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# **Boldizsár Nagy**

## **Renegade in the Club – Hungary’s Resistance to EU Efforts in the Asylum Field**

### **I. Introduction**

The essence of the club is not the existence of bylaws, but the faith of the members that they form an alliance for pursuing a common endeavour. Discipline and loyalty derive from inner conviction and the desire to co-operate for the benefit of all. These virtues are no longer characterising Hungary’s attitude towards the EU, which not only aims at the ever closer union of its peoples, but is also attached “to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”<sup>1</sup> and acknowledges the historic importance of ending the division of the European continent. Hungary is increasingly undermining all these goals and principles, starting with the treatment of irregular migrants and continuing with attacks against pillars of the rule of law, including watchdog NGO-s.<sup>2</sup> This short contribution is limited to a review of how Hungary, once an eminent member of the club in field of asylum, made a U-turn and became the renegade, who destroys its own asylum system and threatens the EU-wide mechanism with blocking measures of solidarity.

### **II. Breaching international and EU law in the domestic context**

There are two ways of undoing the EU: by ignoring the *acquis* and the steps for its enforcement in the domestic context and by paralysing the collective decision making within the EU bodies. Hungary is engaged in both. Therefore, first, a review of the domestic legislation and practice that violates EU obligations is due, to be followed by the analysis of the struggle between Hungary and most of the EU to adopt ad hoc solidarity measures and a permanent system of solidarity in the frame of the Agenda for migration as proposed in 2016.<sup>3</sup>

#### **1. Violations of obligation by adopting rules contrary to the *acquis***

The tightening of the Hungarian asylum law, the core of which is the Asylum Act of 2007,<sup>4</sup> started in 2015. The empowerment of the government to adopt lists of safe third countries and safe countries of origin<sup>5</sup> may have been in harmony with the EU *acquis*, but the subsequent application of the adopted list,<sup>6</sup> including Serbia as a safe third coun-

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<sup>1</sup> TEU, preamble.

<sup>2</sup> See below the text accompanying fn. 76.

<sup>3</sup> A European Agenda on Migration Brussels, 13.5.2015 COM(2015)240 final.

<sup>4</sup> Act LXXX. of 2007. The Act entered into force on 1 January 2008. The text as it was in force on 1 June 2016 is available in English at: <http://www.refworld.org/cgi-bin/telex/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5773d2594> (18 November 2017 – the date in brackets after the link indicates the date of the most recent access).

<sup>5</sup> Act CVI. on the amendment of Act LXXX of 2007 on asylum. Published in the Official Journal (Magyar Közlöny) on July 8, 2015, in force since July 9, 2015.

<sup>6</sup> Government Decree 191/2015 (VII. 21). Both lists were identical: “Member States and candidate states of the European Union – except for Turkey, Member States of the European Economic Area, and those States of the United States of America that do not apply the death penalty, furthermore:

try, was not compatible with the Procedures Directive's criteria.<sup>7</sup> Still, in July 2015, a large scale overhaul of the system<sup>8</sup> entailed the transposition of the 2013 recasts, but at the same time introduced heavily securitising rules with a view to the fence which was being built at the border between Hungary and Serbia. It set short periods for accelerated procedures, which may undermine the idea of due process and effective remedy. The authority is supposed to decide within 15 calendar days. Only three days are granted for appeal and the court must adopt the final decision within eight days, possibly without a personal hearing.<sup>9</sup> In all accelerated procedures and in case of inadmissible applications the suspensive effect of the appeal allowing the stay in Hungary was removed, leaving only two exceptions, namely the case of rejection based on safe third country grounds, and acceleration based on delayed submission of the application. Whereas the rules adopted before September 2015 may be subject to debates as to their legality, the second set of large scale changes introduced in September 2015<sup>10</sup> introducing a specific regime for asylum-seekers coming across the fenced external border is even more suspect of violating international and EU law. Elementary human rights guarantees were taken away and exceptional powers were granted to the government under the pretext of a "crisis situation caused by mass immigration". The essence of the new rules can be summarised in the following way.

– The illegal crossing of the 175 km long fence with Serbia was made a criminal act threatened with a maximum of three years of imprisonment.<sup>11</sup>

– Asylum seekers arriving via Serbia were deprived of access to Hungarian territory as they are obliged to enter the so-called "transit zones" practically forming part of the fence.<sup>12</sup> The assumption is applied that presence in the transit zone does not entail entry into Hungary.

– The rules adopted in September 2015 introduced a new notion, the "crisis situation caused by mass immigration".<sup>13</sup> First, the crisis situation was only introduced in the affected region, but in March 2016 it became extended to the whole country.

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1. Switzerland 2. Bosnia and Herzegovina 3. Kosovo 4. Canada 5. Australia 6. New-Zealand". After the "deal" between the EU and Turkey on asylum matters arranged on 18 March 2016 Turkey was added to both lists and not removed, even after the purges following the failed coup of 15 July 2016. The Government failed to note that member states of the European Economic Area may not qualify as third countries.

<sup>7</sup> Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, 2013 O. J. (L 180) 60–95.

<sup>8</sup> Act CXXVII on the establishment of a temporary security border-closure and on the amendment of laws relating to migration. Published in the Official Journal (Magyar Közlöny) on 13 July 2015, in force since 1 August 2015.

<sup>9</sup> Since then the deadline was extended to seven days in "normal" accelerated procedures, but is still 3 days under the procedure in times of "crisis situation caused by mass influx" which has been the case since 2015.

<sup>10</sup> Act CXL on the amendment of certain acts in connection with the mass immigration. Published in the Official Journal (Magyar Közlöny) on Sept. 7, 2015. The date of the entry into force of the amendments and the closure of the border with the fence was the same: 15 September 2015.

<sup>11</sup> Damaging the fence entails a threat of five years imprisonment (Articles 352/A and 352/B of the Hungarian Criminal Code (Act C of 2012).

<sup>12</sup> The concept is described in Act LXXXIX of 2007 on the state border. See Articles 5/A–D and 15.

<sup>13</sup> See Chapter IX/A of the Asylum Act. In November 2017 the preconditions for declaring the crisis situation may be summarised in the following way: Arrivals on average in excess of 500 per day for a month, or 750 per day for two weeks or 800 per day for a week. Or, on average the number of persons in the transit zone exceeds 1,000 per day for one month, 1,500 per day for two weeks, or 1,600 per day for one week. The third fairly vague precondition refers to any situation "related to migration" that "directly endangers the protection of the border of Hungary as set out in Article 2 (2) of the

– At the same time a new border procedure was established, designed for use in the transit zone.<sup>14</sup> It combined detention without court control with an extremely fast procedure and was based on a fiction untenable after *Amuur v France*,<sup>15</sup> namely that the person in the transit zone had not yet entered Hungary. This procedure has been further tightened in 2017.

– A number of criminal procedural rules have been changed in a manner that removes guarantees protecting those accused of a crime related to the irregular crossing of the fence.

The rules adopted in 2015 raised serious concerns.<sup>16</sup>

First, it is very likely that the prevention of access to the territory and the punishment for crossing the fence is incompatible with article 31 of the Geneva Convention relating to the Status of Refugees guaranteeing impunity after irregular crossing of the border.<sup>17</sup> UNHCR's 2016 country paper on Hungary recalls that lawyers have invoked in vain the defence of article 31 in penal cases following irregular entry. The UNHCR concludes that it “considers that Hungary's law and practice in relation to the prosecution of asylum-seekers for unauthorized crossing of the border fence [is] likely to be at variance with obligations under international and EU law”.<sup>18</sup>

Second, the spectre of refoulement also emerged. The High Court of England and Wales (Administrative Court) in the *Ibrahimi and Abasi v SSHD* case,<sup>19</sup> raised the question if “removal from the UK to Hungary gives rise to a risk of indirect refoulement to Iran?”<sup>20</sup> It concluded that “[t]he reality remains that there are systemic flaws in the system of a substantial nature which create a real risk of refoulement. This is a view shared by other Courts in the EU”.<sup>21</sup>

Third, the judgment of the ECtHR in the *Ilias and Ahmed v Hungary* case<sup>22</sup> came to the conclusion that the procedure preceding the return of asylum seekers from Hungary

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Schengen Borders Code”, or “directly endangers the public security, public order or public health in a 60 m wide zone of the territory of Hungary measured from the border of Hungary as set out in Article 2 (2) of the Schengen Borders Code and the border mark or in any settlement in Hungary, in particular the outbreak of unrest or the occurrence of violent acts in the reception centre or another facility used for accommodating foreigners located within or in the outskirts of the settlement concerned”.

<sup>14</sup> See Article 71/A of the Asylum Act.

<sup>15</sup> *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights (June 25, 1996).

<sup>16</sup> *Tímea Drinóczi* had serious constitutional law concerns. She highlighted the unconstitutionality of the new laws due to serious violations of fundamental rights, and pointed out the dissatisfactory relation between the “crisis situation caused by mass immigration”, and other emergency situation that are recognized by the Hungarian constitution. See *Tímea Drinóczi*, Special legal orders; challenges and solutions, *Osteuropa-Recht* 4|2016, pp. 428–437.

<sup>17</sup> The effect of Article 31 is subject to an endless debate in the academic literature. I side with Gregor Noll: *G. Noll*, Article 31, in: A. Zimmermann/F. Machts/J. Dörschner (eds.), *The 1951 Convention relating to the status of refugees and its 1967 protocol: a commentary*, OUP, Oxford 2011, p. 1243–1276.

<sup>18</sup> UNHCR: Hungary as a Country of Asylum, May 2016, p. 23, § 62.

<sup>19</sup> *Mr Husain Ibrahimi and Mr Mohamed Abasi v. The Secretary of State for the Home Department*, [2016] EWHC 2049, United Kingdom: High Court (England and Wales), 5 August 2016, [2016] EWHC 2049 (Admin).

<sup>20</sup> Para 148.

<sup>21</sup> Para 161. The Evidential Summary of the judgment contains a long list of judgments and decisions reversing decisions on return to Hungary.

<sup>22</sup> *Ilias and Ahmed v Hungary* (Application no. 47287/15), Judgment of 14 March 2017, discussing the situation in 2015.

to Serbia did not include appropriate guarantees and therefore – as a consequence of the return decision – the applicants were exposed “to a real risk of being subjected to inhuman or degrading treatment in breach of Article 3 of the Convention”<sup>23</sup> The same judgment also found that – contrary to the claim of the Hungarian Government – keeping persons in the transit zone, even if they were free to leave towards Serbia, was detention. As such it did not meet the criteria of Article 5 (1) and (4) of the European Convention of Human Rights as it was arbitrary and no formal appeal against the detention was possible as no decision on detention was ever taken.<sup>24</sup> The border procedure “implied” detention without the right of remedy against the deprivation of liberty as appeal was only provided against the negative determination of the asylum claim.

Forth, as early as 6 October 2015 the Commission – worried by the developments –, wrote an “administrative letter”<sup>25</sup> indicating its concerns. The Commission warned Hungary stating the following:

– Forcing people to wait on the Serbian side of the transit zone (but on Hungarian territory) may violate the Charter of Fundamental Rights (Article 4, Prohibition of torture and inhuman or degrading treatment or punishment Art. 18, right to asylum) in connection with the application of the Reception Conditions Directive (RD)<sup>26</sup> and the Procedures Directive (PD).<sup>27</sup>

– The border procedure in the transit zone, occasionally only lasting less than an hour may violate the principle to be heard (Charter of Fundamental Rights of the European Union, Art. 41 (2), *M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, 22 November 2012).

– The return to Serbia under the Hungarian safe third country rules may not meet the requirements enshrined in Article 38 PD. Serbia is not a safe third country.<sup>28</sup> Moreover people returned are not provided “with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance”. The return is not in conformity with the applicable Serbia – EU return agreement<sup>29</sup> as, instead of the formalities envisaged in it, it simply forces persons to illegally re-enter Serbia, for which they may be punished there.

– Persons in the transit zone may be deprived of access to information on legal assistance and voluntary legal assistance providers may not have access to potential clients in violation of Art 5 of RD and of Art 12 PD.

– As the presence in the transit zone is not considered detention by the authorities, asylum applicants are deprived of all the guarantees surrounding detention according to RD (9-11).

– The right to an effective remedy (Art 46 PD, general principle of EU law, Art. 47 of the Charter of Fundamental Rights) ) is prejudiced by the extremely short deadlines (three calendar days for the appeal in transit zone procedure) as well as by the fact that courts are not entitled to reverse the decision in any asylum procedure. They may only

<sup>23</sup> Para 125 of the judgment.

<sup>24</sup> Paras 67–68 of the judgment.

<sup>25</sup> Ref. Ares(2015)4109816–06/10/2015 available at: <http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf> (18 November 2017).

<sup>26</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180, 29.6.2013, p. 96–116).

<sup>27</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, p. 60–95).

<sup>28</sup> See discussion *infra* at 4.3.

<sup>29</sup> Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation OJ L 334/46, 19.12.2007.

annul it and return the case to the administrative authority for renewed procedure. No new facts may be produced in the appeal phase, which is an unjustified curtailment of the principle of effective remedy. Oral hearing in the appeal phase is not compulsory. The appeal may be decided by someone not having the full powers of a judge.

– The identification of persons with special needs is neither formalised nor guaranteed, which may run counter to Articles 21-22 RD and Article 24 PD.

– The informal return from the transit zone to Serbia, as well as the forced return from any part of Hungary to Serbia (including persons, who may have irregularly entered through another neighbouring country, such as Romania), is arguably in conflict with the Return Directive<sup>30</sup> as its main principle is the voluntary return of the “illegally staying” person before enforced removal.

– The specific accelerated criminal procedure in relation to the crime of crossing the fence and allowing the omission of the translation of documents of the case is in conflict with the Directive on interpretation and translation in criminal proceedings.<sup>31</sup>

The Commission has sent a formal letter of notice, starting an infringement procedure in December 2015.<sup>32</sup> The reply of the Hungarian “did not address the Commission’s concerns”.<sup>33</sup> Further changes in the asylum system led to a “complementary letter of formal notice”, reacting to the 2017 changes on 17 May 2017<sup>34</sup> which will be discussed later.

2016 saw further limitations. The amendment of the 2007 Asylum Act adopted on 10 May 2016<sup>35</sup> took away all integration assistance to recognised refugees or beneficiaries of subsidiary protection and limited the length of stay in the reception centres after recognition to 30 days. All specific financial supports were eliminated, practically leaving one choice for most in need of international protection: homelessness or secondary movement. A compulsory review of the status of refugees and beneficiaries of subsidiary protection after three years was introduced at the same time, increasing the feeling of insecurity among those few who decided to remain. Two month later, in light of the fact that arrival across the fence started to increase and reached 2014 levels of irregular arrivals, a further amendment to the Asylum Act was adopted.<sup>36</sup> This very peculiar move resembled Australia’s excision practice<sup>37</sup> and “extended the border fence inwards” by allowing police to arrest and remove from the country without any formal procedure all the irregular migrants intercepted within eight kilometres of the Serbian-Hungarian border. No hearing, no appeal against removal, no guarantees, no offering voluntary departure as required by the Return Directive<sup>38</sup> was part of the system.

<sup>30</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (OJ L 348, 24.12.2008, p. 98–107).

<sup>31</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings OJ L 280, 26.10.2010, p. 1–7.

<sup>32</sup> [http://europa.eu/rapid/press-release\\_IP-15-6228\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6228_en.htm) (18 November 2017).

<sup>33</sup> [http://europa.eu/rapid/press-release\\_IP-17-1285\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1285_en.htm) (18 November 2017).

<sup>34</sup> [http://europa.eu/rapid/press-release\\_IP-17-1285\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1285_en.htm) (18 November 2017).

<sup>35</sup> Act XXXIX of 2016, adopted on 10 May 2016, published on 20 May 2016 and entering into force (in respect of the asylum provisions) on 1 June 2016.

<sup>36</sup> Act no. XCIV of 2016, entry into force on July 6, 2016.

<sup>37</sup> <http://www.unhcr.org/news/press/2013/5/519ccec96/new-excision-law-relieve-australia-its-responsibilities-towards-asylum.html> (18 November 2017).

<sup>38</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (OJ L 348, 24.12.2008, p. 98–107).

The past tense is justified by the fact that the system of informal removals was totalised by the Act of the Hungarian Parliament adopted on 7 March 2017.<sup>39</sup> According to the so amended Asylum Act, since 28 March 2017 the whole territory of Hungary is subject to the same rules, so not only those, who are intercepted within an eight kilometre wide strip from the border, but practically anyone above the age of 14<sup>40</sup> without a proven right to stay may be pushed across the fence to the Serbian side with a view to submit the application for international protection in the transit zone. Persons caught in such a way but not declaring an intention to apply for international protection are spared this treatment and are admitted to the usual aliens' police procedure aimed at removal.

In light of the 3 October 2017 judgment of the European Court of Human Rights in the *N. D. and N. T. v. Spain*<sup>41</sup> that found that the summary returns by the Spanish authorities from Melilla to Morocco constitutes a breach of the prohibition of collective expulsion, one can safely say that the Hungarian practice of pushback of migrants through the fence without any identification procedure or administrative or judicial measure being first taken breaches Protocol 4, article 4 of the European Convention of Human Rights, prohibiting collective expulsion and of article 13 of the Convention (together with the Art. 4 of Protocol 4) requiring effective remedy.<sup>42</sup>

## 2. Violations of obligation by practice

The epicentre of the dishonesty of the system is the concept of “crisis situation caused by mass immigration”. It is the legal ground for the deviation from the normal procedure and the application of the special rules enshrined in chapter IX/A of the Asylum Act. That chapter in essence establishes a complete special regime, entailing the indeterminate detention of almost all<sup>43</sup> asylum seekers in the transit zone until the final decision. The preconditions of the crisis situation<sup>44</sup> giving the government special powers as if it was a state of emergency,<sup>45</sup> have never been met!<sup>46</sup> The last extension on 31 August 2017,<sup>47</sup> announcing the crisis situation until 7 March 2018 was adopted, when the number of asylum seekers from 1 January 2017 until the end of August totalled at 2491<sup>48</sup> that

<sup>39</sup> Act XX of 2017 on the amendment of certain Acts related to strengthening the procedure conducted in the border control area.

<sup>40</sup> Minors, younger than fourteen years are subject to the “normal” procedure and accommodated in homes for young persons.

<sup>41</sup> *N. D. and N. T. v. Spain*, Application Nos. 8675/15 and 8697/15.

<sup>42</sup> For an early comment see: *Annick Pijnenburg*, Is *N. D. and N. T. v. Spain* the new *Hirsi*? EJIL Talk! 17 October 2017 at <https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/> (18 November 2017).

<sup>43</sup> Exempt from that extraordinary procedure are minors below the age of 14, those who are in criminal detention or in asylum detention (which is a separate possibility within the ordinary procedure) or who regularly stay in Hungary at the moment of application.

<sup>44</sup> See fn. 13 above.

<sup>45</sup> For criticism, see *Drinóczi*, fn. 16.

<sup>46</sup> As the government does not consider the crisis situation caused by mass immigration a public emergency threatening the life of the nation in the sense of Article 15 of the ECHR, it never informed the Secretary General of the Council of Europe of the exceptional powers it exercises in derogation from the ECHR.

<sup>47</sup> Government Decree 247/2017. (VIII. 31.)

<sup>48</sup> Immigration and Asylum Office online statistics at [http://www.bmbah.hu/index.php?option=com\\_k2&&view=item&layout=item&id=492&Itemid=1259&lang=en](http://www.bmbah.hu/index.php?option=com_k2&&view=item&layout=item&id=492&Itemid=1259&lang=en) (18 November 2017).

is 1.7 % (on average) of what would justify its proclamation.<sup>49</sup> Nor are or have ever been the elastic requirements (endangering the border or public order or health) met. It is a state of exception giving ground to the securitising language and measures without any exceptional fact in sight.<sup>50</sup> The total lack of a genuine ground for maintaining the crisis situation was clearly admitted by the government, when it admitted that the justification of the latest extension was that “as a consequence of mass immigration during summer, the terror-threat has increased in Europe”.<sup>51</sup> The all-European terror threat (whether growing or abating) has nothing to do with any of the legal grounds entitling the government to proclaim the crisis situation.

Most of the practical violations of the law grow out from this situation. Observers claim that violence and brutality was applied when the foreigners caught and indicating their wish to apply for international protection were forcefully pushed across the fence. The recent report on his fact-finding mission by the Special Representative of the Secretary General of the Council of Europe on migration and refugees dated 13 October 2017<sup>52</sup> is only the last in a long list of reliable sources referring to violence used during pushbacks.<sup>53</sup> An indication of potential problems is the fact that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment felt it necessary to return to Hungary in October 2017 and pay an almost one week visit, examining “the treatment and conditions of detention of foreign nationals detained under aliens legislation”.<sup>54</sup> The delegation not only visited the two transit zones at Röszke and Tompa and two police detention facilities, but “also held interviews with foreign nationals who had recently been escorted by border police officers to the other side of the Hungarian border fence”.<sup>55</sup> The report on this visit is expected with great interest as the one on the 2015 visit included a serious warning.

<sup>49</sup> Taken as a basis one of the possible criteria, 500/day arrivals for a month.

<sup>50</sup> For a comprehensive study embedding the facts of the Hungarian landscape into the theoretical frame of securitisation, crimmigration and majority identitarian populism see: *Boldizsár Nagy*, Hungarian Asylum Law and Policy in 2015–2016. Securitization Instead of Loyal Cooperation, *German Law Journal* Vol. 17, No. 6|2016, p. 1032–1081.

<sup>51</sup> “A kormány döntött a bevándorlás okozta válsághelyzet meghosszabbításáról” (The Government has decided to extend the crisis situation caused by immigration), <http://www.kormany.hu/hu/a-kormanys-zovivo/hirek/kormany-dontott-a-bevandorlas-okozta-valsaghelyzet-meghosszabbitasarol> (18 November 2017).

<sup>52</sup> Council of Europe Information Documents SG/Inf(2017)33, Report of the fact-finding mission by Ambassador *Tomáš Boček*, Special Representative of the Secretary General on migration and refugees to Serbia and two transit zones in Hungary 12–16 June 2017.

<sup>53</sup> *Ibid.*, p. 6 and p. 12. See further: “Since May, UNHCR staff and partners have collected information on over 100 cases with disturbing allegations of excessive use of force as people try to cross the border”. UNHCR alarmed at refugee death on Hungary-Serbia border, (June 6, 2016), <http://www.unhcr-centraleurope.org/en/news/2016/unhcr-alarmed-at-refugee-death-on-hungary-serbia-border.htm> (7 September 2016). Situation in Hungary European Parliament resolution of 17 May 2017 on the situation in Hungary P8\_TA-PROV(2017)0216 (referring to NGO reports); FRESH RESPONSE Volunteer-driven humanitarian support for refugees in Serbia at <http://freshresponse.org/category/testimonials/> (21 November 2017).

<sup>54</sup> “CPT returns to Hungary to assess the situation of foreign nationals detained under aliens legislation”, <https://www.coe.int/en/web/cpt/-/cpt-returns-to-hungary-to-assess-the-situation-of-foreign-nationals-detained-under-aliens-legislative-2> (18 November 2017).

<sup>55</sup> *Ibid.*



CPT has serious doubts whether border asylum procedures are in practice accompanied by appropriate safeguards, whether they provide a real opportunity for foreign nationals to present their case and involve an individual assessment of the risk of ill-treatment in case of removal [...].<sup>56</sup>

The practical access to the asylum procedure is excessively obstructed by the fact that only five persons are admitted to the transit zone per day.<sup>57</sup> As a consequence all other persons returned through the gate of the fence to the Serbian side are practically forced to illegally re-enter Serbia which obviously is a breach of all rules on border crossing between the two countries. The people returned informally to Serbia wait until they are admitted to the reception centre for which a totally informal system has developed in practice based on the silent collusion of the Serbian and the Hungarian authorities.<sup>58</sup>

*Filippo Grandi*, the UN High Commissioner for refugees during his visit to Hungary stressed his dissatisfaction with the fact that even children were detained in Röszke, noted the restrictive legal measures and the virtual elimination of state support for recognised refugees, only to conclude that:

[w]hen I was standing at the border fence today, I felt the entire system is designed to keep people, many of whom are fleeing war and persecution, out of the country and preventing many from making a legitimate asylum claim.<sup>59</sup>

That came four months after the High Commissioner, referring to the “worsening situation of asylum-seekers in Hungary” urged the suspension of the return of asylum seekers to Hungary within the Dublin system “until the Hungarian authorities bring their practices and policies in line with European and international law”.<sup>60</sup>

The drastic restrictive measures introduced in March 2017 and the accompanying practice, which does not respect the special procedural needs of the asylum seekers or the rights of minors between the age of 14 and 18 and implies a potentially very long detention until the adoption of the final judgment on the merits of the case induced the Commission of the EU to issue a “complementary letter of formal notice”, in the 2015 infringement case mentioned above<sup>61</sup> reacting to the 2017 changes on 17 May 2017.<sup>62</sup> The Commission centres its criticism around three subject matters, namely procedural breaches, violations of the rules on return to a third country and violations of the Charter of Fundamental Rights and the rules on reception conditions by detaining all applicants in harsh conditions.<sup>63</sup> It claims that Hungary fails

<sup>56</sup> Hungary: Visit 2015 CPT/Inf (2016) 27, <https://rm.coe.int/16806b5d22>, at p. 33 (18 November 2017).

<sup>57</sup> Hungarian Helsinki Committee: Two Years After: What’s Left of refugee Protection in Hungary?, p. 3, [http://www.helsinki.hu/wp-content/uploads/Two-years-after\\_2017.pdf](http://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf) (18 November 2017).

<sup>58</sup> Council of Europe Information Documents SG/Inf(2017)33, Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees to Serbia and two transit zones in Hungary 12–16 June 2017, p. 4–5 describing the details of the system.

<sup>59</sup> “UNHCR Chief visits Hungary, calls for greater access to asylum, end to detention and more solidarity with refugees” UNHCR, 12 September 2017, <http://www.unhcr.org/news/press/2017/9/59b809d24/unhcr-chief-visits-hungary-calls-greater-access-asylum-end-detention-solidarity.html> (18 November 2017).

<sup>60</sup> *Cécile Pouilly*, UNHCR urges suspension of transfers of asylum-seekers to Hungary under Dublin 10, April 2017, <http://www.unhcr.org/news/press/2017/4/58eb7e454/unhcr-urges-suspension-transfers-asylum-seekers-hungary-under-dublin.html?query=Hungary%20Dublin> (18 November 2017).

<sup>61</sup> See above the text accompanying fn. 25.

<sup>62</sup> [http://europa.eu/rapid/press-release\\_IP-17-1285\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1285_en.htm) (23 July 2017).

<sup>63</sup> European Commission – Press Release IP/17/1285, Commission follows up on infringement

to provide an effective access to asylum procedures within its territory. The border procedures are not in accordance with the conditions of EU law and the special guarantees for vulnerable individuals not respected. The reduced time for appeals violates the fundamental right to an effective remedy.<sup>64</sup>

The Commission notes the unordered returns to Serbia and then stresses

that the systematic and indefinite confinement of asylum seekers, including minors over 14, in closed facilities in the transit zone without respecting required procedural safeguards, such as the right to appeal, leads to systematic detentions, which are in breach of the EU law on reception conditions and the Charter of Fundamental Rights of the EU. The Hungarian law fails to provide the required material reception conditions for asylum applicants, thus violating the EU rules in this respect.<sup>65</sup>

Senior lecturer *Dr Maria-Teresa Gil-Bazo*, when reviewing the Hungarian refugee law developments in May 2017 entitled her piece: “The End of the Right to Asylum in Hungary?”<sup>66</sup> *Krisztina Juhász* in her article on Hungary’s stance on migration and asylum concludes that the Hungarian government does not “honour its international and European commitments when it comes to immigration and asylum”.<sup>67</sup> The Hungarian Helsinki Committee, an unmatched authority on the situation of Hungary raised the question “What’s Left of Refugee Protection in Hungary?”.<sup>68</sup> The academic<sup>69</sup> and the NGO evaluations<sup>70</sup> as well as the above quoted statements of the UN High Commissioner for Refugees and other senior international officers point to the direction well summarised by High Court Justice Green in the *Ibrahimi & Abasi v. SSHD* case:<sup>71</sup>

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procedure against Hungary concerning its asylum law Brussels, 17 May 2017, [http://europa.eu/rapid/press-release\\_IP-17-1285\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1285_en.htm) (23 July 2017).

<sup>64</sup> European Commission – Press release Commission follows up on infringement procedure against Hungary concerning its asylum law Brussels, 17 May 2017, [http://europa.eu/rapid/press-release\\_IP-17-1285\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1285_en.htm) (18 November 2017).

<sup>65</sup> Ibid.

<sup>66</sup> <http://www.asylumlawdatabase.eu/en/journal/end-right-asylum-hungary> (18 November 2017).

<sup>67</sup> *K. Juhász*, *Assessing Hungary’s Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies*, *Politics in Central Europe* Vol. 13 1|2017, p. 52.

<sup>68</sup> Hungarian Helsinki Committee: *Two Years After: What’s Left of refugee Protection in Hungary?*, p. 3, [http://www.helsinki.hu/wp-content/uploads/Two-years-after\\_2017.pdf](http://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf) (18 November 2017).

<sup>69</sup> Academic comments in jurisprudence, beyond the already mentioned ones, and this author’s contributions not quoted in the text, are remarkably sparse. The former director of the Asylum section of the Office of Immigration and Nationality as it was then, has published a summarising book chapter in Hungarian in 2017, without quoting a single scholarly piece, but himself being very critical of the system emerging in 2015–2016. *Á. Szép*, *A 2015-ös migrációs válságra adott menedékjogi válaszok. Jogszabály-módosítással a tömeges beáramlás ellen?*, in: P. Tálás (ed.), *Magyarország és a 2015-ös európai migrációs válság, Dialóg Campus, Budapest 2017*, p. 49–67 (The asylum law responses to the migration crisis of 2015. With amending the law against mass influx?, in: P. Tálás (ed.), *Hungary and the migration crisis of 2015*).

<sup>70</sup> Amnesty International believes that “Hungary is, on multiple counts, in flagrant breach of international human rights and refugee law and EU directives on asylum procedures, reception conditions, and the Dublin regulation”, *Stranded hope. Hungary’s sustained attack on the rights of refugees and migrants*, London 2016, p. 5. ECRE published an assessment of the situation on 31 March 2017, entitled: *Asylum in Hungary: damaged beyond repair?*, calling on “all to all States not to transfer applicants for and beneficiaries of international protection to Hungary under the Dublin Regulation or any bilateral arrangements”, p. 7, <https://www.ecre.org/legal-note-asylum-in-hungary-damaged-beyond-repair/> (19 November 2017).

<sup>71</sup> *Mr Husain Ibrahimi and Mr Mohamed Abasi v. The Secretary of State for the Home Department*, [2016] EWHC 2049, United Kingdom: High Court (England and Wales), 5 August 2016, [2016] EWHC 2049 (Admin).

[The Hungarian asylum regime] 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.<sup>72</sup>

### III. Clash of values, undermining solidarity within the EU and resisting the EU enforcement actions, including the CJEU judgment

After examining how a meaningful asylum system became dismantled in Hungary during the last three years, defying major obligations stemming from the EU *acquis* and international law, it is time to look at the direct confrontation between the EU and its renegade member.

That confrontation may be assessed along three levels.

The first is the high level, political conflict. It consists of the Hungarian side presenting “Brussels” or the “European decision makers” as irrational, as a power-centre that dictates the small member states just as Moscow did in the Socialist times. In the reverse direction the conflict is read as the misbehaviour of a member state defying the core values of the Union, behaving like a renegade in the club, who needs to be appeased or disciplined.

The second level of the conflict is the overall clash of priorities concerning issues of solidarity and loyal co-operation in the field of asylum and migration policy.

The third level relates to the concrete legal battles fought in the frame of infringement procedures or in the Court of Justice of the European Union, with a view to annul a decision of the Council.

#### 1. Clash of values between the EU and the Orbán Government

*Viktor Orbán*, the Prime Minister of Hungary in a speech delivered in 2012 compared Brussels to Moscow as two versions of alien powers aiming at the deprivation of Hungary of its freedom of choice and religious roots.<sup>73</sup> As the *Guardian* reported:

Drawing a clear parallel between Soviet domination of Hungary until 1989 and the behaviour of the European authorities, Orbán said: ‘we are more than familiar with the character of unsolicited comradely assistance, even if it comes wearing a finely tailored suit and not a uniform with shoulder patches.’

In 2014 he introduced the concept of illiberal democracy as the goal his government pursues. The long speech revealed that

<sup>72</sup> § 159 of the judgment.

<sup>73</sup> *Ian Traynor*, Hungary prime minister hits out at EU interference in national day speech, *Guardian*, 15 March 2012, <https://www.theguardian.com/world/2012/mar/15/hungary-prime-minister-orban-eu> (19 November 2017).

The new state that we are constructing in Hungary is an illiberal state, a non-liberal state. It does not reject the fundamental principles of liberalism such as freedom, and I could list a few more, but it does not make this ideology the central element of state organisation, but instead includes a different, special, national approach.<sup>74</sup>

Another March 15 speech, widely televised and reported went further in 2016. In that the Prime Minister described the relationship between the EU and Hungary in the following words:

Europe is not free, because freedom begins with speaking the truth. In Europe today it is forbidden to speak the truth. A muzzle is a muzzle – even if it is made of silk. [...] It is forbidden to say that immigration brings crime and terrorism to our countries. It is forbidden to say that the masses of people coming from different civilisations pose a threat to our way of life, our culture, our customs, and our Christian traditions [...] It is forbidden to say that in Brussels they are constructing schemes to transport foreigners here as quickly as possible and to settle them here among us. It is forbidden to say that the purpose [is] [...] eliminating nation states, which are the last obstacle to the international movement. It is forbidden to say that Brussels is stealthily devouring ever more slices of our national sovereignty, and that in Brussels today many are working on a plan for a United States of Europe, for which no one has ever given authorisation.<sup>75</sup>

It is only logical that the EU institutions are frustrated by this attitude of the Hungarian Government which transforms into a great number of measures seen as contradicting core values of the union. The European Parliament in its resolution on Hungary, adopted on 17 May 2017<sup>76</sup> noted a serious deterioration of the rule of law, democracy and fundamental rights over the past few years. It regretted, inter alia, the challenges to the freedom of expression, academic freedom, the human rights of migrants, asylum seekers and refugees, freedom of assembly and association. It recalled restrictions and obstructions to the activities of civil society organisations, the right to equal treatment, the rights of people belonging to minorities, including Roma, Jews and LGBTI people. In the context of the emerging, systemic threats to the rule of law it found shortcomings in the functioning of the constitutional system, the independence of the judiciary and of other institutions and referred to the many worrying allegations of corruption and conflicts of interest. The Parliament suggested the launch of the Article 7(1) TEU procedure, which in fact was set in motion in the fall of 2017. LIBE will prepare a report (reasoned opinion) on the Hungarian situation to be voted upon by the plenary in September 2018.<sup>77</sup> Thereafter the Council may find that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.

The position of the Council and of the Commission may be less visible in the public eye, but a look at *Mr Juncker's* letter to *Mr Orbán* of 5 September 2017,<sup>78</sup> essentially

<sup>74</sup> Prime Minister *Viktor Orbán's* Speech at the 25<sup>th</sup> Bálványos Summer Free University and Student Camp, 26 July 2014, Tusnádfürdő (Băile Tuşnad), Romania, <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp> (19 November 2017).

<sup>75</sup> The talk is translated into English and posted on the Prime Minister's official website: <http://www.miniszterelnok.hu/speech-by-prime-minister-viktor-orban-on-15-march/> (19 November 2017), *Mr Orbán* seems never to have read the German Grundgesetz, article 23 of which starts with the following phrase: "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union [...]".

<sup>76</sup> P8\_TA-PROV(2017)0216 Situation in Hungary European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0216+0+DOC+PDF+V0//EN> (20171119).

<sup>77</sup> EP, press release, 10 November 2017, <http://www.europarl.europa.eu/news/en/press-room/201711011IPR85823/hungary-meps-to-assess-whether-there-is-a-risk-of-seriously-breaching-eu-values> (18 November 2017).

<sup>78</sup> The letter was moved to another url, reproduced here: <http://g8fip1kplyr33r3krz5b97d1>.

refusing the request to get funding for the fence, allows a glimpse into that relationship. The president of the Commission in fairly ironic tone reminds the Prime Minister – among others – to the fact that Hungary could have been the beneficiary of the relocation scheme of 2015, but refused. He mentions that Hungary gets funds from the European Structural and Investment Funds amounting to 3 % of the GDP. The conclusion is resounding: “solidarity is not an à-la-carte dish; one that can be chosen for border management, and rejected when it comes to complying with relocation decisions that have been jointly agreed”. Another guidance as to the position of the Commission is included in the speech of *Frans Timmermans* delivered in the EP on 26 April 2017<sup>79</sup> in which he recalled that the College of the Commission held two discussions on the overall situation in Hungary. He also announced that the Commission was to publicly challenge (his word was to “correct”) statements used in a propaganda campaign (“national consultation”<sup>80</sup>) in Hungary claiming that “Brussels wants to force Hungary to abolish the reduction in public utility charges” or that “Brussels wants to force Hungary to let in illegal immigrants”.<sup>81</sup>

## 2. Undermining solidarity within the EU

Starting in 2014 *Viktor Orbán* and the government media have built up a parallel reality which ignores the forced migrant in genuine need of international protection and replaces her with the image of the “illegal migrant”, who at least threatens our culture, but easily may be a terrorist.<sup>82</sup> The Council of Europe Commissioner for Human Rights lamented in his third party intervention in the ECtHR:

anti-migrant sentiment has since [April 2015] been further fuelled, including at the highest political level. The Commissioner is particularly shocked at repeated references by the Hungarian Prime Minister to the danger for Hungary’s culture posed by the arrival of Muslim migrants. The Commissioner was all the more dismayed to learn during his [2015] November visit that the government was planning a new media campaign under the headline: ‘The quota increases the terror threat!’ (Referring to the EU plans to relocate asylum seekers in different countries according to quotas) and other statements reading: ‘An illegal immigrant arrives in Europe on average every 12 seconds’; other messages read: ‘We don’t know who they are, or what their intentions are’; and ‘We don’t know how many hidden terrorists are among them.’<sup>83</sup>

The lack of solidarity with other EU member states first manifested itself by building the fence at the border with Serbia and Croatia. That obviously led to the diversion of the

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wpengine.netdna-cdn.com/wp-content/uploads/2017/09/JuckerOrbansignedletter.pdf (19 November 2017).

<sup>79</sup> [http://europa.eu/rapid/press-release\\_SPEECH-17-1118\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-1118_en.htm) (19 November 2017).

<sup>80</sup> [http://www.kormany.hu/download/5/be/01000/NK\\_2017\\_A4\\_v05\\_engl.pdf](http://www.kormany.hu/download/5/be/01000/NK_2017_A4_v05_engl.pdf) (19 November 2017).

<sup>81</sup> *Ibid.*

<sup>82</sup> *B. Nagy*, Hungarian Asylum Law and Policy in 2015–2016. Securitization Instead of Loyal Co-operation, *German Law Journal* Vol. 17, No. 6|2016, p. 1053–1057, see also: *A. Szilagyí*, Mighty Words The power of propaganda – Hungary’s great anti-migrant campaign, Blog: Talk decoded, <https://www.talkdecoded.com/blog/2016/10/6/mighty-words-hungarys-great-anti-migrant-campaign> (19 November 2017), and *C. Bridge*, Orbán’s Hungary The othering of liberal Western Europe, in: *J. Chovanec/K. Molek-Kozakowska* (eds.), *Representing the Other in European Media Discourses*, John Benjamins Publishing Company, 2017, p. 25–54.

<sup>83</sup> Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36 of the European Convention on Human Rights Applications No. 44825/15 and No. 44944/15, *S. O. v. Austria and A. A. v. Austria* 5–7, Council of Eur. (Dec. 17, 2015), [https://rm.coe.int/ref/CommDH\(2016\)3](https://rm.coe.int/ref/CommDH(2016)3) at 7 § 31.

movement in 2015 fall, pushing burden and responsibility on Croatia and Slovenia, which until the fall of 2015 were not seriously affected.<sup>84</sup>

The next manifestation of Hungary's denial of solidarity with other EU member states was and still is its total refusal to participate in the relocation system<sup>85</sup> and in the resettlement system<sup>86</sup> adopted or proposed by the EU.

The counter-claim of the Hungarian Government is that the state performs its contribution by "protecting the external borders". In his letter to the President of the European Commission,<sup>87</sup> dated 31 August 2017, *Mr Orbán* expressed his view that solidarity was an important principle of the EU which Hungary exercised by way of "the construction of the fence and the training and placing of three thousand border-hunters into active service, our country is protecting not only itself but entire Europe against the flood of illegal immigrants".<sup>88</sup> That attitude is closely related to the idea of "flexible solidarity" promoted by the *Visegrad Countries*, as promoted in the Joint Statement of the heads of Governments, adopted in Bratislava, on 16 September 2016.<sup>89</sup>

Hungary not only challenged the ad hoc relocation system but is a fierce opponent to the introduction of a permanent, capless and compulsory system of allocating refugee status determination procedures within the union according to reference keys. After the Commission introduced its proposal for the reform of the Dublin regulation,<sup>90</sup> an intensive campaign against the idea of a permanent relocation system started in Hungary.<sup>91</sup> First it entailed a public campaign that – in the words of *Nils Muiznieks*, the Council of Europe Commissioner for Human Rights – "demonized" refugees, "portrayed migrants as a danger to the Hungarian society" and promoted "deceptive messages".<sup>92</sup> Then a referendum was held responding to the question: "Do you agree that the European Union

<sup>84</sup> V. Bajt/N. Kogovšek Šalamon (eds.), *Razor-Wired: Reflections on Migration Movements Through Slovenia in 2015*, Peace Institute, Ljubljana 2016, and N. Kogovšek Šalamon, *Mass Migration, Crimmigration and Defiance. The Case of the Humanitarian Corridor, Southeastern Europe 41*[2017], p. 251–275.

<sup>85</sup> Relocation decisions, Council Decision (EU) 2015/1523 of September 14, 2015, and 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, 2015 O. J. (L 248/80).

<sup>86</sup> The resettlement decision took the form of conclusions of the (JHA) Council Doc. No. 11130/15: 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 (22 July 2015) [hereinafter JHA Council Doc. No. 11130/15].

<sup>87</sup> Available in English at the government's website: <http://www.kormany.hu/download/a/e/9/2/1000/JunckerJeanClaude%2020170831.pdf> (20 November 2017).

<sup>88</sup> *Ibid*, p. 1

<sup>89</sup> "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.", <http://www.visegradgroup.eu/calendar/2016/joint-statement-of-the-160919> (20 November 2017).

<sup>90</sup> 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 (12 May 2016).

<sup>91</sup> All the details are available in: B. Nagy, *The aftermath of an invalid referendum on relocation of asylum seekers: a constitutional amendment in Hungary*, Blog: EU Immigration and Asylum Law and Policy, published on 10 November 2016, <http://eumigrationlawblog.eu/the-aftermath-of-an-invalid-referendum/> (21 November 2017).

<sup>92</sup> N. Muiznieks, *Hungary's Duties to refugees*. Op Ed., *The New York Times*, 28 September 2016, [https://www.nytimes.com/2016/09/29/opinion/hungarys-duty-to-refugees.html?\\_r=0](https://www.nytimes.com/2016/09/29/opinion/hungarys-duty-to-refugees.html?_r=0) (21 November 2017).

should have the power to impose the compulsory settlement of non-Hungarian citizens in Hungary without the consent of the National Assembly of Hungary?” Turnout was low and therefore the result strongly supporting the government's preference had no legal significance, and it is invalid according to Hungarian constitutional law.<sup>93</sup> The ideological entrenchment behind the false image of immigration forced on Hungary, instead of the reality of the Dublin proposal, suggesting a fair sharing of responsibility across the EU in assisting those in need of protection determines the position the government represents in the ongoing negotiations. When the European Parliament adopted its negotiating mandate on the proposal on 16 November 2017<sup>94</sup> the reaction of the Hungarian Government was scathing. The government website reported:

Zoltán Kovács was interviewed on Thursday [17 November 2017] on the public service television news channel M1 in light of the fact that the plenary sitting of the European Parliament has approved the mandate to enter into negotiations of the Dublin asylum reform package [...] The Government Spokesperson said: this vote, too, confirms that the stakes of the current national consultation<sup>95</sup> have never been clearer than they are today. In his view, the proposed changes seek to punish the countries which refuse to take in migrants. [Footnote added]

### 3. Resisting the EU enforcement actions, including the CJEU judgment

On 3 December 2015 Hungary challenged the validity of the second, compulsory decision of 22 September 2015 on relocation of asylum seekers in clear need of protection before the CJEU.<sup>96</sup> Slovakia also contested the decision.<sup>97</sup> The judgment was delivered on 6 September 2017.<sup>98</sup> The court refused the more than a dozen arguments of Hungary and Slovakia. It denied that the decision was (or had to be) a legislative act amending the Dublin Regulation, it saw no violation of the procedural rules governing a decision under TFEU 78 (3) and, finally found no basis to the material law claims related to proportionality, legal certainty, normative clarity and compatibility with the Geneva Convention relating to the Status of Refugees. Until mid-November 2017 Hungary has relocated none of the 1294 asylum seekers it was supposed to take from Italy and Greece.<sup>99</sup> This

<sup>93</sup> According to the relevant provision of the Constitution (Fundamental Law) of Hungary, 50 % of those entitled ought to have registered valid votes. Instead, only 3.4 million of the total of the more than 8.3 million eligible voters cast a valid vote, which is equal to 41 %. More than 98 % of the valid votes were “no”, heeding the government propaganda. The 200,000 invalid votes expressed that no reasonable answer was available to a question which had no precise legal content and certainly did not correspond to any proposal of the Commission, as the Commission had never proposed a compulsory settlement into any member state.

<sup>94</sup> <http://www.europarl.europa.eu/news/en/press-room/20171115IPR88120/ep-ready-to-start-talks-with-eu-governments-on-overhaul-of-dublin-system> (21 November 2017).

<sup>95</sup> The “current national consultations” refer to yet another government campaign, this time entitled *Let's stop Soros*, and the first of the six questions is ample illustration of the whole: “1. George Soros wants to convince Brussels to resettle at least one million immigrants from Africa and the Middle East annually on the territory of the European Union, including Hungary as well. Do you support this point of the Soros plan? YES NO?”. Available at the site of the International Communications Office, Cabinet Office of the Prime Minister, <http://abouthungary.hu/news-in-brief/national-consultation-on-the-soros-plan/> (21 November 2017).

<sup>96</sup> Case C-647/15, *Hungary v. Council of the European Union*, 2016 E.C.R. 43.

<sup>97</sup> Case C-643/15, *Slovak Republic v. Council of the European Union*, 2016 E.C.R. 41.

<sup>98</sup> Judgment of 6. 9. 2017 – joined cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*, ECLI:EU:C:2017:631.

<sup>99</sup> Member States' Support to Emergency Relocation Mechanism as of 17 November 2017, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_relocation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf) (20 November 2017).

denial is the subject matter of another infringement procedure, which in light of the judgment may proceed. On 14 June 2017 the Commission launched the procedure against the Czech Republic, Hungary and Poland for non-compliance with their obligations under the 2015 Council Decisions on relocation, as Hungary neither pledged, nor relocated anyone, Poland stopped in December 2015 and the Czech Republic in August 2016.<sup>100</sup> As the response of the three countries was found unsatisfactory, the Commission sent its reasoned opinions to them on 26 July 2017, giving one month to respond,<sup>101</sup> but until the moment of the submission of the manuscript has not initiated the proceedings with the CJEU.

#### IV. Conclusion

This contribution gave a factual description of the change of the Hungarian asylum law in 2015–2017. It also drew its international, institutional and political context. Hungary has dismantled a relatively well functioning and EU conform asylum system in 2015–2017. At the turn of 2017–2018 practically all the asylum-seekers are detained in metal containers in the so-called transit zones, until the final decision in their case. Their procedural rights as well as the rights derived from the reception conditions directive as well as their human right are seriously curtailed. That is the consistent view of academic sources, EU institutions, Council of Europe bodies and the domestic and international NGO sector.

The dismantling of the EU by way of not implementing its rules is accompanied by a direct confrontation with the fundamental values of the EU, as well as its efforts to create a functional system, based on solidarity and fair sharing of responsibility among the member states in the field of migration and asylum.

To avoid the charge of looking at the situation from too close, and after the many quotes from official sources, as the closing paragraph of this contribution, let me recall the views of an impartial academic observer from Australia:

The change in the right-wing political orthodoxy over the past 20 years has been a dramatic one, from trumpeting Hungary's 'return to Europe' in the 1990s to the current penchant for drawing parallels between the EU and the former Soviet Union, and looking east for aspiration. But the reconstruction of liberal Western Europe as a threat to the Hungarian nation is also a threat to Europe. Orbán proposes his illiberalism not just as a solution to Hungary's problems, but as a source of renewal for the whole of Europe. [...] It is all too apparent that the EU is ill-equipped to deal with Hungary's defiance of its norms. But doing nothing may be creating a dangerous precedent.<sup>102</sup>

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<sup>100</sup> Commission Press Release, 14 June 2017 [http://europa.eu/rapid/press-release\\_IP-17-1607\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1607_en.htm) (20 November 2017).

<sup>101</sup> European Commission – Press release Relocation: Commission moves to next stage in infringement procedures against the Czech Republic, Hungary and Poland [http://europa.eu/rapid/press-release\\_IP-17-2103\\_en.htm](http://europa.eu/rapid/press-release_IP-17-2103_en.htm) (20 November 2017).

<sup>102</sup> C. Bridge, Orbán's Hungary The othering of liberal Western Europe in: J. Chovanec/K. Molek-Kozakowska (eds.), *Representing the Other in European Media Discourses*, John Benjamins Publishing Company, 2017, p. 48.