelia (Lilian) Tsourdi, “The Bratislava Declaration on Migration: European Irresponsibility Instead of Solidarity”, in *European Immigration and Asylum Law and Policy Blog*, 27 September 2016, <http://eumigrationlawblog.eu/?p=1084>; Eleni Karageorgiou, “The Law and Practice of Solidarity in the Common European Asylum System: Article 80 TFEU and Its Added Value”, in *SIEPS European Policy Analysis*, No. 2016:14 (November 2016), <http://www.sieps.se/en/node/3407>; Marcus Klamert, *The Principle of Loyalty in EU Law*, Oxford, Oxford University Press, 2014; Volker Türk and Madeline Garlick, “From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees”, in *International Journal of Refugee Law*, Vol. 28, No. 4 (December 2016), p. 661-665, <https://doi.org/10.1093/ijrl/eew043>; Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford, Oxford University Press, 2009, p. 170-171.

6 Gregor Noll, “Why the EU Gets in the Way of Refugee Solidarity”, in *OpenDemocracy*, 22 September 2015, <https://www.opendemocracy.net/node/96232>.

built on the expectation that every participant in a co-operative venture contributes its own share. That meaning of solidarity may be linked to the duty of loyal or sincere co-operation as enshrined in Article 4 (3) of the Treaty of the European Union (TEU), referring to the expectation that each Member State will perform according to the requirements of the relevant *acquis*.⁷

However, solidarity may have a second, substantively different meaning, whereby it refers to a gesture of assistance, when one actor goes beyond what may (legally) be expected from it in order to help the other actor who seeks external assistance. In this sense solidarity may be required by moral (or political) norms but certainly is more than simply meeting the existing concrete legal obligations and responsibilities.⁸

The preambular paragraph of the Geneva Convention relating to the Status of Refugees of 1951 is the usual starting point for establishing a duty/expectation of solidarity in the second sense.

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of the problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation...⁹

Referring to the “unduly heavy burden” assumes “due” “burden”, which again may be due as a legally undertaken responsibility or as a political-moral expectation assuming that countries have fair shares of the burden; but a situation may arise (e.g. mass influxes or internal difficulties) when providing asylum becomes so onerous that it can no longer be expected from the country.

As a principle of law, solidarity is frequently seen as a vague normative command, which does not lead to justiciable obligations but has an element of corrective justice, a drive to achieve or restore a fair allocation of duties by way of co-operation and assistance.¹⁰

Article 80 of the Treaty on the Functioning of the European Union (TFEU) establishes a clear connection between solidarity and fair sharing of responsibility, when it treats them as aspects of a single principle applicable to several policies in the area of freedom, security and justice, including asylum policy:

7 Marcus Klamert, *The Principle of Loyalty in EU Law*, cit., p. 40.

8 Philippe De Bruycker and Evangelia (Lilian) Tsourdi, “The Bratislava Declaration on Migration”, cit.

9 United Nations, *Treaty Series*, Vol. 189 (1954), p. 137, [https://treaties.un.org/doc/publication/UNTS/Volume 189/v189.pdf](https://treaties.un.org/doc/publication/UNTS/Volume%20189/v189.pdf).

10 See for example Volker Türk and Madeline Garlick, “From Burdens and Responsibilities to Opportunities”, cit., p. 662-663 with further references and quotes from relevant documents.

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.¹¹

Beyond doubt, the rule enshrined in Article 80 is binding: the policies and their implementation “shall be governed” by the principle and EU acts “shall contain appropriate measures” to realise solidarity and fair-sharing.¹²

“Sharing of responsibilities” is usually understood as the polite term for what was and still is frequently referred to as “burden-sharing”. The use of “responsibility” instead of “burden” acknowledges that asylum seekers and refugees enrich society even if – especially in the early period of their presence – they may burden the social support system and, for lack of integration, create tensions based on cultural or habitual differences, and sometimes even political animosity.¹³ However, it should be recalled that J. Hathaway establishes a meaningful difference between “burden-sharing” and “responsibility-sharing” by using the first expression to the allocation of costs and the second to the placement of persons.¹⁴

Allocation of responsibilities may (and unfortunately frequently is) different from a fair sharing of responsibility – ask any Greek official. Allocation of responsibility is assigning competence or duty to act. Since its inception in 1990 the Dublin system has been a system of allocating responsibility for refugee status determination procedure,¹⁵ but it was never a system aimed at fairness or genuine burden/responsibility-sharing.¹⁶ This was clearly

admitted by the Commission in 2016: “The current Dublin system was not designed for situations of large-scale uncontrolled arrivals and does not ensure a sustainable and fair sharing of responsibility for asylum applicants across the Union.”¹⁷

An attempt to take into account the dysfunctional effect of the rules on allocating responsibility for the determination of refugee status is reflected in Article 78 (3) TFEU, which states that:

In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

The conclusion of the above is that solidarity and fair sharing of responsibility in Article 80 TFEU make room for more than an allocation of tasks; they enable fairness and assistance beyond existing legal obligations. As the Dublin regime ignores the size of the task assigned by it to the individual Member States, it is neither an expression of solidarity nor a fair sharing of responsibility.

Naturally solidarity has many other relevant aspects (in respect of the refugees, the local communities, those left behind by the asylum seeker, etc.) but those are beyond the scope of this paper. The relation to third countries will, however, be touched upon.¹⁸

2. Scholarly views and legal measures of burden-/responsibility-sharing in receiving refugees

Is protection of refugees a public good, which should be produced as a result of collective effort? What type of burden-/responsibility-sharing should take place? These questions have been haunting the scholars for decades.¹⁹

European Parliament, June 2016, p. 22-25, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2016\)571360](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2016)571360); Esin Küçük, “The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?”, in *European Law Journal*, Vol. 22, No. 4 (July 2016), p. 468, <http://dx.doi.org/10.1111/eulj.12185>.

¹⁷ European Commission, *Questions & Answers: Reforming the Common European Asylum System* (MEMO/16/1621), 4 May 2016, p. 1, http://europa.eu/rapid/press-release_MEMO-16-1621_it.htm.

¹⁸ TFEU Article 78(2)g lays the foundation: “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising [...] g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.”

¹⁹ James C. Hathaway and R. Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and

¹¹ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, OJ C 326, 26.10.2012, p. 47-390, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:12012E/TXT>.

¹² Noll is of the same view. See Gregor Noll, “Why the EU Gets in the Way of Refugee Solidarity”, cit.

¹³ Volker Türk and Madeline Garlick, “From Burdens and Responsibilities to Opportunities”, cit., p. 664-665.

¹⁴ James C. Hathaway, “A Global Solution to a Global Refugee Crisis”, in *European Papers*, Vol. 1, No. 1 (2016), p. 98, <http://dx.doi.org/10.15166/2499-8249/7>.

¹⁵ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, OJ C 254, 19.08.1997, p. 1-12, [http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:41997A0819\(01\)](http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:41997A0819(01)). The Dublin regulation in force is Regulation (EU) No 604/2013. See European Parliament and Council of the European Union, *Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32013R0604>.

¹⁶ Francesco Maiani, *The Reform of the Dublin III Regulation*, Brussels,

• **Table 1 | Levels of analysis and possible methods of evaluating responsibility-/burden-sharing proposals**

Level of analysis Field/discipline	State / community	Individual / family
Moral and political philosophical	* Responsibility sharing or shifting? * What constitutes a fair allocation of responsibility?	* Freedom of movement (choice of residence) * Decreasing vulnerability
Practical, political	* What is in the interest of the state: - ever fewer asylum seekers? - minimum expenses? - avoidance of social tensions?	* Can the asylum seeker reach her preferred destination? * Where is social integration the smoothest?
Legal, justice-oriented	* Compatibility with the Geneva Convention * Mutual trust and recognition * Criteria of fairness towards the asylum seeker: - Procedural rights - Substantive interpretation of definition - Material reception conditions	European Convention on Human Rights (Article 3, 8, 13) issues (torture, inhuman degrading treatment or punishment, right to privacy and family, effective remedies)
Social, sociological, psychological	* Social identity construction of receiving society by deciding on why to protect refugees (or why not to) * Selectivity according to country of origin and according to assumed cultural/religious proximity/distance	* Extended trauma * Loss of trust in democracy (and its superiority over authoritarian regimes)

Academics and institutions have come up with a great number of proposals, many of which rely on hard variables (gross domestic product [GDP], population, size of territory), while others include soft variables as cultural proximity or the preferences of the asylum seeker. There is no agreement concerning the mix of variables, but the pressure for a solution, based on global, regional or sub-regional co-operation is mounting. Instead of individually reviewing the proposals, let me offer an analytical table

Solution-oriented Protection”, in *Harvard Human Rights Journal*, Vol. 10 (Spring 1997), p. 115-211, <http://repository.law.umich.edu/articles/1622>; Peter H. Schuck, “Refugee Burden Sharing: A Modest Proposal”, in *Yale Journal of International Law*, Vol. 22, No. 2 (Summer 1997), p. 243-297, http://digitalcommons.law.yale.edu/fss_papers/1694; Eiko R. Thielemann, “Between Interests and Norms: Explaining Burden-Sharing in the European Union”, in *Journal of Refugee Studies*, Vol. 16, No. 3 (September 2003), p. 253-273; Alexander Betts, “Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory”, in *Journal of Refugee Studies*, Vol. 16, No. 3 (September 2003), p. 274-296; Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees*, cit.; Jan Schneider, Marcus Engler and Steffen Angenendt, *European Refugee Policy. Pathways to Fairer Burden-Sharing*, Berlin, Sachverständigenrat deutscher Stiftungen für Integration und Migration (SVR), November 2013, <https://www.svr-migration.de/en/publications/european-refugee-policy-pathways-to-fairer-burden-sharing>; Jesus Fernández-Huertas Moraga and Hillel Rapoport, “Tradable Refugee-admission Quotas and EU Asylum Policy”, in *CESifo Economic Studies*, Vol. 61, No. 3-4 (September-December 2015), p. 638-672; Martin Wagner and Albert Kraler, *An Effective Asylum Responsibility-Sharing Mechanism*, Updated version, Vienna, International Centre for Migration Policy Development (ICMPD), October 2015, https://www.icmpd.org/fileadmin/ICMPD-Website/Newsletter/October_2015/ICMPD_TP_Responsibility_Sharing_Update2015_1007.pdf; Esin Kūçük, “The Principle of Solidarity and Fairness in Sharing Responsibility”, cit.; James C. Hathaway, “A Global Solution to a Global Refugee Crisis”, cit.

showing the range of proposals, some scholarly and some from EU institutions.

As a preliminary to the actual matrix of proposals an analytical tool is offered in the form of Table 1. It reflects the many possible ways of evaluating any responsibility-sharing suggestion. Whereas this paper concentrates on the interstate aspects, Table 1 highlights the impact of any physical allocation proposal on the asylum seeker or refugee. It is applicable to the existing Dublin regime as well as to any relocation or resettlement suggestion.

A proposal on burden-/responsibility-sharing may target different elements and geographic entities. Table 2 reflects the abstract variables which may be reflected in any concrete proposals on burden- and/or responsibility-sharing. It broadens our perspectives as it recognises that the mechanism intended to carve out a fair share may come in different shapes, from addressing root causes (as in the case of the EU Regional Trust Fund in Response to the Syrian Crisis²⁰) to sharing costs without moving persons, which is the underlying idea of the EU’s Asylum, Migration and Integration Fund (AMIF).²¹ The Trust Fund is an inter-regional form of burden-sharing; by contrast, the AMIF is a sub-regional body, covering the EU countries.

²⁰ See the European Commission website: *The Madad Fund*, last updated, 6 December 2016, https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/syria/madad_en.

²¹ European Parliament and Council of the European Union, *Regulation (EU) No 516/2014 of 16 April 2014 establishing the Asylum, Migration and Integration Fund...*, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32014R0516>.

• **Table 2 | The goals and the sites of responsibility-/burden-sharing**

Forms of responsibility-/burden-sharing		Geographic setting of the implementation of the goal
Addressing root causes	Most of the forms may be realised in different geographic settings →	Global
Impact on routes, denial of entry, diverting arrivals		Inter-regional
Harmonisation of rules		Regional
Allocation of persons		Sub-regional
Financial contribution instead of receiving persons		Bilateral
Sharing of costs and benefits of receiving persons in places of their choice		Intra-state (e.g. in a federation)

• **Table 3 | Institutional/state schemes for responsibility-sharing**

	Commission Crisis relocation mechanism COM/2015/450	EU Council Relocation decision 2015/1601	Commission Dublin recast - Corrective allocation mechanism COM/2016/270	Germany Königstein formula
Total GDP	Yes	Yes	Yes	No
GDP/person	No	No	No	No
Tax income	No	No	No	Yes
Population (size)	Yes	Yes	Yes	Yes
Territory	No	No	No	No
Population density	No	No	No	No
Unemployment	Yes	Yes	No	No
Number of earlier applicants	Yes	Yes	No	No
Physical proximity to country of origin (neighbour, same region)	No	No	No	No
Cultural proximity	No	No	No	No

The above forms of harmonisation of (national) rules may at first sight appear not to be forms of burden/responsibility sharing. However, when a group of states harmonise their rules on reception conditions, on procedural standards, or on interpreting key terms of the definition of a person in need of international protection, then that group is aiming at creating a level playing field, which can act as a disincentive for the asylum seeker to preferring one state of the group over the other when choosing a destination country in order to seek asylum.

Table 3 summarizes three institutional efforts reflecting one possible form of sharing the tasks of protection, namely the allocation of persons, in the case of the EU at sub-regional level, in the case of the Königstein formula²² at intra state level, in Germany.

²² The Königstein key, weighing tax income with two-thirds and population size with one-third is the general formula, recalculated every year, to allocate the contribution of the Länder in financing certain federal tasks.

The change in the Commission's approach is interesting. Whereas in the autumn of 2015 both its general crisis relocation proposal²³ and the second relocation decision of the Council²⁴ based on the Commission's proposal²⁵ incorporated four criteria determining the allocation key (population, total GDP – increasing the share, unemployment, number of applicants during the last five years – decreasing the share), the 2016 proposal drops those factors which would decrease the numbers of persons to be taken in.

²³ European Commission, *Proposal for a Regulation establishing a crisis relocation mechanism...* (COM/2015/450), 9 September 2015, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52015PC0450>.

²⁴ Council of the European Union, *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32015D1601>.

²⁵ European Commission, *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary* (COM/2015/451), 9 September 2015, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52015PC0451>.

• **Table 4 | Selected scholarly views on responsibility-/burden-sharing**

	Schuck (1997)	Hathaway and Neve (1997)	Schneider et al. (2013)
Total GDP	Yes ("wealth")	No (Yes – external supporter)	Yes (5-year average – within EU average)
GDP/person	(Yes)	No (Yes – external supporter)	No
Tax income	No	No	No
Population (size)	No	No	Yes
Territory	No	No	Yes (compared with EU total)
Population density	No	No	(Yes)
Unemployment	No	No	Yes
Number of earlier applicants	No	No	No
Physical proximity to country of origin (neighbour, same region)	Yes	Ye	No
Cultural proximity	No	Yes	No

This small sample of academic proposals (see Table 4), of which the first two relate to a global responsibility-sharing and the third to an intra-EU solution, show that the relative weight given to factors listed in Tables 1 and 2 lead to different combinations in the basis of responsibility-sharing. Cultural proximity – to take one example – may relate to the practical/political dimension both at community (society) level (avoidance of social conflict) and at individual level (social integration). The differences in geographic scope and applicable criteria notwithstanding, they all share the view that actions for protection should not be determined by chances of history and geography and by choices on the part of the smugglers and asylum seekers, but, instead, by active co-operation among states that should lead either to the allocation of persons or to a mix of physical distribution and financial compensation.

3. EU schemes for relocation and resettlement of asylum-seekers and their implementation

This section focuses on the *ad hoc* measures adopted or proposed by the EU in the wake of the large-scale arrival of asylum seekers and other migrants from 2015. It does not cover the standard operation of the Asylum, Migration and Integration Fund (AMIF).²⁶ Nor does it scrutinise the European Asylum Support Office, which in due course will become the European Union Agency for Asylum.²⁷ Which of the options reviewed above materialised in the hasty legislative and other acts? Which measures led to the drifting away of the Visegrad countries from the core

²⁶ European Parliament and Council of the European Union, *Regulation (EU) No 516/2014 of 16 April 2014 establishing the Asylum, Migration and Integration Fund*, cit.

²⁷ European Commission, *Proposal for a Regulation on the European Union Agency for Asylum...* (COM/2016/271), 4 May 2015, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52016PC0271>.

of the EU?

The summer and autumn of 2015 led to rapid changes in the asylum landscape.²⁸ The ill-baptized European Agenda on Migration essentially dealt with irregular arrivals, border management and strengthening the common asylum system, devoting minimal attention to regular migration.²⁹ It heralded a "temporary distribution scheme for persons in clear need of international protection to ensure a fair and balanced participation of all Member States" and also promised "a lasting solution" in the form of a "legislative proposal by the end of 2015 to provide for a mandatory and automatically-triggered relocation system to distribute those in clear need of international protection within the EU when a mass influx emerges".³⁰

Attempts at a fair responsibility-sharing resulted in two decisions on *ad hoc* relocation,³¹ a lifeless proposal for a permanent crisis relocation system³² and the proposal for the amendment of the Dublin regulation,³³ including,

²⁸ Sergio Carrera et al., "The EU's Response to the Refugee Crisis. Taking Stock and Setting Policy Priorities", in *CEPS Essays*, No. 20 (16 December 2015), <https://www.ceps.eu/node/11189>.

²⁹ European Commission, *A European Agenda on Migration* (COM/2015/240), 13 May 2015, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52015DC0240>.

³⁰ *Ibid*, p. 4.

³¹ Council Decision (EU) 2015/1523 of 14 September 2015 envisaging the voluntary relocation of 40,000 persons, 24,000 from Italy and 16,000 from Greece, and Council Decision (EU) 2015/1601 of 22 September 2015 envisaging the relocation of 120,000 persons in clear need of protection. Within that 15,600 from Italy and 50,400 from Greece in the first year and 54,000 either from the same two or from other Member States in the second year.

³² European Commission, *Proposal for a Regulation establishing a crisis relocation mechanism...*, cit.

³³ European Commission, *Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a*

among others, a “corrective allocation mechanism” (the fairness mechanism). The latter essentially replaced the 2015 general crisis mechanism proposal. In the two binding decisions of September 2015, no relocation to Denmark, Ireland, the UK, Greece and Italy is envisaged; in exchange, the latter two are supposed to adopt a roadmap leading to the normal operation of the Dublin system.

The voluntary and compulsory relocation of asylum seekers “in clear need of international protection” from Greece and Italy is far behind schedule and some Member States formally breach the binding decision. According to the state of play at 17 May 2017,³⁴ 5,758 asylum seekers from Italy, and 13,107 from Greece have been relocated. In its tenth report on relocation and resettlement, the Commission did not show signs of abandoning the scheme.³⁵ Instead, it declared that: “It is crucial that all Member States urgently intensify their efforts and meet the monthly relocation targets – at least 3,000 relocations from Greece and at least 1,500 relocations from Italy.”³⁶

No ambiguity was left as to the consequences of not conforming to the binding relocation decision: “If Member States do not increase their relocations soon, and if the pressure on Greece and Italy is not alleviated, the Commission will not hesitate to make use of its powers under the Treaties.”³⁷

The poor performance of the Visegrad countries was highlighted, when the Commission noted with disappointment that in respect of relocation from Italy, “Hungary, Austria and Poland are still refusing to participate [...] the Czech Republic has not pledged since May 2016 and has not relocated anyone since August 2016, [...] and Slovakia [is] relocating on a very limited basis.”³⁸ The assistance offered by the Visegrad countries to

stateless person (recast) (COM/2016/270), 12 May 2016, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52016PC0270>.

³⁴ European Commission, *Member States’ Support to Emergency Relocation Mechanism (As of 17 May 2017)*, available on the European Agenda on Migration webpage as the latest “State of Play – Relocation”, <http://europa.eu/!YC64jH>.

³⁵ European Commission, *Tenth Report on Relocation and Resettlement* (COM/2017/202), 2 March 2017, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52017DC0202>.

³⁶ *Ibid.*, p. 7.

³⁷ *Ibid.*, p. 8. On 16 May, the Commission “urges the Member States that have not relocated anyone, or have not pledged for Italy and Greece for almost a year, to start doing so immediately and within a month. If no action is taken, the Commission will specify in its next report in June 2017 its position on making use of its powers under the Treaties and in particular on the opening of infringement procedures.” European Commission, *Twelfth Report on Relocation and Resettlement* (COM/2017/260), 16 May 2017, p. 11, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52017DC0260>.

³⁸ European Commission, *Tenth Report on Relocation and Resettlement*, cit., p. 4. See also European Commission, *Twelfth Report on Relocation and Resettlement*, cit., p. 4.

Greece was similarly unacceptable, with Slovakia and the Czech Republic altogether having relocated 28 persons in clear need of international protection, and Hungary and Poland none. The Commission’s eleventh report again highlighted Hungary’s and Poland’s inaction.³⁹ It also stressed that those Member States which do not meet their obligations by September 2017 (the expiry date of the decision) will still be under an obligation to relocate their share.⁴⁰

The corrective allocation mechanism envisaged a process to deal with those asylum seekers whose application was eligible – that is, who did not come from a safe third country or a first country of asylum.⁴¹ Each Member State would have a “reference key” related to the total number of eligible asylum applications submitted in the past 12 months, indicating a share it ought to process. The size of that share was to be determined by the total GDP and population of the country, compared with EU totals. Both factors would have equal relative weight.⁴² If the number of spontaneously arrived eligible asylum seekers and resettled refugees exceeded 150 percent of the reference key, then the arrivals above the 150 percent would automatically be relocated to those countries which were responsible for fewer applications than their share (reference key). Those unwilling to take the appropriate number of applicants would be obliged to pay 250,000 euros per applicant, who ought to have been allocated to that state but the state was unwilling to receive them.

In addition to the relocation mechanism, the EU has initiated several resettlement schemes. The *ad hoc* decision of 20 July 2015 of the “Representatives of the Governments of the Member States meeting within the Council” agreed to resettle persons from third countries who were in clear need of international protection.⁴³ The

³⁹ “Hungary and Poland should start pledging and relocating immediately; the Commission stands ready to discuss with these Member States on how to assist them in making progress towards meeting their legal obligations, taking into account the importance for all Member States to show solidarity towards Greece and Italy.” European Commission, *Eleventh Report on Relocation and Resettlement* (COM/2017/212), 12 April 2017, p. 4, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52017DC0212>. See also European Commission, *Twelfth Report on Relocation and Resettlement*, cit., p. 3 and 4.

⁴⁰ European Commission, *Eleventh Report on Relocation and Resettlement*, cit., p. 12. European Commission, *Twelfth Report on Relocation and Resettlement*, cit., p. 11.

⁴¹ European Commission, *Proposal for a Regulation establishing the criteria and mechanisms...*, cit.

⁴² A simple example: Hungary’s population (roughly 10 million) makes up approximately 2 percent of the EU population before Brexit. Its total GDP amounts to 0.4 percent of the EU total. Each of them weighed with 50 percent the reference key for Hungary would be 1.2 percent, meaning that out of 100,000 applications Hungary ought to process 1,200.

⁴³ Council of the European Union, *Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection*, 20 July 2015, <http://>

Czech Republic pledged 400 places, Poland 900, Slovakia 100. Hungary did not offer a single place. That was in stark contrast with the fact that even states which could opt out or are not even EU Member States participate in the resettlement scheme.

Approximately a year later, the Commission submitted a proposal for a permanent resettlement scheme.⁴⁴ The planned Union Resettlement Framework would entail an annual union resettlement plan set by the Council, based on the offer of Member States, fixing the maximum number of persons to be resettled into the EU and the geographic priorities, identifying countries of first asylum from where to resettle. The Commission is to implement the plan by way of targeted Union resettlement schemes fixing the actual number to be resettled by each state as well as the details of regions and specificities of co-operation. Member States would eventually choose the actual persons, who have to consent to the resettlement. The proposal is being negotiated at the time of writing this paper.

The third avenue of resettlement to the EU regulated by a Union document⁴⁵ is fixed in the EU–Turkey statement of 18 March 2016.⁴⁶ This document prescribes that if a Syrian person is returned from Greece to Turkey under the arrangement created by the statement, then another Syrian person will be resettled from Turkey to the EU. The statement's nature has been disputed. As the General Court of the EU approvingly recalled, the European Council made it clear that it was “merely ‘the fruit of an international dialogue between the Member States and [the Republic of] Turkey and — in the light of its content and of the intention of its authors — [was] not intended to produce legally binding effects nor constitute an agreement or a treaty.’”⁴⁷

According to the Commission a total of 16,163 people have been resettled into the EU as of 12 May 2017, of which 5,695 came as a result of the EU–Turkey statement

data.consilium.europa.eu/doc/document/ST-11130-2015-INIT/en/pdf.

⁴⁴ European Commission, *Proposal for a Regulation establishing a Union Resettlement Framework...* (COM/2016/468), 13 July 2016, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52016PC0468>.

⁴⁵ In fact in case Case T 193/16 the General Court of the EU came to the conclusion that it had no jurisdiction to consider the plea for annulment of the deal as it did not constitute a treaty concluded by the EU Council. Court of Justice of the European Union, *Case T 193/16 (NG v the Council)*, Order of 28 February 2017, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62016TO0193>.

⁴⁶ EU-Turkey Statement, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement>.

⁴⁷ Court of Justice of the European Union, *Case T 193/16 (NG v the Council)*, cit. Order of 28 February 2017 quoting the European Council's submission to the case.

mechanism.⁴⁸ Of the Visegrad countries only the Czech Republic participates in the voluntary resettlement, with 52 persons having been taken in to date.

A confluence of the relocation and the resettlement schemes was created by Council decision 2016/1754,⁴⁹ which entitled states to admit Syrian nationals from Turkey instead of relocating people from Greece or Italy.

4. The Visegrad countries' response to the EU measures

4.1 The attack of Hungary, Slovakia and Poland on the 22 September 2015 resolution on relocation of 120,000 asylum seekers in clear need of protection (The CJEU case⁵⁰)

For purely political reasons Hungary⁵¹ and Slovakia⁵² (which, together with Romania and the Czech Republic, voted against Council decision 2016/1754) started a – still pending⁵³ – case for the annulment of the decision⁵⁴ on legal grounds.

The main arguments submitted by Hungary are the following,⁵⁵ whereby “(S)” indicates that Slovakia's pleas are more or less the same:

1. Article 78(3) TFEU does not empower the Council to adopt a legislative act, so the decision ought not to have amended the Dublin III regulation (604/2013) (S);
2. Measures lasting or having effects for three or more years are not provisional as required by 78(3) (S);
3. The decision-making ought to have been unanimous

⁴⁸ European Commission, *Relocation and Resettlement - State of Play*, 16 May 2017, available in the European Agenda on Migration webpage: Factsheets, <http://europa.eu/!Hm98Yn>.

⁴⁹ Council of the European Union, *Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32016D1754>.

⁵⁰ Poland's intervention mentioned in the European Council conclusions of 15 December 2016 (EUCO 34/16), <http://europa.eu/!Qn94Rg>.

⁵¹ Court of Justice of the European Union, *Case C-647/15, Hungary v Council of the European Union*, OJ C 38, 1.2.2016, p. 43-44, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62015CN0647>.

⁵² Court of Justice of the European Union, *Case C-643/15, Slovak Republic v Council of the European Union*, OJ C 38, 1.2.2016, p. 41-43, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62015CN0643>.

⁵³ The oral hearing took place on 10 May 2017.

⁵⁴ Council of the European Union, *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, cit.

⁵⁵ The following passages are taken from Boldizsár Nagy, “Hungarian Asylum Law and Policy in 2015–2016: Securitization instead of Loyal Cooperation”, in *German Law Journal*, Vol. 17, No. 6 (2016), p. 1070-1071, http://www.germanlawjournal.com/s/07-PDF_Vol_17_No_06_Nagy-Final.pdf.

- as the Council departed from the Commission proposal;
4. As the decision is a legislative act because of its content, national parliaments ought to have had a right to form an opinion (S);
 5. After changing the content of the proposal the European Parliament was not consulted again (S);
 6. The decision contradicts the conclusions of the European Council adopted on 25 and 26 June 2015 envisaging voluntary relocation and so violates Article 68 TFEU;
 7. The decision infringes the principles of legal certainty and legislative clarity as rules of procedure and selection for relocation were left in the dark;
 8. It violates the right of the asylum seekers guaranteed by the 1951 Geneva Convention to stay in the country in which the application was submitted if there are no material links to the state to which the transfer is envisaged;
 9. The measure is contrary to the principle of proportionality (S).

Some of the arguments may be well founded in law,⁵⁶ but the overall impact of the case goes beyond the validity or not of the decision, especially in view of the limited results of the scheme as a whole. Kees Groenendijk and this author came to the conclusion that “[w]hat appears to be a legalistic challenge to a Council Decision may be part of a larger strategy representing a genuine threat to the functioning of the CEAS [Common European Asylum System]. Alternatively, it may turn out to be a rear guard battle.”⁵⁷ The fact that neither the Commission nor Greece intervened in the case (Italy did, on the side of the Council) and that no visible action has been taken in the year and a half since the start of the case may indicate the low priority given to the case within the EU.⁵⁸

4.2 The corrective allocation mechanism under fire

The proposal in the Dublin recast of 2016 envisaging compulsory and automatic relocation also met with fierce resistance from the Visegrad countries, especially by Hungary. The words of State Secretary for Government Communication, Bence Tuzson, at a press briefing were reported by the government portal on 1 August 2016 in the following way:

⁵⁶ Zuzana Vikarska, “The Slovak Challenge to the Asylum-Seekers’ Relocation Decision: A Balancing Act”, in *EU Law Analysis Blog*, 29 December 2015, <http://eulawanalysis.blogspot.de/2015/12/the-slovak-challenge-to-asylum-seekers.html>.

⁵⁷ On the process see Kees Groenendijk and Boldizsár Nagy, “Hungary’s Appeal Against Relocation to the CJEU: Upfront Attack or Rear Guard Battle?”, in *European Immigration and Asylum Law and Policy Blog*, 16 December 2015, <http://eumigrationlawblog.eu/?p=476>.

⁵⁸ Marcello Di Filippo, “The Strange Procedural Fate of the Actions for Annulment of the EU Relocation Scheme”, in *Eurojus*, Vol. 4, No. 1 (January-March 2017), <http://rivista.eurojus.it/?p=2909>.

The Hungarian people must stop Brussels which wants to settle in Hungary a town [full] of illegal immigrants, thereby increasing the risk of terrorism and crime [...] The European Union would extend an invitation to the continent to millions if – by curtailing national sovereignty – it [extended its] competence [to] the assessment of asylum requests and implemented a mandatory mechanism for the distribution of those arriving in Europe. [...] He stressed: the Hungarian Cabinet finds it unacceptable, and it is likewise contrary to EU [law], that Brussels would impose a penalty of HUF 78 million [250,000 euros] per immigrant on the Member States that reject the forced settlement of immigrants. “Hungary will not sign any contract or agreement in which it would resign its fundamental right to decide whom we may live together with in Hungary.”⁵⁹

Resolution 308, adopted by the Czech Parliament’s Committee on European Affairs on 22 September 2016, called on the government “to insist on deletion of the provisions establishing the Corrective Allocation Mechanism from the text of the proposal while discussing the Dublin regulation reform at the EU level and eventually to block adoption of the respective proposal as a whole.”⁶⁰

Slovakia, which holds the presidency, submitted a “non-paper” essentially rejecting the compulsory allocation and replacing it with flexible solidarity (later renamed “effective solidarity”), entailing a phased approach and only voluntary relocation.⁶¹ The Polish Sejm and the Slovak Parliament also sent reasoned opinions refusing the corrective allocation mechanisms.⁶²

On 16 September 2016 the heads of states of the V4 coined their idea of “flexible solidarity” in a statement adopted at the day of the European Council meeting in Bratislava.

⁵⁹ Hungarian Government, Cabinet Office of the Prime Minister, *Brussels Must Be Stopped*, 1 August 2016, <http://www.kormany.hu/en/cabinet-office-of-the-prime-minister/news/brussels-must-be-stopped>.

⁶⁰ Czech Chamber of Deputies, Committee for European Affairs, *Resolution No. 308*, 22 September 2016, <http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20160133/czpos.do>.

⁶¹ The non-paper entitled “Effective Solidarity: A Way Forward on Dublin Revision” is available at <http://www.statewatch.org/news/2016/nov/eu-council-slovak-pres-non-paper-dublin-effective-solidarity-11-16.pdf>. For a comment, see Maarten den Heijer, “Corrective Allocation or Effective Solidarity? The Slovak Presidency Non-Paper on the Revision of the Dublin System”, in *EU Immigration and Asylum Law and Policy Blog*, 10 March 2017, <http://eumigrationlawblog.eu/?p=1404>.

⁶² Polish Sejm, European Union Affairs Committee, *Opinion No. 13*, 22 September 2016, <http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20160133/plsej.do>; Slovak National Council, European Affairs Committee, *Resolution No. 29*, 12 September 2016, <http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20160133/skrad.do>.

Migration policy should be based on the principle of the “flexible solidarity”. This concept should enable Member States to decide on specific forms of contribution taking into account their experience and potential. Furthermore any distribution mechanism should be voluntary. The Visegrad group countries call for full and timely implementation of the roadmap Back to Schengen.⁶³

On 21 November 2016 the Visegrad group adopted a joint statement that left no doubt about their stance towards the compulsory distribution mechanism:

We believe that sharing of responsibilities under the Common European Asylum System, as well as support provided in accordance with the principle of solidarity, should be based on a voluntary mechanism coordinating Member States support provided in order to enhance asylum systems of those Member States that are affected by a large increase in numbers of asylum seekers. We are of the opinion that the EU needs to move beyond the proposals dividing EU Member States and that the EU should find an unequivocal solution which should include a viable and constructive alternative to measures imposing relocation of migrants. At the same time, we are committed to support the common European response to migration crisis with result-oriented and effective solutions that bring us closer to achieving our common goals and normalising the migration situation.⁶⁴

Five things are notable. First, a return to the Schengen roadmap, as demanded by the heads of states, would entail full participation in the relocation scheme as according to the roadmap:

[t]he agreed relocation schemes are essential tools to lessen the strain on the Member States under greatest pressure and to restore order to the management of migration. In the case of Greece, it has also become a tool of humanitarian assistance. Member States must step up the rate of relocation speeding up processing.⁶⁵

Second, the V4 texts speak of “sharing of responsibilities” but not of a fair sharing of responsibility. If a scheme is

based on voluntary contribution then fairness is less likely to be a component than voluntary contributions, which may reflect national preferences and (perceived) interests in an unchecked manner. Third, the insistence of voluntary schemes. Fourth, the replacement of the term “applicant” – a person who has made an application for international protection and is in clear need of international protection – with the neutral term “migrant”. Lastly, one must note the call for a “common European response” clearly rejecting the repeated Hungarian calls for sorting out the problems by national solutions.

5. The different roles played by the Visegrad countries in EU-bound migration

The Visegrad group is a political construct that is the outcome of the post-1990 euphoria. It is not a homogenous block and its internal co-operation is symbolic rather than effective in reinforcing it as a group separable from its environment. EU membership led to a soft harmonization of positions within the EU, but even at a crucial crossroads, such as the election of the president of the European Council, they may take different routes.

There are obvious country differences beyond the dissimilarities in size, population and economic power. Slovakia is member of the Eurozone, the rest are not. Hungary's increasing Russophilia is in stark contrast with Poland's traditional Russophobia. The inverse was true for many years in their relationship to Germany.

For this paper their different roles in the migratory movements has to be highlighted. Hungary lies on the western Balkan route and was crossed by more than 400,000 migrants in 2015 of whom 177,000 applied for asylum, while the others were simply transported to the Austrian border.⁶⁶ Hungary is a free-rider, ignoring the asylum acquis and the Schengen rules. The other three V4 countries were not confronted with similar challenges: even Poland registered a fraction of the claims submitted in Hungary. So, the Visegrad countries play very different roles in respect of migration to the EU (see Table 5).

Not only are the figures different, but the constitution of the asylum seeker groups is also varied (see Table 6).

⁶³ Visegrad Group, *Joint Statement of the Heads of Governments of the V4 Countries*, Bratislava, 16 September 2016, <http://www.visegradgroup.eu/calendar/2016/joint-statement-of-the-160919>.

⁶⁴ Visegrad Group, *Joint Statement of V4 Interior Ministers on the Establishment of the Migration Crisis Response Mechanism*, Warsaw, 21 November 2016, <http://www.visegradgroup.eu/calendar/2016/joint-statement-of-v4>.

⁶⁵ European Commission, *Back to Schengen - A Roadmap* (COM/2016/120), 4 March 2016, p. 9, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52016DC0120>.

⁶⁶ For details see Boldizsár Nagy, “Hungarian Asylum Law and Policy in 2015–2016”, cit., p. 1035-1040.

• **Table 5 | Asylum applications and protection granted in the V4 countries, 2015–2016**

Country	2015		2016	
	Asylum applications	Number of persons receiving protection at first instance	Asylum applications	Number of persons receiving protection at first instance
Czech Republic	1,525	460	1,475	435
Hungary	177,135	505	29,430	395
Poland	12,190	640	12,305	305
Slovakia	330	80	145	225

Source: Eurostat, (Applications) *Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded)*, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza; (Recognition numbers) *First instance decisions on asylum applications by type of decision - annual aggregated data*, <http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tps00192&language=en>.

• **Table 6 | Nationality of the largest asylum seeker groups and number of applicants in 2015**

Czech Republic	Hungary	Poland	Slovakia
Ukraine	Syria	Russia	Iraq
565	64,080	6,985	170
Syria	Afghanistan	Ukraine	Afghanistan
130	45,560	1,575	25
Cuba	Kosovo	Tajikistan	Ukraine
125	23,690	525	15
Vietnam	Pakistan	Syria	Unknown
55	15,010	285	15
China*	Iraq	Georgia	Cuba
35	9,175	230	5
Other	Other	Other	Other
325	16,920	655	40

Note: * including Hong Kong; ** UNSCR 1244/1999.

Source: Eurostat, *Five main citizenships of (non-EU) asylum applicants, 2015 (number of first time applicants, rounded figures)*, [http://ec.europa.eu/eurostat/statistics-explained/images/1/18/Five_main_citizenships_of_\(non-EU\)_asylum_applicants,_2015_\(number_of_first_time_applicants,_rounded_figures\)_YB16.png](http://ec.europa.eu/eurostat/statistics-explained/images/1/18/Five_main_citizenships_of_(non-EU)_asylum_applicants,_2015_(number_of_first_time_applicants,_rounded_figures)_YB16.png).

Poland and the Czech Republic have taken in a large numbers of Ukrainians who do not appear in refugee statistics but who may have been driven away from home for similar reasons.⁶⁷

These dissimilarities in the order of magnitude of arriving asylum seekers and other migrants set Hungary apart from the other three V4 countries. The language of securitisation, the discourse on “protecting (external) borders” had very different practical implications for Hungary. Whereas the other three countries could use the very same discursive turns in an almost abstract way, serving domestic political purposes without the need to actually process actual asylum applications or expand the reception capacity,⁶⁸ Hungary had to be intensively involved in the field.⁶⁹

⁶⁷ Andrej Babiš claims that Poland employs 1,000,000 Ukrainians, the Czech Republic 200,000. Karolina Zbytniewska, “Czech Deputy PM: A ‘Different’ Migration Is Needed”, in *EURACTIV.pl*, 20 February 2017, <http://eurac.tv/6E8C>.

⁶⁸ Ivana Smoleňová, “Fear-mongering in the Czech Republic and Slovakia. The Projection and Exaggeration of a Potential Threat Is a Powerful Weapon Itself”, in *Visegrad Insight*, 22 February 2017, <http://visegradinsight.eu/?p=4434>.

⁶⁹ It is a symbolic illustration of the different weight of Hungary and the other three V4 countries that neither the Czech Republic, nor Poland or Slovakia are mentioned in UNHCR’s more than 100 pages long book on its plans for Europe in 2017. UNHCR, *Regional Refugee and Migrant Response Plan for Europe. January to December 2017*, December 2016, <http://reporting.unhcr.org/node/17167>.

6. The lack of unity in the V4

Can it be expected that the Visegrad countries will act as a unified block, substantively changing the course of EU in migration matters, let alone destroy the EU’s asylum policy? The answer is complex. The Visegrad countries in essence do not form a homogenous block with shared values and preferences. As Vít Dostál has remarked:

the Czech Republic has a different approach towards the future of the EU. Its position is close to the one of Bratislava and distant to the views of “cultural counterrevolutionaries” from Poland and Hungary. This was visible during the preparation of the joint V4 position before the Bratislava summit, which in September [2016] started the EU’s reflection process, as all hard-liners’ paragraphs were removed from the V4’s document. Thus, one can hardly expect that the V4 would contribute to the debate on the future of the EU with any strong common position.⁷⁰

This position reverberates among other observers and is not limited to the academia.⁷¹ Andrej Babiš, the Czech

⁷⁰ Vít Dostál, “Alleged Czech Discomfort. The Visegrad Group and the Cynic Reality”, in *Visegrad Insight*, 19 December 2016, <http://visegradinsight.eu/?p=4286>.

⁷¹ Milan Nič, “Cracks Appearing”, in *Berlin Policy Journal*, 10 January

Minister of Finance, who also serves as Deputy Premier, reports the same:

But above all, Visegrad is not the platform of the EU. It's useful, but for issues beyond the EU authority: cross-border cooperation, culture, education, transportation and so on. Honestly, with the competition present within the V4 we cannot create a united platform. [...] And also – what is the opinion of Jarosław Kaczyński in the EU? It's low. So is the one of Viktor Orbán. Now, the question is: do you really cooperate with someone who doesn't have any position?⁷²

At a time when the Hungarian government is running a tsunami-like media campaign with the slogan "Let's stop Brussels"⁷³ and is conducting a "national consultation" with "questions" such as:

In recent times, terror attack after terror attack has taken place in Europe. Despite this fact, Brussels wants to force Hungary to allow illegal immigrants into the country. What do you think Hungary should do? (a) For the sake of the safety of Hungarians these people should be placed under surveillance while the authorities decide their fate. (b) Allow the illegal immigrants to move freely in Hungary?⁷⁴

It cannot be expected that the more moderate and pro-EU Visegrad members would associate themselves with such post-truth demagoguery.

All the domestic populism notwithstanding, an examination of formal statements corroborates the impression that, except for the refusal of the binding relocation and resettlement quotas, the V4 countries' attitude towards the EU reflects a preference for collective action. Their statement of 15 December 2016 calls for consensus on internal migration policy.⁷⁵ The statement also reflects the shift of the focus to externalisation and "full control of external borders." As a forerunner of the Malta Declaration of members of the European Council,⁷⁶

2017, <http://berlinpolicyjournal.com/?p=4482>.

⁷² Karolina Zbytniewska, "Czech Deputy PM: A 'Different' Migration Is Needed", cit.

⁷³ Hungarian Government, Cabinet Office of the Prime Minister, *Állítsuk meg Brüsszelt! Nemzeti Konzultáció 2017* [Let's stop Brussels. National Consultation 2017], 1 April 2017, <https://nemzetikonzultacio.kormany.hu>.

⁷⁴ For an English translation, see the Hungarian Spectrum website: <http://wp.me/p5LV7k-53N>.

⁷⁵ Visegrad Group, *Joint Statement of the Heads of Governments of the V4 Countries*, Brussels, 15 December 2016, <http://www.visegradgroup.eu/documents/official-statements/joint-statement-of-the-161215-1>.

⁷⁶ Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017, <http://europa.eu/!gjj33mU>.

it avoids any reference to asylum seekers and refugees. Protection is out of sight. Fair sharing or responsibility is replaced with "the principle of responsibility" which cannot mean other than the expectation that Member States return to the faithful implementation of existing obligations, whether on managing their external borders or in applying the Dublin regime.

The Visegrad countries appreciate important efforts of the Slovak Presidency to broaden consensus concerning the application of the principles of solidarity and responsibility in the context of migration policy. They recognize that good progress has been made in the convergence of views on various aspects, including the external dimension of migration and the protection of EU external borders. [...] They believe that any new European migration policy can only be built for a common area where full control of external borders is ensured and migratory pressures can therefore be resisted effectively.⁷⁷

The Polish presidency of the V4 hit similar chords in its programme putting more emphasis on externalisation, but maintaining the desire for common EU action:

As regards the reform of Common European Asylum System and specifically the Dublin system within it, the V4 countries should focus on opposing any changes that would result in the introduction of any permanent and compulsory redistribution mechanism or would significantly reduce Member States competencies in this area. Our efforts should be directed mainly at providing help to third countries and deepen the cooperation with them in order to tackle the root causes of the current migratory pressure.⁷⁸

7. Short digression: Hungary's extreme policies

These views of the V4 were certainly influenced by the radically anti-refugee stance of Hungary. Confronted in 2015 with a large influx of migrants, more than half of whom came from Syria and Afghanistan, Hungary opted for a policy which can be characterised by securitisation,⁷⁹

⁷⁷ Visegrad Group, *Joint Statement of the Heads of Governments of the V4 Countries*, Brussels, 15 December 2016, cit.

⁷⁸ Visegrad Group, *Programme of the Polish Presidency of the Visegrad Group (July 2016-June 2017)*, <http://www.visegradgroup.eu/documents/presidency-programs/presidency-programs>.

⁷⁹ Jef Huysmans, "The European Union and the Securitization of Migration", in *Journal of Common Market Studies*, Vol. 38, No. 5 (December 2000), p. 758, <http://dx.doi.org/10.1111/1468-5965.00263>.

• Table 7/A | Interpreting Hungary's measures

Denial and securitisation	Deterrence	Obstruction	Punishment
Securitising discourse since early 2015	Detention (6 months until March 2017, since then unlimited)	Serbia declared safe third country by a government decree	Unlimited detention of every asylum seeker since March 2017
Denying refugee quality	Dire treatment in 2015	Reduced and deteriorating reception capacity	Ban from the Schengen territory (after expulsion)
Parliament debate on "subsistence migrants"	Unpredictable behaviour of authorities in letting or not letting cross Hungary in 2015	* Limited capacity of the "transit zones" – the Hungarian Calais. * Capacity gradually reduced from 100/day to 10/day by early 2017	Sentence for the crime "crossing the border barrier" (the fence)
Creating parallel reality with a threatening Other	The fence at the Serbian and Croatian border (September and October 2015)	Forced removal from the territory of Hungary to the Serbian side of the fence based on the "8 km rule"	The notion of human smuggling extended covering acts even without actual crossing of border
Designation of the "crisis situation caused by mass immigration"	Criminalising the crossing of the fence	Bill of 14 February 2017: anyone without the right to stay to be pushed back beyond the fence into the transit zone and detained there until the end of the whole procedure, no matter where caught in Hungary, including unaccompanied and separated minors between ages 14–18	Unlawful detention of applicants in the transit zone (without court control)
Government controlled media never refers to refugees	* Deterring NGOs – renewed campaign against them in 2017 * Bill on "organisations supported from abroad" in parliament, April 2017		
Referendum question, 2 October 2016: "Do you want the European Union to be able to mandate the obligatory resettlement of non-Hungarian citizens into Hungary even without the approval of the National Assembly?"	"Crisis situation caused by mass immigration" – extended to September 2017 without any of the conditions set in the relevant legislation (Government decree No. 41/2016)		
Prime Minister Orbán in his 2017 <i>Hungarian Review</i> article speaks of Hungary defending "the common external border against the frightening tsunami of migrants since 2015", adding that "migration in its entirety is killing us"	Maintaining a tent-camp in Körmend, while closing down the well-equipped Bicske reception centre		

majority identitarian populism⁸⁰ and "crimmigration".⁸¹ An increasingly restrictive policy towards the new arrivals

⁸⁰ Gabriella Lazaridis and Anna-Maria Konsta, "Identitarian Populism: Securitisation of Migration and the Far Right in Times of Economic Crisis in Greece and the UK", in Gabriella Lazaridis and Khursheed Wadia, eds., *The Securitisation of Migration in the EU. Debates since 9/11*, Basingstoke and New York, Palgrave Macmillan, 2015, p. 186.

⁸¹ For crimmigration, see César Cuauhtémoc García Hernández, *Crimmigration Law*, Washington, American Bar Association, 2015, p. 3. For a detailed analysis of the Hungarian situation along these ideas, see Boldizsár Nagy, "Hungarian Asylum Law and Policy in 2015–2016", cit., p. 1051-1079.

was adopted, in an attempt to deny access to the asylum procedure and possibly even to the territory of Hungary, claiming that Serbia was a safe third country into which persons entering from the south could be returned. The long story may be summarised by six expressions and a short set of tables (see Table 7/A and 7B). Denial and securitization refer to the fact that the government propaganda consistently denies that many of the arriving people are in need of international protection. Instead, they are characterised as a threat to the society, its culture and security. In order to prevent the arrivals, deterring measures are implemented, such as increased use of

• **Table 7/B | Interpreting Hungary's measures**

Free riding – lack of solidarity	Breaching the law (international, European, domestic)
The fence only relocates the route towards Croatia and Slovenia	Articles 33 (non-refoulement) and 31 (non-penalization for irregular entry and stay) of the Article 3 ECHR on prohibition of inhuman and degrading treatment – see UNHCR press statement of 10 April 2017
Reluctance to receive transfers under the Dublin system	Violating CERD by presenting migrants (and asylum seekers among them) as inferior and a threat, thereby inciting hatred against the whole group
Refusal to participate in relocation and in resettlement	Potential EU law breaches – see letter of the Commission of 6 October 2015 Ares (2015)4109816 at least ten counts, including - no effective remedy - inhuman treatment - breaches of Schengen and Dublin by “waving through”
Attacking Council decision 2015/1602 on the relocation of 120,000 asylum seekers in CJEU Case C-647/15 Hungary v Council of the European Union	Violation of many domestic rules, e.g. on environment, construction, land use, subsequently legalised by retroactive waiver
2016 Fall Referendum against any compulsory relocation scheme	Coercing persons apprehended within anywhere in the country back across the fence towards Serbia leading to inhuman treatment or illegal re-entry to Serbia
After the failed referendum attempt to amend the Fundamental Law in order to block EU decision. (Did not get required 2/3 majority in the Hungarian Parliament)	Breach of rules on legislation, avoiding ministerial and public scrutiny of the bills

detention even if no threat of absconding is present. Obstructive manoeuvres slow down and complicate access to protection. Punishment is not only a deterrent but also extends to those assisting migrants in good faith or who object to the government's restrictive policies. The country's attitude towards the EU's attempts to deal with migration issues is characterized by free-riding and lack of solidarity. A major manifestation of free-riding was in diverting asylum seekers and other migrants to Croatia and Slovenia by way of building the fence. Finally, the measures adopted in Hungary may well have entailed a number of breaches of domestic, international and EU law.

The ruling in a case in the UK, where the judge decided not to return asylum seekers from Britain to Hungary under the Dublin regime,⁸² offered an apt summary of the situation in Hungary. Justice Green pronounced that Hungary is:

a state that is prepared to adopt an asylum regime which is deliberately designed to deter immigrants and to weaken judicial supervision with a view to removing those who are temporarily present in Hungary to third countries. In these circumstances [...] the presumption that Hungary qua EU Member State adheres to the *acquis Communautaire* and can be relied upon to respect relevant international law and ECHR rights of the Claimants cannot carry much weight. The objective facts suggest

otherwise.⁸³

The situation has only deteriorated since then, with the introduction of the unlimited detention of every asylum seeker, irrespective of their nationality, background or vulnerability, including children between 14 and 18 years in March 2017. Filippo Grandi, UN High Commissioner for Refugees, noted further worsening of the situation in April 2017: “The situation for asylum-seekers in Hungary, which was already of deep concern to UNHCR, has only gotten worse since the new law introducing mandatory detention for asylum-seekers came into effect.”⁸⁴

Conclusion

Mutual trust between Member States and trust in the EU institutions on which the EU is built are crumbling. This is the cumulative result of the inability and occasional reluctance to perform by the EU Member States at the external borders combined with the free-riding attitudes and restrictive practices of others, including Hungary and some other Visegrad countries.

These countries' objection to a fair sharing of responsibility in offering protection to those in need and their poor performance in returning those not in need of protection undermines the efforts of those Member States that have been seeking an intra-EU solution based on loyal co-operation and solidarity with those under particular

⁸² High Court judgment in the case *Ibrahimi & Abasi v SSHD*, [2016] EWHC 2049, 5 August 2016, <http://www.refworld.org/pdfid/57a87cca4.pdf>.

⁸³ *Ibid.*, para. 159.

⁸⁴ Cécile Pouilly, *UNHCR Urges Suspension of Transfers of Asylum-seekers to Hungary under Dublin*, cit.

pressure.

Speaking about the “principle of responsibility” and about “protecting external borders” simply shifts the focus from responsibility-sharing to externalisation and national action as in the case of the Italy–Libya deal⁸⁵ or the restoration of internal border controls within the Schengen area.

The resignation into national existence is nothing but a mistake: measures, which in themselves give the illusion of rationality and efficiency, in fact lead to collective failure – a classical “tragedy of the commons” situation. The challenge is enormous: abandoning a common and effective EU asylum policy in favour of restrictive national reactions threatens with the restoration of internal border controls within the Schengen area. That would deprive the EU of one of its major achievements: the experience of freedom by its citizens. Moreover, the measure would be extremely costly and could lead to larger losses than the cost of integrating refugees and returning people without the right to stay.

The solution is that the EU Member States consider any asylum seeker as applying to the whole of the Union and react as one unit of – presently still – more than 500 million persons. A viable burden- and responsibility-sharing encompassing the whole of the EU is the only solution. That ought to be accompanied by a genuine and much larger scale resettlement programme in order to lessen the motivation to arrive irregularly.⁸⁶ I see no alternative. Effective return of those not in need of international protection is required to maintain the (presently lacking) credibility of an EU asylum and migration policy.

In contrast to the above suggestion, in practice, the focus is increasingly shifting from the intra-EU solidarity and burden-/responsibility-sharing to burden-shifting (externalisation) and to refocusing on control at external borders. That will turn out to be futile if Turkey abandons the arrangement set out in the 2016 March statement.⁸⁷ Libya won't for long be a genuinely safe third country, no matter how much bilateral and EU support it gets.

At the individual level, the critical refusal of the securitizing majority identitarian populist public policy and discourse pursued by some EU governments and a significant portion of the mainstream media is the adequate answer.

⁸⁵ Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana, 2 February 2017, <http://www.governo.it/sites/governoNEW.it/files/Libia.pdf>.

⁸⁶ Timothy J. Hatton, *Refugees and Asylum Seekers, the Crisis in Europe and the Future of Policy*, paper presented at the 64th Economic Policy Panel, Florence, 14-15 October 2016, <http://www.economic-policy.org/?p=1873>.

⁸⁷ EU-Turkey Statement, cit.

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