

European Asylum Policy and its Reforms from a Central and Eastern European Perspective

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ABSTRACT

This chapter explores the recent developments of the EU's asylum policy and focuses in details on three specific issues, namely the short-term actions at EU level given to the 2015 migration crisis, the direction of the long-term reform of the Common European Asylum System, and the most recent developments at the Eastern borders, including the instrumentalization of migration by Belarus and the fleeing of millions from Ukraine. Given the geographical position of Central European countries in the EU, they have been exposed to migratory challenges earlier and to a greater extent than many other parts of the Union. Because of their unique historical and societal context, their reaction is focused on the provision of security instead of allowing for the misuse of the asylum system. Therefore, the three specific issues are introduced with special attention to the effect on and the position of Central Europe and especially the Visegrad countries.

KEYWORDS

Common European Asylum System, relocation, asylum reforms, instrumentalization of migration, Ukrainian refugees.

1. The Common European Asylum System and its Inoperability

Art. 78(1) of the Treaty on the Functioning of the European Union (TFEU) sets out that

‘the Union shall develop a common policy on asylum, subsidiary protection, and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.’

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Since 1999 the EU, based on its shared competence in the field of asylum, has established a Common European Asylum System governed by several legislative instruments that already underwent a reform phase before the 2015 migration crisis.

In 2015, a record 1,392,155 applications for international protection were lodged in EU+ countries,¹ with most asylum seekers being nationals of Syria, the Western Balkans, and Afghanistan. The main EU+ countries that received the most applications for international protection were Germany (34% of all applicants), Hungary, Sweden, Austria, and Italy. Although Germany had the highest number of asylum applications in 2015 (476,510), Hungary had the highest number of applicants (177, 135) in the population, four times more than in 2014.²

‘The European Union failed to coordinate a rapid and effective response, and many asylum and social-support systems reached a breaking point. Yet the number of arrivals alone, while historic, was not solely to blame. Structural deficiencies—both legal and operational—are baked into the very DNA of the Common European Asylum System (CEAS) and have long undermined Europe’s ability to manage asylum flows.’³

This study explores the recent developments of the EU’s policy on refugees and focuses on details on three specific issues, namely the short-term actions at EU level in response to the 2015 migration crisis, the direction of the long-term reform of the CEAS, and the most recent developments at the Eastern borders, including the instrumentalization of migration by Belarus and the fleeing of millions from Ukraine. Given the geographical position of Central European countries in the EU, they have been earlier and more exposed to migratory challenges than many other parts of the Union. Given their unique historical and societal context, their response focuses on providing security rather than allowing the asylum system to be abused.

Therefore, the three specific issues will be introduced with special attention to the effect on and the position of Central Europe and especially the Visegrad countries. There is a wide selection of academic work formulating critical examination of the actions of these states from a human rights perspective, this study instead intends to highlight the policy challenges that the European asylum reform ideas pose for these countries. It also argues that these challenges are no longer vocalized solely by the Central European countries; furthermore, it concludes that the most recent influx of those fleeing from the war in Ukraine proved that these countries are ready to provide effective protection when people in need are seeking refuge from an imminent danger.

1 EU Member States plus Switzerland and Norway.

2 European Asylum Support Office, 2016, p. 11.

3 Beirens, 2018, p. 1.

2. Immediate Actions: The Relocation Decisions as the Root of Mistrust

On 27 May 2015, the Commission, to assist Italy and Greece, proposed to use the emergency response mechanism under Art. 78(3) TFEU. This provision, which was activated for the first time, envisioned the relocation of 40,000 asylum seekers⁴ in the clear need of international protection from Italy and Greece toward other EU Member States over a two-year period. Although the Commission had suggested the share of relocation among Member States to be calculated based on a distribution key, the adopted Council Decision (EU) 2015/1523⁵ of September 14, 2015, in line with the April 2015 European Council conclusions, set out that relocation should be carried out by Member States based on their voluntary pledges.

The first relocation decision was soon followed by the proposal of another relocation decision after the sharp increase in illegal border crossings in the Central and Eastern Mediterranean, but also on the Western Balkans route. On 9 September 2015, the Commission proposed the setting up of another emergency relocation for 120,000 asylum seekers in clear need of international protection from Italy (15,600), Greece (50,400), and Hungary (54,000). Hungary, however, expressed its wish not to become a beneficial state in the framework of relocation, especially that the possible necessity of such measure had not been previously consulted with Hungary. After rejecting becoming a beneficiary of relocation, and contrary to its explicit objection,⁶ Hungary became obligated according to the adopted Council Decision 2015/1601 of 22 September 2015⁷ to relocate a certain number of persons (quotas) calculated according to a distribution key based on GDP and population, without considering the constant migratory pressure Hungary still faced.

The annulment of the second relocation decision was sought by Hungary and Slovakia,⁸ yet its validity was confirmed by the Court of Justice of the EU (CJEU) in its 6 September 2017 ruling.⁹ In support of their actions for annulment they put forward pleas seeking to show that, on the one hand, the adoption of the decision was vitiated

4 According to Recital (21) of Council Decision 2015/1523 this number corresponds to ca. 40% of the total number of third-country nationals in clear need of international protection who have entered irregularly in Italy or Greece in 2014.

5 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, pp. 146–156.

6 The decision was adopted by the Council by a qualified majority, with the Czech Republic, Hungary, Romania and the Slovak Republic voting against and Finland abstaining.

7 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, OJ L 248, 24.9.2015, pp. 80–94.

8 Judgment of the CJEU (Grand Chamber) of 6 September 2017, Slovak Republic and Hungary v. Council of the European Union, Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v. Council of the European Union, ECLI:EU:C:2017:631 (hereinafter: Judgment of the Court in Joined Cases C-643/15 and C-647/15).

9 Judgment of the Court in Joined Cases C-643/15 and C-647/15.

by errors of a procedural nature or arising from the choice of an inappropriate legal basis and that, on the other hand, the decision was neither a suitable response to the migrant crisis nor necessary for that purpose. Vikarska¹⁰ and Nagy¹¹ argue that although some of the arguments may be well founded in law, the overall impact of the case goes beyond the question of validity of the Council decision. Groenendijk and Nagy conclude that ‘what 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. Alternatively, it may turn out to be a rear guard battle.’¹²

By the end of the two-year implementation period most of the Member States did not or not completely implement the obligations arising from the two Council Decisions on relocation. The European Commission started infringement procedures against Poland, the Czech Republic and Hungary¹³ as these Member States were the ones that did not offer any relocations to take place in the last 12 months of the implementation period of the decisions. The three Member States at issue put forward a series of arguments which they claimed vindicated them for having disapplied Decisions 2015/1523 and 2015/1601. The arguments concerned, first, relate to the responsibilities of Member States with regard to the maintenance of law and order and the safeguarding of internal security, arguments derived by the Republic of Poland and Hungary from Art. 72 TFEU read in conjunction with Art. 4(2) TEU and, secondly, are derived by the Czech Republic from the malfunctioning and alleged ineffectiveness of the relocation mechanism as provided for under these decisions. Poland and Hungary also referred to the drawbacks of the practical implementation of relocations by other Member States that were later also highlighted by the European Court of Auditors in its special report.¹⁴

Art. 72 TFEU sets out the important and indisputable rule in the Area of Freedom, Security and Justice (AFSJ) that harmonization in this area shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. According to Craig and de Búrca, the proposition in Art. 72 TFEU

‘has political resonance and is not without substance but does not reflect reality. The AFSJ title is an area of shared competence. This necessarily means that Member State responsibilities for law and order will be circumscribed by EU measures. The nature and degree of this circumscription will perforce depend on the particular measure adopted by the EU.’¹⁵

10 Vikarska, 2015.

11 Nagy, 2017.

12 Groenendijk and Nagy, 2017.

13 Judgment of the CJEU (Third Chamber) of 2 April 2020, *European Commission v. Republic of Poland and Others*, Joined Cases C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257 (hereinafter: Judgment of the Court in Joined Cases C-715/17, C-718/17 and C-719/17).

14 European Court of Auditors, 2019.

15 Craig and de Búrca, 2015, p. 976.

These infringement cases therefore raise important questions of Union law, including whether and, if so, under what conditions a Member State may rely on Art. 72 TFEU to disapply decisions adopted based on Art. 78(3) TFEU, the binding nature of which is not disputed.

In its evaluation¹⁶ the CJEU highlighted that the derogation provided for in Art. 72 TFEU must be interpreted strictly, and it is for the Member State which seeks to take advantage of Art. 72 TFEU to prove that it is necessary to have recourse to that derogation to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security.¹⁷ In its conclusions the Court found that the Member States in question could not prove the justified use of this derogation and that by not implementing the relocation decisions they had infringed EU law. Bornemann finds it emblematic of a judicial strategy ‘that casts questions of high politics, *in casu* the fundamental opposition of the defendant Member States’ governments against mandatory refugee relocation, in the guise of administrative deliberation.’¹⁸

It is interesting to see that most of the Member States were far from completely fulfilling their obligations deriving from the relocation decision, and even the implemented procedures showed deficiencies exactly because of the security concerns raised by Poland and Hungary.

‘The majority of rejections [of the relocations of particular asylum-seekers] were justified on public order or national security grounds, in accordance with the Relocation Decisions. However, the explanations given [by the contacted Member State] were often generic, without detailed justification of individual cases. The number of rejections was higher for Greece than for Italy owing to the different security profiles of eligible migrants.’¹⁹

The number of relocations effectively carried out by November 14, 2017, so in the two-year implementation period of the two relocation decisions there were 31,503 relocations,²⁰ which is even fewer than the original aim of the first relocation decision adopted based on voluntary pledges of Member States. Given this figure, it is even more painful to conclude that all the loss of trust, the division of east and west, and increasing political differences could have been avoided by taking a step back and not rushing ahead with further relocation, which was expected to be a magic solution but instead forced even more migrants to undertake a dangerous journey. As a long-lasting effect, the relocation decisions and the migration crisis ‘became a Rubicon

16 Töttös, 2021.

17 Judgment of the Court in Joined Cases C-715/17, C-718/17 and C-719/17, points 143–144 and 147.

18 Bornemann, 2020.

19 European Court of Auditors, 2019, p. 25.

20 Report from the Commission (EU) to the European Parliament, the European Council and the Council Progress report on the European Agenda on Migration, Brussels, 15.11.2017, COM/2017/0669 final, Annex 6.

because it exposed the deep philosophical, political, and emotional differences²¹ that have only intensified in recent years.

3. Long-term Reforms: Missing the Target of Crisis Resilience

3.1. The First Set of CEAS Reform Proposals and Ideas

‘The overall objective is to move from a system which by design or poor implementation places a disproportionate responsibility on certain Member States and encourages uncontrolled and irregular migratory flows to a fairer system which provides orderly and safe pathways to the EU for third country nationals in need of protection or who can contribute to the EU’s economic development....For it to work, this system must be comprehensive, and grounded on the principles of responsibility and solidarity.’²²

To make the CEAS more crisis proof in the future, the Commission presented two packages of altogether seven reform legislative proposals in 2016.²³ The first asylum package launched on May 4, 2016, includes the reform of the Dublin system aiming to make it more transparent and enhance its effectiveness, while providing a relocation mechanism to deal with situations of disproportionate pressure on Member States’ asylum systems;²⁴ transforming the existing European Asylum Support Office (EASO) into a fully-fledged EU Agency for Asylum to reflect its enhanced role in the new system;²⁵ reinforcing of the EU’s fingerprinting database, Eurodac, to better manage the asylum system and to help tackle irregular migration.²⁶

On July 13, 2016, the European Commission presented further proposals to complete the reform of the CEAS to move toward a fully efficient, fair, and humane asylum policy—one which can function effectively both in times of normal circumstances and in times of high migratory pressure. To this end, to achieve a common and harmonized set of rules at EU level, the Commission proposed the creation of

21 Orbán, 2021b.

22 Communication from the Commission (EC) to the European Parliament and the Council, Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, Brussels, 6.4.2016, COM/2016/0197 final.

23 See also Töttös, 2019.

24 European Commission, COM(2016) 270 final, Proposal for a Regulation of the European Parliament and of the Council 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 (recast), COM/2016/0270 final–2016/0133 (COD).

25 European Commission, COM(2016) 271 final, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) 439/2010, COM/2016/0271 final–2016/0131 (COD).

26 European Commission, COM(2016) 272 final, Proposal for a Regulation on the establishment of EURODAC (recast), COM/2016/0272 final–2016/0132 (COD).

a common procedure for international protection by turning the existing Asylum Procedure Directive into a regulation,²⁷ uniform standards for qualification as beneficiaries of international protection and rights granted to them by turning the existing qualifications Directive into a regulation²⁸ and the further harmonization of reception conditions in the EU.²⁹ Overall, these proposals aim at simplifying and shortening the asylum procedure and the decision-making, discouraging secondary movements of asylum seekers and increasing integration prospects of those that are entitled to international protection. On the same day and as a fourth element of the second asylum reform package the European Commission proposed an EU Resettlement Framework³⁰ to establish a common European policy on resettlement ensuring orderly and safe pathways to Europe for persons in need of international protection.

Given the different nature and sensitivity of the seven legislative proposals, the negotiations of the files in and between the co-legislators, namely the Council of Ministers and the European Parliament, were taking different paces and showing various degrees of progress. While the Commission likes to promote the result by stating that in 2017, the European Parliament and the Council reached a broad political agreement on five out of the seven proposals,³¹ the Council actually did not confirm these provisional agreements. On the one hand, the different groups of Member States, such as the Mediterranean, the Visegrad Four and the western Member States, had greatly diverging ideas on what direction the reform of the CEAS should go. On the other hand, the European Council reconfirmed in its June 2018 conclusions that ‘a precondition for a functioning EU policy relies on a comprehensive approach to migration which combines more effective control of the EU’s external borders, increased external action and the internal aspects’.³² Therefore it was not enough to proceed further on internal asylum reforms, if amidst the constant inflow

27 European Commission, COM(2016) 467 final, Proposal for a Regulation of the European Parliament and the Council establishing a common procedure in the Union and repealing Directive 2013/32/EU, COM/2016/0467 final–2016/0224 (COD).

28 European Commission, COM(2016) 466 final, Proposal for a Regulation of the European Parliament and Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM/2016/0466 final– 2016/0223 (COD).

29 European Commission, COM(2016) 465 final, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM/2016/0465 final–2016/0222 (COD).

30 European Commission, COM(2016) 468 final, Regulation establishing a Union Resettlement Framework and amending Regulation (EU) No. 516/2014 of the European Parliament and the Council, COM/2016/0468 final–2016/0225 (COD).

31 As regards the setting-up of a fully-fledged European Union Asylum Agency, the reform of Eurodac, the review of the Reception Conditions Directive, the Qualification Regulation, and the EU Resettlement framework.

32 European Council, 28 June 2018, para. 1.

of migrants the external borders were not protected or the third-country nationals found to be illegally staying could not be effectively returned to their countries of origin.

In this context, the European Council remained ‘determined to continue and reinforce this policy to prevent a return to the uncontrolled flows of 2015 and to further stem illegal migration on all existing and emerging routes’.³³ It also raised further ideas to be explored, such as the concept of regional disembarkation platforms in a non-EU country that could host those disembarked after search and rescue (SAR) operations at sea borders instead of automatically taking them to EU territory.³⁴ Yet, only initial elements of the concepts were drafted³⁵ and no serious thought was given at EU level to this direction of the reforms. Maiani in his crude summary states that ‘the idea is that if Europe can lift the drawbridge and confine migrants in its Southern neighborhood, it need not face a divisive debate on internal solidarity’³⁶ and concludes that these initiatives raise so many legal and political questions that they might never see actual implementation. The Commission nevertheless rolled out a series of new legislative proposals in 2018 as well,³⁷ yet they merely added to the complexity of ideas instead of solving the legislative deadlock evolved by the end of the Juncker era of the Commission.

While the negotiations of legislative reforms missing the target of creating a resilient system had only increased divisions between Member States and allowed the uncontrolled inflow of migrants, a meaningful solution to manage these challenges was reached in the external dimension of migration that is the cooperation with third countries, particularly with Turkey. Turkey currently hosts about four million refugees, and the EU is committed to assist Turkey in dealing with this challenge to provide Syrian refugees protection as close to their home as possible and also not to encourage anyone to embark on a dangerous journey toward the EU. According to the EU–Turkey statement³⁸ of March 2016, Turkey would take any measures necessary to stop people travelling irregularly from Turkey to the Greek islands, and for every Syrian returned from the Greek islands, EU Member States would resettle one Syrian refugee from Turkey. Refugees and host communities in Turkey also received 6 billion EUR to improve their situation.

33 Ibid. para. 2.

34 Ibid. para. 5.

35 European Commission, 2018. https://home-affairs.ec.europa.eu/system/files/2018-07/20180724_non-paper-regional-disembarkation-arrangements_en.pdf.

36 Maiani, 2018.

37 European Commission, COM(2018) 633, Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, A contribution from the European Commission to the Leaders’ meeting in Salzburg on 19-20 September 2018, COM/2018/633 final.

38 European Council, 2016. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

3.2. *The Second Set of CEAS Reform Proposals and Ideas*

‘Asylum and migration are amongst the most significant challenges the EU has faced in recent years. Along with security, they rank high among the priorities and concerns of many Europeans. They will inevitably remain at the center of our politics during the next mandate.’³⁹

The new commissioner for Home Affairs, Ylva Johansson, was entrusted by Commission President von der Leyen with the task of finding the common ground and the fresh start on migration and asylum by developing the New Pact on Migration and Asylum. This should involve a comprehensive approach looking at external borders, systems for asylum and return, the Schengen area and working with partner countries outside the EU.

The New Pact was initiated in a Commission Communication⁴⁰ on September 23, 2020 with another set of ideas and legislative proposals.⁴¹ Although the newest reform proposals were prepared by rounds of consultation with the capitals, and they aim at balancing the various interests of the different groups of like-minded countries, what has been proposed is a strange mixture of already existing elements of migration and asylum policy that have a questionable effect on their own, and when seemingly arranged into one set of rules, they do not necessarily create a fully operable system that is able to resist crises.

According to the new proposals, once migrants reach the borders of the EU, only a five-day screening procedure is envisioned, and only a small group of migrants would be kept at the border for further procedures. Most asylum seekers would need to be provided access to the territory of the EU even if the present figures show that most asylum claims are not well-founded and only a small percentage of those with an expulsion order actually leave the territory of the EU. Furthermore, those avoiding such screening at the border and only being caught in the territory of a Member State would not be sent back to the border, which only encourages illegal border crossings and human smuggling activities. Even if certain groups of migrants would be kept at the external borders for specific asylum and/or return procedures, the time of applying such procedures with the legal fiction of non-entry would be very limited (12 weeks for each procedure to be concluded completely). Consequently, even those most likely to be expelled from the EU would need to be provided entry to the territory of the EU after a certain period, yet the ratio of effective return of these migrants is still very low.

39 Von der Leyen, 2019, p. 4.

40 Communication from the Commission (EC) to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final.

41 European Commission, 2020, Press release. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706.

The main and almost exclusive form of reaction the Pact proposes to situations of disproportionate pressure is relocation or return sponsorship, the latter being practically a delayed relocation after unsuccessful implementation of return decisions from the Member State of entry. Relocation has already proven to be an ineffective solution as it is neither able to alleviate the burden effectively in case of constant inflows, nor able to stem further inflows of migrants. Those rescued and disembarked after a search and rescue operation are handled as a separate category by the reform proposals, and the Pact envisions the automatic relocation of most of the rescued after a SAR operation, thus it can generate further embarkations and increase the loss of lives, having the opposite effect of what is intended.

While in 2020, the Commission has been supporting a quick adoption of the proposals, or at least those that have advanced well during the negotiations, the only reform element in which the co-legislators could reach an agreement was to turn EASO into a fully fledged EU Asylum Agency.⁴²

3.3. The Position of Central Europe

On July 9, 2021 the prime ministers of the Visegrad Group countries discussed, among others, the situation along the main migratory routes into the EU and declared that ‘uncontrolled illegal migration represents one of the most serious threats to the security and cohesion of the European Union and that citizens expect credible actions in tackling this phenomenon.’⁴³ Therefore the Visegrad Group prime ministers restated their conviction in a Joint Statement that ‘the main goal of the reform of the Common European Asylum System is to set up the framework in a comprehensive, sustainable, efficient, safe, and crisis-resilient form to stem illegal migration on all existing and emerging routes.’⁴⁴

As regards the formulation and negotiation of the new reforms, the voice of Central Europe many times remains unheard contrary to the extensive experience these countries have in coping with the challenges of migration. This only resulted in controversial actions that rather brought division of Member States instead of real solutions. Consequently, even if Art. 78 TFEU sets out qualified majority voting rules in the Council, the V4 leaders advocate for the reform of the EU asylum policy to be based on a consensus among all Member States and that the different reform elements have to be adopted as a package, ensuring proper balance between responsibility and solidarity.⁴⁵ As regards the content of the reforms, with a view to avoiding further pull factors, they remain convinced that ‘mandatory relocation is not a viable solution to stem illegal migration flows.’⁴⁶

42 Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, OJ L 468, 30.12.2021.

43 Visegrad Group, 2021a, p. 2.

44 Ibid.

45 Ibid. p. 3.

46 Ibid.

The Visegrad Group is far from being isolated in representing this position. Not only V4 ministers, but also the ministers of interior of Estonia, Latvia, and Slovenia, signed a letter on June 4, 2020, expressing their shared position. Furthermore, Denmark and Austria in their letter also highlighted the need for a consensus on the key issues and similarly rejected mandatory relocation that can only 'reawaken old disagreements.'⁴⁷ While the list of countries realizing the toxic nature of any form of automatic and compulsory relocation is growing, there are still a number of countries, especially the five Mediterranean countries (Cyprus, Greece, Italy, Malta, and Spain) as well as Germany, who call for a mandatory relocation mechanism entailing the distribution among all Member States of all or most of those who enter the territory of a European nation, including as a result of SAR operations at sea.

Central Europe's position does not end with simply rejecting the proposals coming from Brussels, as this region also points to solutions that provide meaningful impact:

'It is important for a well-functioning EU asylum and migration policy to anticipate migration developments and focus all the efforts on truly strengthening the external dimension, improving border management, and providing international protection to those in need while ensuring rapid return of others.'⁴⁸

The Visegrad countries therefore support the increased EU attention on the external dimension to better handle the migration-related challenges and in this context, they emphasize that

'the EU should continue working on tailored migration partnerships based on conditionality in various areas and responding to EU priorities and the needs of third countries as well. Concrete actions for priority countries indicating clear objectives are needed to prevent illegal migration and address its root causes, encourage better border protection, efficient fight against smugglers and human traffickers as well as effective implementation of returns and readmission. These activities should aim at strengthening their capacity to combat external threats and to prevent future migration crises.'⁴⁹

As regards cooperation with third countries, the continuation of financing for Syrian refugees and host communities in Turkey as well as maintaining and developing cooperation with the neighboring regions, such as the Western Balkans and North Africa, remain essential.

47 Barigazzi, 2020. <https://www.politico.eu/article/eu-countries-still-fighting-over-mandatory-relocation-of-migrants/>.

48 Visegrad Group, 2021a, p. 2.

49 Ibid.

4. The Most Recent Events at the Eastern Borders of the EU

4.1. The Instrumentalization of Migration

In the meantime, another migratory route has been activated through the Eastern borders of the EU because of Belarus facilitating migration of Iraqi and other nationals via Minks to the EU as a response to EU sanctions. By late November 2021, 7, 831 migrants had entered Latvia, Lithuania, and Poland from Belarus illegally, compared to 257 in the entire 2020; in addition, 42741 attempts to cross illegally had been prevented by the three Member States.⁵⁰ While the figures were still lower than those of 2015, the brutally visible manifestation of institutionalization of migrants is what raises serious concerns. The phenomenon is not new either in an EU or in a global context. As regards EU borders, in the early months of 2020, the situation at the EU's external borders with Turkey raised similar concerns.⁵¹

In her book *Weapons of Mass Migration*,⁵² Greenhill offers the first systematic examination of this widely deployed but largely unrecognized instrument of state influence. She shows both how often this unorthodox brand of coercion has been attempted and how successful it has been. She claims that

‘since the 1951 Refugee Convention came into force, there have been at least 75 attempts globally by state and non-state actors to use displaced people as political weapons. Their objectives have been political, military, and economic, ranging from the provision of financial aid to full-scale invasion and assistance in effecting regime change. In nearly three-quarters of these historical cases, the coercers achieved at least some of their articulated objectives. In well over half of the documented cases, they obtained all or nearly all of what they sought, making this rather unconventional instrument of state-level influence more effective than either economic sanctions or traditional, military-backed coercive diplomacy.’⁵³

Braw also highlights that

‘the standoff at Belarus’ borders with its EU and NATO neighbors is not a migration crisis but a border-violation crisis. The migrants at the border are being used by a hostile government that is trying to harm NATO and the EU.’⁵⁴

50 European Commission, COM(2021)752 final, Proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final, Recital (4).

51 Council of the EU, 2020. <https://www.consilium.europa.eu/en/press/press-releases/2020/03/04/statement-on-the-situation-at-the-eus-external-borders/>.

52 Greenhill, 2016b.

53 Greenhill, 2016a, p. 77.

54 Braw, 2021. <https://www.politico.eu/article/belarus-border-migration-geopolitical-crisis-nato-eu/>.

Nevertheless, even in such cases of force majeure, neither the present asylum and migration acquis, nor the reforms proposed by the Commission in 2016 and 2020 allow any immediate actions by Member States at the external borders to effectively combat a serious threat to public policy and internal security. That is why Ministers of Interior of 12 Member States⁵⁵ argued in their letter on October 7, 2021 that

‘recent developments at the external borders of the European Union indicate that the EU needs to adapt the existing legal framework to the new realities, enabling us to adequately address attempts of instrumentalization of illegal migration for political purposes and other hybrid threats.’⁵⁶

The letter also emphasized that physical border barriers appear to be effective border protection measures that serve the interest of the whole EU, and therefore this legitimate measure should be additionally and adequately funded from the EU budget as a matter of priority that has so far been systematically rejected by the European Commission.⁵⁷ On December 13, 2021 the V4 leaders, on their meeting with the President of the French Republic, also discussed the recent developments at the external borders of the European Union with Belarus and condemned the instrumentalization of migration and all other forms of hybrid attacks affecting the EU’s external borders. While the Prime Ministers expressed their solidarity and further support to Member States on the Eastern borders as they protect the EU as a whole, they also acknowledged the efforts of these Member States standing at the forefront of the fight against illegal migration that poses a serious threat to the security and integrity of the European Union. In this context, the V4 leaders agreed that

‘the current EU legal framework is not sufficient to address challenges of mass migration, including the instrumentalization of migration for political purposes, as it does not provide adequate means that Member States under pressure can apply in a crisis situation. The practical experience of directly affected Member States needs to be considered while adapting the legal framework to the new realities based on consensus: our focus should be on stemming primary migratory movements to the EU, avoiding pull factors, and guaranteeing the security of our citizens. Given the volatile migration situation, the Visegrad group Prime Ministers restated their conviction that all effective external border control measures, including physical border

55 Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Greece, Hungary, Lithuania, Latvia, Poland, Slovak Republic.

56 Ministers of Interior, 2021. https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter_Adaptation-of-EU-legal-framework-20211007.pdf?utm_source=POLITICO.EU&utm_campaign=78aac25596-EMAIL_CAMPAIGN_2021_10_08_04_59&utm_medium=email&utm_term=0_10959edeb5-78aac25596-190591327.

57 Orbán, 2021a.

barriers, should be at the forefront of our actions and therefore must be underpinned by adequate EU financial support.⁵⁸

4.2. Providing Protection for Those Fleeing from Ukraine

As a result of the Russian invasion of Ukraine started on February 24, 2022, more than three and a half million people, mainly women and children, have arrived in the European Union in the first month, showing an unprecedented scale and the speed of arrivals. The focus of the four Member States bordering Ukraine (Poland, Slovakia, Hungary, and Romania) together with Moldova was rightly on meeting the immediate reception and protection needs of those fleeing the war and therefore they opened their Eastern borders and ensured an unconditional but at the same time-controlled inflow to their territory. The Commission also acknowledged their efforts after seeing first-hand the very substantial support programs these countries provided.⁵⁹

Responding to the enormous numbers fleeing Russian military aggression, the EU made an unprecedented move in activating the Temporary Protection Directive⁶⁰ on March 4, 2022, thus offering a unified protection status for Ukrainian nationals and their family members.⁶¹ Nevertheless, it should be highlighted that many of the Member States close to Ukraine already made a step toward providing national protection from the outset of the war. For instance, the Hungarian Government activated the national scheme of temporary protection already on the eve of February 24, 2022.⁶²

The role of protection provided by Central and Eastern European countries finding themselves in the frontline may raise two particular aspects. First, the volatile situation of Ukraine has been in the spotlight of these countries for some time. As regards the migration crisis in 2015 Kowalski⁶³ pointed out that Polish authorities should have put their perception of the crisis in a broader context by highlighting the potential outflow of internally displaced persons in Ukraine after the annexation of the Crimean Peninsula by Russia in 2014 together with the tens of thousands Ukrainian workers in Poland who could easily turn into refugees should the situation escalate further.

58 Visegrad Group, 2021b, p. 4.

59 European Commission, COM(2022) 107 final, Communication from the Commission (EC) to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on European solidarity with refugees and those fleeing war in Ukraine, COM/2022/107 final, p. 4.

60 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, HL L 212., 7.8.2001.

61 Council Implementing Decision 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4.3.2022.

62 Government Decree No. 56/2022 (II. 24.) on the different application of the transitional rules of the asylum procedure of Act LVIII of 2020 on the transitional rules and epidemiological preparedness related to the cessation of an emergency.

63 Kowalski, 2016, p. 968.

Secondly, many could regard the current action of solidarity toward Ukrainian refugees as a shift in asylum policy of Central European states. The basis for this is the misperception that anti-migration narrative means a complete lack of international human rights of people in need of protection. This interpretation simply ignores the position also highlighted by Visegrad countries that refugees should be helped in the region closest to their country of origin, and those who arrived during or after the 2015 migration crisis have either crossed several safe third countries or they are not in genuine need of international protection. Therefore, being ready from the start to fulfil the protection needs of those fleeing now from a war in our neighborhood is not only not contradictory to previous positions, quite the opposite as the newly occurring situation just provided an opportunity to confirm their position in practice by offering their help when it is primarily this region's duty to welcome these refugees.

5. Conclusions on the Role of Central Europe in the Midst of Various Migration Crises

In his memoirs, Jean Monnet famously stated that 'Europe will be forged in crises and will be the sum of the solutions adopted for those crises.'⁶⁴ Migration and asylum issues provide more than enough crises for the EU that could push it into a new development phase. The main challenge is whether the reforms should remain at the level of fine tuning or be based on a complete change in concept. As the situations along the external borders of the EU no longer show any version of 'normal situation' of arrivals of asylum seekers as atypical situations of mass arrivals and asylum applications by non-eligible persons have become the new normal. The present unfitness of the current asylum *acquis* makes the whole EU vulnerable to, among others, situations of instrumentalization of migration.

In this context, Central Europe raises the 'heretic idea' of diverging from the main conception of the present CEAS and not to allow asylum applications on the territory of the EU as a main rule, and as a result eliminate the elements that give rise to abuse.

'Although the legal standards currently in force in the EU have their roots in the Geneva Convention, European asylum law has evolved into its current form through the layering of a legal superstructure onto the Convention. As a result, there are considerable differences between what is laid out in the Convention and the implementation carried out by the Common European Asylum System. (...)The Geneva Convention itself cannot be linked to certain overly generous interpretations and that such an outcome was not intended by the framers of the Convention. Rather, supplementary judicial and legislative interpretations, which have accumulated over decades, have caused Europe's

64 Monnet, 1978, p. 417.

asylum system to become more permissive in certain aspects, compared to those of other major democratic jurisdictions.⁶⁵

Šimonák and Scheu attribute this outcome to the jurisprudence of the European Court of Human Rights as well as the EU's legislative ambition, which is broader than that of the Geneva Convention.

Central European countries many times functioned as an early warning region shouting out their concerns regarding the inoperability of the present *acquis*, based on this overly generous interpretation. Nevertheless, their position has constantly been overwritten. Forming regional alliances to balance powerful states instead of going with the flow and accepting their dominant role in European policymaking and legislation regarding migration and asylum policy has therefore become a new area for cooperation for the Visegrad countries (V4). Since the negotiations on the long-term reforms of the CEAS are still ongoing, the V4 should aim at maintaining its cooperation in this field to provide a greater influence even if the V4 alone cannot establish a blocking minority and should make the voice of this part of Europe also heard.

The most recent tragic events in Ukraine and the millions of people fleeing showed that even situations in the direct neighborhood of the EU may require Member States to be prepared to provide help and protection. Central and Eastern European states were ready from the outset to mobilize their reception and protection system. The large scale of the influx of Ukrainians in clear need of protection nevertheless raises the question for the rest of the EU as well, whether it can continue spending a huge part of its administrative and reception capacities on asylum-seekers not in genuine need of protection.

65 Šimonák and Scheu, 2021, p. 11.

Bibliography

- Barigazzi, J. (2020) *EU countries still fighting over mandatory relocation of migrants* [Online]. Available at: <https://www.politico.eu/article/eu-countries-still-fighting-over-mandatory-relocation-of-migrants/> (Accessed: 1 February 2022).
- Beirens, H. (2018) *Cracked Foundation, Uncertain Future, Structural weaknesses in the Common European Asylum System* [Online]. Available at: https://www.migrationpolicy.org/sites/default/files/publications/CEAS-StructuralWeaknesses_Final.pdf (Accessed: 1 February 2022).
- Bornemann, J. (2020) *Coming to terms with the refugee relocation mechanism* [Online]. Available at: <https://europeanlawblog.eu/2020/04/14/coming-to-terms-with-the-refugee-relocation-mechanism/> (Accessed: 31 March 2022).
- Braw, E. (2021) *Stop calling what's happening with Belarus a migration crisis* [Online]. Available at: <https://www.politico.eu/article/belarus-border-migration-geopolitical-crisis-nato-eu/> (Accessed: 1 February 2022).
- Council of the EU (2020) *Statement on the situation at the EU's external borders* [Online]. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2020/03/04/statement-on-the-situation-at-the-eus-external-borders/> (Accessed: 1 February 2022).
- Craig, P., de Búrca, G. (2015) *EU Law: Text, Cases and Materials*. 6th edn. Oxford: Oxford University Press.
- European Asylum Support Office (2016) *Annual Report on the Situation of Asylum in the European Union 2015*, pp. 8–12 [Online]. Available at: https://euaa.europa.eu/sites/default/files/public/EN_%20Annual%20Report%202015_1.pdf (Accessed: 1 February 2022).
- European Commission (2018) *Non-paper on regional disembarkation arrangements* [Online]. Available at: https://home-affairs.ec.europa.eu/system/files/2018-07/20180724_non-paper-regional-disembarkation-arrangements_en.pdf (Accessed: 1 February 2022).
- European Commission (2020) *A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity*, Press release [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706 (Accessed: 1 February 2022).
- European Council (2016) *EU-Turkey statement, 18 March 2016* [Online]. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (Accessed: 1 February 2022).
- European Council (2018) *Conclusions*, Press releases [Online]. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/> (Accessed: 1 February 2022).
- European Court of Auditors (2019) *Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results*, Special report, No. 24. [Online]. Available at: https://www.eca.europa.eu/Lists/ECADocuments/SR19_24/SR_Migration_management_EN.pdf (Accessed: 1 February 2022).

- Greenhill, K. M. (2016a) 'The weaponisation of migration' in Leonard, M. (ed.) *Connectivity Wars, Why Migration, Finance and Trade are the Geo-economic Battlegrounds of the Future*. London: European Council on Foreign Relations, pp. 76–82.
- Greenhill, K. M. (2016b) *Weapons of Mass Migration: Forced Displacement, Coercion, and Foreign Policy*. New York: Cornell University Press.
- Groenendijk, K., Nagy, B. (2015) *Hungary's appeal against relocation to the CJEU: upfront attack or rear guard battle?* [Online]. Available at: <https://eumigrationlawblog.eu/hungarys-appeal-against-relocation-to-the-cjeu-upfront-attack-or-rear-guard-battle/> (Accessed: 31 March 2022).
- Kowalski, M. (2016) 'From a Different Angle—Poland and the Mediterranean Refugee Crisis', *German Law Journal*, Special Issue – Constitutional Dimensions of the Refugee Crisis, 17(6) pp. 967–980; <https://doi.org/10.1017/S2071832200021556>.
- Maiani, F. (2018) "Regional Disembarkation Platforms" and "Controlled Centres": *Lifting The Drawbridge, Reaching out Across The Mediterranean, or Going Nowhere?* [Online]. Available at: <https://eumigrationlawblog.eu/regional-disembarkation-platforms-and-controlled-centres-lifting-the-drawbridge-reaching-out-across-the-mediterranean-or-going-nowhere/> (Accessed: 31 March 2022).
- Ministers of Interior of Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Greece, Hungary, Lithuania, Latvia, Poland, Slovak Republic (2021) *Letter on the adaptation of the EU legal framework to new realities* [Online]. Available at: https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter_Adaptation-of-EU-legal-framework-20211007.pdf?utm_source=POLITICO.EU&utm_campaign=78aac25596-EMAIL_CAMPAIGN_2021_10_08_04_59&utm_medium=email&utm_term=0_10959edeb5-78aac25596-190591327 (Accessed: 1 February 2022).
- Monnet, J. (1978) *Memoirs*. (Mayne, R. trans.) New York: Doubleday and Company.
- Nagy, B. (2017) *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*, Working Paper 17 [Online]. Available at: https://www.iai.it/sites/default/files/gte_wp_17.pdf (Accessed: 31 March 2022).
- Orbán V. (2021a) *Letter to Ursula von der Leyen on the costs of border protection* [Online]. Available at: <https://www.primeminister.hu/vikstories/viktor-orbans-letter-ursula-von-der-leyen-costs-border-protection> (Accessed: 1 February 2022).
- Orbán, V. (2021b) *On December 8th, Angela Merkel leaves the German Chancellorship. A piece of the life of Central Europeans will go with her, Samizdat No. 14* [Online]. Available at: <https://abouthungary.hu/speeches-and-remarks/samizdat-no-14> (Accessed: 1 February 2022).
- Šimonák, V., Scheu, H. C. (2021) 'Back to Geneva, Reinterpreting Asylum in the EU', *Wilfried Martens Centre for European Studies*, 20(2), pp. 237–238; <https://doi.org/10.1177/17816858211061792>.
- Töttös, Á. (2019) 'How to interpret the European migration crisis response with the help of science' in Hautzinger, Z. (ed.) *Dynamics and Social Impact of Migration*. Budapest: Dialóg Campus Kiadó, pp. 69–81.

- Töttös, Á. (2021) 'The Possibility of Using Article 72 TFEU as a Conflict-of-Law Rule', *Hungarian Yearbook of International Law and European Law*, 9(1), pp. 212–232; <https://doi.org/10.5553/hyiel/266627012021009001012>.
- Vikarska, Z. (2015) *The Slovak Challenge to the Asylum-Seekers' Relocation Decision: A Balancing Act* [Online]. Available at: <http://eulawanalysis.blogspot.com/2015/12/the-slovak-challenge-to-asylum-seekers.html> (Accessed: 31 March 2022).
- Visegrad Group (2021a) *Joint Statement of the Prime Ministers of the Visegrad Group* [Online]. Available at: <https://www.visegradgroup.eu/download.php?docID=461> (Accessed: 1 February 2022).
- Visegrad Group (2021b) *Statement of the Presidency of the Visegrad Group* [Online]. Available at: <https://v4.mfa.gov.hu/asset/view/146564/13-Dec-2021%20V4%20Summit%20-%20Presidency%20Statement.pdf> (Accessed: 1 February 2022).
- Von der Leyen, U. (2019) *Mission letter sent by to Ylva Johansson, the Commissioner for Home Affairs* [Online]. Available at: https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-ylva-johansson_en.pdf (Accessed: 1 February 2022).

Legal Sources

- Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015.
- 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, OJ L 248, 24.9.2015.
- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, HL L 212., 7.8.2001.
- Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4.3.2022.
- Communication from the Commission (EC) to the European Parliament and the Council Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe. Brussels, 6.4.2016, COM/2016/0197 final.
- European Commission, COM(2016) 270 final, Proposal for a Regulation of the European Parliament and of the Council 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 (recast), COM/2016/0270 final–2016/0133 (COD).

- European Commission, COM(2016) 271 final, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM/2016/0271 final–2016/0131 (COD).
- European Commission, COM(2016) 272 final, Proposal for a Regulation on the establishment of EURODAC (recast), COM/2016/0272 final–2016/0132 (COD).
- European Commission, COM(2016) 465 final, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM/2016/0465 final–2016/0222 (COD).
- European Commission, COM(2016) 466 final, Proposal for a Regulation of the European Parliament and Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM/2016/0466 final–2016/0223 (COD).
- European Commission, COM(2016) 467 final, Proposal for a Regulation of the European Parliament and the Council establishing a common procedure in the Union and repealing Directive 2013/32/EU, COM/2016/0467 final–2016/0224 (COD).
- European Commission, COM(2016) 468 final, Regulation establishing a Union Resettlement Framework and amending Regulation (EU) No. 516/2014 of the European Parliament and the Council, COM/2016/0468 final–2016/0225 (COD).
- European Commission, COM(2017) 669 final, Report to the European Parliament, the European Council and the Council: Progress report on the European Agenda on Migration, COM/2017/0669 final. European Commission, COM(2018) 633 final, Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/633 final.
- European Commission, COM(2018) 634 final, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/634 final.
- European Commission, COM(2020) 609 final, Communication from the Commission (EC) to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final.
- European Commission, COM(2021)752 final, Proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final.

European Commission, COM(2022) 107 final, Communication from the Commission (EC) to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on European solidarity with refugees and those fleeing war in Ukraine, COM/2022/107 final.

Government Decree No.56/2022 (II. 24.) on the different application of the transitional rules of the asylum procedure of Act LVIII of 2020 on the transitional rules and epidemiological preparedness related to the cessation of an emergency.

Judgment of the CJEU (Grand Chamber) of 6 September 2017, Slovak Republic and Hungary v Council of the European Union, Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the European Union, ECLI:EU:C:2017:631.

Judgment of the CJEU (Third Chamber) of 2 April 2020, European Commission v. Republic of Poland and Others, Joined Cases C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.

Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, OJ L 468, 30.12.2021.